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Final Report

Dismissal under Japanese Employment Law: A Brief Comparison with Cambodian Labour Law

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Introduction

Under Japanese labour and employment law, termination of employment contract takes three forms: resignation, mandatory retirement, and dismissal. Resignation is based on mutual consent between the two parties of the employment contract, employer and employee. Mandatory retirement takes place on the basis of stipulations in the employment contract, workplace regulations or collective agreement. According to the survey in 2012, 82.7 % of private enterprises set the mandatory retirement age of 60 and 14.3 % choose 65 or above.¹ On the other hand, dismissal, which is probably the worst form of terminating the employment contract, only requires 30 days prior notice for an employer to dismiss an employee.² However, practically, it is very difficult to dismiss an employee since Japan has adopted the lifetime employment practice. To add up to this, there are also some restrictions that prohibit unlawful dismissal, which will be explaining in this paper. In addition, this paper covers grounds for dismissal and remedies for abusive dismissal. It also briefly compares Japanese and Cambodian law with regard to dismissal of employees. Finally, this paper ends with conclusion.

Restriction on Dismissal

A number of labour-related regulations provide various restrictions on terminating labour relation through dismissal. These include dismissal based on the following grounds:³

- Factors such as employee's nationality, religion and social status (for example, being born out of wedlock.)
- Union membership or taking part in lawful union activities.
- Marriage, pregnancy, childbirth, or taking childcare.
- Taking leave during maternity or on medical leave to receive treatment for injuries or illness suffered in the course of employment.

Although there is a restriction on dismissal, this does not mean that dismissal is impossible. There are several cases, where employer has successfully dismissed employee, individually or collectively. At the same time, there are also several cases, where employer failed to do so. However, looking at the general picture of the cases of dismissal, there are two types: economic dismissal and

¹ The Japan Institution for Labour Policy and Training, *Labor Situation in Japan and Its Analysis: General Overview 2013/2014* (The Japan Institute for Labour Policy and Training, 2014), 89.

² Article 20, Labor Standards Act (1947).

³ See Articles 3, 19, and 104 of Labour Standards Act.

dismissal due to insufficient ability or normal dismissal.⁴ Normal dismissal happens when an employee is dismissed for specific individual reasons; however, economic dismissal occurs when there is no individual reason for dismissal but rather the dismissal is due to the firm's circumstances.⁵

Justifiable Grounds for Dismissal

In Japan, Supreme Court judgments play a dominant role in judicial decisions. In the case of dismissal, the Supreme Court of Japan has declared that “even when an employer exercises its right of dismissal, it will be void as an abuse of rights if it is not based on objectively reasonable grounds that are socially acceptable.”⁶ Furthermore, even in the case where grounds for dismissal are provided for in the employer's Rules of Employment, “the employer is not always entitled to dismiss the employee, and the notice of dismissal will be void as an abuse of rights if dismissing the employee is grossly unreasonable and socially unacceptable under the specific circumstances.”⁷ These two judgments in the 1970s endorsed the interpretation that dismissal should be considered null and void as an abuse of right without objective and appropriate reasons.⁸ For this reason, termination should never be approached lightly regardless of how sure the employer may be of the justification for employee termination. The reasons for dismissing employees need to be justifiable reasons. Justifiable reasons are categorized into three types: employee's incompetence, or lack or loss of the skills or qualifications required for fulfilling the job; breach of disciplinary rules or misconduct; and business necessity of the company.

Dismissal by reason of employee's incapability is listed in three types: loss of occupational capacity as a result of an injury or illness, an uninformed certain period of absence, and insufficient job performance. The last one is quiet technical since the court will look into whether the employer has offered any assistance to the employee including education and training to improve their performance. Also, the court will see whether the employer has tried to match the ability of the employee with the suitable job for the employee's qualification.⁹ However, dismissing a mid-career

⁴ “Analysis of Case Law on Dismissal of Restricted Regular Employees,” in *Labor Situation in Japan and Its Analysis: Detailed Exposition 2014/2015* (The Japan Institution for Labour Policy and Training, 2015), 120.

