

**A Comparative Research on the Dismissal and
Compensation Systems of China and Japan**

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Introduction

The legal system concerning dismissal and compensation in employment law is one of the most important parts in employment and labor law, which has a great influence on the stability of labor relation and the employment cost. Last year, when the economic situation was downturn in Mainland China (China), there were lots of discussions on the unreasonableness in the dismissal and compensation system in the Labor Contract Law of China (the LCLC). There was even a voice advocating to abolish the LCLC. At that time, the author read an essay entitled `Dismissals in Japan` written by Professor Kazuo Sugeno, the most famous Japanese labor and employment law scholar. In the essay Professor Kazuo Sugeno drew a conclusion that Japanese dismissal law is neither too strict nor too loose for the employer. It is by nature protective for workers, but it does not impose excessive rigidity on the employer for establishing discipline and efficiency on the workplace or carrying out necessary adjustments of the workplace.¹ The essay arose the curiosity of the author to make a comparative study of the dismissal and compensation system between China and Japan to see the difference between the systems in China and Japan and what kinds of lessons we could draw from Japanese systems. This essay includes three parts. The first part introduces the basic regulations concerning the dismissal and compensation in China and Japan. The second part compares the two systems and studies the practical situation during the operation of the two systems. The third part discusses the problems in dismissal and compensation regulation in China and puts forward some suggestions on the improvement of the current regulations concerning dismissal and compensation.

¹Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part One: How Strict Is Japanese Law on Employers?* *Japan Labor Review*, vol. 11, no. 2, Spring 2014, p. 92.

I. The dismissals and compensations in China

i. Background information

Before starting the study, this paper likes to provide two pieces of background information. The first is that the definition of employer and worker in the Labor Law of China (the LLC) and the LCLC are different from those of the laws in industrialized countries; the second is that the LLC and the LCLC have their specific legislation backgrounds. The author believes that with such background information in mind one could understand the dismissal and compensation system better.

First, in the context of foreign labor and employment laws of the western industrialized countries, the two parties of employment relationship are named the employer and the employee, while In Japan they are named employer and worker (労働者). However, in accordance with the LLC and the the LCLC, the parties of the employment under the LLC or the LCLC are named the employing unit and worker (劳动者). The employing units include the government agencies, non-profit organizations such as schools and hospitals and all kinds of enterprises. An individual person, a farm owner or a family are beyond the scope of the employing units in China. In 2000, the Supreme Court of China issued an interpretation stating that the following disputes are not considered disputes in labor and employment laws: the disputes between an individual person and a family with a domestic worker; the disputes between an individual artisan with an apprentice or a helper; disputes between lease holding rural household and its workers.²

The second is to understand that Chinese market economy was transformed from planned economy. LCC and the LCLC were enacted during the transforming period. In the planned economy period (from 1949 to 1978), China practiced state-owned economy system. In the cities only state-owned or collective-owned enterprises were allowed at that time. In the state-owned factories, all of the regular workers were enrolled and sent to work by the government, and the regular workers had lifelong employment relation with the state. At that time, there were few temporary workers working in the state-owned enterprises. In the late 1970s, private economy was gradually permitted. Later, the foreign economy was also permitted in China. However, at that time, the employment systems were different with regard to the difference in the economic sections. In the state-owned enterprises lifelong employment were practiced, and in other enterprises labor contracts were practiced. Seeing the efficiency and vitality in the non-state-owned enterprises by practicing the labor contract system, the state-owned enterprises began to practice the labor contract reform. On July 12, 1986, the State Counsel issued a decision which provided that from the day on, the newly-enrolled workers would be

² 《最高人民法院关于审理劳动争议案件适用法律若干问题的解释》（一）【法释（2001）14号】。

contracted workers, and however, the former life-long workers still could keep their former status. Only after the enforcement of Labor Law of China from 1995, workers in different economic section were treated equal.

According to the Labor Law of China, there are three types of employment contract, the fixed-term contract, the contract without a fixed term and the contract with time limit for the completion of certain amount of work. One outstanding characteristic of the LLC is that it encourages fixed-term employment contract. A labor contract without a fixed term shall be concluded if the worker requests for the conclusion of labor contract without a fixed term after working continuously with the employing unit for more than 10 years and with agreement between both of the parties involved to prolong their contracts.³ The reason that such a regulation was established is that the legislators believed that the `iron bowl` (which means the life-long employment) is one of the most important reasons that resulted in the inefficiency of the state-own enterprises. Therefore, the LLC was based on such a notion the unstable employment relation was loaded with the function to improve the efficiency of the enterprises. However, the prevalence of fixed-term employment contracts in China resulted in problems: first, many employing units refused to sign contract with workers, which made it difficult for the workers to advocate their rights whenever any disputes arise; second, the majority of employing units choose to sign short fixed-term employment contracts with workers, mostly one year contract or contract within one year; third, under the situation with no contract or short fixed-term employment contract, it was very difficult for workers to claim their rights, and they faced the difficult situation in which they had to choose between jobs and rights; fourth, the short fixed-term employment contract replaced the function of disciplinary dismissal, the employing unit could end the employment relation just by waiting the short fixed-term employment contract to be terminated; fifth, when the employment relation is unstable, the workers had no sense of security to their employments, which made it difficult for them to settle down. Therefore, in 2007 when the LCC was drafted, there was voice to stabilize the labor relation so as to improve the conditions of the workers and the enforcement of the Labor Law. The following dismissal and compensation system was mainly established under the above background.

ii. The types of dismissals and the procedures in China

Usually, dismissal means to remove somebody from a position or service while the employment contract is still binding, which is caused by some special circumstances in the parties of worker and employing unit or due to the economic situations. The types of dismissals and the relating compensations are mainly included in the LCLC.

³See Article 20 of the LLC. Under such a regulation, no one could conclude an employment contract with the employer, for the employer argues that the party of the employer only hopes to conclude a fixed-term employment contract, and the agreement between both of the parties involved to prolong their contracts could only be established upon that the party of the worker agrees the fixed-term employment contract.

A. The consensual termination proposed by an employing unit

The employment relationship could be terminated if either of the parties proposes to end the employment relation and then both sides reach an agreement whether it is a fixed-term labor contract, a labor contract without a fixed term or a labor contract with time limit for the completion of certain amount of work. In accordance with the regulations in the LLC and the LCLC, if the employing unit proposes to terminate the employment relation and then reach an agreement with a worker with respect to the termination, the employing unit needs to pay the severance payments to the workers according to Article 46 (2) of the LCLC. On the contrary, if a worker proposes to end the employment relation, no severance payments shall be paid from the employing unit to the workers. For the revocation of a labor contract through negotiations, there are no special requirements in the procedure.

