# JAPAN LABOR BULLETIN

ISSUED BY THE JAPAN INSTITUTE OF LABOUR

*Vol.41 No.01* *January 2002*

CONTENTS

## General Survey

### Fewer Children and More Elderly: 2000 Population Census

The Ministry of Public Management, Home Affairs, Posts and Telecommunications has released the final figures for the total population and number of households obtained from the population census carried out in 2000. As of October 1, 2000, Japan's population totalled 126,925,843, an increase of 1,355,597 over the previous survey conducted in 1995. The growth rate stood at 1.1 percent, a record low excluding the period immediately after World War II.

Japan's population accounts for 2.1 percent of the world population of some six billion, placing ninth after China, India, the United States, Indonesia, Brazil, Russia, Pakistan and Bangladesh. The population density was 340 people per square kilometer, fourth in the world after Bangladesh, the Republic of Korea and Holland.

By age, the number of people under 15 years old came to some 18.47 million, 14.6 percent of the total population. The number of people of working age — 15 or over but under 65 — was about 86.22 million, accounting for 67.9 percent. There was approximately 22 million senior citizens, those aged 65 or over, or 17.3 percent of the total, an increase of 3.74 million, or 20.5 percent, compared to 1995 figures. On the other hand, the number of people under 15 years old fell by 1.54 million, or 7.7 percent, over the same period. Elderly living alone (households comprising a single person aged 65 or over) totalled some three million, an increase of about 830,000, or 37.3 percent. The proportion of elderly living alone to the elderly population as a whole increased by 13.8 percent compared to the 12.1 percent recorded in the 1995 census.

The number of non-Japanese residing in Japan was about 1.3 million, an increase of some 170,000 (14.9%) compared to 1995. The breakdown in terms of nationalities for the 1995 and 2000 censuses is shown in Figure 1 on page 2. The census highlights a substantial change in the demographic structure due to the aging population, fewer children, and an increase in people from abroad, holding significant implications for Japan's future.

**Figure 1. Foreign Residents in Japan by Nationality**

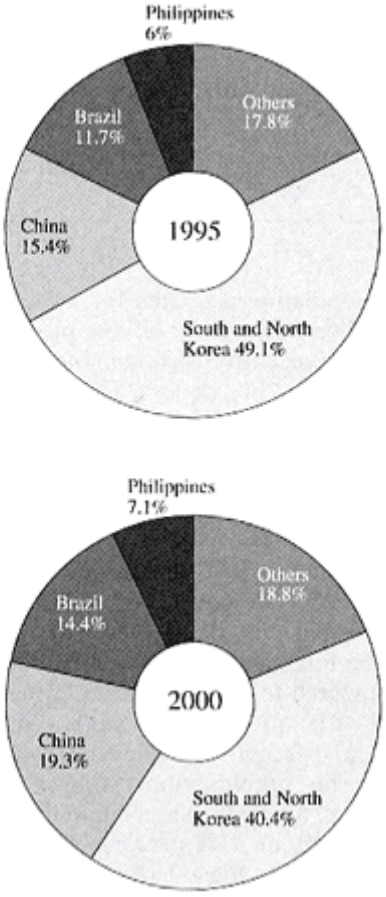
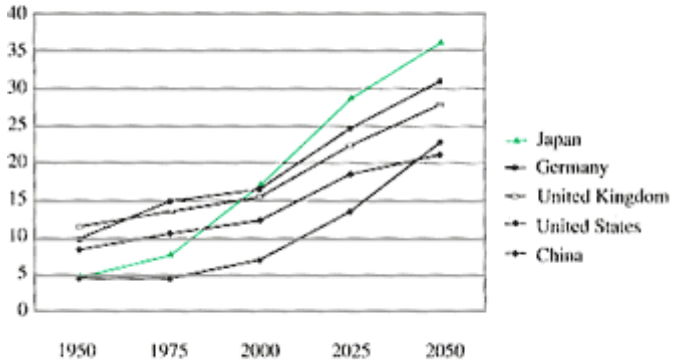



**Figure 2. Percentage of People Over 65 to Total Population in Major Countries and Future Trends**




**Source:** United Nations, *World Population Prospects: 2000 Edition.*

# Working Conditions and the Labor Market

## 'Interviews' Commonly Conducted before Dispatching Workers

It has been 15 years since the Worker Dispatching Law (WDL) was enacted. During this time, regulations concerning the scope of duties assigned to dispatched workers were relaxed and the number of dispatched workers has almost doubled, from 630,000 in 1991 to 1.07 million in 2000.

This law prohibits client companies from interviewing candidates and also from requesting a copy of the potential worker's curriculum vitae (CV) prior to concluding a contract. However, a Ministry of Health, Labour and Welfare survey revealed that such prohibitions are widely ignored.

The WDL was revised in December 1999, widening the scope of duties that dispatched workers can engage in while simultaneously reinforcing measures to protect their rights. (For details of the revised WDL, see the "Special Topic" column in the September 1999 issue of *Japan Labor Bulletin*.) The revised law bars client companies from any actions aimed at specifying dispatched workers. More precisely, companies which hire dispatched workers via agencies are not allowed to conduct interviews directly with such workers prior to signing the contract, to ask the dispatching agency for the CV of a candidate, or to specify a certain age group or gender. At the same time, dispatching agencies cannot help client companies specify certain types of workers prior to the dispatching contract. These regulations are intended to protect the personal information of the worker concerned, as well as to prevent selection of workers based on sex, age, appearance or other characteristics unrelated to job performance.

To see how the law was being carried out in practice, the Ministry of Health, Labour and Welfare conducted a survey in January 2001, covering 2,000 dispatching agencies, 10,000 establishments which receive workers dispatched by those agencies, and 10,000 dispatched workers. Usable answers were returned by 699 agencies (30.5%), 1,223 establishments (12.2%), and 2,029 workers (20.3%). The survey revealed that it is common for all parties to engage in actions that are prohibited by law.