⁵ Ryo Kambayashi, *Dismissal Regulation in Japan*, Technical Report, March 2010, 9.

⁶ Hiramatsu Takemi, “Dismissal of Employees under Japanese Employment Law,” *Nishimura & Asahi* (March 2012): 1.

⁷ *Ibid.*

⁸ Sugeno Kazuo and Yamakoshi Keiichi, “Dismissals in Japan (I): How Strict Is Japanese Law on Employers?,” *Japan Labor Review* 11, no. 2 (Spring 2014): 84. See also 1975 *Nippon Salt Manufacturing Case*, Supreme Court Judgment on the 1977 *Kochi Broadcasting Case*.

⁹ *Ibid.*, 86.

employee due to poor performance is considered acceptable since there is high expectation from this type of employee compared to those who just freshly graduated and start their careers.¹⁰

Breach of disciplinary rules often resulted from the employee's misconduct. The employee's misconduct is usually spelled out in the employee regulation, which includes negligence of duties, defiance or disobedience of job-related orders or instructions, obstruction or disturbance of the work, violation of workplace discipline, infringement of the interest or reputation of the employer in the employee's private life and falsification of the employee's past record, sexual harassment and power harassment, and certain criminal acts. If the breach of disciplinary rule is serious, it might lead to disciplinary dismissal, which bars the employee to receive certain benefit. It is easy to dismiss an employee who has violated the work rule during working time; however, there are cases where disputes arose over misconduct committed outside the workplace and on the employee's own time.¹¹ Whether or not to dismiss an employee because of his or her misbehavior outside the workplace is up to the court's interpretation. The Court has taken into account the nature of severity of the actions, employer's line of business, size, and position in the market as the consideration for deciding this kind of dispute.¹²

The last ground on reasonable dismissal is dismissal by reason of firm's economic necessity, which is normally a ground for collective dismissal. The *Labour Contract Act* does not provide any substantive or procedural regulation about this type of dismissal; however, Court's judgments have formulated rules for this matter.¹³ In fact, a leading case on economic dismissal is the Tokyo High Court case *Shimazaki v. Toyo Sanso* from 1979, specifying four criteria for dismissal: a compelling need exists to reduce the number of employees, effort made to avoid dismissal in attaining the reduction, the selection of the person(s) for dismissal must be based on objective standards, and proper procedures must be followed. These four requirements are sometime called "Doctrine of Economic Dismissal" in order to differentiate them from the two simple conditions of "objectively reasonable" and "socially acceptable".¹⁴

A compelling need to reduce the number of employees is found where dismissal is unavoidable, and it is the last resort that the companies have to do in order to save the business. Such a need is found in the case of business slump, decline or recession affecting the employer, or a situation that arguably makes such dismissal otherwise unavoidable.¹⁵

¹⁰ Kojima Law Offices, "Terminating Employees in Japan-An Overview, Common Pitfalls and How to Avoid Costly Mistakes (Part I of III)," *Labor & Employment Law Newsletter* 5 (August 2014): 2.

¹¹ Kojima Law Offices, "Terminating Employees in Japan-An Overview, Common Pitfalls and How to Avoid Costly Mistakes (Part III of III)," *Labor & Employment Law Newsletter* 3 (February 2014): 2.

¹² *Ibid.*

¹³ Kazuo and Keiichi, "Dismissals in Japan (I): How Strict Is Japanese Law on Employers?," 87.

¹⁴ Kambayashi, *Dismissal Regulation in Japan*, 10.

¹⁵ Chinagoabroad, "Termination of Employees in Japan: Legal Challenges and Best Practices," *Chinagoabroad*, 2011, 3, <http://www.chinagoabroad.com/en> (accessed September 2, 2015).

