DENTONS LEE

Number of Days of Annual Paid Leave for One-Year Fixed-Term Workers

Supreme Court Decision No. 2021Da227100 rendered on October 14, 2021

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In the Subject Ruling, the court determined that up to 11 days of annual leave are granted to any worker who has signed a one-year fixed-term employment contract. So far, the Ministry of Employment and Labor took the position that the allowance for paid leave not taken for up to 26 days should be paid when the contract term of a one-year fixed-term worker expires. But the Subject Ruling made different judgment, resolving the continuing dispute as to the number of days of annual paid leave for one-year fixed-term workers.

I. Fact Relations

Plaintiff is an employer who operates a nursing facility for the elderly in Uijeongbu, and Defendant A is a worker who worked as a caregiver at the nursing facility for the elderly operated by the Plaintiff for one year from August 1, 2017 to July 31, 2018. Defendant A retired after using 15 days of annual paid leave for one year.

Around June of 2018, Jungbu Regional Employment and Labor Administration Uijeongbu Branch under Defendant Republic of Korea (hereinafter the "Uijeongbu Labor Administration") distributed an <Explanatory Material for the Revised Labor Standards Act> issued by Defendant Republic of Korea (Ministry of Employment and Labor) in a meeting with representatives of local workplaces and trained them that "the amended Labor Standards Act increased the number of annual paid leave from 15 days to 26 days and this amendment must be thoroughly implemented and anyone who violates this will face criminal punishment."

Defendant A submitted a petition to the Uijeongbu Labor Administration in August 2018 after retirement, seeking payment of 11 days' worth of allowance for annual leave not taken against the Plaintiff and accordingly, the Plaintiff got under investigation by labor inspector of the Uijeongbu Labor Administration. At the time, the labor inspector suggested above-mentioned <Explanatory Material for the Revised Labor Standards Act>, saying that since the number of annual leave has been increased to 26 days, your act of not paying an allowance for the remaining 11 days of annual leave would be a violation of the Labor Standards Act. In the end, the Plaintiff had to pay Defendant A the 11 days' worth of allowance for annual leave not taken.

However, the Plaintiff filed a litigation in the present case to get back the payment of the 11 days' worth of allowance for annual leave not taken jointly by Defendant Republic of Korea, as a compensation for damages caused by illegal act and Defendant A, as a return of unfair profit, by asserting that the number of annual paid leave stipulated in the labor contract signed between the Plaintiff and Defendant A was 15 days in accordance with then Labor Standards Act

and Defendant A used all of them, so there was no more annual leave allowance payable by the Plaintiff to Defendant A but Defendant Republic of Korea damaged the Plaintiff by making and enforcing the <Explanatory Material for the Revised Labor Standards Act> which stated that the maximum number of paid leave days for working for up to one year is 26 days.

II. Issue at Stake in the Present Case

Before introducing the court ruling, we need to first look at Article 60 of the Labor Standards Act, which is the issue at stake in the present case: II.

Article 60 of former Labor Standards Act (Annual Paid Leave)[1]	Amended Labor Standards Act[2]
1. Every employer shall grant any employee who has worked not less than 80 percent of one year a paid leave of 15 days. 2. Every employer shall grant any employee who has continuously worked for less than one year or who has worked less than 80 percent of one year one paid-leave day for each month during which he or she has continuously worked. 3. Where an employer grants any worker a paid leave for the latter's first year of work, **the former shall grant the latter a paid leave of 15 days, including the paid-leave referred to in paragraph (2), and, if the latter has already taken the paid-leave provided for in paragraph (2), shall deduct the number of days of such paid-leave from the said 15 days.**	3. Deleted

In connection with annual paid leave for a one-year worker, Article 60 of former Labor Standards Act stipulates that any employee shall be granted one paid-leave day for each month during which he or she has continuously worked (paragraph 2) but when such paid leave is granted, **the number of days must be 15 days including the leave under paragraph 2** and if the employee has already taken the paid-leave, the number of days of such paid-leave taken shall be deducted from the said 15 days (paragraph 3). To put it plainly, any employee who has "completed" his/her one-year service after being employed is entitled to have 15 days of annual paid leave, but **when the employee has taken any annual paid leave, such taken leave day(s) shall be deducted from the 15 days originally given.**