Responses given by client companies are presented in Table 1 on page 3. More than half the companies surveyed often or sometimes request to see a CV and conduct direct interviews with workers before signing a work contract. An age limit was set by more than 30 percent and gender was specified by more than 40 percent of the companies surveyed. On the other hand, although it is not defined as illegal, nearly half of the companies surveyed allowed

"pre-contract signing visits" at the request of the dispatched worker.

The findings of the survey for dispatching agencies are shown in Table 2. Approximately 40 percent admitted to "submitting CVs" to their clients, "arranging pre-contract interviews," "cooperating in imposing age limits," and "cooperating in specifying candidates' gender." At the same time, nearly 60 percent of the agencies "arranged for candidates to visit workplaces" at the request of dispatched workers."

The findings of the survey directed toward dispatched workers are shown in Table 3. The largest number (28.8%) answered that they chose to be dispatched "because I could not find a regular post." This was followed by 27.6 percent who wanted to "choose the type of duties," and 21.7 percent who responded "because the scope of duties and responsibilities are clear." On average, dispatched worker earned ¥1,255 per hour, ¥9,263 per day, ¥188,000 per month, and ¥2.395 million per year.

The rampant violation of rules concerning interviews, releasing CVs, and other matters seems to be attributable to, among other things, the weak position of dispatching agencies in relation to their clients, the weak position of dispatched workers in relation to agencies and their clients, and insufficient understanding of the regulations. Thus in many cases, client companies conduct interviews with a certain number of candidates introduced by several dispatching agencies, and decide who to take on, a process which poses a problem concerning contracts. However, as seen in the increasing number of "visits to workplaces before signing the contract at the request of the dispatched worker," the workers themselves feel the need to actually see the workplace and duties before a contract is signed. The results of the survey pose the question of how to avoid mismatching workers and companies while protecting the former, who are in the weaker position.

## Labor Management Relations

### Adopting Work-sharing: Agreement between Nikkeiren and Rengo

The idea of work-sharing traditionally has been linked to shortening work hours, or to increasing employment of elderly workers during labor shortages. At other times, it has been an emergency measure taken by a limited number of firms faced with poor business performances. However, since around 1999, when unemployment exceeded three million, the concept has been mentioned in labor-management negotiations, and Nikkeiren (Japan Federation of Employers' Association) and Rengo (Japanese Trade Union Confederation) have started to put forward concrete opinions, though these opinions are different and remain far

apart.

As a means to curb total labor costs, Nikkeiren proposed wage cuts involving reduction of working hours and the introduction of an "employment portfolio" combining three types of employment: a core group of employees with abilities that have been developed over the long term, with specialized skills and flexible employment. On the other hand, Rengo has criticized the idea of sharing work under various job contracts, saying it would lead to the replacement of regular workers by non-regulars. It also stressed that before discussion of work-sharing, something should be done to reduce wages by, for example, reducing overtime or encouraging workers to use all their paid holidays. Thus the arguments of the two sides remained parallel. However, with the employment situation deteriorating still further, Rengo President Sasamori softened his position to the point of saying, "Wage cuts are unavoidable when working hours are reduced," making a compromise in the direction of work-sharing. Following this, on October 18, 2001, Nikkeiren and Rengo announced that they would promote a "social agreement concerning employment," incorporating efforts by both labor and management to introduce work-sharing.

The "social agreement" has two mainstays: Nikkeiren and Rengo will make every possible effort and will encourage individual companies and their unions to also cooperate (specifically, the statement says, "employers will maintain and create jobs to curb unemployment," and "unions will help management strengthen its business bases by, for example, improving productivity and cutting production costs"). In addition, both Nikkeiren and Rengo will ask the government to enact supplementary measures to speed the introduction of work-sharing. (More concretely, these measures include improving the safety net for employment; reconsidering the content of vocational training and improving the functioning of job placement services; assisting new business start-ups and creating job opportunities through deregulation; and urgently revising taxation and social security systems to allow for a greater choice of lifestyles.)

Following the release of this joint statement at the end of October, the two parties formed a research group concerning varied working styles and work-sharing and began discussion of concrete issues for further investigation. The issues include (1) appropriate evaluation and fair treatment in accordance with duties, achievement, and responsibilities (reorganization of wages, retirement allowances, and personnel management systems); (2) improvement of vocational skills (improvement of specialized skills and reorganization of job training schemes within companies); and (3) improvement of working styles (better adjustment of work schedules). Labor and management organizations are planning to make an interim report by around March-April 2002.

The gap between Rengo and Nikkeiren is not negligible. The former stresses the establishment of the principle of equal treatment, and the elimination of chronic overtime and "service overtime" (overtime without pay) as prerequisites for the introduction of work-sharing, whereas the latter regards work-sharing as a means of maintaining employment or of making employment more varied.

It is, nevertheless, noteworthy that labor and management have at last begun to consider the adoption of work-sharing, which has been put on hold for many years. The government and ruling party are also showing great interest.

---

## Influential Industrial Unions No Longer Demand Basic Pay Raise

Spring wage negotiations, known as the shunto, are joint campaigns by industrial labor unions to realize the demands of their members, mainly regarding pay raises, and are held every spring. Denki Rengo (Japanese Electrical Electronic and Information Union with some 770,000 members) and Tekko Roren (Japan Federation of Steel Workers' Unions with some 140,000 members) have already announced they will not call for a basic pay hike during the 2002shunto. Both industrial unions are affiliated with Kinzoku Rokyo (Japan Council of Metalworkers' Unions, IMF-JC), the pattern-setter in wage negotiations. These unions instead have announced they will be placing top priority on employment stability at the coming negotiation table. This will be the first time that Denki Rengo will not demand a basic wage increase, and for Tekko Roren the first time since 1987 when the economy was depressed due to the high Japanese yen. Both unions are planning to finalize their wage struggle policies in January 2002.