B. The summary dismissals without advance notice

The summary dismissal means that when an employing unit makes a decision to dismiss a worker without advance notice. The summary dismissal is applied only when a worker has serious faults or during the probation period the worker is proved to be unqualified. In accordance with Article 39 of the LCLC, the employing unit may have the labor contract revoked and dismiss the worker if the worker is found in any of the following circumstances: (1) being proved unqualified for recruitment during the probation period; (2) seriously violating the work rules of the employing unit; (3) causing major losses to the employing unit due to serious dereliction of duty or engagement in malpractices for personal gain; (4) concurrently establishing a labor relationship with another employing unit, which seriously affects the accomplishment of the task of the original employing unit, or refusing to rectify after the original employing unit brings the matter to his attention; (5) invalidating the labor contract as a result of the circumstance specified in subparagraph (1) of the first paragraph of Article 26 of this Law;⁴ or (6) being investigated for criminal responsibility in accordance with law. The workers shall not be paid any compensation for such dismissals

For the summary dismissals, the employing unit is required to notify the trade union of the reasons in advance and if the employing unit violates the provisions of laws or administrative regulations or the labor contracts, the trade union shall have the right to demand that the employing unit put it right. The employing unit shall consider the trade union's opinion and notify the trade union in writing of the settlement of the matter.⁵

⁴Article 26 provides that a labor contract shall be invalid or partially invalid under one of the following circumstances:(1) The labor contract is concluded or modified against a party's true intention by means of deception or coercion, or when the party is in precarious situations.

⁵Article 43 of the LCLC provides that“Where an employing unit intends to revoke a labor contract unilaterally, it shall notify the trade union of the reasons in advance. If the employing unit violates the provisions of laws or administrative regulations or the

For the dismissals due to the reasons of seriously violating the work rules of the employing unit or causing major losses to the employing unit due to serious dereliction of duty or engagement in malpractices for personal gain, the employing units need to have effective work rules because Article 4 of the LCLC stipulates that when formulating or modifying the work rules, or making decisions on important matters, which have a direct bearing on the immediate interests of workers, such as labor remuneration, working hours, rest and vacation, occupational safety and health, insurance and welfare, training, labor discipline and labor quota control, the employing unit shall, after discussion by the conference of workers or all the workers, put forward plans and suggestions and make decisions after consulting with the trade union or the representatives of the workers on an equal footing.⁶ Also, according to the Labor Law of China⁷ and the relevant interpretation of the Supreme Court of China,⁸ a set of effective work rules should fulfill three requirements, enacted through procedures required by the laws, no illegal provisions included and promulgated to the workers.

The enactment of the LCLC brought great impacts to disciplinary dismissal. As mentioned above, before 2008, the employing units usually signed short fixed-term labor contracts, mostly one year contracts or less than one year contracts. In practice, the short fixed-term labor contracts could function as working rule, for the employing units had the rights to refuse to renew the labor contracts when the fixed-term contract terminated. Some employing units even did not sign any written labor contract with the workers. Under such a situation, the employing units could easily dismiss the workers without any cost.

However, the LCLC stipulates that if an employing unit does not sign a written labor contract with a worker within one month starting from the day the worker begins to work for the employing unit, the employing unit shall pay double wages to the worker from the second month until to the end of one year.⁹ Also, Article 46 (5) of the LCLC stipulates that an employing unit shall pay severance payment to a worker when the fixed-term labor contract is terminated.¹⁰ These two new rules force the employing unit into an impasse. If the employing unit does not want to pay the severance payments, there would be only two ways left: to give the worker the summary dismissal or the worker quitting the job voluntarily. Therefore, a worker could only be legally dismissed for violation of the work rules of an employing unit where the employing unit has effective work rules.

For such a kind of dismissal, the employing units also require to notify the trade union of the reasons in advance and if the employing unit violates the provisions of laws or administrative regulations or the labor

labor contracts, the trade union shall have the right to demand that the employing unit put it right. The employing unit shall consider the trade union's opinion and notify the trade union in writing of the settlement of the matter.”

⁶Article 4 of the LCLC.

⁷Article 4, 25 and 89 of the Labor Law of China.

⁸Article 19 of the *Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labor Dispute Cases (I)* [法释〔2001〕14号].

⁹Article 82 of the LCLC.

¹⁰Article 44 (1) of the LCLC.

contracts, the trade union shall have the right to demand that the employing unit put it right. The employing unit shall consider the trade union's opinion and notify the trade union in writing of the settlement of the matter.¹¹

C. The dismissals of workers with advance notice

The dismissals of workers with advance notice are applied in two situations: first, a worker could not perform the labor contract because of his personal reasons but without personal faults; second, an employing unit is in a difficult economic situation and could not perform the labor contract and has to dismiss the workers to meet the challenges of the economic situation.

a. The dismissals due to the incompetence of the workers

An employing unit is entitled to dismiss a worker if the competence to work is lost due to the personal reasons. Article 40 of the LCLC provides that an employing unit may revoke the labor contract, if it notifies in writing the worker of its intention 30 days in advance or after paying him an extra one month salary in the circumstances: (1) the worker is unable to take up his original work or any other work arranged by the employing unit on the expiration of the specified period of medical treatment for illness or for injury incurred when not at work¹²; (2) the worker is incompetent for the post and remains incompetent after receiving a training or being assigned to another post.

b. The dismissals for the objective conditions

In accordance with Article 40 (3) of the LCLC, where the objective conditions taken as the basis for conclusion of the contract have greatly changed so that the original labor contract cannot be performed and, after the consultation of the employing unit with the worker, no agreement could be reached on modification of the contents of the labor contract, an employing unit has the right to dismiss the workers. For such a kind of dismissal, the employing unit is also required to notify the dismissed worker 30 days in advance or pays one month wage instead of the advance notice.

c. The dismissal for economic reasons of the employing unit

¹¹Article 43 of the LCLC provides that“Where an employing unit intends to revoke a labor contract unilaterally, it shall notify the trade union of the reasons in advance. If the employing unit violates the provisions of laws or administrative regulations or the labor contracts, the trade union shall have the right to demand that the employing unit put it right. The employing unit shall consider the trade union's opinion and notify the trade union in writing of the settlement of the matter.”

¹²Such a period is from 3 months to 24 months according to the total service years and the service years with the last employing unit. See 《企业职工患病或非因工负伤医疗期规定》【劳部发[1994]479号】。

The dismissal of workers for the economic reasons refers to the dismissals under the following circumstances: (1) the enterprise is to undergo reorganization pursuant to the provisions of the Law on Enterprise Bankruptcy of China; (2) the enterprise is in dire straits in production and management; (3) the enterprise changes its line of production, introduces a major technological updating or adjusts its business method, and, after modification of the labor contracts, still needs to reduce its personnel; or (4) the objective economic conditions taken as the basis for conclusion of the labor contracts have greatly changed, so that the original labor contracts cannot be performed.¹³

The dismissal for the economic reasons is subdivided into two types, one is the small-number dismissals and the other is mass dismissals. The small-number of dismissals refers to less than 10% workers or less than 20 workers in an employing unit are dismissed for economic reasons. There are no special requirements for the procedures of such a dismissal. An employing unit is only required to notify the dismissed worker 30 days in advance or pay one month wage instead of the advance notice.

