

An Essay on the Dismissal Regulation in Japan[†]

A VERY preliminary note for the lunch seminar at Maison Franco Japonaise

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0. Introduction

The Japanese legal tradition has basically come from Germany; therefore, it is mainly under the written law system. However the judgments in Japanese courts also provide practical rules as in the other countries, because the statute law does not offer the complete contingency.

The Japanese labor market is also subject to such dual legal regulations. On the one hand, the Labor Standard Law clearly regulates the minimum level of each items of labor contract. On the other, there is little specific statute to govern the procedure of concluding, changing and terminating labor contract. To supplement the lack of legislation, the Japanese courts have gradually constructed their case laws since 1945. The most important is the case law for dismissing employees; the Doctrine of Abusive Dismissal (Kaiko-ken Ran-yo Ho-ri).

Although there have been some academic discussions whether the Doctrine has impeded the economic activity by imposing excess cost to employers (Ohtake et al eds. (2002), Okudaira (2006)), it is still difficult to detect the Doctrine had actually interfered the adequate employment adjustment. One of main reasons for this difficulty is the lack of data (Imai et al. (2007)), but it is quite important how to interpret the Doctrine in terms of economic mechanism. The economists implicitly assume the Doctrine is a general tax (or severance payment from employer to employee). From legal aspects, the Doctrine offers a social norm. As long as they obey the social norm, employers shall adjust the number of workers without any additional payment. In this

respect the Doctrine forces an additional cost not in *any* case but in *some* case.

To mediate two concepts I will anecdotally show, in this short essay, how the Doctrine has been constructed and its role in actual disputes.

1. The Doctrine of Abusive Dismissal

Under the contractual freedom, the Japanese Civil Code admits to discharge employees anytime if the contract is open-ended.

Article 627 says,

“(1) If the parties have not specified the term of employment, either party may request to terminate at any time. In such cases, employment shall terminate on the expiration of two weeks from the day of the request to terminate.

(2) If remuneration is specified with reference to a period, the request to terminate may be made with respect to the following period of time onward; provided, however, that the request to terminate must be made in the first half of the current period.

(3) If remuneration is specified with reference to a period of six months or more, the request to terminate under the preceding paragraph must be made three months before the termination.¹”

When terminating labor contracts, the Japanese Civil Code requires only the

¹ We do not have any official English translation of laws in Japan. The cabinet secretariat offers some unofficial translations through website (<http://www.cas.go.jp/jp/seisaku/hourei/data2.html>). Fortunately the laws which I quote in this essay are covered in this site. I will use this translation if I do not mention particularly about the translation.

time-relating pre-dismissal procedure. It is quite remarkable that the Code does not distinguish the termination by employer (dismissal) from that by employee (resign).

Although Article 627 of Civil Code has not been changed since its enactment in 1896, the transition of economic and political environment has led to add supplementary regulations on the employers' termination. For example, according to Labor Standard Law in 1947, workers suffering a job-related illness, or those on maternity leave cannot be dismissed (Article 19), and employers must satisfy at least 30 days notification prior to dismissal or payment of sudden dismissal compensation (Article 20). Article 6 of Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment in 1972 prohibits discharging employees by the sexual discrimination. According to Article 7 of Labor Union Act in 1949, "The employer shall not commit ...to discharge or otherwise treat in a disadvantageous manner a worker by reason of such worker's being a member of a labor union, having tried to join or organize a labor union, or having performed justifiable acts of a labor union." Leaving from the world of pure contractual freedom, these enacted laws restrict employers' behavior when they want to discharge their workers. It is important to recognize that these statutes protect workers who are in specific states temporarily (job-related illness, maternity, union activity and so on) and that they do not provide a general dismissal rule.

