

1. A severance payment.
2. A payment in lieu of advance notice.
3. A payment for any unused annual leave of the last year of service (the year of termination) in proportion to the working period in the last year of service. For instance, in the event that in the last year of service, a terminated employee has worked for 6 months out of 12 months prior to the termination, the terminated employee shall be entitled to 50% of a number of days of the annual leave. If the annual leave entitlement is 6 days for the entire year, this terminated employee must get paid for 3 days ($6 \times 50\% = 3$).
4. A payment for the unused annual leave of previous years carried forward to the last year of service.
5. A compensation payment for unfair dismissal if the court deems that the termination is in fact unfair.

In computing the severance payment and other payments, by law the court will apply an amount of a monthly wage (not just a monthly base salary) as a basis for the computation. Many people get a wrong impression that the monthly wage always means the base salary in every circumstance. Unfortunately, this is not always the case. If the Company happens to pay or offer other benefits and perks (aka welfare) to the terminated employee, the court may consider the monthly value of any of those benefits and a perks as part of the monthly wage for the computation of those severance and other payments.

Monthly Wage = Base Salary + Monthly Value of Other Recognized Benefits & Perks

What does this means for the terminated employee?

If you receive any benefits and perks on the top of your base salary, the Company may underpay you the severance payment and other payments by excluding the value of each of other benefits and perks in computation of the amount of the monthly wage. You need to verify the correct computation first before taking any action.

What does this mean for the Company?

If the Company happens to pay/offer any of other benefits and perks in addition to the base salary, the Company must handle the termination with caution, otherwise any terminated employee may come back to sue the Company for underpaying the severance payment and other payments in order to seek any unpaid portion of each item.

Case Study

At the time of termination, the terminated employee has been working for 10 years and 1 month. His base salary is Baht 100,000 and his position and living allowance is Baht 100,000 per month. He is entitled to the severance payment in the amount equal to 300 days' wage (or 10 months' wage). As you can see from the below calculations, we are talking about a lot of money. What is considered part of the wage applies not only the severance payment, but other entitlements too.

Period Service	Severance Payment Rate
At least 120 days but less than 1 year	30 days of wage
At least 1 year but less than 3 years	90 days of wage
At least 3 years but less than 6 years	180 days of wage
At least 6 years but less than 10 years	240 days of wage
At least 10 years but less than 20 years	300 days of wage
20 years or longer	400 days of wage

Allowance Being Deemed Part of the Wage	Allowance Being Deemed Not Part of the Wage
Wage = 100,000 + 100,000 = 200,000 Severance = 200,000 × 10 = 2,000,000	Severance = 100,000 × 10 = 1,000,000

Wage vs Welfare

Unfortunately, there is no clear guideline/precedent on how to construe any item of benefits and perks as the wage or the non-wage under the Labor Protection Act, B.E. 2541 (1998). There are some of the criteria laid down by the court.

1. If the item is paid constantly every day or every month without any condition and without any need to furnish any receipt whatsoever, it is more likely than not to be deemed the wage.
2. If the items is called the welfare being paid for a personal expense, a meal cost and costs of fast moving consumer products to encourage for the good performance as a reward and the employee has to furnish the Company with a receipt, the item is likely to be the non-wage.

Here're some examples.

	Wage	Non-Wage/Welfare
Meal		✓
Service charge for hotel employees		✓
Constantly and monthly paid living allowance	✓	
Hardship allowance for working in a faraway location	✓	
Sales commission at an agreed percentage of sales proceeds applicable from Baht 1 (first Baht) of the sales proceeds	✓	
Driving shift commission/allowance	✓	
House rental as welfare		✓
Tax and social security contribution paid on employee's behalf by the Company		✓
Position and living allowance	✓	

It is noted that the above table should not be treated as the finally definitive conclusion on the legal status of each item. It should be used a general overview on how the court construes (or used to construe) any item as the wage or the non-wage (welfare) because each circumstance is different and with the different circumstance and facts the court in a later case may uphold the above interpretation or lay down an alternative interpretation.

2. Unfair Dismissal

In addition to making (i) a severance payment, (ii) a payment in lieu of advance notice, (iii) a payment for any unused annual leave of the last year of service (the year of termination) and (iv) payment for the unused annual leave of previous years carried forward to the last year of service (the year of termination) to a terminated employee, the Company is still potentially liable for a payment of unfair dismissal compensation to the terminated employee if the court eventually rules that the termination is unfair.

What is considered an unfair dismissal?

Likewise, there is no clear guideline on what is considered a fair dismissal or an unfair dismissal. The court has a high degree of discretion in interpreting the facts & law and concluding whether the termination in question is in fact the fair dismissal or the unfair dismissal.

In the event that the court concludes that any termination is unfair, Section 49 of the Act Establishing the Labor Court and Labor Procedure Act, B.E. 2522 (1979) (the “Labor Court Act”) allows the court to either (i) order the Company to rehire the terminated employee; or (ii) pay the terminated employee the unfair dismissal compensation if the court deems that the terminated employee and the Company can no longer work together.

