South Korea

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CARE WORK WITHOUT CARE? KOREAN CONSTITUTIONAL COURTS' DUALISTIC APPROACH TO THE EMPLOYMENT RIGHTS OF A CARE WORKER AND ITS LIMITATIONS

In October 2022, the Constitutional Court of Korea rendered a very interesting and possibly landmark decision for the next few years on the employment rights of a care worker[1]. The central issue of the case was whether the non-existence of a retirement payment for a care worker, where the same is paid to a similarly situated ordinary wage worker, violated the equality provision of the Korean Constitution (Art. 11).

I - FACTS AND LEGAL BACKGROUND

The facts of the case are simple and straightforward. Ms. Chae, a care worker who has been employed in a private home, rendered care services to the family for four consecutive years. She sued her employer in Seoul Central District Court after her employment was terminated, claiming that she was entitled to a retirement payment under the Korean Act on the Guarantee of Employees' Retirement Benefits (« GERB Act »), a law that guarantees a certain amount of retirement pay upon termination of employment.

The district court dismissed the case on the ground that the employer has no duty to pay retirement payments, as Art. 3 of the GERB Act exempts care workers from the application of the law[2]. Ms. Chae brought the case to the Korean Constitutional Court, arguing that the exemption of care workers from the protection of the GERB Act is a violation of the Korean Constitution, which guarantees equality of all citizens before the law (Art. 11. Sec. 1. of the Constitution)[3] and anti-discrimination principles

1 The Constitutional Court of Korea, 2019 Heon-ba 454, decided on October 27, 2022.

2 Act on the Guarantee of Employees' Retirement Benefits (Art. 3): This Act shall apply to all businesses or workplaces (hereinafter referred to as « businesses ») employing employees: provided that this shall not apply to businesses employing only relatives cohabiting with their employer, nor to private households with employed persons.

3 Korean Constitution (Art. 11. Sec. 1): All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social, or cultural life on account of sex, religion, or social status.

to the working conditions of women (Art. 32. Sec. 4. of the Constitution)[4]. In short, the claimant challenged the constitutionality of Art. 3 of the GERB Act, arguing that the provision in question discriminates against care workers without justification when compared to ordinary wage workers.

Before going into detail about the Constitutional Court's answer to this question, to fully understand the case, it is necessary to know the overarching Korean labour law scheme on the legal status and rights of care workers.

First of all, Korean Labor Standard Act (« LSA »), which was enacted in 1953 and is the most fundamental keystone legislation on employment rights, exempts care workers from the application of the act[5]. Art. 11 of the LSA stipulates that the act does not apply to domestic workers[6]. This means that while ordinary wage workers are entitled to basic employment rights under the LSA, such as the minimum wage, regulation on working hours, proper rest and holidays, protection from unfair dismissal and workplace harassment, etc., care workers are virtually out of the scope of those protections.

Secondly, the GERB Act, a law designed to provide a retirement benefit scheme to workers upon termination of employment, similarly exempts care workers from its protection just like the LSA. Art. 3 of the GERB Act (the article in question in this case) stipulates that the Act applies to all businesses and workplaces in Korea that employs a worker, except for private households that employ a care worker.

Thirdly, there has been a quite recent legislative effort in Korea that offers at least a partial employment rights to care workers – i.e. Act on the Employment Improvement of Domestic Workers (« EIDW Act »). The EIDW Act, passed in 2021 after much debate in the civil society, aims to improve the working conditions of care workers by providing them with a standard employment contract, regulating their working hours, providing rest, holidays, and retirement payments, and so on. However, it should be emphasized that the definition of care worker under the EIDW Act is an extremely limited one. Art. 2. Sec. 4 of the EIDW Act defines « domestic worker » as « a person who enters into a labor contract with an employer

4 Korean Constitution (Art. 32. Sec. 4): Special protection shall be accorded to working women, and they shall not be subject to unjust discrimination in terms of employment, wages, and working conditions.