The mass dismissal refers to the circumstance where an employing unit needs to cut employment by more than 20 persons, or by less than 20 persons, which, however, accounts for more than 10 per cent of the total number of the employing unit's workers. The mass dismissal needs to follow the procedures: (1) explaining the situation to the trade union or all of its workers 30 days in advance; (2) soliciting opinions from among the trade union or all of its workers; (3) submitting its plan for dismissing workers to the administrative department of labor. Then, the employing unit is also required to notify the dismissed worker 30 days in advance or pay one month wage instead of the advance notice.

D. The revocation of labor contract by the workers

Usually, the dismissal only refers to the situations where a worker passively loses his or her job. On the contrary, if a worker actively revokes the labor contract and leaves the employer, there is not any compensation to the employee from the employer. However, in China Article 38 of the LCLC lists the situations where a worker revokes labor contracts and leaves the employing unit due to the faults of the employing unit, the worker is also entitled to get compensation. The purpose of such legislation is to force the employing unit to abide the laws. Article 38 provides that a worker may revoke his or her employment contract if the employing unit: (1) fails to provide the labor protection or working conditions specified in the labor contract; (2) fails to pay labor compensation in full and on time; (3) fails to pay the social insurance premiums for the worker in accordance with the law; (4) has work rules that violate laws or regulations, thereby harming the worker's rights and interests; (5) causes the employment contract to be invalid due to a circumstance specified in the first paragraph of Article 26 hereof; (6) gives rise to another circumstance in which laws or

¹³Article 41 of the LCLC.

administrative statutes permit a worker to revoke his or her employment contract. If an employing unit uses violence, threats or unlawful restriction of personal freedom to compel a worker to work, or if a worker is instructed in violation of rules and regulations or peremptorily ordered by his employing unit to perform dangerous operations which threaten his personal safety, the worker may revoke his employment contract forthwith without giving prior notice to the employing unit.

iii. The economic compensations for dismissed workers

A. The situations where an employing unit shall pay economic compensations

Normally, an employing unit shall pay the economic compensation to workers where a fixed-term labor contract terminates (unless the worker himself does not hope to renew the labor contract) or a worker is dismissed without personal faults no matter the worker is under a fixed-term labor contract or a labor contract without a fixed term. The situations where an employing unit shall pay economic compensations are provided in Article 46 and the specific situations are as follows: (1) a worker revokes the labor contract pursuant to the provisions in Article 38 of the LCLC; (2) the employing unit proposes revocation and reaches an agreement with the worker thereon through negotiation in accordance with Article 36 of the LCLC; (3) The employing unit revokes the labor contract pursuant to the provisions in Article 40 of the LCLC as mentioned above, for the worker does not have personal liability under such circumstances; (4) The employing unit revokes the labor contract pursuant to the provisions in the first paragraph of Article 41 due to economic reasons of the employing units; (5) the fixed-term labor contract is terminated pursuant to the provisions in Article 44 (1) of the LCLC, except that the worker does not agree to renew the contract even though the employing unit maintains the same conditions as, or offers better conditions than, the ones stipulated in the previous contract, which is mentioned above too; (6) the labor contract is terminated pursuant to Article 44 (4), where the employing unit is declared bankrupt in accordance with law, or where the business license of the employing unit is revoked, the employing unit is ordered to close down or to dissolve, or it decides to dissolve on an earlier date; (7) under any other circumstances provided for by laws or administrative regulations.

B. The standards of economic compensation and damages

a. The standards of economic compensation

In China, the economic compensation shall be paid based on the number of years of service in the employing unit at the rate of one month's wage for each full year worked. Any period of not less than six months but less than one year shall be counted as one year. The economic compensation to a worker for any period of less than six months shall be one-half of his monthly wages. However, for those workers whose monthly wage is greater than three times the average monthly wage of workers in the area of the employing

unit, the rate for the economic compensation paid to the worker shall be three times the average monthly wage of workers and shall be for not more than 12 years of work. The term “monthly wage” means the worker's average monthly wage for the 12 months prior to the termination or ending of his employment contract.¹⁴

b. Damages due to illegal dismissal

Before the LCLC was enacted in 2008, for a worker who claimed that he or she had been illegally dismissed, the only two results they could get through arbitration and civil litigation were, first, if the dismissal was legal, the worker would lose the job forever; if the dismissal was illegal, the only choice for the worker was to resume his former position. However, the labor relation had been deteriorated due to the labor disputes, and in most of the circumstances, the worker did not like to go back. But if the worker did not choose to go back, there would be nothing for the worker to get through arbitration and civil litigation. Such a situation put the workers who had been illegally dismissed into a predicament. Such a situation has been improved with the enactment of the LCLC, for Article 48 provides that if an employing unit terminates or revokes an employment contract in violation of the LCLC and the worker demands continued performance of such contract, the employing unit shall continue performing the contract. If the worker does not demand continued performance of the employment contract or if continued performance of the employment contract has become impossible, the employing unit shall pay damages pursuant to Article 87 hereof. The standard of damages is double compensation, which means two-month wages for one year's service.

iv. The procedures to resolve dismissal disputes and actual situation in China

A. The procedure to resolve dismissal disputes

There are three procedures for dismissed workers who wish to raise their grievance which include mediation, labor arbitration and civil litigation. The mediation procedure offered by labor dispute mediation committee in the employing unit or the local people's mediation organization is elective for grievant. In practice, most of the labor dispute cases start from the labor arbitration tribunal, which is a compulsive procedure to settle labor disputes including disputes relating to dismissals. The labor dispute tribunals are in charge by the Labor Dispute Arbitration Committee. According to Article 19 of *the Labor Dispute Mediation and Arbitration Law of China (LDMALC)*, Labor Dispute Arbitration Committee is composed of three parties, the representatives from Department of Human Resource and Social Security, Union, and Employer Unit, and the chairman of the committee shall be from Department of Human Resource and Social Security. Therefore, the Labor Dispute Arbitration Tribunals are dominated by Department of Human Resource and Social Security, which is similar to administrative arbitration in nature.

¹⁴Article 47 of the LCLC.

In China, labor dispute arbitration is quite swift. The decision of a labor dispute case shall be made within 45 days since the case is docketed by the arbitration committee. A case could be prolonged due to the complexity with the approval of the dean of arbitration committee. However, the prolonged time shall not exceed 15 days. The parties could bring a case directly to the civil court if no decision has been made after the time runs out.

