

4 Resignation, Mandatory Retirement and Dismissals, etc.

Resignation and Retirement

This section provides an overview of the main reasons for termination of employment in Japan, particularly from a legal perspective.

1. Resignation

There are several categories of resignation: resignation for personal reasons, in which the worker unilaterally dissolves the contractual relationship with the employer; severance agreement, voluntary retirement, and retirement by worker request, involving mutual agreement between the worker and the employer; and mandatory retirement as dictated by employment contracts, company regulations, or labor agreements.

Legal issues concerning resignation arise when employees are encouraged to retire due to businesses' reorganization or downsizing, or with regard to incentives for early retirement.

When encouragement to retire crosses the line into persistent demands, or even to intimidation or physical violence, it constitutes criminal behavior, and not only the direct perpetrator but also the employer may be held responsible and required to pay damages. According to statistics from the individual labor dispute resolution system, approximately 29% of disputes arising in the workplace relate to "encouragement to retire" (7.5%) or to "bullying or harassment" (21.4%) closely tied to encouragement to retire. (For more details on labor dispute resolution, see Chapter 4, Section 4, "Labor Disputes and Resolution Systems").

When companies offer incentives to employees who retire early, depending on the timing of retirement, the employee may be placed at a disadvantage in terms of the application of financial incentives, or there may be inequality among people retiring, leading to litigation seeking payment of the differential. As there are no legal statutes governing these incentives, the enterprise is free to decide when,

how, and to whom they are applied. As a result, while disadvantageous or unequal treatment of employees with regard to incentives may occur, as a general rule, retiring employees' claims for compensation are not recognized.

Also, in recent years poor yields on investment due to worsening economic conditions have afflicted the company pension programs independently set up and operated by enterprises, and there have been numerous cases of lawsuits concerning payments lower than those originally stipulated, lowering of payout rates, or legal problems related to the wholesale abolition of the program (for more details on company pension programs, see Chapter 6, Section 3, "The Pension System and Public Assistance").

2. Retirement

In Japan, the retirement-age system is entrenched as a corporate program that helps underpin the practice of long-term employment. On the other hand, it also plays the role of helping to curtail the high personnel cost of older workers, as seniority-based wage increases have been the norm in Japan.

According to the overview of findings of the 2014 General Survey on Labor Conditions (Ministry of Health, Labour and Welfare [MHLW], released November 13, 2014), among private-sector enterprises with 30 or more full-time employees, 93.8% have a designated retirement age, and of these, 98.9% designate the same retirement age for all employees. Of these, 81.8% set a retirement age of 60, while 15.5% set an age of 65 or above.

Article 8 of the Act on Employment Stability for Older Persons stipulates that employers cannot designate a retirement age lower than 60, while Article 9 makes it mandatory for employers to take measures to ensure stable employment for workers until the age of 65. These measures were stipulated in a 2004 revision of the Act, which specifically states that employers must either 1) raise the retirement age,

2) introduce a program for continued employment, or 3) abolish a mandatory retirement age altogether (For details, see Chapter 5, Section 3, “Policies Designed to Secure Employment for Older and Disabled Workers”). Under the 2004 revised Act, if a continued employment program for older workers is prepared and implemented according to standards agreed upon by a majority of either labor union members or company representatives, option 2) above is considered to be fulfilled. However, the Act was revised again in 2012 to state that as a basic rule, the continued employment program should be applied to all employees who wish to participate. Also, for employers that have affiliated companies, continued employment at an affiliated company is considered to be included in option 2). These measures are aimed at ensuring stable employment for older persons as the aging of Japanese society progresses, and at facilitating progressive raising of the age when public pension payments start.

As for the status of implementation of measures for ensuring employment *until* the age of 65, as seen in the tabulated results of a 2014 “Status of Employment of Elderly Persons” (released October 31, 2014), as of June 1, 2014, out of approximately 140,000 companies with 31 or more employees 98.1% had introduced measures to ensure continued employment, while the corresponding figure for small and mid-sized companies (with 31-300 employees, accounting for 130,812 companies) was 98.0%. As for the breakdown of type of measures taken, 81.7% had introduced a continued employment program, 15.6% had raised the retirement age, and 2.7% had done away with a designated retirement age altogether. Of those that had introduced a continued employment program, the most common option, 66.2% had introduced a program that applied to all persons aged 65 *or above* who wish to participate, while 33.8% had a program for all persons aged 65 *or above* who meet certain standards (programs that set standards limiting eligibility are legally recognized as a transitional measure). 93.1% of companies enabled employees to continue working only at the company itself, while the remaining 6.9% facilitated continued employment elsewhere than at the company itself. All persons aged 65 *or above* who wish to continue

working can do so at 71.0% of companies, and all those aged 70 *or above* at 19.0%.