At a conference of representatives from affiliated unions in early November 2001, Denki Rengo confirmed that it was giving up the demand for a basic pay raise. Electronic companies are facing a drastic deterioration in their business performances due to the IT recession caused by the drop in sales of semiconductors, and many have announced measures for large-scale labor shedding. Under these circumstances, the union judged the situation too unfavorable to call for a basic pay hike, and decided to give priority to the safeguarding and stability of jobs, focusing on requests for maintenance of the current wage level and an increase in wages for part-time workers.

Meanwhile, at the end of October 2001 Tekko Roren explained the no-hike proposal to

its affiliated enterprise unions. Since the union engages in wage negotiations biannually, the decision will result in a zero basic pay hike for two successive years. The total current profit of the five major metal companies in fiscal 2001 is expected to fall to ¥63 billion, roughly one-third that of the previous fiscal year (some ¥197 billion). The main cause is a sharp decline in the prices of metal materials. In return, the union will call for an agreement on employment stability, asking employers neither to encourage voluntary retirement nor to dismiss workers for restructuring purposes for the next two years. Workers whose unions are affiliated to Tekko Roren are provided with regular pay increase schemes. Thus the union will try to obtain a pledge to observe the regular increase in wages for the next two years, together with the agreement on job security.

Where other industrial unions are concerned, JAM (Japanese Association of Metal, Machinery and Manufacturing Workers) — affiliating unions of small and medium-sized metal and machinery companies — is planning to pursue a similar policy, and it is expected that only Jidosha Soren (Confederation of Japan Automobile Workers' Unions with some 750,000 members) and Zosen-Juki Roren (Japan Confederation of Shipbuilding and Engineering Workers' Unions with some 110,000 members) will call for basic pay raises. Even here, the amount demanded will be a record low of ¥1,000. As for the automobile industry, performance varies depending on the company. For example, Toyota and Honda are making record high profits, whereas bus and truck makers such as Isuzu Motors Ltd., are in a difficult situation in the midst of the recession, meaning that some enterprise unions may find it difficult to request basic pay raises.

The spring wage offensive was first held in Japan in 1956. Via this wage-setting system, labor unions have attempted to secure a uniform pay raise in the base rate for all workers, and in 1974 when prices were highly inflated after the oil crisis, achieved a record high wage increase of 32.9 percent. Since 1976, they have regularly attained wage increases of up to 10 percent. But with the substantial drop since 1999 in the consumer price index, a gauge of the cost of living and therefore what the unions base their demands on, they are now finding it much harder to demand pay hikes.

## Public Policy

### Revised Child Care and Family Care Leave Law Includes Schemes to Care for Sick Children

On November 9, 2001, a draft revision of the Child Care and Family Care Leave Law,

targeting parents who have to juggle work and child-care simultaneously, was approved and became law. The revision takes effect in April 2002 and features a new scheme enabling parents to take leave to care for pre-school aged children who are sick. In addition, it also specifies that workers have the right to request exemption from overtime work exceeding a specific amount, and a relaxation of the conditions necessary for workers to shorten their work hours if they do not take the leave.

The Child Care Leave Law came into effect in April 1992 and initially applied only to business establishments with 30 or more regular employees. It was revised in April 1995 to cover all establishments. The law stipulates that an employee, either male or female, with an infant can take a leave of absence until the child reaches the age of one. According to a *Basic Survey on the Employment of Women* carried out in October 1999 by the Ministry of Health, Labour and Welfare, 56.4 percent of female workers who gave birth during fiscal 1998 took child care leave. (This result was obtained from a survey directed at 9,885 establishments in the private sector with five or more regular employees, with usable replies from 6,990 establishments.)

The main points of the latest revision include:

(1) Prohibition of unfair treatment: Employers can not dismiss or treat employees in an unfair manner because they requested or took child-care leave. The current law only specifies that the employees cannot be dismissed, and fails to help workers who, after taking such leave, were transferred to work locations where it was more difficult to combine work with the rearing of children, and were thus forced to give up their jobs. The concrete definition of "unfair treatment" for the revised law will be discussed by a committee, and the Ministry of Health, Labour and Welfare is planning to release guidelines concerning these around spring 2002. At the moment, it is thought that unfair treatment will include, for example, a change in employees' status from regular to non-regular, a drastic shift in duties, and transfer of employees to a remote work location.

(2) Restrictions on overtime work: Employees responsible for the care of children younger than school age will be allowed to refuse overtime work exceeding 150 hours per year, or 24 hours per month. To date, a temporary measure under the Labour Standards Law effective until March 2002 allows only women with pre-school children to refuse overtime exceeding 150 hours per year.

(3) Raising the maximum age covered by assistance in child rearing: The current law stipulates that employers must take certain measures, such as shortening working hours, for employees who need to care for infants younger than one but who do not take childcare leave. The maximum age has been raised to "under three."

(4) Introduction of leave to care for sick children: Employers must attempt to provide leave for

employees who need to care for pre-school aged children. This is the first time that taking leave to care for a sick child will be sanctioned. While some firms have similar schemes, many employees find it difficult to keep their jobs when their children are sick or injured, and in many cases have to use their paid holidays to attend and look after such children. Minshu-to (Democratic Party of Japan), an opposition party, and Rengo (Japanese Trade Union Confederation) have been calling for the right of workers to take care leave, and the revised law has incorporated the phrase that firms have the "duty to endeavor." The proposed draft revision also contains a promise to consider again this issue in three years, and approval is expected to be gained.

