Revue de droit comparé du travail et de la sécurité sociale

4 | 2017
English Electronic Edition

The Law on Dismissal for Economic Reasons in Japan

Toshiharu Suzuki

Electronic version

URL: <https://journals.openedition.org/rdctss/2312>

DOI: 10.4000/rdctss.2312

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2017

Number of pages: 162-169

ISSN: 2117-4350

Electronic reference

Toshiharu Suzuki, "The Law on Dismissal for Economic Reasons in Japan", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2017, Online since 01 November 2021, connection on 04 December 2021. URL: <http://journals.openedition.org/rdctss/2312> ; DOI: <https://doi.org/10.4000/rdctss.2312>

Revue de droit comparé du travail et de la sécurité sociale est mise à disposition selon les termes de la Licence Creative Commons Attribution - Pas d'Utilisation Commerciale - Pas de Modification 4.0 International.

THE LAW ON DISMISSAL FOR ECONOMIC REASONS IN JAPAN

TOSHIHARU SUZUKI

Associate Professor, Ibaraki University

In Japan, dismissal for economic reasons is also referred to as “dismissal for redundancy” (hereinafter, for simplicity, dismissal for economic reasons). Under Japanese law, a dismissal for economic reasons is subject to the same legal rules as other types of dismissals, but with certain specific differences. In this article, I will describe the laws and regulations governing dismissals as well as case law in Japan (I). I will then explain the judicial peculiarities relating to dismissal for economic reasons (II). Finally, I will devote some time in the last part of this article to the “Omura Nogami” case, a judgment in which the Court referred to a now well-established rule concerning dismissal for economic reasons (III).

I - JAPANESE LEGISLATION ON DISMISSALS

A - LAWS GOVERNING EMPLOYMENT CONTRACTS

Work is performed within the framework of an employment contract signed by an employer and a worker. Traditionally, the employment contract is governed by the Civil Code.¹ Yet the number of provisions in the Civil Code relating to the contract of employment is extremely limited. According to the Civil Code, the essential principle in this matter is that of contractual freedom under which the contracting parties are free to decide the content of their contract as well as its performance. The State and the law were supposed to abstain from intervening as much as possible so that the economy could develop and the State become richer. The result is that in principle, there should be no state interference in the content of an employment contract entered into by an employer and a worker.

¹ Article 623 et seq. of the Civil Code

Nevertheless, in general, many workers are in a socially and economically weaker position than employers. In addition, in the performance of their work, employees are liable to be deprived of their freedom or be subjected to mental and even physical pressure. This means that the principle of untrammelled contractual freedom leads to violations of employees' essential rights. A rebalancing is therefore necessary to limit the application of this principle in labour law. It is for this reason that laws such as the Labour Standards Act, the Labour Contract Act, and the Industrial Safety and Health Law were adopted. In addition, there are other regulations intended to protect workers and make contracts fairer and more equitable.

Consequently, the relationship in an employment contract is governed by the provisions of the aforementioned laws and regulations, where they apply. Where there is no legal or regulatory provision specific to labour law, then the Civil Code applies.

B - LAWS AND REGULATIONS ON DISMISSAL

1 - PROVISIONS OF THE CIVIL CODE

Concerning the rules relating to dismissal, the Civil Code distinguishes between fixed term and unlimited term contracts.

In the case of a fixed term employment contract, termination is only possible if the employer has reasons of "unavoidable necessity" for dismissing a worker.² It is therefore extremely difficult to dismiss a worker on a fixed term employment contract. On the other hand, there are no restrictions for an unlimited term employment contract. Employers are free to dismiss workers as long as they give two weeks' notice before breaking off the contractual relationship.³

2 - STATUTORY AND REGULATORY PROVISIONS

The Labour Standards Act has modified the aforementioned provisions in the Civil Code. First of all, the period of notice has been increased to 30 days. Failing that, the employer must pay compensation in lieu of notice at least equal to the average wage⁴ that the worker would have received during these last 30 days.⁵ The duration of this notice may be shortened by the payment of compensation.⁶ Furthermore, where it has become impossible for an enterprise to continue its business because of a natural disaster or a comparable event, or when a worker is dismissed for misconduct, the employer is under

2 Article 628 of the Civil Code.

3 Paragraph 1, Article 627 of the Civil Code.

4 The average wage means the worker's average wage over the last three months. Article 12 of the Labour Standards Act.

5 Paragraph 1, Article 20 of the Labour Standards Act.

6 Paragraph 2, Article 20 of the Labour Standards Act.

REDUNDANCY IN JAPAN

no obligation to give notice or pay compensation.⁷ Finally, no notice is required to dismiss the following workers:⁸

- Workers who are employed on an occasional basis (except those with a period of service of more than one month);
- Employees with a fixed term employment contract of 2 months or less, or employees carrying out seasonal work under a fixed term employment contract of 4 months or less; and
- Employees on a probationary period (excluding those who have been employed for more than 14 days).