According to one viewpoint, the retirement age system, in which employment is terminated for the reason that the employee has reached a certain age, lacks rationality from a legal standpoint, and runs counter to the principle of employment security. However, the general view is that under Japan’s long-term employment system, which revolves around seniority-based wage increases, the retirement age system is rational in that it fulfills the function of ensuring employment for workers up until a certain age, and of maintaining a fresh and vital labor force. In addition, courts of law have not found the retirement age system to be a legal violation (of public policy doctrine, specifically Article 90 of the Civil Code).

With the adoption in recent years of Article 9 of the aforementioned Act on Employment Stability for Older Persons making it mandatory for employers to take measures to ensure employment until the age of 65, there have also been disputes over the legally binding status of this article (whether it has binding force under private law). As Article 8 of the Act is interpreted as a mandatory provision under private law (i.e. setting a retirement age under 60 is illegal and invalid), one interpretation holds that based on legal theory Article 9 is also binding under private law and may be the source of claims for damages and verification of status under employment contracts. However, another argument holds that Article 9 only stipulates employers’ obligations under public law, and denies its binding status in the private sphere.

3. Dismissals

A. 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 (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" (1975 decision). 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" (1977 decision).

This legal principle is an unequivocal mandatory civil provision stipulated in the 2003 amendment of Labor Standards Act (Article 18-2, former Labor Standards Act). 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).

As of 2015, the current administration is considering creation of a system of dispute resolution with more foreseeable outcomes and introduction of a more effective system for resolving financial disputes over dismissal, due to the difficulty in foreseeing dispute resolution outcomes under the Employment Dismissal Regulations of Japan. These moves by the administration indicate that the societal role played by Employment Dismissal Regulations thus far may be subject to change in the future.

B. Collective Dismissals

(Dismissals for Economic Reasons)

In Japan, employment adjustment primarily involves reduction of overtime hours and is carried out in a manner not detrimental to employees (i.e. not resulting in dismissal), with regular employees not removed from a company's ranks unless its business situation is truly severe. This is because of Japanese corporations' emphasis on continuous long-term employment, and also because of the genuine difficulty of dismissing employees due to the Employment Dismissal Regulations that underpin the long-term employment structure.

The legal framework surrounding collective dismissals for economic reasons (euphemistically known as "restructuring") derives from the Employment Dismissal Regulations, and is considered illegal and invalid unless it meets the following four conditions.

On the employer's side, 1) that there is a need to reduce personnel, 2) that the obligation to make efforts to avoid dismissal have been discharged (examples: reducing overtime hours, re-assigning or seconding staff, halting new recruitment, temporarily suspending employment, offering voluntary

retirement, reducing numbers of non-regular employees), 3) 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 4) 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).

Courts' judgments based on Japanese corporations' methods of employment adjustment, taking these four conditions into account, constitute the legal principles of "collective dismissal." These legal principles, unlike those surrounding dismissal traceable to employees (lack of competency, etc.), call for multiple specific circumstances, because the reasons for collective dismissal lie solely with employers' economic situations.

In legal precedents and legal discourse, arguments have arisen over whether the four conditions outlined above constitute "prerequisites" or merely "factors" for legal judgments on dismissals. However, the difference between prerequisites and factors does not make a difference to specific decisions, as in practice, the four conditions are used by courts as a basis for overall judgments.

C. 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 the principle of abusive dismissal 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. 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".

D. 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 1) 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, 2) 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 (when fixed-term contracts are renewed).

In such cases, thus far, 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 1) above, the 1974 Supreme Court Judgment on the Toshiba Yanagi-machi Factory Case, and as a case corresponding to 2) 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).

Also, the Act was revised in 2012 to include a provision where, in cases where fixed-term contracts are repeatedly renewed and the overall length of the contract exceeds five years, and one of the parties to the contract (the worker) applies to the employer for an unlimited contract (i.e. exercises the right to request conversion to an unlimited contract), the employer is deemed to have approved the request, thus facilitating the conversion from fixed-term to an unlimited contract. This provision is aimed at resolving the issue of insecure and unstable employment affecting fixed-term contract workers. Whereas the legal principles surrounding termination of fixed-term employment merely had the effect of facilitating renewal of contracts, the new provision is open to broader legal interpretation, and amounts to an important policy measure that significantly impacts the status of non-regular employees. This is tantamount to an acknowledgment of the expansion of non-regular employment in Japan and the scope of its negative impact on society.

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.