However, amended Labor Standards Act deleted paragraph 3 of Article 60 (for a reason to be explained below) and under Article 60 of such amended Labor Standards Act, only the existing paragraphs 1 and 2 have remained in relation to the generation of annual paid leave. If we apply this literally to a case when an employee has provided labor for the first one year term, **a total of 11 days of annual paid leave (one paid-leave day for each month during the period less than one year; according to paragraph 2 of Article 60) and 15 days of annual paid leave generated from the provision of labor for one year (according to paragraph 1 of Article 60) have come to coexist,** so the Act opened a room to be interpreted that 26 days of annual paid leave would be generated when above two were added.

This issue came out from the deletion of paragraph 3 of Article 60 under former Labor Standards Act which removed the part "15 days including the annual paid leave taken during the first year of work" and the part on "deduction". Regarding the annual paid leave generated in the first one year of service at work, (i) the opinion that the number of days would be 11 as only paragraph 2 applies and (ii) the opinion that the number of days would be 26 as both paragraphs 1 and 2 apply have come into conflict with each other and on this, **the Ministry of Employment and Labor took the position that it was 26 days.[3]**

However, it appears that the biggest issue in the present case lies not in the controversy over the amendment of the Labor Standards Act as above and its interpretation, but in **whether granting 26 days of annual paid leave to an employee who retires after one year of service at work and then paying 15 days' worth of allowance for annual leave on which he/she never had a chance to take[4] could be accepted 'in terms of social norms.'**

1 The Labor Standards Act before amendment as Act no. 15108 on November 28, 2017 (hereinafter "former Labor Standards Act")
2 The Labor Standards Act amended as Act no. 15108 on November 29. 2017 and enforced on May 29, 2018 (hereinafter "amended Labor Standard Act")
3 As the Ministry of Employment and Labor hasn't made any official announcement yet since the pronouncement of the Subject Ruling, it can be seen that the Ministry has not changed its position that the number of annual paid leave is 26.
4 In case of any employee whose period of initial work is less than one year, one paid-leave day would be generated for each month of his/her service at work (Article 60(2) of the Act) so any one-year contract worker has no opportunity to take the 15 days of annual paid leave generated in accordance with Article 60(1) due to termination of the employment contract he/she signed.

III. Courts' Judgments[5]

1. Judgments by the Courts of Lower Instances

The court of the 1st instance dismissed the Plaintiff's claim (Seoul Northern District Court decision no. 2020Gaso444237 rendered on October 14, 2020). This means that such court took the position that the number of annual paid leave days for any one-year contract worker is 26, like the position taken by the Ministry of Employment and Labor. The court of the 1st instance ruled that **the reason why the Labor Standards Act was amended is to better guarantee the granting of annual paid leave to any worker whose continuous work period is less than two years.** Therefore, in the case of any worker whose continuous work period is over one year but less than two years, 15 days of annual paid leave generated to an employee who has worked for more than a year under paragraph 1 and 11 days of annual paid leave generated to an employee who has worked for less than a year under paragraph 2 can both be applied, so up to 26 days of annual paid leave can be acknowledged.

However, the court of the 2nd instance upheld the Plaintiff's claim by making different ruling f rom the one rendered by the court of the 1st instance (Seoul Northern District Court decision no. 2020Na40717 rendered on April 6, 2021).

The court of the 2nd instance ruled that **the right to take annual paid leave** stipulated in Article 60(1) of the Labor Standards Act **occurs on the day following the completion of an employee's one-year work of the previous year** unless otherwise specified and thus, in the case of Defendant A who has worked less than one year, he cannot claim the annual paid leave allowance as compensation for his right to take annual paid leave specified in Article 60(1) of the Labor Standards Act, and only Article 60(2) of the Labor Standards Act applies to Defendant A, making him being entitled up to 11 days of annual leave.

