4 Resignation, Mandatory Retirement and Dismissals, etc.

Resignation

Resignation is one of the reasons for the termination of employment contract and is the general term for a employee quitting a company where they had been working (however, dismissals are excluded from this definition).

With regard to the actual situation concerning resignation, the categories include "general resignation" and "resignation due to personal circumstances", when an employee unilaterally terminates the employment contractual; "resignation by agreement," "resignation at the employee's own request" and "voluntary resignation," which take place on the basis of agreement between the employee and employer; and "mandatory retirement," which takes place on the basis of stipulations in the employment contract, workplace regulation or collective agreement.

Legal problems relating to resignation that have emerged in recent years include encouragement to resign resulting from business restructuring or shrinkage and preferential measures when soliciting volunteers for early retirement.

With regard to the former, unscrupulously encouraging employee to resign through persistent approaches or violence is illegal and could result in both the individual at fault and the employer becoming liable to pay damages. The details of the actual situation are unclear, but from looking at statistics concerning the system for resolving individual labor disputes, one can see that approximately 25.5% of disputes arising in the workplace arise from "encouragement to resign (8.5%)" and "bullying or harassment (17.0%)" that can be closely related to this (concerning this point, see Chapter IV-4 "Labor Disputes and Resolution Systems").

As for the latter, although not so evident recently, there have been claims for payment of the difference when a disadvantage or unfairness arises concerning the application of preferential measures in the form of financial incentives, depending on the timing of retirement. As such preferential measures have no basis in legislation, employers themselves can decide what measures to apply when and to whom. Consequently, in general, even if the application of such systems, the need for the consent of users when applying them, and any disadvantage or inequality in the application of preferential measures become an issue in litigation, employees' claims for payment of any difference are hardly ever approved.

In recent years, there have also been numerous cases involving corporate pensions independently created and operated by companies (a problem also related to retirement, in the next section). In these cases, litigation ultimately arises when legal problems are caused by a reduction in actual payments compared to initial expectations, a lower rate of payment, or the scrapping of the system itself, as a result of poor yields on investments due to a downturn in the economic climate, etc. (on this point, see Chapter VI-3. "The Pension System and Public Assistance").

Mandatory Retirement

According to the summary findings of the 2012 General Survey of Working Conditions (Ministry of Health, Labour and Welfare, released on November 1, 2012), 93.1% of private enterprises with 30 or more regular employees have mandatory retirement systems, of which 98.8% have a uniform mandatory retirement age. Of these, 82.7% set the mandatory retirement age at 60, and 14.3% set it at 65 or above.

On the other hand, if we look at the legal system, Article 8 of the Act on Stabilization of Employment of Older Persons stipulates that employer may not prescribe a mandatory retirement age below 60 years of age. Moreover, Article 9 of the same Act obliges employers to take measures to secure employment up to the age of 65. There are three of these measures, which were prescribed under the 2004 amendment of the Act, namely i) raising the mandatory retirement

age; ii) introducing continued employment systems; and iii) abolishing mandatory retirement (for the background and details of the amendment, see Chapter V-3 "Policies Designed to Secure Employment for Older and Disabled Workers").

In the past, a system of continued employment as in ii) above was considered to have been introduced if standards for a system of continued employment of older workers had been decided and was being operated with the agreement of a majority union or majority representatives. However, the 2012 amendment provides that, when the employer owns related companies, a provision for continued employment in those related companies should be included in ii) above.

If we look at the 2012 Aggregate Results of the Survey on Employment Conditions of Elderly persons (released on October 18, 2012), focusing on the status of the introduction of measures aimed at securing employment up to the age of 65 based on the 2004 amendment, as of June 1, 2012, the companies that had already introduced measures to secure employment for employees aged 60 and above, up to the age of 65, accounted for 97.3% of the approximately 140,000 companies with at least 31 employees that were the focus of the aggregate results; even just looking at small and medium-sized companies (those with between 31 and 300 employees, totaling 125,708 companies), the figure was 97.03%.

If we look at the breakdown of measures to secure employment from the same aggregate results, in order of the measures accounting for the greatest proportion of responses, "introduction of a continued employment system" accounted for 83.53%, "raising of the mandatory retirement age" accounted for 14.7%, and "abolition of mandatory retirement" accounted for 2.7% (average for aggregated companies).

Concerning the "continued employment system" (the system with the highest rate of introduction), 57.2% of companies "Have standards based on labor agreements" while 42.8% of companies "Do not have standards" (average for aggregated companies). Meanwhile, 92.1% of companies set a minimum age of 65 for application of measures to secure employment (average for aggregated companies).

