A Comparative Study on Dismissal Rules in Cambodia and Japan: A Focus on The Rule of Justified Dismissal

2nd edition

NOP Kanharith

Nagoya University

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Center for Asian Legal Exchange
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Published March, 2014
Printed by
the Nagoya University Consumers' Co-operative Association, Nagoya, Japan

Furo-cho, Chikusa-ku, Nagoya 464-8601 JAPAN
Phone: +81(0)52-789-2325
Fax: +81(0)52-789-4902

Preface

This book is a comparative study of Japan and Cambodia centering on the issue of justifications for the legality of dismissal from work. It is a highly interesting piece of research which examines the legal theories in conjunction with various relevant case studies in each country.

I would like to draw attention to the important aspects of this study.

Firstly, this is a comparative study related to genuine cases in law. It draws on eighty major cases involving precedents and decisions in Japanese law, and awards in Cambodian law. It analysis the background to each case and deduces the legal reasoning guiding the precedent they set. This is the first time such a study has been attempted in regard to Cambodian law. We are also given precise understandings of the complex cases from Japanese law and provided with an accessible arrangement of judicial precedents. More than anything else, the study manages to use this analysis of precedents in Japanese law to help sort out award precedents in Cambodian law. The research here has gone one step further than previous research by overseas students which have been confined to comparisons of legislative systems. The author was a student in the English-language stream at our School but his high level of Japanese enabled him to read original Japanese law cases and to understand them accurately.

Secondly, in analyzing the legal theory behind dismissal laws, the discussion is not limited to merely the implications of the wordings of statutory laws, but also looks at how such laws function in reality as revealed through an examination of cases. And so, for example, we can see how, in the Cambodian situation, an unjustly dismissed worker may, as a point of law, demand reinstatement as distinct from simple monetary settlement but also how the arbitration committee will judge whether reinstatement is possible when the various circumstances of the case have been looked at. The study presents strong theoretical critiques of this. There are many such instances of analyses of actual conditions which would not be obvious if only the provisions of the laws were to be considered.

Thirdly, the study goes beyond being merely an arrangement of case precedents and adds an analysis of core points in Japanese law which can only be understood by reading the original texts in Japanese. For example, in the case of illegal dismissals, as with French law, the employment contract is not considered to have been severed meaning that the worker can be reinstated in their job. However, the study makes clear that in reality resolutions tend to be through monetary compensation. Another example is how dismissal through illness are difficult grounds for employers to use, so the study describes how there exists a system for suspension and temporary retirement.

Fourthly, the justified grounds principle in Cambodian law and the abuse of the right to dismiss principle in Japanese law are seen to function the same in reality as legal principles through an analysis of various cases. Consequently it is possible to compare both legal principles and with this understand that there are many points in an examination of Japanese law that can act as suggestions for Cambodian law. The legal principles regarding dismissals

are the same but in the case of Japan these were first shaped by precedents and afterwards established in law (the 2003 Revised Labor Standards Act Article 18-2 and the 2007 Labor Contract Act Article 16) whereas in Cambodia they were initially established in law in connection with the ratification of ILO treaties, and afterwards became regulated through awards by arbitration committees. This distinction is also deftly demonstrated.

Fifthly, the two legal principles are different, however, in the attention they give to social appropriateness. Japanese law offers important implications on this point. This is the originality of this study. The idea of separating the rational grounds for dismissal and its social appropriateness has been little theorized in Japan but from the perspective of Cambodian law it is clear that separating the two like this is of significance. The writer has acquired this insight through his research into comparative law.

I would like to express my gratitude towards the CALE Center for their successful publication of this superb piece of research.

Hajime Wada

Professor at Nagoya University School of Law

February 2014

Acknowledgements

I am indebted to many people. First of all, I would like to express my sincere gratitude to my academic supervisor, Professor WADA Hajime, for his considerable expertise, excellent guidance, and encouragement since the first day I participated in his seminar. His comments as well as guidance have provided me with an overall understanding on how to conduct a legal research and to analyze the legal issue critically. Without his supervision, I would have not been able to reach such a positive achievement.

Second, I would like to extend my profound thanks to Associate Professor NAKANO Taeko, Associate Professor BENNETT Frank for their comprehensive lecture and guidance on how to write a legal paper. My sincere gratitude is also extended to Associate Professor OKUDA Saori who always encourages and advises me whenever I need help. I also would like to thank professors and staffs of Graduate School of Law of Nagoya University for their generosity in providing a good environment for both academic and daily life.

Third, my profound thanks go to the Government of Japan and the Ministry of Education, Culture, Sports, Science and Technology (MEXT) of Japan for their financial support during my study in Japan. This priceless support is very influential to my future career, which more or less will contribute to the development of my country, Cambodia.

Fourth, I would like to thank Associate Professor KUONG Teilee who spent valuable time to teach me and other Cambodian students to read Japanese legal documents. I am also in debt to a kind assistance from Dr. HAP Phalthy, Mr. HEM Sras, Ms. POK Phearoun, and Ms. NUTH Sotheavy in proofreading my dissertation.

Last, my thanks and love go to Miss PLANG Dara, my parents, siblings, and relatives who always give me inspiration, encouragement, and the will to be ambitious.

NOP Kanharith

Nagoya, July 19, 2012

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Abbreviations and explanatory notes

1. Abbreviations

AC: Arbitration Council

CBA: Collective bargaining agreement

ILO: International Labor Organization

MoU: Memorandum of Understanding

NSSF: National Social Security Fund

Prakas: Ministerial orders (proclamation)

2. Explanatory notes

Hanji: Hanrei Jiho （判例時報）

Minshu: Saikosai Minji Saibanreshu (最高裁民事裁判例集)

Rouhan: Roudou Hanrei （労働判例）

Roukeisoku: Roudou Keizai Hanrei Sokuhou （労働経済判例速報）

Rouminshu: Roudou Kankei Minji Saibanreishu （労働関係民事裁判例集）

Abstract

The rule of justified dismissal either in the form of valid reason or abuse of rights has protected workers against unfair termination of employment by their employers. The rule of valid reason in Cambodia lacks comprehensive content. The rule was long a legislative rule but has a short history of application due to the civil war from 1970 to 1993. While the courts are passive in creating case law to fill in for the flaws in legislative rules, the Arbitration Council has been developing many rules governing issues concerning dismissals. However, these arbitrator-made rules cannot provide a comprehensive approach to all cases of dismissals. This is because the council deals only with collective labor disputes. The awards of the council do not always bind employer and worker to enforcement. Though the council has developed comprehensive rules for dismissal in cases of worker's misconduct, it has yet to establish rules for dismissal in the case of a worker's lack of ability or in the case of economic difficulties.

In contribution to the development of rules for justified dismissal in Cambodia, this dissertation proposes contents for rules for dismissal based on the Japanese experience. In Japan, the rules concerning abuse of right to dismissal consist in the requirement for the existence of reasonable grounds and the appropriateness of dismissal. An examination of the application of the Arbitration Council shows that the rule of valid reason in Cambodia is based on the existence of reasonable grounds while the requirement for appropriateness of dismissal is not widely applied by arbitrators in all cases of dismissals. Moreover, there are two kinds of remedies in the practice of collective labor disputes. The worker has the option of monetary compensation as provided by the Labor Law or of reinstatement that is another remedy provided by the Arbitration Council in cases of dismissal without a valid reason.

In conjunction with an increase in companies in Cambodia that wish to maintain continuous employment relationships, there is a trend for the Arbitration Council to expand the rule of valid reason far beyond the existence of valid reason in the case of dismissal due to workers' misconduct. With the aim of having consistent rules, this study suggests that the rule of justified dismissal in Cambodia should consist of two main requirements: the existence of a valid reason and the appropriateness of dismissal. This proposal would involve introducing rules concerning the abuse of right to dismissal to be found in Japan to Cambodia. Furthermore, based on the practice found in collective labor disputes, the remedy for unjustly dismissed workers should be a choice of reinstatement or monetary compensation.

Introduction

The dismissal of an employee is a unilateral action on the part of an employer through an expression of intention for the termination of an employment contract and a cancellation of future employment relations.[1] In Japan, the issue of dismissal is called *Kubikiri*, which literally means "beheading."[2] However, in the field of labor and employment law, *Kubikiri* refers to the removal of workers from enterprises. Given that the term *Kubikiri* refers literally to a form of death, the implication is that dismissal is a serious matter. In Cambodia too where the income of a worker supports not only his or her life but also that of family members,[3] the matter of dismissal also concerns lives and causes social and economic hardship to workers and their dependents. Thus, Cambodia adopted the first Labor Code in 1972 and restricted the employer's freedom to discharge a worker without a valid reason.

The International Labor Organization's Recommendation on Termination of Employment in 1963 influenced the rule on justified dismissal in Cambodia through the requirement for the existence of a valid reason for discharge. Although there were subsequent changes to the Labor Codes in line with social and political changes, the rules of valid reason of the Labor Code in 1972 remained the foundation for the dismissal rules in the Labor Code in 1992 and the Labor Law in 1997.

Reasons for protecting workers

There are many reasons for supporting restrictions on an employer's freedom to terminate the employment contract in accordance with the rules of justified dismissal. For example, the rule of valid reason derives from the concept of the protection of the right to life; and therefore, the employer originally does not have the right to dismiss the worker freely.[4] The Universal Declaration of Human Right of 1948 (Article 3), the Constitution of Cambodia (Article 32), and the Constitution of Japan (Article 25) guarantee the right to life. In Japan, the right to life in Article 25, the right to education in Article 26, the right to work in Article 27, and the right to association, the right to collective negotiation and the right to act collectively in Article 28 are called the fundamental rights of the right to life in general terms.[5]

---

[1] The following cases are not dismissals: the end of contract according to expiration of a set period and retirement age; the automatic cancellation of employment contract according to the expiration of the period of work suspension even where the worker wishes to continue the contract; the refusal to hire a person who receives a "tentative decision to hire" and "employment stoppage" a worker whose short-term contract has been repeatedly renewed (they are named as being dismissed) but they are not dismissed in the strict meaning. 瀧川誠男, 解雇の法理 Doctrine of Dismissal (東京: 労働法学出版, 1972), 11.

[2] 池田直視, 解雇の法的問題 Legal Problem of Dismissal (京都: ミネルヴァ書房, 1976), 26.

[3] Lejo Sibbel and Petra Borrmann, "Linking Trade with Labor Rights: The ILO Better Factories Cambodia Project," Arizona Journal of International and Comparative Law 24 (2007): 247–48.

[4] 池田, 解雇の法的問題, 56.

[5] Ibid., 190.

In addition, the requirement of a valid reason for dismissal is the realization of "the right to work, which relates to both access to and security of employment."[6] Both international and national laws have guaranteed the right to work. For example, the Universal Declaration of Human Rights of 1948 states that "Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment."[7] Furthermore, the International Convention on Economic, Social and Cultural Rights of 1966 recognized that "the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts and obliges the State Parties to take appropriate measure to safeguard this right."[8]

The Constitution of Cambodia (Article 36, paragraph 1) recognizes and respects the right to work in general terms and that the people have a right to choose their occupations suited to their ability according to the need of society. The Constitution of Japan (Article 27, paragraph 1) reads, "All people shall have the right and the obligation to work." In Japan, there is an assumption that the protection of this constitutional right influences the legal systems governing dismissal. The right to work means that the government has an obligation to create and maintain an environment where workers have an opportunity to take a position in a suitable job and to secure the livelihood of workers who lose this chance.[9] In addition, Article 27 protects the continuity of employment of the worker. Because employment is connected to the worker's personal well-being, the avoidance of unemployment for the protection of workers' livelihood in the situation of unemployment reflects the constitutional value.[10]

Respect for individual dignity is another reason for protecting workers against employer's arbitrary dismissal. The Universal Declaration of Human Right (Article 1) recognizes and reaffirms the respect for individual dignity. Moreover, the Constitution of Cambodia (Article 38) and the Constitution of Japan (Article 13) also recognize the right to dignity. The employer violates the worker's right to dignity when he or she does not treat an individual with "concern and respect."[11] A dismissal based on discrimination, discharge without a cause, or the dismissal of the worker immediately without giving a chance for self-defense against an employer's allegation of misconduct are examples of employer's violation on the dignity of individual. Hence, respect for individual dignity requires employers to have a valid reason and to abide by reasonable procedures when dismissing workers.[12]

Justification is the only requirement for the termination of employment contracts at the initiative of employers, but not when initiated by workers since there is a different implication of the rule that provides parties with equal right to termination of contract.[13] The rules

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[6] *General Survey of the Reports Relating to the Termination of Employment Recommendation, 1963 (No.119)*, International Labor Conference 59th Session 1974 (Geneva: International Labor Office, 1974), 2, Geneva.
[7] The Universal Declaration of Human Rights, art. 23, ¶ 1 (1948).
[8] The International Convention on Economic, Social and Cultural Rights, art. 6, 1966.
[9] Kazuo Sugeno, Japanese Employment and Labor Law, trans. Leo Kanowitz (Tokyo: University of Tokyo Press, 2002), 16.
[10] 和田肇, 人権保障と労働法 Human Right Protection and Labor Law (東京: 日本評論社, 2008), 206.
[11] Hugh Collins, *Justice in Dismissal : the Law of Termination of Employment*, Oxford monographs on labour law (New York: Oxford University Press, 1992), 16.
[12] Ibid., 17.
[13] *Protection Against Unjustified Dismissal*, International Labor Conference 82nd Session 1995 (Geneva:

governing termination of an employment contract in the nineteenth century were those based on the principle of freedom of contract in the civil codes that allowed either an employer or a worker to unilaterally terminate their employment relations without taking care of a valid reason.[14] When examined carefully, an employer has much discretion in dismissal at any time provided that he or she gives advance notice to the worker. Such a rule that provides equal freedom for an employer to dismiss a worker and for a worker to resign has different consequences. The consequences of the worker's resignation merely makes it difficult for the employer to find a replacement in the abundant labor market, while the consequence of employer's right to dismissal can cause social and economic hardship for the dismissed worker and his or her dependents.[15] The different implications of the right to end contracts obliges the employer to show justification when terminating employment while there is no requirement of justification for termination when done at the initiative of the worker.[16]

The Constitution of Cambodia of 1993 states "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights."[17] Accordingly, Cambodia has an obligation to realize the right to life, the right to work, and the right to dignity that are guaranteed by the Universal Declaration of Human Rights, the International Convention on Economic, Social and Cultural Rights. In addition, Cambodia has to respect the right to be dismissed with a valid reason in the ILO Termination of Employment Convention (No. 158). As a result of this constitutional obligation, Cambodia adopted its Labor Law in 1997 that requires a dismissal to take place only with a valid reason.

Problem of the study

The rule that requires a valid reason for a dismissal is abstract in content even though it tries to categorize the reason as being related to the worker's attitude or behavior, or to the necessity of the enterprise. Consequently, there are many disputes over whether or not an employer is dismissing a worker according to a valid reason. In such instances, in order to predict the possibility of winning the case, either party has to know the tendency of judges in dealing with disputes through a review of their previous judgments.

Although there is no principle of stare *decisis* in countries for civil law systems as in

International Labor Office, 1995), para. 2.

[14] Article 1148 of the Cambodian Civil Code of 1920 allowed each party to terminate the contract at any time with an obligation of eight-day prior notice. Article 627 (paragraph 1) of Japanese Civil Code of 1896 provides that "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."

[15] *Report VIII (1) Termination of Employment at the Initiative of Employer*, International Labor Conference 67th Session 1981 (Geneva: International Labour Office, 1981), 6, Geneva.

[16] The freedom of worker to leave a job freely is guaranteed by the Force Labor Convention (No. 29), 1930, and the Abolition of Forced Labor Convention, (No.105), 1957. See *General Survey of the Reports Relating to the Termination of Employment Recommendation, 1963 (No.119)*, Paragraph 26.

[17] The Constitution of Cambodia, art. 31, ¶ 1 (1993).

Cambodia and Japan, there is an acceptance of previous judgments as the standard of jurisdiction according to three points of view.[18] The first viewpoint concerns how the court treats similar cases fairly and equally, meaning that similar facts should have similar decision. The second one is based on the stability of rule grounded on the expectation that the same court should have the same rules for making decisions. The third one is that the courts should find it convenient just to refer to the previous decision when there are similar facts.

In Cambodia, it is difficult for parties to find a court's previous decisions for use as reference to deal with the abstract rule of dismissal due to the following reasons. First, the legislative rule on dismissal for a valid reason is old but has had a short history of application. Though Cambodia adopted its first Labor Code in 1972 and provided workers with the right to be protected from unfair dismissals in Article 70, application of this was impossible due to the subsequent civil wars from 1975 until 1993 when Cambodia shifted its political system from socialism to democracy with a market economy.[19] The employer's use of dismissal started after there was an increase in foreign direct investment in Cambodia in the early 1990s. In response to an increase in the importance of employment relations, the Royal Government of Cambodia enacted a new labor code in 1997.

Second, even though one can access the judgments of the courts, it is still difficult for to understand the court's tendency in the interpretation of law. This is because most judges are passive in interpreting laws or in making any judicial rule. The passiveness of judges might be a result of the tradition and history of legal practice in Cambodia after the defeat of the Pol Pot regime in 1979. If compared with judgments before Pol Pot regime came to power in 1975, the present decisions lack a judge's explanation or interpretation before applying the law to the fact.[20] Historically, since the collapse of the Pol Pot Regime in 1979 until 1993, Cambodia was ruled under socialism and judges were government officials whose duty was to apply the laws supplemented by regulations made by the executive branch in resolving the conflicts.[21] Additionally, the capacity for interpreting the law of judges after the subsequent civil wars was another cause for this passiveness.

The workload of judges might be another cause of passiveness. The Labor Law (Article 387) demands the establishment of a Labor Court to deal with individual disputes. However, such special court has never existed since the adoption of the Labor Law in 1997. Consequently, ordinary courts are entrusted to resolve all kinds of disputes including labor disputes.[22] Because the number of judges was small to deal with all kinds of cases, a judge had to deal with 1000 cases per year.[23] In 2011, the number of judge increased, and there

[18] The Constitution of Cambodia, art. 31, ¶ 1 (1993).
[19] The Constitution of Cambodia, art. 56.
[20] Kan Channmeta et al., *Legal Methodologies: Khmer Law* (Association for Khmer Law, 2006), 46. The bulletin written by a group of Cambodian PhD candidates, judges, and other legal practitioners in 2006 examined the development of structures and contents of the judgment papers. It was revealed that judgments after independence from France in 1953 consisted of explanation and interpretation of each legal rule before applying it to the fact. In contrast, present day judgments (judgments made after the collapse of Pol Pot Regime in 1979) have lacked legal reasoning and have mostly referred to the facts or claims of the parties.
[21] Dolores A. Donovan, "Cambodia: Building a Legal System from Scratch," *International Lawyer* (ABA) 27 (1993): 450.
[22] The Labor Law of Cambodia of 1997, art. 389 (1997).
[23] *Recommendations and Comments on the Draft Law on Juvenile Justice* (European Commission and Unicef, 2007), 111.

were 228 judges in the courts of first instance dealing with approximately 69,146 cases. Hence, each judge had to deal with 300 cases on average per year.[24] As a result, judges are exhausted expending great effort on each case. If they spend too much time on a case, this process can prolong the time for resolving the next waiting cases.

In addition, the passiveness of judges may be a result of an absence of legislation that encourages judges to interpret or explain laws. For example, when there is conflict over the interpretation of laws or the question of constitutionality, only the Constitutional Council[25] has the right to a final say and not the courts, not even the Supreme Court.[26] Only Article 143 of the Law on Criminal Procedure dated March 8, 1993 guided the judges about the elements that should be included in the criminal decision. However, there was no legislative rule that demanded judges include reasons in civil judgment papers until the enactment of the Code of Civil Procedure in 2006.[27] The implementation of this new Code of Civil Procedure will allow parties in conflicts to see judges' explanation or interpretation on abstract laws before applying them in each case.

Third, the reason that leads to the lack of comprehensive content for the dismissal rule is the matter concerning the function and effectiveness of the Arbitration Council. In 2003, the Arbitration Council was established according to Chapter 12 of the Labor Law to deal with labor disputes. This council is an institution consisting of arbitrators who are representatives of employers, workers and government, and it deals only with collective labor disputes. The council publishes its awards on a homepage where everyone can freely access it.[28] From May 2003 until December 2010, the council received 978 cases and issued 658 awards.[29] Among the 658 awards, there were approximately 213 awards concerning disputes related to dismissals.[30] The review of these awards has shown that the decisions of Arbitration Council are consistent with a comprehensive explanation. This is because when dealing with the same kind of disputes with similar facts, the arbitrators often refer to the previous decisions in covering the loopholes in laws.

However, the influence of the arbitrator-made rules on employment relations, especially the rule for dismissal remains questionable. First, the council has authority in dealing only with collective, but not individual labor disputes.[31] In order for the disputes to be resolved by the Arbitration Council, the workers often attach the issue of dismissal of individual workers onto matters concerning collective labor disputes. In Cambodia, a dispute

[24] *Annual Report* (Ministry of Justice, 2011). The average number of the cases a judge has to deal with is derived from the number of all kinds of cases divided by number of the judges in courts of first instance.
[25] There are nine members in the Constructional Council. The King appoints three members, the Supreme Council of Magistracy elects three other members, and the National Assembly elects the other three members. Law on the Organization and the Functioning of the Constitutional Council and Law on the Amendment of the Law on the Organization and the Functioning of the Constitutional Council, art. 3 new (1998).
[26] The Constitution of Cambodia, chap. 10 (1993).
[27] The Code of Civil Procedure of Cambodia of 2006, art. 189 (2006). The Code of Civil Procedure is the first legislative rule that requires judges to write down facts and points at issue, reasons, and the final decision in their judgment papers.
[28] The awards of the Arbitration Council are published via its homepage http://www.arbitrationcouncil.org/.
[29] *The Arbitration Council: Annual Report (2010)* (The Arbitration Council, 2010), 12.
[30] The number of awards on dismissal was counted after the review on each award issued from May 2003 to December 2010. In 2011, there were 57 awards regarding dismissal.
[31] Dismissals of individual workers are excluded from the collective disputes. [2008] Case no 13/08 (kh The Arbitration Council, February 27, 2008); [2011] Case no 25/11(kh The Arbitration Council, March 18, 2011).

is collective one when it involves the participation of a union, and when the dispute affects the operation of the enterprise concerned.[32] In some cases, if the employers and workers have agreed that a dispute is collective and it has been registered as a non-conciliated collective one in the report of the Labor Inspector, then the dismissal of an individual can become the subject of a collective labor dispute.[33]

Second, the arbitrator-made rules on the issues of dismissals are not sufficient to foresee the result of all categories of dismissals. According to the Labor Law (Article 74), the grounds for dismissals are those relating to worker's aptitude, worker's misconduct, and the necessity of the operation of the enterprise. Through the review of the awards of the council, many cases of dismissals occurred in the garment sector, and they were mainly concerned with dismissals on the ground of worker misconduct. As a result, the Arbitration Council has developed comprehensive rules in cases of dismissal on the ground of worker's mistakes while it has yet to establish the rules for dismissal on grounds relating to worker's poor capacity or sickness, or the necessity for the operation of the enterprise.

Third, the awards of the Arbitration Council do not always have binding effects. There was a Memorandum of Understanding in September 2010 among the unions and employer associations in the garment sector to abide by the decision of the Arbitration Council for disputes over rights (the disputes that concern the violation of the laws). However, the awards still remain weak in enforcement in other sectors of employment relations that are not in the scope of this Memorandum of Understanding, such as hotels, restaurants, and beer companies.

In sum, Cambodia lacks comprehensive and consistent rules for resolving issues concerning all kinds of dismissals due to the short history of the application of legislative rules on dismissal, the passiveness of judges in legal interpretation, and due to questions over the function and effect of the arbitrator-made rules. Accordingly, this dissertation conducts the first mission in providing recommendations on the concrete content for the dismissal rules in Cambodia.

Objective and scope

This dissertation aims at providing recommendations on the content of rules on justified dismissal in Cambodia through looking at the Japanese experience. In Japan, the legislative rule for dismissal is also an abstract rule, but the courts play an important role in providing comprehensive content through the creation of case law. After an examination of these detailed rules, the dissertation makes suggestion for the content of rules on justified dismissal in Cambodia for the consideration of judges and arbitrators or persons in charge of dispute resolution. In addition, the development of concrete and consistent rules is important for parties to the conflicts who wish for stable employment relations, rules and practices.

[32] The workers who were members of unions and workers who were not members of unions filed complaints against dismissals to the AC through a union. The union in the disputing company represented these workers in the name of collective labor disputes. The AC accepted this claim as one of the dispute issues in the collective dispute. See 10/10 (2010).
[33] [2012] Case no 70/12 (kh The Arbitration Council, May 10, 2012).

The study focuses only on drafting the content rules of dismissal, and it does not resolve the problem of dispute resolution mechanisms or how to alter the attitude of courts in providing reasoning when making a decision. The dissertation mainly discusses the rule of justification that applies to the relationship under employment contracts of unspecified duration. Even though there are disputes over the employer's renewal of fixed-term contracts, the dissertation supports the interpretation of the Arbitration Council that the total duration of fixed-term contracts including their renewal cannot exceed the maximum period of two years[34]. If a fixed-term contract is renewed for more than a period of two years, the contract will automatically be converted into an unspecified duration contract. In this sense, the rule of justification also applies to the case where an employer refuses to renew the contract or terminate the contract of the worker where the duration of the fixed-term contract exceeds two years.

Structure of dissertation

The content is comprehensive and consistent in order to realize the protection of the worker against arbitrary dismissal, to secure the consistency and stability of laws or legal rules, and to stabilize employment relations. In order to develop the content for the dismissal rules, Chapter 1 of the dissertation examines the development and problems of dismissal rules in Cambodia. In particular, the study conducts a deep analysis of the legality of a dismissal according to the rule that requires a valid reason relating to the worker's poor capacity, sickness or behavior, or the business needs of the enterprise. The research on dismissal rules is based on a review and analysis of available court judgments and the awards of the Arbitration Council. While the decisions of the Arbitration Council are consistent, its rules are in the process of development. Since there are few judgments on dismissals available, the awards of the council are used to understand the development and characteristic of dismissal rules in Cambodia.

Chapter 2 examines the rules of justified dismissal and their applications in Japan. Japan helped Cambodia adopt the Code of Civil Procedure in 2006 and Civil Code in 2007. Although Cambodia enacted the Labor Law in 1997, nine years before the Civil Code; the rules in Civil Code that came into force in 2011 have had much influence on the interpretation of the articles in the Labor Law. One cannot deny the close relationship between the Civil Code known as the general rule and the Labor Law known as the special rule.

Therefore, the study of the Japanese experience is interesting and useful for the development of the legal system of Cambodia. In order to understand the dismissal rules in Japan, one needs to not only read the text of laws but also refer to the judicial rules or judge-made rules. Hence, several selected judgments are used as models for analyzing the legality or validity of dismissals. There are also many books and articles that contribute to the comprehension of dismissal rules in Japan. This chapter also analyses the strengths and weaknesses of the dismissal protection rules in Japan.

[34] [2003] Case no 10/03 (kh The Arbitration Council, July 23, 2003).

Chapter 3 looks at the two legal systems under a comparative method in order to highlight the similarities, differences, strengths, and weaknesses. Finally, Chapter 4 concludes and provides suggestion for improvement of dismissal rules in Cambodia through consistent and concrete content.

Chapter 1: Rule of justified dismissal in Cambodia

Section 1: History of dismissal rules

1. General overview of rules regarding dismissal

The principle of freedom of contract in the civil codes was a traditional rule that provided employers with much discretion in terminating a contract. The freedom of an employer to dismiss an employee has been restricted by the internationally accepted concept that employment relations cannot be terminated unless there is a valid reason[35]. The rules of justified dismissal in various countries have been worded in a variety of terms, such as *valid reason*, *objective cause*, *specified serious reason*, *real and serious grounds*, *legitimate grounds*, *justified*, *unreasonable*, or *rational reason*[36]. However, though the rules are worded in different terms, the national laws of an individual country have the same purpose in terms of providing protection for workers against an employer's arbitrary dismissal.

Until the adoption of the ILO Recommendation (No. 119) on the Termination of Employment in 1963, there was no international standard demanding that a dismissal must take place with justification even though a few countries provided workers with such a protective mechanism[37]. The Mexican Constitution of 1917 required justification for dismissal perhaps because it was adopted in the period where workers faced low employment opportunities, low wages, and an absence of unemployment benefits or other protective mechanisms for unemployed workers[38]. In 1920, Germany adopted the Work Council Act that entitled the dismissed worker to report to a work council over a period of five days when the dismissal took place without justified grounds[39]. The Russian Soviet Federative Socialist Republic adopted the Labor Code in 1922, which required justification for dismissal[40]. Hence, this Recommendation (No. 119) was the first international instrument that provided some fundamental protections to workers, such as the requirement for justification, a notice period prior to dismissal, the right to appeal, compensation and income protection, and safeguards

[35] R119 Termination of Employment Recommendation, 1963 (1963); C158 Termination of Employment Convention, 1982 (1982); R166 Termination of Employment Recommendation, 1982 (1982).
[36] *General Survey of the Reports Relating to the Termination of Employment Recommendation, 1963 (No.119)*, Paragraph 29.
[37] In 1950, the International Labor Conference through its resolution adopted in June 28, 1950 noted the absence of international standard and requested the member countries to submit reports concerning termination of individual contract of employment. See Record of Proceedings, International Labor Conference 33th Session 1950 (Geneva: International Labor Office, 1951), 579, Geneva; *General Survey of the Reports Relating to the Termination of Employment Recommendation, 1963 (No.119)*, para. 2.
[38] Arturo S. Bronstein, "Protection Against Unjustified Dismissal in Latin America," *International Labour Review* 129 (1990): 593. Article 123 (XXII), first sentence, provides " Any employer who dismisses a worker without justifiable cause or because he has entered an association or union, or having taking part in a lawful strike, shall be required, at the election of the worker, either to fulfill contract or to identify him to the amount of three months' wage."
[39] Work Council Act of Germany, art. 84 (1920).
[40] Section 47 of Labor Code of Russian Soviet Federative Socialist Republic adopted in 1922 at Edward Yemin, "Job Security: Influence of ILO Standards and Recent Trends," *International Labour Review* 113 (1976): 20.

for dealing with a reduction in the workforce.

According to the General Survey of the Report Relating to the Termination of Employment Recommendation in 1974, the presence of the ILO Recommendation No. 119 in 1963 reflected an international understanding that the requirement of a valid reason was needed for the protection of workers against the economic and social hardship resulting from the loss of employment [41]. Recommendation No. 119 had much influence on the establishment and revision of legislation in many countries. For example, in 1971, Britain enacted the Industrial Relations Act to deal with unfair dismissal[42]. In 1972, Cambodia adopted its first Labor Code where the dismissal rule is worded similarly to the rule given in the Recommendation[43]. France adopted legislation on dismissal in 1973 (modified in 1989 and 1991) that required that dismissal to take place when there was a real serious cause (Labor Code, Article L 122-4). [44]

Since the concept of justified dismissal provides protection and job security as a part of the right to work, the Governing Body of the International Labor Office found that there had to be an international instrument that was more appropriate than Recommendation No. 119[45]. Hence, the ILO Convention (No. 158) and ILO Recommendation (No.166) were adopted in 1982 to replace the ILO Recommendation (No. 119). [46]

2. Development of dismissal rules in Cambodia

2.1.Civil Code of 1920: Freedom of dismissal

In Cambodia, the principle of freedom of contract is also the basis of rules dealing with contract termination. In the early 20th Century, Cambodia was primarily an agricultural society. Custom or practice played an important role in governing employment relations[47]. In 1920, Cambodia adopted its first Civil Code. Articles 1145 to 1176 were regulations

[41] *General Survey of the Reports Relating to the Termination of Employment Recommendation, 1963 (No.119)*, para. 3.
[42] Collins, *Justice in Dismissal*, 23.
[43] Yemin, "Job Security," 21.
[44] Antonida Alibekova, ed., *Employment Law*, The Comparative law yearbook of international business (Alphen aan den Rijn: Kluwer Law International, 2007), 210.
[45] In 1980 the Governing Body of International Labor Office requested the member states to reply and give comments on the matter concerning the termination of employment at the initiative of the employer. Among 50 replying countries to question 1, 46 countries agreed to have a draft of the adoption of international instrument. Among 49 replying countries to question 2, 25 selected the choice where the instrument had to be made in form of Convention supplemented by a Recommendation. *Report VIII (2) Termination of Employment at the Initiative of the Employer*, International Labor Conference 67th Session 1981 (Geneva: International Labour Office, 1981), 4–6, Geneva.
[46] Since the adoption of ILO Convention (No. 158) in 1982 until today, there were 35 countries that ratify and enforce this convention. See *Termination of Employment Instruments*, Background paper for the Tripartite Meeting of Experts to Examine the Termination of Employment Convention, 1982 (No. 158), and the Termination of Employment Recommendation, 1982 (No. 166) (Geneva: International Labour Office, April 18, 2011), Appendix 1, Geneva.
[47] There were rubber plants, family enterprise, and small factories inventing the crops or melting the rice. Sitha Hang, *Nitekanhea (Labor Law)*, 2005, 4.

dealing with labor relations under the contract for hiring of work or service. Article 1145 defined the hiring of work as a contract whereby one person, called a worker, an employee, or a servant, was committed to work only for determined periods for another person, called a "boss" or "employer," in return for a price proportional to the agreed work, called a "salary" or "wage." Article 1147 demanded parties to conclude their contracts of hiring for service only for a fixed period.

According to the current legislation in Cambodia and Japan, a fixed-term contract normally ends at the arrival of the specified date in the contract, and the premature of termination of a fixed-term contract is allowed only when there is an unavoidable cause or serious misconduct by one of the parties. The Civil Code in 1920 (Article 1148) of Cambodia provided each party with the freedom to reduce the length of the contract at will, provided that notification took place eight days prior to the date of termination. This notice had to be made before the commune chief (Article 1149). With the freedom of parties to reduce the length of contracts, the old Civil Code accepted the freedom of termination while not favoring a long-term contract of hiring for service. The legislators in the 1920s did not favor long-term employment relations because they wanted to end the use of labor in the form of slavery, which had been commonly practiced in Cambodia until there was Royal Decree of February 1, 1898 that abolished all forms of slavery in the whole country.