(5) Consideration regarding transfer of workers to other work locations: When assigning transfers, employers must take into consideration the situation of workers who are responsible for the care of children or of family members.

(6) Education of the public: The state should take steps to help people appreciate the importance of harmonizing working life with family life.

Of these items, the provision regarding unfair treatment and public education came into effect on November16, 2001, while the other clauses are expected to be enacted on April 1, 2002.

## Special Topic

### Change in Japanese Employment Security: Reflecting on the Legal Points

Shinya Ouchi
Professor of Labor Law
Graduate School of Law
Kobe University

Many companies in Japan are finding it difficult to secure long-term employment for their employees, an indication that the lifetime employment practice, a pillar of the employment system, is gradually collapsing. In fact, in October 2001, the unemployment rate reached 5.4 percent, the highest since World War II, and it is expected to climb even higher. Needless to say, this situation has its origins in the deep recession that the Japanese economy is in, which has not recovered since the bursting of the bubble economy. Currently, it is difficult to imagine that the situation will improve quickly, and it has become necessary to revise the present employment system which was created in an era of robust economic growth.

Already many companies have revised their employment practices. That is to say, more

and more enterprises are doing away with long-term employment. For example, the seniority-based wage system, another pillar of the employment system, is being replaced by performance-based wage systems, and the retirement allowance — the amount of which increases according to the length of service, thereby providing employees with an incentive to stay with the same company for a long period — is undergoing change or, in some cases, has been abolished. What is of greater importance is that many employees, even if employed by large companies, have been dismissed before reaching the mandatory retirement age, or they are leaving their company by consensual termination, which may often be a pretext to evade legal restrictions governing dismissal.

It is likely that such changes will affect the Japanese labor law which is closely related to the employment system. To what extent dismissals or other measures to shed redundant personnel are lawful is a subject that needs immediate resolution. This is not only a legal matter that needs to be tackled by labor law scholars, but also a matter of social concern.

## 1.0 The Legal Framework regarding Dismissals

From a comparative viewpoint, Japanese dismissal regulations have a unique characteristic. However, if viewed only from the perspective of the Civil Code, this appears not to be the case. In European countries with a tradition of civil law, such as France, Germany and Italy, the Civil Code provides that either party to an employment contract may terminate the contract at any moment with or without advance notice. This reflects the legal thinking of the 19th century and the first half of the 20th century, which was dominated by the liberal concept of freedom of contract. According to this principle, in theory both employers and employees are free to end an employment contract; in other words the employer's freedom to dismiss and the employee's freedom to resign are guaranteed on an equal basis. In Japan also, Article 627, Paragraph 1 of the Civil Code states, "If the parties don't define the period of employment, either party may request to terminate the contract at any moment. In this event, the contract will be extinguished two weeks after the request is made."

The Japanese dismissal law, however, has remained at this level, while many European countries have developed a special protective law against dismissals, moving away from the Civil Code principle. Of course, in Japan there exist particular legal provisions regarding dismissals: the Labour Standards Law (LSL) restricts dismissals during maternity leave and while an employee is receiving medical treatment for work-related injuries (Art.19). It also requires employers to give 30 days' advance notice of a dismissal (Art.20). Needless to say, the LSL's prohibition of discriminatory treatment (Art.3) and provisions in the Equal Employment Opportunity Law prohibiting discriminatory dismissals of female employees also play a significant role in restricting dismissals. Moreover under the Trade Union Law it

is considered an unfair labor practice to dismiss workers because they are union members, because they were engaged in proper union activities, or for similar reasons (Art.7). These dismissals are interpreted as invalid by the Supreme Court(1). There are other regulations limiting dismissals based on particular reasons, such as requests for parental or family care leaves. But Japan has no legal provision which explicitly requires that dismissals must be justified, while such a provision is common among the main European countries(2).

However, employers in Japan cannot dismiss their employees without reason. The court has ruled that the employer's right to dismiss shall be null and void as an abuse of the right to dismiss if the dismissal is not based upon objectively reasonable grounds and thus cannot be socially approved as an appropriate act(3). This rule is called "the doctrine of the abusive exercise of the right of dismissal" (hereafter referred to as "the doctrine of abusive dismissal"). The legal basis for this rule can be found in the Civil Code (Art. 1, Par. 3) which prohibits any kind of abuse of the right.

Due to this doctrine, the employer's freedom to dismiss has been considerably restricted. An analysis of accumulated cases in which judges applied this doctrine shows that there are four reasons which can justify dismissals: first, where there is a union-shop agreement; second, incompetence or lack of the skills or qualifications required to perform a job; third, violation of disciplinary rules; fourth, business necessity. The last type of dismissal, that is, dismissal for business necessity, is called "adjustment dismissal." In this case, the judge has ruled that, to justify this kind of dismissal under the doctrine of abusive dismissal, it is necessary to satisfy the following four requirements: a need to reduce the number of employees, a need to resort to adjustment dismissals, an appropriate selection of employees to be dismissed, and appropriate procedures such as consultation with the employees' representative. This rule is called the "four requirements of adjustment dismissals" rule.

Consequently, "the doctrine of abusive dismissal" established by the court compensates for insufficient positive legal provisions regulating the employer's right to dismiss.

It may be worth noting in passing that restrictions on the right of dismissal impact both business and legal theory. Regarding the business aspect, prohibiting arbitrary dismissals can give employees the incentive to participate positively in the occupational training organized by their employers. It can raise employees' motivation to work and their loyalty toward their employers.

