Dismissals in Japan
Part One: How Strict Is Japanese Law on Employers?

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Introduction

In its 2004 Employment Outlook, the Organisation for Economic Co-operation and Development (OECD) estimated that the legal protection of permanent workers against individual dismissal in Japan is one of the most strictly regulated among nations. However, in its 2013 Employment Outlook, the OECD reassessed the laws regarding dismissals among its member nations and reclassified Japan in the top third of OECD countries in which regulation is less stringent.[1] On the other hand, a prestigious newspaper commented recently that "in Japan, employment laws make it almost impossible to fire regular workers."[2] This stereotypical view still exists among international observers. In this paper, the authors provide more precise information on the law and practice of dismissals in Japan. This Part One gives an overview of the law regulating dismissals. In Part Two to follow later, the authors will outline the practice of dismissals in Japan.

1. Substantive Law: Overview

In Japan, the Civil Code (CC) has, since before World War II, provided that either party can terminate a contract of employment at any time by giving two weeks' advance notice. The CC thus guarantees the "freedom of dismissal" to the employer.[3]

This general principle has been modified in part by the labor law reforms since World War II.

The Labor Contract Act (LCA) restricts the freedom of dismissal by enjoining abusive dismissal. The Labor Standards Act (LSA) and several other Acts restrain certain types of dismissal, and the LSA strengthens the notice of a dismissal to thirty days' advance notice with criminal sanctions.[4]

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[1] OECD, Employment Outlook 2013.

[2] Editorial, "Abe's Missing Arrow," *Financial Times*, October 7, 2013.

[3] The Civil Code provides that "If employment is not for a definite period, either party may request to terminate the contract at any time, in which event the contract will be terminated in two weeks after the request is made." (§627CC)

[4] "Dismissal" in this article signifies the employer's expressed intention to terminate an employment contract with an indefinite period. It is distinguished from the employer's refusal to renew a

2. The Concept of "Abusive Dismissals"

2.1 History

The Civil Code (CC), which still provides the freedom to terminate employment, was established in 1896, and for many years thereafter, Japan had no legislation regulating abusive or unfair dismissal. During the post-World War II Reform, the Labor Union Act of 1945 and 1949 came to prohibit the dismissal of union members as an unfair labor practice. Yet, the Labor Standards Act (LSA) of 1947 maintained the CC's freedom of dismissal and merely strengthened the requirement to give notice of dismissal. In the 1950s, nevertheless, lower courts came to nullify abusive dismissals using a general principle in the CC which restricts the abuse of rights. Such decisions continued to accumulate in lower courts which even ruled that "a dismissal without appropriate reasons is invalid." Between 1975 and 1977, the Supreme Court, in two cases, endorsed the interpretation of lower courts that a dismissal should be considered null and void as an abuse of right without objective and appropriate reasons.

In 2003, the LSA was revised to integrate the case law rule of abusive dismissals established by the Supreme Court. The case law rule was then moved from the LSA to the Labor Contract Act when the latter Law was enacted in 2007.

2.2 The LCA Provision regarding Abusive Dismissals

The Labor Contract Act provides that "a dismissal shall, if it lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as an abuse of right and be invalid" (§16).

This provision applies to all kinds of dismissal—dismissals due to an employee's misconduct, an employee's incapability and job redundancy. It applies not only to individual dismissals but also to collective dismissals.

3. Prohibited Dismissals

Apart from the abusive-dismissal provision in the Labor Contract Act, Japanese labor-law statutes prohibit the employer from discharging employees discriminatorily on the grounds of sex, nationality, creed, etc. These statutes also prohibit dismissals during family leave related to childbirth, maternity or family care.[5]

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fixed-term employment upon its expiration, or the employee's voluntary or agreed resignation from employment.

[5] In detail, Japanese Acts prohibit the employer from dismissing his/her employees:

(a) during a period of incapability for work caused by a work-related accident (§19LSA).
(b) during a period of statutory childbirth leave (§19LSA).
(c) on the grounds of nationality, creed or social status (§3LSA).
(d) on the grounds of sex, marriage, pregnancy (Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment).

