

Research on the nature of liquidated damages during the service period

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Abstract: *At present, the academic circles have not yet reached a consensus on the nature of liquidated damages during the service period. Some believe that they are compensatory, some believe that they are punitive, and some believe that they are both compensatory and punitive. This article first sorts out the service period liquidated damages system inside and outside the region, and discusses the concept of service period and the legal nature of service period agreement. On this basis, similar laws and regulations are summarized, and the nature of liquidated damages during the service period is determined by comparing the legislative purpose, value pursuit and legal provisions.*

Keywords: *service period; liquidated damages for service period; legal nature*

1. Introduction

Peng joined iQiyi in July 2018 as a research and development engineer, and the two parties signed a labor contract from July 18, 2018 to July 17, 2021. In addition, the two parties also signed a 5-year service agreement at the expense of iQiyi assisting Peng to handle the formalities of household registration in Beijing. After Peng settled in Beijing, he randomly proposed to resign and no longer fulfill the service period agreement. iQiyi then sued Peng for breach of contract. The court of first instance judged Peng to bear 100,000 yuan in liquidated damages, and the court of second instance upheld the original judgment.

The case once aroused heated discussions among netizens. Netizens who support Peng's side believe that Peng is good at making use of the rules, although it violates morality, it is not illegal. Netizens who support iQiyi believe that Peng's actions will harm the interests of other job seekers, because other major companies will learn from experience and no longer provide similar benefits to job seekers. Putting aside the moral controversy in this case, the author hopes to use this case as a reference to study the nature of liquidated damages during the service period from the perspective of labor law.

2. Domestic and extraterritorial research on liquidated damages system during service period

2.1. Extraterritorial Research

Different countries have different liquidated damages systems during the service period. Generally speaking, there are three representative models: the prohibited liquidated damages model, the restricted liquidated damages model, and the arbitrary liquidated damages model.

Japan and South Korea adopt the model of prohibiting liquidated damages. This model regards employers and workers as two parties with unequal status. Legislators believe that employers are in a strong position and workers are in a weak position. Laborers need to sell their labor to employers in exchange for remuneration in order to survive. In a sense, part of the personal freedom of workers is attached to employers. In order to prevent enterprises from binding disadvantaged laborers by signing high liquidated damages with laborers, the laws of Japan and South Korea prohibit labor and management from signing any form of liquidated damages^[1].

The Taiwan region of China adopts the restrictive liquidated damages model. Employers are allowed to set liquidated damages, but two conditions must be met: First, the employer has provided professional technical training and paid for the training. The second is that the employer and the employee have agreed on the minimum service period, and the agreed minimum service period does not exceed the reasonable range^[2]. On this basis, the laborer only needs to bear the liquidated damages

if he unilaterally breaches the contract. The purpose of this model is to maximize the protection of the interests of both employers and employees, and strive to achieve a balance between employers and employees.

Most European countries adopt the model of arbitrary liquidated damages, among which France and Germany are the most representative. Although both France and Germany adopt the model of arbitrary liquidated damages, the two countries have their own characteristics: France pays attention to prior agreements, and the country regards labor and management as two subjects with equal status, gives both parties full and free negotiation rights, and emphasizes that both parties agree Autonomy is agreed upon. Workers have the right to resign, but this right cannot be abused. Once the employee signs a service period agreement with the employer and accepts the training fee borne by the employer, if he resigns at will, he will be liable for liquidated damages. The amount of the liquidated damages is based on the training fee borne by the employer. Germany focuses on ex post relief because it has a mature labor dispute review mechanism. In order to protect workers, the German Labor Court will review the rationality of the content of the service period agreement. In specific cases, the judge will make a decision based on the two factors of training period and training cost after comprehensive consideration of the specific situation^[3].

2.2. In-Field Research

In 1990, the Ministry of Personnel promulgated the "Provisional Regulations on the Resignation of Professional and Technical Personnel and Management Personnel in Public Institutions Owned by the Whole People", Article 12. For the first time, it is stipulated that if a worker receives training funded by the employer, he must pay the training fee of the employer as agreed when resigning. Article 102 of the "Labor Law" implemented in 1995 stipulates the liability for violation of the labor contract; Article 4 of the "Measures for Compensation for Violation of the Labor Law" promulgated in the same year (hereinafter referred to as the "Measures")) to supplement the Labor Law, Article 102 of the "Labor Law" implemented in 1995 stipulates the liability for violation of the labor contract; Article 4 of the "Measures for Compensation for Violation of the Labor Law" promulgated in the same year (hereinafter referred to as the "Measures")) supplemented the "Labor Law". The "Measures" stipulate that the laborer unilaterally terminates the labor contract and must pay the losses suffered by the employer, including the training fees paid by the employer. Article 3 of the "Notice on Several Issues Concerning the Flow of Employees in Enterprises" promulgated in 1996 stipulates that both employers and employees may agree on liquidated damages in the labor contract.