After France granted independence in 1953, Cambodia remained an agricultural society until the years 1957-58 when the government started to realize the necessity of industrial development and began increasing state-own and private enterprises[48]. In addition to the existing laws concerning labor relations made during the French colonial period, [49] the development of labor law in the independent era was needed in order to govern the change of employment relations at the time.

For example, in 1962, Marcel Clairon, who was a French attorney, wrote a book entitled "Droit Khmer: Droit du Travail" as a contribution to studies at universities in Cambodia[50]. In this book, Clairon explained the types of employment contracts and rules of termination of employment contract as follows. Employment contracts could be concluded for a fixed duration or non-fixed term[51]. While fixed term contracts automatically ended on the arrival of the specified date, the non-fixed term contracts ended at anytime according to the intention of either party. Moreover, the right of unilateral termination in Article 1148 of the Cambodia's Civil Code of 1920 was likely to cause serious disadvantages, especially to a worker who was dismissed untimely or arbitrarily; and therefore, prior notice was necessary for him or her to find new employment. [52]

[48] Kimsok Ly, "Apercu sur le droit du travail au Cambodge" Overview on the Labor Law of Cambodia, *Annale de Factulte de Droit et des Sciences Economiques De Phnom Penh*, 1997, 41.
[49] In addition to the Civil Code of 1920, there were number of regulations concerning labor relations. For example, these regulations were regulation of 1927 providing detail rules of contract work, regulation of labor of December 30, 1936 applying to labor relations among Indo-Chinese people; regulation of labor of February 24, 1937 applying to labor relations among European people; Royal Ordinance No. 84 N.S of May 20, 1938 expand the scope of labor relations to Cambodian people. The history of these regulations was located in the preface of Labor Law made by H.E Suy Sem on October 25, 1998.
[50] Ly, "Apercu sur le droit du travail au Cambodge," 43.
[51] Marcel Clairon, *Droit Khmer: Droit Du Travail* Khmer Law: Labor Law, 2nd ed. (Phnom Penh, 1962), 53.
[52] Ibid., 56.

In addition, according to Clairon, investigation into the reason of termination allowed the court to consider whether or not the termination constituted an abuse of right; and a party who terminated the contract without just cause had to repair the damage caused to the other party[53]. An employer or a worker could carry out the abuse of the right to terminate the contract. However, in practice, it was the employer who often terminated the contract improperly. Therefore, Clarion suggested that there had to be a limitation on the rule of unilateral termination of contract in Article 1148 of the Cambodia's Civil Code through the requirement of a notice period and the requirement of the existence of valid reason.

2.2.Labor Code of 1972: Notice period and rule of valid reason

The decade of 1970s marked the period of the development of labor law in Cambodia. For example, Cambodia became a member of the International Labor Organization according to Kram (Law) No. 467/71 CE on April 7, 1971. The Ministry of Social Affairs and Labor invited Clairon to help draft the Labor Code, and this draft became the first Labor Code in 1972. The 1972 Labor Code introduced the employment contract of unspecified duration in addition to the fixed-term employment contract. At the same time the code amended the system of prior notice and restricted the employer's right to dismiss the worker through the requirement of the existence of a valid reason[54]. In contrast to the Civil Code of 1920, the Labor Code set the minimum standard of period for prior notice in accordance with the length of continuous service of the workers. The length of service subjected to the obligation of a notice period started from the period of continuous work less than or equal to three months with a two-day notice period to the period of more than ten years with a three-month notice period.[55]

Moreover, the Labor Code (Article 70, second paragraph) provided that "no layoff can be taken without a valid reason relating to the worker's aptitude or behavior, based on the requirements of the operation of the enterprise, establishment or group." This law also entitled workers the right to obtain compensation for any damage caused by an unjustified dismissal[56]. When the Government of the Khmer Republic came to power by means of military force through the coup d'états in March 1970, there were great difficulties in the application of the Labor Code of 1972 due to social and political chaos.[57]

The collapse of the Khmer Republic in 1975 brought Cambodia into a genocidal regime during which the legal system was completely destroyed. From April 17, 1975 to January 7, 1979, the Cambodian people suffered genocide under the Pol Pot regime, which had the right to decide the life and death of everyone. During this regime, all of the pre-existing legal systems were destroyed and those who were educated in law or other fields, such as teachers and medical doctors, were killed. The Civil Code of 1920 and Labor Code of 1972 were not

[53] Ibid., 60.
[54] The 1972 Labor Law in its Chapter 4 deals with the formation, suspension, and termination of employment contract.
[55] The Labor Code of Cambodia of 1972, art. 71 (1972).
[56] Ibid., 87.
[57] Hang, *Nitekanhea (Labor Law)*, 7.

used during the Pol Pot regime.

After the collapse of the Pol Pot regime in 1979, Cambodia entered a period involving the rebuilding of everything[58]. In 1988, the government of the Republic of Cambodian People adopted Decree Law No. 38, concerning the contracts and liability for non-contract misconduct. However, this decree did not regulate issues about employment contracts. The absence of employment relations in the decree was the result of the fact that most of the enterprises or business belonged to the government and agriculture was performed in a collective form. Also, the employment relationship was performed under contracts of hiring for work in small and medium enterprises. Thus, the rules in the Civil Code of 1920 remained valid for the employment relations.

In 1992, Cambodia adopted another Labor Code when the government started to change from a planned economy to a market economy granting citizens the full right to possess, use, and inherit the land in 1989.[59] The government predicted that the change in the national economy would lead to the establishment of private enterprises; therefore, it had to pass laws to govern employment relationships in the private sectors[60]. Because the Labor Code of 1992 was a replica of the Code of 1972, the Code of 1992 (Article 70) also required a valid reason to accompany a dismissal.

2.3.Labor Law of 1997: Notice period, prohibited dismissals, rule of valid reason

The present Labor Code of Cambodia is called "the Labor Law" and this term shall be used in this dissertation. From 1979 until the Paris Peace Agreement in 1992, Cambodia's political system was based on socialism with a planned economy. Consequently, even though Cambodia had the second Labor Code in 1992, the implementation of this Code was not important. The adoption of the Cambodian Constitution in 1993 transformed its centrally planned economy into a market economy. The political change attracted foreign direct investment in the export-oriented garment factories. In 1994, many garment producers from Hong Kong, Taiwan, Malaysia and Singapore started to operate businesses in Cambodia when there were no restrictions on the quantity of exports from Cambodia into the US market.[61]

In response to the transition from socialism to democracy and to the increase of factories in Cambodia, the Ministry of Social Affairs, Labor and Veteran Affair drafted a new Labor Code with assistance from the International Labor Organization (ILO), the French Ministry of Labor, and the Asian American Free Trade Institution (AAFLI). The draft of the

[58] Donovan, "Cambodia."
[59] Directive on the implementation of policy on management and use of land, No. 03 SNN (1989).
[60] Hang, *Nitekanhea (Labor Law)*, 8.
[61] In 1974, many developed countries such as the United States, the European Union, Canada and Norway adopted Multi-Fiber Agreement to restrict the export of textile and garment products from developing countries that were active producers of garment products. MFA is a bilateral agreement and has discriminatory basis. In 1995, WTO Agreement on Textiles and Clothing (ATC) replaced MFA with a period of 10 years for this transition and ended MFA by January 1, 2005. See Omar Bargawi, *Cambodia's Garment Industry – Origins and Future Prospects*, Economic and Statistics Analysis Unit Working Paper 13 (London: Overseas Development Institute, October 2005), 5, London.

new code primarily was based on the existing Labor Code in 1992 to adjust with the new Constitution of 1993. The rule that requires dismissal with a valid reason is one of the mechanisms that materializes the protection of right to life as guaranteed in Article 32, paragraph 1 of the Constitution. In addition, Article 37, paragraph 2 provides that the law prohibits all physical abuse of any individual. The law protects the life, honor and dignity of citizens. Therefore, the principle of individual dignity requires an employer to treat the dismissal of a worker with concern and respect. Based on the protection of the right to life and the right to dignity in the Constitution, the rule that requires a valid reason for a dismissal was again included in the new Labor Law.

Cambodia adopted a new Civil Code in 2007 that came into force in 2011, 14 years after the adoption of the Labor Law of 1997. Even though the general law (the Civil Code) existed after the special law (the Labor Law), the rules of the Civil Code have much influence on the interpretation of rules in the Labor Law. The Civil Code resolves some defects or loopholes in the Labor Law of 1997. For example, the code defines the employment contract, demands employers to show exact working conditions, and obliges the employer to have a duty of consideration for the safety of workers, and regulates about the absoluteness of person in the employment contract.[62] The other issues of employment and labor relations are still under the umbrella of the Labor Law of 1997.[63] Therefore, the Labor Law of 1997 governs issues regarding dismissal.

Section 2: Rules of dismissals

According to the Labor Law, an employer cannot unilaterally terminate the employment contract unless he or she has a valid reason and notifies the worker in a certain period prior to the dismissal.[64] Regarding a dismissal, the employer should also be aware of a set of prohibited dismissal grounds in the Labor Law. In addition, the employer has to know other rules on dismissal in the Labor Law and other ministerial orders. Hence, there are examinations of the rule of prior notice and of the prohibited dismissals before the examination of the rules of valid reason.

1. Notice period

Article 74 (first paragraph) of the Labor Law allows either party to voluntarily terminate the contract but obligates the party who intends to initiate the termination to notify the other party. The period of prior notice aims at preparing either the employer or worker to be ready for contract termination. Article 75 has set the minimum period of prior notice based on the

[62] The Cambodia Civil Code of 2007, arts. 664 to 667 (2007).
[63] Ibid., art. 668.
[64] [2006] Case no 07/06 (kh The Arbitration Council, February 17, 2006); [2006] Case no 09/06 (kh The Arbitration Council, March 09, 2006); [2006] Case no 24/06 (kh The Arbitration Council, April 11, 2006).

length of the continuous employment of the workers:

1) Seven days, if the worker's length of continuous service is less than six months;
2) Fifteen days, if the worker's length of continuous service is more than six months to two years;
3) One month, if the worker's length of continuous service is longer than two years and up to five years;
4) Two months, if the worker's length of continuous service is longer than five years and up to ten years; and
5) Three months, if the worker's length of continuous service is longer than ten years.

Accordingly, workers are protected from seven days at a minimum up to longest maximum period of three months in response to the length of their continuous service. In order to guarantee that there is no employer's unilateral reduction of this minimum period, the Labor Law (Article 76) invalidates any clause in an employment contract, any internal work rule, or of any individual agreement that provides for the period of prior notice to be less than the period set by Article 75.

The Labor Law does not mention about the possibility of the employer reducing this minimum period or paying compensation in lieu of prior notice. The employer's violation of the obligation of prior notice entitles the worker to compensation equal to amount of wages and all the benefits the worker would have received during the notice period.[65] For example, if the employer did not inform the workers who had worked for the company for eight years, then the employer would have to inform the workers two months prior to the dismissal. Since the employer paid half the salary for the two months after the dismissal, he or she also have to pay them one month as compensation. The compensation for each month is the average salary that is calculated in a formula that divides the total wages including overtime wage and bonus that the dismissed worker received during the 12 months prior to dismissal by 12.[66]

The Labor Law (Article 82) releases the employer from the obligation of prior notice for the following conditions: (1) a probation period or an internship specified in the contract, (2) a serious offense by the worker, and (3) acts of God that make it impossible for the employer to notify the workers. The list of serious misconducts is specified in Article 83-B and exempts the employer from the obligation to provide the worker with the prior notice period. In addition to serious misconducts in Article 83-B, there are various serious misconducts in other articles of the Labor Law and in clauses in internal work rules of the company. A detailed discussion of serious misconduct is provided in the discussion on dismissal based on the worker's behavior in this chapter.

2. Prohibited dismissals

First, the Labor Law and ministerial order (*Prakas*) have forbidden employers from dismissing workers on grounds relating to discrimination. According to Article 12 of the Labor Law, race, color, sex, creed, religion, political opinion, social origin, or membership of

[65] The Labor Law of Cambodia of 1997, art. 77 (1997).
[66] [2004] Case no 51/04 (kh The Arbitration Council, July 22, 2004).

a workers' union or the exercise of union activities cannot become a ground for dismissal. Article 279 emphasizes the protection of worker's collective rights through the prohibition of dismissal for reasons related to union affiliation or participation in union activities.[67] A worker who claims that a dismissal took place due to discrimination has the burden of proof.[68]

Second, a dismissal of a protected worker and of the worker during the protective period can only take place if there is an approval from the Labor Inspector. The system that requires approval from the Labor Inspector protects workers from employer's discrimination against activities carried out by workers for the sake of a union. A shop steward is a protected worker. Article 293, paragraph 1 of the Labor Law requires employers to receive approval from the Labor Inspector for the dismissal of a shop steward, a candidate for shop steward, or a former shop steward during three months after the end of their mandate, and an unelected candidate during the three months after the announcement of the voting result.[69] The Labor Inspector has the duty to investigate and decide to approve or deny the request of an employer concerning the dismissal of the shop steward at least one month after being informed of the firing.[70] In addition, according to Article 282, shop stewards who resign from their position for less than six months are also protected by the requirement for the approval of the Labor Inspector.

The category of protected workers also includes three other union positions, namely union president, union vice president, and union secretary whose dismissals can take place only with an authorization from the Labor Inspector.[71] Clause 3, paragraph 3 of *Prakas* No. 305 of the Ministry of Social Affairs, Labor and Veteran Affairs in 2001 stipulated that all workers who are candidates for election of the union leader receive dismissal protection the same as the shop steward. This protection is provided for 45 days before the election and for 45 days after the election if these candidates are not elected. The labor union has to inform the employer about this candidacy by all available means. The employer applies this rule in every election of union leaders.

The union founders are also protected workers. Clause 4, paragraph 1 of the same *Prakas* No.305 rules that from the outset of registration for the establishment of the union, all workers who are founders or workers who voluntarily register as members of unions during the registration process also receive the same protection as shop stewards. This protection

[67] The employer dismissed two workers who were not members of a union's leadership but were activists of the union. The Arbitration Council found the dismissal was taken on the ground of discrimination against the exercise of union activities and ordered reinstatement in the case of employer's violation on Article 12 and Article 279 of Labor Law. See [2010] Case no 10/10 (kh The Arbitration Council, February 16, 2010).
[68] [2008] Case no 108/08 (kh The Arbitration Council, September 17, 2008); [2009] Case no 41/09 (kh The Arbitration Council, April 22, 2009); [2010] Case no 16/10 (kh The Arbitration Council, March 09, 2010).
[69] Even though the worker received a series of warning letter that was enough for dismissal, the dismissal was illegal if there was no approval from the Labor Inspector. See [2009] Case no 146/09 (kh The Arbitration Council, November 16, 2009).
[70] See the interpretation of this article in [2008] Case no 149/08 (kh The Arbitration Council, December 19, 2008); [2010] Case no 09/10 (kh The Arbitration Council, February 15, 2010); The Labor Law of Cambodia of 1997, art. 293, ¶ 2.
[71] Three union leaders have to be protected under Article 293 of the Labor Law as well. Union leaders who are protected are the union president, union vice president and union secretary. Prakas No. 313 SKBY on the Roles and Duties of Shop Stewards and Unions, Clause 7 (2000).

covers a duration of 30 days following the date the registration of the union has been completed. When there is dispute as to whether or not a worker can receive special protection against dismissal, the Arbitration Council interprets Clause 3 and 4 of the *Prakas* No. 305 as follows: a worker cannot receive special protection against dismissal unless he or she has met three conditions. First, the worker is in the category of those who receive special protection; second, the dismissal takes place during the period of special protection; and third, the union must inform the employer by all official means about the candidacy of the worker who must receive protection.[72]

Moreover, the Labor Law prohibits the employer from dismissing women workers on the ground of pregnancy. According to Article 182 of the Labor Law, the employer is prohibited from dismissing women workers during their maternity leave or at the date when the end of the notice period would fall during the maternity leave.

A dismissal of these protected workers on the grounds of the expiry of a fixed-term contract rather than on the basis of discrimination by the employer does not require approval from the Labor Inspector. In the case of 34/05 in 2005, the employer notified the workers who were union leaders about the non-renewal of their employment contracts, which meant the termination of the contracts. Article 293 of the Labor Law requires employers to have the approval of the Labor Inspector in case of the dismissal of protected workers (union leaders), but there is no such requirement in the case of the expiry of the fixed-term contracts of these protected workers (union leaders).[73]

The approval of the Labor Inspector does not always legalize the dismissal. In other words, this approval does not deter the Arbitration Council in considering whether or not there is a valid reason accompanying the dismissal. In the case of 91/04 in 2004, the employer dismissed a union leader with the approval of the Labor Inspector. The Arbitration Council ruled that the approval of the Labor Inspector was a mechanism like immunity given to the members of the National Assembly or of the Senate, and protected union leaders or shop stewards from discrimination and abuse from the employer.[74] In this case, when there was permission from the Labor Inspector to carry out a dismissal, then the union leaders lost immunity (the protection that required approval of Labor Inspector for dismissal) and become normal workers. The dismissal in this case had to fulfill the rule that required a valid reason in Article 74. Therefore, the request for permission from the Labor Inspector is just a procedural requirement that protects persons who are representatives of the interests of the workers against discrimination or unfair treatment.

[72] [2006] Case no 07/06 (kh The Arbitration Council, February 17, 2006); [2006] Case no 09/06 (kh The Arbitration Council, March 09, 2006); [2008] Case no 148/07 (kh The Arbitration Council, February 11, 2008); [2009] Case no 71/09 (kh The Arbitration Council, July 16, 2009); [2010] Case no 09/10 (kh The Arbitration Council, February 15, 2010).
[73] *34/05* (The Arbitration Council 2005).
[74] [2004] Case no 91/04 (kh The Arbitration Council, November 22, 2004); [2006] Case no 96/06 (kh The Arbitration Council, November 24, 2006).

3. Rule of valid reason

The rule of valid reason in the present Labor Law was enacted in 1997 as a replica of the rule in the Labor Code of 1992. The Labor Code of 1992 is also a copy of the Labor Code of 1972. From this connection, the rule in the Labor Code of 1972 is the foundation of the rule of valid reason in the Labor Law of 1997. The Labor Code of 1972, particularly Article 70, stated that there was no dismissal to be taken without "a valid reason relating to the worker's aptitude or behavior, based on the requirements of the operation of the enterprise, establishment or group."[75] The above rule is worded similarly to the standard rule set in Paragraph 2 (1) of the ILO Termination of Employment Recommendation (No. 119) of 1963 that reads, "Termination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service."[76]

In order to understand the nature of the rule of justification for dismissal in Cambodia, the dissertation examines the history of the drafting of the Recommendation (No. 119). In order to draft this recommendation, the Governing Body of the International Labor Office in November 1960 requested the member states of the ILO to provide answers and comments to questions from the office. Questions five and six were the main points leading to the expression of Paragraph 2 (1) because they dealt with the existence of justification for termination and the reason constituted that justification. Question five stated "Should the instrument state that no dismissal should take place unless there is a valid reason for such dismissal based on the interest of the undertaking?"[77] And Question six posited, " (1) Should the instrument give examples of reasons which might justify dismissal, such as incompetence, physical or mental incapacity, negligence, violation of works rules and other breaches of discipline? (2) Should any other examples be included?"[78]

The comments from member states of the ILO about question five concerned the expression "valid reason for such a dismissal based on the interest of the undertaking" which was seen as unclear, and also dealt with the need to add some elements such as the interests of the worker or person or the conduct of the workers.[79] Regarding question six, the International Labor Office observed that member states had a strong tendency to reject the inclusion of examples of valid reason in the recommendation because many states feared that enumeration of examples denied other reasons that were not listed in the clause of recommendation.[80] In addition, those member states were concerned that listing too many examples of the justification would be too elaborative while listing a few examples might lead to arbitrary dismissal.[81] In the end, there was no listing of examples of justification and the expression of "…based on the interest of the undertaking" was replaced by expression "… connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking."

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[75] The Labor Code of Cambodia of 1972, art. 70, ¶ 2 (1972).
[76] R119 Termination of Employment Recommendation, 1963, ¶ 2 (1) (1963).
[77] *Report VII (2) Termination of Employment (Dismissal and Lay-Off)*, International Labour Conference 46th Session 1962 (Geneva: International Labour Office, 1962), 43, Geneva.
[78] Ibid., 48.
[79] Ibid., 185.
[80] Ibid., 186.
[81] Ibid.

Therefore, instead of listing the example of reasons for dismissal, the expression of "…connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking" was used which demonstrated the general types of justification for dismissal that was again upheld by the adoption of the Convention on Termination of Employment (No. 158) in 1982.[82] After observing the practice and laws of member states, the Office concluded:

> The reasons generally held to justify termination by the employer, although formulated in varying degrees of generality or specificity and in varying ways in different countries, do fall within the general categories of reasons mentioned in this question (which is identical in working to Paragraph 2 (1) of Recommendation No. 119), that is, reasons concern to the capacity or conduct of the worker or the operational requirements of the undertaking, establishment or service.[83]

The Recommendation and Convention express the rule of the justification in general terms and leave the duty in defining and interpreting what constitutes a valid reason to national laws, collective agreements, work rules, arbitration, court, or other means appropriate to the practice of each national law and practice.[84]

The rule of dismissal can only demonstrate the general categories of reason for dismissal, as such there is a failure on the part of the rule to define or list justifications. There are two main reasons for such a weakness in defining the valid reason for dismissal.[85] First, all the reasons for dismissal cannot be listed due to the differing types of work. Second, since a real case of dismissal may not fall into the reason enumerated in the law, a detailed definition may sometimes restrict the discretion of the courts or arbitration in protecting the workers. Therefore, the definition of valid reason is decided by the courts or arbitration based on the real case. In this respect, in some countries where judges or arbitrators have long experience of this rule, the task in interpreting or defining the valid reason is achieved easily. However, judges and arbitrators in Cambodia, where the history of application of the rules of justification is short, find it hard to fulfill the task of defining the valid reason.

Section 3: Determinants of valid reason

The Labor Law requires a valid reason for a dismissal. Instead of defining what constitutes a valid reason for dismissal, the Labor Law enumerates three main categories of valid reason, namely reason related to aptitude, misconduct, and the necessity of the enterprise. Even though, the type of grounds can be classified, there are disputes over whether or not a justification given by an employer constitutes a valid reason for dismissal. For

[82] The employment of a worker shall not be terminated unless there is a valid reason for such a requirement connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. C158 Termination of Employment Convention, 1982, art. 4 (1982).
[83] *Report VIII (2) Termination of Employment at the Initiative of the Employer*, 33.
[84] R119 Termination of Employment Recommendation, 1963, ¶ 2(2) (1963).
[85] Yemin, "Job Security," 25–26.

example, in a case where a worker breaks a fan in the company, this might be classified as an action of misconduct. However, whether or not such misconduct constitutes a reasonable ground for dismissal remains controversial among parties to employment relations and other legal practitioners in Cambodia. There is also a question concerning indicators that determine whether a ground is justifiable for dismissal. These determinants are laws, internal work rule, collective agreement, and individual agreement in employment contracts. In addition, a review of the court's decisions and the Arbitration Council's awards provides a comprehensive understanding of the characteristics of the rules of justification.

1. Laws

Laws play an important role in determining whether a justification given by an employer is a valid reason for dismissal. Laws, in this context, not only mean the legal texts adopted by the legislative branch but also refer to rules adopted by the executive branch, in particular ministerial orders called *Prakas*, which are the legal grounds for resolving disputes over dismissals. In Cambodia, the executive branch, the ministries, are active in issuing the *Prakas* to accompany the legislative rules. This is because it is a tradition of legislation that in the law, there are clauses that entitle the involving ministry the right to make detailed rules in the form of *Prakas*.

For example, Chapter 12 of the Labor Law deals with labor disputes. Section 2 of this chapter deals with collective labor disputes, which are resolved through reconciliation and arbitration. Article 317 in this section reads, "The Ministry in Charge of Labor shall issue a Prakas (ministerial order) to determine the mode of enforcement of the present section." Accordingly, the Ministry of Social Affairs, Labor and Veteran Affairs issued *Prakas* No. 317 SKBY of November 29, 2001 on the procedure of collective disputes resolution, *Prakas* No. 099 SKBY of April 21, 2004 on the Arbitration Council, and other relevant ministerial orders dealing with labor disputes.

In addition to the Labor Law and the two ministerial orders above, there are some ministerial orders that often become the reference for resolving the issue of dismissals. For instance, *Prakas* No. 313 SKBY of November 27, 2000 concerned the roles and duties of shop stewards and unions, and *Prakas* No. 305 SKBY of November 22, 2001 dealt with the representativeness of professional organizations among the workers at the enterprise and establishment level, and the right in collective negotiation for the conclusion of collective agreement at enterprise and establishment level. These are rules dealing with the dismissal of worker's representatives who are protected workers. However, there is no ministerial order that directly deals with the issue of the dismissal of an ordinary worker who is not included in the list of protected workers.

There are other laws that have indirect influence over the rule of valid reason. Before the enforcement of the Civil Code in 2011, Decree Law No. 38 of 1989 dealing with contracts and liability for non-contract misconduct was the general rule for interpreting an employment contract. The Arbitration Council often used this Decree Law when dealing with labor disputes. After the Civil Code came into force and replaced this Decree Law No. 38, the Arbitration Council applied the rules of the Civil Code, in addition to the rules in the Labor

Law in order to resolve labor conflicts in case 63/12 in 2012.[86]

Moreover, judges or arbitrators in Cambodia are meant to interpret the articles in the Labor Law and other ministerial orders according to the principles of the Constitution. In addition to the guarantee of the right to life, the right to work, the right to organize, bargain and to act collectively, and the right to equal treatment against any form of discrimination, the Constitution of Cambodia respects a worker's right to be dismissed only with a valid reason in the ILO's Convention on Employment Termination adopted in 1982. Article 31 (1) of the Constitution of Cambodia provides, "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights." Accordingly, even though Cambodia is not a country ratifying this convention, the interpretation of the Labor Law must be in compliance with the rule and purpose of the ILO Convention.

2. Internal work rule, collective agreement, employment contract

When there is no law and ministerial order to deal directly with the issue of valid reason in disputes over dismissals, the Arbitration Council refers to the rules of employment of companies, collective agreements, and employment contracts. The internal work rules of companies play an important role in providing rules concerning the issue of dismissals. The Labor Law (Article 22) requires an employer who is currently employing at least eight workers to draw up an internal work rule.

According to Article 23 of the Labor Law, this internal work rule applies the general provisions in accordance with the type of enterprise and the collective agreements relevant to the real activities or nature of the enterprise or establishment. The employer must include rules relating to the conditions of hiring, the calculation and payment of wages and perquisites, benefits in kind, working hours, breaks and holiday, notice periods, health and safety measures for workers, the obligations of workers and sanctions.

The internal work rule is drawn up or changed by the manager of the enterprise after consultation with the worker's representatives (their consent is not needed)[87] and comes into effect after the Labor Inspector approves its legality.[88] The internal work rule is not an agreement between employer and workers; therefore, an employer does not have to ask for agreement from the workers when setting the rules in the companies.[89] An employer should use his or her right of management in a reasonable scope.

In order to enforce the internal work rule, the employer has to notify workers about the contents of this internal work rule by locating it in the workplace where workers can access

[86] [2012] Case no 63/12 (kh The Arbitration Council, April 30, 2012).
[87] [2006] Case no 63/06 (kh The Arbitration Council, August 16, 2006).
[88] The Labor Law of Cambodia of 1997, art. 24 (1997).
[89] [2012] Case no 63/12 (kh The Arbitration Council, April 30, 2012).

it easily.[90] Since the employer is the one who sets up the internal work rule that includes worker's obligation and sanctions, the employer must abide by this rule when taking any disciplinary measure such as dismissals.[91] The failure to follow the procedures in the internal work rule will make a dismissal illegal.

3. The rules of Arbitration Council

The present Labor Law, particularly Chapter 17, requires the government to establish a Labor Court to deal with labor disputes. However, since 1997 right until the present, the Labor Court has not been established due to the "weak institutional structures of the government overall, the Ministry of Labor in particular, and lack of political will."[92] In 2003, the Arbitration Council was established under the ILO's project to deal with labor disputes as a responsive measure for the failure of the establishment of Labor Court. The power of Arbitration Council in resolving disputes derives from the Labor Law and the *Prakas* No. 338 of December 11, 2002 that was nullified by *Prakas* No. 099 SKBY of April 21, 2004 on the Arbitration Council. In this sense, the Arbitration Council has authority dealing only with those collective labor disputes that cannot be reconciled by the Department of Labor Disputes, Ministry of Labor and Vocational Training. The Arbitration Council is known for its comprehensive and reasonable decisions and plays an important role in developing the rules for employment practice in Cambodia. The International Labor Organization views the Arbitration Council in Cambodia as "a major landmark in the development of sound labour relations in Cambodia."[93]

The Labor Law and ministerial orders do not automatically compel the parties of the dispute to abide by the awards of the Arbitration Council. An award becomes a binding one when there is a written agreement between the parties or a collective agreement that contains a clause that requires parties to abide by the award.[94] In addition, even though there is no agreement between the parties, a non-binding award can also become a binding one when either party fails to appeal this award to the Ministry of Labor and Vocational Training in eight working days.[95] If one of the parties makes an appeal, then it will deter the effect of the award.

The Economic Institute of Cambodia (EIC) conducted a study to enable the Arbitration Council Foundation and the Arbitration to understand and evaluate the effectiveness of these services for workers and employers. Regarding the effectiveness of the awards, this study found that even though an award was a non-binding one, the award became the ground or

[90] The Labor Law of Cambodia of 1997, art. 29.
[91] [2005] Case no 64/05 (kh The Arbitration Council, November 30, 2005) 05.
[92] Sibbel and Borrmann, "Linking Trade with Labor Rights," 246.
[93] "Freedom of Association in Practice: Lessons Learned. Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2008," Report, May 1, 2008, Paragraph 294, http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_096122/lang--en/index.htm (accessed June 01, 2012).
[94] Prakas No. 099 SKBY on the Arbitration Council, Clause 42 (2004).
[95] The Labor Law of Cambodia of 1997, arts. 313–14; Prakas No. 099 SKBY on the Arbitration Council, Clauses 40–41.

supportive document for further discussion and negotiation among the parties, for decisions in courts, or for strike or lockout.[96] In addition, employers and workers in the garment sector are committed to abide by the awards of the Arbitration Council. In September 28, 2010, a Memorandum of Understanding (MoU) on Improving Industrial Relations in the Garment Industry was drawn up to bind the parties of the award of the Arbitration Council on the labor disputes over right (disputes over the right and obligation, or benefit in laws), but not interest (the disputes over the benefit that is not provided in laws). For example, point six of the MoU read:

> In the absence of a CBA, the parties shall agree to use the national dispute procedure and accept, where the mediation is unable to resolve the issue, binding arbitration for rights disputes. The parties also agree to follow the dispute resolution procedures and not resort to strike or lockout during the process. Where an arbitration decision on dispute of right is given, the employer and workers and their representatives accept that the decision is final and binding on them. Where a party fails to honor the agreement, then strike or lockout shall be available as a last resort. [97]

According to this MoU, even though the award was not a binding one, both employers and workers were strongly committed to abide by the award of the Arbitration Council, and strikes or lockouts were used as an implementation mechanism against the violation of this commitment. In January 21, 2011, there was a meeting among 70 legal practitioners including arbitrators, judges and prosecutors to discuss on how to improve labor relations through a call for cooperation between arbitration and the courts.[98] On the one hand, the Minister of Justice, based on the spirit of the MoU, gave a recommendation that arbitrators, judges and prosecutors cooperate to enforce the final decisions of the Arbitration Council that were not binding. On the other hand, regardless of the scope of this MoU, the meeting also called for cooperation from the court on the enforcement of the binding award of the Arbitration Council when one of the parties did not abide by the award.

After the MoU was signed in September 28, 2010 and came into effect in January 1, 2011, the Arbitration Council found that employers and workers agreed to abide by the awards in the cases covered by the MoU.[99] The compliance with the awards of the Arbitration Council reflects that employers and workers have trust in the decisions as well as judgment of

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[96] *Final Report: Baseline Study for the Arbitration Council Foundation (ACF)* (Phnom Penh: Economic Institute of Cambodia (EIC), August 2010), 106, Phnom Penh.

[97] "Memorandum of Understanding on Improving Industrial Relations in the Garment Industry," September 28, 2010. It is a four-page document consisting of principles and commitments by employers and workers, and it covers on the side of employers, current and future member of the Garment Manufacturers Association in Cambodia. It covers on the side of unions, confederation and federations that have signed this MoU, and their current and future affiliates at the federation and enterprise level. It was signed by representative of Garment Manufacturer Association of Cambodia and representative of 6 trade unions in Cambodia.

[98] "News and Updates on Industrial Relations and Labor Dispute Resolution in Cambodia," *The Arbitration Council Newsletter, January-March 2011*, 2011.

[99] "Memorandum of Understanding on Improving Industrial Relations in the Garment Industry and Binding Arbitration," *The Arbitration Council E-Newsletter*, January 2011; "Memorandum of Understanding on Improving Industrial Relations in the Garment Industry and Binding Arbitration," *The Arbitration Council E-Newsletter*, February 2011; "Memorandum of Understanding on Improving Industrial Relations in the Garment Industry and Binding Arbitration," *The Arbitration Council E-Newsletter*, March 2011.

Arbitration Council.[100] In addition, according to the Annual Report 2011 of the Arbitration Council, the Kampot Provincial Court and Appeal Court upheld the decision of the Arbitration Council in case 22/11.[101] In this case, the dismissal of workers who attended the strike was illegal as it violated Article 333 of the Labor Law, and the employer had to reinstate them to their previous workplace and pay lost wages.[102] The fact that the courts enforced the decisions of the Arbitration Council was another recent development showing the effectiveness and the influence of the council on employment practice in Cambodia. Because the dispute over dismissal is a dispute over the right that is guaranteed by Article 74 of the Labor Law, the award of the council binds employers to abide by the decision according to the spirit of the MoU.

Since the Arbitration Council plays an important role in developing employment practices in Cambodia, this dissertation uses the awards of the council as primary materials to understand the development of dismissal rules in Cambodia. The available judgments are also used though there are only a few, and the contents lack explanation on the legal rules before applying them to the facts.

Section 4: Types of valid reasons

The Labor Law categorizes valid reasons for dismissal into three types relating to the worker's aptitude, the worker's behavior, and the necessity of the company. These three types of valid reasons have different rules according to the nature and characteristic of each reason. This section examines the rules governing these three types of valid reason.