As for the theoretical impact, it is important to reference a very unique court ruling concerning modification of working conditions. According to this ruling, a unilateral

disadvantageous modification of work rules is binding if it is rational. This ruling has been justified by the existence of the doctrine of abusive dismissal. For example, according to Sugeno, the contract theory originally acknowledged the dismissal of workers who do not approve of changes in the working conditions. "There are strong doubts, however, about whether such dismissals are valid under the legal principles governing abuse of the right of dismissal which strictly controls the employer's right to dismiss. Éôhe framework of the judicial decision, while protecting the workers' interests, also pays attention to the needs of the enterprise."(4) According to a comparative analysis by Araki(5), in the United States, which has the principle of "employment at will," there exists external-flexibility, but no internal-flexibility. On the other hand, in Japan there exists internal-flexibility — mainly connected with the unilateral and rational modification of work rules doctrine — but no external-flexibility connected with the doctrine of abusive dismissal.

## 2.0 Change in the Economic Situation(6)

However, as noted earlier, the economic situation surrounding Japanese companies is undergoing significant change, and as a result the employment system is being transformed. This has resulted in a growing tendency to revise the present legal system regarding dismissals.

First, there are those who argue that the doctrine of abusive dismissal will be difficult to maintain if the practice of lifetime employment collapses, as the two are integrally linked(7).

Secondly, Japanese enterprises are facing stiffer competition on the international level as the economy continues to globalize. Not only do they have to compete against U.S. companies — where the employer's freedom to dismiss is widely guaranteed separate from anti-discriminatory regulations — but also against companies in China where labor costs are remarkably low. In addition, evaluations by the financial market often greatly influence the fate of a company; now, to maximize stockholders' interests, managers must concentrate on improving profit in the short-term. Such a situation makes it difficult for companies to continue to employ a low productive labor force. Therefore, the dismissal regulation has become a heavy fetter on Japanese companies.

Thirdly, one economist's opinion — to reduce unemployment it is necessary to ease dismissal regulations which will, in turn, provide incentives for companies to increase hiring — has been gaining in popularity.

## 3.0 Surprising Decisions by the Tokyo District Court

According to research conducted by Fumio Otake, a specialist in labor economy at the Osaka University Institute of Social and Economic Research, in the latter half of the 1990s

judges ruled that dismissals were unjustified in 80 percent of the cases that were brought before them(8).

However, since November 1999, the Tokyo District Court has continuously ruled against employees in adjustment dismissal cases. It is safe to state that Tokyo District Court judges are very sensitive to the economic predicament of Japanese companies, however, labor law scholars severely criticized these judicial decisions arguing that the judges did not correctly apply the doctrine of abusive dismissal. Obviously these judges did not randomly apply the doctrine of abusive dismissal. In theory, the doctrine of abusive dismissal is only one part of the general principle regarding prohibition of abusive exercise of the right as laid down in the Civil Code. According to an original way of applying this principle, application of the doctrine of abusive dismissal should be left to the discretion of the judge. Furthermore, the "four requirements for adjustment dismissals" rule has not been clearly supported by the Supreme Court, and thus lower court judges can apply this doctrine somewhat freely in accordance with the characteristics of a particular case.

Ironically, a series of decisions by the Tokyo District Court have revealed some legal problems concerning the doctrine of abusive dismissal, prompting labor law scholars to delve deeper into a theoretical analysis of dismissal regulations. Above all, the question of burden of proof is heatedly argued.

First, based on the fact that the doctrine of abusive dismissal is substantially a law requiring just cause for dismissal, some academics argue that an employer must prove the existence of factors that justify dismissal. These scholars believe that the doctrine of abusive dismissal fills the void created by the lack of a law explicitly requiring just cause for dismissal. However, recent decisions by Tokyo District Court judges(8) state that the burden of proof should be assumed by the employee, who will have to prove that the dismissal was an abusive exercise of the right.

Contrary to the above-mentioned academic opinion, judges at the Tokyo District Court took as a premise for their argumentation the principle of freedom of dismissal as prescribed by the Civil Code. But if this conclusion is accepted as is, it will surely become difficult for employees to obtain a winning judgment.

Secondly, Article 89, No.3 of LSL prescribes that matters pertaining to retirement, including dismissal reasons, should be indicated in work rules. Since this provision applies to employers who continuously employ 10 or more workers, reasons for dismissal must be indicated in work rules in all enterprises, excluding some small enterprises. One

interpretation problem is whether or not an employer can dismiss an employee if it has omitted reasons for dismissal. Some academics have argued that, in this case, an employer cannot dismiss because indicating reasons for dismissal in work rules is an important duty imposed by the law to protect the interest of workers.

According to this opinion, however, an employer would have to indicate in the work rules every possible reason for dismissal. Of course, since an employer may insert a general clause in work rules such as "for reasons similar to those indicated above," the above mentioned interpretation will not necessarily bring about much disadvantage to an employer. But, for example, if a careless employer neglects to indicate in work rules an economic reason as cause for dismissal, what will happen? One ruling from the Tokyo District Court in such a case stated that listing reasons for dismissal in work rules should not be interpreted as limiting the scope of the right of dismissal, and an employer cannot be deprived of the possibility of carrying out a dismissal because the reason is not included in work rules(9).

Furthermore, regarding the rule concerning the "four requirements for adjustment dismissals," there has been debate as to whether it is necessary to meet each requirement to carry out a dismissal, or if the requirements should only be viewed as factors to be taken into consideration. Recent decisions by the Tokyo District Court tend to accept the latter interpretation, that is, adjustment dismissals that do not meet all of the requirements will not necessarily be ruled as null and void. In these cases, moreover, deciding which factor is more important in justifying dismissals has become a controversial issue.

