

LABOUR COMPENSATION FOR RETRENCHMENT OR RE-LOCATION

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A foreign invested company (the “Company”) was planning to relocate its Shanghai plant in Pudong to another place about 45 minutes away. The relocation resulted in industrial action by its 200 workers. This case received media publicity throughout China and overseas.

一家外商投资公司要将其坐落于上海浦东的工厂搬迁到距离原厂址 45 分钟车程的另一地区。该行为引发了由 200 多名工人参加的罢工。本案引起了中国各地和海外媒体的关注。

The Company’s solution was simple: compensation of 1 hour’s pay for every extra 1.5hours taken to commute to the new location. The Company claimed that such package was in accordance with the labour laws of China and endorsed by the labour union in Shanghai. However, about 10 workers who claimed to represent the bulk of the workers on strike requested for one month pay for every year of service plus an additional month for those who wanted to leave the company as a result of the re-location.

公司的解决方案很简单：对为到达新厂址而花的时间进行赔偿，每花 1.5 小时赔偿 1 个小时的工资。公司表示该方案符合法规的规定并且已经获得了上海工会的认可。然而，自称为罢工工人代表的 10 名工人要求公司向因为搬迁而希望离开公司的工人按工作年限支付补偿金，即每一年折合成一个月的工资，并且需再多支付一个月。

The Labour Contract Law / 《劳动合同法》

The PRC Labour Contract Law (“Labour Contract Law”), which came into effect on 1 January 2008, provides for some channels of dispute resolution between employers and employees. It provides for resolution through:

- 1) negotiations,
- 2) termination of the labour contract by the employee; and
- 3) termination of the labour contract by the employer.

2008 年 1 月 1 日起施行的《中华人民共和国劳动合同法》中规定了用人单位与劳动者之间解除劳动合同的各种途径。《劳动合同法》中规定了通过协商解除合同的方式，以及劳动者或用人单位单方解除劳动合同的情形。

If both the workers and the Company can resolve the dispute by negotiation, it can result in a binding agreement. This will be a win-win situation for both parties. However, if all efforts at negotiation fail, the key issue of compensation will be triggered. The first issue to consider is the legal basis for compensation. Article 46 of the Labour Contract Law provides for the situations where the compensation needs to be paid. They include the following:

本案中，若公司与工人能够通过平等协商来解决这个争议，即可达成一个具有约束力的协议。这对双方而言将是双赢的局面。但若双方继续僵持不下，将引发关于经济补偿金的关键问题。

第一个需要考虑的问题是补偿金的法律依据。《劳动合同法》第 46 条规定了需要支付补偿金的情况，包括：

1. The employee terminates the labour contract as per Article 38 of the Labour Contract Law;
劳动者依照本法第三十八条规定解除劳动合同的；
2. The employer proposes the termination of labour contract and reaches an agreement with the employee regarding such termination after mutual negotiation;
用人单位依照本法第三十六条规定向劳动者提出解除劳动合同并与劳动者协商一致解除劳动合同的；
3. The employer terminates the labour contract as per Article 40 of the Labour Contract Law;
用人单位依照本法第四十条规定解除劳动合同的；
4. The employer terminates the labour contract as per Article 41(1) of the Labour Contract Law;
用人单位依照本法第四十一条第一款规定解除劳动合同的；
5. Termination of fixed-term labour contract as per Article 44(1) of the Labour Contract Law, except that the employer agrees to renew the labour contract maintaining or enhancing the stipulated conditions while the employee disagrees with such renewal;
除用人单位维持或者提高劳动合同约定条件续订劳动合同，劳动者不同意续订的情形外，依照本法第四十四条第一项规定终止固定期限劳动合同的；
6. Termination of labour contract as per Article 44(4) or (5) of the Labour Contract Law;
依照本法第四十四条第四项、第五项规定终止劳动合同的；
7. Other situations provided in the laws or administrative regulations.
法律、行政法规规定的其他情形。

Article 47 provides the salient formula for compensation:

第 47 条则规定了补偿金的计算方法：

“An employee shall be given an economic compensation based on the number of years he has worked for the employer and at the rate of one month's wage for each full year he has worked. Any period of no less than six months but less than one year shall be counted as one year. The economic compensations payable to an employee for any period of less than six months shall be one-half of his monthly wages.”