1. Reason relating to the aptitude of the worker

The aptitude of a worker can constitute a valid reason for dismissal. The aptitude according to the Labor Law is called *Sampatear* and refers to a worker's capacity or ability to perform a duty. In general, if the worker cannot perform the duties in the employment contract because his capacity is poor or his skill is out-of-date or because he is sick or has an unrelated work injury, then the employer can terminate the contract unilaterally. The following is an examination of the rules of dismissal relating to a worker's aptitude, in particular, what kind of situations or conditions constitutes reasonable grounds for discharge.

[100] "News and Updates on Industrial Relations and Labor Dispute Resolution in Cambodia," *The Arbitration Council Newsletter, July-September 2010*, 2010.
[101] *The Arbitration Council: Annual Report (2011)* (The Arbitration Council, 2011), 5.
[102] [2011] Case no 22/11 (kh The Arbitration Council, March 21, 2011).

1.1. Dismissal due to capacity shortage

A worker's ability or skill might decrease or be out-of-date after a long period of time. In addition, when a worker does not have any more ability or any skill required to perform the task in the employment contract, it is proper that the employer uses this as grounds for dismissal. The Labor Law, ministerial orders, and most of the internal work rules of companies do not regulate the conditions or rules of dismissal on grounds relating to the lack of capability of the workers. There are disputes over the degree of poor capacity or shortage of skills that a worker may have which could become valid grounds leading to dismissal. In the 55/08 case, the employer dismissed a worker on the grounds of slow performance and the person was less productive compared to that of other workers. Arbitrator-made rules meant that the dismissal was made without valid reason because the employer did not explain the measures used to evaluate a worker's ability; for examples the difference in quantity and speed of performance between the dismissed worker and the other workers.[103]

In Cambodia, a review of the awards of Arbitration Council reveals that employers often use poor ability to accuse workers of carelessness leading to slow production. Carelessness or negligence means misconduct while having poor skill alone does not constitute misconduct. Even though employers consider poor capacity as a mistake, this ground cannot lead to dismissal when the Labor Law and the rules of employment do not state that poor capacity is a case of serious misconduct. In the 73/06 case, the employer dismissed 15 workers alleging that they worked so carelessly and slowly that they could not satisfy the requirements and needs of the company from the day they started their work until the day of dismissal. In this case, working slowly was not serious misconduct in the Labor Law or internal work rules of the company, and the employer could not use disciplinarily dismissal against the workers.[104]

The majority of collective labor disputes occurred in the garment sector, which accounted for 92 percent of all the disputes resolved by the Arbitration Council.[105] In the manufacturing industry which uses intensive labor supply such as garment factories in Cambodia, even an unskilled person can work on a production line after he or she has received training. It is difficult for employers to dismiss workers by asserting the grounds of poor capacity. Consequently, employers use poor capacity in the form of the assertion that mistakes were made in order to dismiss the workers.

1.2. Dismissal due to sickness or injuries

In Cambodia, there are no provisions in the Labor Law or other ministerial orders that explicitly prohibit employers from the dismissal of a worker who is sick or injured due to private reasons or of a worker who is sick or injured due to work. The Labor Law (Article

[103] [2008] Case no 55/08 (kh The Arbitration Council, May 20, 2008).
[104] [2006] Case no 73/06 (kh The Arbitration Council, September 18, 2006).
[105] *The Arbitration Council: Annual Report (2010).*

89, paragraph 4) grants the worker the right to indemnity[106] when a dismissal occurs due to the health of the concerned workers. However, the Labor Law fails to explain clearly the seriousness of the condition of a worker's health that can lead to dismissal. The ILO Convention on Termination of Employment, particularly Article 6 (1) provides, "Temporary absence from work because of illness or injury shall not constitute a valid reason for termination."[107] The temporary absence does not affect the worker's capacity in the supply of labor, except for a long period of absence, or repeated short-term absence due to illness.[108] Hence, the Labor Law (Article 71) establishes a system for the suspension of an employment contract in the case of a worker's temporary absence from duty. The employment relation is maintained during the employment contract suspension; however, the worker does not have to work, and the employer does not have to pay wages.[109]

According to Article 71, the suspension of an employment contract is allowed according to the following, "[(3)] the absence of the worker for illness certified by a qualified doctor. This absence is limited to six months, but can, however, be extended until there is a replacement...(4) the period of disability resulting from a work-related accident or occupational illness."[110] Article 71 (Point 3) explains that a worker's absence may be due to private illness or illness that is out of the scope of occupational sickness or injury. This private sickness is not one of the reasons for contract suspension unless a qualified doctor certifies it as an illness. In addition, the maximum period for suspension is limited to six months but can be extended until there is a replacement. In the case of dismissal, the employer can dismiss the worker when he or she cannot resume duties after the expiration of this six-month period of work suspension. The exception occurs after this period, if there is no replacement, the employer cannot discharge the worker.

According to a review of the awards, there seems to have been no case where there was an extension of the period of work suspension on the condition of the availability of replacement because employers often can find another worker to replace the sick worker for the sake of business operations. The Arbitration Council in many cases refers to the internal work rules of each company. In compliance with Article 23, which demands an employer regulate rules on health and safety measures, the Labor Inspector has authority to approve the legality of rules of employment made as models or samples that provide benefits as well as protection for sick or injured workers for a certain period. For example, the internal work rules of a hotel provide that:

> An employee taking leave because of sickness certified by a State hospital is paid 100% of wage for the first month, 60% for the 2nd and 3rd month and if his leave exceeds three months the employer has no obligation to pay any wages to employee. However, the employer cannot terminate the employment contract during the six months of sick

[106] Dismissal indemnity refers to amount of money the employer gives to the dismissed worker. Except for dismissal on the ground of serious misconduct, the employer has to provide this indemnity to the worker without considering whether a dismissal is taken with or without valid reason.
[107] C158 Termination of Employment Convention, 1982, art. 6 (1) (1982).
[108] *Report VIII (2) Termination of Employment at the Initiative of the Employer*, 38–40.
[109] Suspension of employment contract affects only the main duties of workers and the employer. This means the worker does have to work and the employer does not have to pay the wage. See The Labor Law of Cambodia of 1997, art. 72 (1997).
[110] Ibid., art. 71.

leave.[111]

This rule of employment protects the sick worker from dismissal during the maximum period of six months. In addition, the internal work rule of a garment factory (Point 7 of Article 4) also regulates that "If the employee is sick for more than six months, the company will apply the Labor Law to lay the worker off."[112] According to the work rules of the company, the sick worker is protected for the maximum period of six months. If the worker cannot recover and come to work for the company after this period, the employer can terminate the contract.

The worker's temporary disability due to occupational disease or injuries is also a reason for the suspension of an employment contract. In case of work-related accidents or disease, the Labor Law makes employers liable for all work-related accidents (Article 249) and also requires the government to establish the National Social Security Fund (NSSF) to run a general insurance system obligatory for work-related accidents (Article 256). In 2007, the NFFS was created under a Sub-Decree on the Establishment of National Social Security Fund in reference to Labor Law 1997, Law on Social Security Fund, and Persons Covered by the Provision of Labor Law in 2002. According to the *Prakas* on Benefit of Occupational Risks in 2008, an employer with at least eight workers has to register with the NFFS in order to provide the benefits or compensation accruing on those occasions when there are work-related accidents or illnesses that fall upon the workers.

As with the Labor Law, the *Prakas* on Benefit of Occupational Risks is silent on prohibiting the employer the right to terminate a contract during the period of disability. Clause 7 of the *Prakas* on Benefit of Occupational Risks entitles the workers to daily severance pay for temporary loss of working ability within 180 days at the latest (6 months). This *Prakas* puts the responsibility of compensation on the NFFS while it fails to mention the relationship between the employer and the effected workers.

According to the system for the suspension of employment contracts in Article 71 (4) of the Labor Law, the employer has to maintain the status of the worker during the period of work suspension. However, there is no specification for the period of work suspension in the case of work-related accidents or occupational disease. Based on the *Prakas* on Benefit of Occupational Risks, the worker receives daily severance pay for the period of six months. Therefore, the absence due to work-related accident or sickness for temporary loss of the working ability becomes a valid reason for dismissal when it exceeds the period of six months.

2. Reason relating to behavior of the worker

Worker's misconduct may become grounds for various disciplinary actions, namely a verbal warning, written warning, suspension of employment contract without wages, and finally dismissal. The Labor Law provides some rules governing the disciplinary measures used on workers. These rules are as follows: the rule for the extinction of the employer's right

[111] [2004] Case no 29/03 (kh The Arbitration Council, February 02, 2004).
[112] [2004] Case no 62/04 (kh The Arbitration Council, September 09, 2004).

to disciplinary action in Article 26, the rule for proportionality between misconduct and disciplinary sanction in Article 27, and the rule of prohibition of double punishment on the same misconduct (double jeopardy) in Article 28.

An employer can lose the right to take disciplinary action against a worker when he or she does not take action in time. Article 26 of the Labor Law provides that:

> An employer cannot impose disciplinary action against a worker for any misconduct of which the employer or one of his representatives has been aware for over fifteen days…The employer shall be considered to renounce his right to dismiss a worker for serious misconduct if this action is not taken within a period of seven days from the date on which he has learned about the serious misconduct in question.[113]

When applying this rule in the case of dismissal, the employer loses the right to fire the worker on the grounds of serious misconduct when he or she does not take action within seven working days.[114] The conditions concerning serious misconduct are discussed latter.

The employer has to use disciplinary action properly. Article 27 of the Labor Law stipulates, "Any disciplinary sanction must be proportional to the seriousness of the misconduct. The Labor Inspector is empowered to control this proportionality." Because dismissal on the grounds of misconduct is a disciplinary measure, the proof that such an action is proportional or relevant to the magnitude of the seriousness of misconduct constitutes a valid reason required by Article 74.[115] Article 27 authorizes the Labor Inspector to check the proportionality of any disciplinary punishment.

Article 293 of the Labor Law requires dismissals of worker's representatives to take place only after the employer receives approval from the Labor Inspector. In this respect, the Labor Inspector has the important duty of checking whether or not the dismissal is proportional to the misconduct of these protected workers. However, there appears to be no case where the Labor Inspector decides the proportionality in the case of the dismissal of ordinary workers. Since the proportionality of dismissal is not easily defined even by the Labor Inspector, Article 393, paragraph 3, entitles workers who reject the decision of the Labor Inspector to appeal to the Minister of Labor and Vocational Training.[116]

In addition, the approval of the Labor Inspector of the dismissal of protected workers does not deter the Arbitration Council from considering the proportionality that constitutes a valid reason for dismissal. When resolving disputes, the council also plays an important role in checking the proportionality of disciplinary sanctions. The Labor Law does not clearly mention the criteria for the evaluation of this proportionality; however, the examination of the awards of the council has provided some standard rules to judge the legality of the dismissals. The proportionality is recognized when the employer dismisses the worker according to serious misconducts listed in the Labor Law, the internal work rules of the companies, or according to considerations of the worker's intention or motives and the employer's equal treatment.

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[113] The Labor Law of Cambodia of 1997, art. 26.
[114] [2004] Case no 27/04 (kh The Arbitration Council, June 16, 2004).
[115] [2005] Case no 59/05 (kh The Arbitration Council, October 27, 2005).
[116] The Labor Law of Cambodia of 1997, art. 393, ¶ 3.

The employer cannot use double punishment for the same misconduct of a worker. Article 28 of the Labor Law reads, "The employer is prohibited from imposing fines or double sanctions for the same misconduct. By fine is meant any measure that reduces the remuneration normally paid for the work performed."[117] In addition, regardless of whether or not a worker commits the same misconduct, the Arbitration Council upholds a decision of the employer that uses a history of disciplinary measures on the worker for a particular misconduct as grounds for consideration of the next disciplinary sanction when that worker commits another misconduct. According to the Arbitration Council in the 76/05 case, misconduct was subject to serious sanction when a worker kept repeating the same problem after there was series of warnings and other punishments.[118] Therefore, in a case where the worker has already received a punishment, and then commits the same offence again, even though it is subject to ordinary disciplinary sanction, the employer can dismiss the worker instead of applying disciplinary sanctions on the worker.

2.1. Dismissal on the ground of serious misconducts

The worker's misconduct cannot become grounds for disciplinary dismissal unless the magnitude of such a mistake is serious. The nature of serious misconduct is not defined, but instances are listed in the Labor Law, the rules of employment of the companies, and arbitrator-made rules. The Labor Law enumerates serious misconduct by workers in Article 83-B as follows:

1. Stealing, misappropriation, embezzlement;
2. Fraudulent acts committed at the time of signing (presentation of false documentation) or during employment (sabotage, refusal to comply with the terms of the employment contract, divulging professional confidentiality);
3. Serious infractions of disciplinary, safety, and health regulations;
4. Threat, abusive language or assault against the employer or other workers;
5. Inciting other workers to commit serious offenses; and
6. Political propaganda, activities or demonstrations in the establishment.[119]

In addition to Article 83-B, the Labor Law demonstrates serious misconduct as follows. In the procedures prior to a strike in Article 326, if a worker who is appointed to manage a minimum service in order to protect the facility installations and equipment of the enterprise, then he or she is considered to have committed serious misconduct when he or she fails to provide this service during the period of the strike.[120] Moreover, according to Article 328, when a worker who is assigned to provide essential services and does not turn up for such work during the strike; such conduct is also a serious offence.[121] Essential service refers to

[117] Ibid., art. 28.
[118] [2006] Case no 76/05 (kh The Arbitration Council, January 20, 2006).
[119] The Labor Law of Cambodia of 1997, art. 83–B.
[120] Ibid., art. 326.
[121] Ibid., art. 328.

supplies that are important for the life, safety, or health of all or part of the population.[122]

Furthermore, Article 330 and Article 337 of the Labor Law points out the serious action the worker should be aware of when exercising a strike. The Constitution (Article 37) guarantees the right to strike, but it must be exercised within the framework of law. The Labor Law (Article 330) provides that "A strike must be peaceful. Committing violent acts during a strike is considered to be serious misconduct that could be punished, including work suspension or disciplinary layoff." Based on the arbitrator-made rule, the performance of a strike without informing the employer is not a case of serious misconduct.[123] The Labor Law (Article 333) prohibits an employer from taking any disciplinary measure against workers who join a strike. Accordingly, the dismissal of workers on the grounds that they were involved in a strike is illegal.[124]

In addition, even when a strike does not follow the procedures set in the Labor Law, calling or inciting other workers to participate in the strike is also not a case of serious misconduct. However, if a worker incites others to use violence during a strike, then the issue is serious.[125] In the 36/04 case, the workers switched off the electricity in the company. The council ruled that the workers could go on strike, but they could not switch off the electricity because it would interrupt the production of the company. Therefore, such an action was a serious case of misconduct because switching off the electricity destroyed the company's property during the strike.[126]

Article 337 of the Labor Law points out that serious misconduct occurs when the worker without valid reason fails to return to work within forty-eight hours of the court's declaration of the strike to be illegal.[127] In the 22/04 case, the employer dismissed 97 workers because they failed to return to work within forty-eight hours after the issuance of an emergency injunction by the Phnom Penh Municipal Court declaring the illegality of the strike on April 9, 2004 at around 2pm.[128] In this case, when the workers failed to return to work before April 11, 2004 at 2pm without a valid reason, the conduct constituted serious offense. However, the officials of Phnom Penh Municipal Court did not inform workers about the court's injunction until 2pm on April 10, 2004. On April 11, 12, and 13, the workers tried to return to work, but the security guards did not allow them to enter. The security guards demanded that the workers sign an agreement that they would return to work and not join any further strikes, but the workers refused to sign this agreement. The Arbitration Council finally ruled that the dismissal was illegal because the workers' refusal to sign the agreement was a valid reason for not returning to work on April 11, and the right to strike was guaranteed by the Constitution (Article 37) and the 1997 Labor Law (Section 1 of Chapter 13).

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[122] Ibid., art. 327.
[123] [2009] Case no 125/09 (kh The Arbitration Council, October 09, 2009).
[124] [2009] Case no 154/09 (kh The Arbitration Council, December 16, 2009).
[125] [2005] Case no 08/05 (kh The Arbitration Council, March 23, 2005); [2005] Case no 20/05 (kh The Arbitration Council, April 21, 2005).
[126] [2004] Case no 36/04 (kh The Arbitration Council, June 22, 2004).
[127] Article 337 of Labor Law states "The Labor Courts or, in the absence of the Labor Courts, the common courts, have sole jurisdiction to determine the legality or illegality of a strike…If the strike is declared illegal, the strikers must return to work within forty-eight hours from the time when this declaration is given out. A worker who, without valid reason, fails to return to work by the end of this period is considered guilty of serious misconduct."
[128] [2004] Case no 22/04 (kh The Arbitration Council, June 07, 2004) 04.

While the Labor Law provides the basic and general types of serious misconducts, the internal work rules of the companies regulate a certain number of serious cases of misconduct that fit with the nature and characteristic of their business. The Labor Law (Point (3) of Article 83-B) has listed serious misconduct as a "serious infractions of disciplinary, safety, and health regulations." The Arbitration Council, in the 137/07 case, found that this article did not state clearly what was the disciplinary regulation. Hence, the Arbitration Council examined the company's internal work rule to see whether or not disobedience to the company's order is a serious misconduct.[129]

In addition, an internal work rule is used to check the serious misconduct because Article 23 of the Labor Law requires employers to include worker's obligation and punishments that serve the need of the actual operation of the enterprises or companies. Hence, the rules of employment play an important role in checking the legality of employer's execution of the right to disciplinary actions. Accordingly, although the employer may prove that the worker engaged in misconduct, a dismissal as disciplinary action must be in accordance with internal work rules.[130]

Many enterprises established their internal work rule by imposing disciplinary sanctions based on the magnitude of the misconduct (light misconduct, medium, and serious misconduct). For example, the internal work rule mentions serious misconduct, medium misconduct, and light misconduct as follows:[131]

> A. Serious Misconduct: The Management board has the right to terminate a worker immediately without reprimand in the following circumstances:
> - 1. During the assignment, if a worker is involved in obtaining interest from an outside individual institute or organization which is at the expense of the Company. In this case, the worker will be fired immediately and be responsible for the loss to the company.
> - 2. If a worker divulges a company's secret to an outsider without agreement from the management board, the worker will be fired immediately and be responsible for the loss to the company.
> - 3. If a worker incites other workers not to work or to join in an illegal strike (see "Labor Law" of the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation), the worker will be fired immediately.
> - 4. If a worker commits serous misconduct or seriously violates the Company's Internal Work Rules or any law of the country, the worker will be fired immediately.
> - 5. If a worker committed misconduct as stated in type one of annex "A".
> B. Medium Misconduct: If worker committed misconduct as listed in type two of annex "A", he/she will receive a written reprimand. After being reprimanded two times, and if there is no improvement, the worker will be fired.
> C. Light Misconduct: If worker commits light misconduct, he/she will receive an oral reprimand. In case of continuation of the misconduct, it is considered medium misconduct.

While some internal work rules have regulated and enumerated a number of serious

[129] [2008] Case no 137/07 (kh The Arbitration Council, January 10, 2008).
[130] *54/04* (The Arbitration Council 2004); *55/04* (The Arbitration Council 2004).
[131] [2006] Case no 73/06 (kh The Arbitration Council, September 18, 2006).

misconducts, some just refer to serious misconducts provided by the Labor Law.[132] Even though an employer fails to include serious misconduct under the Labor Law into the rules of employment, the employer still has the right to end the employment relation. For example, even if an internal work rule of a company does not mention that fighting is a case of serious misconduct, an assault against other workers is serious.[133]

The review of the awards of the Arbitration Council has shown that misconduct that is judged as serious is not always found in the Labor Law or rules of employment of the companies. If misconduct is not listed in the Labor Law and internal work rule, then the first time an act is committed cannot constitute a serious offense.[134] However, misconduct regardless of being light or medium can also become serious offence that will lead to dismissal when it is repeated after a series of punishment records, such as warnings and suspension of employment.[135] The internal work rules of many companies regulate that it is a case of serious misconduct when the worker commits serious offenses receives repeated warning letters and commits another offence during the period of six months.

2.2. Examples of rules of dismissal due to misconduct

2.2.1. Misappropriation, embezzlement, and fraud

In the 76/12 case in 2012, the employer dismissed two workers on the grounds that they falsified the attendance registration and working time of the company. A worker telephoned his coworker to register that he came to work at 7:59am, but he actually arrived at 8:15am. Both of the workers were dismissed since they falsified the real information of attendance registration in order to hide the lateness from their boss. Falsification of attendance registration is a conduct of embezzlement of working time because the worker did not work eight hours per day. According to the Arbitration Council, such a falsification was unacceptable misconduct that reflected the disloyalty of the worker towards the employer and which fell under serious misconduct in Article 83-B concerning misappropriation, embezzlement, and fraud.[136]

[132] Clause 10 of the internal work rule in [2006] Case no 33/06 (kh The Arbitration Council, May 25, 2006); Clause 10 of the internal work rule in [2010] Case no 90/10 (kh The Arbitration Council, August 2010); Clause 10 in case [2012] Case no 76/12 (kh The Arbitration Council, May 22, 2012).
[133] [2008] Case no 53/08 (kh The Arbitration Council, May 30, 2008).
[134] In Case No: 76/05, the worker was accused of committing 3 different mistakes. According the Labor Law, these offences were not serious ones as maintained by the employer. In addition, the company did not have internal work rules to regulate the disciplinary measures or the type of serious misconduct. Therefore, the worker was considered to have committed a first time misconduct since there was no advance warning from the employer. [2006] Case no 76/05 (kh The Arbitration Council, January 20, 2006).
[135] [2006] Case no 73/06 (kh The Arbitration Council, September 18, 2006).
[136] [2012] Case no 76/12 (kh The Arbitration Council, May 22, 2012).

2.2.2. Insult and assault

When examined carefully, the serious misconducts set in the Labor Law and the internal work rules of a company are not the main determinants to comply with the principle of proportionality. Thus, the fact that a worker commits misconduct, which falls into serious misconduct in the Labor Law and the rules of employment, cannot deter the council from considering the proportionality of the dismissal and the offence. To consider whether the choice of dismissal is taken appropriately according to the magnitude of the offence, the council considers not only the fact that a worker commits a specified serious offense but also all the facts or situation surrounding the action of the misconduct. In this sense, the council considers the motive (intentional or unintentional) of the worker or whether or not he or she can control himself or herself when committing misconduct.

For example, in the 13/04 case in 2004, the employer dismissed a worker for supposedly committing a serious misconduct.[137] Article 82 of the Labor Law allows the employer to dismiss workers without any prior notice period when the worker has committed serious offenses. Article 83 lists some serious actions such as "threats, abusive language, or assaults on an employer or other workers."[138] In this case, the dismissed worker called another worker a crocodile and said, "I could always take your mother's husband" and threw a book and shoes at the other worker. From these behaviors, the dismissed worker committed serious misconduct namely by using abusive language and assaulting the other worker. However, the employer had to take disciplinary sanctions proportional to the seriousness of the misconduct.

The Arbitration Council examined all the circumstances surrounding the offense of the worker to consider whether or not the dismissal was proportional to the misconduct, particularly the cause for the yelling and the throwing of things at the other worker. The council found that the dismissed female worker committed such aggressive behavior when a male worker insulted her by saying "if you act up like that, you will never find another husband." This comment was made in public and affected the reputation of the woman in the context of Cambodian culture. Therefore, the Arbitration Council ruled that a reasonable person would be likely to lose control of himself or herself and have a similar reaction as that taken by the dismissed worker in the above situation. Consequently, the dismissal was not proportional to misconduct. The proper appropriate sanction was suspension for a period of two months without pay.

In the 79/09 case, a worker was dismissed on the grounds of using insulting words.[139] The worker was fired without notification or information about his offence. The worker had no history of misconduct. During instruction from the administrative staff, there was no conflict or disagreement with the dismissed worker. However, when that worker left the room, he used a derogatory phrase. The Arbitration Council interpreted the expression of the dismissed worker in three meanings. First, the worker insulted the administrative worker. Second, he talked to his friends. Third, it was his habit when getting angry. In this case, the dismissed worker did not clearly insult the administrative workers, and such misconduct was not a serious one. The Arbitration Council had the right to demand that the employer reinstate

[137] [2004] Case no 13/04 (kh The Arbitration Council, March 30, 2004).
[138] The Labor Law of Cambodia of 1997, art. 83–B (4) (1997).
[139] [2009] Case no 79/09 (kh The Arbitration Council, July 15, 2009).

or pay monetary compensation as provided by the law.

In the 16/11 case, one worker took pictures of another leading to a fight. According to the Labor Law (Article 83-B), the worker's assault against the other was a case of serious misconduct. However, in this case, though there were two workers involved in the fighting, the employer dismissed only the one who started the dispute. The worker's representatives in the dispute claimed that the employer's disciplinary measure dismissing only one worker was inappropriate. The Arbitration Council ruled that the dismissal of the worker who started the fighting was appropriate because starting a conflict and fighting with the others was serious.[140]

2.2.3. Vandalism of company's property

In the 59/05 case, a worker broke a company's fan. According to the internal work rules, vandalism constituted serious misconduct which would lead to dismissal. However, the council ruled that the dismissal was not proportional to the misconduct because the worker did not destroy the company's property on purpose.[141] The employer should have considered all the facts before rendering a decision whether the act of engaging in such misconduct was due to a violent personality or unintentional misconduct. The motive of the worker should be considered in such cases.

2.2.4. Inciting other workers to commit serious offense

The Labor Law (Article 83-B) enumerates a list of serious mistakes including "inciting other workers to commit serious misconduct." According to this article, a serious misconduct occurs when the worker incites other workers to do wrong. If a worker incites others but the offense committed by the incited people is not serious, then it is not a case of serious misconduct as provided in Article 83-B.[142] Consequently, the act of the other workers who are incited by the alleged worker is the main criteria for determining whether or not the alleged worker has committed serious misconduct. The determination of whether or not the act of the other workers is serious relies on the Labor Law and internal work rules.

In the 33/06 case, the Arbitration Council found that a worker incited other workers to stand up for five minutes to express solidarity, and the act of standing up by the workers caused damage to the employer; however, such a misconduct was not serious according to the Labor Law Article 83-B and the internal work rule of the company.[143] In this case, the council, when examining whether or not the act of standing up was serious misconduct, also relied on the fact that the employer did not punish the others who stood up but only the worker leading the act of solidarity.

[140] [2011] Case no 16/11 (kh The Arbitration Council, February 11, 2011).
[141] [2005] Case no 59/05 (kh The Arbitration Council, October 27, 2005).
[142] [2005] Case no 08/05 (kh The Arbitration Council, March 23, 2005).
[143] [2006] Case no 33/06 (kh The Arbitration Council, May 25, 2006).

2.2.5. Disobedience to the employer's order

Another reason for dismissal is a worker's disobedience to an employer's order and most of the disputes concerning the legality of employer's order of transfer. Employers need to modify their business operations through the transfer of their labor force or the movement of the company's location. Consequently, these changes may affect the working conditions of the workers. The right of an employer to direct and control the workers as the owner of the enterprise derives from Article 2 of the Labor Law. Article 2 states:

> [E]very enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in factory, workshop, work site, etc., under the supervision and direction of the employer… [144]

> The Arbitration Council interpreted this Article by ruling that "The AC is mindful not to interfere with the right of supervision and management of activities of business and general authorities of the company as employer in managing and changing the works of the employees of the company provided it does not result in a reduction of wages, a changing of the working place to a place far from the original one, changing of day shift to night shift or night shift to a day one and does not affect specific professional skills. If these things are affected, it is considered as a violation of employment contract that is required to be respected.[145]

According to this interpretation, employers have the right to direct and manage their labor force according to the needs of the company's operation provided that this supervision and direction are reasonable and lawful.[146] The idea of reasonable supervision or lawful management refers to an employer's decision that satisfies four conditions such as (1) no wage reduction; (2) no transfer to a distant workplace; (3) no transfer from day shift to night shift; and (4) no transfer that affects a substantial change in the skills required to undertake the work.[147] These four conditions are flexible rules and do not deter employers from mobilizing their labor resources.

In the 61/09 case, the Arbitration Council accepted the transfer of a worker who was currently working in Phnom Penh to Sihanouk Ville (200 km away).[148] Consequently, this order violated condition (2) which requires there be no transfer to a distant place. The Arbitration Council found that the company ordered the transfer be for six months, provided the worker with an extra salary, accommodation and transport fees. The worker was a good worker so the company wanted this worker to work temporarily in the other place as a model for other workers. Considering these facts, the council ruled that the transfer by the company was reasonable.

In the 137/07 case, the employer was a company that provided security services to its

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[144] The Labor Law of Cambodia of 1997, art. 2 (1997).
[145] [2003] Case no 17/03 & 18/03 (kh The Arbitration Council, November 11, 2003).
[146] [2006] Case no 06/06 (kh The Arbitration Council, February 16, 2006); [2006] Case no 18/06 (kh The Arbitration Council, March 31, 2006); [2006] Case no 44/06 (kh The Arbitration Council, June 22, 2006).
[147] [2006] Case no 38/06 (kh The Arbitration Council, June 07, 2006).
[148] [2009] Case no 61/09 (kh The Arbitration Council, June 17, 2009).

clients, such as hotels, airports, restaurants, and houses. The employer transferred 17 workers from Siem Reap Province and Kompong Thom Province to work in Phnom Penh City. Phnom City is around 200 kilometers far from these two provinces. The council found that this transfer and act of management was inappropriate and consequently the workers could reject this order.[149] In this case, the council ordered the company to transfer these workers to another location in the same province when it was impossible to allow them to work at the previous place.

In the case where the exercise of the right of management and supervision is legal, disobedience of an employer's order will become misconduct. An employer can dismiss a worker on this ground only when disobedience is a serious mistake as provided by the Labor Law and the internal work rules. If it is not an instance of serious misconduct corresponding to dismissal grounds in the Labor Law or rules of employment, the employer can discharge the worker only if there is a history of previous disciplinary measures, such as verbal warning and written warning.[150]

3. Necessity of the operation of enterprise

Article 74 of the Labor Law allows the employer to dismiss a worker on grounds relating to the requirements of the operation of the enterprise, establishment or group. The Arbitration Council in the 32/05 case interpreted this point as being the case that "according to this Article the employer has a valid reason [if the dismissal was] based on the operational requirements of the establishment like a reduction of work or the closure of some part of the operation."[151] In this case, the council also accepted a valid reason of dismissals of 131 workers on the ground that the employer closed the building where they were working because there was no longer any work.[152] In addition, a fire accident that causes complete damage to a factory is a valid reason related to the necessity of the enterprise.[153]

Since the grounds for such a dismissal is not the fault of the worker, Article 95 of the Labor Law requires an employer to fulfill the procedure in order to minimize the effect of the laying off on the workers. Article 95 states as follows:

> Any layoff resulting from a reduction in an establishment's activity or an internal reorganization that is foreseen by the employer is subject to the following procedures: The employer establishes the order of the layoffs in light of professional qualifications, seniority within the establishment, and family burdens of the workers.

[149] [2008] Case no 137/07 (kh The Arbitration Council, January 10, 2008).
[150] The employer did not change the location of the company, reduce wages, change the work shift, or change completely the skill of workers. Thus, the disobedience of the workers was misconduct. Since the workers had been punished by disciplinary actions many times already, the dismissal was appropriate disciplinary action. See 157/08 (The Arbitration Council 2009).
[151] [2005] Case no 32/05 (kh The Arbitration Council, June 17, 2005).
[152] The company faced with economic difficulty because the only client of the company reduced buying electricity from the company. [2011] Case no 111/11 (kh The Arbitration Council, September 14, 2011).
[153] [2011] Case no 54/11 (kh The Arbitration Council, June 17, 2011).

> The employer must inform the workers' representatives in writing in order to solicit their suggestions, primarily, on the measures for a prior announcement of the reduction in staff and the measures taken to minimize the effects of the reduction on the affected workers.
>
> The first workers to be laid off will be those with the least professional ability, then the workers with the least seniority. The seniority has to be increased by one year for a married worker and by an additional year for each dependent child.
>
> The dismissed workers have, for two years, the priority to be re-hired for the same position in the enterprise.
>
> Workers who have priority for re-hire are required to inform their employer of any change in address occurring after the layoff. If there is a vacancy, the employer must inform the concerned worker by sending a recorded delivery or registered letter to his last address. The worker must appear at the establishment within one week after receiving the letter.
>
> The Labor Inspector is kept informed of the procedure covered in this article. At the request of the workers' representatives, the Labor Inspector can call the concerned parties together one or more times to examine the impact of the proposed layoffs and measures to be taken to minimize their effects. In exceptional cases, the Minister in Charge of Labor can issue a Prakas (ministerial order) to suspend the layoff for a period not exceeding thirty days in order to help the concerned parties find a solution. This suspension may be repeated only one time by a Prakas of the Ministry.[154]

In compliance with Article 95, an employer has two main duties: one before the layoff and the other after the layoff. Before a layoff or adjustment dismissal, the employer has to (1) establish a reasonable method for selection of which workers to dismiss, (2) consult with the workers' representatives, (3) notify the competent authorities, and (4) suspend the layoff according to the order of the minster in charge of labor. After a layoff, the employer has to provide the dismissed workers with a chance of reemployment within a period of two years in the case where employer reopens the company.