The Japanese courts have gradually provided their own case law to require legitimate justification for generally dismissing a worker; otherwise, the dismissal may be regarded as an abuse of the individual's rights and judged invalid. As effect this case law is called as 'The Doctrine of Abusive Dismissal.' The textbook explanation for the Doctrine is as follows:

Based on the reason of termination, this Doctrine divides dismissals into two

categories. When the worker is responsible for dismissal, these cases are called as ‘Normal Dismissal.’ When the worker does not have any individual reason for dismissal, these cases constitute the second category, ‘Economic Dismissal.’ No-fault layoffs are usually categorized into the second one.

In the case of ‘Normal Dismissal’ the Supreme Court decided in 1975,

“even when an employer exercises its right of dismissal, it will be void as an abuse of receive general social approval as a proper act.”²

Two years later, the Supreme Court stated again,

“even where there are normal reasons for a dismissal, an employer does not always have the right to dismiss. If, under the specific circumstances of the case, the dismissal is unduly unreasonable so that it cannot receive general social approval as a proper act, the dismissal will be void as an abuse of the right of dismissal.”³

Even if the worker is responsible for his own dismissal, the exercise of terminating contract by employers must satisfy additional conditions; that is ‘objectively reasonable and socially appropriate.’ In addition, the courts, by using its authority to ask for explanation, ask the defendant (employer in the dismissal case) to prove that the exercise of rights is not an abuse. Because it is not easy for employees to verify the employers’ behavior and/or intent, this reverse of reliability is practically one of the

² Judgment of April 25, 1975, *Ichikawa v. Nihon Shokuen Seizo Co.*, Supreme Court, 29 Minshu 456, 458. Sugeno (1992) p.402.

³ Judgment of Jan. 31, 1977, *Kochi Hosoo Co.*, Supreme Court, 268 Rodo Hanrei 17. Sugeno (1992) p.402.

most important characteristics of the Doctrine.

While the Japanese courts apply the same Doctrine into no-fault dismissals, they show the meaning of ‘objectively reasonable and socially appropriate’ more concretely in this category. The leading case is *Shimazaki v. Toyo Sanso* at the Tokyo High Court in 1979,⁴ and four years later the Supreme Court indicated four standards as follows.

- (1) The employer must reasonably explain the necessity of reducing the number of workers to courts.
- (2) The dismissal must be the last resort to adjust labor inputs.
- (3) The selection of the persons to be discharged should be proper.
- (4) The procedure of dismissals should be reasonable.

These four standards, however, do not specify what kind of employers’ behaviors are going to be admitted by the courts. Imai et al. (2004) (2005) examine the actual judgment documents of layoff cases between 1975 and 1995 to clarify which behavior the courts admitted or did not admit.

Generally the first standard (necessity of reducing workers) is interpreted that the layoff must be carried out under a sufficient consideration about the urgent business needs. Up to the first half of 1980s (the growing period of this case law) the courts’ judgment had been based on “whether or not the firm would fall down without adjusting the number of employers.⁵” Since the latter half of 1980s, as the case law has been matured, the courts tended to have left the firm free to decide the adjustment of number

⁴ Judgment of Oct. 29, 1979, *Shimazaki v. Toyo Sanso*, Tokyo High Court, 30 *RŌ MINSHŪ* 5, 1002.

⁵ Several judgments use the exact same phrase. For example, Judgment of Dec. 24, 1975, *Omura-Nogami Co.*, Omura Branch, Nagasaki District Court, 98 *Hanrei Jiho* 813. Judgment of April 25, 1979, *Hosokawa Seisakujyo Co.*, Sakai Branch, Osaka District Court, 48 *Rohan* 331.

of employees, but have examined whether the reasoning by employers was logically consistent by itself.

The second 'Last Resort Principle' means that dismissals are justified only when other methods of labor adjustment are not available. The courts usually mention each behavior to avoid discharging such as solicitation of voluntary retirements, stopping new recruitment, or transferring workers into different positions, and conclude whether the firm's behavior as a whole satisfies the second standard. In effect each criterion of behavior is still ambiguous.