4. Notice of Dismissals

The Labor Standards Act (LSA) provides that the employer must give at least thirty days' advance notice before dismissal (§20). Notice is required regardless of length of service (there are exceptions, such as temporary workers for a term of less than two months). The LSA also provides that the employer must deliver to the retiring employee a certificate stating the reasons for retirement upon his/her request (§22). This provision also applies to dismissals.

5. Criteria of Abusive Dismissals

5.1 Introduction

For understanding the criteria of abusive dismissals in Japan, one should first know that firms in Japan usually specifically list the reasons for dismissal in their employment regulations. The employee regulations (literally, "work rules") are drawn up by the employer and stipulate the rules and working conditions of the establishment. The Labor Contract Act endorsed its case-law binding effect on labor relations on condition that the regulations provide reasonable rules or working conditions and are promulgated to the employees of the establishment. The Labor Standards Act requires the employer to seek the opinion of the union organizing a majority of employees or, if there is no such union, a representative of a majority of employees of the establishment. If there is a union organizing such employees, the employer usually negotiates with the union when making or changing the employee regulations to obtain the union's agreement.

The major reasons for dismissal listed in the employee regulations can be roughly classified into three types: employee's misconduct, employee's incapability and the firm's economic necessity. When judging whether a dismissal is to be nullified as abusive, the court starts with the question of whether the alleged misconduct, incapability or economic necessity falls under the reasons for dismissal set forth in the employee regulations. The court first assesses the reasonableness of the statutory reason, and then examines its applicability to the dismissal.

(e) on the grounds of discrimination against a part-time worker (Act on Improvement, Etc. of Employment Management for Part-Time Workers).
(f) on the grounds of labor union membership or participation in labor union activities (Labor Union Act).
(g) by reason of applying for statutory maternity/paternity leave, sick/injured child care leave or nursing care leave (Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave).
(h) by reason of reporting the facts regarding violation of Acts related to labor standards to a labor standards inspector (§104 LSA, etc.)
(i) by reason of whistle-blowing protected by the Whistle Blowing Protection Act.

5.2 Dismissal by Reason of Employee's Misconduct

Employee's misconduct spelled out in the employee regulations includes negligence of duties, defiance or disobedience of job-related orders or instructions, obstruction or disturbance of the work, violation of workplace discipline, infringement of the interest or reputation of the employer in the employee's private life and falsification of the employee's past record. In the case of an employee's misconduct, the court usually takes into consideration the following factors in making a decision on whether the dismissal is abusive:

(a) Components of facts regarding the misconduct such as its manner, gravity, motives, circumstances, damages or disorder caused, etc.

(b) Propriety of the dismissal as a means of sanction, i.e., whether the dismissal is too harsh considering the overall nature, type and degree of the misconduct as well as the employee's record. For example, the employee regulations usually institute disciplinary sanctions less rigorous than dismissal, such as suspension of employment for a certain period, demotion, monetary punishment and reprimand, and the court may evaluate the dismissal as too severe if it finds that past similar misconducts had been disposed of by milder means.

(c) Due process, such as whether the employee was given an opportunity to give an explanation in his/her defense, and whether he/she had received a proper warning upon committing a similar but less serious misconduct in the past.

5.3 Dismissal by Reason of Employee's Incapability

There are three main types of employee's incapability:

(a) Loss of occupational capacity as a result of injury or illness: In this type, the court usually considers its nature and extent to see whether the employee became unable to fulfill the requirements of the occupation permanently. If the employee is likely to recover his/her capacity in due course through medical treatment, the court will require the employer to give the employee a chance to do so. As a matter of practice, the employer tends to grant sick-leave up to a certain (lengthy) period specified in the employee regulations. The employer will dismiss the employee only when he/she does not recover the capacity to return to work within the leave period.

(b) A certain period (usually specified in the employee regulations of the firm) of absence not informed by the employee (typically, disappearance, confinement due to criminal charges, etc.). The court will endorse the validity of dismissal if it finds that the employer waited long enough to terminate employment.

(c) Insufficient job performance: In this type of dismissal, the court will examine the nature and degree of insufficient performance to see if the employer has no other recourse than dismissing the employee. The court will consider whether the employer offered any assistance to the employee including education and training to improve their performance, or whether the employer is not making an effort to match the employee to a job more fitting to the employee's qualifications. The court also tends to

require the employer to give a warning of termination. The court considers these various aspects in the case of ordinary employees in long-term employment. On the other hand, the court is more likely to approve the validity of dismissals of well-paid professional or managerial employees who were recruited mid-career but who failed to exhibit the expected high level of special capability.