3.1. Reasonable selection of workers

The Labor Law requires an employer to carry out a fair and reasonable selection of workers in the case of collective or adjustment dismissal. An order of layoff is set in consideration of professional qualifications, seniority, and the family burdens of the workers. The Labor Law of 1997 makes it clear that the workers to be first laid-off are those who have less qualifications and less seniority. The family burden is considered to be a determinant of seniority in the sense that seniority is increased one year for married workers with additional years according to the number of dependent children. A reasonable selection of workers for

[154] The Labor Law of Cambodia of 1997, art. 95 (1997).

layoff is also a procedural requirement in the first Labor Code of Cambodia of 1972.[155] As the Labor Code of 1972 was influenced much by the ILO Recommendation No. 119, the reasonable selection in Article 91 of the Labor Code of 1972 and in Article 95 of the Labor Law of 1997 is an application of Paragraph 15 of this recommendation.[156]

3.2. Employer's obligation to consult with workers' representatives

The employer has to inform the workers' representatives to procure their suggestions on the announcement of layoffs and measures to minimize the impact of layoffs. In this case, the employer not only informs, but also consults with the worker's representative to find a resolution to avoid damage to the workers who are on the list of layoffs. The employer's duty to consult with the workers' representatives in case of economic or adjustment dismissal is also another procedural rule for collective layoff in the Labor Code of 1972.[157] The employer's obligation to have such consultations derives from Paragraph 13 (1) and (2) of the ILO Recommendation No. 119 in 1963.[158]

The employer's obligation to consult in Article 95 of the Labor Law of 1997 should be interpreted according to Article 13 of the ILO Convention No. 158 in 1982 on Termination of Employment.[159] This is because the Constitution of Cambodia (Article 31) requires the

[155] The Labor Code of Cambodia of 1972, art. 91 (1972).
[156] "R119 Termination of Employment Recommendation, 1963," ¶ 15 reads: (1) The selection of workers to be affected by a reduction of the work force should be made according to precise criteria, which it is desirable should be established wherever possible in advance, and which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers. (2) These criteria may include-- (a) need for the efficient operation of the undertaking, establishment or service; (b) ability, experience, skill and occupational qualifications of individual workers; (c) length of service; (d) age; (e) family situation; or (f) such other criteria as may be appropriate under national conditions, the order and relative weight of the above criteria being left to national customs and practice.
[157] The Labor Code of Cambodia of 1972, art. 91.
[158] "R119 Termination of Employment Recommendation, 1963," ¶ 13 (1) & (2) reads:(1) When a reduction of the work force is contemplated, consultation with workers' representatives should take place as early as possible on all appropriate questions. (2) The questions on which consultation should take place might include measures to avoid the reduction of the work force, restriction of overtime, employment over a certain period, measures for minimizing the effects of the reduction on the workers concerned, and the selection of workers to be affected by the reduction.
[159] "C158 Termination of Employment Convention, 1982," art. 13 reads: 1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall: (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment…2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce…3. For the purposes of this Article the term the workers' representatives concerned means the workers' representatives recognized as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

government of Cambodia to respect human rights guaranteed in the international conventions, such as ILO Convention No. 158 which provides workers with the right to a valid reason in a dismissal. In many countries, employers are not required to obtain the consent of the workers' representatives toward employer's decision on the issue of dismissal on the consideration that the workers' representatives do not possess co-determination rights to minimize the impact of dismissal, the right to appeal the reconciliation committee, or the right to reject the proposed layoff.[160]

3.3. Employer's obligation to notify a competent authority

The Labor Code of 1972 did not require an employer to notify an authority in the case of collective layoffs. In compliance with Article 31 of the Constitution of Cambodia, the Labor Law of 1997 includes this requirement in procedural dismissals in the case of a company's restructuring or conducting necessary operations. Accordingly, the employer should continue to inform the Labor Inspector of all the procedures and participate in meetings to examine the impact of the proposed layoffs and measures to be taken to minimize their effects, when the Labor Inspector calls for such meetings after there has been a request from the shop steward or workers' representatives. The employer's duty to inform a competent authority is an application of Article 14 of the ILO Convention No.158 on Employment Termination in 1982.[161] In the practice of many countries, although informed by the employer, the authority helps the parties only in the case where there is a request from parties who consider that the assistance of the authority as necessary.[162]

3.4. Employer's obligation to suspend a layoff

The employer, in exceptional cases, suspends layoffs for a period of not more than 30 days when there is *Prakas* or regulation of Ministry of Labor in order to help the parties find a solution. The Ministry can issue such a regulation once again in order to deal with the issue of collective dismissals. Accordingly, the workers can request from the Ministry a suspension of layoff for a maximum of two months. However, from the enactment of the Labor Code in

[160] *Report VIII (2) Termination of Employment at the Initiative of the Employer*, 98.
[161] "C158 Termination of Employment Convention, 1982," art. 14 reads: 1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out…2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce… 3.The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.
[162] *Report VIII (2) Termination of Employment at the Initiative of the Employer*, 108.

1997 up to the present, based on the reviewed of the awards of the Arbitration Council, it appears that there has been no case where Ministry issued a *Prakas* to suspend the layoff.

3.5. Employer's obligation to reemploy dismissed workers

In cases where an employer reopens a business or the section of the company where the discharged workers used to work, the Labor Law requires the employer to give priority to these workers for rehiring in the same position within two years. In this case, the employer has to inform the concerned workers by sending a recorded delivery or registered letter to his or her address.

4. Burden of proof

The Labor Law (Article 74) reads:

> The labor contract of unspecified duration can be terminated at will by one of the contracting parties. This termination shall be subject to the prior notice made in writing by the party who intends to terminate the contract to the other party…However, no layoff can be taken without a valid reason relating to the worker's aptitude or behavior, based on the requirements of the operation of the enterprise, establishment or group.

According to Article 74, only a worker can terminate the unspecified duration contract at will, while an employer cannot terminate the contract freely unless he has a valid reason relating to the worker's aptitude or behavior, or to the requirement of business necessity. In this sense, an employer does not have the right to dismissal. The freedom of an employer to dismiss exists only for a valid reason. Consequently, the employer has to prove that a dismissal takes place with a valid reason.[163] If the employer fails to provide evidence to prove the existence of a valid reason, the council will make a decision that is favorable for the worker.

For example, in the 91/04 case, the employer accused the worker of committing a serious misconduct by insulting four other workers. The worker was never given a chance to know who the accusers were nor to defend against the allegations. The council ruled that " based on equity and justice, a person accused of a crime has the right to information about the charge to know who the plaintiff are and has the right to self-defense or to find a lawyer or representative to defend."[164] In the hearing, the employer refused to show the complaint

[163] [2004] Case no 36/04 (kh The Arbitration Council, June 22, 2004); [2004] Case no 71/04 (kh The Arbitration Council, September 2004); [2006] Case no 53/06 (kh The Arbitration Council, July 28, 2006); [2007] Case no 17/07 (kh The Arbitration Council, March 09, 2007); [2007] Case no 35/07 (kh The Arbitration Council, May 08, 2007); [2007] Case no 109/07 (kh The Arbitration Council, December 12, 2007); [2008] Case no 48/08 (kh The Arbitration Council, April 29, 2008).
[164] *91/04*.

file of the four workers and did not allow those workers to appear in the hearing although there was a request from the council. The council concluded that the employer failed to provide evidence of serious misconduct. If any party failed to provide evidence, then the council made unfavorable decisions for the other party, or accepted the evidence of the other party as true.

In cases of dismissal taking place according to valid reason, the employer has an obligation to prove the existence of reasonable grounds. However, in cases of disputes over dismissal on the grounds of discrimination against union's membership or activities, the worker who is the claimant has the burden of proof.[165] The worker has to show that the dismissal is the result of discrimination while the employer has to prove that the dismissal takes place based on other grounds. If the employer fails to convince the council that the discharge took place according to a valid reason, the dismissal of the union leader or shop steward falls under discriminatory action by the employer.

Section 5: Remedies for unjustified dismissal

As mentioned in the previous section, issues of dismissal are governed by three rules: the requirement for prior notice, the statutorily prohibited dismissals, and the requirement for a valid reason. In other words, the employer cannot just rely on the prior notice to dismiss the worker without being mindful of some particular prohibited dismissals in the Labor Law and the rules of employment and the need for the existence of a valid reason. In response to the employer's unjustified dismissal, the Arbitration Council provides the victim worker with a form of remedy, namely monetary compensation or reinstatement, according to conditions particular to each case.

This section aims to further discuss the two kinds of remedies. It examines the types of remedies, and the legal grounds the Arbitration Council applies in order to provide remedies to the dismissed workers.

1. Monetary compensation

1.1.Compensation for damages

[165] [2003] Case no 03/03 (kh The Arbitration Council, June 11, 2003); [2003] Case no 10/03 (kh The Arbitration Council, July 23, 2003); [2004] Case no 19/04 (kh The Arbitration Council, May 05, 2004); [2004] Case no 17/04 (kh The Arbitration Council, April 08, 2004); [2008] Case no 01/08 (kh The Arbitration Council, January 23, 2008); [2008] Case no 06/08 (kh The Arbitration Council, February 12, 2008).

The Arbitration Council demands employers to pay for damage in the form of consolation money to the victim worker in the case where dismissal takes place without valid reason. Article 91 of the Labor Law stipulates that:

> The termination of a work contract without cause, by one or the other of the parties to the contract, can give the other party rights to damages…These damages are not the same as the compensation in lieu of notice or the layoff compensation…The employee, however, can request to be given a lump sum equal to the layoff compensation. In this case, he is relieved of the obligation to provide proof of the damage incurred.[166]

According to Hel, who is the author of a book explaining the Labor Law in Cambodia in 2005, the provision regarding consolation money has an interesting history of revision.[167] The first and second paragraphs of Article 91 are inherited from Article 87 of the Labor Code 1972 and Article 87 of the Labor Code 1992[168] where the employer or worker has the same right to damages whenever one of them terminates the employment contract without reasonable grounds, and that damage is different from compensation in lieu of a notice period and dismissal indemnity. The claimant, either employer or worker, must provide proof of damages resulting from the termination without cause in order to receive compensation.[169] The third paragraph is an additional rule covering the purpose of protecting the workers by exempting them from the obligation to prove the damages. In this case, the dismissed worker can receive compensation for damage only equal to the amount of dismissal indemnity or the layoff compensation. If the damages are huge and the worker can show proof, he or she can be compensated for more than the amount equal to the dismissal indemnity.

Moreover, Article 91(1) requires any party who terminates the contract without valid reason to pay compensation for damage to the other party. Article 74(2) requires that the employer only have a valid reason when terminating a contract of undetermined duration, and Article 91 (1) applies only to an employer whose right to unilateral termination of contract has to be taken with a valid reason. In the cases of a contract of undetermined duration, the workers have much freedom to terminate the employment contracts even when they do not have any reason.

1.2.Severance pay

Severance pay refers to an amount of money that is provided by the employer when terminating a contract, but it is not compensation or remedy for damage as a result of

[166] The Labor Law of Cambodia of 1997, art. 91 (1997).
[167] Chamreoun Hel, *Nitekanhea (Labor Law)*, 2005, 263–66.
[168] Article 87 of the Labor Code 1972 and Article 87 of the Labor Code 1992 read "The termination of a work contract without cause, by one or the other of the parties to the contract, can give the other party rights to damages…These damages are not the same as the compensation in lieu of notice or the layoff compensation."
[169] It has been noticed that there was a surprising interpretation of Article 91 when the AC rejected the claim for damage when the workers could not provide evidence of their damage. See [2004] Case no 51/04 (kh The Arbitration Council, July 22, 2004).

dismissal without valid reason.[170] This form of pay is a kind of social cost that an employer has to bear as part of the responsibility to provide the workers with an amount of money based on the length of employment and is related to safeguarding the livelihood of the victim workers and their dependents during a certain period before they obtain new employment.[171] Severance pay here refers to dismissal indemnity in Article 89 of the Labor Law.

As stated in Article 91 of the Labor Law, damage and dismissal indemnity are different. A dismissal indemnity is a kind of severance payment that is provided to the worker regardless of whether or not there is a valid reason attached to the termination. Accordingly, even though the employer has a valid reason relating to the worker's capacity and economic difficulty, the employer has to provide the worker with a dismissal indemnity. However, in the case of serious misconduct, the employer is exempted from providing such compensation. Hence, dismissal indemnity provides workers with income protection for a short period.

Article 89 of the 1997 Labor Law stipulates that:

> I If the labor contract is terminated by the employer alone, except in the case of a serious offense by the worker, the employer is required to give the dismissed worker, in addition to the prior notice stipulate in the present Section, compensation for the layoff as explained below:
> Seven days of salary and benefits if the employee's length of continuous service at the firm is between six and twelve months.
> If the worker has more than twelve months of service, compensation for a layoff will be equal to fifteen days of salary for each year of service, up to the maximum of six months of salary. Fractions of a year of six months or more count as an entire year.
> The worker is also entitled to this compensation if he is laid off for reasons of health.[172]

According to Article 89, a worker can receive the maximum of six months of salary when the length of his or her service is at least 12 years. The disputes over the dismissal indemnity mostly concern the method of calculation. In the 27/04 case in 2004, the employer calculated the dismissal indemnity of the worker whose length of service was 13 months by taking the minimum wage as the basis for calculation.[173] The Arbitration Council rejected this calculation and provided the formulation of calculation as follows: total gross wages including overtime and bonuses received by the worker over the 12 months period prior to dismissal divided by 12 divided by 26 and finally multiplied by 15 days.[174]

In certain cases, the termination of an employment contract does not appear in the form of a dismissal but instead resignation. This is because the Labor Law requires the dismissal to be taken when there is a valid reason and to comply with procedures. The employers wish to avoid the complicated compliance of the rules and the consequences when they violate these rules of the Labor Law. The employer may suggest or behave in a negative manner to force the workers to resign. In order to protect the worker, the Labor Law (Article 90) reads,

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[170] *Termination of Employment Digest* (Geneva: International Labour Office, 2000), 3.
[171] With the absence of unemployment insurance and the measure to protect the worker's income, the government will shift the burden of social cost to the employer. See Collins, *Justice in Dismissal*, 141–142.
[172] The Labor Law of Cambodia of 1997, art. 89 (1997).
[173] [2004] Case no 27/04 (kh The Arbitration Council, June 16, 2004).
[174] [2004] Case no 17/04 (kh The Arbitration Council, April 08, 2004).

> Indemnity for dismissal must be granted to the worker and, if applicable, he can also claim damages even though the contract was not terminated by the employer, but the latter, through his evil actions, pushed the worker into ending the contract himself. If the employer treats the worker unfairly or repeatedly violates the terms of the contract, he also has to pay indemnities and damages to the worker.[175]

Accordingly, in cases where the worker terminates the employment contract because of the employer's bad intention or persecuting behavior, the resigning worker has the right to a dismissal indemnity and the right to damages. In the 21/10 case, the employer advised the worker to resign so that they could receive a dismissal indemnity. When the worker did not resign, the employer fired the worker due to serious misconduct concerning the leaking of secret information and internal documents of the company. Consequently, the worker could not receive dismissal indemnity at all.[176] The worker asserted that she did not commit any alleged misconduct, and the employer could not prove anything. Therefore, the Arbitration Council ruled that the resignation or termination by the worker was in accordance with the will of worker but was due to the bad intentions of employer. Thus, the worker had a right to dismissal indemnity and damages.

1.3. Paid annual leave

A worker who has been working continuously has the right to paid annual leave at the rate of one and a half work days of paid leave per month. In a year, a worker has at least 18 days for annual paid leave. In addition, this length of paid annual leave increases according to the seniority of the workers at the rate of one day per three years of service.[177] The worker can use their paid leave only after they have served the company for one year of service. In principle, workers use annual leave during the Khmer New Year (April 14-16).[178] Based on Article 167 (Paragraph 2) of the Labor Law, any form of agreement providing compensation in lieu of paid annual leave or renouncing or waiving the right to paid leave is void. More importantly, the workers cannot demand compensation for the days of the annual paid leave not used during the continuance of an employment contract.[179]

When the employment contract is terminated before the use of annual paid leave or there are days of annual paid leave that are not used, the employer has to pay indemnity for these unused days.[180] In practice, there are many disputes regarding the method of calculation of annual paid leave. For example, in the 40/09 case, the employer calculated the amount of money for annual paid leave by taking the basic wage of a month divided by 26 and multiplying by the days of annual paid leave.[181] Article 168 of the 1997 Labor Law reads:

[175] The Labor Law of Cambodia of 1997, art. 90.
[176] [2010] Case no 21/10 (kh The Arbitration Council, April 23, 2010).
[177] The Labor Law of Cambodia of 1997, art. 166.
[178] Ibid., art. 170.
[179] [2009] Case no 40/09 (kh The Arbitration Council, July 06, 2009).
[180] The Labor Law of Cambodia of 1997, art. 167, ¶ 2.
[181] [2009] Case no 40/09 (kh The Arbitration Council, July 06, 2009).

> Before the worker departs on leave, the employer must pay him an allowance that is at least equal to average wage, bonuses, benefits, and indemnities, including the value of benefits in kind, but excluding reimbursement for expenses, that the worker earned during the twelve months preceding the date of departure on leave. This allowance shall in no case be less than the allowance that the worker would have received had he actually worked.[182]

In dealing with disputes over the amount of compensation for the annual paid leave, the Arbitration Council in many cases decides that the indemnity is calculated by taking the gross total wage including wages for part-time work and bonuses the workers received in 12 months divided by 12 and divided again by 26 and finally multiplied by the number of days of annual paid leave.[183]

2. Reinstatement

According to the arbitrator-made rules, reinstatement is a legal consequence of dismissals prohibited by the Labor Law and ministerial orders, and dismissal without valid reason. The victim who succeeds in the arbitration process can return to the previous workplace. In this sense, the workers are guaranteed job security since the employer cannot use money to dismiss workers arbitrarily. However, there is no provision that explicitly says that dismissal without valid reason will lead to reinstatement. The question concerns the legal grounds and on which conditions the Arbitration Council uses in order to provide reinstatement to workers.

2.1.Legal grounds for the claim of reinstatement

The 1997 Labor Law does not precisely regulate whether or not the effect of an invalid dismissal is illegal. There are two main articles in the Labor Law regarding the remedies for dismissal without valid reason. Article 91 entitles the dismissed worker to damages while Article 385 empowers the courts to order reinstatement. In this context, the Labor Law fails to determine whether or not the dismissal without valid reason is ground s for reinstatement, but it empowers the Labor Court to reinstate the victim workers. For example, Article 385 of the Labor Law stipulates that:

> Any labor dispute covered by Chapter XII of this law that could not be settled through conciliation can be brought before the Labor Court…For the purpose of this dispute; the Labor Court can take a number of the necessary measures as follows:

[182] The Labor Law of Cambodia of 1997, art. 168.
[183] [2009] Case no 40/09 (kh The Arbitration Council, July 06, 2009).

1) Order the reinstatement of a dismissed worker, by retaining his former position and paying him a retroactive wage.
2) Nullify the results of a union election or the election of a shop steward.
3) Order an employer to negotiate with a union or to cooperate with a union steward or a shop steward.
4) Decide the payment for damages in favor of the party who won the case in the labor conflict.[184]

Kompong Speu Provincial Court in 2002 applied Article 385 in ordering an employer to reinstate seven workers who were alleged to have engaged in misconduct.[185] In contrast, the Appellate Court of Cambodia rejected this reinstatement order for the following reasons.[186] First, the workers were absent without permission and went on strike several times, and had committed many offences as seen in the apology papers. Second, the court considered the employer's worry that the reinstatement of these workers would lead to interruption of operations and damage to the collective benefit between employer and workers. Third, the court considered that the dismissal of these workers took place according to Article 74 for the social or collective benefit between workers and employer. Fourth, the application of Article 385 by the Kompong Speu Provincial Court through an order for reinstatement with consolation money was not appropriate because Article 74 entitled the employer to terminate the employment contract at will. In this case, the employer dismissed the workers because the workers had committed offences.

The decision of the Appellate Court in the above case seemed to follow a tendency in rejecting the application of Article 385 of the Labor Law to reinstate workers in cases of dismissals without valid reason. As seen in the fourth reason, the Appellate Court interpreted Article 74 by allowing the employer to dismiss the workers freely and cancelled the decision of Kompong Speu Provincial Court whose decision was based on Article 385. However, it is too soon to make the above-mentioned conclusion by relying on this only one judgment of the higher court. Since the case was in 2002, there are not many judgments available for analysis on the issue of justified dismissals.

The Labor Law also does not clarify if a violation by employers in carrying out prohibited dismissals is void and if the employer must reinstate the workers. In order to close this loophole, the Ministry of Social Affairs, Labor and Veteran Affairs in 2001 issued *Prakas* No. 305 that nullified the dismissal of the protected workers such as union founders, leaders, candidates for union leaders, and shop stewards that were taken without approval from the Labor Inspectors.[187] Therefore, even in the case where the dispute was being settled by the

[184] The Labor Law of Cambodia of 1997, art. 385.
[185] [2002] Case no No.12/12–03–2002 (kh Kompong Speu Provincial Court of Cambodia, March 12, 2002); cited in Channmeta et al., *Legal Methodologies: Khmer Law*, 88–98.
[186] [2002] Case no No.173 "CHH"/26–09–2002 (kh Appellate Court of Cambodia, September 26, 2002); cited in Channmeta et al., *Legal Methodologies: Khmer Law*, 88–98.
[187] "The workers who run for a union election, like the staff delegates, are entitled to protection against dismissal. The protection lasts for 45 days before the election and ends 45 days after it if the candidate does not win the election. The union shall inform the employers about the membership by all means. The employer shall carry out this provision only once in the election for a union leader." Prakas No. 305 SKBY on the Representativeness of Professional Organization of the Workers at the Enterprise and Establishment Level, and the Rights in Collective Negotiation for the Conclusion of Collective Agreement at the Enterprise and

court, the ministry immediately took all actions to reinstate the workers to their former positions.[188]

The Arbitration Council was established in 2003 to resolve collective labor disputes. In 2004, the Ministry of Labor and Vocational Training issued *Prakas* No. 099 to empower the Arbitration Council to issue awards of reinstatement or monetary compensation. Article 34 of *Prakas* No. 099 on the Arbitration Council provides:[189]

> In matters referred to the Arbitration Council, the Arbitration Council shall have the power and authority to fully remedy any violation of the provisions in the Labor Law, implementing regulations under the Labor Law, collective bargaining agreements or other obligations arising from the professional relationship between the employer and the employees. Within the limitations of the Labor Law and this Prakas, it has the power and authority to provide any civil remedy or relief that deems just and fair, including:
>
> A. Orders to reinstate dismissed employees to their former or any other appropriate position;
> B. Orders to the immediate payment of back pay;
> C. Orders to cease immediately any industrial action, which is being conducted by a party to the dispute;
> D. Orders to cease immediately any other illegal or prohibited conduct, including but not limited to retaliation;
> E. Orders to bargain;
> F. Orders following a settlement under Article 30 of this Prakas;
> G. The establishment of terms for a collective bargaining agreement;
> H. Such other relief as is appropriate.[190]

Based on *Prakas* 099, the Arbitration Council ordered the employer to reinstate the workers to their former position with the amount of money they would have received during dismissal. These reinstatement cases mostly are concerned with dismissals which are grounded in discrimination on the basis of union affiliation and the exercise of union's activities.[191] The Arbitration Council orders reinstatement when there are dismissals of union

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Establishment Level, Clause 3 (2001).

[188] "Any employer who fired an employee protected by the above provision without the approval from the labor inspector or who causes damage to him/her shall be fined under Article 373 of the Labor Law. Any action by the employer in violation of above provision shall be considered null and void. The MoSALVY shall take careful, immediate actions in its authority to help the fired worker back into his/her job (although the case is awaiting a hearing before an authorized court.)"Ibid., Clause 4 (4).

[189] Prakas No. 099 SKBY on the Arbitration Council, Clause 34 (2004).

[190] Ibid.

[191] The dismissal of candidates of union without approval from the Labor Inspector is void. See *17/04*. "The Arbitration Council found that the worker's dismissal was related to discrimination against a union rather than his mistake and it was wrong according to the procedure in the Labor Law. Thus the Arbitration Council considered worker's dismissal unlawful and decided that the employer had to reinstate the worker with full salary from the time he was dismissed. See *19/04* (The Arbitration Council 2004). Reinstatement of the workers: The employer gave severance pay to the workers. One of the 4 rejected this payment while other 3 had no choice but to accept the payment. The dismissal was based on the union involvement, thus the employer had to reinstate the workers. See [2004] Case no 41/04 (kh The Arbitration Council, August 06, 2004).

leaders or protected workers without approval of the Labor Inspector.[192] However, from the outset, the Arbitration Council also provides workers with an order of reinstatement as a remedy in the case where the employer unilaterally terminates the contract without reasonable ground.

2.2. Conditions for reinstatement

With the power to order reinstatement, the Arbitration Council can order reinstatement in cases of prohibited termination or the dismissal of protected workers and extends this protective mechanism. For example, in the 81/04 case in 2004, the employer dismissed a worker who had been at the company more than two years, and he could not provide a valid reason related to the worker's aptitude or behavior or to operational reasons. The Arbitration Council ordered the employer to reinstate the worker by stating that:

> Based on only the law and the hearing alone, the Arbitration Council would order the employer to reinstate [the worker X] giving her full wage...However, the Arbitration Council is aware and acknowledge that [the Company] suspended the contracts of 282 workers due to a lack of orders. The suspension of so many labor contracts serves as a driving force for the Arbitration Council to believe that it will be very difficult for the company to find a job for [the worker X]. Based on the particular facts and the principle of equity (the employer cannot afford to offer [the worker X] a job), the Arbitration Council decides that the employer should include [the worker X] as a suspended worker.[193]

According to this case, even though the Arbitration Council did not specify which law was used as a ground for reinstatement, it seemed that the council had the power in deciding whether or not monetary compensation or reinstatement was an acceptable remedy for a dismissal without valid reason. Moreover, in the 111/04 case, the employer dismissed an ordinary worker without a valid reason. The fired worker wanted to be reinstated whereas the employer rejected this. The council ordered the employer to pay monetary compensation instead of reinstating the worker by ruling that:

> Generally, when the employer terminates the worker without a valid reason, Arbitration Council can issue an award ordering reinstatement or payment of indemnity for dismissal in accordance with the Labor Law, depending on the context…In this case, the worker is normal worker and based on the employer's ultimate position of not accepting the reinstatement, the Arbitration Council will not issue the award ordering the reinstatement of this worker.[194]

Additionally, in order to provide reinstatement to the worker, the Arbitration Council even nullified the dismissal as being without valid reason as its award in the 111/04 case

[192] [2008] Case no 148/07 (kh The Arbitration Council, February 11, 2008); [2009] Case no 71/09 (kh The Arbitration Council, July 16, 2009); [2010] Case no 09/10 (kh The Arbitration Council, February 15, 2010).
[193] *81/04* (The Arbitration Council 2004).
[194] [2005] Case no 111/04 (kh The Arbitration Council, January 12, 2005).

reads "[B]ecause this worker did not commit serious misconduct according to Article 83 of the Labor Law and also the employer did not apply its internal work rule, the termination of [the worker X] is invalid."[195] In the 47/06 case, a worker was dismissed without prior notice and no valid reason was given for termination. In this case, the council ruled "In Arbitral Award 19/04, the Arbitration Council made an interpretation that if a dismissal is not in accordance with the law, the dismissal is null and void and the employee will be considered to have remained employed by the company.[196]

The council in this case referred to the 19/04 case where the dismissal was related to discrimination against a union rather than the offence of a worker, and was wrong according to the procedure in the Labor Law where the approval of the Labor Inspector is needed for the dismissal of protected worker. In this case, the Arbitration Council ruled that the dismissal was unlawful and that the employer had to reinstate the worker with full salary.[197]

In addition to a statement that nullifies the dismissal without valid reason, the Arbitration Council decides on the basis of the conditions or context of each case in order to justify reinstatement. The Arbitration Council cannot provide reinstatement by simply saying that a dismissal without valid reason is void since a decision has to be grounded on the situation or the context of each case. For example in the 59/05 case where the employment relationship had broken down beyond repair, the Arbitration Council rejected the claim of the worker for reinstatement and ordered the company to provide the discharged workers with monetary compensation.[198] In the 64/05 case, the Arbitration Council ordered reinstatement by referring to Clause 34 of the *Prakas* No. 099 when a dismissal was made without valid reason.[199] Accordingly, the power to order reinstatement derives from a ministerial order and belongs to the council that has jurisdiction over the collective labor disputes.

In conclusion, the Arbitration Council has the authority to order an employer to pay monetary compensation or to reinstate the workers based on *Prakas* No. 099 (Clause 34). In the case of dismissal prohibited by law, the Arbitration Council orders reinstatement with full wage from the period of dismissal.[200] Moreover, the council orders reinstatement in the case of dismissal without valid reason.[201] However, a dismissal without a valid reason is not always the object of a reinstatement order. In cases where the worker requests monetary compensation, even though the dismissal occurs without a valid reason, the council orders monetary compensation according to the wishes of the fired worker.[202] In cases where the

[195] Ibid.
[196] The reason for this reinstatement was also because the AC referred to the reconciliation report date 13 March 2006 in order to end a strike taken from February 22 to March 13, 2006. The report provided as follows: (1) before firing any worker, the Company would look for the valid reasons (internal rules and Labor Law). The Company would not use the contract termination as the pretext to dismiss a permanent worker, union activist and leader. And (6) the Company agreed that it would not commit reprisals against any worker who joined the strike including the regular workers, probation workers, {task workers} and reinstated all workers who were fired during the strike. See Ibid.
[197] [2004] Case no 19/04 (kh The Arbitration Council, May 05, 2004).
[198] *59/05*.
[199] *64/05* (The Arbitration Council 2005).
[200] [2009] Case no 154/09 (kh The Arbitration Council, December 16, 2009).
[201] [2008] Case no 134/08 (kh The Arbitration Council, November 19, 2008).
[202] [2008] Case no 51/08 (kh The Arbitration Council, April 25, 2008); [2009] Case no 157/08 (kh The Arbitration Council, January 20, 2009).

employment relationship is broken beyond reparation and the worker requests reinstatement, the council orders monetary compensation and rejects reinstatement.[203]

3. Problem of remedies for economic dismissal

In the case of adjustment dismissal or dismissal due to economic reasons, there are also two requirements: the existence of a valid reason such as a reduction in an establishment's activity or an internal reorganization that is foreseen by the employer and the requirement to comply with some procedures. In brief, these procedures demand the employer (1) establish an order for layoff based on worker's professional qualifications, seniority, and family burden; (2) inform the workers' representatives to get their suggestions on the announcement of layoffs and measures to minimize the impact of layoffs; (3) keep informing the Labor Inspector about all the procedures and participate in meetings to examine the impact of the proposed layoffs and measures to be taken to minimize their effects, when summoned by the Labor Inspector at the request of the shop steward/workers' representatives; and (4) in exceptional cases, to suspend the layoffs for a period not more than 30 days when there is a *Prakas* or regulation from the Ministry of Labor in order to help the parties find a solution. Ministry can reissue this regulation once.

Though the Labor Law provides substantive and procedural rules for dismissal relating to the operational needs of an enterprise, the two are not inter-dependent. The failure to abide by the procedures in Article 95 does not affect the reasonableness of dismissal. A dismissal without a valid reason entitles the workers right to damages in Article 91. However, there is no provision that punishes the employer who violates the procedures in Article 95.

When dealing with disputes where there is a violation of procedural rules, the Arbitration Council uses its equitable right[204] to provide compensation for the workers according to the real facts or conditions of each case. The council's equitable right derives from clause 34 of *Prakas* No. 099 that empowers the Arbitration Council with "the power and authority to fully remedy any violation of the provision in the Labor Law, collective bargaining agreements or other obligations arising from the professional relationship between the employer and the employees."[205]

Several cases show how the Arbitration Council provides remedies to dismissed workers when there is employer's non-compliance with the procedures in Article 95. In the 02/04 case, the company lost its benefit due to the decline of guests then resorted for collective dismissal of 71 workers.[206] Thus, it complied with Article 74 that requires a valid reason, but failed to follow the procedures in Article 95. The company only explained to the

[203] [2011] Case no 144/10 (kh The Arbitration Council, February 16, 2011).
[204] The equitable right refers to the power of the judge who has discretionary power in providing fairness according to the fact of individual cases when there is no legislative provision dealing with the issues. John Merryman and Rogelio Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd ed. (Stanford Univ Pr, 2007), 48–55.
[205] Prakas No. 099 SKBY on the Arbitration Council, Clause 34 (2004).
[206] [2004] Case no 02/04 (kh The Arbitration Council, April 16, 2004).

ministry about its economic difficulties and its intention to suspend the workers but failed to establish an order for layoffs or to discuss it with the representatives of the workers. In the Labor Law, there is no provision that clearly punishes the employer who does not fulfill the procedure before collective layoff in Article 95.

Since the Arbitration Council has jurisdiction over labor disputes, the council has the power to consider if the dismissed workers should receive monetary compensation or reinstatement.[207] The council in this case decided that monetary compensation was the appropriate measure. The Arbitration Council in this case stated, "The 71 employee have been dismissed between six and eight months because the employer failed to comply with the procedures set out in Article 95 of the Labor Law. If the employer had, the 71 people may still be the hotel's employees. Therefore, they lost at least the amount equal to between six and eight months wage and fringe benefits."[208] The Arbitration Council found that the employer should compensate the employees the amount equal to three months wages and fringe benefits was an appropriate and justified remedy. The employer breached the law without ill intent and the workers lost their wages due to a violation of law.

A review of the decisions of the Arbitration Council also reveals the change of rule that requires an employer to pay wages and all kind of benefit from the date of dismissal until the date of the issuance of the award. For example, in the 21/10 case, the employer failed to follow procedures, in particular to inform the union and labor inspector. The Arbitration Council interpreted that the notification regarding the reduction of workers to union and labor inspectors provided workers with chance for the Minister of Labor to intervene by issuing a proclamation to suspend the dismissal or layoffs for the duration less than 30 days at least twice.[209]

In this case, according to the council's decision, the failure to follow Article 95 regarding notification to the union and Labor Inspector made the workers lose the chance for an intervention by the ministry. Thus, the employer had to provide compensation to the workers for two-month wages and all benefits calculated according to the wage received one month before dismissal.

Conclusion

A review of the short history of the application of the Labor Law, particularly the rule of valid reason, reflects the weaknesses of the rule of justified dismissal in Cambodia. The difficulties in access to the judgments of the courts along with the scarcity of the disputes referred to the courts makes it hard for researchers to understand the standard rules, or the unwritten rules of the courts.[210] When dealing with collective labor disputes on the matter of

[207] Prakas No. 099 SKBY on the Arbitration Council, Clause 34.
[208] [2004] Case no 02/04 (kh The Arbitration Council, April 16, 2004).
[209] [2010] Case no 21/10 (kh The Arbitration Council, April 23, 2010).
[210] Only one Supreme Court's judgment No: 53 dated March 14, 2000 is available in hand. In that judgment, there is no explanation as to what constitutes valid reason. The judgments in the lower courts are not available.

dismissal, the Arbitration Council develops rules to an extent that at least provides some insight into the system of dismissal rules in Cambodia. Based on the arbitrator-made rules, remedies for unjustified dismissal consist of monetary compensation and reinstatement.

Since the rules of dismissal are being developed, the remedies as parts of the rules have many flaws as a result of loopholes in the law, particularly the 1997 Labor Law. The violation of the procedures in Article 95 does not affect the legality or validity of dismissal relating to the operational needs of the enterprise since these procedures aim only to minimize the impact of the layoff. However, the 1997 Labor Law fails to mention punishments for this violation. Thus, the Arbitration Council with its power to order compensation or reinstatement can order remedies for the worker under the justification that if the employer complies with the procedures the worker will not lose their income. In this case, the employer has to pay an amount of money equal to the wages and all benefits the workers would have received during two months.