“经济补偿按劳动者在本单位工作的年限，每满一年支付一个月工资的标准向劳动者支付。六个月以上不满一年的，按一年计算；不满六个月的，向劳动者支付半个月工资的经济补偿。”

Termination by an employee / 劳动者单方解除合同

An employee has the legal right to terminate a labour contract with written notice of 30 days. This right is provided for under Article 37 of the Labour Contract Law. No compensation is payable for such a termination proposed by the employer.

劳动者有权以提前 30 日书面通知用人单位的形式解除劳动合同。本权利规定在《劳动合同法》的第 37 条中。对于协商解除合同而言，若有劳动者提出，则无权取得补偿金。

On the other hand, Article 38 provides for several situations under which the employee may dissolve the labour contract immediately. This includes situations where the employer fails to provide adequate labour protection or breaches the terms of the contract. These breaches could arise when the employer fails to pay remunerations or social security premia; or if the employer introduces company rules which are contrary to the law. The employee also has the right to terminate the labour contract if the employer violates any other laws or administrative measures. This includes the use of violence or threats, illegal restraint of personal freedom, or any violations of safety regulations. For example, if an employee is instructed to perform dangerous tasks which may threaten his life, he has the right to dissolve the labour contract without notice. The dissolution of a labour contract under this provision will result in the employer's obligation to pay compensation according to Article 46 and 47.

另一方面，第 38 条规定了几种劳动者可以即时解除劳动合同的情形，包括用人单位未按照劳动合同约定提供劳动保护或者劳动条件的，例如未及时足额支付劳动报酬的，未依法为劳动者缴纳社会保险费的或用人单位的规章制度违反法律、法规的规定，损害劳动者权益等。另外，用人单位以暴力、威胁或者非法限制人身自由的手段强迫劳动者劳动的，或者用人单位违章指挥、强令冒险作业危及劳动者人身安全的，劳动者可以立即解除劳动合同，不需事先告知用人单位。例如，用人单位强令劳动者执行一项会危及其生命的危险的操作，则劳动者有权不告知而直接解除劳动合同。依据第 38 条解除劳动合同的，用人单位需要按照第 46 和 47 条的规定支付经济补偿金。

The facts of this case do not support the dissolution of the labour contracts under Article 38. Thus, the workers are not entitled to the compensation under Article 46 and 47 on this basis.

本案实施中并没有第 38 条项下规定的情况。因此，工人不得依照此条款解除劳动合同，也无法据此取得 46 和 47 条规定的赔偿金。

Termination by employer / 用人单位单方解除合同

Under the Labour Contract Law, an employer is also given the legal right to terminate or dissolve a labour contract with any employee.

根据《劳动合同法》，用人单位也被赋予与其所雇佣的劳动者终止或解除合同的权利。

Under Article 39 of the Labour Contract Law, an employer can terminate a labour contract if the employee:

根据《劳动合同法》第 39 条，用人单位可以劳动者出现以下情况时解除劳动合同：

1. does not meet the recruitment conditions during the probation period;
在试用期间被证明不符合录用条件的；
2. seriously violates the rules and procedures set up by the employer;
严重违反用人单位的规章制度的；

3. causes severe damage to the employer due to poor performance or negligence regarding his duties or seeks private benefits;
严重失职，营私舞弊，给用人单位造成重大损害的；
4. simultaneously enters an employment relationship with other employers and thus seriously affects his completion of the tasks with the employer, or refuses to make the ratification after the employer points out the problem;
同时与其他用人单位建立劳动关系，对完成本单位的工作任务造成严重影响，或者经用人单位提出，拒不改正的；
5. through deception, coercion or by taking advantage of the employer's difficulties, causes the employer to conclude or amend the employment contract in a manner that is contrary to the employer's true intent, thereby rendering the labour contract invalid.
以欺诈、胁迫的手段或者乘人之危，使对方(用人单位)在违背真实意思的情况下订立或者变更劳动合同，而致使劳动合同无效的；
6. has been held criminally liable for any offence.
被依法追究刑事责任的。

In such a case, payment of compensation upon the termination of labour contract is not necessary.
依据本条款解除劳动合同的，用人单位无需支付经济补偿金。