In China, the Labor Arbitration Tribunals award two types of arbitration decisions: final decision and non-final decision. With the purpose to make the labor dispute arbitration swift and solve the disputes quickly, LDMALC establishes a conditional and limited final arbitration system. The final arbitration only applies to the labor disputes claiming for wages, medical expense of industrial injury, economic compensation and indemnity, and the sum of money of such claims shall not exceed 12 month minimum wages; and the labor disputes relating to the enforcement of labor standards, such as working time, rest and vocation, social security and etc.¹⁵

The final arbitration only applies to the employer, which means that if the employer is not satisfied with the decision, the employer is prohibited to bring an action to the civil trial court. What the employer could only do is to make an application to the appeal court to have the arbitration revoked which is very difficult and needs to meet the strict requirements. Such requirements include: (1) error in the application of the laws and regulations; (2) outside of the jurisdiction of labor dispute arbitration committee; (3) the evidence which would influence the arbitration decision being hidden by the opposing party; (4) the arbitrators have committed embezzlement, accepted bribes or done malpractices for personal benefits or perverted the law in the arbitration of the case. If arbitration decision were revoked, the parties could bring an action to the civil trial court within 15 days since the written verdict is received. However, if a worker is not satisfied with such final decision, he/she could bring an action to the civil trial court within 15 days since the arbitration decision is received. As to the non-final arbitration, if the parties do not bring an action to civil trial court within 15 days since the arbitration decision is received, the decision of the arbitration would take effect.

B. The actual situation concerning dismissal in China

In China, the labor dispute concerning dismissal and termination is one of the most common types of labor disputes. Normally, even if a worker knows that the labor rights are infringed, the worker usually would not bring the suits against the employing unit for the reason that during the employment, the worker would hope to ruin the labor relation. However, in the event that the worker is dismissed, he or she would bring the case to the arbitration tribunal claiming all the rights that he or she could deserve in law. The common claims would concern wages, social insurance, dismissal and termination.

¹⁵Article 47 of LDMALC.

Table 1: The Number of Labor Dispute Cases in Mainland China from 2001 to 2015

Year	Disputes on wages	Disputes on social insurance	Dismissal and termination of labor contracts	Total cases accepted	Percentage of dismissal and termination
2001	45172	31158	39336	154621	25.5%
2002	59144	56558	43848	184116	21.4%
2003	76774	76181	52060	226391	23.0%
2004	85132	88119	57021	260471	21.9%
2005	103183	97519	68873	313773	21.9%
2006	103887	100342	67868	317162	21.4%
2007	108953	97731	80261	350182	22.9%
2008	225061	146325	139702	693465	20.1%
2009	247330	143685	43876	684379	6.4%
2010	209968	136566	31915	600865	5.5%
2011	200550	149944	118684	589244	20.1%
2012	225981	159649	129108	641202	20.1%
2013	223351	165665	147977	665760	22.2%
2014	258716	160961	155870	715163	21.8%
2015	321179	158002	182396	813859	22.4%

If workers are illegally dismissed, in most of the cases, the workers would choose to claim for damages instead of restoration due to the reason that the standard of damages is high. For example, if a worker has served the employing unit for ten years, the worker could claim for damages of the wages of 20 months. In practice, the arbitrators and judges are usually cautious in ruling the illegal dismissals of the employing units so as to avoid to order the employing units to pay high damages.

II. The dismissal and compensation in Japan

i. Consensual termination

In Japan, a consensual contract-termination refers to an agreement between a worker and an employer to prospectively terminate a labor contract is not subject to the dismissal rules of the Labor Standards Law or the legal principles governing abusive dismissals.¹⁶ In practice a resignation on the request of the employer amounts to an agreed-upon contract termination. However, after the resignations have been submitted to the employer, the worker would often deny the effectiveness of the resignations. Judicial decisions have held that the resignations could be withdrawn before it is accepted by the employer. Therefore, the disputes were resolved around whether the employer has expressed their consent.¹⁷ Because such a termination is reached through negotiation between the worker and the employer, there is no compensation required by statutory rules.

ii. The dismissal under contracts for a fixed-term

As a general rule, where an employment contract is for a fixed term, the employer may not dismiss the worker during the term, but is permitted “immediate canceling of the contract” (i.e. prompt dismissal of the worker) only “if any unavoidable cause exists.” If that cause is due to the employer’s fault, the employer will be liable to pay damages to the workers. If the fixed-term employment contract is renewed in an implied way, the employer may not dismiss the worker in the same manner as under a contract without a fixed term.¹⁸

In Japan, the case law relating to restricting the refusal to renew repeatedly renewed fixed-term contracts plays an important role in limiting the right of the employer to renew the labor contract. In the 1960s and early 1970s, Japan enjoyed long-term economic growth. Many fixed-term workers have been employed for many years by renewing their fixed-term contracts and their employment relation had become indistinguishable from that of the workers under contracts without a fixed term. In *Toshiba Yanagi-cho plant* case, the Supreme Court of Japan held that where there was a desire for continued employment on part of both contracting parties, where the fixed-term contracts were repeatedly renewed so many times that they were de facto indistinguishable from the contracts without a fixed term, the refusal to renew is tantamount to a dismissal, and accordingly the legal theory concerning dismissal applies by analogy. Thus, a case law was established that

¹⁶Kazuo Sugeno, *Japanese Employment and Labor Law*, translated by Leo Kanowitz, Carolina Academic Press, 2002, p. 390.

¹⁷Kazuo Sugeno, *Japanese Employment and Labor Law*, translated by Leo Kanowitz, Carolina Academic Press, 2002, p. 390.

¹⁸Kazuo Sugeno, *Japanese Employment and Labor Law*, translated by Leo Kanowitz, Carolina Academic Press, 2002 p. 395.

required an objective and rational reason for terminating employment relation by not renewing a fixed-term contract that has been repeatedly renewed.¹⁹

In *Hitachi Medico* case, the Supreme Court of Japan further held that even where the fixed-term contracts were not indistinguishable from the contracts without a fixed term, the theory concerning dismissal shall apply by analogy when there was an expectation of continued employment and the contract was renewed five times.²⁰

Though the employment of the security of the fixed-term workers are protected in Japan, one should know that they are not protected equally with that of the workers without a fixed-term labor contracts. The Supreme Court held that when an employment adjustment plan is implemented, it is reasonable for management to terminate fixed-term workers prior to regular workers and it is not required that management solicit voluntary retirement from the workers under contracts without a fixed term before terminating the employment of the fixed-term workers. The difference in the extent of protection of employment security reflects the facts that the company invests heavily in and follows a careful procedure to employ the workers without a fixed term and hopes that the workers would stay in the company for a long time.²¹

iii. Dismissals under labor contracts without a fixed term

A. Civil Code principles

The Civil Code of Japan provides that if employment is not for a definite term, either party may make a request to terminate the contract at any time, in which event the contract will be extinguished two weeks after the request is made.²² Thus, in accordance with the civil principles, an employer has the right to dismiss a worker if the employer notifies the worker two weeks before the dismissal. On the other side, a worker has the same right as that of the employer. So, it could be called the right or freedom to terminate a labor contract.

B. Regulation by the Labor Standards Law

a. Limitation of dismissals during the periods of maternity leaves and medical treatment of work-related injuries

However, such a freedom is limited by the Labor Standards Law. First, an employer is not allowed to dismiss a worker during the period of rest for medical treatment with respect to injuries and illnesses resulting

¹⁹Takashi Araki, *Changing Employment Security in Japan*, p.37.