It is also prohibited for an employer to dismiss a worker during the period when an employment contract is suspended due to an occupational accident or illness, as well as during the 30 days after a workers' return to work. The same applies to female workers on maternity leave⁹ who are also protected during the 30 days after they return to work.¹⁰ However, there are some exceptions. Dismissal is possible, with payment of discontinuance compensation¹¹ when an employee who has suffered an occupational accident or illness is absent for more than 3 years, or when it has become impossible to continue its business because of a natural disaster or a similar event.¹²

Furthermore, an employer must provide a certificate stating the period of employment, the type of occupation, the worker's position in the enterprise and the wages without delay if the workers requests one.¹³ In addition, during the period of notice of dismissal, the employer must, if the employee requests it, issue without delay a certificate stating the reasons for the dismissal.¹⁴ No information is provided if the employee does not ask for it.¹⁵ The certificate concerning the grounds for the dismissal is particularly important, as it clarifies the reasons for the dismissal on the employers side at the time of the termination.

3 - DOCTRINE ON UNFAIR DISMISSAL

Dismissal is governed by laws and regulations as well as the Civil Code. Under these laws, employers are supposed to be able to freely terminate employees' employment contracts as long as they respect the minimal rules set out above. In actual fact, the dismissal of workers has been severely restricted by case law since the Second World War, under a

7 Proviso, paragraph 1, Article 20 of the Labour Standards Act.

8 Article 21 of the Labour Standards Act.

9 Article 65 of the Labour Standards Act. An employer is prohibited from employing a woman who is expected to give birth within 6 weeks (in the case of multiple births, within 14 weeks), if the employee requests leave. It is also prohibited for an employer to employ a woman within 8 weeks after the birth. However, it is possible to shorten the postnatal leave to 6 weeks at the employee's request and as long as the work is authorised by a doctor.

10 Paragraph 1, Article 19 of the Labour Standards Act.

11 Article 81 of the Labour Standards Act. The amount of the compensation is equivalent to 1,200 days' wages.

12 Proviso, paragraph 1, Article 19 of the Labour Standards Act.

13 Paragraph 1, Article 22 of the Labour Standards Act.

14 Paragraph 2, Article 22 of the Labour Standards Act.

15 Paragraph 3, Article 22 of the Labour Standards Act.

case law rule known as the “Doctrine of abusive dismissal”. This case law rule is based on a general provision of the Civil Code relating to abuse of right.¹⁶ Accordingly “dismissals without objectively reasonable grounds” and “dismissals with objectively reasonable grounds but which are socially unacceptable” are judged abusive. Such terminations are considered null and void.

Certain judgments that have considered that terminations were null and void as they were “dismissals without objectively reasonable grounds” relate to discriminatory situations, due to gender, trade union membership or human rights violations. However, such cases are not very common.

On the other hand, there are numerous examples of dismissals considered as “socially unacceptable”. A dismissal is judged “socially unacceptable” when, even though the reason for the termination is connected to the work, dismissal is considered as too severe a measure given the particular circumstances. Judges take into account not only the reasons for dismissal, but also the worker’s attitude. Japanese employees are generally employed by a company for a long period. Once dismissed, the employee will find it difficult to find another job. Dismissal therefore has an extremely significant impact on the life of the dismissed worker. For this reason, in Japan, dismissal is rarely accepted as valid by the courts.

This case law, once established by the courts, was then enshrined in the law.¹⁷

4 - THE CONSEQUENCES OF ABUSIVE DISMISSAL

As already stated, a dismissal will be invalidated if it is judged to be abusive.¹⁸ In this case, it is as if the employee was never dismissed, and the employee can return to work in the enterprise. He or she also has the right to ask for the payment of the wages for the period when he or she was dismissed.¹⁹ Finally, damages may be claimed if there were acts of violence or defamation during the dismissal procedure.²⁰

II – DISMISSAL FOR ECONOMIC REASONS

A - THE MEANING OF DISMISSAL FOR ECONOMIC REASONS

A dismissal for economic reasons is a dismissal motivated by the good management of the enterprise. In Japan, large and medium-sized organisations use the principle of fixed-term contracts and strive to preserve their employees’ jobs. For this reason, in the event of a recession or a deterioration in the enterprise’s financial situation, adjustment measures are implemented first following an employer-union consultation: controls on overtime working, suspension of new hiring or the relocation of workers. Even in serious situations which would justify collective dismissals, enterprises choose to ask for voluntary redundancies, offering to pay large amounts of compensation. Large and medium-sized organisations in Japan

16 Article 1 of the Civil Code.

17 Article 16 of the Labour Contract Act.

18 Article 16 of the Labour Contract Act.

19 Article 536 of the Civil Code.

20 Article 709 of the Civil Code.

only dismiss workers for economic reasons in extreme situations such as bankruptcy or the closure of a company. On the other hand, foreign companies and small enterprises do not hesitate to dismiss workers for economic reasons when their financial situation deteriorates.