First, the majority opinion holds that it is not appropriate for judges to rule on the need to reduce the number of employees, as this should be considered a management issue, a field in which judges usually do not have expertise. Secondly, while there is an overwhelming consensus that judges can examine the appropriateness of measures an employer adopted to avoid dismissals (often referred to as the "duty to endeavor to avoid dismissals"), the extent to which an employer must endeavor to avoid dismissals is controversial. One Tokyo District Court ruling stated that the "duty to endeavor to avoid dismissals" did not apply to non-regular employees because the duty is linked with the lifetime employment practice, which covers only regular employees(10). In addition, it is left to individual judges to decide whether an employer must attempt to modify the types of job or work locations before dismissing an employee, or whether an employer must always invite a voluntary resignation before dismissal. Consequently, even a general framework on which to base rulings has not yet been established.

Finally, considering there are no legal provisions requiring a clear statement explaining

the reason for a dismissal, consultation with the employee or his/her representative should play a significant role in informing the employee of the reason he/she is being let go. Nevertheless, some decisions from the Tokyo District Court denied the importance of such a procedural requirement(11).

## 4.0 The Need for Various Remedies

Another legal issue regarding adjustment dismissal is whether the question of financial compensation can be introduced. The problem may be divided into two categories. The first category is whether an employer's voluntary offer of an increase in retirement allowance or payment of compensation can be considered an advantage to the employer in cases concerning abuse of dismissal.

In one case, a firm proposed that its female assistant manager be demoted to the position of clerk, because her previous position as assistant manager had been eliminated due to changes in managerial strategy. Because the employee refused the demotion, she was dismissed. The Tokyo District Court ruled that the dismissal was effective, noting that the company had fully negotiated with the employee and that it had offered financial compensation(12).

Some economists argue that to accomplish a suitable distribution of limited human resources in the labor market, it is necessary to enact a law which permits employers to dismiss unnecessary labor force whenever they carry out appropriate compensation.

The second category concerns remedy of an unjustified dismissal. In Japan, according to case law, an unjustified dismissal is null and void and the relationship between employer and employee is considered never to have been severed. In these cases, the judge must order reinstatement and back pay covering the period from dismissal to judicial decision. Thus in Japan, an employee does not have the option of choosing compensation in lieu of reinstatement, unlike some European countries such as Italy where a worker can choose between reinstatement and indemnity equivalent to five months' salary, and sole indemnity equivalent to 15 months' salary. The Japanese process of redress is not necessarily suitable to resolving dismissal disputes, as the relationship of trust between employer and employee has been lost. The judicial order to reinstate cannot recover a relationship of trust even if it can recover a legal relationship. Considering this, it may be more desirable to give the employee a choice for compensation in lieu of reinstatement.

## 5.0 What Should be Covered in a Dismissal Law?

Now we must examine the necessity and possibility of enacting a dismissal law to resolve

the various legal problems mentioned above. Recently, Chikara Sakaguchi, Minister of Health, Labour and Welfare, expressed his intention to enact a law which restricts dismissals, making it appear that such a law was imminent. However, it is important to remember that both labor and management have been lobbying for passage of such a law, with both sides advocating opposing goals. Labor would like to see legislation similar to, or stricter than, the present doctrine of abusive dismissal, while management desires a looser regulation. Therefore, even if a bill is submitted to the Diet, it would be difficult for both labor and management to approve it. In fact, both sides expressed disagreement with Mr. Sakaguchi's aforementioned remark.

On the other hand, some academics point to the defects in the regulation regarding dismissal by case law. First, they assert that the reason why dismissal restrictions are not fully respected in small and medium-sized companies is because they find it difficult to access and understand the doctrine of abusive dismissal. In addition, since application of the doctrine of abusive dismissal is mostly left to the discretion of the judge, it is difficult for both employer and employee to know in advance whether a dismissal is effective or not. Some academics are afraid that such legal uncertainty may prevent rational activity by an enterprise and employee. Certainly it may be useful to codify the case law in order to resolve the above mentioned defects. Nevertheless, we should bear in mind the merits of case law: case law can adapt more elastically to socio-economic changes than statute law. Furthermore, the government is currently preparing a series of policies aimed at enhancing the mobility of the labor force. Since restrictions on dismissal are linked closely with the low degree of employee mobility, a policy toward a higher mobility might dispense with strict restrictions of dismissal. Anyway, from now, to cope with a increasing number of individual labor disputes it may be necessary to enact an employment contract law, which codifies various case law rules. If this is done, it may be not too late to try to decide concrete provisions for a regulation of dismissal within the framework of a new employment contract law.

Notes:

(1) The Shinkokai case, Supreme Court, April 9, 1968, Minshu vol.22, no.4, p.845.

(2) See "genuine and serious cause" in the French law of 1973, "social justification" in the German law of 1951 and "justified reasons" in the Italian law of 1966.

(3) See the Nihon Shokuen case, Supreme Court, April 25, 1975, Minshu vol.29, no.4, p.456.

(4) See Sugeno, Kazuo, Japanese Labor Law, University of Washington Press and University of Tokyo Press, 1992, pp.99-100.

(5) See Araki, Takashi, "Accommodating Terms and Conditions of Employment to Changing Circumstances: A Comparative Analysis of Quantitative and Qualitative Flexibility in

the United States, Germany and Japan," in C. Engels & M. Weiss (ed.), Labour Law and Industrial Relations at the Turn of the Century: Liber Amicorum in Honor of Roger Blainpain, Kluwer, 1998, pp. 509.

(6) For further details, see Araki, Takashi, "Re-examination of Employment Security in Japan in Light of Socio-economic Structural Changes," in New Trends of Labour Law in International Horizon: Liber Amicorum for Prof. Dr. Tadashi Hanami, Shinzansha, 2000, pp.193.

(7) See, for example, the Kadokawa Bunka Shinko Zaidan case, Tokyo District Court, November 29, 1999, Rodo-Hanreino.780, p.67.