²⁰Takashi Araki, *Changing Employment Security in Japan*, p.38.

²¹Takashi Araki, *Changing Employment Security in Japan*, p.38.

²²Kazuo Sugeno, *Japanese Employment and Labor Law*, translated by Leo Kanowitz, Carolina Academic Press, 2002 p. 395.

from employment nor within 30 days thereafter. Also, a woman during the period of rest before and after the childbirth in accordance with the provisions of Article 65 of the Labor Standards Law or within 30 days thereafter is not allowed to be dismissed.²³

One exception to the above limitations of dismissal is where, with respect to a dismissal during medical treatment for an accident incurred in the course of employment, the employer pays compensation for the discontinuance of the benefits in accordance with Article 81 of Labor Standards Law²⁴, which provides that in the event that a worker receiving compensation pursuant to the provisions of Article 75 fails to recover from the injury or illness within 3 years from the date of commencement of medical treatment, the Employer may pay compensation for discontinuation of the said medical compensation, equivalent to the average wage that would be earned over 1,200 days; thereafter, the employer shall not be obligated to pay compensation under the provisions of the Labor Standards Law.

A second exception, which applies to the restriction on dismissal for work-related accidents and before and after childbirth, is “when the continuance of the enterprise has been made impossible by a natural disaster or other unavoidable cause”. The natural disaster or other unavoidable cause does not include the business fluctuations or mistaken business forecasts.

b. Notice of dismissal

In the event that an employer wishes to dismiss a worker, the employer must provide at least 30 days advance notice. An employer who does not give 30 days advance notice is required to pay the average wage for a period of not less than 30 days and the number of days of notice may be reduced only by the number of days that the employer pays the average daily wage.²⁵ Therefore, the rule of 14 days advance notice in the Civil Code is changed by the Labor Standards Law. However, where “the continuance of the enterprises has been made impossible by a natural disaster or other avoidable cause” or “the worker is dismissed for reasons attributable to the worker”, neither the notice nor the notice allowance is required”. It should be noted that summary dismissal of workers requires the approval of the administrative office. In accordance with Article 21 of LSL, in the following situations the advance notice of dismissal is not applied: (1) workers who are employed on a daily basis; (2) workers who are employed for a fixed period not longer than 2 months; (3) workers who are employed in seasonal work for a fixed period not longer than 4 months; (4) workers serving during a probationary period.

²³Kazuo Sugeno, *Japanese Employment and Labor Law*, translated by Leo Kanowitz, Carolina Academic Press, 2002 p. 396.

²⁴Kazuo Sugeno, *Japanese Employment and Labor Law*, translated by Leo Kanowitz, Carolina Academic Press, 2002 p. 397.

²⁵Kazuo Sugeno, *Japanese Employment and Labor Law*, translated by Leo Kanowitz, Carolina Academic Press, 2002 p. 398.

C. Regulation by the trade union law and by collective agreements

In Japan, the dismissals of workers for engaging in proper union activities would be invalid as violation of public policy contained in the guarantee of organizational and other rights in Article 28 of the Constitution. As unfair practices, such dismissals are subject to Labor Commission remedial orders.

Also, dismissal is regulated by collective agreements, which functions in three ways: the first is through the regulation of pre-dismissal procedures and the clauses in the collective agreement may require consultations with the trade union before the disposal; the second collective agreements regulate the reasons for the dismissal specifying the grounds for dismissal; the third is concerned with the post procedure of the dismissal, such as the grievance procedure etc.

D. Regulation by doctrine of abusive dismissal

a. The formation and establishment of the doctrine of abusive dismissal

By 2003, though the statutes, such as Labor Standards Law, provide some situations where the dismissals were not permitted, the freedom of dismissal has been maintained apart from the listed limitations, which was quite different from some foreign legislation which clearly required that there should be rational reason for dismissals.

However, in the period of riots after World War II, the dismissal meant the deprivation of food of the worker and the family. Therefore, at that time there were lots of cases in which the freedom of dismissal was limited. During such process, the Supreme Court of Japan formed the doctrine of abusive dismissal. The Supreme Court formalized these legal principles by declaring that “even when an employer exercises its right of dismissal, it will be void as an abuse of the right if it is not based on objectively reasonable grounds so that it cannot receive general social approval as a proper act.”²⁶

In 2003, when the Labor Standards Law was revised, the case law of abuse of dismissal right was added in Article 18, which provides that the dismissal without object and reasonable excuses not accepted by the reasonable social conceptions shall be void for abuse of rights. In 2007 when the Labor Contract Law of Japan was enacted, this Article was transplanted to Article 16.

b. The contents of reasonable grounds for dismissal

²⁶Kazuo Sugeno, *Japanese Employment and Labor Law*, translated by Leo Kanowitz, Carolina Academic Press, 2002 p. 402.

In Japan, there are roughly four types of reasonable grounds for dismissal. The first is the worker's incompetence, or the worker's lack, or loss, of the skills or qualifications required for the performance of the worker's job. The second is where the worker has engaged in an act that violates a disciplinary rule. The third is a ground based on business necessity. The fourth is the where a union demands the dismissal based on a union shop agreement. Specific determinations with regard to these types must be made in individual cases. With regard to the first three, however, the reasons for the dismissal generally have to be so seriously that the employer cannot be expected to maintain the employment relationship with the employer.²⁷

E. The dismissal for economic difficulties

There are several elements relating to the dismissal for economic reasons, otherwise, the adjust dismissal is an abuse of the right to dismiss.²⁸ First, there must be a necessity of dismissal. In the past cases in Japan there once required that one enterprise would surely result in bankruptcy if its workers had not been dismissed. Such a method was criticized for that the court made judgment on the operation of enterprise. As a result, at present the court would respect the judgment of the court though the court still examine the state of operation in detail. It could also be accepted if only one branch is stagnant while one enterprise is in good state as a whole.

Second, there should be efforts to avoid dismissals on the side of employer. Even if it is positive that there is a necessity to dismiss workers, it does not mean there would be dismissals of workers immediately. The employer should first try other methods, such as decreasing the overtime work, stopping to employ the new workers, temporary vocation days. Otherwise, the dismissals would be treated as the abuse of dismissals.

The third is that the fairness of the standards in the choice of dismissed workers. The typical example is that it has been held as violation of law to choose the union member or to choose the wife while a couple work for the same employer. Besides, it is considered illegal where the employer makes a choice at random without objective and rational standards. However, there are no clear objective and rational standards that are applied in any situations of dismissals. Nevertheless, even there are objective and rational standards, the choices could be denied in the event they are not fairly applied.

The fourth is the properness in the procedure such as explanation or negotiation. If there are clauses in the collective agreements that require negotiation between the employer and the union, the dismissals without such negotiations would violate the negotiation obligation. However, even if there are no such obligations in the collective agreement, the courts also require the employer negotiate with the trade union or the group of workers as to the time, scale and methods of the dismissals.

