

Unfair Termination Claim: How to Mitigate It?

It is a common practice in Thailand for an employee whose employment was terminated with or without any cause to file an unfair termination claim in Court against the employer. Thai law does not define the “unfair termination” term. However, precedents of the Supreme Court have shown that “unfair termination” refers to a situation where an employer terminates an employee without legal cause of termination and/or without compliance with the proper employment termination procedures as required by law.

Fair Termination

Section 119 of the Labour Protection Act B.E. 2541 (“LPA”) specifies 6 legal causes for the employer to terminate the employee with immediate effect and without paying the statutory severance pay. These causes arise when the employee: (i) performs duties dishonestly or intentionally committing a criminal offence against the employer; (ii) wilfully causes damage to the employer; (iii) commits negligent acts resulting in significant damage to the employer; (iv) violates the employer's work rules, regulations, or orders which is lawful and just, and after written warning have been given by the employer, except for a serious case where a warning is not required; (v) is absent from his/her duty without justifiable reason for at least three consecutive days regardless of whether there is a holiday in between; and (vi) is sentenced to imprisonment by a final court judgment.

The warning under (iv) shall be valid for not exceeding one year from the date when the employee committed the offence.

If termination of the employee is made for any of the above-mentioned causes, normally the Court would not find the termination unfair, provided that the employer can prove such cause to the satisfaction of the Court. Termination with a legal cause does not prevent the terminated employee from filing an unfair termination claim against the employer.

Some examples of fair termination: The employer terminated a high-ranking executive who had repeatedly engaged in sexual harassments against female employees and attempted to coerce female subordinates into sexual relations (Supreme Court Judgments No. 1372/2545 and No. 11610/2554). An employee was terminated due to the lack of necessary work capabilities and has been given a written warning of not exceeding one year (Supreme Court Judgments No. 6840/2544 and No. 49/2549).

Unfair Termination

The employer can terminate the employee without any of the legal termination causes under Section 119 of the LPA, provided that a prior termination notice must be given (or payment in lieu of the prior termination notice is paid) and the statutory severance pay and other legal and

contractual entitlements must be paid to the employee.

However, the employee who is terminated without cause as discussed above may still file an unfair termination claim in Court against the employer claiming for unfair termination compensation in addition to the necessary statutory and contractual entitlements already received from the employer.

The Court determines whether the termination is fair or unfair on a case-by-case basis and at its sole discretion, taking into account a number of factors, such as the reasons for the termination, how the termination was carried out, the negative impacts of the termination on the livelihood of the employee and his / her dependants, the gratuities already paid to the employee on top of the statutory and contractual entitlements, the number of years in which the employee worked for the employer, the age of the employee, the possibility of the employee getting a new job after the termination, etc.

Two examples of unfair termination: Although the employer company was experiencing financial difficulties, it remained profitable, despite a significant decrease in profits from the previous year. The decrease in profits was not a valid and justifiable reason for termination of the employee (Supreme Court Judgment No. 7083/2548). The employer terminated the employee who was a labor union representative for an alleged serious misconduct without conducting an investigation as required by the Employment Conditions Agreement between the labor union. Such termination was an unfair termination (Supreme Court Judgment No. 404/2531).

Mitigation of Unfair Termination Claim

To mitigate the risk of liabilities under an unfair termination claim, the employer may do the followings:

1. Ensure that there is a fair ground for termination and keep all records and evidence materials to prove to the Court that the termination was necessary and unavoidable. If only certain but not all employees are being terminated, the employer must ensure that the employee selection process for termination is fair.
2. Clearly communicate the reason for termination to the employee upon termination and in the termination letter. If the employee is to be terminated for poor performance, the employer should make regular assessments of the employee's work performance to give the employee the feedback on his/her performance and the opportunity to the employee to first improve his/her performance prior to the termination of employment to ensure that the termination is justified;
3. Observe the requirements and procedures for termination of employees as specified in the employer's work rules and/or code of ethics and/or internal policies before terminating the employee. For instance, if the work rules require the employer to set up an investigation

committee to investigate the employee's alleged misconduct act or to give a verbal warning or suspension of work before termination of employment, such requirements must be observed.

Encourage the employee to resign instead of being terminated or sign a mutual separation agreement with the employer where the employee agrees to waive the right of claims, including the unfair termination claim, against the employer in exchange of gratuity payment.



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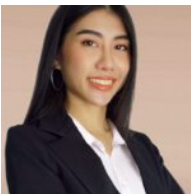
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