Under Article 40 of the Labour Contract Law, the employer may terminate the labor contract by giving written notice of 30 days or salary in lieu of notice if:
另外，依据《劳动合同法》第40条，有以下情形之一的，用人单位提前三十日以书面形式通知劳动者本人或者额外支付劳动者一个月工资后，可以解除劳动合同：

- (1) The employee is sick or injured for reasons that are not related to his employment; and cannot resume his original position or any other position that the employer arranges for after the prescribed duration for medical treatment; or
劳动者患病或者非因工负伤，在规定的医疗期满后不能从事原工作，也不能从事由用人单位另行安排的工作的；
- (2) The employee is unsuitable for his position and remains so despite further training or re-designation; or
或劳动者不能胜任工作，经过培训或者调整工作岗位，仍不能胜任工作的；
- (3) The labour contract is incapable of performance due to an objective and significant change in the circumstances on which the contract is based; and the employer and employee fail reach an agreement to vary the terms of the labour contract.
或劳动合同订立时所依据的客观情况发生重大变化，致使劳动合同无法履行，经用人单位与劳动者协商，未能就变更劳动合同内容达成协议的。

An employer seeking to terminate a labour contract under Article 40 must also pay the compensation due the employee under Articles 46 and 47.

依据第 40 条解除劳动合同的，用人单位需要按照第 46 和 47 条的规定支付经济补偿金。

In this case, the labour contracts were executed by the Company and workers on the original factory site in Pudong. This case could fall under Article 40 (3) – the contract cannot be performed due to a change in circumstances. Hence, if the Company intends to terminate the labour contracts, it must give the workers proper notice or salary in lieu thereof, and compensate them. If the Company elects to pay the salary in lieu of notice, it must do so in addition to the compensation payable under Article 47. This may be the only legal ground for a claim of the compensation by the workers.

在本案中，公司与工人之间的劳动合同是以浦东的原厂址为基础履行的。这将可能符合第 40 条第三项规定，即劳动合同订立时所依据的客观情况发生重大变化，致使劳动合同无法履行，经用人单位与劳动者协商，未能就变更劳动合同内容达成协议的。鉴于此，若公司方面希望解除劳动合同的，可以使用该条款的规定，提前三十日以书面形式通知劳动者或额外支付一个月工资。同时，公司仍需要支付第 46 和 47 条规定的经济补偿金。此时，若公司选择以支付额外工资的方式替代提前 30 日通知，则公司实际应支付的补偿金为：额外的一个月工资加上第 47 条规定的经济补偿金。仅在这种情形下，本案中工人们的补偿要求才有法律依据。

Conclusion / 结论

In this case, if the workers dissolve the labour contracts with 30 days' written notice, they would have no legal claim to the compensation. On the facts, if they do not choose this method, they would have no other grounds to initiate the termination. Nevertheless, it would be advisable for the Company to settle the dispute by compensating the workers according to Labour Contract Law. Firstly, if the deadlock continues, the Company would still have to pay for the workers' salary and social security premia. If it does not do so, the employees could terminate the contracts under Article 38 and the Company would then have to pay the compensation under Article 46 and 47. Hence, the longer this deadlock period lasts, the more the Company will suffer. Secondly, even if the Company chooses to dissolve the contract under Article 40, it would still have to pay the compensation under Articles 46 and 47. Therefore, the most effective way for the Company to settle the dispute without starting legal proceedings is to pay the compensation under the Labour Contract Law.

本案中，若工人按照《劳动合同法》第 37 条提前 30 天通知公司解除劳动合同，则无要求补偿金的法律依据。若工人不选择该方式，据现有事实而言，工人尚无法单方解除劳动合同。然而，即便如此，对于公司来说最好的方式还是应该以支付《劳动合同法》规定之补偿金的方式解决争议。首先，如果僵持局面持续，公司将仍需支付僵持期间工人的工资和社会保险费用等。否则，一旦工人依据第 38 条的规定解除合同的，公司将需支付 46 与 47 条规定的补偿金。僵持时间越长，公司损失将越大。另一方面，如果公司按照 40 条解除与工人的合同，也同样需要支付 46 与 47 条规定的补偿金。因此，公司在诉讼外可采取的适当解决方式应为依据《劳动合同法》支付经济补偿金。