²⁷Kazuo Sugeno, *Japanese Employment and Labor Law*, translated by Leo Kanowitz, Carolina Academic Press, 2002 p. 402-403.

²⁸Takashi Araki, *Labor and Employment Law in Japan*, the Japan Institute of Labor, 2002, p.26.

Typically, in the case that redundancy exists, labor and management at each enterprise first engage in joint consultations to share information and to form understanding on the scale and gravity of business crises. They then discuss a wide range of practical issues, including the goals of cost reduction and the methods to attain them. In particular, they perform serious negotiations on the necessity of reducing the workforce and means of doing so. When labor and management find it necessary to resort to termination of employment at a certain scale, they work out a voluntary-retirement program with additional compensation as generous as they can afford. They find dismissals unavoidable only when they cannot attain the goal of downsizing of employment with such alternative measures. Then they will discuss the number of workers to be dismissed, the amount of additional retirement payment, and the method of selecting such workers. Most of those labor and management negotiations are carried out successfully, with adjustments made to their positions. According to the 2012 JILPT Hiring and Termination Survey, labor and management reached agreements in 84.1% of negotiations resulting in economic dismissals.²⁹

F. Wages during the dismissal period

If a worker has been dismissed without reasonable grounds, and the worker brings a lawsuit against the employer and obtains a judgment holding that the dismissal violates the law and thus is void, therefore, the worker restores his job. During the period from and after the dismissal until the judgment that holds the dismissal is void, the labor relation on the part of the worker will still exist. Because the worker could not do his work due to the wrongful dismissal, the worker is entitled to claim for the wages for the period of dismissal.

However, in the case where the worker's unlawful act falls within the work rules' grounds for disciplinary dismissal, and a disciplinary dismissal is a little too severe and is therefore held to be an abuse of right of dismissal. Under such a situation, if it is very difficult for the employer to make a judgment, the inability of the worker to work during the period of dismissal should not be attributed to the employer. Where a right to claim wages during the period of dismissal is confirmed by court, the wages the worker could get is the same as if the worker has not been dismissed, which means a big sum of money, including basic wage, various allowance, bonuses and the like.³⁰

In accordance with the last paragraph of Article (2) of Civil Code of Japan, during the dismissal, if the worker works in another workplace and earns income, and the income should be deducted from the back-pay wages. Article 26 of Labor Standards Law provides that the worker should get at least 60% of the average wage during the period the worker works normally. Because in Japan the lawsuit often takes quite a long time and the sum of wages paid back to the worker usually is a big sum of money if the dismissal held void.

²⁹Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part Two: How Frequently Do Employers Dismiss Employees?* *Japan Labor Review*, vol. 11, no. 4, Autumn 2014, p. 121.

³⁰Kazuo Sugeno, *Japanese Employment and Labor Law*, translated by Leo Kanowitz, Carolina Academic Press, 2002 p. 404-405.

G. Compensation for the workers dismissed

In a case concerning with dismissal dispute, if the court finds that the dismissal is abusive and, accordingly, invalid, the court will confirm the continuation of employment relations and will order the employer to compensate the worker for the loss of earnings as mentioned above. The amount of compensation is usually the sum of the salary that the worker would have been paid between the date of the dismissal and the date of the court judgment.³¹ Because the civil procedure is quite long, therefore the amount of money compensated to the unjustly dismissed worker is quite a lot. It should be noted that only a small number of workers were reinstated; the percentage was approximately five percent of the number of dismissal disputes.³²

iv. Administrative and Judicial Procedures to resolve dismissal disputes and the actual situations of dismissals in Japan

A. Administrative and Judicial Procedures to Resolve Dismissal Disputes

In Japan, there are four administrative and judicial procedures for dismissed workers who wish to raise their grievance, The first and second layers are the consulting and conciliation services offered by the Labor Administration and the third and fourth layers are the labor-tribunal and the civil-procedure systems administered by the judiciary. Those four layered services and procedures are elective for grievants namely, the parties of the disputes are free to choose (or skip) any of the services or procedures in any order. However, as a matter of practice, the parties tend to start with the first layer, and proceed to the second, then to the third, and finally to the fourth layer, if the dispute is not resolved at the first or intermediate layers.³³

The first layer is the information and consultation services provided by Regional Offices of the National Labor Administration. When requested, such Regional Offices provide such services to both employers and workers regarding all kinds of questions arising from employment relations, which greatly help the parties to clarify and assess the situations. If the worker using the service wishes to pursue his or her legal claim, the Office may request the employer to appear in the Office to discuss how to resolve the dispute. This advisory service is done informally and expeditiously (usually within one month from the date of consultation).³⁴

³¹Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part One: How Strict Is Japanese Law on Employers?* *Japan Labor Review*, vol. 11, no. 2, Spring 2014, p. 90.

³²Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part Two: How Frequently Do Employers Dismiss Employees?* *Japan Labor Review*, vol. 11, no. 4, Autumn 2014, p. 127.

³³Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part One: How Strict Is Japanese Law on Employers?* *Japan Labor Review*, vol. 11, no. 2, Spring 2014, p. 88.

³⁴Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part One: How Strict Is Japanese Law on Employers?* *Japan Labor Review*, vol. 11, no. 2, Spring 2014, p. 89.

The second layer is the conciliation service provided by a panel set up in the Regional Offices mentioned above. The panel is usually composed of practicing lawyers and law professors serving on a part-time basis. If requested by either party of a dispute concerning employment relations, a member of the panel, with the assistance of the staff of the Office, ascertains the facts of the case and the allegations of both parties, and proposes a settlement. The service is free and speedy, without any charge, in most cases, within one session of a few hours (within two months of the request for conciliation). The success rate of such conciliation services is about 40 percent. Dismissal disputes are one of the most major types of disputes handled in this expeditious conciliation service. When successfully conciliated, they are mostly resolved with a modest monetary payment.³⁵

The third layer is the Labor Tribunal System instituted in the judiciary. According to the Labor Tribunal Act of 2004, either party in an employment relationship can bring a dispute of rights arising from employment relations under this procedure in the district court. A tribunal composed of one career judge and two part-time experts in labor relations examines the written claims and responses and holds informal hearings to clarify the facts and the issues. The tribunal then makes mediation efforts, and, if such efforts fail, renders a decision specifying measures to resolve the case. The decision is not binding, and if either party objects, the case is automatically transferred to the formal civil procedure. As a matter of practice, about 80% of the disputes brought in the labor tribunal procedure are resolved successfully and about 70% through the panels' mediation proposals and 10% through advisory decisions. Of the remaining about 20% of the disputes, 10% are withdrawn and only 10% (about a half of the advisory decisions) are transferred to the formal civil procedure. Dismissal disputes are the most common type of disputes handled, which are resolved in most cases by monetary agreements (mediation) or awards (decisions).³⁶

The fourth layer is the civil procedure, a formal adversarial procedure, in which the parties are mostly represented by their own lawyers. The court clarifies issues by grasping allegations expressed by their briefs, and examines exhibits and listens to the testimony of witnesses through formal hearings. After this process, the court usually tries to settle the dispute, and, if it fails, renders a judgment. On average, it takes about a year for the court to dispose of the case either by a settlement or a judgment. In judging a dismissal dispute, if the court finds that the dismissal was abusive and, accordingly, invalid, the court will confirm the continuation of employment relations and will order the employer to compensate the worker for the loss of earnings.³⁷

³⁵Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part One: How Strict Is Japanese Law on Employers?* *Japan Labor Review*, vol. 11, no. 2, Spring 2014, p. 89.