The Arbitration Council has developed the dismissal rules by filling the loopholes with the consistency of its decisions. The decisions of the previous panel of the council become the model or case law for the next panel to decide cases with similar stories. Since 2010, the MoU has enforced the council's award on right disputes; the arbitrator-made rules have had some influence on employment practices in Cambodia since decisions were accompanied by justification with transparency and reliability.

Chapter 2: Rule of justified dismissal in Japan

Section 1: Dismissal rules in Japan

1. Freedom of dismissal

The Japanese Civil Code promulgated in 1898 was the primary legal source dealing with the termination of employment relations before the enactment of the Labor Union Act in 1945 (amended in 1949) and the Labor Standard Act in 1947.[211] According to the principle of the Civil Code, dismissal and resignation are treated equally as a means of employment contract termination. For example, Article 627 (paragraph 1) of the Civil Code provides that "[I]f 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."[212] Since parties could request to terminate a contract at any time, employers and workers could freely terminate their employment contracts after the elapse of the two-week prior notice period. Employers or workers did not have to present a valid reason for their intention of termination.

The Civil Code of Japan was enacted when the influence of the concept of freedom of contract existed in the civil code of many countries, which allowed both employer and worker to freely conclude and terminate their contract.[213] In addition, this code allows for the possibility to end a contract at any time because long-term employment relationships were not popular among workers and employers at the time, and the two-week prior notice was used to avoid disadvantages resulting from a sudden or unexpected termination.[214] In addition, the freedom to terminate the contract at any time without the requirement of a reason was to protect the parties from being bound to unfair long-term employment relations.[215]

After the end of World War II, there was an increase in rules restricting the employer's right to dismissal while workers still enjoyed their freedom in terminating the contracts. It is good for parties to a contract that they received equal treatment under the law, particularly the Civil Code. However, the rule of equal treatment of employment termination under the Civil Code leads to different implications. This is because the execution of equal freedom causes considerable disadvantages to workers in real practice while it benefits only employers who have greater economic power.[216]

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[211] Employment relations are governed from Article 623 to Article 631 of The Civil Code of Japan of 1898 (1898).
[212] Ibid., art. 627.
[213] Sinya Ouchi, "Special Topic: Change in Japanese Employment Security: Reflecting on the Legal Points," *Bulletin of Japan Institute of Labor* Vol. 41-No. 1 (January 1, 2002).
[214] Daniel H. Foote, ed., *Law in Japan : a Turning Point*, Asian law series (Seattle: University of Washington Press, 2007), 484.
[215] 鳩山秀夫, 日本債權法各論 Detail on Law of Obligation in Japan (東京: 岩波書店, 1924), 549.
[216] Sugeno, *Japanese Employment and Labor Law*, 473–74.

A dismissed worker may face economic or even social hardships while an employer finds it easy to replace a resigning worker. Particularly, after World War II when there were numerous workers who faced food shortages and low employment opportunities, dismissal could cause social and economic hardship for workers and their dependents.[217] Consequently, the statutory laws and judicial rules noticeably controlled the employer's right to dismissal.

In 1947, the Labor Standard Act was enacted to provide workers with "a set of basic minimum standards" that are a better protection than what Civil Code ever achieved.[218] The minimum standard according to the Labor Standard Act means that parties to the employment relationship cannot establish working condition that provides less protection than the working condition in this act; however, it encourages parties to interact under the better working conditions.[219]

Regarding dismissal rules, the Labor Standard Act requires prior notice to be given one month before the date of dismissal. In addition to the Labor Standard Act, which deals with individual labor relationships, the Union Act was amended in 1949 to deal with collective labor relations. Many other legislative rules were also adopted. These rules provided workers with the protection of one-month prior notice and prohibitions on dismissals.

2. Notification of dismissal

The period of prior notice is necessary to prevent threats to the livelihood of workers and to provide workers with a sufficient period for preparation, such as reemployment.[220] Based on this consideration, the Labor Standard Act (Article 20) extends the two-week period of prior notice in the Civil Code to 30 days. Therefore, employers have to notify about a dismissal to workers at least 30 days in advance. If employers fail to fulfill this obligation, they have to pay the average wage for a period of not less than 30 days. However, the employer is released from the obligation of giving prior notice when dismissal takes place due to serious offences by the worker, or to the impossible continuance of the enterprise due to natural disaster, or other unavoidable grounds.[221] In this case, the employers have to obtain approval from the relevant government agency (Chief of Labor Standard Inspection Office).[222] In addition, the employers also can reduce the number of days of prior notice by paying the average wage of each day the employers have reduced.[223] For example, after 20 days of advance notice, an employer has to pay for the remaining 10 days to the dismissed worker.

Regarding dismissal based on reasons attributable to workers, when an employer

[217] Takashi Araki, *Labor and Employment Law in Japan* (Tokyo: The Japan Institute of Labor, 2002), 24.
[218] Daniel H. Foote, "Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of -Stability," *UCLA Law Review* 43 (1996 1995): 640.
[219] Labor Standard Act of Japan, art. 1(2) (1947).
[220] 土田道夫 et al., 条文から学ぶ労働法 Studying Labor Law from Articles (有斐閣, 2011), 31-32.
[221] Labor Standard Act of Japan, art. 20, ¶ 1.
[222] Ibid., art. 20, ¶ 3.
[223] Ibid., art. 20, ¶ 2.

dismisses workers immediately the employer is required to obtain approval from the Chief of Labor Standard Inspection Office. Moreover, there have been also conflicts over the question of whether or not this approval could affect the validity of disciplinary dismissal.

In a case where there was reason for immediate dismissal, the dismissal that took place without the approval of the Chief Labor Inspector Office and so was the object of punishment on the grounds of violation of procedure; however, the validity upon the civil law/private law of this dismissal was fine because the approval was made from the viewpoint of the chief of administration.[224] The judgment over the validity of a disciplinary dismissal was not an easy task for the labor inspector.[225]

Authorization for an exemption of dismissal notice was no more than the procedure to authorize the fact by the government office, and whether or not to provide the benefit of dismissal notice was decided according to the existence or non-existence of the concrete fact that exempts the employer from the obligation of dismissal notice.[226] Therefore, though there was approval from the labor inspector, if there was no reason of exemption, the employer could not escape from the obligation to provide compensation for the dismissal notice.

In the case where there was no reason that made the immediate dismissal possible, no notice, and no payment of notification benefit, the validity of the dismissal was decided according to the following concepts: the concept of absolute invalidity, relative invalidity, choice (the worker could choose to claim for invalid dismissal or to request for compensation in lieu of notice period by accepting the valid dismissal), and the concept of validity.[227] If the validity of such a dismissal was decided according to the concept of absolute invalidity, the rule of Article 114 that allowed the payment of additional money with the request for benefit of notice became meaningless; on the other hand, if validity of dismissal was according to the concept of validity, it was an unnatural outcome that among the prohibited regulations of the Labor Standard Act, only Article 20 did not have enforcement.[228] Hence, the case law has applied the concept of relative invalidity. The Supreme Court ruled that:

> In the case where the employer does not respect the notice period of the rule in Article 20 of the Labor Standard Act, or notifies the worker about dismissal without paying benefit of notice, this notice as immediate dismissal is invalid; however, as long as in the meaning that the employer does not persist/adhere to the immediate dismissal, when the employer pays benefit of notice of the same article after the elapse of the period of 30 days or after notification, it should be interpreted that the validity of dismissal exists after either occasion.[229]

While the court applied the concept of relative invalidity, there was a case where it was unclear if employer had the intention to adhere to immediate dismissal, in which case the dismissal was invalid.[230] For example, Osaka District Court in the case of an ordinary

[224] 土田 et al., 条文から学ぶ労働法, 32.
[225] 君和田伸仁, *問題解決 労働法〈5〉解雇・退職* Problem Solving Labor Law〈5〉Dismissal・Resignation (旬報社, 2008), 25.
[226] Tokyo District Court, December 17, 2004, *Rouhan*, 889, p. 52.
[227] 君和田, *問題解決 労働法〈5〉解雇・退職*, 27.
[228] 土田 et al., 条文から学ぶ労働法, 33.
[229] Supreme Court, March 11, 1960, Minshu, 14–3, p. 403.
[230] 君和田, *問題解決 労働法〈5〉解雇・退職*, 28.

dismissal ruled that:

> Even though it is a dismissal taken without respecting the notice period of Article 20 of the Labor Standard Act, without providing dismissal notice, in the case where it is clear that the employer does not intent to adhere to immediate dismissal, and if the dismissed worker requests for payment of benefit of notice, and the employer hurries to pay, taking the elapse of 30 days from the expression of intention of dismissal, it is interpreted that the validity of dismissal exists…The trial in this case is continued on the effect of immediate dismissal as the sole point of dispute. Until the end of the trial, there is no expression of intention to pay benefit of notice at all from the employer. The employer is believed to have been preparing enough for the immediate dismissal, and seriously investigating the inappropriateness of the worker. Hence, it is difficult to say that it is clear that the employer does not have intention to persist with the immediate dismissal.[231]

3. Statutorily prohibited dismissals

3.1. Period of restricted dismissal

At present, the worker is protected from dismissal during a period of absence from work due to injury or disease in the course of employment and for the following 30 days. However, this rule does not apply to cases where the employer pays compensation for discontinuance in accordance with Article 81 or in cases where continuance of the enterprise is impossible due to natural disaster or other unavoidable reasons.[232] According to Article 81 of the Labor Standard Act, in the case where the worker cannot recover from the injury or illness within three years from the date of commencement of medical treatment, the employer should pay compensation for the discontinuation of the compensation, equivalent to the average wage of 1,200 days.

Article 19 of the Industrial Accident Compensation Insurance Act (1947) considers that the employer has paid a compensation for discontinuance pursuant to Article 81 of the Labor Standard Act when the employer pays the compensation pension on the day when the three years have elapsed after commencement of medical treatment or starts to pay the compensation pension after said day.[233] In cases of impossible continuance of the company due to natural disaster or other unavoidable cause, the employer must obtain the approval of the relevant government agency with respect to the reason in question.[234]

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[231] Osaka District Court, September 12, 1995, *Rouhan*, 688, p. 53.
[232] Labor Standard Act of Japan, art. 19, ¶ 1 (1947).
[233] Article 19: Where a worker who has suffered an injury or disease resulting from an employment-related cause receives an injury and disease compensation pension on the day when three years have elapsed after the commencement of medical treatment pertaining to said injury or disease, or begins to receive an injury and disease compensation pension after said day, for the purpose of the application of the provision of Article 19, paragraph (1) of the Labor Standards Act, the relevant employer shall be deemed to have paid a compensation for discontinuance pursuant to the provision of Article 81 of the Labor Standards Act on the day when said three years have elapsed or on the day when the worker begins to receive the injury and disease compensation pension, respectively. Industrial Accident Compensation Insurance Act of 1947 (1947).
[234] Labor Standard Act of Japan, art. 19, ¶ 2.

In addition, the employer cannot dismiss women during the period of absence from work before and after childbirth according to Article 65 of the Labor Standard Act or within 30 days after the end of the period of absence from work.[235] According to Article 65, before childbirth, a worker can be absent from work for six weeks or 14 weeks in case of multiple fetuses.[236] After childbirth, the worker can be absent from work for 8 weeks.[237] This protection is not provided in the case of the discontinuance of the company due to natural disaster or unavoidable cause, and the employer must obtain approval from the Chief of Labor Standard Inspection Office in order to verify the above reason.[238]

3.2. Dismissals with discriminatory grounds

Article 3 of the Labor Standard Act prohibits an employer from using discriminatory treatment with respect to wages, working hours or other working conditions by reason of nationality, creed or the social status of any worker. Under the Act on Securing of Equal Opportunity and Treatment between Men and Women in Employment (1972, revised in 2006), Article 7 stipulates that an employer cannot take the sex of worker as grounds for dismissal, or encouragement of retirement, mandatory retirement age, or renewal of the labor contract.[239]

Statutory law also prohibits dismissal on discriminatory grounds against union affiliation and activities. According to the Labor Union Act (1949), Article 7 prohibits the employer from dismissing the worker on the grounds that a worker is a member of, or has tried to join or to organize a labor union, or has performed the justifiable actions of a labor union.[240] In addition, Article 28 of the Constitution of Japan also protects this collective right by stipulating that "the right of workers to organize and to bargain and act collectively is guaranteed." More importantly, the right to organize, to bargain, and to act collectively are fundamental rights contributing to and realizing the right to life guaranteed in Article 25 of the Constitution of Japan.

3.3. Report of violation or request for an inspection body

When an employer violates any provision of Labor Standard Act or Industrial Safety and Health Act or ordinances under these laws in the workplaces, the worker can report such a fact to the Director of the Prefectural Labor Bureau or Chief of the Labor Standards

[235] Ibid., art. 19, ¶ 1.
[236] Ibid., art. 65, ¶ 1.
[237] Ibid., art. 65, ¶ 2.
[238] Ibid., art. 19, ¶ 2.
[239] Act on Securing of Equal Opportunity and Treatment between Men and Women in Employment, art. 7, ¶ 4 (1972).
[240] Union Act of Japan, art. 7, ¶ 1 (1949).

Inspection Office or to the Labor Standards Inspector and request for appropriate action to be taken for rectification.[241] In this case, the employer cannot dismiss or discriminate against the worker who has reported the violation of laws to the relevant government agency. There are three levels of government agencies responsible for matters relating to labor conditions and the protection of workers: the Labor Standards Management Bureau (Department within the Ministry of Health, Labor and Welfare), Prefectural Labor Bureaus, and Labor Standard Inspector Offices.[242]

In addition, in accordance with the Act on Promoting the Resolution of Individual Labor-Related Disputes (2004), an employer cannot dismiss a worker who has made requests for assistance to the Director of the Prefectural Labor Bureau to resolve the individual labor disputes or to organize mediation.[243] The employer is also prohibited from dismissing a worker who has made a request for assistance to the Director of the Prefectural Labor Bureau in resolving labor disputes concerning violation of the Act on Improvement of Employment Management for Part-Time Workers (1993), or violation of the Act on Securing of Equal Opportunity and Treatment between Men and Women in Employment (1972), or in the case where the worker applies for mediation.[244]

When the worker reports to the competent authorities about the employer's violation of law, it is undeniably true that the employer at first denies the fact of violation of the law in the worker's report and asserts that the dismissal is made according to other reasons. The dismissal is not the employer's retaliation against the worker's report to the authority. However, if the worker can prove that the real cause of dismissal is related to the report of a violation of law, the court will reject the assertions of the employer.[245]

3.4. Dismissal of whistleblower

The Act on Whistleblower Protection (2004) was enacted for the purpose of promoting compliance with the laws and regulations concerning the protection of life, body, property, and other interests of citizen and thus contributes to the stabilization of the general welfare of the life of the citizens and to the sound development of the socio-economy.[246] Accordingly, an employer cannot discharge the whistleblower who reports facts that have occurred or about to occur by the business operators, other workers, or agencies to the Administrative Organ or any competent person with authority to prevent the occurrence and damage.[247]

The courts have a tendency to invalidate dismissals in cases where an employer executes the above legally prohibited dismissals.[248] For example, in the case of dismissal as

[241] Labor Standard Act of Japan, art. 104; Industrial Safety and Health Act of 1972, art. 97, ¶ 1 (1972).
[242] Sugeno, *Japanese Employment and Labor Law*, 102–5.
[243] Act on Promoting the Resolution of Individual Labor-Related Disputes, arts. 4, ¶¶ 3 & 5, ¶ 2 (2004).
[244] Act on Securing of Equal Opportunity and Treatment between Men and Women in Employment, arts. 17, ¶¶ 2 & 18, ¶ 2; Act on Improvement of Employment Management for Part-Time Workers, arts. 21, ¶¶ 2 & 22, ¶ 2 (1993).
[245] 君和田, *問題解決 労働法〈5〉解雇・退職*, 17.
[246] Act on Whistleblower Protection, art. 1 (2004).
[247] Ibid., arts. 3 & 4.
[248] Yasuhiko Matsuda, "Dismissal of Workers Under Japanese Law," *Stanford Journal of International Law* 20

a result of unfair labor practice, the Supreme Court in 1968 ruled:

> For the dismissal according to unfair labor practice, in the old Labor Union Act (Law No. 51 of December 22, 1945), Article 11 prohibited unfair labor practice, and Article 33 stipulated the penal regulation against the violating employer. However, the present Union Act (Law No.174 of June 1, 1949), Article 7 No. 1, prohibits unfair labor practice. Even though it is a violation of the prohibition, it does not punish the employer immediately. When the order of restoration of the present conditions of the labor relation commission against the employer is supported according to the confirmed decision of the court, it is firstly the object of punishment if the employer still does not follow this order. However, because the regulation on the prohibition of unfair labor practice derives from Article 28 of the Constitution, which is the regulation on the purpose of protection of the right to organize and the right to act collectively of the worker, from the purpose of this article, the action violating this article naturally must be interpreted as invalid according to the old and present law. In the present law, immediately, the concerned conduct is not the object of punishment, it is said that because there is the system of remedy order according to the labor relation commission, it is inappropriate to interpret that the present law differs from the old law.[249]

3.5. Dismissal on grounds of marriage, pregnancy or childbirth

The Act on Securing of Equal Opportunity and Treatment between Men and Women in Employment (1972) prohibits an employer from dismissing female workers for reasons of marriage, pregnancy, childbirth, or requests for absence from work before childbirth as provided by Article 65 of the Labor Standard Act[250] or requests for absence after childbirth.[251] In addition, paragraph 4 of Article 4 of the same law invalidates the dismissal of women workers who are pregnant or in the first year after childbirth. However, the exception to this protection would be if the employer can prove that the dismissals were made based on other reasons. Accordingly, in disputes over such terminations, the women workers need to prove that they were pregnant at the time of dismissal, and they were in the first year after childbirth while an employer has to prove that there is no relationship between the firing and the pregnancy.[252] If an employer cannot prove that the dismissal took place for other reasons other than pregnancy or absence for childbirth, the dismissal is invalid by law.

(1984): 458–61.

[249] Supreme Court, April 09, 1968, *Rouminshu*, 22–24, p. 845.

[250] Article 65: In the event that a woman who is expected to give birth within 6 weeks (or within 14 weeks in the case of multiple fetuses) requests leave from work, the employer shall not make her work.
(2) An employer shall not have a woman work within 8 weeks after childbirth; provided, however, that this shall not prevent an employer from having such a woman work, if she has so requested, after 6 weeks have passed since childbirth, in activities which a doctor has approved as having no adverse effect on her. Labor Standard Act of Japan (1947).
(3) In the event that a pregnant woman has so requested, an employer shall transfer her to other light activities.

[251] Act on Securing of Equal Opportunity and Treatment between Men and Women in Employment, art. 9, ¶¶ 2&3 (1972).

[252] 君和田, *問題解決 労働法〈5〉解雇・退職*, 18.

Furthermore, a dismissal due to absence from work for childcare is not allowed. The Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave (1991), Article 10 and 16, protects workers against dismissal when they apply for or take child or family care leave.

Before 2003, even though there was a requirement for a prior notice period and prohibition of certain dismissals, there was no statutory rule restricting the dismissal to take place with just cause. Thus, employers could discharge workers freely as long as they complied with dismissals as per the restrictive regulations in the Labor Standard Act and Labor Union Act, and other regulations mentioned above.

4. Rule of abuse of right

4.1. Judge made rules restricting dismissals

The 1950s saw the development of judicial rules that provided job protection to the workers when there was an increase in disputes over the legality of dismissals. There was no agreement among the courts regarding the rule governing dismissals in the early 1950s. First, some lower courts applied the rule of freedom of dismissal. For example, in 1951, the Matsuyama District Court stated that an employer could fire the worker freely without any reason after a notice period of 30 days or immediately by compensation in lieu of the notice period as long as the employer did not violate Article 19 of the Labor Standard Act relating to workers who were on maternity leave or work-related injuries.[253]

Second, the courts required dismissal to be taken with a valid reason. For example, the Tokyo District Court in 1950 ruled:

> Dismissal in this case is invalid, as it is not based on reasonable grounds. Generally, the employer can dismiss the worker freely as long as the employer does not violate the laws, collective agreements, or rules of employment. However, (1) in consideration of the commonality of the enterprise, the employer's right to personnel management has to be exercised in the method that promotes the productivity of the enterprise. The exercise of the personnel management is not accepted when it invades the productive activities of the worker under the standard of productivity or the right to life of the worker. (2) Because the worker has the right to work [according to this meaning, workers select the jobs and provide labor force under the most advantageous condition, and maintain their lives. It is the right to be released from other invasion and to continue the employment relation], the dismissal that violates such a right is not allowed. Therefore, it is appropriate to interpret that based upon the social common sense; the employer can dismiss the worker reasonably as long as there is proper reason. Such a worker does not contribute to the productivity of the enterprise, and the worker disturbs the whole coordinated order of the business.[254]

> Third, the courts restricted an employer's freedom of dismissal by applying the principle of abuse of right found in Article 1(3) of the Civil Code.

[253] Matsuyama District Court, February 08, 1951, *Rouminshu*, 50, p. 68.
[254] Tokyo District Court, May 08, 1950, *Rouminshu*, 1–2, p. 230.

For example, the Nagoya District Court ruled in 1951:

> In employment relations, a dismissal as an announcement that differs from the cancellation of contract is the freedom of the employer. However, even though it is the exercise of the right, when it violates the principle of good faith or honesty, it is certainly not allowed because it is an abuse of the right. This principle is not different even in the employment relationship. Probably, the worker generally receives income from employment as the only wage mostly for living. When immediate dismissal is taken, the worker cannot easily find other employment. In contrast to the worker whose livelihood is almost jeopardized by the dismissal, the employer finds it comparatively easier to find other workers. Therefore, it is mostly an abuse of right when there is no appropriate reason attached to the dismissal…[255]

Among the rules governing dismissals, the rule of freedom to discharge allows employer to fire the worker without paying attention to any grounds whereas the rule of valid reason and the rule of abuse of right restricts the employer's right to dismissal. The differences between the rule of valid reason and the rule of abuse of right are as follows. According to the rule of valid reason, dismissal is not an original or natural freedom of the employer and takes place only in the case where there is reasonable ground or just cause.[256] On the other hand, under the rule of abuse of right, the employer has the right to dismiss but is restricted when there is an abuse in the exercise of this right. The difference between the two also places the burden of proof on the existence of valid reason and the abuse of right.[257] According to the rule of valid reason, the employer carries the burden of proof to show that he has a reasonable ground for dismissal. In contrast, according to the rule of abuse of right, the burden of proof belongs to the worker who alleges that the employer has abused the right to dismissal.

From the beginning of the 1960s, most of the courts only applied the principle of abuse of right to provide job security to the workers.[258] The shift from the rule of valid reason to the rule of abuse of right was because the former was developed without any legal basis while the latter was developed based on the general principle in the Civil Code and finally aimed for the same restriction as the rule of just cause did. Moreover, in Japan, the rule of just cause contradicts the Civil Code and the Labor Standard Act where an employer has discretion or freedom over dismissals.

In 1975, the Supreme Court upheld the rule of abuse of right in the case of Nihon Sokuen by deciding that even the exercise of the employer's right to dismissal, if it lacked objectively reasonable grounds and could not be accepted as proper under the common idea, was invalid as an abuse of right.[259] In this case, a dismissal took place after a worker was expelled from a union. According to the union shop agreement, the employer had a duty to dismiss the worker who was expelled from the union. However, if the expulsion from the union was invalid, the employer had no duty to dismiss the concerned worker. The employer

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[255] Nagoya District Court, December 04, 1951, *Rouminshu*, 2–5, p. 578.
[256] 浜村彰 et al., *ベーシック労働法 第3版* Basic Labor Law 3rd Edition, 第 3 ed. (有斐閣, 2008), 209‐10.
[257] 池田, 解雇の法的問題, 52.
[258] 大内伸哉, 山川隆一, 解雇法制を考える : 法学と経済学の視点 Thinking the Legal System: The View Point of Law and Economics, ed. 大竹文雄 (東京: 勁草書房, 2004), 6.
[259] Supreme Court, April 25, 1975, *Minshu*, 29–4, p. 456.

could only dismiss the worker when there were objectively reasonable grounds and dismissal could be accepted as proper from the social conscience. Finally, the court judged that dismissal was as an abuse of right because there were no other reasonable grounds, except the invalid expulsion.

In 1977, the Supreme Court confirmed the content of the rule of abuse of right to dismissal in the Kochi Hoso case by emphasizing two main requirements: "the objectively or concretely reasonable ground" and the "appropriateness of dismissal based on the social common sense." For example, the Supreme Court ruled that:

> …even in the case where there is ground of disciplinary dismissal, the employer cannot always dismiss. Under the particular concrete circumstances, when the execution of dismissal is remarkably unreasonable and cannot be accepted as proper under the social common sense, the expression of intention of particular dismissal becomes invalid as abuse of right.[260]

Regarding burden of proof, there is a relationship between the rule of just cause and the rule of abuse of right. According to the rule of just cause, where dismissal does not take place unless there is a just cause, the employer has an obligation to prove the existence of a valid reason. This rule simply means the right of the employer to dismiss depends on the existence of a valid reason. Thus, the employer has to prove just cause in order to dismiss a worker.

On the other hand, according to the rule of abuse of right, where the employer has the right to dismiss the worker and this right is prohibited only there is abuse of such a right, the worker has the obligation to prove this abuse of right. However, since the requirement of reasonable ground or just cause becomes a part of the content of rule of abuse of right in a dismissal, the employer in reality has the obligation to prove the existence of reasonable grounds in order to the deny the worker's claim.[261] There is a trend in the Supreme Court that though the explanation was made in the form of the doctrine of abuse of right to dismissal, because the doctrine has turned inside out the theory that discharge needs reasonable grounds, the doctrine of abuse of right in real practice has not differed greatly from the theory of valid reason.[262] Accordingly, there is the transfer of the burden of proof to the employer who has to prove that the existence of grounds for dismissal in the rules of employment, grounds for dismissal according to actual misconduct, poor ability or the health condition of the workers; whereas, the worker only needs to prove the existence of the employment contract, enough working ability and a good health condition.[263]

4.2. Incorporation of judicial rule into laws

There were many views supporting the legislation of dismissal law. According to Yamakawa, there were two different supporting viewpoints regarding the legislation

[260] Supreme Court, January 31, 1977, *Rouminshu*, 268, p. 17.
[261] 大内, 山川, 解雇法制を考える, 92.
[262] 土田道夫, 豊川義明, 和田肇, ウォッチング労働法, 法学教室 Watching Labor Law (東京: 有斐閣, 2009), 226.
[263] Ibid.

governing dismissal.[264] The first view was that the legislative measures to deal with economic dismissal were proper because the judicial standard not only made it difficult to predict the legality of discharge but also deterred employers from creating new employment opportunities due to inflexible and difficult rules. The second view was that legislation was very important for rules on dismissal with content that protected workers from dismissal without reasonable grounds and to improve the procedural rules for dismissal. These two different viewpoints influenced the content of the legislation for dismissal law.

During the amendment of the Labor Standard Act in 2003, there was an intense debate over the content of the dismissal rules due to the different opinions of the employers and workers. The draft of Article 18-2 of the Labor Standard Act stated, "[T]he employer may dismiss workers except in cases where the exercise of the right to dismiss is restricted by the provisions of this law or other laws. However, a dismissal shall be considered an abuse of right to dismiss and therefore null and void if it is not based on objectively reasonable grounds and may not be recognized as socially acceptable."[265]

The workers' representatives strongly criticized the draft article as the first sentence stressed the employer's right to dismiss and placed the burden of proof regarding the existence of valid reason/abuse of right to the worker.[266] Finally, the judicial rule stating that "the exercise of the employer's right to dismiss, if it lacks objectively reasonable ground and cannot be accepted as proper under the social common idea, is invalid as abuse of right" was included in Article 18-2 of the Labor Standard Act.

Under the traditional rules for economic dismissal, a termination is void even when the employer cannot fulfill one of four requirements. These requirements are (1) the necessity of personnel reduction, (2) administration of effort to avoid the dismissal, (3) reasonable selection of workers for dismissal, and (4) the administration of explanation or consultation with the union or use of appropriate dismissal procedures. However, since 2000 many district courts started to relax the interpretation of the principle of abuse of right in the case of economic dismissal. For example, the Tokyo District Court ruled in 2000 that even though there was a claim that abuse of right in the case of adjustment dismissal was decided according to the four requirements, the four requirements were typified with factors deciding whether an adjustment dismissal was an abuse of right.[267]

Moreover, there was no legal requirement for any of the requirements, there was no legal effect, and the abuse of rights was judged through consideration of all individual concrete cases.[268] Accordingly, the rule involving the four factors does not require employers to follow all four requirements. The refusal of the incorporation of the four requirements as the criteria for the abuse of right rule in the case of economic dismissal led to an allegation

[264] Foote, *Law in Japan*, 506.
[265] Ibid., 507–8.
[266] Under the Civil Code, the employer can dismiss the worker for any reason. However, there was no provision requiring just cause for dismissal. Therefore, the incorporation of the employer's right to dismiss in the Labor Standard Act made strong emphasis that this right was reinforced. In addition, in the practice of courts, the employer had a burden of proof for the dismissal. When the requirement of just cause for dismissal was placed in the second paragraph, the draft article may imply that it was the worker who had the burden of proof because the employer normally had the right to dismiss. Hiroya Nakakubo, "The 2003 Revision of the Labor Standard Law: Fixed-term Contracts, Dismissal and Discretionary-work Schemes," *Japan Labor Review, Japan Institute for Labor Policy and Training* (2004): 15–18.
[267] Tokyo District Court, January 21, 2000, *Rouhan*, 782, p. 23.
[268] Ibid.

that the Koizumi Cabinet intended to relax case law because they thought that this rule was too rigid and consequently hindered the structural changes needed for the mobilization of the work force.[269]

On the other hand, the labor policy commission introduced monetary compensation to employers and worker's representatives during the amendment of the Labor Standard Act. This proposal was made due to the fact that having to wait long for a judgment made employer and the worker difficult in maintaining their employment relationships and to the fact that the worker's skill became out of date.[270] The proposal gave authorization to the court to terminate the employment relations upon a request by either the employer or worker if the relations had been worsened beyond repairable and to make the employer pay a certain amount of monetary compensation.[271]

However, there was strong opposition from labor who insisted "it would be scandalous if employers who had resorted to invalid dismissal were afterwards allowed to seek termination of contracts by such means."[272] Finally, there was no incorporation of monetary compensation into the Labor Standard Act. Only judicial principle was incorporated into the Labor Standard Act in 2003 while the rules regarding economic dismissal and monetary compensation of invalid dismissal remained under the regime of case laws.

Unlike other provisions in the Labor Standard Act, which require an employer's compliance under the punitive measure through monitoring by the Labor Standard Inspector, Article 18-2 is under civil action.[273] Under Article 18-2 of the Labor Standard Act, a worker who opposed a dismissal by an employer had to file a lawsuit at the court. When there was an enactment of the Labor Contract Act in 2007 which was a private law, the rule of abuse of right to dismissal in Article 18-2 of the Labor Standard was replaced by Article 16 of the Labor Contract Act.

Article 16 states that "A dismissal shall, if it lacks objectively reasonable grounds and is not considered to be appropriate in general societal term, be treated as an abuse of right and be invalid." Therefore, the legislation of dismissal rules is simply a codification of the judicial principle for termination.[274] As with the Labor Standard Act, the Labor Contract Act specifies the content of dismissal law in general and abstract terms. Therefore, the court again has discretion to determine whether a dismissal is based on "objectively reasonable ground" and "socially accepted standards."

Considering the fact that dismissal law in Article 18-2 and Article 16 is a copy of preexisting case law and according to the doctrine of abuse of right of dismissal where the judge has discretion to determine whether a discharge is an abuse of right, this rule already

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[269] Takashi Araki, "Corporate Governance Reforms, Labor Law Developments, and the Future of Japan's Practice-Dependent Stakeholder Model," *Japan Labor Review, Japan Institute for Labor Policy and Training* 2–1 (Winter 2005): 40.
[270] Nakakubo, "The 2003 Revision of the Labor Standard Law: Fixed-term Contracts, Dismissal and Discretionary-work Schemes," 17.
[271] Ibid.
[272] Ibid., 18.
[273] Ibid., 15.
[274] Ryuichi Yamakuwa, "The Enactment of the Labor Contract Act: Its Significance and Future Issues," *Japan Labor Review, Japan Institute for Labor Policy and Training* (2009): 508.

exists in Article 1(3) of Civil Code. Because the general principle of abuse of right in the Civil Code is so abstract, ordinary people find it hard to comprehend that a dismissal requires just causes; and the incorporation of the "abuse of right" into legislative measures is just the confirmation or clarification.[275]

5. Certificate on occasion of retirement or dismissal

The Labor Standard Act (Article 22) requires employers to issue a certificate without delay on the occasion of the retirement of a worker. This regulation aims to help workers in seeking new employment.[276] The worker can request a certificate that includes the period of employment, kind of occupation, position in the workplace, wage, reason of retirement, and reason of dismissal.[277] In addition, during the period from the day when the notice of dismissal has been provided until the day of retirement, in the case where the worker requests a certificate corresponding with the reason for the concerned dismissal, the employer must issue the certificate without delay. However, in the case where the worker retires after the day of the notice of dismissal according to reasons other than those for the concerned dismissal, it is not necessary for the employer after said day of retirement to issue that certificate.[278]

A regulation was established during the amendment of the Labor Standard Act in 1998 to include the rule that controlled unfair dismissal by requiring an employer to show grounds for dismissal. However, because request by the worker was included as the condition in the regulation of "certificate of retirement" so as to contribute to the re-employment of the worker, it was very difficult to understand the characteristics of the dismissal rule.[279] During the amendment process in 2003, an additional rule was necessary to control the period from the notice of retirement or dismissal until the day of retirement or dismissal.