Let see, for example, how the courts treat with the solicitation of voluntary retirements. This adjustment method seems to be a typical way to avoid discharging under life-time employment so that it is a good example to find how the courts apply the second standard to each behavior. In Imai et al. (2004) (2005), we can find 54 layoff cases between 1975 and 1985. In 16 cases within 54, the courts rejected layoffs simply because employers did not try to avoid discharging sufficiently. But, in 8 cases within these 16, the firms actually solicited voluntary retirements; that means, the solicitation is not sufficient to meet the Last Resort Principle. On the contrary, we can find 34 cases in which employers did not ask any voluntary retirements. In 15 cases within 34, the courts admitted the employers' justification of layoffs. Moreover in 12 cases within 15, the courts explicitly said that employers had satisfied the Last Resort Principle without the solicitation of voluntary retirements. Thus, the solicitation of voluntary retirements is neither necessary for the Last Resort Principle. Even though the solicitation seems to be the most typical way to avoid discharging, the courts' decisions are ambiguous how important this behavior is.

The purpose of the third standard is said to eliminate arbitrary dismissals. In the

actual cases the employers which had chosen workers to be laid off on the basis of “those who is married female and have two or more children⁶” or “no criterion⁷” are defeated just because the selection of the persons to be discharged should not be proper.

The fourth standard implies employers have to explain the necessity of layoffs to workers and/or unions with or without collective agreements. In actual cases the courts basically admit the insufficient effort only when employers did not explain at all.

Overall, the Doctrine of Abusive Dismissal probably regulates the labor inputs adjustment as a case law. Still it is ambiguous how strict the Doctrine regulates the number of workers because it does not specify which behaviors clear the bar. It is a traditional economics to detect the strictness by using data and estimation, assuming the Doctrine is a kind of tax. This essay pursues the other way to investigate why such an ambiguous doctrine can resolve the actual dispute. The resolving mechanism can shed light on the economic mechanism of this case law.

2. Truth of Leading Cases of the Doctrine

One of the most important roles of courts is, off course, to resolve the dispute. The case law is a result of resolutions. Over thirty-year examination by legal scholarship has polished several courts’ statements up to a principle of law, just as overviewed in the previous section. But they did not care about how the statement actually decided the complicated conflict. Here by examining the leading cases of the Doctrine we can find the key of conflicts that the judges had to resolve.

⁶ Judgment of Sep. 12 1975, *Koparu Co.*, Tokyo District Court, 17 *Hanrei Jiho* 789.

⁷ Judgment of April 25, 1979, *Hosokawa Seisakujo Co.*, Sakai Branch, Osaka District Court, 48 *Rohan* 331.

Firstly *Ichikawa v. Nihon Shokuen Seizo Co.* is an example that the employer discharged a worker who had been expelled from the union. The cause of exile was a serious political antagonism within the union. Informed the plaintiff was expelled from the union, it was quite natural for the employer to dismiss the expelled worker, because there was a union-shop agreement between the employer and the union. The worker went to the courts to wipe away not the exile from union but the discharge from firm; that is, the defendant in this case was not the union but the employer. After examination the courts admitted the exile from union had been unfair; therefore, the discharge based on an unfair exile should have been void. To deduce this decision the courts ask a help for the Fundamental Principle of Civil Code, "No abuse of rights is permitted," (Article 1 of the Civil Code), and concluded that even when an employer exercised its right of dismissal (the dismissal based on the union-shop agreement in this case), it would be void as an abuse of right so that it cannot receive general social approval as a proper act. It is clear that the true cause of dispute was the conflict among workers in this case.

Secondly the case of *Kochi Hosoo Co.* is such that the broadcast company dismissed a radio announcer, because he had been late for the time twice within two weeks and as results the company had to skip the ten minutes news once completely and once partially. The courts examined several officers who related to these two skips as well as the past skips in the same broadcast company. Finally it was shown that two recent skips had been occurred by both of the announcer and an undertaker who should have supported him because the undertaker himself was also late in the accident days. It was also shown that the company had sometimes suffered from the same kind of skips prior to this case. However, the plaintiff was the only person who had been discharged in the company. Not only the undertaker but also other announcers who missed his program

had not been dismissed at all. Thus the courts judged this dismissal was not fair because there was no reason why only the plaintiff should have been discharged compared with other workers. Then they concluded that if, under the specific circumstances of the case, the dismissal is unduly unreasonable so that it cannot receive general social approval as a proper act, the dismissal will be void as an abuse of the right of dismissal.