2. Judgment of the Supreme Court (Subject Ruling)

Like what has been ruled by the court of the 2nd instance, the Supreme Court determined that the maximum number of annual paid leave days for any one-year fixed-term worker is 11 for the following grounds:

1. Amended Labor Standards Act deleted a provision which deducted any paid leave for the work of an employee's first one year taken from the paid leave for the following year, allowing the employee to take up to 11 days paid leave during the first year of work and 15 days of paid leave during the second year of work. Therefore, it could not be considered that paragraphs 2 and 1 of Article 60 apply together to an employee who has provided service at work for just one year.
2. Since the right to take annual leave generally arises on the day following the completion of an employee's one year of work in the preceding year, if the employment relationship is terminated before such date, an employee cannot claim annual leave allowance as compensation for his/her right to take such annual leave.
3. If 26 days of annual paid leave is granted, this goes beyond the scope of literal interpretation of Article 60(4) of the Labor Standards Act which stipulated that "the total number of paid-leave days, including the additional paid-leave days, shall not exceed 25 days."
4. This would result in preferential treatment for workers who signed one-year fixed-term contracts compared to long-term workers, which goes against the principle of equity.
5. Considering the purport of paid-leave system to provide opportunities for recreation and improvement of cultural life by exempting workers from his/her obligations of work for a certain period of time with paying them once they have worked for a certain period of time, Article 60(1) of the Labor Standards Act has a purpose of giving 15 days of paid leave on the second year of work to an employee who has worked more than 80% of his/her first year on the premise that the employment relationship will continue in the following year. Therefore, Article 60(1) of the Labor Standards Act does not apply to any employee who has concluded a one-year fixed-term employment contract and would not have the labor contractual relationship any more when such one-year term expires.

5 In the claim made by the Plaintiff, the part on Defendant Republic of Korea has been dismissed by all courts of lower/higher instances. Therefore, we will review only the part on Defendant A hereinafter.

IV. Annotation

1. Review of the Subject Ruling

A. Purport of amending the Labor Standards Act

Both the judgment made by the court of the 1st instance and the Subject Ruling suggested the reason for deleting Article 60(3) of the revised Labor Standards Act as their basis of decision. For the reason of amendment of the Labor Standards Act, the court of the 1st instance mentioned that it was to better guarantee the granting of annual paid leave to any worker whose continuous work period is less than two years, and the Subject Ruling stated that the Act was amended to allow an employee to take up to 11 days paid leave during his/her first year of work and 15 days of paid leave during his/her second year of work. To tell the conclusion first, what the court of the 1st instance and the Supreme Court told was correct. Under former Labor Standards Act, even if an employee is granted any annual paid leave in his/her first year of work, such given days could be deducted from the 15 days of annual paid leave available to take in his/her second year of work. So, if any employee took 11 days of paid leave on his first year of work, such employee would have been able to take only 4 days of annual paid leave on his second year of work. To resolve such issue, Article 60(3) of former Labor Standards Act was deleted to allow up to **"26 days of annual paid leave for two years from the date an employee has joined the company.**"

In other words, the fundamental reason for amending the Act was to increase the days of annual paid leave available to take for the first two years at work to 26 days because it was only 15 days. When we look at the reason why the National Assembly Environment and Labor Committee has suggested a bill to delete Article 60(3) of amended Labor Standards Act, it mentioned "to allow up to 11 days of paid leave in the first year of work and 15 days of paid leave for the second year of work, respectively, by deleting the provision which deducts the days of paid leave for the work done in the first one year from the days of paid leave given in the following year." Even based on this, we cannot get any clear answer on whether both paragraphs 1 and 2 of Article 60 under the Labor Standards Act can be applied to a person who has provided work for exactly one year. This means that it failed to provide any clear answer to whether 15 days of annual paid leave that can be taken in the second year of service immediately occurs upon completion of the first year of work, or whether it occurs the day following the end of an employee's one-year working period, or whether it also occurs to any worker who has signed one-year fixed-term employment contract. After all, what the court of the 1st instance and the Supreme Court told was correct, but could not be a critical ground for resolving the present case.