However, looking at the mandatory retirement system in legal terms, there is a compelling view that it is not rational to cease the employment relationship on the grounds of having reached a certain age, and that this contravenes the principle of job security. Nevertheless, in Japan's seniority-based long-term continued employment system, there is a general attitude that the mandatory retirement system is rational, and no courts have ruled that the mandatory retirement system is unlawful (contravening public policy as detailed in Article 90 of the Civil Code).

Moreover, due to the fact that the aforementioned Article 9 of the Act on Stabilization of Employment of Older Persons obliges employers to implement measures to secure employment up to the age of 65, discussions have recently emerged concerning the legal enforceability of that article. More specifically, there is a question about whether or not the article concerned is valid in private law. In theoretical terms, there is a conflict between the theory that sees the article to be effective in private law, so it is possible to confirm its status with regard to compensation for damages and in employment contracts, and the viewpoint that denies its effectiveness in private law, arguing that the article only imposes on employers an obligation in public law (administrative law).

Dismissals

1. General

The Labor Standards Act only prohibits the dismissal of a employee during a period of absence from work due to injuries or illnesses suffered in the course of employment, and the dismissal of a female employee during a period of absence from work before and after childbirth, or within 30 days after either type of absence, but it does not prohibit dismissal itself (Article 19). On the other hand, discriminatory or retaliatory dismissal on grounds such as gender or labor union activity is prohibited by law (by such legislation as Article 3 and Article 104, paragraph (2) of the Labor Standards Act, Article 6, item (iv) and Article 9 of the Equal Employment Opportunity Act, Articles 10 and 16 of the Child Care and Family Care Leave Act, and Article 7 of the Labor Union Act).

Amidst this legal situation, regulations based on the principle of the abuse of the right of dismissal have played a particularly important role in dismissals in general (such as dismissals due to incompetence or lack of ability to perform work). This principle is a legal theory that examines and restricts an employer's exercise of the right of dismissal (in legal terms, to be more precise, the expression of intention to dismiss), in that this constitutes unilateral termination of a labor contract relationship by the employer toward the employee. The principle was established by Supreme Court judgments from the mid-1970s onwards (Supreme Court Judgment on the 1975 Nippon Salt Manufacturing Case, Supreme Court Judgment on the 1977 Kochi Broadcasting Case).

The Supreme Court formulated the content of this principle, stating that, "the exercise of the right of dismissal by an employer shall be deemed an abuse of rights and become invalid, in the event that it lacks objectively reasonable grounds and therefore cannot be considered to be appropriate in general societal terms." Furthermore, the Court set forth the specific elements and methods of decisions on the principle, stating that, "even when there is a reason for general dismissal, the employer may not always be able to dismiss the employee. If the grounds for dismissal in the specific situation concerned are singularly unreasonable, or if they cannot be considered to be appropriate in general societal terms, the expression of intention to dismiss in question shall be deemed an abuse of rights and become invalid".

This legal principle is an unequivocal mandatory civil provision stipulated in the 2003 amendment of Labor Standards Act (Article 18-2). Underlying this was a recognition of two things: that these legal principles should be clearly stated because, despite having played an important role (job security = long-term continued employment) in regulating dismissals in Japan, their lack of statutory form made them unclear to the public; and that employers should be prevented from resorting to dismissals without careful consideration during the recession at time that the act was revised. This provision has now been transferred to the Labor Contract Act enacted in 2007 and stipulates 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" (Article 16).

2. Collective Dismissals (Dismissals for Economic Reasons)

Employment adjustment in Japan has mainly been carried out by means that do not involve any pain for employees, such as reductions in overtime, with the method of removing regular employees from the company not being used unless the financial condition of the company was especially poor. This is due to the fact that Japanese companies emphasize long-term continued employment, as well as the difficulty of dismissing employees due to the existence of the principle of the abuse of the right of dismissal that has underpinned this.

The regulations governing collective dismissals for economic reasons of the company have been shaped in forms derived from the principle of the abuse of the right of dismissal; unless a dismissal complies with the following four criteria, it is deemed to be illegal and invalid (four criteria for collective dismissals):

On the employer's side, (i) that there is a need to reduce personnel, (ii) that the obligation to make efforts to avoid dismissal have been discharged (examples: reducing overtime hours, re-assigning or seconding staff, halting new recruitment, making temporary layoffs (leave of absence), offering voluntary retirement, reducing numbers of non-regular employees), (iii) that the standards for selecting staff for dismissal are reasonable (examples: frequency of lateness or absence, existence of a history of breaking rules, low level of economic impact due to absence of dependents), and (iv) that full discussions have been held with workers or labor unions (i.e. the background leading to collective dismissal, the timing and method to be used, and other matters have been fully explained, opinions have been heard, and efforts have been made to gain understanding).