5.4 Dismissals by Reason of Firm's Economic Necessity (Collective Redundancy)

The Labor Contract Act (LCA) does not include any substantive or procedural regulation about collective dismissals to cope with redundancy, and it is left to the courts to decide whether such collective dismissal constitutes abusive dismissal under §16LCA. The employee regulations are also inclined to give an abstract expression such as "compelling economic reasons of the firm." Since the latter half of the 1970s, the court has been formulating four factors to be considered for deciding the abusiveness of economic dismissals:

(a) Economic necessity of reducing the workforce
(b) Efforts made to avoid dismissal in attaining the reduction
(c) The method of selecting the employees to be dismissed, i.e., whether the selection is done fairly on the basis of objective criteria
(d) The extent and manner of labor management consultation in executing the collective dismissal

The courts have already judged many cases, which have been analyzed and classified by jurists[6] and presented to those who are in charge of HRM.

Japanese labor legislation does not impose on the employer the requirement to create a social plan to reduce the hardship of collective dismissal. However, the Labor Union Act requires the employer to bargain collectively with the labor union organizing his/her employees. Therefore, the employer is required to bargain with the union about a workforce reduction or collective dismissal involving its members. In fact, when an employer intends to reduce the workforce, the management will usually engage in extensive negotiations with the union to work out the size, timing and method of the reduction, and the social plan is usually agreed on particularly when it includes soliciting voluntary retirement.

Also, as explained in (d) above, the courts consider the extent and manner of labor management consultation as one of the major factors in deciding whether an economic dismissal constitutes an abuse of dismissal right. The employer is pressed to explain and consult with the union or representatives of the relevant employee group in carrying out a restructuring involving economic dismissals. The employer also tends to present some kind of social plan to minimize the reaction of employees against the restructuring.[7]

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[6] See for example, Kaoko Okuda, "Seiri Kaiko no Zian Ruikei to Handan Kijun [Types of collective redundancy and criteria for judgment]," *Journal of Labour Law* 98 (2001): 47–63.

[7] In this context, there is one administrative regulation in regard to collective dismissals due to redundancy. When a firm intends to terminate more than thirty employees, the employer is required to submit a re-employment assistance plan to the Public Employment Security Office. This plan requires

6. Severance Pay

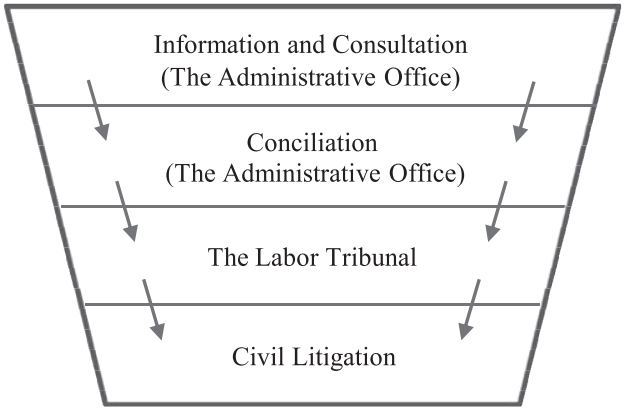
Severance pay is not required by any Acts in Japan. There is a subsidy program instituted by the Employment Insurance System to help small companies with establishing severance pay systems.

On the other hand, it is a long-standing and widely-established practice that firms offer considerable retirement benefits to retiring employees, in the form of lump-sum payments and/or pensions, and this benefit is offered even in the case of discharges; except in the case of disciplinary ones for serious misconduct. Such benefits function, in effect, as severance payment for discharge. In the case of soliciting voluntary retirement for workforce reduction, firms usually offer a considerable severance payment in addition to the retirement benefit. If a union exists in the firm, the amount of such payment will be one of the major points of negotiations.