The certificate of retirement plays an important role in the process of litigation concerning dismissal. In cases where dismissal grounds are written in the certificate of dismissal, there is a question as to whether or not an employer can dismiss the worker on other grounds after issuance. In theory, the function of the certificate of dismissal must be respected; therefore, the employer cannot claim for that the dismissal grounds that were different from those in the certificate during the procedures for a dispute over dismissal.[280]

[275] Nakakubo, "The 2003 Revision of the Labor Standard Law: Fixed-term Contracts, Dismissal and Discretionary-work Schemes," 14.
[276] Ibid., 19.
[277] Labor Standard Act of Japan, art. 22, ¶ 1 (1947).
[278] Ibid., art. 22, ¶ 2.
[279] 中窪裕也, 野田進, 和田肇, 労働法の世界 The World of Labor Law (東京: 有斐閣, 2011), 423.
[280] 土田 et al., 条文から学ぶ労働法, 34.

Section 2: Determinants of the abuse of right to dismissal

1. Laws

Japan does not have a code that gathers all regulations on employment relations. Since the end of World War II, a number of individual texts of law were enacted to deal with the issue of employment relations. Accordingly, the issue of dismissal is resolved in various laws, such as Labor Standard Act, Labor Union Act, Labor Contract Act, and other legislative texts. In addition to the above laws that directly deal with labor and employment relations, the principles in the Civil Code and the Constitution also have much influence on the decision of the courts when resolving disputes over dismissal. Furthermore, the Labor Standard Act entitles employers to create rules of dismissal in the rules of employment that fit with the characteristic nature of the operation of their company.

2. Internal work rules, collective agreement, and employment contract

The rules of employment, collective agreements and employment contracts play an important role in determining whether a dismissal is an abuse of the right. One of the reasons for their influence on the rule on dismissal is that the Labor Standard Act requires employers and workers to abide by the rules of employment, collective agreements and employment contracts and to fulfill their duties in good faith.[281] Most of the working rules set the clauses relate to reasons or conditions of dismissals.[282] Article 89 of the Labor Standard Act requires employers who employ ten or more workers to draw up internal work rules which include ten items, including working hours, method of wage payment, retirement (dismissal), matters concerning retirement allowance, and others as set in the same article. Item 3 of this article demands an employer to include "matters pertaining to retirement (including grounds for dismissal)"[283], and it is in the new revision of Article 89 after the amendment of the Labor Standard Act in 2003.

Before the amendment in 2003, item III mentioned only "matters pertaining to retirement" and the term "retirement" had many interpretations such as resignation by the worker, dismissals by the employer, mandatory retirement at a prescribed age, and expiration of the term of an employment contract.[284] This amendment made it clear that the employer must draw up the rules for termination by adding the word dismissal in brackets next to the word retirement. Accordingly, an employer can dismiss workers according to the reasons

[281] Labor Standard Act of Japan, art. 2, ¶ 2.
[282] Clause 56, paragraph 1, number 4 regarding dismissal in the internal work rule of a private hospital provides that "when there is unavoidable reason based on the necessity of the business of the hospital, the hospital can dismiss the workers." Osaka District Court, October 20, 1995, *Rouhan*, 685, p. 49; The internal work rule of the company, particularly Clause 52, No. 8, stipulates, "Dismissal can be taken according to the ground relating to the unavoidable business convenience." *Rouhan*, 330, p. 71.
[283] Labor Standard Act of Japan, art. 89 (iii).
[284] Nakakubo, "The 2003 Revision of the Labor Standard Law: Fixed-term Contracts, Dismissal and Discretionary-work Schemes," 18–19.

prescribed in the rules of employment.

Regarding the requirement to list the reasons for dismissal, there are two different interpretations of the right of the employer. On the one hand, the employer can dismiss the worker on grounds which are not listed in the rules of employment. This view is based on the consideration that the employer has the right to dismissal. In the National Westminster case in 2000, the rules of employment of the company enumerated grounds for dismissal such as violations of the rules of the workplace, lack of ability, and any offence by the worker. The worker in this case claimed that the dismissal could not take place according to the ground of economic necessity which was not listed in the rules of the employment. In this case, Tokyo District Court ruled that:

> Based on the present laws, it is appropriate that ordinary dismissal is according to the principle of freedom of dismissal. However, because dismissal is invalid in the limit of the case where dismissal is an abuse of right to dismissal, even though there is no fact corresponding to the ground of ordinary dismissal in the rule of the employment, the employer can terminate the employment contract as long as employer has concretely reasonable ground and dismissal is not an abuse of right. If according to this reason, even though it is the case where the employer enumerates the grounds of ordinary dismissal in the rule of employment, except the case where there is a clear special circumstance of restrictive enumeration, it is appropriate to interpret in the meaning of exemplification enumeration.[285]

Therefore, the employer can dismiss workers on grounds that are not prescribed in the rules of employment.

On the other hand, another point of view prohibits the employer from dismissing the worker on grounds that are not prescribed in the rules of employment.[286] The enumeration of the grounds of dismissal in the internal work rules of the company is the duty of the employer, which is required by the Labor Standard Act (Article 89). In addition, the basis of this interpretation is that the content of rules of the employment becomes the content of the contract of employment. Even though the Labor Standard Act requires an employer to clarify working conditions in an employment contract,[287] in Japan, employers and workers usually do not make their written contract to include descriptive content because rules of employment regulate working conditions.[288]

According to Article 7 of the Labor Contract Act, when the employer and worker conclude an employment contract, if the employer has informed the workers about the rules of employment that provides for reasonable working conditions, the content of such rules of employment becomes the content of the employment contract of the parties. As the rules of employment are the contents of the contract, the employer cannot dismiss workers on grounds that are not prescribed in the rules of employment.

It is worth noting that the two interpretations of Article 89 (3) of the Labor Standard

[285] Tokyo District Court, January 21, 2000, *Rouhan*, 782, p. 23.
[286] Ouchi, "Special Topic: Change in Japanese Employment Security: Reflecting on the Legal Points."
[287] Labor Standard Act of Japan, art. 15.
[288] Takashi Araki, "Legal Issues of Employee Loyalty in Japan," *Comparative Labor Law and Policy Journal* 20 (1999 1998): 269.

Act seem to be pointless to the discussion when most of the rules of employment provide a general clause such as "other reason or reasons similar to those listed above" in addition to the lists of reasons for dismissal.[289] However, even though reasons for dismissal are prescribed, this does not always mean that the employer can dismiss workers without consideration of the rule of the abuse of right to dismissal.

The validity of a dismissal may also rely on the procedural clauses set in the rules of employment and the collective bargaining agreement. In the collective agreement, there will be a clause that requires an employer to consult and to obtain agreement from the union when the employer wishes to change the status of members, position, or working condition. In addition, in the rules of employment or the collective agreement, there will also be a rule that requires a process of interrogation of the workers or discussion with the personnel committee, especially the committee that is in charge of rewarding and punishing workers when an employer wishes to punish or dismiss the workers. Moreover, when the reasons for dismissals are enumerated or restricted in the collective agreement, the regulation has legal effect as the content of the employment contract, and a dismissal on grounds other than those listed in the collective agreement is invalid.[290]

Generally, a dismissal is invalid when it violates the rule mentioned in the rules of employment or collective agreement. Article 16 of the Labor Union Act reads:

> Any part of an individual labor contract contravening the standards concerning working conditions and other matters relating to the treatment of workers provided in the collective agreement shall be void. In such a case, the invalidated part of the individual labor contract shall be governed by those standards. With respect to matters as to which the individual labor contract does not provide, the same shall apply.[291]

According to this Article 16, the Union Act empowers collective agreement to set the rule of dismissals and the court according to this rule decides the invalidity of a dismissal that violates the rule of the collective agreement where a dismissal is required to take place with reason.[292]

3. Employment practice

The employment practice is also one of the factors that shape the rules of abuse of right in dismissal. The tradition of employment practice in large Japanese companies is characterized by lifetime employment, seniority based wage, and enterprise based unions.[293] Among the three features, lifetime employment has a closer relationship to the decision of

[289] 君和田, *問題解決 労働法〈5〉解雇・退職*, 20-21.
[290] This is application of Article 16 of the Union Act 浜村 et al., *ベーシック労働法 第3 版*, 208.
[291] Union Act of Japan, art. 16 (1949).
[292] Fumito Komiya, "Dismissal Procedures and Termination Benefits in Japan," *Comparative Labor Law Journal* 12 (1991 1990): 155..
[293] 野村正実, 日本的雇用慣行 : 全体像構築の試み Japanese Employment Practice : Trying to Build An Overall Picture, Minerva 人文・社会科学叢書 (京都: ミネルヴァ書房, 2007), 95.

courts in restricting the employer's right to dismissal. Lifetime or permanent employment is the practice of employment of large enterprises where fresh gradates, regardless of their level, start their work, upgrade their skills and knowledge through inside training, and stay in the same enterprise until they reach the age of retirement set by the company (55).[294]

James C. Abegglen, an American social scientist revealed the employment practice in Japan in his book entitled "The Japanese Factory" in 1979. At that time, the most important difference between employment relationships in the USA and Japan was the commitment for lifetime employment relationships between employers and workers.[295] The employer did not dismiss the worker unless there was an unavoidable cause and the worker did not leave his or her employer to work for other companies. Abbeglen compared such a lifetime employment relationship in the Japanese factory to that of the family business in the USA where an employer treated his workers as members of the family.[296]

Japanese management justified this commitment to a permanent relationship in the matter of dismissals or layoffs on the grounds that it was a matter of national concern, and claimed that Japan was "a poor country and an overpopulated one, a country where jobs are scarce and employment difficult. Laid-off or dismissed workers will simply starve, the argument goes, because they will be able to find no other work."[297] The Japanese management thought there was a closed interrelation between the policy of business and the national welfare in Japan whose economy survived from export and import activity.[298] In addition, there was loyalty to the overall group and reciprocal responsibility where employers had to refrain from discharging the worker until the end of their time in the business and the worker had to work in the company.[299] The system of factory organization in Japan consisted of the commitment to permanent employment which had an interrelationship with methods of recruitment, incentives and rewards.[300]

There was a close relationship between the system of recruitment and the level of education in Japan. For example, *Koin* (person who works) were a group of workers who were wageworkers with a minimum education, while *Shokuin* (person in charge) were a group of workers who were the salary workers or managers of the company and in the lower levels had a high school education and in the top ranks, were college graduates.[301] The personnel department of the main or parent companies selected and distributed workers, both *Koin* and *Shokuin*, to the local plant or companies.[302] October was the examination month when the companies recruited new workers who graduated in spring.

The system of incentives varied in each company. Wage payment was one of the methods in the promotion of incentives for workers in devoting their effort to the outcome of

[294] Robert E. Cole, "Permanent Employment in Japan: Facts and Fantasies," *Industrial and Labor Relations Review* 26 (1973 1972): 615.
[295] James C. Abegglen, *The Japanese Factory*, Perennial works in sociology (New York: Arno Press , 1979, 1979), 11–25.
[296] Ibid., 11.
[297] Ibid., 15.
[298] Ibid., 15–16.
[299] Ibid., 17.
[300] Ibid., 25.
[301] Ibid., 29.
[302] Ibid., 30.

the factory. Allowances for work, attendance, family, job rank, and regional allowances were added to the basic wage though these elements did not relate to the workers' performance or the output of the companies.[303] Hence, the workers had large amounts of wage. In addition to monetary and non-monetary allowances, most large companies in Japan conducted a system of retirement that set the age of retirement and rewarded the workers according to the length of their service in the company, and the system of bonus that was a part of the wage and which was provided twice a year in mid-summer and at the end of the year.[304]

Regarding the scope of protection against dismissal, one of the criticisms is that only regular employees in large firms enjoy the job security while regular employees in small firms face poor working conditions, high possibility of bankruptcy, uncertainty of production demand, and a shortage of capital fund.[305] However, the long-term employment practice, though it applies only to the regular workers in a few large enterprises, is the traditional employment practice in Japan that influences the decision of the courts restricting the employer's right to dismissal according to the rule of abusive dismissal.[306] For example, the Tokyo Higher Court in 1979 ruled that:

> The decision to close a section of the company is a company's discretion and freedom; however, the employer naturally does not have freedom to dismiss the worker in that closed section. This is because in Japan the employment relationship has its foundation on the principle of long-term employment that customarily plans for the long-term livelihood based on permanent and stable employment relations.[307]

The courts applied the rule of abuse of right to dismissal that made discharge as the last resort even in the case of economic dismissal. Such a restriction on the dismissal has protected workers from poverty and secured them in their jobs until they reach retirement age. In Japan, in 2010, regular workers who received protection against dismissal accounted for 65.7 percent while irregular workers who did not get such protection accounted for 34.3.[308]

Section 3: Types of reasons for dismissal

In Japan, most of the disputes on dismissals concern the question whether or not the employer abuses the right of dismissal. However, the rules concerning abuse of the right to dismissal just provide the abstract requirements of "objectively reasonable grounds" and "appropriateness in general societal terms." In this section, there is an examination of what constitutes objectively reasonable ground and makes the dismissal as appropriate based on social consciousness. Since the courts developed the judicial rules concerning employer's unilateral termination of contract, the review on the decisions of the courts is of great importance to understand the detailed rules on the abuse of right to dismissal.

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[303] Ibid., 48–52.
[304] Ibid., 58–60.
[305] Cole, "Permanent Employment in Japan," 617.
[306] Komiya, "Dismissal Procedures and Termination Benefits in Japan."
[307] Tokyo High Court, October 29, 1979, *Rouhan*, 330, p. 71.
[308] "Japanese Working Life Profile 2011/2012- Labor Statistics" (The Japan Institute of Labour Policy and Training, 2011), 33.

1. Dismissal based on worker's capacity

Lack of capacity and loss of ability due to sickness or injuries are the reasonable grounds for employers to dismiss workers. Here firstly, there is an overview of the rules for dismissal based on a worker's capacity shortage or poor knowledge, which leads to poor working results. Secondly, there is an overview of the rules concerning dismissal grounds involving the loss of working ability due to sicknesses or injuries, which are not work-related ones, but are related with private causes.

1.1. Dismissal on grounds due to lack of capacity

1.1.1. Unusually low ability according to appropriate performance evaluation

Companies regulate the rules of employment with clauses regarding dismissal grounds, such as "worker has remarkably poor service without good faith in duty,"[309] "the employer recognizes that the worker does not suit with the duty because of result of work and efficiency is poor,"[310] "working ability is poor and there is no expectation of improvement,"[311] and "there is no expectation of skill development."[312] Disputes concern whether or not the grounds raised by an employer correspond with the grounds for dismissal in the clauses of the rules of employment.

The validity of dismissal relies not only on the existence of the grounds, which is the interpretation of clauses in the rules of employment but also on the requirement that the employer's termination of a contract is an appropriate measure considered from the social common sense. The courts examine the appropriateness of the method of evaluation on personnel performance before concluding whether or not a worker's poor ability or unsatisfying achievement falls into grounds for dismissal. The courts decide the appropriateness of the methods of evaluation of the worker's performance according to the real conditions of each case. The following courts' decisions are examples of rules on the validity of dismissal based on the worker's poor capacity or bad achievement.

There is a tendency in the judicial rules to uphold the validity of dismissal on the grounds of unusually poor capacity or achievement by the worker.[313] For example, a company fired a worker based on the grounds in the rules of employment that a dismissal would take place when the working ability was low and there was no expectation of improvement.[314]

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[309] Tokyo District Court, December 22, 2003, *Rouhan*, 871, p. 91.
[310] Osaka District Court, November 29, 1991, *Rouhan*, 599, p. 42.
[311] Tokyo District Court, October 15, 1999, *Rouhan*, 770, p. 34.
[312] Osaka District Court, March 22, 2002, *Rouhan*, 832, p. 76.
[313] 君和田, *問題解決 労働法〈5〉解雇・退職*, 49.
[314] 770 Rouhan 34.

The worker's working ability was in grade C and did not reach the average standard and ranked under 10 percent among the workers of the company. However, the performance evaluation of personnel was a relative evaluation and not an absolute evaluation.[315] Accordingly, the court ruled that it was not proper to immediately judge that the working efficiency was unusually low and that there was no expectation of improvement. At the same time the company advised the worker to retire from the company, also advised another 55 workers with low ranks in the performance evaluation to retire and these 55 workers agreed to resign.

Taking such relative evaluation as the premise, if the advice for retirement given to a particular proportion of the workers was repeatedly done every year, although it was clear that the standard of workers had improved as a whole, any worker in the lowest 10 percent would automatically incur a low-mark performance in the evaluation. Therefore, even though the workers improved their performance, the company could dismiss a particular proportion of workers every year.

In reference to the rules of employment, which mentioned about when the working ability was low and there was no expectation of improvement, the employer took the relative evaluation as the premise for dismissal. However, the court did not accept this dismissal of workers with a relatively low rank of performance evaluation. The court strictly interpreted low working ability as being an unusually low working ability with appropriate and even strict methods of performance evaluation.

In another case decided by the Nagoya District Court in 2003, the court examined the indication and content concerning the fulfillment of duty of a company towards a worker and invalidated the dismissal because there was no recognition that the worker had an unusually poor performance.[316] In a letter notifying the dismissal, the employer wrote that the reason for discharge was that the worker could not achieve the sale target that was 4 million Yen per months. The company established a target of increasing sales after negotiation with the union on July 10, 2000. During the period of one year and ten months (from August 1, 2000 to May 31, 2002), the worker's real result of total sales of 2,924,224 Yen showed a clear poor work achievement. The amount of total sales of 2,924,224 Yen in average was less than 1,32,919 Yen per month, which was very far from the sales target of 4,000,000 Yen per month.

The court examined the records of sales of companies that did not exceed 134,897 Yen per month and concluded that the establishment of the target 4,000,000 Yen per month was unreasonable. In addition, when compared with the sales achievement of other workers, the amount of sales for the dismissed worker was only a bit lower than that of other workers. Regarding the sale of new shops during the period from June 1, 2001 to May 31, 2002, the sale achievement of dismissed worker was 182,700 Yen per month. In addition, there were workers whose sale achievements were lower than that of the dismissed worker, such as 166,000 Yen, and 46,000 Yen. Although there were a lot of workers who achieved sales

[315] The company conducted the performance evaluation of personnel to all workers excluding officers three times a year: in March, in May, and in February. Performance evaluation for salary increase was on March while evaluation for bonus was on May and February. Items for performance evaluation in the case of salary increase were 30 points of work result, 45 points of demonstration ability, and 25 points of working attitude, in total 100 points. Ibid.

[316] Nagoya District Court, February 05, 2003, *Rouhan*, 848, p. 43.

higher than the dismissed worker, such as 290,000 Yen to 594,000 Yen, these were not extremely large in number. The work result of the worker was not unusually poor in this case.

1.1.2. Dismissal avoiding measures: possibility of education/training or transfer

Even when there is a problem of worker's ability, the dismissal cannot immediately take place. Before firing the worker, the employer has to take measures to avoid dismissal, such as education training or transfer of the worker to other tasks in light of his or her ability.[317] According to the Tokyo District Court's decision in 2001, even though there was a reason for ordinary dismissal based on the internal work rules (Article 53, Paragraph 1, No. 3 where the dismissal takes place in a situation where the working ability had gotten remarkably worse and it is an obstacle or hindrance on the company's business efficiency), the employer cannot always dismiss the worker.[318] Under particular concrete circumstances, if the choice of dismissal is noticeably unreasonable and unacceptable based on social common sense, the employer's expression of intention of dismissal is an abuse of right and invalid. Especially, under the long-term employment system where workers continuously worked until retirement age, dismissal on the grounds of unsatisfying achievement or bad working attitude caused great disadvantage to the worker who had been continuously serving the company for a long period.

Moreover, workers were paid a high salary regardless of poor working performance. The court ruled that there should have been a special plan of revision according to the reduction of payment based on the agreement with those workers or the introduction of a reasonable payment system. A dismissal based on the employer's reason that the salary was extremely high compared to the low working efficiency was an abuse of right. The court determined the validity of dismissal in this case according to the possibility and validity of the transfer.

In conclusion, under the system of long-term employment relationships, even though the worker's ability is low, the employer cannot dismiss the workers unless the employer has already executed dismissal avoiding measures, such as educational training, transfer, or demotion of the worker. Accordingly, the possibility or validity of transfer can influence the decision on the validity of dismissal. However, the employer's consideration of measures to avoid dismissal may vary according to the real condition or difficulty of transfer. Large firms have more possibility of transfer than small firms.

1.1.3. Dismissal of worker employed under special treatment for special purposes

According to Tokyo District Court in 2000, the court accepted the validity of dismissal even though the employer did not take any measure to avoid the dismissal such as education or transfer.[319] In this case, the employer's main business was not only to provide knowledge

[317] Tokyo District Court, August 10, 2001, *Rouhan*, 820, p. 74.
[318] Ibid.
[319] Tokyo District Court, April 26, 2000, *Rouhan*, 789, p. 21.

and strategies to the client companies but also to help his client companies by working with them to completely establish or take root of the re-evaluation of benefit systems of held resources (person, items, capital, information and time) and of the advancement of effective benefit. The employer emphasized the outcome of his clients through the creation and maintenance of profit improvement of the clients under the form of possible measures. Thus, this company differed from typical consultant companies. According to the internal work rule, Article 9, paragraph 1, No. 1, a dismissal would take place when the worker was judged as unsuitable to the accomplishment of the occupation. No. 2 stated that a dismissal would take place when the worker was judged as incompetent or lacking in ability for the accomplishment of the assigned occupation.

In this case, the company claimed that the worker was employed as an installation specialist and received a high salary and annual income (7,700,000 Yen). This treatment differed from the treatment of employment of new graduates under the long-term employment system. The requirement that the worker as an installation specialist meant he or she was expected to have skills or special ability or qualifications which became the content of employment contract. The court examined whether or not the case fell within the grounds of the internal work rules. Indeed, the employment contract decided the type of ability and qualification the company required from the worker who was employed as an installation specialist.

The worker who was employed as an installation specialist had to have qualifications as a business consultant and as installer. The worker did not always have to receive directions from his boss, but he had to be able to make a proposal or suggestion on his own initiative. Moreover, the worker had to have a strong interest in the discovery of problems in the working place (of the client company). The worker had to be able to discover and clarify the root cause of the problem, and to resolve the problem from many different perspectives. In addition to these abilities, he had to have the ability to communicate and to build a trustful relationship with many people from the top to the lowest level in the company.

Regarding the dismissal of the worker, the court found that that after being employed in April 10, 1995, the worker was engaged in four projects during the period from June 6, 1995 to September 27, 1996. Among the four projects, three projects showed that the worker's requested ability or qualification as an installation specialist did not reach the average level. The poor ability of the worker continued for a year and a half since the date of entering the company. The court ruled that there was no expectation that the worker's ability could reach the average point even though the worker continued to work in the company when the worker expressed self-recognition about his poor ability and the competence required as an installation specialist at the time the worker was being removed from the last project. The worker's poor capacity at the time of being removed from the last project fell into the dismissal grounds in Article 9, paragraph 1, No. 1 and No. 2 of the internal work rules.

Even though the poor ability of the worker reached the level of dismissal, after removing the worker from the last project, the employer provided the worker with another occupation through a proposal. This proposal showed that the company tried to continue the employment of the worker. Even though the negotiation between the worker and the company continued for about three months from the date of the proposal until December 1996, it was

impossible to find a compromise between the two parties. On March 12, 1997 (two months after the end of negotiations), the employer dismissed the worker. Considering the above process, the dismissal took place according to concretely reasonable grounds and the dismissal was an appropriate measure based on social common sense. The dismissal in this case was valid.

In conclusion, based on the grounds of a worker's low or unsatisfying achievement, the dismissal of this worker who was hired for a special or particular duty with high expectations and responsibilities along with a high salary could take place even though there was no execution of dismissal avoiding measures.

1.1.4. Dismissal of manager who cannot achieve what is written in employment contract

In 1987, the Tokyo District Court accepted a dismissal on the grounds that the worker who was employed as the chief of marketing section could not achieve what had been written in the employment contract.[320] The company faced with high competition and a change of business environment. As a result, the company decided to establish a marketing section on April 1, 1985 with expectations for them to make a marketing plan on the maintenance of profit, expansion of high sales, and expansion of share. The company hired a worker on May 1, 1985 as the chief of marketing section with a monthly salary 517,000 yen and with a bonus twice a year (summer and winter for 3,000,000 Yen). On February 28, 1986, the company dismissed the worker based on Clause 55, No.5, which stated that an employer could fire a worker when the grounds were similar results as previous cases that involved dismissal.

According to the process of the employment, the contract regulated the position of the worker as the chief of the marketing section with an expectation that the worker had ability suitable with that position. However, because the worker was employed according to the recommendation of the corporation whose business was to recruit talented workers, and the worker received special treatment from the company, the court stated that these facts showed that the employer's expectation of the worker was far more than what had been concluded in the contract. Based on this view, when examining the conditions of work performance, the court found that the worker decided the marketing plan in order to make the business sections run, particularly to make a concrete plan for the method of selling medical cosmetic products for seven months after the beginning of the of work.

However, the worker did not conduct such a plan and did not make an effort to do this plan as seen from the fact that the worker noticeably violated the expectations of the company when creating this marketing section. In addition, the worker joined a political party and would have become politician if he were elected. The worker abandoned the duties half way. Therefore, the worker did not fulfill the duties in the employment contract.

Another case reflects the trend of the courts that accepts the validity of the dismissal of a worker who is employed under special treatment as a manager even though there was no transfer. In addition, the court accepted the validity in this case when the employer provided the worker with a chance to improvement his ability, but there was no improvement in the

[320] Tokyo District Court, August 24, 1987, *Rouhan*, 503, p. 32.

ability.[321] In the case presented to Tokyo District Court in 2002, based on the evaluation of the employee's work history, and especially on the employer's interest in the employee's history of duties in an important foreign customer company, the employer judged the dismissed worker to be talented with the English and Japanese language ability necessary for the work and for providing immediate assistance in quality control.[322] Then, the worker was employed as a first class manager as a person responsible to the customers. The worker also acknowledged his status as halfway employment. The condition of the discharged worker differed from the case of newly graduating workers who were under the long-term employment practice.

The company required that the worker extend his education and earn the necessary ability from the beginning. However, the worker did not have the ability expected at the time of employment at all and did not even try to improve his ability. Hence, dismissal was unavoidable under Clause 37, No. 2 of the rule of employment in cases where the worker had no faith/truth in achievement of duties and had remarkably low knowledge, skill, or efficiency.

At first, the court examined the ability or aptitude needed to achieve the duties of the worker as stated in the internal work rules. In fact, the worker did not have the work experience at the foreign customer company of the employer (mentioned at the time of recruitment), and lacked the knowledge and ability related to quality control or management. In addition, the worker also made a wrong translation of the name of his own company and partner companies, the content of a complaint, and failed to use language used in industry as seen in a report written in English. For example "cover case" was mistranslated as "hippo-case." Thus, the worker had a big problem with the English language ability expected by the company.

Second, the court examined the efforts for improvement in his poor ability (there was no future expectation of improvement). At the time of deciding whether or not to employ the worker, there was a problem with his Japanese language ability and the manner in which he accepted instructions from others (cooperation). However, because the worker was employed under the promise that he would improve his ability, when the worker did not make an effort to receive instructions from the boss honestly, the company could not continue to employ him. In this case, after employment, there was no evidence that the worker made an effort to improve his Japanese language and ability in quality control.

In addition, the dismissed worker behaved as follows. The worker resisted instructions and advice from the vice-secretary and demonstrated an unreasonable reaction. For example, the worker exaggerated his ability and experience in the foreign customer company, refused instructions from a supporting team, and violated an administrative order that required agreement from the boss before the submission of a report.

Moreover, the worker did not admit his own offence in going against the instructions from the chief of personnel section regarding the request from the boss for improvement. On the contrary, the worker criticized the boss. This conduct by the worker was inappropriate, and it was clear that the worker rejected the request for improvement from the company. Therefore, the employer could not expect any effort in improvement. This ground

[321] Tokyo District Court, October 22, 2002, *Rouhan*, 838, p. 15.
[322] Ibid.

corresponded to the internal work rules that dismissal took place when there was no faith/truth in achievement of the duties; when the knowledge, skill, or efficiency were remarkably low; and there was no future expectation of improvement.

More importantly, the dismissed worker used false information about his work experience. Although the worker stated that his wife had provided this information without receiving his concrete instruction, he did not confirm the content of that resume and submitted it to the company. The court ruled that the worker did not have any intention to submit the resume with correct information. Because the employer discharged the worker four and a half months after entering the company, the choice of dismissal in this case was reasonable and a proper measure from the point of view of social common sense.

1.1.5. Appropriateness of dismissal

Regarding the grounds of unsatisfying results, even though the achievement is low, the employer cannot always dismissal a worker who is not the main person responsible for a particular duty. For example, in a Tokyo District Court case in 1985, a worker resigned from the position of director of the company due to his poor ability in managing the budget plan of the company.[323] Then, the worker served as the chief of planning office and section sales manager with the same wage. His position involved submitting a document for the plan of a remade brand of commercial products, to make samples, to hold exhibitions of products, and to sell the products. However, the remade brand commercial product did not provide any benefit at all, and the worker could not increase the price of sale set in the budget plan he had submitted.

The court found it hard to accept the fact that the company also added the decision of the budget plan to the content of the duties of the dismissed worker after placing him as the chief of the planning section. This was because the company already knew that there was a problem relating to the worker's ability in the management of the budget plan, and it was also the reason that the worker resigned from the position as director. In addition, the draft of the budget plan made by the worker was just a proposal. The worker's plan relating to the commercial product had to receive approval from other members in planning meetings and sampling meetings.

Regarding sales, the staffs of the company had little knowledge about the nature or characteristics of the brand of products. For this reason, they conducted methods of sale under a form that placed old products together with the commercial products of the new brand. Considering these conditions, the court concluded that making less or even no profit on the remade brand commercial products could not be the fault or responsibility of the worker alone. Also, the grounds for discharge did not fit with Clause 41, No. 2 of the internal work rule regarding a worker's lack of ability. The dismissal in this case was invalid.

In 2002, Tokyo District Court ruled that it was not appropriate to judge the worker's ability or working result in a short period after holding the assigned position.[324] The employer

[323] Tokyo District Court, September 30, 1985, *Rouhan*, 464, p. 38.
[324] Tokyo District Court, August 09, 2002, *Rouhan*, 836, p. 94.

hired the worker for the post as chief of the business development section and expected the worker to achieve a designed task. The court continued to state that the period from the commencement of work until the dismissal was less than two months which was a very short period for the worker to carry out the expected duties.

In this case, the court recognized that if the company continued to employ the worker, he could achieve the result requested by the employer. This was a case where the employer rejected the employment of the worker who was in the probation period according to the grounds of poor or unsatisfying results. The worker was employed as chief of the business development section and received an annual income of 13,000,000 Yen. The company cancelled the contract during the probation period, two months after engaging the worker to the work. The Court could not accept the company's dismissal grounds, that the worker had weak ability, poor qualifications, a shortage of English language knowledge, and a false job history (resume). Thus, the rejection of employment in this case lacked concrete reasonable grounds and was invalid accordingly.

In conclusion, in case of poor ability, the dismissal is valid only in a case where there is noticeably low level of worker's capacity and there has been consideration about transfer measures or education training given to the concerned worker prior to the dismissal. This reflects the practice of lifetime employment in which nurturing talent through longtime education and training is commonly conducted in the Japanese enterprise.

For workers who work in a managerial post or with special duties with particular special skills or abilities and who receive good working conditions and wages, the employer can fire them on grounds relating to the loss of the ability specified in the contract even though there have been no prior measures, such as transfer or education training. This is because the employment of such a worker is made halfway based on their special skills with specified or expected results and is different from the employment of normal workers who are in general newly graduated staff members. The dismissal in this form is allowed in the case where at the time of the conclusion of the contract; there was an agreement requiring a specific skill or ability.

Moreover, if the worker is not the main person who is responsible for this particular task or receives a short period of time to achieve a result, the court does not accept the validity of dismissal. Compared to those who are employed soon after their graduation from school, workers who are hired half way for specific tasks with special treatment from the employer have a higher risk of dismissal.

1.2. Dismissal due to illness

1.2.1. Impossibility of work performance after expiration of work suspension

In cases where the worker cannot return to the same post as before due to injury or sickness, the worker's inability in providing labor or service or lack of ability becomes a reasonable ground for dismissal. However, as sickness or injury comes to everyone, to immediately dismiss a worker due to such reasons is quite unpleasant, especially to those who

have been serving the company for years. Thus, many companies draw up their internal work rules with a system of work suspension for medical treatment for a certain period. This system is also accompanied by a condition that allows dismissal when a worker cannot return to the previous post after the period of suspension of employment has elapsed.

In a case at the Tokyo District Court in 2007, the Japan Gas Company employed a worker from March 26, 1990.[325] A worker was transferred to the subsidiary company, known as Nichigasu Calculation Center from September 16, 1997. This was after many previous transfers. From October 1, 2001, the worker was transferred to the Transportation Service Company that was also a subsidiary of the Japan Gas Company. While working in the delivery section, the worker was moved to the gas loading section from January 20, 2003. These transfers were made because of the poor physical condition of the worker.

The worker received orders from the Transportation Service Company to suspend duties four times. The first suspension was from November 16, 2004 until December 25, 2004. The second was from December 26, 2004 until March 29, 2005. The third was from March 30, 2005 until June 24, 2005, and the fourth was from June 25, 2005 until August 15, 2005. Before the first suspension, the worker took annual leave with wages due to poor health from September to November 2004. After the worker submitted a health examination paper to make a request for one-month absence for medical treatment for a condition that included symptoms such as loss of self-control, the Transportation Service Company ordered the worker to suspend duties.

After the expiration of the period of suspension, the worker submitted to the company another health examination document with the same content. Accordingly, the company repeatedly ordered more suspensions of work three times. The suspension of work on November 16, 2004 was made according to Clause 45, No. 4 of the Japan Gas Company that the suspension was made in line with the existence of "special circumstance," and Clause 49, No. 1 of the Transportation Service Company that suspension was allowed when the worker could not fulfill duties due to accident or weakness of mentality or spirit.

On July 29, 2005, a date near the expiration of the period of work suspension due on June 23, 2005, the Transportation Service Company sought to confirm whether or not the worker could return to the workplace and asked the worker in a written letter to submit a health examination document. However, when the worker did not submit this document, the company telephoned the worker to confirm his capability of returning to the workplace. This confirmation was a message from the employer that if the worker could not return to the workplace, he should retire.

Subsequently because the worker replied that his body condition remained as bad as before, the Japan Gas Company on August 15, 2005 telephoned him to check the possibility of his returning to work. The worker replied that his physical condition had not improved and wished to work in an appropriate position because he could not work in the area of gas loading any more. The Japan Gas Company after receiving the same answers decided that the worker could not return. Later on, the Transportation Service Company transferred the status of the worker back to the Japan Gas Company.