For the second criteria of collective dismissal, at which effort is made to avoid dismissal in attaining the reduction, is also seen as a last resort strategy for employer. The employer has to try all the possibilities to avoid reducing the number of workforce by transferring, temporarily furloughing, offering an early retirement package, or obtaining the employee's consent to terminate the employment contract.¹⁶

The selection of the person(s) for dismissal must be based on objective standards, where the court has accepted that there are three types of person who should be selected for workforce deduction. These persons include employees who are: close to retirement age, often tardy and absent, or leave the office early, and ranked comparatively poor compared to their peers in the company.¹⁷ This criterion is said to eliminate arbitrary dismissal.¹⁸

In the matter of collective dismissal, the employer needs to discuss and consult with the union or the representative of the relevant employee group. The discussion and consultation should be conducted in good faith by explaining about the need for dismissal and the conditions. In addition, prior notice and other benefits should also be discussed between employer and employees or union.

Remedies for Abusive Dismissal

The *Labour Contract Act* provides 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.” Therefore, if an employer dismisses an employee unreasonably or unlawfully, possible consequences are: restoration of the status between an employer and an employee, payment of unpaid wages, and compensation for damages (optional).

Comparison between Japanese Law and Cambodian Law with regard to Dismissal of Employee/Worker

This part focuses on the comparison between Japanese and Cambodian law with regard to dismissal by exploring the justifiable grounds for dismissal and remedies for abusive dismissal. Generally, there is no significant difference between the two systems since these two systems adopted the same justifiable grounds for dismissal. In addition, the available remedies for abusive dismissal are similar in nature. Nonetheless, the two systems are different substantially, which is illustrated in the following table.

¹⁶ Ibid.

¹⁷ Ibid., 4.

¹⁸ Kambayashi, *Dismissal Regulation in Japan*, 11.

Justifiable Grounds for Dismissal	Cambodia	Japan	Remedies for Abusive Dismissal
Misconduct/Breach of Disciplinary Rules	Hardly guarantee equal treatment and good faith	Strictly guarantee equal treatment and good faith	The remedies are similar as provided under the law; however, practically, the system is different since the Japanese system highly protects employee from dismissal.
Employee's Incapability	Employee is protected for a period of 6months and there is no case, which requires an employer to transfer an employee to an easier job.	Employee is protected until there is a justification that the employee will not be able to go back to work. Employee will be transferred to do an easier job that fits the employee's ability.	
Economic Necessity	Rule based on reasonable grounds. The necessity for the operation of the enterprises + procedures to follow reasonable selecting process, consulting with union, notifying labor inspector)	Rule based on reasonable grounds and appropriateness. Four justifiable grounds for dismissal under economic necessity.	

Table 1: Comparison between Cambodian and Japanese Law with regard to Dismissal.¹⁹

Conclusion

In summary, there are three ways to terminate employment contract in Japan: resignation, mandatory retirement, and dismissal (normal and economic dismissal). Justifiable reasons for dismissal are categorized into three grounds: misconduct or breach of disciplinary rule, employee's

¹⁹ See Kanharith Nop, *A Comparative Study On Dismissal Rules In Cambodia And Japan: A Focus On The Rul of Justified Dismissal* (Center for Asian Legal Exchange, 2014).

incapability, and economic necessity of the firm or company. Whatever types of reason that the employer chooses to dismiss employee(s), employer must always follow due process by giving prior information to the affected employee(s) plus other benefits as provided under the law. In the event that employer does not have a justifiable ground to dismiss employee(s), there will be an abuse of right, which makes dismissal invalid. Abusive dismissal will be entitled to remedies such as restoration of the status between employer and employee(s), payment of unpaid wages, and compensation of damages if any.

Comparing between the two systems between Cambodian and Japanese systems with regard to dismissal is firmly conspicuous that the Japanese system is better than the Cambodian system. However, taking into account the different nature of culture and the practice of lifetime employment in Japan, Japanese system might not be an ideal system that Cambodia should adopt. At most, Cambodia can learn some parts of the system especially on the factor that Japanese courts have based on when deciding cases of dismissal, whether an ordinary or an abusive one.

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