

Commentary

Dismissal due to Company Dissolution in the COVID-19 Pandemic

The *Ryusei Taxi* Case

Tokyo High Court (May 26, 2022) 1284 *Rodo Hanrei* 71

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I. Facts

On April 15, 2020, a taxi company Y (hereinafter “Company Y”), issued an advance notice to all 33 employees including X, informing them that the company would dismiss all of them as of May 20, 2020, because business continuity had become impossible due to a sharp decline in sales amid the COVID-19 pandemic. After issuing this advance notice of dismissal, Company Y engaged in collective bargaining with a labor union consisting of the majority of the employees and another labor union A (hereinafter “Union A”), of which X was a member, and explained its business conditions. Company Y made an offer to all employees except one employee in charge of liquidation affairs, for an agreement on their separation from employment. While 31 employees accepted the offer and received special severance payment, X and another employee refused the offer, and they were dismissed by the company. On June 2, 2020, Company Y was dissolved based on a resolution reached at the shareholders’ meeting. X filed a lawsuit against Company Y, alleging that the dismissal by the company was null and void. On October 28, 2021, the Tokyo District Court dismissed X’s claim. X filed an appeal with a higher court.

II. Judgment

In the judgment rendered on May 26, 2022, the Tokyo High Court stated as follows. A company has the freedom to decide its dissolution, and if the

company is dissolved, there is no basis for continuous employment of workers. Therefore, if a worker is dismissed due to the dissolution of the company, it is not appropriate to apply the so-called collective redundancy (collective dismissal based on economic reasons) theory in determining whether the dismissal constitutes an abuse of the right to dismiss. At the same time, the court presented a judgment framework whereby the dismissal by a company due to its dissolution would be judged to be an abuse of the right to dismiss and therefore null and void in cases where (i) the dismissal is regarded as seriously lacking consideration for procedures, or (ii) the dissolution, which is asserted as the cause of the dismissal, was fictitious or effected for unjust purposes (e.g., eliminating the existing employees), because the dismissal in these cases lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms.

Regarding Company Y’s situation, the court found that the company was facing difficulty in continuing its business under reasonable conditions due to the impact of the spread of COVID-19 and the issuance by the government of the declaration of a state of emergency. The court also stated as follows. In consideration of the magnitude of the impact that the dismissal could have on workers’ livelihood, even in the case of dismissal due to the dissolution of the company, it is desirable that the employer should hold consultation with workers and provide them with relevant information in a timely manner. The dissolution of Company Y was triggered by a sharp

decline in operating income amid the COVID-19 pandemic. It might have been difficult for Company Y to foresee such situation, and even if Company Y had provided information on its business conditions directly to X or Union A before its business conditions rapidly deteriorated, it is unthinkable that this could have made a significant difference to X's job search activities. Therefore, it cannot be said that the dismissal by Company Y seriously lacked consideration for procedures just because the company did not provide such information. The court rather evaluated the procedures conducted by Company Y, finding that the company gave consideration to procedures to the extent possible even while its business conditions were worsened rapidly. This was demonstrated by the company providing specific information through collective bargaining, although this occurred after the issuance of the advance notice of dismissal. Additionally, the court noted the provision or offer of monetary benefits by the company although in a small amount.

X alleged that Company Y should have used the Employment Adjustment Subsidy (EAS) to continue employment while searching for a business transferee and seeking new jobs for the employees. The court rejected X's allegation, stating as follows: the EAS is a means for the employer to continue employment by taking measures such as temporary absence from work when it has been compelled to rapidly curtail its business activities for economic reasons; it cannot be considered that it is naturally assumed that the employer, having given up the continuity of its business, will use the EAS for the purpose of securing employment until its employees find new jobs.

In conclusion, the court held that as X's dismissal by Company Y was caused by an unforeseeable situation, it was difficult for Company Y to provide X with significant information in advance, and that some procedural considerations were still given after the dismissal, and that, therefore, it cannot be said that the dismissal was carried out with a significant lack of procedural consideration.

III. Commentary

Before providing commentary on this judgment, the author provides an overview of the current status of the dismissal regulations in Japan. Article 16 of the Labor Contracts Act stipulate that: "If a dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, it is treated as an abuse of rights and is invalid." This provision is the enactment (restatement) of the case law (abuse of the right to dismiss theory), almost as it is, that was established by Japanese courts through the accumulation of judgments during the period between the 1950s and the 1970s. There is no further detailed provision in positive law. In actual lawsuits, however, courts have presented more detailed judgment criteria depending on types of dismissal such as dismissal for a lack of capability, dismissal for disciplinary actions, and dismissal for collective redundancy. Among these, a dismissal for collective redundancy or economic reasons has four requirements established as case law and is justified only when all of the following are satisfied: (i) there was a business necessity to resort to reduction of personnel; (ii) efforts were made to avoid dismissal; (iii) selection of employees to be dismissed must be made on an objective and reasonable basis; and (iv) appropriate procedures (consultation with a labor union and workers in good faith) were conducted.

