

Employer's Delay in Acceptance or Risk of Loss in Unlawful Dismissal Cases: A Comparative Study on Japan, and the Judicial Decisions of the Civil Code §487 in Taiwan

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Abstract

If an employee has not performed his or her promised work, he or she will not have a claim for remuneration, which is so-called the doctrine of no-work-no-pay. However, according to the Civil Code §487, if the employer delays accepting the performance, the employee may demand for his remuneration without being bound to perform the service subsequently. It is the exception of the doctrine of no-work-no-pay. On the other hand, according to the Civil Code § 267, where “performance of the service is impossible”, the existence of the employee’s right to demand for his remuneration depends on whether the impossibility is “attributable to the employer”. Thus, how to distinguish the employer’s delay to accept the performance tendered to him from the impossibility of the employee’s performance is an important issue because it will decide if the employee has the right to claim for remuneration.

Through an analysis of the Japan experiences and the reflection on the judicial decisions of the Civil Code §487 in unlawful dismissal cases in Taiwan, this research will focus on the controversial issues, such as when the employer delays accepting the performance and if the employee still has to tender the performance, and try to solve them by the doctrine of risk of loss.

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