On January 1, 2008, the "Labor Contract Law" was officially implemented, of which Article 22 (hereinafter referred to as Article 22) is of great significance. First, determine the legal concept of service period to fill in the gaps in this field. Since there is no concept of "service period" before, the employer pays training fees for the laborers and stipulates the special obligations of the laborers. When the laborer breaches the contract, it is difficult to define whether it is a breach of contract involving civil law or a breach of labor law. Secondly, clarify the scope of the economic costs that the laborer must bear for breach of contract during the service period, that is, the laborer who breaches the contract during the service period only needs to bear the penalty for breach of contract during the service period, and limits the amount. Previously, if the laborer breached the contract during the service period, he had to bear other expenses besides the training fee paid by the enterprise, which was obviously unfair to the laborer.

So far, my country's service period liquidated damages system has been formally established, adopting a restrictive liquidated damages model.

3. The concept and legal nature of service period

3.1. The Concept of Service Period

To study the nature of liquidated damages during the service period, it is first necessary to clarify the concept of the service period and the legal nature of the service period agreement. Article 22 of the "Labor Contract Law" revised in 2012 lacks a definition of the concept of service period, which has led to long-standing disputes in the academic circle. The author summarizes the mainstream views by combing.

The first point of view is that the service period is agreed between the employer and the employee.

After the employer provides certain conditions for the other party, the other party must continue to perform the minimum period of obligations^[4]. The second point of view is that the service period refers to the period when the employer and the employee agree that the employee should continue the labor relationship with the employer on the premise that the employer has provided or promised to provide special treatment to the employee^[5]. The third point of view is that the service period is a special bilateral civil agreement. It is formed between the parties to the labor contract, on the premise that the employer first performs or promises to perform the obligations other than the labor contract, and on the premise that the laborer promises not to find another job for the time being but to provide work obligations for the unit within a certain period of time Civil contract for "quid pro quo"^[6]. The author agrees with the third point of view. The service period is essentially an agreement between the employer and the employee, that is, the service period agreement. The employee enjoys the special treatment provided by the employer and pays for it.

3.2. Legal Nature of Service Agreement

The legal nature of labor contract duration and service period is different, but the two are easy to be confused. In practice, the term of the labor contract and the service period are often equated, which complicates the handling of labor disputes. The term of the labor contract is an ordinary term, which means that there must be a term in the labor contract; however, the service period agreement arising from the service period does not need to be attached to the text of the labor contract, and both parties can make separate agreements. Under normal circumstances, the service period is shorter than the labor contract period, and only in exceptional cases is the service period longer than the labor contract period. Although the term of the labor contract and the period of service may overlap, the two co-exist in parallel. A party to a labor contract may unilaterally terminate the labor contract in accordance with the Labor Contract Law, but neither party to the service period agreement may unilaterally terminate the service period agreement in accordance with the provisions of the Labor Contract Law. In addition, in addition to the obligations stipulated in the labor contract, the laborer also needs to bear the additional obligations stipulated in the service period agreement. Therefore, the service period agreement is actually a new consideration relationship established between the laborer and the employer on top of the normal labor contract relationship^[7]. Independent of the labor contract, it is a special civil bilateral contract.

4. Determination of the Nature of Liquidated Damages During the Service Period

Since the service period agreement is a special civil bilateral contract, once the employee breaches the contract, he shall bear the liability for breach of contract. Most of the way to assume responsibility is to pay liquidated damages. As for the service period liquidated damages for workers, whether they are compensatory liquidated damages or punitive liquidated damages is currently quite controversial in the academic circles. To explore whether liquidated damages during the service period are compensatory or punitive, or both, the author summarizes similar norms for comparative analysis. At present, in addition to Article 22 of the "Labor Contract Law", relevant provisions that stipulate liquidated damages include Article 585 of the Civil Code and Article 16, Paragraph 1 of the Railway Law of the People's Republic of China.

4.1. Legislative Purpose

From the purpose of legislation to compare the three laws.

The legislative purpose of the Civil Code is to protect the legitimate rights and interests of civil subjects. Civil subjects are the cells of society, and several civil subjects interact and collaborate with each other on a daily basis, through which civil subjects form civil legal relations. The personal and property rights of civil subjects are often damaged in civil activities. Once the civil rights are damaged, it will directly or indirectly affect the social and economic order. Therefore, in order to regulate the behavior between civil subjects and to protect the after-the-fact relief of rights infringement, there is a civil code. It can be seen that the legislative purpose of the Civil Code can be understood as "maintaining a certain order by protecting rights and interests".

The legislative purpose of the Railway Law is to ensure the development of my country's railway construction and the smooth progress of railway transportation. In order to promote my country's socialist modernization, improve people's living standards and quality of life. National railways and

local railways account for the largest proportion of my country's railway system, and these railways are under the supervision of the railway department of the State Council. National railways and local railways are characterized by large scale, large investment, wide benefit range, long service life and far-reaching influence. The operation of the railway system is more public welfare, aiming to seek benign social effects through railway and other infrastructure, promote social construction, and facilitate people's lives. Therefore, the legislative purpose of the Railway Law can be understood as "to achieve certain social benefits through legislation".