The third case is *Shimazaki v. Toyo Sanso*. This case is a typical example of layoffs caused by technological progress. The company belongs to the gas industry which has gradually lost their competitiveness during 1960s and 1970s because of technological changes. The managers decided to close a factory and dismissed almost all of the workers who belonged to it. The workers insisted, in the court, that the company could have avoided dismissals by transferring workers to other factories in the same company which were still growing up in those days. The district court admitted workers' insistence and decided the case as a void dismissal. On the contrary, the high court did not regard the transfer of workers as an obligation of employer and concluded that the dismissal had been effective. In this decision the Tokyo High Court presented the four standards that should be satisfied for no-fault discharge, and the Supreme Court approved the decision of high court. However, the actual conflict had continued even after the Supreme Court decision for ten years and ended as reconciliation. To reconcile the two parties agreed with admitting the void discharge and returning half of the plaintiffs (6 persons) to the original position in the company. It seems to be inconsistent because the final decision of courts was that the dismissal had been effective.

Imai et al (2007) shed light on the inside of case through direct interview with the plaintiffs. It shows that the main reason of the conflict was the split of union. Unfortunately the basis of minority group was in the closed factory. When the company

implied the union to close the factory, the majority was (at least seemed to be) reluctant to resist it, which made the minority interpret that the purpose of this closure was to expel their group from the company. Because the company and the union had a union-shop agreement, the minority had no choice to exit the union, and they had to ask the majority to negotiate with employers on behalf of minority's interest. As the minority had thought, however, the majority admitted the dismissals after a few negotiations. Without any means to directly communicate with employers, the dismissed minority brought the case into the court.

Therefore the main aspect of conflict was how to recover the direct communication between the company and the minor group and how to clear the minority's suspicion about the purpose of closing a factory if it would not have been so. The courts failed to grasp it and as results the courts' decision was almost useless to resolve the actual conflict.

3. Industrial Relations behind Leading Cases of the Doctrine

The focus of conflict in these leading cases was essentially the problem about industrial relations. Especially if multiple unions (groups) were in the same firm (it is usual during 1970s), it was quite natural for the employer to try to expel the extreme group out of the firm. When the minor group (or the third party) could not distinguish the exile and the mere employment adjustment, the conflict became severe and was sometimes brought into courts. The employers had to persuade the dismissed workers that the dismissals were not caused by the political reason and/or personal picky

feelings of managers.

In sum the Doctrine of Abusive Dismissal was produced from the conflict about industrial relations. Imai et al (2004) confirms this observation by using 54 cases between 1975 and 1984.

Within 54 cases, the conflicts of the manufacturing sector occupy 64% (34 cases). 25% (13 cases) comes from the service sector and includes 5 educational institutions and 4 medical companies. This proportion of sectors is near the distribution of whole conflicts of industrial relations.

In these 54 cases, 469 workers participated in total, and the average number of participants is 8.7 per case. While the single plaintiff cases were up to 39% (21 cases), the cases which involved more than ten workers were 11 cases. The biggest conflict was the case of *Hiroshima Glass Kogyo Co.*, in which 128 plaintiffs participated. To evaluate these figures we can find more recent one in Imai et al. (2007) that examines 55 layoff cases in the Tokyo District Court between 2000 and 2004. It reports the average number of plaintiff is 2.1 per case, and the share of single plaintiff cases is 67% (37 cases). Compared with 8.7 plaintiffs as well as 39%, the layoff cases between 1975 and 1984 surely had a strong nature of collective conflicts.