B. When an employee's annual paid leave occurs

The biggest issue in the present case would be when an employee's annual paid leave occurs. Only with the reason for amending the Labor Standards Act we reviewed above, it is hard to get a clear answer on whether any one-year fixed-term worker can be granted 26 days of annual paid leave. So, the conclusion of the present case will depend on whether it must be considered that annual paid leave occurs on the day when an employee's one year of work is completed, or 'on the following day' after the completion of one-year work. For example, if an employee who joined the company on January 1 after signing a one-year fixed-term employment

contract retires after working until December 31, if we consider that the granting of his/her annual paid leave will occur on December 31 (the last day of the one-year contract period), this worker will be granted 15 days of annual paid leave in accordance with Article 60(1) of the Labor Standards Act. On the other hand, if we consider that the granting of annual paid leave will occur on January 1 of the following year (the day following the end of his/her one-year service period), this worker whose employment contract expired the previous day will not be granted 15 days of annual paid leave in accordance with Article 60(1) of the Labor Standards Act.

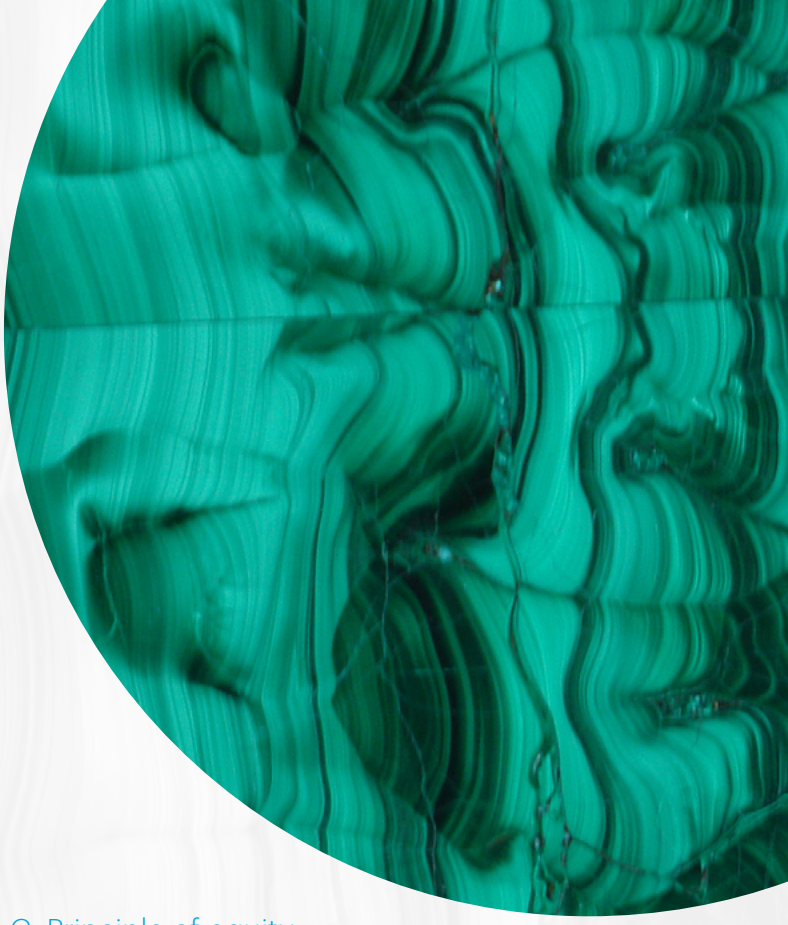
On this matter, the Subject Ruling determined that since the right to take annual leave shall be deemed to arise on **the day following** the completion of work for one year of the preceding year unless otherwise specified, if the employment relationship is terminated before such date due to retirement, etc., then such employee cannot claim annual leave allowance as compensation for the right to take such annual leave. By stating as above, the Subject Ruling upheld the legal principle applied to the existing Supreme Court decision (Supreme Court decision no. 2061Da48297 rendered on June 28, 2018) as it was.

Meanwhile, the court of the 1st instance was also aware of the above-mentioned Supreme Court decision. On this, the court of the 1st instance determined that it was hard to apply above Supreme Court decision to the present case as it was, saying that despite of the existence of such Supreme Court decision, the issue deliberated in such ruling was about annual leave as compensation for work in the year of retirement when a full-time employee retires and thus, it was different from the present issue regarding fixed term workers. The court of the 1st instance further determined that considering purport of the existing Supreme Court precedents (Supreme Court decision nos. 2003Da48549 and 48556 rendered on May 27, 2005) which revealed that the right to take annual leave with being paid is something an employee definitely acquires in return for completing his/her prescribed amount of work for one year, compensation for any work shall be settled based on the expiration date of the working period.