5 In Korea, while core employment rights such as wages and working hours, protection against unfair dismissal are governed by the LSA (Labour Standard Act), labor rights are protected by a separate act which is the TULRAA (Trade Union and Labor Relations Adjustment Act).

6 Art. 11. Sec. 1. This Act shall apply to all businesses or workplaces in which not less than five employees are regularly employed: provided that this Act shall neither apply to any business or workplace in which only the employer's blood relatives living together are engaged, nor to servants hired for the employer's domestic works.

of a domestic service provider and provides domestic services to users »[7]. Here, « employer of a domestic service provider » is not a private household employer. The domestic service provider under the EIDW Act refers to an institutional care provider certified by government[8].

Ms. Chae, the claimant in this constitutional court case, while she certainly was a care worker, was not a « domestic worker » as defined under new EIDW Act since she was employed by a private household. Also, the period she rendered care services to her employer was from 2014 up until 2018, which was prior to the enactment of the EIDW Act.

II - THE DECISION OF THE CONSTITUTIONAL COURT

As mentioned above, the claimant specifically argued that the non-existence of a retirement payment scheme for a privately employed care worker, where the same exists for ordinary wage workers under the Labour Standard Act and other publicly employed domestic workers who are covered by the EIDW Act, is unconstitutional on the ground that it violates anti-discrimination principles and protection for women's work guaranteed by Korean Constitution. In answering this question, the nine constitutional court justices were split by 7-2; seven majority justices ruled that the case at hand is a reasonable discrimination, while two justices strongly disagreed.

A - Majority opinion

One cannot really find much legal reasoning in the majority opinion. The short, three-page long majority opinion was mostly concerned with governmental administrative cost-efficiency perspectives. The majority started by admitting that « in principle, care workers are like other workers because they provide service for remuneration »[9]. « However, care workers are clearly distinguished from other workers due to the uniqueness of care; unlike ordinary labor, care work is inherently

7 The language of Art. 2. Sec. 4 of the EIDW Act uses the term « domestic worker » instead of « care worker ». In this article, I use the term « care worker » in a broad sense, which includes both privately employed persons (just like the claimant in this constitutional court case) and care workers employed by a publicly registered care service institution. In contrast, « domestic worker » defined under the EIDW Act only refers to care workers employed by publicly registered care service institutions. Therefore, the latter is a narrower concept.

8 To be officially recognized as a « domestic service provider » under the EIDW Act, the institution must meet certain legal requirements of the law. Only then the institution may hire a « domestic worker » and offer legal rights provided to the domestic workers under the EIDW Act.

9 This basic premise of the majority opinion is based on Art. 2 of the Labour Standard Act which defines an employee as « a person, regardless of the kind of occupation, who offers labor to business or a workplace for the purpose of earning wages ». While different labour legislations use separate definitions of an employee (or worker) according to the purposes of each law, the definition of an employee under the LSA is the most well-known and a foundational one in Korean labour law doctrine.

private and is deeply related to the privacy concern of the care service recipient family », the majority continued.

Meanwhile, the GERB Act, which mandates employers to give retirement payments to their employees, is « a public one, which could be enforced only upon labour inspection; it is beyond the scope of governmental power to inspect private homes in regard to their treatment of care workers ». The majority ruled that the GERB Act cannot be enforced to private care workers and their employers. The majority also emphasized that, if retirement payments are to be given to private care workers, it will cause «huge administrative costs for the government to enforce and an economic burden on the private household employers who use care workers at their homes.» In conclusion, the majority decided that the absence of a retirement payment scheme for a private care worker like Ms. Chae did not violate the equality principle of the Korean Constitution.

B - Dissenting opinion

On the other hand, two dissenting justices, Justice Seoktae Lee and Justice Kiyoung Kim, pro-labour judges in the current Constitutional Court, rendered a logical and lengthy dissent that focused more on the socio-legal realities of care workers in Korea.