³⁶Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part One: How Strict Is Japanese Law on Employers?* *Japan Labor Review*, vol. 11, no. 2, Spring 2014, p. 89.

³⁷Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part One: How Strict Is Japanese Law on Employers?* *Japan Labor Review*, vol. 11, no. 2, Spring 2014, p. 90.

B. The actual situations of dismissals in Japan

Statistics show that in Japan there are lots of labor disputes concerning dismissal of workers. For example, in the fiscal year of 2012, there was over 50,000 dismissal cases handled in by the information and consultation services. Approximately 5,000 disputes involving dismissals are brought either by conciliation, labor tribunal or civil procedures every year, and a great majority of such disputes are resolved informally and expeditiously through the administrative conciliation services or the judicial labor-tribunal system, mostly in the form of monetary payment. Relatively few dismissal disputes were filed with the formal civil procedure: less than 1,000 cases in fiscal 2012. In addition, a majority of such civil litigations are settled, mostly monetarily, and judgments are rendered in only a third of them. Furthermore, workers won in just under half of such judgments.³⁸

Table 2: Statistics on the Settlement of Dismissal Disputes (Fiscal 2012)³⁹

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

Sources: The Statistics of the Ministry of Welfare and Labor and the Supreme Court.

Note: *These figures include all kinds of disputes involving all kinds of employment termination (not only dismissals, but also alleged resignation, refusal of renewing fixed-term employment upon its expiration,

³⁸Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part One: How Strict Is Japanese Law on Employers?* *Japan Labor Review*, vol. 11, no. 2, Spring 2014, p. 91.

³⁹Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part One: How Strict Is Japanese Law on Employers?* *Japan Labor Review*, vol. 11, no. 2, Spring 2014, p. 91.

compulsory retirement, etc.) and requesting confirmation of worker status. Nevertheless, the predominant type is dispute involving dismissal.

Also, according to different sources, even in the resolutions attained by administrative conciliation and labor-tribunal procedures, reinstatements were very rare. One of the factors is that most of the workers who file complaints with the administrative office or labor tribunal do not insist on reinstatement. In most cases, they seek monetary compensation to settle dismissal disputes.⁴⁰

Table 3: Resolution of Dismissal Disputes⁴¹

	Conciliation of Dismissal Disputes	Labor Tribunal
Reinstatement	1.3%	4.0%
Monetary compensation	94.8%	95.0%

Table 4: Amounts of Monetary Compensation⁴²

	Median	Minimum	Maximum
Administrative office (Conciliation)	175,000 ¹	10,000 ²	10,000,000 ²
Labor tribunal	1,000,000 ³	30,000 ³	14,680,000 ³

Sources: ¹Kazuo Sugeno and others, eds., *Rodo Shinpan Seido no Riyosha Chosa* [Labor tribunal system: User's survey] (Tokyo: Yuhikaku, 2013). ²JILPT Research Report no.123 (2010). ³Institute of Social Science, University of Tokyo (2011).

Though the amounts of monetary compensation ranged widely, most of them were at rather low levels. Half of them fell below 175,000 yen in conciliation settlements by administrative offices, and 1,000,000 yen in decisions or settlements following labor tribunal procedures. The lower levels of monetary settlement in

⁴⁰Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part Two: How Frequently Do Employers Dismiss Employees?* *Japan Labor Review*, vol. 11, no. 4, Autumn 2014, p. 127.

⁴¹Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part Two: How Frequently Do Employers Dismiss Employees?* *Japan Labor Review*, vol. 11, no. 4, Autumn 2014, p. 128.

⁴²Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part Two: How Frequently Do Employers Dismiss Employees?* *Japan Labor Review*, vol. 11, no. 4, Autumn 2014, p. 128.

administrative conciliations may be attributable to the fact that conciliators mainly seek to attain a quick and amicable solution rather than to examine the legal merits of the case.⁴³

III. The comparisons of the dismissals and compensations between China and Japan and its inspirations for China

i. The dismissal of workers under fixed-term labor contract

China uses the high standard of compensation as a tool to increase the cost of dismissals so as to prevent the employing units from dismissing the workers and enhance the stability of labor relations. However, from the practice of past several years, the employing units feel it unfair on two aspects. First, for fixed-term labor contracts, the termination compensation is established on such a hypothesis that all fixed-term labor relation could continue and all labor contracts could be renewed. But, in fact, only some of the fixed-term labor contracts could be renewed. Therefore, there are no fair and reasonable reasons to force the employing units to compensate the workers whose labor contracts could not be renewed. Second, under such a rule, the labor agency (the dispatching company which is identified as employing unit in the LCLC) also needs to pay termination compensation to the dispatched workers when the fixed-term labor dispatching labor contracts terminate. It seems contradictory to the nature of labor dispatching which represent the flexibility of employment.

In practice, the employing units complain that they have no flexibility in employment for they need to pay compensations whenever they dismiss a worker beside disciplinary dismissals no matter the worker under a fixed-term contract or a contract without a fixed term. Under such a situation, a worker does not care much about whether he or she in working under a fixed-term contract or a contract without a fixed term. The only thing a worker needs to know it that an employing unit needs to pay economic compensation if an employing unit let him or her go. Under such a situation, the complaints of the employing units that they lost the flexibility in employing since the enforcement of the LCLC are somewhat reasonable.

Compared with the dismissals of workers under fixed-term labor contracts, the Japanese regulations make it easier for the employers. First, in Japan, as mentioned above, where an employment contract is for a fixed term, the employer may not dismiss the worker during the term, but is permitted to cancel the contract immediately only if any unavoidable cause exists. If such an unavoidable cause is due to the employer' s fault,

⁴³Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part Two: How Frequently Do Employers Dismiss Employees?* *Japan Labor Review*, vol. 11, no. 4, Autumn 2014, p. 128.

the employer will be liable to pay damages to the workers. Second, where a fixed-term labor contract terminates, there is no law requiring an employer to pay compensation to a worker. Third, if the fixed-term employment contract is renewed in an implied way, then the employer may not dismiss the worker in the same manner as under a contract without a fixed term. Such arrangements give employers more flexibility in employments and also avoid increasing the employment cost of employers.

ii. The dismissal of workers under labor contracts without a fixed term

For the dismissal of workers under contracts without a fixed term, the regulations in Japan and China look quite similar and both regulations have limitations in the dismissal order and compensations. However, there are two basic differences.