7. Administrative and Judicial Procedures to Resolve Dismissal Disputes

7.1 Overview

There are several administrative and judicial procedures for dismissed employees who wish to raise their grievance. These procedures are structured as a four-layered system: the first and second layers are the consulting and conciliation services offered by the Labor Administration and the third and fourth layers are the labor-tribunal and the civil-procedure systems administered by the judiciary. Those four layered services and procedures are elective for grievants; namely, the parties of the disputes are free to choose (or skip) any of the services or procedures in any order. However, as a matter of practice, the parties tend to start with the first layer, and proceed to the second, then to the third, and finally to the fourth layer, if the dispute is not resolved at the first or intermediate layers.



the employer to consult with the labor union organized in the firm.

7.2 Administrative Remedies

(a) The Information and Consultation Services

The first layer is the information and consultation services offered by Regional Offices of the National Labor Administration.[8] When requested, such Regional Offices provide such services to both employers and employees regarding all kinds of questions arising from employment relations. Thus, if an employee feels that his/her dismissal was unfair, he/she may bring the grievance to those offices to clarify and assess his/her legal position. The parties using such services are frequently satisfied or relieved merely by understanding the merits or demerits of their case through counseling in the Office. However, if the party using the service wishes to pursue his/her legal claim, the Office may request the employer to appear in the Office to discuss how to resolve the dispute. This advisory service is done informally and expeditiously (usually within one month from the date of consultation).

(b) The Conciliation Service

The second layer is the conciliation service performed by a panel[9] set up in the Regional Offices mentioned above. The panel is usually composed of practicing lawyers and law professors serving on a part-time basis. If requested by either party of a dispute concerning employment relations, a member of the panel, with the assistance of the staff of the Office, ascertains the facts of the case and the allegations of both parties, and proposes a settlement. The service is offered without charge, and is accomplished expeditiously, in most cases, within one session of a few hours (within two months of the request for conciliation). The success rate of such conciliation services is about 40 percent.[10] Dismissal disputes are one of the most major types of disputes handled in this expeditious conciliation service. When successfully conciliated, they are mostly resolved with a modest monetary payment.[11]

7.3 Judicial Procedures

(a) The Labor Tribunal System

The third layer is the Labor Tribunal System instituted in the judiciary. According to the Labor Tribunal Act of 2004, either party in an employment relationship can bring a dispute of rights arising from employment relations under this procedure in the district court. A tribunal composed of one career judge and two part-time experts in labor relations examine

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[8] More exactly, the Prefectural Labour Bureaus and the Labour Standards Inspection Offices of the Ministry of Welfare and Labour.

[9] The Dispute Adjustment Committee.

[10] About 70% of the cases in which the other party appears.

[11] The amount of payment is rather inexpensive; a JILPT research found that in 65.7% of the employment termination disputes successfully conciliated, payments fell in the range of ¥50,000–400,000 (The Japan Institute for Labour Policy and Training [JILPT], *Kobetsu Rodo Kankei Funso Shori Jian no Naiyo Bunseki* [Content analysis on the treatment of individual labor-related disputes], JILPT Research Report no.123 [Tokyo: JILPT, 2010]).

the written claims and responses and holding informal hearings to clarify the facts and the issues. The tribunal then makes mediation efforts, and, if such efforts fail, renders a decision specifying measures to resolve the case. The decision is not binding, and if either party objects, the case is automatically transferred to the formal civil procedure. The Law requires the tribunal to dispose of the case within three sessions, and is premised upon the cases lasting a few months. The parties usually hire lawyers to go through such procedures.

As a matter of practice, about 80% of the disputes brought in the labor tribunal procedure are resolved successfully; about 70% through the panels' mediation proposals and 10% through advisory decisions. Of the remaining about 20% of the disputes, 10% are withdrawn and only 10% (about a half of the advisory decisions) are transferred to the formal civil procedure explained below.

Here also, dismissal disputes are the most common type of disputes handled. They are resolved in most cases by monetary agreements (mediation) or awards (decisions). Generally speaking, the amount is much higher than that attained in the administrative conciliation services,[12] but less than that in the formal procedure.

(b) The Civil Procedure

The fourth layer is the civil procedure. An employee may file a suit to confirm or restore his/her right with the civil court. This is a formal adversarial procedure, in which the parties are mostly represented by their own lawyers. The court clarifies issues by grasping allegations expressed by their briefs, and examines exhibits and listens to the testimony of witnesses through formal hearings. After this process, the court usually tries to settle the dispute, and, if it fails, renders a judgment. On average, it takes about a year for the court to dispose of the case either by a settlement or a judgment.