First, they began by quoting the ILO Domestic Workers Convention (C189), which says that « domestic work continues to be undervalued and invisible and is mainly carried out by women and girls (…) who are particularly vulnerable to discrimination in respect of conditions of employment and of work ». Using this sentence from the Convention's preamble, the dissent pointed out that the true reason for not applying labor laws to caregivers is gender stereotyped and discriminatory legal regimes, rather than privacy concerns or administrative costs, as stated by the majority opinion.

The exemption of care work from the application of the law might appear neutral on the surface as the plain language of the law does not specifically mention gender. However, when we re-read Art. 3 of the GERB Act in light of the disturbing truth that our laws are still gender-stereotyped, and considering the fact that a vast majority of care workers in Korea are women, the exemption of care workers from the protection of the law in fact results in gender discrimination. This, in turn, is a violation of the equality principle and the anti-discrimination principle against women's work guaranteed under Art. 11 and Art. 32. Sec. 4 of the Korean Constitution.

Secondly, what does « privacy concern of the family » have to do with retirement payments anyway? The dissenting justices have criticized the majority on the rationale that the legal nature of a retirement payment in Korea is basically a wage. In Korea, retirement payment is a legal obligation mandated by the LSA and GERB Act, not an optional or contractual arrangement. Under Korean case laws, it is a well-established principle that a retirement payment is treated like a deferred wage[10]

10 For example, see Korean Constitutional Court decision, 96 Heon-ba 27, decided on June 25, 1998.

- which means that the employee has an absolute claim to her retirement payment upon termination of employment. Bringing attention to this point, the dissenting justices reasoned that since the claim for retirement payment in Korea arises upon termination of employment, a care worker would ask for the retirement payment «after» her work at the household is over. Therefore, contrary to the majority opinion's belief, there is no serious privacy concern in giving retirement payment to a care worker. The dissenting opinion on this point is quite more realistic, reasonable, and persuasive than the majority opinion.

Lastly, the dissenting opinion pointed out that care workers are in dire need of receiving proper retirement payments when we look at their social realities. As is widely known, care workers usually work extremely long hours but receive low pay. They suffer harsh working conditions and are even subject to sexual harassment and other gross forms of human rights violations. The employment arrangement of care workers is almost always precarious when compared to white-collar jobs. On top of it all, the very fact that care workers are not standard employees makes them unable to join and contribute to regular social insurance schemes (e.g. national health insurance, unemployment insurance, and old-age pensions, etc.) In short, care workers are a vulnerable group of workers, even in the realm of social security law. Considering this, the dissenting opinion advocated the need to extend retirement payments for care workers to protect their social welfare.

To sum up, the dissenting opinion concluded that Art. 3 of the GERB Act constitutes unjustifiable discrimination against the rights of care workers. The dissent indicated that a correct reading of the anti-discrimination principle in Art. 32. Sec. 4 of the Constitution should be interpreted in a way that obligates the government to respect and promote *substantive*, not just formal, equality for all working women.

Conclusion

Although the recent enactment of the EIDW Act in Korea is a significant step forward, as previously stated, this law provides only limited labor protection to a specific group of care workers, as the law applies only to a narrow definition of « domestic workers » employed by government-registered care service institutions. The Constitutional Court decision discussed so far manifests the legal difficulty suffered by a privately employed care worker who falls outside the scope of the EIDW Act. So far, a private care worker has only a contractual claim in civil court when a legal problem arises. Unfortunately, the majority opinion of the Constitutional Court reaffirms the chronic problem of the situation of care workers; most care workers are basically left without the protection of labour law. Indeed, care workers are « working without care ».

While it might be true that care work has certain distinctive features when compared to ordinary work, - such as being personal, inter-relational, and emotional - the uniqueness of care work should not be used as an excuse to avoid legal protection for them. As mandated in the ILO Domestic Workers Convention and emphasized in the well-thought out dissenting opinion of the Korean Constitutional Court, the final aim of the labour laws relating to care workers must be focused on

achieving *substantive* equality for all care workers. To this end, one cannot stress enough the need for both legislative and judicial effort.