First, in China there is strict limitation in arranging a worker on a changed position different from that agreed in the labor contract. In accordance with Article 35 of the LCLC, only a written agreement is reached could the position of a worker be adjusted by an employing unit, which means that such a change need to get the approval of the worker and the employing unit has no right to adjust the position of a worker. In accordance with the interpretation of the Supreme Court in 2013, where no written agreement is reached, the adjustment is valid if the new terms of the labor contract have been practiced for over one month and the new terms are not violating the laws, regulations or public policy.⁴⁴ If an agreement could not be reached, the employing unit should dismiss the worker and pay compensations in accordance with Article 40 (3) and Article 46.

In Japan, the duty to work is not limited to mere mechanical performance of one's duties but encompasses the duty to perform in good faith.⁴⁵ In practice Japanese employers have more powers than Chinese employing units in adjusting the positions of the workers and employers have the rights to dismiss the workers who refuse to abide the proper orders from the employer for seriously violation of the work rules. Generally, Japanese courts tend not to recognize an implied specification of type or place of work which would hinder a transfer.⁴⁶ Such a power enables employers to arrange the workers in a changing economic situation, which is quite important for the operations of enterprises. The lack of such an important power often makes it difficult for employing units in China to adapt to the needs of economic situations without additional cost.

Second, the economic compensation paid to a dismissed worker is calculated on the number of years and months the worker has served in the company. In the cases of mass dismissals during the difficult times of an

⁴⁴Article 11 of the *Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labor Dispute Cases (IV)*, 【最高法院法释（2013）4号】.

⁴⁵Tadashi A. Hanamo, Fumito Komiya & Ryuichi Yamakawa, *Labour Law in Japan*, Kluwer Law International BV, 2015, p. 133-134.

⁴⁶Takashi Araki, *Labor and Employment Law in Japan*, the Japan Institute of Labor, 2002, pp. 135, 140.

enterprise, the amount of money could be too much for the enterprise to bear and could bring the enterprise to a more difficult situation. As mentioned above, in the difficult times, a Japanese employer should first try other methods, such as decreasing the overtime work, stopping to employ the new workers, temporary vacation days. Otherwise, the dismissals would be treated as the abuse of dismissals. In China, workers usually would not like such arrangements because a worker can get economic compensation if dismissed. On the contrary, a worker could not get extra payments besides wages even if a worker works on to the retirement age, which explains why workers in China would like to leave the employing unit and find other jobs.

Third, for the dismissals of workers with just cause, there is no statutory compensation. In practice, most companies would pay severance compensations to the dismissed workers besides disciplinary dismissals. Such a practice began to spread between 1910 and 1920. In many large companies, they were paid not only to executives, but also to factory workers. During the economic boom around 1920 (during the Taisho Era), such payments were used as a tool to induce workers to stay with their employers, but during the recessionary period in the latter half of the 1920s they were more often used as compensation for forced termination benefits.⁴⁷ In the 1970s and 1980s many of them came to rely on outside pension plans for funding. Combined, these dual-type benefit plans function as a substantial source of old-age income for 60-70 percent of all workers working for approximately 90% of employers. In addition, they have been important components of Japan's seniority-based labor management and compensation system. They have been used in order to make core workers stay for a long time with a single employer.⁴⁸ Such a sum of severance payment (also named retirement payment) has been accumulating since a worker is employed. Therefore, when an employer needs to pay the money, it would not hinder the daily operation of business, which is especially enlightening for China in the improvement of the current labor contract system.

iii. The remedies for dismissed workers

First, for an illegal dismissal, the LCLC provides better protection to dismissed worker than the LLC and Japanese labor laws, which gave the workers the right to choose between double compensation and restoration of the job. Considering the number of disputes concerning dismissals, from the above introduction, it could be seen that both countries have lots of disputes concerning the dismissals. The remedies in Japan for the dismissed workers is relatively limited. While in China, in practice, most of the dismissed workers who have been wrongfully dismissed would choose the double compensation because of the lump sum of cash. Such a remedy for wrongfully dismissed workers put the employers under pressure especially under the situations in which workers have some mistakes, in which it is often hard for employing units to judge whether the mistake

⁴⁷Masaharu Usuki, *Recent Changes to Retirement Benefits in Japan*, and Relevant Public Policy Issues, p. 2. <https://ideas.repec.org/p/hit/piedp1/135.html>

⁴⁸Masaharu Usuki, *Recent Changes to Retirement Benefits in Japan*, and Relevant Public Policy Issues, p. 1. <https://ideas.repec.org/p/hit/piedp1/135.html>

is serious enough and could provide justified reasons for disciplinary dismissals. In practice, the statutory double compensation sometimes result in outrageous conclusions.

Second, in the remedial procedures, Japan has four layers in procedure in dealing with labor disputes including disputes in dismissals, which in each procedure function well and successfully solve many labor disputes. When reaching to the last procedure, the civil litigation, most of the disputes have been resolved. In China, there are three procedures in dealing with labor disputes including disputes in dismissals, which are mediation, arbitration and civil litigation. However, the mediation procedure does not function as it is expected. Chinese labor disputes arbitration system functions well, but still many cases go to the final step, the civil litigation. In this respect, the experience of Japan is also worthy for China to learn from.

iv. The connection between civil law and employment and labor law

In Chinese employment law practice, the connection between civil law and employment and labor laws has been neglected. In the dismissal cases, the decisions of arbitration tribunals and courts nearly never mention the civil law principle, the abuse of rights. The reasons of such a practice may result from the short history of civil law and employment and law. There was no such a period in the history of People's Republic of China as in the western countries, the employment disputes were settled by civil laws. Such an isolation of employment law from civil law has already influenced the trials of cases concerning dismissal. Besides the theory of abuse of the right to dismissal, the arbitration tribunals and courts often try to annul the dismissals of the employing units in the disciplinary procedures, which greatly hinders the development of the theory of abuse of right to dismiss in China.

Concluding Remarks

It may be concluded that as for the relationship between dismissal and compensation, China uses the high standard of compensation as a tool to increase the cost of dismissals so as to prevent the employing units from dismissing the workers and enhance the stability of labor relations. Such a practice increases the cost of the employing units. However, in Japan the stability of labor relation is built on the theory of abuse of dismissal rights. Compared with the practice in China, the Japanese way in achieving the stability of labor relation will not increase the cost of the Japanese employer. Generally, China and Japan have different history in employment and labor law legislation. Compared with the history of employment and labor law in Japan, the Chinese history in modern employment and labor law legislation is quite short. Therefore, China needs more time to see the shortcomings in the LCLC and gradually improve it. Besides, the two countries also have many other differences in labor administration, judicial system, political system and stages of economic development.

On one side, the existence of so many differences would surely result in the difference in the labor and employment laws. On the other side, such differences would not be a barrier for China to learn the experience from Japan. By comparison of the systems of dismissal and compensation of China and Japan, it could be seen that there are many aspects in Japanese employment and labor laws that China could use to improve her own system.