The collective redundancy theory applies in full in cases of dismissal for reasons such as the abolition of a post, the closure of a business division, and the closure of a branch, but its applicability in the case of dismissal due to the dissolution of the company that is the employer has been disputed so far. Some court decisions are in favor of the applicability of this theory in such case and others are not. In the judgment on this case, the court denied the applicability of the theory of collective redundancy on the grounds that if a company is dissolved, there will be no basis for continuous employment of workers. However, while denying the applicability of this theory, the court presented the judgment criteria in a different form for the case of dismissal due to the dissolution of the company because the theory of the abuse of the right

to dismiss is still applicable pursuant to Article 16 of the Labor Contracts Act. Specifically, the court specified the following two requirements: (i) appropriate procedures were conducted; and (ii) the dissolution of the company was not fictitious or effected for unjust purposes. The requirement mentioned in (ii) is out of the question because, if this requirement is not satisfied, the dissolution of the company, which is the basis for the dismissal, would be invalid. The focus should be on the other requirement of appropriate procedures mentioned in (i), that is, to what extent the employer should conduct procedures such as providing information to and holding consultation with a labor union or workers when the workers would eventually lose their jobs due to the dissolution of the company.

Requiring appropriate procedures even in the case of collective redundancy due to the dissolution of the company is a common judgment criterion adopted in similar court decisions. The distinctive feature of this judgment lies in the recognition that, despite setting forth such criteria for assessment, the Company Y satisfied the requirement of appropriate procedures by (a) considering the extraordinary circumstances of the COVID-19 pandemic, and (b) engaging in information provision and consultation with the labor unions and workers after issuing the advance notice of dismissal, although the absence of any prior consultation with them.

Regarding the point in (a), the court stated that although it is necessary in principle for the employer to provide information to and hold consultation with a labor union and workers before issuing the advance notice of dismissal, Company Y cannot be deemed to have failed to conduct appropriate procedures on the following grounds: it was difficult for Company Y to foresee a sharp decline in operating income due to the sharp decrease in the number of taxi users as a result of the declaration of a state of emergency issued by the government amid the COVID-19 pandemic; and even if the company had provided information to X beforehand, it cannot be said that this could have made a significant difference to X's job search activities. It is true that the pandemic had an impact to a level of suddenly paralyzing economic

activities on a global scale. However, it is unclear where to draw a line depending on whether or not appropriate procedures are conducted. It is, one might say that the court left the explanation to the enormity of the background circumstances, that is, the pandemic. There may be no criterion that can clearly indicate the scale of a social challenge in which prior consultation would be unnecessary due to the urgency of the dismissal.

Regarding the point in (b), while stating that the employer should, in principle, provide information to and hold consultation with a labor union and workers before issuing the advance notice of dismissal, the court determined that Company Y satisfied the requirement of appropriate procedures on the grounds that within the one-month period of advance notice of dismissal, Company Y engaged in collective bargaining with the labor unions and made an offer to the employees for an agreement on their separation from employment on condition of payment of a small amount of special severance payment, and the large majority of the employees actually accepted this offer and left the company. This is a difficult point to evaluate. In theory, providing information to or holding consultation with workers would be meaningless if the employer did not conduct these procedures before dismissing them. However, in Company Y's case, there was one month before the dismissal. During this period, at least before X was actually dismissed, Company Y took measures to mitigate the shock by the dismissal (providing information and holding consultation), which X claimed as measures that should have been taken before issuing the advance notice of dismissal. In view of this fact, it cannot be completely denied that Company Y can be judged to have satisfied the requirement of appropriate procedures. However, one must be deliberate about applying this logic without restraint because a worker, once they have received the advance notice of dismissal, would desire to reach an agreement with the employer during the advance notice period and avoid the harsh situation.

As shown above, the two points, (a) and (b), which are cited by the court as the reasons for finding

that Company Y satisfies the requirement of appropriate procedures, cannot be easily accepted because they already have many problems. However, the idea of solving these problems by making up for the lack of prior consultation, which is required in principle, with the combination of the two special reasons, that is, the urgency amid the COVID-19 pandemic and the procedures conducted after the issuance of the advance notice of dismissal (collective bargaining and offer for an agreement on separation from employment), cannot be denied as a practical argument in some respects. The author supports the conclusion of the judgment in this case although it still involves many issues.

X claimed that the EAS should have been used

under the circumstances of this case. However, this subsidy funded by the employment insurance, is to pay “the employers who [gave temporary absence from work [...] in the case where the employer[s] have been compelled to curtail business activities [for] economic reasons” (Article 62-1 of the Employment Insurance Act). The subsidy system is based on the major premise that the employers will resume their business activities and the workers will return to their jobs after the temporary absence period ends. Therefore, it is contrary to the purpose of the system to use this subsidy to cover wages for workers who are decided to be dismissed until they find new jobs. Consequently, in this respect, the conclusion of the judgment on this point is appropriate.

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