To explain the issue ruled in the Supreme Court decision no. 2061Da48297 and the issue in the Subject Ruling simply as 'conclusion-oriented', (i) in the case of a worker who retires under the age clause, he/she cannot be granted annual paid leave under Article 60(1) of the Labor Standards Act which he/she would have acquired according to his/her work in such year, and (ii) even a one-year fixed-term worker cannot be granted annual paid leave under Article 60(1) of the Labor Standards Act on which he/she could acquire according to the work done in such year. And the common reason for such rulings is "annual paid leave arises on the day following the completion of an employee's one year of work, and the person in question is not in the position of an employee anymore at a time when the granting of annual paid leave occurs."

What the above two cases have in common is that the case is about "an employee who is already scheduled to leave the company." In other words, workers who retire under the age clause or one-year fixed-term workers cannot provide work after the end of their employment term because the retirement date or the end date of the labor under the contract is set in advance. From such point of view, I believe above two judgments rendered justified conclusions. The fundamental purpose of annual leave is to provide opportunities for mental/physical recreation and improvement of cultural life by exempting workers from his/her obligations of work for a certain period of time with paying them once they have worked for a certain period of time and for this to happen, the provision of work must be preordained as a premise for exempting the duty to work. In other words, the primary purpose of the annual leave system is to give workers the right to rest, and the employer compensates them in money only when the worker fails to take the annual leave. Therefore, if even the right to rest cannot be granted, it is reasonable to assume that there must be no monetary compensation premised on such right to rest. For example, as in the case of the Subject Ruling, even if 15 days of paid annual leave is granted to an employee who is scheduled to retire according to the retirement date, it is a leave that has no opportunity to be taken and the employee in question is already fully anticipating that he/she will not be able to take such leave. Thus, forcing the employer to compensate with money in above cases goes against the essence of the leave system which will pose an excessive burden on the employer.

In conclusion, I agree with the conclusion of the Subject Ruling. Provided, however, that some criticizes that the Subject Ruling is inconsistent with the ruling of the Supreme Court decision nos. 2003Da48549 and 48556 rendered on May 27, 2005 which served as a ground for the judgment of the court of the 1st



instance and the administrative interpretation by the Ministry of Employment and Labor by identifying that "**the right to take annual leave is something an employee definitely acquires in return for completing his/her prescribed amount of work for one year,** so if the employment relationship is terminated due to a reason such as resignation, etc., before the employee takes his/her annual paid leave after obtaining the right to take annual paid leave, then the right to take annual leave which requires continuation of the employment relationship as a premise would expire but his/her right to claim annual leave allowance that does not presuppose the continuation of the employment relationship remains. As a result, an employee can claim to the employer an annual leave allowance with an amount equivalent to all the annual leave days he/she has not taken until the end of the employment relationship" and also, above Supreme Court decision no. 2003Da48549 has not been discarded since the Subject Ruling was not an en-banc Supreme Court judgment.

With regard to above matter, the details of above judgment rendered in Supreme Court decision no. 2003Da48549 was not about when the right to take annual paid leave occurs, but about if the employment relationship is terminated after the right to take annual paid leave has been effectively acquired, whether to pay the allowance for the entire annual paid leave right that has already been effectively acquired, or to calculate the number of leave days that such employee could have actually taken and then pay only for that days. Therefore, it is considered that among the details of above ruling, the part that "the right to take annual leave is something an employee definitely acquires in return for completing his/her prescribed amount of work for one year" was only to mention the theoretical aspect of the issue, rather than ruling "when an employee acquires his/her right to take annual paid leave" as a determination on a specific issue. Thus, it is hard to deem that the Subject Ruling apparently contradicts the judgment rendered in above Supreme Court decision no. 2003Da48549.

C. Principle of equity

In the Subject Ruling, the court determined that "an employee who has signed a one-year fixed-term employment contract will be given more than 25 days of leave, which is bigger than the number of leave days granted to a long-term employee. This would not only go beyond the scope of literal interpretation of Article 60(4)6 of the Labor Standards Act regarding annual paid leave, but violate the principle of equity by resulting in giving preference to workers who have signed one-year fixed-term contract over their long-term employed counterpart."