How much is the unfair dismissal compensation awarded?

Unlike rates of a severance payment, Section 49 of the Labor Court Act does not offer any fixed rate of unfair dismissal compensation. But Section 49 only broadly lays down four

1. An age of the terminated employee.
2. Terminated employee’s period of service.
3. Troubles suffered by the employee upon being terminated with the Company.
4. A cause of termination.
5. A severance payment that the terminated employee is entitled to receive.

If the court concludes that any termination is unfair, the court may award the terminated employee the monetary damages as the court deems appropriate.

Essentially, if the Company does not handle the termination right, any terminated employee could still come back to file a complaint/lawsuit to the court to seek the monetary compensation for unfair dismissal. From Company’s perspective, it is no longer safe to let the terminated employee walk away without some form of understanding (ideally in writing) with the Company and at this point seeking a representation from an attorney might be useful and beneficial to the Company’s own interest. It is noteworthy that the terminated employee does not need to pay any 2% court/filing fee to go to labor court. While properly engaging an attorney to represent the terminated employee in filing a complaint/lawsuit against the Company to labor court is definitely useful and highly recommended for the terminated employee to do, doing so is not a must for labor court.

What is the fair dismissal? What is the unfair dismissal?

There is no clear definition of the unfair dismissal defined by the Labor Court Act.

Effectively in absence of any apparent fraudulent action taken by a terminated employee (i.e. stealing Company's asset, misappropriation of Company's assets or other crimes), it is in terminated employee's interest to take a chance and sue the Company to seek the unfair dismissal compensation.

The summary of recent Supreme Court judgment on unfair dismissal (or fair dismissal) is provided in the below table.

Termination Case	Fair Dismissal	Unfair Dismissal
1. An employee becomes bankrupt person (being adjudicated by the court to be under the absolute receivership) in contrary to life insurer's internal regulations because a bankruptcy decreases credibility of the employee as a sales person.	✓	
2. Allegedly elimination of division the employee works without any necessity or without any effort to locate a new position for the terminated employee.		✓
3. Failure to comply with employer's order to take up a newly assigned position, which is a lower ranking position, (from an accounting division manager to a finance staff member) without any supervisory power over other employees, and a position allowance being taken away.		✓
4. Corporate restructure (necessitated by an economic recession and lower amount of work in property development projects), a downside of employee's division and an elimination of employee's position, but the Company still reports the net profit. This means the real rationale for dismissal is only to reduce the expenses or the costs of the Company. There is no apparent method to reduce expenses or there is no method to select employees to be terminated.		✓
5. Strategic restructure of Company's business support division to be consistent with a three year business strategy allegedly for business competition without the Company's incurring any loss to the extent that the termination is inevitable.		✓
6. Three commercial bank employees' providing one's password to each other in order to record the time-in and the time out for working for another bank employee.	✓	
7. Employee's forwarding Company's confidential information to employee's personal email address, which is easy for the employee to re-forward the email or take out the information without Company's knowledge.	✓	
8. Grocery store chain's high performing executive whose division at a has generated the constant growth in sales at a growth rate much higher than that of other divisions becomes ill-tempered, and angry to the extent that 2 of 4 employees in her division have resigned without any deliberate intent on the part of the grocery store chain to harass this angry but top performing executive.	✓	

Termination of Employment in the Present Economic Recession/Downturn

At present if any employee gets terminated due to Company's poor performance (or loss making), it might be easy for the Company to argue that such termination of employment is justified and fair in light of the economic downturn arising from the pandemic. However, at the end of the financial year if the Company happens to post the lower amount of net profit or the slim net profit, not the net loss, it is possible for an terminated employee to come back and file a complaint/lawsuit against the Company to seek the monetary compensation for allegedly unfair dismissal. A precedent going back to the 1997 Asian financial crisis indicates that if the Company really poses the net loss at the year end, definitely the termination is highly likely to deem fair. Without actually posting the net loss, the Company still faces a potential claim for unfair dismissal compensation.

3. Change to any of the Conditions of Employment

Normally, if the Company intends to do any restructure by reassigning any employee to a lower ranked position or a position with a lower pay, such action is considered a change to the conditions of employment. The Company may not implement any change to the conditions of employment unless the affected employee gives a consent.

This legal article was written by Narit Direkwattanachai, a corporate, tax & trial attorney at NARIT & Associates with expertise in corporate & commercial, commercial dispute and tax law. He holds a bachelor of laws (1st class honors) from Chulalongkorn University, a master of law from the University of Cambridge, UK and an MBA in finance from the Georgia Institute of Technology, USA. He can be reached at narit@naritlaw.com

Visit: www.naritlaw.com

Disclaimer: The materials on this document have been prepared to informational purposes only and are not intended to be legal advice. The reader should not act in any way on the basis of the information without seeking where necessary appropriate professional advice concerning their own individual circumstances. NARIT & Associates assumes no responsibility for, and disclaims all liabilities (including responsibility for any action or inaction taken) to the fullest extent permitted by law.