The object of claim also reveals that the nature of conflict was on the collective interest. Among 54 layoffs cases between 1975 and 1984, 52% (28 cases) claimed “an unfair labor practice.” Article 7 of Labor Union Act in 1945 enumerates various types of acts that are prohibited as unfair practices. For example, employers can neither discharge workers “by reason of such worker’s being a member of a Union” nor “refuse to bargain with the representatives of its employees without proper reasons.” The claim of an unfair labor practice means the conflict is from workers’ collective action. During

the period when the Doctrine of Abusive Dismissal had grown up, almost half of the actual no-fault dismissal cases are based on collective interest. On the other hand, within 55 cases of the Tokyo District Court at the beginning of 21st century, the plaintiffs claim an unfair labor practice only in 8 cases (15%).

Since the latter half of 1980s, in addition to the decline of extremism, the companies have got prepared for the communication mechanism between workers and managers to share the information about circumstances. When they can agree with the economic circumstances around them, the employers can easily persuade the worker that the dismissal is neither from the political activity nor personal favoritism of managers. In effect the mass layoffs since 1997 did not cause severe conflicts between dismissed workers and employers.

4. Curious Cases in the recent Tokyo District Court

Between 1998 and 2000 the Tokyo District Court had decided several dismissal cases. The judgment documents of these seem to have left from the traditional interpretation of the Doctrine of Abusive Dismissal.

For example, in the case of *Kadokawa Bunka Shinko Zaidan*, and the case of *Tokyo Gyogyo Shogyo Kyodo Kumiai Katsushika-branch*, the judge said, “Because the employers originally can discharge workers freely, it is the plaintiff to show the evidence and prove the abusiveness of rights,” and concluded the dismissals were justified.

5. Article 18-2 of Labor Standard Act

In 2004 Labor Standard Act was revised to include the Doctrine of Abusive Dismissal, adding new Article 18-2. This Article says,

“A dismissal shall, where the dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as a misuse of that right and invalid.”

At the beginning of discussion, the original form prepared by governments had an additive sentence, “The employers can discharge workers except for the case in which this or other law restricts the right.” This sentence was at last deleted during the deliberation in Diet. Employees asserted that the sentence could be interpreted to create a new right to dismiss and would lead people to misunderstand that employers could discharge workers freely. Along with this assertion the employers did not oppose to delete the sentence.

The detail of deliberation had focused on the following two points; the liability to prove the abusive rights, and the role of rule of employment. Under the Doctrine it is employers to prove the non-abusiveness of dismissals. Along with the original form of governments, the liability to prove would reallocate oppositely; that is, it would be employees to prove the abusive dismissal of employers. When the rule of employment specifies the causes of discharge, the Japanese courts have not admitted the dismissals different from these causes. The original form by government would change this

practical rule to permit the employers to discharge workers even though there is no reason in the rule of employment.

They confirmed the purpose of legislation was not to change the case law but to widen it, and deleted the sentence with the additional resolution, “this new article shall not change the practice in the courts.”

If the original form by government had been enacted, the curious cases in the Tokyo District Courts could have been leading cases of the “modified” Doctrine of Abusive Dismissal. On the contrary, in the deliberation it was clarified that the new article did not alter any practice of case law, and this discussion could affect the judgment of Tokyo District Court. As matter of fact we cannot find any such curious cases after the discussion of amendment.

6. Conclusive Remarks

The Doctrine of Abusive Dismissal has been produced from the collective action cases. Therefore, it may have been useful to resolve the dismissal cases based on collective conflicts. On behalf of the Doctrine (or social norm) the rapid adjustment of labor after 1997 may have not led to severe conflicts. On the other, the Doctrine is not always useful to mediate the discharge of individual conflict. Unfortunately since 1990s the legal conflict about labor has gradually changed from collective to individual. The curious cases in the Tokyo District Court may have been a leading case to adapt the change of circumstances. However, the legislation of the Doctrine and its deliberation in Diet has fixed the interpretation of Doctrine and may confiscate its ability to adjust the

changed circumstances.

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