Controversial issues surrounding dismissal regulations

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Under the second Abe administration, there has been a revival of the debate on dismissal regulations. The main points at issue are the clarification of the rules and the feasibility of a monetary compensation.

Dismissal regulations in Japan have been criticized for their uncertainty, rigidity and lack of alternatives. Due to uncertainty, the interested parties cannot behave rationally. An ambiguous rule is also likely to be interpreted and applied restrictively towards companies, at the risk of binding them in an excessive way. Moreover, in case of violation, the only remedy is to declare the dismissal null and void, forcing the continuation of the employment relationship.

According to some, dismissal regulations might hinder companies’ much needed restructuring plans. Furthermore, the legislation protects only the so-called regular workers, thus reducing precious job opportunities for irregular workers and the unemployed (especially, young people).

In short, pursuant to dismissal laws currently in force, (1) companies shall, pre-emptively, include grounds for dismissal in the “rules of employment” (article 89, paragraph 3, Labor Standards Act) and (2) dismissal, albeit based on such grounds, is invalid as an abuse of right if it lacks “objectively reasonable grounds” and is not “socially appropriate” (article 16, Labor Contract Act).

There is almost a general agreement concerning what kind of dismissal grounds are appropriate: inability to perform one’s duties or serious lack of abilities and qualifications, serious disciplinary violations, or economic necessity. Clear enough, so far. However, the real predictability of a dismissal validity judgement by a court of law is not high, because the rules regarding dismissal are ultimately based on the theory of the abuse of right and, therefore, depend on a general judgment by the judge.

Concerning dismissals on grounds of economic necessity, the interpretative criteria also known as “the four factors of reorganization dismissal” (necessity to downsize, effort to avoid the dismissal, appropriateness of the selections criteria of the employees to be dismissed, appropriateness of the procedure) are settled case law. Yet, the dependency on the general judgment remains.

Is it, then, possible to establish clear rules delimiting the judge’s discretion? For instance, according to some, we should introduce a rule ensuring the possibility of dismissal if every branch of an area is closed, in the case of a regular worker who was hired for a limited service area. However, in my opinion, the abovementioned proposal includes a certain number of misunderstandings.

First, the decision by the employer to close a branch is essentially respected also in courts, and the company does not even have the obligation to preserve the employment relationship outside the service area. In other words, dismissal is fully possible also under the current legislation. Second, however, if the company leads the worker into believing that the employment relationship
will continue, it is enough to increase the effort required to avoid the dismissal, and dismissing becomes less simple.

Most of the companies, when dealing with regular workers, demand, on the one hand, that their employees provide a service that is loyal and respectful of the employer’s rights, whereas, on the other hand, they are tacitly promising a long-term employment relationship. Dismissal is an act that betrays such promise and greatly penalize the employee. It is for this very reason that the judge, although a dismissal has appropriate grounds, tries to examine how many efforts the company did in order not to dismiss. In short, dismissal regulations can be intended as assessment criteria of the concrete circumstances that legitimize the breach of the promise. Since such circumstances are infinite in kind, establishing clear standards is not easy.

In light of the above, the ambiguity and the rigidity of current dismissal regulations have their reasons. However, it does not mean that there is no room for improvement.

First of all, as already specified, even if we try to regulate the standards of validity for dismissals, we cannot cancel their ambiguity. For starters, it is beyond the judge’s role to assess whether a company is in a financial situation that requires downsizing, or if a worker is incompetent enough to deserve to be dismissed. Such a decision is an exclusive prerogative of the person responsible of managing the company. The dismissal procedure (including the effort not to dismiss), too, may vary on the basis of the company’s size or of the state of industrial relations.

Consequently, the specific rules for dismissal (in what cases and with what steps to dismiss) are better off if entrusted to companies as an extension of the current obligation to set the grounds for dismissal. On the legislative level, we should establish the guidelines for dismissal regulations on the basis of current case-law, with the obligation for the companies to put them into practice. Moreover, the judge’s assessment must be limited to the conformity of the rules for dismissal established by the companies with the guidelines, and to the conformity of the dismissal with such rules. Such laws would remarkably increase the degree of certainty of the system.

Besides, in the guidelines it would be also necessary to establish a procedural duty to inform and consult with the workers. In such a way, the chances to agree with the workers in the process will increase, and we can also expect a preventive effect on litigation. If a peaceful farewell through termination by consent is reached, it is the best solution.

Even if current dismissal regulations could not be revised right away as described above, what we must urgently consider is the matter of introducing an alternative remedy to wrongful dismissals, i.e. a monetary compensation.

It is clear that, among dismissals, there are completely inadmissible kinds, such as discriminatory dismissals or retaliatory dismissals. For these typologies, it is necessary to maintain the current invalidity rule. Furthermore, it could be worthy of consideration to clarify when a dismissal lacks of “appropriateness” (for example, a disciplinary dismissal in clear absence of a behavior that is appropriate to the disciplinary action) and to establish its invalidity.

On the other hand, dismissals on grounds of lack of ability or economic necessity are based on the company’s decision to put a particular worker “out of the team.” Such decision by the company, although deemed unlawful by the judge in light of the legislation, needs to be, to a certain extent, respected. In these cases, it would be appropriate to avoid the sanction of invalidity, which forces to continue the employment relationship, by means of a compensation. For the
worker, too, instead of clinging to a company that considers them “out of the team,” it would be more constructive to accept the money and search for a new job.

We can identify more or less two types of compensation: (1) the type that can dissolve the employment relationship upon request by the person concerned, although the dismissal is invalid, and (2) the type that validate the dismissal if the employer pays it. The first introduce the monetary factor as a sanction for wrongful dismissal, the second as a requirement for dismissal.

Even today, disputes over dismissal often do not result in reinstatement, but in the payment of a monetary settlement. If we had to choose where to ascribe the current situation, it would probably be the first type. Be as it may, when we will finally legislate on the matter, the issue will be to define the juridical nature and the criteria of the compensation that the company has to pay, but, from the point of view of the legislative technique, they are far from being insuperable difficulties.

Another crucial point is the introduction of exceptions. Current dismissal regulations apply uniformly to all labor contracts, but such a system is too rigid. It would be necessary at least an exception for small businesses, since the burden of employing unnecessary resources becomes heavier as the number of employees is smaller. In addition, we could take into consideration also the introduction of an exception for the initial stages of the labor contract (for example, the training period). Simplifying dismissal as a tool to correct the mismatches caused by information asymmetries could lead to increased job opportunities for young people in desperate need of working experience.

Dismissal rules are the cornerstone of a society based on labor. It is necessary to seek a legislation that represents our expectations for the future Japanese world of employment. If, as seen in recent reforms, we are aiming at reducing inequalities by reinforcing the protection towards non-regular workers, it becomes inevitable to make dismissal regulations for regular workers more flexible. Obviously, when amending dismissal rules, we need to take adequately into account also the negative effects. Needless to say, it will be necessary to improve safety nets such as maintaining an external labor market, professional training and social security.

Revising dismissal rules, as well as the VAT, may not grant popularity, but is a necessary policy, whether we like it or not. It will be necessary, for the Government, a painstaking process of persuasion of the citizens.