There are administrative regulations that govern dismissal for economic reasons. An establishment that dismisses 30 or more employees over a period of one month is obliged to send the Minister of Health, Labour and Welfare a "notification of separation of a large number of workers".²¹ Forgetting to submit this notification or submitting a false notification could lead to a fine of at least 300,000 yen.²²

B - THE CRITERIA FOR JUDGING THE LEGALITY OF DISMISSAL FOR ECONOMIC REASONS

The courts decide whether or not a dismissal for economic reasons is legal based on the aforementioned doctrine of abusive dismissal. Case law since the middle of the 1970s has identified four important points relating to the employment adjustment measures already mentioned.

The first point is the need to "reduce the workforce". Measuring leading to dismissals ("slimming down" the enterprise, restructuring, rationalisation plans) must be justified by a real need for the enterprise such as recession, decline or financial losses, or the measures must be considered as "inevitable in the light of the reasonable functioning of the enterprise". A few, quite severe legal decisions, have demanded that the enterprise prove that in the absence of such workforce reduction measures, bankruptcy was inevitable. However, the majority of the legal precedents on such matters have considered that it is sufficient for the enterprise to prove that it has considerable management difficulties due to excessive debt or an accumulated deficit that have led to the dismissal for economic reasons.²³ The courts examine the financial situation of the enterprises concerned in detail to ensure that there is a genuine need to dismiss workers for economic reasons, but as a rule they conclude that there is such a need. Situations where the need for dismissals are not recognised include those where an enterprise has wrongly estimated its financial situation or where, soon after the decision to reduce the workforce, the enterprise has taken inconsistent measures, such a major increase in salary, hiring large numbers of new workers or the payment of a substantial dividend.²⁴

The second point is the "need to choose dismissal for economic reasons as a measure to reduce the workforce". Indeed, attempts must first be made to achieve workforce reduction by alternative measures to dismissal such as: relocation, reassignment or seeking voluntary redundancies. When the enterprise has immediately resorted to dismissals for economic reasons without having tried these alternative measures, the judge will consider that the dismissal is abusive. However, the particular circumstances of each enterprise are taken into account, and the judge assesses the measures that could have been taken to

21 Paragraph 1, Article 27 of the Employment Measures Act, Articles 8 and 9 of the Employment Measures Act.

22 Number 1, Paragraph 1, Article 40 of the Employment Measures Act.

23 The Osaka Gyomeikan case, judgment of Osaka District Court, 20 October 1995, 685 Rodo Hanrei, page 49.

24 The Senshu Gakuen case, judgment of Osaka High Court, 15 July 2011, 1035 Rodo Hanrei, page 124 (a recent case).

avoid dismissal for economic reasons.²⁵ Accordingly, more is demanded of companies envisaging dismissals for economic reasons due to a new strategy than of enterprises hit by the financial crisis.

The third point is the "rationality of the selection of the employees dismissed". Even where the dismissal of several workers for economic reasons is considered as inevitable, an employer has to establish objective, rational criteria for selecting the employees concerned by and apply them fairly. If the employer disregards this requirement, the dismissal will be considered as invalid. Criteria deemed objective and rational include, for example: the number of days the worker has been absent or late, performance in the job, the worker's disciplinary record, commitment to the company and length of service and the financial consequences of redundancy being deemed less serious for "those aged 30 or under".

The fourth point concerns "normal procedures". It is traditionally considered that dismissals implemented without sufficient consultation with the union on the precise criteria for selecting the workers concerned and their rational nature will be invalid where there is a failure to comply with a stipulation of the applicable collective agreement requiring such consultation. That said, even in the absence of such a stipulation in the collective agreement, it has been established in case law that an employer has a duty to explain to the union and/or the workers the grounds for the dismissals for economic reasons, as well as the timing, scale and method of the dismissals, and to consult them in good faith.

C - A CHANGE IN JUDGMENT TRENDS

1 - FROM FOUR REQUIREMENTS TO FOUR FACTORS

Until recently, the courts consistently considered that it was necessary to comply with these four points in their entirety for the dismissal for economic reasons to be considered as valid, these four points being "four requirements". However, after the economic crisis at the beginning of the 1990s and during the severe recession that followed and continued over a long period, enterprises have resorted more and more to workforce reduction. Consequently, case law has tended to relax the four requirements. The four points are now considered as "factors" rather than requirements, and it is not necessarily required that they all be met. The legality of a dismissal for economic reasons must be judged taking into consideration all the circumstances including the four points.