(8) See Otake, Fumio and Fujikawa, Keiko, "Nihon no Seirikaiko" (Japanese Adjustment Dismissals), in Inoki, Takenori and Otake, Fumio, Koyo-seisaku no Keizai-bunseki (Economic Analysis of the Employment Policy), University of Tokyo Press, 2001, p.14.

(9) See the National Westminster case, Tokyo District Court, January 21, 2000, Rodo-Hanrei no.782, p.23.

(10) See the Kadokawa Bunka Shinko Zaidan case, Tokyo District Court, November 29, 1999, Rodo-Hanrei no.780, p.67.

(11) See the Kadokawa Bunka Shinko Zaidan case, Tokyo District Court, November 29, 1999, Rodo-Hanrei no.780, p.67; the Hirokawa Shoten case, Tokyo District Court, February 29, 2000, Rodo-Hanrei no.784, p.50.

(12) See the National Westminster case, Tokyo District Court, January 21, 2000, Rodo-Hanrei no.782, p.23.

## JIL News and Information

### JIL's Seminars on Japanese Industrial Relations in Indonesia: Indonesia Refers to the Japanese Model in Seeking Stable Labor-management Relations

The Japan Institute of Labour (JIL) held seminars under the theme "The Development of Industrial Relations Systems: Lessons from Japan" in Jakarta, Indonesia, on October 8 and 9, 2001, and in Medan, capital of North Sumatra, on October 10 and 11. Since the downfall of the Suharto regime in May 1998, Indonesian labor relations have been in a great turmoil, and the current government, in cooperation with labor and management, has been seeking to create a new relationship. In line with this, Indonesia's Ministry of Manpower and Migration, seeing Japan's stable industrial relations as a relevant model, asked the Japanese Ministry of

Health, Labour and Welfare to coordinate the introduction of Japanese industrial relations to the Indonesian tripartite. As a result, the seminars were held by JIL and the Ministry of Manpower and Migration of Indonesia, in cooperation with Japanese employers' and employees' associations. The seminars in Jakarta attracted some 250 participants involved in industrial relations or administration, while some 150 people also took part in the seminars in Medan.

Mr. Muzumi, Director General of the Bureau of Industrial Relations and Labour Standards of the Ministry of Manpower and Migration, read the keynote speech on behalf of Mr. Jacob, Minister of Manpower and Migration. He emphasized that for the economic development of Indonesia, the Ministry of Manpower and Migration aimed to create fair and well-balanced industrial relations. The basic concept lay in the establishment of transparent business management and good communication between labor and management. At the same time, he acknowledged that, although the idea had been established, its execution was a different, and more difficult matter, and asked participants to understand the purpose of the seminars, which was "to take advantage of Japan's experience in building up fair and well-balanced industrial relations."

The keynote speech was followed by a lecture by Mr. Kunihiko Saito, president of JIL. Under the theme "A General View of Japan's Industrial Relations," he explained the overall outlook underlying Japanese industrial relations, which are based on discussion between labor and management. Mr. Kiyoharu Matsuura, former Executive Director, Department of Working Conditions of Rengo (Japanese Trade Union Confederation), and Mr. Yasuhiro Kawamoto, Deputy Director, Labour Relations Division of Nikkeiren (Japan Federation of Employers' Associations), then gave lectures on "Negotiations for Collective Labor Agreement," "The Development and Structure of Trade Unions in Japan," and "Cooperation between Trade Unions and Employers in Japan." An additional lecture entitled "Principles of Labor Dispute Settlement in Japan" was given by Mr. Mitsuyasu Maeda, Deputy Director General, Executive Office of the Central Labour Relations Commission of the Ministry of Health, Labour and Welfare. Responding to the participants' high interest in the shunto (the spring wage offensive) in Japan, the lecturers gave accounts of labor-management negotiations concerning wage and collective agreements, with particular reference to the spring wage offensive.

The participants listened enthusiastically to the lectures, and raised questions concerning various points, including: "What do the labor unions demand when their companies' performances are poor?"; "How is the minimum wage determined?"; and "How are negotiations conducted when there are two or more labor unions within a single company?". A

more controversial question was, "Why, when Japanese labor-management relations seem to have no problems, do Japanese firms not apply the same system to their affiliates in Indonesia?". This led to lively discussions between the audience and the lecturers from Japan. In addition, there were many more questions concerning the nature of labor-management relations, such as one asking how to deal with corporate obstruction of the formation of labor unions, to which Mr. Maeda gave a detailed account of Japan's system concerning unfair labor practices.

## Statistics Aspects

### Recent Labor Economy Indices

**Recent Labor Economy Indices**

| | October 2001 | November 2001 | Change from previous year (November) |
|---|---|---|---|
| Labor force | 6,757 (10 thousand) | 6,780 (10 thousand) | -31 (10 thousand) |
| Employed | 6,367 | 6,420 | -96 |
| Employees | 5,331 | 5,346 | -73 |
| Unemployed | 360 | 370 | 45 |
| Unemployment rate | 5.4% | 5.5% | 0.7 |
| Active opening rate | 0.55 | 0.53 | -0.12 |
| Total hours worked | 155.4(hours) | p158.7 (hours) | p0.7 |
| Total wages of regular employees | (¥ thousand) 285.9 | (¥ thousand) p293.3 | p-2.0 |

**Note:** p = Preliminary figures.
**Source:** Ministry of Public Management, Home Affairs, Posts and Telecommunications, *Rōdōryoku Chōsa* (Labour Force Survey); Ministry of Health, Labour and Welfare, *Shokugyō Antei Gyōmu Tōkei* (Report on Employment Service), *Maitsuki Kinrō Tōkei* (Monthly Labour Survey).