[325] Tokyo District Court, March 30, 2007, *Rouhan*, 942, p. 52.

Because the worker did not submit an examination paper as requested by the company, it was appropriate that the Japan Gas Company and Transportation Service Company did not extend the period of work suspension after August 15, 2005 (the fourth order of work suspension). According to Clause 52, No. 6 of the internal work rules of the Japan Gas Company, the retirement from work became valid after August 15, 2005.

Based on the above case, there was also a dispute as to whether or not the situation of the worker fell into the clause provided in the internal work rules. However, in a company where there was no system of work suspension, the immediate dismissal was not allowed. After that, the court examined the relationship between the legal principle of the abuse of right to dismissal and the possibility of working. The problem in this case was whether or not there was the possibility that the worker could return to the same post after the expiration of the period of work suspension. The evaluation or judgment on the ability of the worker was based on the medical diagnosis provided by the companies' doctors and those from outside the companies.

The court decided that there was a possibility for the worker returning to work based on the medical evidence and that content of the duties of the worker. In the case of mental problems, the important determinant for the possibility to work was the court's examination of the worker's attitude and communication during the litigation process. For example, the employer dismissed the worker according to the grounds of manic depression.[326] Before the dismissal, there was no evidence that the company requested the advice of a doctor or medical physician. From the testimony of the worker's attitude during the process, cross-examination and interrogation, the court judged that the condition had improved as a result of treatment, the symptom was not serious, and that there was the possibility that the worker could recover with medical treatment. In addition, in view of the fact that the company continued employing two other workers with health problems and on the existent health condition of the dismissed worker, the court ruled that the employer had violated the principle of equal treatment when they discharged only one worker. The dismissal was an abuse of right.

1.2.2. Possibility of returning to work incrementally

At the time of the expiration of the period of work suspension, the worker cannot perform his or old position, but can do easier tasks. In such cases, there are two points of view among courts regarding the validity of dismissal (the employer's suggestion for retirement).[327] First, the dismissal is valid when the worker cannot recover a state of health that would enable him or her to accomplish his or her previous duties at a normal level. Second, the dismissal is invalid because the employer should place a worker in an easier task so that the worker can recover from the illness or injury to a degree that will enable him to return to normal duties gradually, step by step for a certain extended period. This is also the problem of whether or not the employer has a duty to take measures such as offering a period of preparation for returning to work, offering opportunities for education and training, or transferring of worker so as to avoid dismissing the worker from the company.

[326] Tokyo District Court, February 18, 2005, *Rouhan*, 892, p. 80.
[327] 君和田, *問題解決 労働法〈5〉解雇・退職*, 53.

Regarding the duty of an employer to transfer a worker to an easier task, there was a case where the worker claimed money during the period where the employer refused his labor or service. In this case decided by Supreme Court in 1998, the worker who was being engaged as an onsite overseer of a construction factory asked for a transfer from his present position to an office job on grounds relating to private sickness.[328] The company rejected his request, ordered the worker to have medical treatment at home, and cut his wages.

If an employment contract is concluded without specifying the content of duties, even though the worker could not perform perfectly the specified duty ordered by the company in line with genuine necessity, the employer has a duty to accept the worker's request to offer their labor in other duties when consideration is made of the real situation, the difficulties involved in transferring the worker in the company, the type of company, the scope of the company, and the position, experience, and ability of the worker. In this case, the court examined whether or not the transfer of the worker was possible and decided on the existence or non-existence of the right to claim for wages.

The decision of the Supreme Court above concerned the existence or non-existence of the right to claim for wages; however, it also resolved the problem concerning cases of dismissal on the grounds that there was difficulty in returning to the previous duty due to sickness or injury. Accordingly, if there is no restriction on the type of worker's duty, when the worker cannot return to the previous position but can work in other duties, the court invalidates a dismissal that takes place without any examination of the possibility of transfer to other duties.

Furthermore, the courts have proposed a rule that employers should provide workers with a reasonable period or measures sufficient for regaining the ability to work again incrementally after the expiration of the period of work suspension. The Sapporo District Court on September 21, 1999, dealt with a case where a worker was in the period of suspension of work due to an accident outside the business (private reason). The company dismissed him on the ground of expiration of the period of work suspension.[329] The court interpreted the system of work suspension providing the worker with a period of absence of up to a maximum period of 6 months and that during this period the employment relationship of the worker was maintained with the system exempting the worker from work.

The system protected the worker from retirement (dismissal) during the period of 6 months, as the worker could not supply his services because of the private sickness, with the employer waiting for the worker's recovery during this period. Therefore, in cases where a worker might recover from disease or injury and could return to their previous work after the expiration of the period of work suspension, a retirement (dismissal) on the grounds of the expiration of the period of work suspension is invalid.

The possibility of returning to work must be decided based on the objective or real condition of the recovery of disease or injury of the worker when the period of work suspension expires. Regardless of whether the disease or injury has recovered to a level permitting a return to work, if the employer's advice for retirement or dismissal takes place

[328] Supreme Court, April 09, 1998, *Rouhan*, 736, p. 15.
[329] Sapporo District Court, September 21, 1999, *Rouhan*, 769, p. 20.

without the employer having sufficient information to judge the possibility of the worker's returning to work; the retirement or dismissal is invalid.

When the period of 6 months of work suspension expired (January 10, 1997), the worker's left hand still had slight shaking, the right leg remained numb, and vision was slightly blurred. Despite hospital visits once or twice a month being necessary, there was no problem with the everyday life, and the worker recovered to the extent that he could still engage in office work carry out calculation, and drive a car. The worker could be responsible for previous work duties, such as creating estimates and quantity surveying.

Though the worker could not fulfill 100% of the required work immediately, at least while being engaged in work, there was the possibility of full recovery after the period of two or three months. In the company, there was no rule that recognized the extension of this period. However, in reality going to hospital once or twice going was not obstacle for the worker to carry out his duties. Therefore, the court ruled that based on the principle of good faith, after the expiration of the period of work suspension, it was possible that the worker could go to the hospital once or twice per month. Consequently, the expiration of the period of work suspension was not grounds for retirement or dismissal of the worker.

In another case, a worker, during the period of work suspension due to sickness expressed an intention for reinstatement to work, and there was a genuine possibility of the worker supplying their services.[330] There was no restriction on the type of work at the time of recruitment and there was the fact that the worker expressed an intention to return to work on August 6, 1997. In cases where the worker shows an intention to return to work, the employer decides on this possibility.

The court examined the possibility of a new work arrangement according to the real facts. The employer had a business section of for the Shinkansen Railway at Tokyo City and branches in Shizuoka City and Osaka City and employed 22,800 workers. The content of the business consisted of various jobs relating to buying and selling immovable property for the purpose of railroad business. Also the types of business were numerous, such as general work (work and skills), transportation work (station staff, guard/conductor, and driver). The worker was engaged in the duty of examining carriages when the sickness occurred.

On December 1997, there were four facts about the worker's physical condition. One, the worker could walk by himself without using a stick though it took time. Two, though the right hand was weak compared to left hand, the grip (ability to catch) was not much different to that of an ordinary person. However, there was difficulty in detailed work such as writing because the operation of the fingers of the right hand was bad. Three, the worker's speech was at a level that could be understood by others. Four, even though there was double vision, its level was not serious, and he could focus on a single point.

Moreover, certain control over blood pressure was possible when the worker took medicine. Little by little, the worker's blood pressure increased its stability. If health could be sustained the danger of a reoccurrence of cerebral blood vessel disease decreased. Based on the various contents of jobs in the company, the physical condition of the worker, and the

[330] Osaka District Court, October 04, 1999, *Rouhan*, 771, p. 25.

worker's claim for supplying labor, the court found that the current worker's ability at least fitted with a job in the tool room at Osaka Carriage No.2. Thus, there was the possibility of transferring the worker to the tool room.

The work in the tool room consisted of loaning and keeping tools. Hence, special knowledge and experience were not necessary or required. The work in the tool room did not require speed in writing letters or walking. If the worker had enough ability to engage in conversations with coworkers, there was no hindrance or obstacle to the work. Because the power to grip was within the appropriate range, the worker could manage handling tools to a particular weight.

The court ruled that if the worker could not sufficiently perform the previous task due to body condition, if there was a request to supply labor in the same quantity and speed as an ordinary person in other works, from the principle of good faith in the employment contract, the employer should have made the worker take over a job that corresponded to the ability of the worker from the consideration of the company's scale, worker's arrangement, responsibilities, and possibility of changes. Within the company, for example, one worker did not deal with heavy items because the company arranged for many people to work as partners according to the quantity of work. Carrying in and out the tools was the responsibility of the person who received them. According to the scale of the company of the employer, there was no fact that the employer could not accept the worker's request for these other duties. Therefore, at least, regarding the work in the tool room, there was the possibility to be posted there. Thus, the court rejected the assertion of the company that there was no work possible for the worker.

In conclusion, if there is no restriction on the type of duties for the worker, the employer according to the principle of good faith should assign the worker easier tasks that fits with the current condition of worker's ability even after the end of the expiration of period of the work suspension. The court judges the possibility of new arrangements or transfer based on the worker's experience and responsibility, the company's scale, the real situation of the possibility or impossibility of transfer. However, in cases where the worker cannot even do easy tasks, the employer is permitted to dismiss this worker

2. Dismissal due to worker's misconduct

Most of the rules of employment categorize worker's misconduct as conduct that (1) interrupts the operation of production or service, (2) degrades the reciprocal truth in the employment relationship, and (3) intentionally harms the properties of the company. They also regulate four levels of punishment starting from verbal warning, wage cut, work suspension, up to immediate dismissal.[331] In this case, dismissal on grounds relating to a worker's offence functions as a kind of disciplinary measure the employer takes to punish the worker through termination of the employment contract.

[331] Toshiaki Ohta, "Works Rules in Japan," *International Labour Review* 127 (1988): 633–34.

2.1. Types of dismissals

If viewed from the method of execution, dismissals are divided into two categories, namely ordinary and disciplinary. A disciplinary dismissal is punishment for any worker's conduct that violates the particular instructions of a company while ordinary dismissal is the execution of employer's right to cancel the contract.[332] Both have different social and legal meanings. The two types of dismissal have different procedures and consequences. In the case of ordinary dismissal, the employer has to notify the worker prior to discharge or pay compensation in lieu of the notice period to the dismissed worker.[333] Whereas, in the case of disciplinary dismissal, an employer can fire a worker immediately without advance notification or payment of compensation in lieu of the notice period, but the employer has to obtain approval from the Labor Inspector.[334]

Moreover, in many cases, according to the rules of employment, the dismissed worker cannot receive any amount of retirement allowance.[335] The worker also loses their right to unemployment benefit provided in the Employment Insurance Act when they are dismissed according to serious misconduct.[336] In addition, the workers might face great difficulties in getting new employment after having a history of disciplinary dismissal.[337] In conclusion, when compared to ordinary dismissal, a disciplinary dismissal causes great disadvantages to the worker.

There are punishment measures that have the same effect as disciplinary dismissal. First, *Yushi Kaiko* refers to discharge that lessens the consequence of disciplinary dismissal; and second, *Yushi Taishoku* refers to employer's advice for retirement or resignation through which disciplinary dismissal takes place when the worker does not follow this advice in the set period.[338] Even though *Yushi Taishoku* is done in the form of the employer requesting the worker's resignation, it is one kind of disciplinary measures, and its legal effect has the same rules as disciplinary dismissal.

For example, the Tokyo District Court in 2006 ruled as follows on the rule governing *Yushi Taishoku*.[339] The chief of a finance section submitted a request for retirement to the company in April 26, 2004 on grounds of "punishment by *Yushi Taishoku* due to violation of the internal work rule." Since the court did not recognize the violation of the internal work rule, and based on the fact that the punishment of *Yushi Taishoku* according to the above

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[332] Tokyo District Court, April 24, 2002, *Rouhan*, 828, p. 22.
[333] Labor Standard Act of Japan, art. 20, ¶¶ 1&2 (1947).
[334] Ibid., art. 20, ¶ 3.
[335] 中窪, 野田, 和田, 労働法の世界, 192.
[336] "Employment Insurance Act of Japan," December 28, 1974, Article 33 reads "In the case where an insured person has been dismissed due to significant cause imputable to the accused himself/herself or has resigned voluntarily without justifiable reason, the basic allowance shall not be paid for a period specified by the Chief of the Public Employment Security Office of one month or more and less than three months, following the expiration of the period prescribed in Article 21. Provided, however, that this shall not apply to a period during which he/she takes public vocational training, etc. as directed by the Chief of the Public Employment Security Office, nor to a period after the day of completion of said public vocational training, etc."
[337] Araki, *Labor and Employment Law in Japan*, 154.
[338] 君和田, *問題解決 労働法〈5〉解雇・退職*, 35.
[339] Tokyo District Court, January 31, 2006, *Rouhan*, 912, p. 5.

premise was invalid, the court could not accept the validity of the retirement of the chief of the finance section. The letter of request for retirement submitted due to the violation of internal work rule and due to punishment by *Yushi Taishoku* was an invalid measure. The retirement based on this submission could not be accepted as a valid retirement.

Other than disciplinary dismissal and *Yushi Kaiko*, all kinds of discharges are called "ordinary dismissals."[340] *Yushi Taishoku*, discharge on grounds related to worker's sickness or poor capacity, and adjustment dismissal are ordinary dismissals. The rule of the abuse of right in Article 16 of the Labor Contract Act governs the validity of these kinds of dismissals. Any kind of dismissal that lacks reasonable grounds and appropriateness is an abuse of right and invalid.

Even though the worker commits a misconduct that can be grounds for disciplinary measure, the employer tends to avoid disciplinary dismissal by choosing the ordinary type. There are many reasons for the employer's preference in executing the ordinary dismissal.[341] One reason is that there is the employer's consideration or concern for the livelihood of the workers after dismissal. Second, an employer might wish to avoid the complicated procedure involved in obtaining the approval of the Labor Inspector for exemption of compensation for prior notice. Third, the employer may be annoyed by the trouble involved in any dispute regarding discharge because the rule for ordinary dismissal is already strict and the rule for disciplinary dismissal is even stricter. In other words, courts have a tendency towards strict control and a high possibility of rejecting the validity of disciplinary dismissal, while the recognition of ordinary dismissal is comparatively easy.

Since disciplinary dismissal is made on the grounds of violation of the company's directions through the misconduct of the worker, there are many disputes where the grounds for disciplinary dismissal are used as though it were an ordinary dismissal.[342] For the same worker's conduct (violation of the company's instructions), along with expression of intention for disciplinary dismissal, the employer expresses an intention for ordinary discharge. In such cases, the validity of disciplinary dismissal and that of ordinary dismissal are decided individually.

In addition, though an employer might not express the intention of ordinary discharge, during the litigation process, there are cases where the employer claims that the expression of intention of ordinary dismissal also includes an expression of intention of disciplinary one. Therefore, if the disciplinary dismissal is invalid, the ordinary one is valid. The Tokyo District Court in 1979 ruled that in general it was not appropriate to include expressions of intention for ordinary dismissal with those for disciplinary discharge, and if the transfer from expression of intention for disciplinary dismissal to that of ordinary one was accepted, even though there was a reception of the expression of intention for discharge, it unfairly made the status of the worker become unstable.[343]

Moreover, regarding the transfer from an expression of intention for disciplinary dismissal to an expression of intention for ordinary dismissal, the Saitama District Court in

[340] 君和田, *問題解決 労働法〈5〉解雇・退職*, 36.
[341] Ibid., 32.
[342] Tokyo District Court, April 24, 2002, *Rouhan*, 828, p. 22.
[343] Tokyo District Court, August 29, 1979, *Rouhan*, 326, p. 26.

2003 rejected the assertion of the employer.[344] In this case, employer claimed that even if the court did not allow an earlier disciplinary discharge the ordinary dismissal (economic dismissal) was valid. However, the court ruled that in the letter notifying immediate discharge against the worker, the employer wrote that the dismissal took place according to Clause 49 of the rules of employment on the standard of disciplinary measure. It was clear that the earlier discharge was a disciplinary dismissal.

Therefore, the disciplinary dismissal as punishment and the ordinary dismissal were completely different in the meaning of the system. And, if the court accepted the transfer of such an invalid or bad action by employer, the status of the worker would become noticeably unstable. Such a court ruling could induce easy disciplinary dismissal. In conclusion, the punishment in disciplinary dismissal and ordinary dismissal are different in the meaning or substance of the systems, different in grounds, requirement and effect. Hence, the judges rejected such a transfer.

2.2. Rules for disciplinary dismissal

Though the validity of disciplinary dismissal depends on each individual case, the courts tend to apply the rule of abuse of right to dismissal provided in Article 16 of the Labor Contract Act. Since disciplinary dismissal has the characteristic of combining dismissal with disciplinary measures, there must be a fulfillment of the requirements in Article 15 of the Labor Contract Act that:

> In cases where an employer may take disciplinary action against a worker, if such disciplinary action lacks objectively reasonable grounds and is not found to be appropriate in general societal terms in light of the characteristics and mode of the act committed by the worker pertaining to such disciplinary action and any other circumstances, such disciplinary order shall be treated as an abuse of right and be invalid.

Hence, dismissal as one of the disciplinary measures must take place with objectively reasonable ground and the choice of discharge as a disciplinary measure must be appropriate according to the general societal term. The rule of abuse of right in dismissal is also applied in the case of disciplinary dismissal. In general, legal disputes over the validity of disciplinary dismissal include three points. First, there must be facts to support the existence of misconduct. Second, such misconduct corresponds to the disciplinary ground. Third, the level of seriousness of misconduct is proportional or appropriate with the weight of disciplinary measures, such as disciplinary dismissal or *Yushi Kaiko*.

2.2.1. Existence of rules on disciplinary grounds

An employer cannot take any disciplinary action when there is no rule that enumerates the offence, type of offence, and degree of punishment. There must be rules that clearly state

[344] Saitama District Court, June 30, 2003, *Rouhan*, 859, p. 21.

the grounds for disciplinary action. This rule reflects the principle *nulla poena sine lege* that literally means no punishment without law. The internal work rules of the companies regulate the grounds for punishment and types of disciplinary actions. According to Article 89 paragraph 1 number 9 of the Labor Standard Act, the grounds and types of disciplinary actions are regulated in the rules of employment.[345] According to Article 7 of the Labor Contract Act, the working conditions in the rules of employment that are reasonable can become the content of the employment contract as long as the employer informs workers about such internal rules. In this sense, the content of regulation on disciplinary measure is located in the employment contract and internal work rules.

2.2.2. Analogical application of principles of criminal law in disciplinary dismissal

In addition to the principle of no law without punishment, non-retroactive and double jeopardy that are the principles of criminal law also apply in the case of disciplinary measures, including dismissal. The Constitution of Japan (Article 39) provides that "No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he had been acquitted, nor shall he be placed in double jeopardy."[346] According to the principle of non-retroactivity, there is no disciplinary action for any misconduct occurring before the establishment of regulations and disciplinary measures in the internal work rule. Furthermore, the principle of double jeopardy also applies in the case of disciplinary measures. The court also uses these principles when evaluating the validity of dismissal on the grounds of worker's misconduct.

The following cases illustrate the application of the principle of double jeopardy in case of disciplinary dismissals. For example, the Osaka District Court ruled in 1963 that in general, an employer could not take different disciplinary measures based on the same fact in light of the principle of double jeopardy.[347] The principle of double jeopardy restricted employers from taking second-time disciplinary measures based on conduct that had already been the object of disciplinary measures.

An examination of a decision by the Tokyo District Court in 1998 provides a concrete example of the application of the principle of double jeopardy.[348] The worker was a driver for a taxi company. At time the employer took disciplinary measures against worker including work suspension from July 22, 1997, because the worker had scattered bills inside the company. The company extended the period of work suspension. After this extension, on October 23, the employer dismissed that worker under *Yushi Kaiko* according to the internal work rule on the grounds that the worker clearly expressed an attitude that did not follow the management of the company.

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[345] Article 89 of the Labor Standard Act provides that " An employer who continuously employs 10 or more workers shall draw up rules of employment covering the following items and shall submit those rules of employment to the relevant government agency. In the event that the employer alter the following items, the same shall apply:(9) in the event that there are stipulations concerning commendations and/or sanctions." "Labor Standard Act of Japan."

[346] The Constitution of Japan, art. 39 (1946).

[347] Osaka District Court, February 22, 1963, *Rouminshu*, 14–3, p. 340.

[348] Tokyo District Court, February 06, 1998, *Rouhan*, 735, p. 47.

Clause 81, No. 1 of the internal work rule regulated that even though the worker received punishments such as a reprimand, a pay cut, demotion, suspension from doing transport-related work, and work suspension in general, when there was no expectation of the worker's sincere regret, the employer fired the worker in the form of *Yushi Kaiko* or disciplinary dismissal. However, the court ruled that because the disciplinary measure involved the employer's punishment for the worker's violation of the company's instructions, the principle of double jeopardy also applied to the clause for disciplinary measures in the rules of employment. The conduct of the worker that became the object of disciplinary measures in the past could not be the object of disciplinary measures again. The employer could not punish the worker based only on the grounds that that worker did not self-reflect on his misconduct. In practical terms, the worker had already received disciplinary measures that included suspension.

The company claimed that the worker clearly behaved negatively by not following the operations and management of the company as per Clause 80, No. 3 of the internal work rule. However, on October 16, eight days before dismissal, the chief of the union committee asked the worker whether the employer had said that if the worker wrote a letter of apology the worker would be allowed to do work-related transport duties. Although the worker had no intention of writing an apology, there was no proof from the person related to the union that the worker was to write an apology and a commitment to follow the operations and management, and that at that time the worker had not followed the operations and management of the company.

Even though the worker during the exchange of conversation with the person related to the union had no intention to follow the direction of the company, there was no proof that the worker directly showed a negative attitude to the employer in the sense that he had no intention to follow the management. In addition, there was no proof that the worker clearly disobeyed the order or instructions regarding the business of the company. Consequently, the employer's claim did not correspond to Clause 80, No. 3 of the internal work rule. The *Yushi Kaiko* was invalid according to the violation on the principle of double jeopardy.

The principle of double jeopardy prohibits employers from executing double punishment. However, when there is a history of disciplinary measures against a worker's misconduct, and the same worker commits another mistake again in a short period after the previous sanction, the employer with reference to the history of punishment can decide on disciplinary measure against this fault[349] Similarly, the Kobe District Court in 1983 ruled that the principle did not prohibit an employer from imposing heavy disciplinary measures on a person who had received sanction in the past when that person committed a fresh misconduct that was the object of disciplinary measures, in comparison with other persons who received no punishment at all in the past.[350] Hence, at the time of deciding the content or types of disciplinary measure, the history of past sanctions can be considered as a condition or grounds for disciplinary dismissal.

2.2.3. Type of disciplinary grounds in the rules of employment

[349] 14–3 Rouminshu 340.
[350] Kobe District Court, March 17, 1983, *Rouhan*, 412, p. 76.

Naturally, there must be a correspondence or match between the invoked grounds and the reason for disciplinary action regulated in the internal work rules. The employer can take disciplinary dismissal at the time they come to know about the misconduct. If the employer after carrying out a punishment has acknowledged that the invoked reason corresponds to the grounds for disciplinary dismissal, they cannot discharge the worker.

The Supreme Court in 1996 invalided a disciplinary dismissal when the court did not allow the inclusion of the worker's age, which the employer did not know at the time of discharge, as an additional ground for disciplinary dismissal.[351] In this case, when a worker requested two days off, the employer's representative dismissed him. While the dismissed worker was preparing a document and filing a lawsuit to the court, the company replied by saying that at the time of recruitment, the worker wrote his age as 45 but that his true age was 57. The employer claimed that worker falsifying their background was reason for disciplinary dismissal from the beginning. The employer further asserted that the judgment of the first instance (that rejected the employer's claim that disciplinary dismissal in this case was based on the fact of personal age of the worker) implied a mistake over the interpretation of the execution of the right to discipline.

The court in this case ruled that because the disciplinary measure against the worker was a punishment on the grounds of a violation of the company's instructions, the legality of the concrete penalty was connected with this violation alone. Therefore, when employer did not know the existence of a particular offence by the worker at the time of dismissal, as long as there were no special circumstances, the employer could not use this offence as a ground for disciplinary discharge because it was not the grounds of the disciplinary measure in dispute.

In this case, the Supreme Court accepted the legality of the decision of the first instance, that is, the disciplinary dismissal being based on the ground such as the worker's request for a day off and the worker's attitude in receiving a day off at that time. Because at the time of dismissal, the employer did not acknowledge the issue of the age of the worker, the employer could not take this into account.

2.2.4. Principle of appropriateness and equal treatment

The validity of disciplinary dismissal is much influenced by the principle of appropriateness and the principle of equal treatment.[352] Based on the Labor Contract Act (Article 15), the rule on the abuse of right to disciplinary action and the rule on the abuse of right to disciplinary dismissal have the same content, namely the requirement for the existence of reasonable grounds and the requirement for the appropriateness of the execution. According to the principle of appropriateness, the weight of disciplinary action must be appropriate in the light of type and level of illegal violation, and the disciplinary dismissal or *Yushi Kaiko* can take place when the violation of the company's order reaches a level that justifies such a punishment.[353]

[351] Supreme Court, September 26, 1996, *Rouhan*, 735, p. 47.
[352] 君和田, *問題解決 労働法〈5〉解雇・退職*, 39-40.
[353] Ibid., 39.

Most disputes imply that although any kind of punishment is inevitable, the execution of disciplinary dismissal is the heaviest sanction. According to a case decided by the Tokyo District Court in 2006, after changing the commutating route after approximately four years and eight months, the worker did not report this change to the employer and unjustly received a commuting allowance.[354] The worker's unjustly receiving this allowance fell under the disciplinary rules of employment, Clause 39, No. 11 where there was damage due to a worker's intentional act. However, in consideration to the worker's motive, the amount of damage, and the process of negotiation between the employer and the worker regarding the allowance for the commuting fee, the court invalidated the disciplinary dismissal because such action used to maintain order in the company was too heavy.

In a case presented to the Tokyo District Court in 2005, a worker did not make sale record or cancel the sale of previous order, failed to establish the truth about the intermediate transaction and to pay for the purchased product, made an inappropriate dealing with additional cost and forgery of transaction documents.[355] These misconducts corresponded to grounds for disciplinary dismissal as per the internal work rules, particularly Clause 74 (2) and (6). Clause 74 (2) which stated that a dismissal could take place when the worker did not follow the working rules, or various other rules of the company, or their duties and instructions; and consequently caused serious disturbance for the company. Clause 74 (6) stated that a dismissal could take place when misconduct noticeably hampered the credit of the company and noticeably caused damage to the company due to bad intentions or serious offences.

The court found that in each situation regarding the sale record, the payment of money received in the intermediate transaction, and the creation of false order documents, the worker did not try seeking his own benefit. The worker tried to extend the sales in the company. Each offence was not the individual conduct of the worker, but was conduct that enhanced the company. If the conduct regarding the sale record was excluded, the worker did not have a heavy responsibility for his offence. Regarding the s sale record, the worker's conduct did not cause damage to the company. Especially, when compared to the employer's treatment against the representative director of the company, the dismissal of the worker was questionable on the basis of fairness. When considering the overall situation, even when there had to be disciplinary measures against the worker, the disciplinary dismissal was too harsh. Therefore, the disciplinary dismissal in this case lacked reasonable grounds and was not appropriate according to the social common sense. The right of dismissal was abused and invalid.

The principle of equal treatment requires the employer to take disciplinary measures of the same kind and level against any conduct violating the same rule at the same level. Respect for the principle of equal treatment has its foundation in many legislative texts. The Constitution of Japan (Article 14) stipulates "All of the people are equal under the law and there shall be no discrimination in political, economic or social relation because of race, creed, sex, social status and family origin."[356] In addition, the Civil Code (Article 90) reads, "A juristic act with any purpose which is against public policy is void. [357]

[354] Tokyo District Court, February 07, 2006, *Rouhan*, 911.
[355] Tokyo District Court, November 22, 2005, *Rouhan*, 910, p. 46.
[356] The Constitution of Japan, art. 14 (1946).
[357] The Civil Code of Japan of 1898, art. 90 (1898).

Although equal treatment under the Constitution is not directly applied in private relations, the public policy of the Civil Code is indirectly applied in the relations of private persons. There is a requirement for the realization of equal treatment in labor relations where there is a big difference in power between employer and worker; it is necessary to adopt the principle of equal treatment in the Labor Standard Act.[358]

The Labor Standard Act (Article 3, 4) requires an employer to have fair and equal treatment towards each worker. Accordingly, an employer is restricted from discriminatory treatment in the areas of wage, working hours, promotion, transfer, safety and health, and all kinds of working conditions, including dismissal, in particular the grounds and the dismissal itself.[359]

2.2.5. Compliance with reasonable procedures

If the rules of employment or collective agreements require that dismissal take place through discussion with disciplinary committees and consultation with labor unions or workers' representatives, the employer must abide by these procedures before dismissal. The Labor Standard Act requires an employer to respect the rules of employment and collective agreement.[360] Even if there is no such regulation, upon the existence of grounds for disciplinary action, the employer has to provide the worker with a chance to receive notice and to defend him or herself against the employer's allegations. However, where there is no such regulation in the internal work rule, there are no case laws that invalidate the disciplinary dismissal simply for the reason that there is no worker's chance of defense.[361]

2.3. Examples of rules of dismissal due to misconduct

The examination of decisions of courts is an effective way to understand the concrete content of the rule on the abuse of right to dismissal. The existence of reasonable grounds and the appropriateness of dismissal are the result of the evaluation of all the facts in each individual case. The following courts' decisions are examples of rules on misconduct that appear as reasonable grounds for dismissals.

2.3.1. Violation of company's orders

In general, the disputes over the validity of disciplinary dismissal on the grounds that the worker rejects the company's instructions concern the question of whether or not the

[358] 土田 et al., 条文から学ぶ労働法, 11.
[359] 中窪, 野田, 和田, 労働法の世界, 78.
[360] Labor Standard Act of Japan, art. 2, ¶ 2 (1947).
[361] Tokyo District Court, December 17, 2004, *Rouhan*, 889, p. 52; Osaka District Court, December 19, 2001, *Rouhan*, 824, p. 53.

company's instructions are legal. In the case where the company's instructions are legal, and the violation of these can cause great impact, as a whole disciplinary dismissal can be valid. A violation of the company's instructions mostly concerns the violation of an order of transfer. However, even though a company's orders, such as a transfer, are legal, the disciplinary dismissal is invalid when the execution of transfer is inaccurate.[362]

The following is an examination of a case in the Tokyo District Court in 2000 regarding the validity of disciplinary dismissal on the grounds of the worker's violation an order by the company.[363] An inventory control and package shipment company hired the worker through an employment agency. After three-month probation, the worker became a regular staff member with duties the same as that of the chief section of the administration section. Later on, the company wished to reduce the expense, and ordered a reassignment to the business section on October 6, 1997. The worker refused this order by asserting that he was employed for a managerial occupation. In response, the company took disciplinary measures on October 31 on the grounds that such conduct fell under Clause 51, No. 9 of the internal work rule regarding cases where the worker refused a reassignment, transfer, or temporary transfer without having reasonable grounds. However, the court found that the dismissal took place one day before the new job of the dismissed worker was to start from November 1.

First, the court examined the legality of the company's order. The employment contract in this case was concluded in a form where the company registered with an employment agency to recruit powerful people to strengthen the business power. Hence, the contract was made in order to expand the position of section chief when there was a vacant position as section chief of the administration section. Second, before the case of the disputed transfer of the worker, the company used to employ other workers through an employment agency and used to transfer those people who were in the administration section to the business section. Third, during an interview when being recruited, there was no evidence in the conversation that applied to the specific position. In addition, there was no intention to conclude the contract to specify a particular position such as administrative work or managerial position.

Therefore, the employment contract attached the worker to the administration section from the beginning and paid the worker the same wage, as that of the chief of section, but the contract did not restrict the worker to administration work or managerial work. Based on the recognition that the employer's right to order a transfer, the employer's order for transfer in this case was not an abuse of right as there was a necessity from a business perspective for the reassignment of many workers from the administration section to business section in order to reduce expenses in the company.

In addition, from October 7, 1997 (one day after the transfer order) until the day of the disciplinary dismissal, the worker expressed an intention not to follow the transfer order. The worker did not change this intention, and it was clear that the worker refused the transfer order. The employer had the right to transfer the worker and their order in this case did not constitute an abuse of right. Consequently, the worker's refusal to be transferred lacked valid reason, which fell under Clause 51, No. 9 of the internal work rule regarding disciplinary dismissal.

[362] Tokyo District Court, February 18, 2000, *Rouhan*, 783, p. 102.
[363] Ibid.

The workers in the company formed a union and requested to include the transfer order in this case as the item for consultation in the collective negotiations. However, the company rejected this request by claiming that the refusal of a transfer order was a problem for the individual. The workers were prepared to follow the transfer order if there they were satisfied after consultations. Although the workers created a union after the order for transfer, this order did affect working condition. In view of the fact that the employer had a duty to go through the collective bargaining process relating to this problem, the employer's refusal to go through collective negotiations in this case was considered to be unfair labor practice under Article 7, No. 2 of the Union Act.[364] However, there was no such a procedure. The disciplinary dismissal that was taken against the disputing worker one day before the start of work in the new place and this did not constitute the appropriate procedure mentioned above. Thus, the court invalidated the dismissal because it did not follow an appropriate procedure and as such was an abuse of right.

In a case presented to Tokyo District Court in 2002, the court invalidated a disciplinary dismissal of an incapable person with sex identity who came to the office in the appearance of a woman.[365] The worker's clothes violation corresponded to disciplinary dismissal grounds in the internal rules. However, the court ruled that such a conduct was not a serious or malevolent violation of the company's instructions to the extent that dismissal was appropriate. Based on the fact that the worker was diagnosed as a person with a sexual identity problem, the worker bore great psychological pain due to the company's instructions that required him to act as man or to control her actions as a woman. Moreover, there was not enough evidence to prove any fear or hatred by others regarding the appearance of worker, and the appearance in a woman dress did not cause particular obstacles to the fulfillment of work.

In a decision of the Fukuoka District Court in 1997, the *Yushi Kaiko* of a truck driver who dyed his hair yellow was in valid.[366] The worker was a driver for the company whose business was the sale of alcoholic beverage and transportation. The company ordered the worker to change his hair from yellow to black three times. However, the worker did not obey this and did not submit a letter of apology in accordance with the reprimanding measures of the company. Therefore, the worker expressed the attitude that he did not serve or respect the management of the company. Consequently, the employer used the disciplinary measure *Yushi Kaiko* that was heavier than reprimanding measures.