3. Disciplinary Dismissal

Work rules generally provide that workers who violate work orders should be subject to disciplinary measures in the form of private penalties or

punishments. Disciplinary measures are private penalties or punishments imposed by employers on employees for such reasons as violating a legitimate work order, disrupting the order of the company or workplace, or engaging in illegal acts. In ascending order of severity, the measures are admonitory warning, official warning, reprimand, reduction of salary, suspension of work, official suggestion to resign, disciplinary dismissal.

Dismissal could cause a worker to suffer significant disadvantages, but this is particularly true in cases of disciplinary dismissal. Here, the worker is branded as a disruptive element, resulting in an extremely large disadvantage when seeking re-employment. On the other hand, allowing a disruptive element to remain within a company could hinder the productivity and daily work of other workers.

Thus, the method of rigorously judging the legal validity of disciplinary measures, taking account both of the disadvantage to the worker and of the advantage to the employer, has been established via the principle of legal precedence. In other words, when taking the step of disciplinary dismissal, it is necessary i) to have clearly stipulated in the workplace rules reason for the measure, as well as the type and severity of the measure to be implemented (the principle of nulla poena sine lege, or no punishment without law); ii) to implement a type and severity of measure consistent with those used in similar cases in the past (the principle of equal treatment); iii) for the content of the measure to correspond to the type and degree of violation, as well as other circumstances (the principle of equivalence); and iv) for the procedures for the measure to be fair (due process: screening by a disciplinary committee, granting the employee concerned the opportunity to defend him- or herself).

In that disciplinary dismissal is also a form of dismissal, it was once possible to cite clauses in the amended Labor Standards Act, but today, this issue can be governed by the principle of abusive dismissal carried over to Article 16 of the Labor Contract Act. However, since disciplinary dismissal is a kind of disciplinary measure, it is essentially governed by the principle of abusive disciplinary action as provided in the Labor Contract Act (Article 15). The content and interpretation of provisions on the principle of abusive disciplinary action are the same as with the principle of precedents stated above, but according to the wording of the clause itself, "In cases where an employer may take disciplinary action against a worker, if such disciplinary action lacks objectively reasonable grounds and is not found to be appropriate in general societal terms in light of the characteristics and mode of the act committed by the worker pertaining to such disciplinary action and any other circumstances, such disciplinary order shall be treated as an abuse of right and be invalid".

4. Termination of Employment

A contract with a fixed term is of course terminated when that term comes to an end. In the case of a labor contract, however, the contractual relationship sometimes continues beyond the period in question even if a fixed term is specified. In other words, even employees working under a labor contract relationship with a fixed term may sometimes (i) provide the same labor and be under the same employment management as employees under a labor contract relationship with no fixed term, and not be subject to proper renewal procedures on completion of the contract period. Moreover, (ii) even when the contract period is clearly specified and renewal procedures are properly carried out, there are sometimes circumstances on the worker's side in which continued employment is expected, and in legal terms it is judged that the contractual relationship continues.

In such cases, the courts have analogously applied the principle of abusive dismissal discussed in 1. above, construed "termination of employment" based on completion of the contract period as illegal and invalid, and have ruled that the contractual relationship continues (the "termination of employment principle"; as a case corresponding to (i) above, the 1974 Supreme Court Judgment on the Toshiba Yanagi-cho Factory Case, and as a case corresponding to (ii) above, the 1986 Supreme Court Judgment on the Hitachi Medical Corporation Case). This "termination of employment principle" has been legalized in Article 19 of the 2012 amendment to the Labor Contract Act (and therefore, under existing law,

the "termination of employment principle" is no longer based on analogous application of the principle of abusive dismissal).

Moreover, cancellation of a labor contract during the contract period is not legally recognized unless there are "unavoidable grounds" on the part of the employer (Labor Contract Act, Article 17 para.1). These "unavoidable grounds" are construed more narrowly than the "objectively reasonable grounds" and "appropriateness in general societal terms" applied in the principle of abusive dismissal. Therefore, even if the existence or lack of "unavoidable grounds" is left to individual specific judgments, it is generally construed as being quite narrow and is not easily recognized.