### Prior to Dispatching Workers

**Prior to Dispatching Workers**

**Table 1. Responses from Client Companies**

(%)

| | Often | Sometimes | Rarely | Never | Unknown |
|---|---|---|---|---|---|
| Requests CV | 38.0 | 12.6 | 16.0 | 31.4 | 2.0 |
| Interviews workers | 36.1 | 14.4 | 18.6 | 28.8 | 2.1 |
| Imposes age limits on candidates | 8.4 | 23.3 | 35.9 | 30.1 | 2.3 |
| Specifies gender | 24.9 | 19.7 | 25.7 | 27.6 | 2.2 |
| Allows pre-contract signing visit | 23.2 | 25.3 | 25.6 | 23.1 | 2.7 |

**Table 2. Responses from Dispatching Agencies**

(%)

| | Often | Sometimes | Rarely | Never | Unknown |
|---|---|---|---|---|---|
| Submits CVs | 23.7 | 11.7 | 18.0 | 42.5 | 4.0 |
| Arranges pre-contract interviews | 19.7 | 18.2 | 22.3 | 35.6 | 4.1 |
| Cooperates in imposing age limits | 13.3 | 31.6 | 28.3 | 22.6 | 4.1 |
| Cooperates in specifying candidates' gender | 22.3 | 24.2 | 25.8 | 24.2 | 3.6 |
| Arranges for candidates to visit workplaces | 29.0 | 30.5 | 18.5 | 17.3 | 4.7 |

**Table 3. Responses from Dispatched Workers**

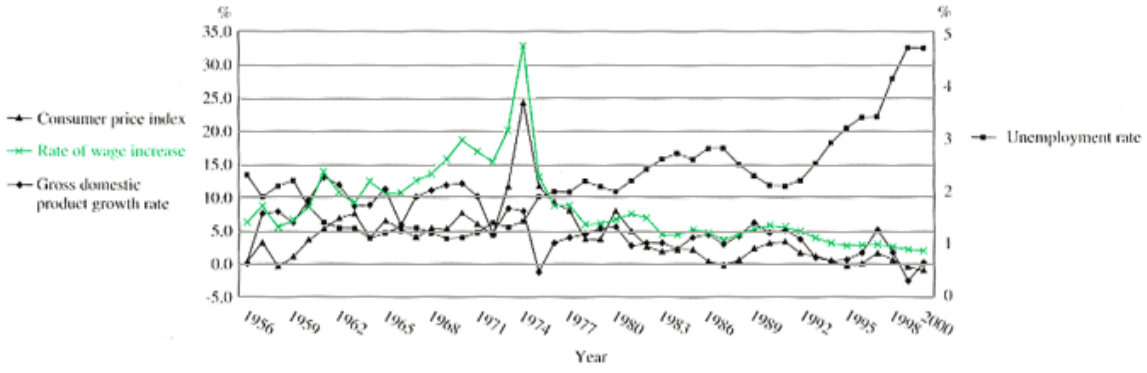
(%)

| | Often | Sometimes | Rarely | Never | Unknown |
|---|---|---|---|---|---|
| Submits CV to company they wish to work for | 35.1 | 8.6 | 11.5 | 38.3 | 6.5 |
| Gives interviews to companies they wish to work for | 35.3 | 12.1 | 13.7 | 33.8 | 5.2 |
| Visits workplaces where they wish to work | 17.4 | 13.3 | 14.1 | 46.5 | 8.7 |

**Source:** Ministry of Health, Labour and Welfare, *Results of a Survey on the Actual Situation of Worker Dispatching Businesses.*

## Wage Increase Trends Determined by the Spring Labor Offensive and Other Related Indices

**Figure 3. Wage Increase Trends Determined by the Spring Labor Offensive and Other Related Indices**



## Prior to Dispatching Workers

**Table 1. Responses from Client Companies**

(%)

| | Often | Sometimes | Rarely | Never | Unknown |
|---|---|---|---|---|---|
| Requests CV | 38.0 | 12.6 | 16.0 | 31.4 | 2.0 |
| Interviews workers | 36.1 | 14.4 | 18.6 | 28.8 | 2.1 |
| Imposes age limits on candidates | 8.4 | 23.3 | 35.9 | 30.1 | 2.3 |
| Specifies gender | 24.9 | 19.7 | 25.7 | 27.6 | 2.2 |
| Allows pre-contract signing visit | 23.2 | 25.3 | 25.6 | 23.1 | 2.7 |

**Table 2. Responses from Dispatching Agencies**

(%)

| | Often | Sometimes | Rarely | Never | Unknown |
|---|---|---|---|---|---|
| Submits CVs | 23.7 | 11.7 | 18.0 | 42.5 | 4.0 |
| Arranges pre-contract interviews | 19.7 | 18.2 | 22.3 | 35.6 | 4.1 |
| Cooperates in imposing age limits | 13.3 | 31.6 | 28.3 | 22.6 | 4.1 |
| Cooperates in specifying candidates' gender | 22.3 | 24.2 | 25.8 | 24.2 | 3.6 |
| Arranges for candidates to visit workplaces | 29.0 | 30.5 | 18.5 | 17.3 | 4.7 |

**Table 3. Responses from Dispatched Workers**

(%)

| | Often | Sometimes | Rarely | Never | Unknown |
|---|---|---|---|---|---|
| Submits CV to company they wish to work for | 35.1 | 8.6 | 11.5 | 38.3 | 6.5 |
| Gives interviews to companies they wish to work for | 35.3 | 12.1 | 13.7 | 33.8 | 5.2 |
| Visits workplaces where they wish to work | 17.4 | 13.3 | 14.1 | 46.5 | 8.7 |

**Source:** Ministry of Health, Labour and Welfare, *Results of a Survey on the Actual Situation of Worker Dispatching Businesses.*

**Figure 3. Wage Increase Trends Determined by the Spring Labor Offensive and Other Related Indices**