In judging a dismissal dispute, if the court finds that the dismissal was abusive and, accordingly, invalid, the court will confirm the continuation of employment relations and will order the employer to compensate the employee for the loss of earnings. The amount of compensation is usually the sum of the salary that the employee would have been paid between the date of the dismissal and the date of the court judgment. Even when the dismissal is found invalid, in effect the employer is obliged to continue to pay the salary that the employee had been earning until the dismissal, and the employee has no right to actual reinstatement.[13]

[12] One survey found that the average amount is around ¥1,000,000 or 3–4 months' salary. Kazuo Sugeno and others, ed., *Rodo Shinpan Seido no Riyosha Chosa* [Labor tribunal system: Users' survey] (Tokyo: Yuhikaku, 2013), 102.

[13] There is no statute of limitation for claims of abusive dismissal.

Table 1. Statistics on the Settlement of Dismissal Disputes (Fiscal 2012)

Administrative Office	
Consultation (Grievances brought in)	51,515
Conciliation (claimed)	1,904
Labor Tribunal*	
Cases Filed	1,735
Mediation (successfully completed)	1,282
Decisions (rendered)	298
Civil Litigation*	
Filed	1,026
Concluded	963
Concluded (963)*	
Settlement	482
Judgment	343
Found abusive	166
Found not abusive	177

Sources: From the statistics of the Ministry of Welfare and Labour and the Supreme Court.

Note: *These figures include all kinds of disputes involving all kinds of employment termination (not only dismissals, but also alleged resignation, refusal of renewing fixed-term employment upon its expiration, compulsory retirement, etc.) and requesting confirmation of employee status. Nevertheless, the predominant type is dispute involving dismissal.

7.4 Statistics

Table 1 shows the number of dismissal disputes brought in or handled by the services or procedures described above. First, the table shows that more than 50,000 dismissal cases are handled in fiscal 2012 by the information and consultation services. In other words, such services play a major role in resolving dispute dismissals. Next, approximately 5,000 disputes involving dismissals are brought either by conciliation, labor tribunal or civil procedures every year, and a great majority of such disputes are resolved informally and expeditiously through the administrative conciliation services or the judicial labor-tribunal system, mostly in the form of monetary payment. Relatively few dismissal disputes were filed with the formal civil procedure: less than 1,000 cases in fiscal 2012. In addition, a majority of such civil litigations are settled, mostly monetarily, and judgments are rendered in only a third of them. Furthermore, employees won in just under half of such judgments.

Conclusion

This article on Japanese labor law regarding dismissals clearly shows that the claim "in Japan, employment laws make it almost impossible to fire regular workers" is a gross exaggeration of the regulatory aspect of Japanese dismissal law.

In terms of the procedural or remedial aspect of Japanese dismissal law, more than 50,000 disputes involving dismissals are brought before the administrative information and consultation services and approximately 5,000 dismissal disputes are filed with the administrative conciliation service, the labor-tribunal and civil procedures in the judiciary in one year. Most of them are disposed of informally and expeditiously with relatively inexpensive monetary arrangements; only a small number of dismissal disputes attain judgments confirming continuation of employment relations. On the whole, the dispute resolution systems are not so onerous that employers are reluctant to resort to dismissals. For employees, on the other hand, the systems provide a good range of recourses that they can select in accordance with their needs.

Also, the substantive rules of dismissals are not so strict as to make employers abandon the idea of dismissing employees who have committed serious misconduct, who exhibit exceptionally poor job performance or when the firm runs into serious economic difficulties. Basically, Japanese dismissal law is premised upon the employer's freedom of dismissal, and protects the interest of employees by restraining its abusive exercise. The abusive dismissal doctrine established by case law and incorporated into the Labor Contract Act is a legal framework that balances the interest of employers and employees in regard to dismissals.

In conclusion, Japanese dismissal law is neither too strict nor too loose for the employer. It is by nature protective for workers, but it does not impose excessive rigidity on the employer for establishing discipline and efficiency in the workplace or carrying out necessary adjustments of the workforce.