If 26 days of leave is granted to one-year fixed term workers, it appears that they would be over-guaranteed compared to their service at work considering the fact that the number of days of leave that can be granted by law to an employee who has continuously worked for three years or more is 25 days in accordance to Article 60(4) of the Labor Standards Act. Given the above, it is considered that the legislator did not intend to grant 26 days of paid leave to one-year fixed-term workers, and I believe the Subject Ruling pointing out this aspect was reasonable.

6 Every employer shall grant any employee who has continuously worked for not less than three years the paid-leave days that are calculated by adding one day for every two continuously working years not including the first one year to the 15 paid-leave days referred to in paragraph (1). **In this case, the total number of paid-leave days, including the additional paid-leave days, shall not exceed 25 days.**

D. Sub-conclusion

Generally, the conclusion and the basis for judgment of the Subject Ruling appear to be valid. Provided, however, that as reviewed above, the issue in the Supreme court decision no. 2016Da48297 and the issue in the Subject Ruling were all about "an employee who was scheduled to retire." So personally, I think the Subject Ruling would not have been criticized for being inconsistent with the existing Supreme Court decision no. 2003Da48549 if it, rather than resolving the case by limiting the issue to when a paid annual leave occurs, paid attention to the fact that annual paid leave is basically a 'right to rest' and advanced the logic that "when termination of the employment relationship is already scheduled, one cannot expect that the employee in question could take his/her paid annual leave and thus, under such special circumstances, the granting of paid annual leave does not occur."

2. On the administrative interpretation made by the ministry of employment and labor

With the sentencing of the Subject Ruling, there are people who criticize the administrative interpretation of the Ministry of Employment and Labor. But I don't think the Ministry of Employment and Labor deserves such criticism because unlike courts which make judgment only when one files a lawsuit, the Ministry of Employment and Labor had to take its position through administrative interpretation anyhow in order to deliver clear policies and avoid confusion among businesses while setting guidelines for the labor administrations which exercise special judicial police power so that they can better handle cases. It doesn't appear that the Ministry of Employment and Labor's administrative interpretation goes against any existing legal principles. It was a judgment made based on the Supreme Court decision no. 2003Da48549 and given the point that the court of the 1st instance made the same judgment with the Ministry, it is difficult to conclude that the decision of the Ministry of Employment and Labor was necessarily wrong or unreasonable. But the Ministry of Employment and Labor has not made any official announcement since the sentencing of the Subject Ruling. Since administrative interpretation by the Ministry of Employment and Labor serves a very important criterion when employers and workers make any decision and when labor inspectors of the labor administrations conduct any practical tasks in reality, I believe it is necessary for the Ministry to announce its official position as soon as possible to prevent further confusion.

3. Significance and Implication of the Subject Ruling

If an employee fails to receive annual leave allowance, he or she can file a petition or a complaint before the labor administration and such remedies are often sought in practice. And labor inspectors of the labor administrations calculate the payable amount of annual leave allowance based on 26 days, being bound by the administrative interpretation of the Ministry of Employment and Labor and before the sentencing of the Subject Ruling, I, too, used to defend my clients in cases of filing petitions to the labor administrations on the same issues as the case of the Subject Ruling. To the labor inspector, I cited the judgment rendered by the court of the 2nd instance in the case subject to the Subject Ruling and insisted that the annual leave allowance must be calculated based on 11 days, but the labor inspector did not accept this. However, things have changed completely after the sentencing of the Subject Ruling and now, inquiries are coming in from many employers who want to check the possibility of wining the case when they file a claim against the employees for the return of unfair benefits, as the case in the Subject Ruling.

The Subject Ruling holds significance in the way that it ended the controversy over the number of days of annual paid leave granted to one-year fixed-term workers. However, if we think carefully about why this situation occurred, then we can find that the controversy happened because the intention of the legislator was not clear when the Labor Standards Act was amended, and because the Act after the amendment was also unclear. If a clearer measure had been taken to prevent paragraphs 1 and 2 from being applied together instead of simply deleting Article 60(3) of the Labor Standards Act by foreseeing that such a situation would occur when the Labor Standards Act was amended, a dispute like the present case would not have arisen in the first place.

*The content of above annotation may differ from the position of the Korea Enterprises Federation.