2 - ENTERPRISES FACILITATING A CHANGE OF CAREER

In Japan, enterprises employ their workers for indeterminate periods due to the tradition of long-term employment. This means that it has been difficult to dismiss workers. Recently, however, against a background of the globalisation of economies, there are more and more enterprises, mainly foreign companies, that hire workers whenever the need arises, due to a new market, rather than hiring newly qualified young people. Such enterprises, when the markets change, offer their now surplus-to-requirements workers advantageous voluntary redundancy conditions known as "packages". These "packages" are intended as incentives for workers to find new jobs. When employees do not accept them, the companies dismiss them. Although this is also a form of dismissal for economic

²⁵ For example, the BXTR/Ergotech case, judgment of Tokyo District Court, 6 July 2001, 814 Rodo Hanrei, page 53.

REDUNDANCY IN JAPAN

reasons, the traditional rules on abusive dismissal cannot be applied as they are, as these companies do not hire people with a view to long-term employment. In this situation, the dismissal of workers for economic reasons is easily considered as legal.

THE "OMURA NOGAMI" CASE (NAGASAKI DISTRICT COURT, OMURA BRANCH, JUDGMENT, 24 DECEMBER 1975)

- **Basic facts:** Y is a textile factory producing products such as underwear and pyjamas. Following a decline in the textile industry since about 1974, the operational situation of Y had deteriorated. Y decided to implement dismissals for economic reasons. First, they excluded from the 231 workers employed at the time those who lived in company housing, disabled workers who had been hospitalised, widows and those who were irreplaceable, and selected 46 workers eligible to be dismissed for economic reasons. Then, based on criteria including (i) rate of attendance, (ii) capacity to do the work, (iii) cooperative nature, and (iv) whether the worker had two incomes, they selected 29 people from among the 46 workers as the final targets for dismissal. On 2 December 1974, Y addressed all the workers at a morning meeting in the canteen and then conducted interviews during which the dismissal was announced to the 29 workers.

X, who was dismissed because he had two incomes, brought urgent proceedings before the District Court of Nagasaki, Omura Branch, to seek confirmation of his status as an employee. The Court found in his favour. Y appealed.

- Judgment:

Dismissal for economic reasons unilaterally causes workers to lose their status as employees already acquired by means of labour contracts, for reasons not attributable to the worker. This fundamentally disrupts the lives of workers and their families who subsist through wages alone. During the recession, such workers faced more difficulties in finding re-employment, making the impact of dismissal on them even more significant. This is why an employer that carries out dismissal for economic reasons must abide by certain rules based on the principle of good faith inherent in employment contracts. Specifically, although in principle an employer can exercise its right to dismiss workers at its own discretion, it may not use this right arbitrarily. The employer may be judged to have abused its right depending on the way it has exercised it.

A dismissal for economic reasons will be considered as abusive in the following circumstances. The first is that the need for dismissals is such that, without such a measure, the survival of the company would be threatened. The second is that the company has made efforts to absorb the surplus manpower using measures other than dismissal, including relocation of workers and offering voluntary redundancy. The third is that the enterprise has explained its reasons to the unions to gain their understanding and has made efforts to explain to workers the timing, scale and method of the workforce reduction. The fourth is that the criteria for the dismissal for economic reasons and the method of selecting the workers concerned are objective and rational.

In this case, the dismissals were carried out because of a drop in the quantity or orders. This means that the number of dismissals planned should first have been calculated in the light of the future production plan and then followed by the specific selection of the workers targeted. The company has not explained how many workers should have been

dismissed. Although Y targeted 29 workers, it has not proved that it needed to let these 29 workers go. In addition, a considerable number of workers resigned voluntarily, with the result that Y even hired 4 new workers, and was in the process of recruiting 8 employees at the time of the court case. In view of the circumstances, it does not seem that in this case there was an immediate need to dismiss 29 workers.

Furthermore, even if there was an objective need to dismiss 29 workers at the time of the dismissals, Y did not make any efforts to avoid dismissal by adopting measures leading to less hardship for the workers, such as transfer to the parent company and seeking voluntary redundancies.

Since Y decided to reduce its workforce in about October 1974 at the latest, it should have made efforts to explain the situation and the need to reduce the workforce to the workers' representative, in this case the "Koyukai", the community body organised by all the workers. It should also have discussed the timing, scale and method of dismissal in order to inform the workers correctly. However, Y did not make the slightest effort. It was only from the morning meeting on the day of the dismissals themselves, that the company briefly explained that the workforce had to be reduced because of the recession. The 29 workers on the list drawn up in advance were informed point-blank of their dismissal.

The dismissals for economic reasons in this case were decided without any in-depth reflection on the method to be followed to inform the workforce of the dismissals and correctly select the workers concerned. This being the case, Y deviated from what is allowed by law. The result is that the expression of Y's wish to dismiss workers must be considered as null and void due to an abuse of rights.