Article 1 of the Labor Contract Law clarifies its four major legislative purposes, which imply a logical level: to improve the contract system - to clarify the rights and obligations of both parties to the labor contract - to protect the legitimate rights and interests of laborers - to build a harmonious labor relationship. It can be deduced from this that the legislative purpose of the Labor Law is also "to maintain a certain order by protecting rights and interests", which is the same as the Civil Code.

4.2. Value Pursuit

Freedom is the value pursuit of the civil code and the foundation of the spiritual structure of the civil law system. Autonomy of will is an important principle in civil law, and it is also the embodiment of freedom pursued by the civil code. Moreover, autonomy of will is not subject to coercion, and is based on the sincerity and mutual trust of the two parties, who do not take advantage of others' dangers. Autonomy of will includes freedom of will and freedom of behavior. Freedom of will embodies the law's respect for people; through freedom of behavior to change and establish legal relations, so as to achieve the needs of both civil subjects. Therefore, the pursuit of liberty is the cornerstone of civil law.

Compared with the civil code, the railway law pursues efficiency. Although at the legal level, the shipper and the carrier are equal civil subjects, and both parties sign a civil legal contract. However, in view of the monopoly position of my country's railways, the status of the carrier and the shipper is not equal in essence. For example, some areas cannot be transported by air because there is no airport, and the cost of road transport is high, so they can only be transported by rail. Article 11 of the Railway Law stipulates that liquidated damages are inclined to the shipper, which is evidence of the substantial unequal status of the two parties. Freight is the artery of economic development. If a dispute occurs and the shipper and the carrier become entangled, it will not only benefit the shipper, but also affect the efficiency of the railway system. Therefore, efficiency is the value pursuit of railway law.

The value pursuit of labor law is also freedom. It is based on the free negotiation between the two parties that the labor and management agree on the service period and sign the service period agreement. On the one hand, the labor force circulates freely, and workers are not bound by a certain unit and can make their own choices. On the other hand, the service period agreement reached between labor and management is the result of free negotiation between the two parties in exchange for a certain price: the employer pays for training in exchange for high-quality employees; the laborer pays for a certain period of "loyal service", in exchange for the training resources of the employer to increase their own competitiveness and improve their labor value. It can be seen that the value pursuit of the labor contract law is similar to that of the civil code.

4.3. Legal Provisions

From a legal point of view. In the Civil Code, liquidated damages are theoretically defined by the relationship between the agreed amount of damages and the actual amount of damages: if the agreed amount is not greater than the actual amount of damages, it is the liquidated damages of the nature of compensation, and if the agreed amount is greater than the actual amount of damages, it indicates such a liquidated damages is punishing^[8]. The amount of liquidated damages can be agreed upon by the parties themselves, and the benchmark for reference is the value of the subject matter. If one party breaches the contract and causes losses to the other party, if the agreed penalty for breach of contract is less than the loss caused by the breach, the "filling up rule" in the civil law will be used, that is, the state before the loss will be restored to the maximum extent, and the damaged party will not be able to benefit from it. At this time Liquidated damages are a monetary payment with a compensatory nature. However, if the agreed liquidated damages are greater than the losses caused by the breach, it goes beyond the "fill-in principle". In addition to compensating for losses, the damaged party can also obtain additional monetary benefits; the additional monetary benefits imply the price paid by the breaching party, which is punishable. Therefore, to judge the nature of liquidated damages in the Civil Code, the "actual damage amount" should be used as the defining criterion.

In the Railway Law, as a carrier, a railway transport enterprise who delivers goods overdue shall bear the liability for breach of contract and pay liquidated damages to the shipper. As far as the shipper is concerned, the entrusted items are not damaged or lost, only delayed arrival, and no functional damage is caused. Otherwise, the carrier shall bear the tort liability and shall compensate the shipper in accordance with the relevant provisions of the tort liability section of the Civil Code. Since the shipper has no actual loss, the so-called "fill-in principle" does not apply. The liquidated damages obtained by the shipper, that is, the price paid for the carrier's work mistakes, are additional monetary benefits, aimed at punishing the work mistakes of the dominant railway transport party. Therefore, the nature of liquidated damages in railway law is punitive liquidated damages.

Article 22 of the Labor Contract Law refers to the nature of compensation. Legislators recognize that breaches by workers during the service period will bring actual losses to the employer. In the law, "If a laborer violates the agreement on the service period, he shall pay liquidated damages to the employer according to the agreement. The amount of liquidated damages shall not exceed the training fees provided by the employer." It is clear that the employer cannot obtain additional monetary benefits due to the employee's breach of contract. The purpose of this item is to prevent laborers from arbitrarily exercising their right to resign, causing losses and confusion to the employer, and ensuring the stable operation of the enterprise. Therefore, the liquidated damages for the service period stipulated in Article 22 of the Labor Contract Law is obviously consistent with the compensatory liquidated damages in the Civil Code.

5. Conclusion

Clarifying the nature of liquidated damages during the service period is of great practical significance. The legislative purpose and value pursuit of the Labor Contract Law are the same as those of the Civil Code. Moreover, in terms of legal provisions, the term of liquidated damages during the service period is consistent with the compensatory liquidated damages of the Civil Code. Therefore, the author believes that the nature of liquidated damages during the service period is compensatory liquidated damages.

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