However, the dismissal was invalid because the instructions of the company that restricted the freedom of the worker were unreasonable and the dismissal was not an appropriate measure. The court ruled that, in general, it was natural that the employer felt it necessary to understand completely the motivation of the workers in order to secure and maintain order inside the company. In this case, the employer was allowed to make necessary rules, directions, and orders. However, the worker did not have to respect the general supremacy of the company. There had to be a restriction on the power to keep order in the

[364] Article 7 of Union Act reads "the employer shall not commit the acts listed in any of the following items…(2) to refuse to bargain collectively with representatives of the workers employed by the employer without justifiable reasons;" "Union Act of Japan."
[365] Tokyo District Court, June 20, 2002, *Rouhan*, 830, p. 13.
[366] Fukuoka District Court, December 25, 1997, *Rouhan*, 732, p. 53.

company. In particular in matters relating to personality or freedoms of a person, such as hair color and type, figure, and dressing, if the employer wanted to restrict the freedom of the worker in the name of keeping order in the company, they could only do so within limits. The employer could restrict the worker's freedom within a reasonable range necessary for the smooth administration of the company. The court invalidated the dismissal. In this case, the court paid attention to the benefits of individual personality and limited the company's order.

2.3.2. Negligence on duty and poor performance

The validity of dismissal for the reason of carelessness in duty depends on the degree or magnitude of negligence. For example, the Osaka District Court in 1997 invalidated a disciplinary dismissal because it was too heavy compared with the worker's mistake.[367] In this case, the dismissed worker was the manager of a production section and took inappropriate measures against the incident resulting in the outflow of poor quality products. When the incident occurred, the dismissed worker did not report to the representatives of the company. The dismissed worker ordered the manufacturing workers to stop operations, which delayed restarting operation by one week. Even though there was an outflow of poor quality products, the dismissed worker wanted to protect his subordinate workers and so did not properly report the incident. Instead, the dismissed worker made a report of the production that included the item as being in stock at that time.

The court ruled that from the point where the fired worker carelessly submitted a report of production repeatedly, this conduct fell under grounds for disciplinary dismissal from the viewpoint of the status of the worker as manager. However, when examining the concrete contents of the damage, the level of inappropriateness of the steps the dismissed worker took during the incident, and the repeated negligence in making production reports, the court ruled that worker's offence should only made the worker lose his qualifications as the manager of the production section, but not his status as an ordinary worker. When doubting the qualifications of the worker as manager of production, the company demoted the worker to ordinary staff. This demotion was already an appropriate disciplinary measure. Hence, the dismissal in addition to the demotion made the worker ineligible for receiving receive a retirement allowance. Though the worker lacked qualifications as a manager, the dismissal was too excessive as the company overlooked the ten-years work the dismissed worker had contributed. Furthermore, the court found it was very doubtful whether or not the disciplinary measures were based on past matters to do with the worker.

In another case, the Tokyo District Court in 2002 validated the dismissal of a worker who was absent without permission for a long period in light of a history of disciplinary punishment.[368] In this case, the dismissed worker was a journalist who went to collect information but did not take any notes at all. Consequently, the dismissed worker wrote wrong news and then had a problem with the person who collected the information. Each boss in each new section of the company evaluated the concerned worker to be not up to the task of producing a good news story compared with other workers.

[367] Osaka District Court, February 12, 1997, *Rouhan*, 714, p. 48.
[368] Tokyo District Court, April 22, 2002, *Rouhan*, 830, p. 52.

Also, when the worker was engaged in sending and receiving E-mails, the worker wrote a message that harmed the reputation of the company and received a verbal warning. The work performance of the worker was also extremely poor. Even when the concerned worker was transferred from the editing section to the welfare program section due to poor capacity as a writer, the worker kept committing offences such as leaving the company early even though there was a warning from the company. As a result, the worker received a wage cut as punishment. In addition, the worker was absent without permission from January 11 to March 2, 2000. Finally, the company dismissed the worker.

The dismissal of a worker in the case of negligence or poor performance is valid when the degree of misconduct is serious. The level of seriousness in regard to the misconduct depends on the court's evaluation of the concrete facts of each case. According to the two cases above, although the worker was careless in duty, the court accepted the dismissal only on the grounds that the worker repeatedly committed offences with a series of disciplinary measures.

2.3.3. Obstruction of service or business

The validity of disciplinary dismissal is decided according to the level of the business interruption. There are cases where interruption of business operation occurs due to the worker's dissatisfaction towards the working conditions. However, in general, business interruption corresponds to disciplinary grounds in the rules of employment. Therefore, when workers are not satisfied with their working conditions, they should establish a labor union or join individual associations and resolve this problem through collective negotiations and collective action.[369] The following are cases regarding dismissals on the ground of worker's obstruction and violation of the rules of the workplace.

In the case presented to Osaka District Court in 2000, the employer dismissed workers in managerial positions on the grounds of operational hindrance.[370] Four workers were chiefs of branches of a company whose business concerned the import of medicine. When the company paid much compensation due to AIDS or HIV disease contraction, they reduced wages in line with a decline in sales. The future was unstable. An adviser to the company, who was the oldest son of the chief of the company, was not happy with the company's conduct and created a vision of renewal in order to reform the company. The workers cooperated with this adviser for the realization of this vision. They signed their names to a petition, created a union of managerial posts, requested for the company to have collective bargaining, administered a strike, and had a sit-down in front of the company.

In response, the company notified them that it did not recognize a union for managerial posts. The company took disciplinary dismissal against one of the workers on the grounds that as the chief of a branch, he had a duty to keep the order of the company. The worker's participation in the renewal vision created by a person outside the company caused corruption and obstructed the appropriate operation of the business. During litigation, the company claimed that the worker's misconduct corresponded to grounds for ordinary dismissal in the

[369] 君和田, *問題解決 労働法〈5〉解雇・退職*, 43.
[370] Osaka District Court, January 07, 2000, *Rouhan*, 789, p. 39.

rules of employment when the worker, as the chief of a branch who had the highest responsibility in each branch interrupted the company's organization.

The court ruled that the act of petition-signing by the worker did not request that the representative director of the company resign from his position. This act was just a request for a constructive improvement of the company. Besides, before grasping correctly the level of participation of the workers, the employer made the decision of dismissal based only on the fact that the worker had the position of chief of the branch.

Regarding disciplinary dismissal of another chief of branch, the company claimed that the company could not accept the establishment of a labor union of workers in managerial positions because the group was established for an unjust motive. The company believed that sitting down in front of the company was not appropriate conduct for the chief of the branch. The court ruled that the union of workers in managerial positions in this case was an organization run by managerial posts in the company.[371] Because only workers who were the chiefs of the branches were qualified to be members of the union, this managerial organization was an independent labor union. Therefore, the court recognized the union of people in managerial positions as a labor union. Accordingly, the act of the workers sitting down in front of the company was a conduct equivalent to a strike by a labor union of workers in managerial positions. The disciplinary dismissal on the grounds of the workers' strike was invalid.

In contrast to the above decision, the Osaka District Court in another similar case accepted the validity of disciplinary dismissals based on the consideration that workers in a managerial position had substantial responsibility towards the company.[372] In this case, the employer dismissed workers who had established a union for those in managerial positions because their conduct disrupted the operations of the company.

The court ruled that the four workers made petitions in order dismiss the manager of the company under a plan that supported the outsiders. The petition was made by calling for the involvement of many other workers in the four branches in the company. This activity of the dismissed workers was conduct that interrupted the order of the company. This conduct fell under the disciplinary grounds of the internal work rules of the company and so the dismissal of the managerial workers was valid.

Regarding the appropriateness of the dismissals, the court ruled that the workers in positions as chiefs of branches had a high responsibility in each branch. Their position was to maintain the system and order, but the workers easily followed the initiative of the outside party and involved many subordinate workers. The conduct of the discharged workers caused disorder for the company. Because the responsibilities of the workers were substantial, the court could not judge that the disciplinary dismissals were inappropriate.

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[371] The establishment of the labor union of the workers in managerial position does not fall into (i) of Article 2 of Labor Union Act which states that a labor union is not an organization "which admits to membership of officers; workers in supervisory positions having direct authority with respect to hiring, firing, promotion, or transfers; workers in supervisory positions having access to confidential information relating to the employer's labor relations plans and policies so that their official duties and responsibilities directly conflict with their sincerity and responsibilities as members of the labor union concerned; and other persons who represent the interests of the employer."

[372] Osaka District Court, December 19, 2001, *Rouhan*, 824, p. 53.

2.3.4. Personal background

Falsifying personal background is appropriate enough to result in disciplinary dismissal when this fraudulence affects evaluation of the worker's ability to carry out duty or causes adverse influences on the social confidence or trust of the company. If the worker continuously works for a company for a long period, but disguises his or her background and does not cause damage to the company, the court rejects immediate disciplinary dismissal.

The following are court decisions are of cases related to dismissal of workers who falsify their historical or educational background. The Urawa District Court in 1994 accepted the validity of disciplinary dismissal on the grounds that the worker wrote "graduate" instead of the fact of having "dropped out" of high school.[373] The worker was employed as driving instructor after the end of a probation period.

On March 18, 1994, the employer used disciplinary dismissal against the worker on the grounds that he had misled the company by asserting his graduation status at the time of employment. The car-driving school was an institution that played a public role in instructing students or trainees in order to obtain the skill and knowledge of driving necessary for obtaining a driving license. As an instructor who was engaged directly in this work, the worker was required to have a high level of skill, knowledge or qualifications. In addition, the worker was required to maintain a proper and truthful relationship with the students, businesspersons, and executive officials.

Based on the consideration that the study record of the worker was a determinant of his quality and appropriateness for work, the court ruled that the background of the worker became one of the most important requirements for job recruitment and arrangement of duties. If the worker had made it clear at the time of employment that he had dropped out of high school, the company would not have employed the worker as an apprentice instructor. Neither after the apprenticeship, would the employer have given the worker the duty of driving instructor. The court considered that the worker committed serious disloyal misconduct under Clause 62, No. 1 of the rules of employment where it becomes grounds for disciplinary dismissal when a worker falsifies his or her background and gets employed.

The Sendai District Court in 1985 invalidated a disciplinary dismissal because merely a falsification of academic background or criminal record in itself could not be grounds for dismissal.[374] The worker was employed as the vice chief in a taxi company that was employing around ten other workers. The worker mainly managed the sums and received orders from passengers. However, at the time of employment, the worker hid a previous conviction record and falsified the work record.

Regarding grounds that the worker hid a history of crime and his past history, the court had the following view:

[373] Urawa District Court, November 10, 1994, *Rouhan*, 666, p. 28.
[374] Sendai District Court, September 19, 1985, *Rouhan*, 459, p. 40.

> When employers conclude the employment contract, they wish to know accurately the labor force of workers. The wish to conclude employment contracts and to understand accurately the labor force of workers is an appropriate requirement because contract continuously establishes the bilateral relationship where payment of wage is done to the labor force. The employers hope to conclude a complete employment contract (the contract without omission), and inform workers about the clause that the academic history, past employment, or history crime affects the evaluation of labor force when seeing concretely. In principle, workers bear the duty based on the principle of good faith that he must answer correctly. Therefore, as means to acquire the document for evaluation the work force, a worker who is requested to submit the paper of background, has a duty based on the principle of good faith that he has to write the fact. As long as there is a column concerning "reward and punishment" in the paper of background, the worker must write correctly his own criminal record in the same column.[375]

To the secure employment opportunities for rehabilitated criminals, the court further ruled that it was generally accepted that the refusal to hire workers based on their criminal record where the punishment had already ended was a cruel punishment or restrain. As a result, the employer's refusal explicitly counteracted with the effectiveness of the system ending the crime and with the purpose of the policy that aimed at eliminating crime. In view of the existence and meaning of the system for eliminating crime and any attempt to control the benefit to both worker and employer through the hiding of a criminal record, and given the type of work or content of the employment contract, as long as there were no special circumstances where the existence of such a criminal record could cause negative influences on the evaluation of work, the court ruled that the worker did not have duty upon the principle of good faith to inform about his criminal record.

In this case, when concluding an employment contract the worker did not write about the criminal record in the background paper. The employer considered such action as grounds for dismissal. However, the business of the company concerned the service of transporting of passengers, i.e. it was a taxi company. The content of the duties of the worker were nothing more than being a driver. Therefore, there was no special circumstance that the worker had to inform the employer about the criminal record. The worker had no duty upon the principle of good faith to fill in the criminal record or past history in the column of the background document requested for submission to the employer. Accordingly, failure in filling in the column did not constitute reasonable grounds for dismissal.

Regarding the grounds that the worker hid his academic record or work past record; the court ruled that an employer required the worker to inform about his or her academic or past record in order to have an appropriate evaluation. Hence, the worker had the duty upon the principle of good faith to write appropriately the academic record and working record in the column of the background document submitted to the employer. In the employment contract in this case, the falsification of the academic record did not have any influence on the appropriate evaluation of the worker. Regarding the working record, instead of writing the fact that the worker had worked for another taxi company for six months, the worker wrote nine months. This was just three months difference and had no effect on the evaluation of the worker. The court thought that the consequence of the falsification was not a serious

[375] Ibid.

violation of the duty based on the principle of good faith.

In another case of a worker falsifying a background the criminal record was a factor in the condition of employment at the time of recruitment. The employer took disciplinary ground when the worker gave a false answer to questions about their history of past criminal convictions. However, Nagasaki District Court in 2000 invalidated the *Yushi Kaiko* for the worker who hid the criminal record.[376] The employer claimed that at the time the worker entered the company in 1983, the worker hid his criminal record and that he had served a three-year imprisonment for a violation of the law on drugs.

The working rules of the company (Clause 100, No. 5) ruled that an employer would execute a disciplinary discharge when the worker lied about a criminal record that was the element of the conditions for recruitment. The court interpreted this regulation to be that worker's falsified answer at the time of interview was a reason for punishment, but the worker had no obligation to clarify his criminal record if employer did not ask. In this case, there was no proof that the employer questioned the discharged worker about the criminal record at the time of the interview. The worker's failure to reveal his criminal record did not correspond to disciplinary dismissal grounds in the rules of employment.

In a case presented to Sapporo High Court in 2006, the employer fired a worker on grounds relating to the worker's hiding information about his physical condition. The worker had problem with his eyesight but he did not report the truth. Instead, he wrote down that the condition of his health was good in the history record.[377] In the letter of history submitted at the time of the interview, the worker wrote good eyesight in the health section. The worker wished to be employed as a driver of heavy machinery. Thus, the worker did not explain the condition of his eyesight. The company employed the worker not knowing of the worker's real condition of shortsightedness.

The court ruled that although the worker did not notify the examiners at the time of interview, in the column of for condition of the health in the history letter, if the worker had a chronic disease that could influence the general condition of health and the working ability, he had to write this information. The worker's poor eyesight did not relate directly to a good or bad general condition of health. Hence, it was not a chronic disease. Because there was no malfunction of the worker's eyesight that concretely caused disqualification as a driver of heavy engines, the employer could not use the rules of employment (Clause 61 regarding grounds for disciplinary dismissal and Clause 54, No. 4 concerning grounds for ordinary dismissal) in order to fire the worker when the worker hid his malfunction of eyesight. In sum, as long as the worker had qualifications as the heavy engine driver, the personal background was not important for the employer.

Another case of dismissal on the grounds relating to falsification of background is seen in the decision of Tokyo District Court in 2004.[378] In this case, the worker who did not have the ability of Java language wrote letter of history that he had knowledge of this language. In addition, at the time of interview for recruitment, the worker told the interviewer that he had this ability. Because the employer hired worker for a position as a programmer of Java

[376] Nagasaki District Court, September 20, 2000, *Rouhan*, 798, p. 34.
[377] Sapporo Higher Court, May 11, 2006, *Rouhan*, 938, p. 68.
[378] Tokyo District Court, December 17, 2004, *Rouhan*, 889, p. 52.

language, the knowledge of Java language was necessity for this duty. When the worker hid the necessary background, this misconduct corresponded to Clause 86, No. 3 of the work rules. The court accepted the validity of the dismissal.

2.3.5. Using computer for private purpose

The employer also can dismiss the worker when that worker uses the computer during working hours for private purpose. The worker's conduct violates the requirement of concentration while on duty. Regarding the use of computer for private purpose while at work, the Tokyo District Court ruled in 2003:

> A worker though bears obligation of attention to work, which is the obligation upon the employment contract, is individual who has more than social life. Hence, it does not mean that communication with outside people during working hour is absolutely prohibited. As long as there is no special regulation in the rules of employment, it is not an obstacle of duty fulfillment, under the degree that is accepted as proper according to social common sense, such as it does not cause great economic burden to employer, using the computer of the employer for private use and for sending or receiving private E-mail does not violate the obligation of attention to work.[379]

In this above case, the court found that there was no prohibition on using a computer for private use. The worker sent and received mail twice a day during working hours, and it did not cause a great economic burden to the company. From a consideration on the appropriateness based on social common sense, the court ruled that such conduct by the worker did not violate the duty of concentration at work and invalidated the ordinary dismissal.

The Fukuoka District Court in 2004 invalidated the dismissal of a worker who was a teacher at technical school who used a computer during working hours for private purpose and contributed to a dating website and received and replied to E-mails many times.[380] The worker was registered with seven dating websites and one marriage consultancy website. The worker exchanged mails many times with a chat partner at the dating website. In particular, the worker used their E-mail address and made contributions to the website. From the content of the contributions, readers could know that the contributor was a person related to the company. Therefore, such contributions were immoral and inappropriate. This conduct violated the rules of employment in the company.

The court ruled that a series of such conduct not only violated the obligation to pay attention to work and obey the rule of the workplace, but also made the worker lose qualifications as an employee of the company. In addition, since this conduct affected the company as well as the credit of the technical school of the company, the worker's offense corresponded to disciplinary dismissal ground in the rules of employment. However, the court further ruled that disciplinary dismissal caused the worker to lose his position which

[379] Tokyo District Court, September 22, 2003, *Rouhan*, 870, p. 83.
[380] Fukuoka District Court, December 17, 2004, *Rouhan*, 888, p. 57.

was a heavy disadvantage. From such a view, the court required dismissal to be an appropriate measure in consideration of the type of violation of the rules, the level and circumstance relating to the punished person, and other various circumstances.

The court found that the content of the mails was about everyday life and a lovers' quarrel. Receiving and replying to the mail did not cause any particular hindrance to the business of the company because there was no proof that such conduct caused any particular bad influence on the pupils who were students of the technical school. Even though the number of applicants to the company's schools decreased in 2004, the worker's contribution on website did not have any influence on the business of the company. From the situation above, the worker's violation of each rule was not grave.

In addition, there was no rule regarding the use of personal computers in the company. There was also the fact that other workers also used the computer for private purposes very often. Accordingly, the company had mistake when it did not appropriately deal with the use of computer in the workplace. Moreover, the worker worked earnestly for a long period from the commencement of work until the time of dismissal. According to the history of the worker, he received disciplinary measures only once. The punishment was a one-month salary cut when the worker refused to take a post as school manager in 2000. In this case, the worker also submitted an apology letter and expressed his regret for the offence. Taking all the circumstances into consideration, the disciplinary dismissal was drastic compared to other disciplinary measures. The disciplinary dismissal in this case was invalid as an abuse of right to dismissal.

The employer appealed the case to the Fukuoka High Court in 2005 and this higher court rejected the decision of the District Court by validating the dismissal.[381] The High Court ruled that the worker used the mail address requested by his chatting partner. This conduct could allow other readers of the website to know the name of the school, which would cause damage on the credibility of the school. Based on the employment contract of the company, the worker had an obligation to concentrate on duties in the school during the working hours. However, the worker received and replied to enormous amounts of mail during the working hours for a long period of time. If this amount of time and work were applied to the original work, it was sure that better results could be obtained. The court could not overlook on the worker's negligence on duty.

In addition, the court ruled that everyone in the school knew that the employer did not allow using the borrowed computer and exchanging private mails for a long period of time and for continuous periods. In regard to the establishment or absence of rules regarding the use of personal computers, the worker's conduct amounted to a level of disloyalty. There was no evidence that there were other workers in the school who repeatedly used private mails in the level that was equal to the dismissed worker.

Furthermore, though the reasons for disciplinary measures were different, the worker received a salary cut as a disciplinary punishment before the dismissal. If the worker repeatedly committed the misconduct, there was a common understanding that employer would invoke a heavy punishment. When his chatting partner asked him twice if it was okay

[381] Fukuoka Higher Court, September 14, 2005, *Rouhan*, 903, p. 68.

to use the computer of the school for private mail, the fired worker still repeatedly received and replied the same mail. According to the investigation of the school, the worker did not apologize or reflect on his behavior even after the employer discovered the inappropriate conduct until the period when the worker stopped going to work.

After stopping going to work, the coworkers begged the worker to submit a letter of apology. Hence, the worker did not submit it following his own intentions. Additionally, there was no evidence that the disciplinary dismissal in this case was in retaliation for past misconduct by the worker. Based on the level of seriousness of the worker's misconduct and his position as a person who provided education to students, the disciplinary dismissal in this case was quite unavoidable and was not an inappropriately cruel measure.

In sum, the disciplinary dismissal on the grounds of private use of computer can take place when the employer publicizes the prohibition regarding the use of computers during working hours. The seriousness of the worker's offence depends on the amount of the time the worker spends on using the computer for private reasons. If the amount of time is considerable, it can affect the worker's results and performance. It is unreasonable when an employer discharges a worker for using a computer for private purpose for a short period of time. The employer investigated every fact of the condition of the private use of the computer and dismissed the worker. The court inevitably refers to the principle of equality by comparing the condition of private use of the computer of the discharged worker with other staff.

2.3.6. Crime or misconduct in private life

Under the employment contract, the worker has a duty to offer labor or services to the company and the company cannot restrict the worker from doing private activities outside of working hours. Therefore, private activities cannot become grounds for disciplinary measures.[382] However, the activities in private life of the workers may have direct relations with the rules of the company and affect the trust and social value of the company. Hence, misconduct and crime outside of work can become grounds for the disciplinary measures.

The Supreme Court in 1974 accepted the validity of disciplinary dismissal of a worker who was convicted for impeding police collection of information for a criminal investigation by ruling as follows:

> Disciplinary measure is a kind of punishment to secure the maintenance of order of the whole company and to make the operation of the company go smoothly. The worker has a duty to secure the maintenance of company's order. To secure the maintenance of the company's order, in general, can be achieved through the regulation that focuses on the worker in the workplace or the fault or misconduct that has relation with the accomplishment of work. However, it is not enough by just focusing on the fault in the workplace or others that relate to the working achievement. That means that the fault that does not relate to the accomplishment of work or occurs outside the company also has direct relation with the company's order. It is clear this fault can become an object

[382] 君和田, *問題解決 労働法〈5〉解雇・退職*, 45.

> of the regulation. In addition, because the company has activities in the society, there is fear that the damage or decline of social value causes obstacle to the smooth operation of the company. When there is fear connected to the damage that declines this value, the misconduct is concretely recognized, even if it is not related to the execution of duty made outside the workplace, and in order to secure the maintenance of order in the company widely, there has to be a case that this fault become an object of the regulation.[383]

In this case, the company was a government owned railway, which was connected to the public benefit; therefore, any criticism from the public was also the concern for the smooth operation of the company. In order to deal with the values from the society, it is reasonable for the employer to establish broader and stricter rules governing the worker's activities although this worker's fault was not related to the execution of duties. Strict rules regarding this issue might not be important for employers in governing the activities of employees in private companies. If the court's judgment showed the crime of the worker to be an interruption of the execution of the pubic work, the employer could take disciplinary dismissal.

The Tokyo Higher Court in 2003 validated the disciplinary dismissal on the grounds that the worker who was on the staff of an electric railroad company repeatedly committed sexual harassment on the train.[384] On November 21, 2000, the worker committed another act of sexual harassment on the train. After arrest and detention by the police, the company dismissed the worker according to a violation of Clause 7, No. 5 regarding disciplinary measures towards railroad staff. Based on this rule, when a railroad staff committed a crime regardless of it being inside or outside the period for performing duties, the employer could punish the worker according to the seriousness of offences. Such punishments include demotion, stoppage of salary rising, and disciplinary dismissal. The sexual harassment caused a great psychological pain to the victim. As with crimes against property such as stealing or embezzlement on duty and crime against body such as using violence or force, sexual harassment is a serious crime because it has a negative influence on the victim.

Moreover, the fired worker was on the staff of the electric railroad company. He had an obligation to protect the customers from the trouble and damage on the train. The court ruled that this moral standard accompanied the duty or position of the worker. The worker was in a position where this crime should be inconceivable. In addition, the court found that half a year before the worker committed sexual harassment that was grounds for dismissal. The worker was fined for it that time. Consequently, the employer did not increase the salary of worker. After this punishment, while the worker submitted a written apology requesting moderation in terms of disciplinary measures, he committed sexual harassment again. Based on these circumstances, the court stated that dismissal that was the most serious punishment was an appropriate measure.

2.3.7. Working for another company

Many companies prohibit an employee from working for another company without

[383] Supreme Court, February 28, 1974, *Rouhan*, 196, p. 24.
[384] Tokyo High Court, December 11, 2003, *Rouhan*, 867, p. 5.

permission, and the violation of this prohibition becomes grounds for disciplinary measure.[385] The employers worry that their business would be hampered when their workers work for their competitors and disclose their business's know-how or trade secret. Even though the employer does not regulate the duty not to compete in the rules of employment, the duty not to compete is one of the workers' duties of loyalty to their employers deriving from the relationship under the employment contract.[386] In addition, the Unfair Competition Prevention Act prohibits the worker from using or revealing trade secrets of the current employer in another company because such a conduct is a form of unfair competition.[387]

A worker can perform other jobs outside of the working hours that are not restricted by the company or that are not by nature competing with the business of his or her current employer. This is a conventional freedom for workers. Therefore, the company cannot use disciplinary measures only on the grounds that the worker provides labor or service in another company and receives wage from them because sometimes working for many jobs is unavoidable in order to sustain one's livelihood.[388]

However, when the worker has another post in another company; there is an obstacle in providing labor or services to the employer.[389] It is undeniably true that having many jobs at the same time is a big burden for the worker who might face problems of health and working ability. If the worker becomes sick because of overwork or cannot supply enough labor or services to the company, the employer can dismiss the worker. In this case, there is only ordinary dismissal, not disciplinary dismissal.

3. Necessity of the operation of the enterprise

An example of adjustment dismissal is the case where the company wishes to reduce the labor costs due to economic difficulties or due to the restructuring of the labor force in the company. Under Article 16 of the Labor Contract Act, the employer has a right to make an adjustment dismissal provided that the dismissal takes place according to concrete reasonable grounds and is appropriate according to the social common sense.

The courts have developed a judicial rule to examine whether or not an adjustment dismissal is an abuse of right. For example, in 1975, Nagasaki District Court ruled:

> Adjustment dismissal is not taken on grounds relating to the worker's capacity or misconduct. Rather, it aims to adjust the surplus number of workers. Because the adjustment dismissal affects the livelihood of the workers and their dependents due to

[385] Araki, "Legal Issues of Employee Loyalty in Japan," 279.
[386] Ibid., 274.
[387] The term "unfair competition" used in this Law shall mean any of the following acts:(vii) the act of using or disclosing a trade secret which has been disclosed by the business entity holding it (hereinafter referred to as the "holder"), for the purpose of unfair business competition or otherwise acquiring an unfair benefit, or for the purpose of causing injury to such holder; Unfair Competition Prevention Law of Japan, 47 art. 2, ¶¶ 1, No. 7 (1993).
[388] 君和田, *問題解決 労働法〈5〉解雇・退職*, 46.
[389] Ibid.

> difficulty in reemployment, particularly in the time of economic recession, the principle of good faith applies in the employment contract and requires particular restriction. In other words, the employer has exclusive right in direct and control the labor force in the company, but he or she cannot exercise this right arbitrarily. The validity of adjustment dismissal in this case must be considered from 4 points of view. First, it is necessary to conduct dismissal. If adjustment dismissal is not taken, continuation of the existence of the company is about to be in jeopardy. Second, the employer must put effort on absorbing the surplus workforce according to the measures such as transfer of worker, short-term suspension of workers, or collection of the voluntary retirement. Third, the employer put effort on explaining and notifying the worker representatives or labor union regarding the time, scope, and method of adjustment dismissal. And fourth, there must be a concrete or reasonable method of personnel selection according to the standard of adjustment.[390]

In this case, the adjustment dismissal was invalid since there was no recognition of the necessity for dismissal or personnel reduction.

The courts' rule on adjustment dismissal was influenced by the practice in large companies that tried to keep their workers even during economic crisis, particularly since the oil crisis in 1973.[391] In order to avoid the abuse of right, the employer has to fulfill four requirements: (1) the necessity of personnel reduction, (2) administration of the effort to avoid the dismissal, (3) reasonable selection of the workers, and (4) the administration of explanation or consultation with the union or appropriate dismissal procedures. An adjustment dismissal is the result of the employer's real situation of management, and is not the fault of the worker. Therefore, there is high necessity for protection of the workers.

In addition, the burden to prove these four requirements also belongs to the employer. The employer has to prove that the adjustment dismissal takes place according to a necessity for personnel reduction after they have conducted dismissal avoidance measures and a reasonable selection of dismissed worker. Furthermore, the employer has a duty to show the evidence that he or she has conducted reasonable procedures such as consultation with workers' representative. However, the burden of proof also belongs to the workers when they claim that the employer does not execute consultation or explanation with the workers in good faith.[392]

There are two different views over the rule deciding the validity of adjustment dismissal. One view is that the validity of dismissal is decided based on the rule of the four requirements where the employer has to fulfill all the four conditions. The second view is the rule of the four factors where the four factors are nothing but the elements for examining the validity of dismissal, and the validity of dismissal is judged from the consideration of the four factors as a whole.[393] Thus, according to the rule of four factors, even though the employer does not respect or follow one of the factors, the dismissal is still valid when considered from the

[390] Nagasaki District Court, December 24, 1975, *Rouhan*, 242.
[391] Roger Blanpain, *Corporate Restructuring and the Role of Labour Law*, 1st ed. (Kluwer Law International, 2003), 115.
[392] Tokyo High Court, October 29, 1979, *Rouhan*, 330, p. 71; Tokyo District Court, November 29, 2006, *Rouhan*, 935, p. 35.
[393] Tokyo District Court, January 21, 2000, *Rouhan*, 782, p. 23.

perspective of the other factors as a whole. There are many cases where courts have a tendency in applying the rule of four requirements in the case of the adjustment dismissal.[394]

3.1. Necessity of personnel reduction

One of the four requirements for a valid adjustment dismissal is the necessity for personnel reduction. When the economic situation of the company becomes worse, an employer may wish to reduce expenses. Hence, an employer may reduce the companies' expenses by reducing the labor cost and this leads to personnel reduction. A personnel reduction is necessary only if it is the last resort after the employer has taken other measures in order to decrease expenditure in the company. Accordingly, there is an interrelationship between the requirement of necessity for workforce reduction and the requirement of employer's effort to avoid the dismissal. For instance, if the employer does not make efforts to avoid dismissal by halting recruitment of new workers or by cutting the cost of the workforce, the employer violates the requirement of necessity through workforce reduction.

The necessity in personnel reduction is recognized when the situation of the business of a company reaches a certain level.[395] First, the continuance of the company is about to be in danger if the dismissal does not take place.[396] In one case, a company that sold sewing products such as underwear and pajamas let go 29 workers on the grounds that there was a reduction in orders due to the bad condition of the textile industry. However, the employer was not sure about the number of workers necessary for dismissal.

In addition, the court had questions over the company's standards for selecting the workers for adjustment dismissal. The employer did not examine carefully the condition of the company properly before the dismissal of the 29 workers. After the dismissal, there were nearly 130 women workers who voluntarily resigned according to reasons of marriage and childbirth. Consequently, the company lacked workers, and employed four new workers. Considering the recent recruitment of eight new workers and the fact that of whether the employer in good faith had examined the detailed facts before conducting the adjustment dismissal in the company, the court ruled that there should have been no such dismissal. Thus, the company did not need to dismiss 29 workers.

Second, personnel reduction is necessary when there is in reality a high level of business crisis and there is no alternative method besides a reduction of workers through dismissal.[397] For example, in a case decided by Okayama District Court in 1979, the shipbuilding section was the backbone of the employer's business.[398] The company was faced with a difficult situation as follows. There was a surplus of world-sized ships that led to the decline of share in shipbuilding in the company due to the huge fall in orders for shipbuilding (in 1978 declined by 12% if compared to 1973), and the fall of in prices (reduced

[394] 大内, 山川, 解雇法制を考える, 9.
[395] 君和田, *問題解決 労働法〈5〉解雇・退職*, 60.
[396] Nagasaki District Court, December 24, 1975, *Rouhan*, 242, p. 14.
[397] Okayama District Court, July 31, 1979, *Rouhan*, 326, p. 44; *Rouhan*, 685, p. 49.
[398] 326 Rouhan.

half of the price compared to that in 1973).

Furthermore, the company excessively decreased the production of ships run by diesel and started to develop printing machines. The company found it difficult to start new production. According to the content of the plan for the improvement of the company's business drawn up in 1978, the court found that the company faced with a real deficit of around 200 billion yen. The employer explained that the total amount of money in reservation at the time of conducting the plan for improvement was 300 billion yen. In the year of 1978, the company had already used up two-thirds of this amount. Therefore, the company faced a high level of business crisis.

Third, the court accepts the necessity of workforce reduction according to the reasonable administration of the company.[399] In a case decided by Tokyo High Court in 1979, a company produced and sold high-pressure gas such as oxygen, argon, nitrogen, acetylene, and liquefied petroleum gas.[400] The company also produced and sold equipment for using gas. The dismissed workers were those employed at the sales section of the acetylene gas at the Kawasaki city factory of the company. The company notified the workers on July 24, 1970 about the dismissal accompanied by the closure of the acetylene sales section on August 15, 1970.

To consider whether the dismissal corresponded to Clause 52, No. 8 of the rules of employment that allowed dismissal to take place due to unavoidable business necessities, the court synthesized the concrete circumstances and conditions of the employers and workers. Hence, the court considered the requirement that the closure of the particular section was an unavoidable necessity based on the reasonable administration of the company.

The acetylene section faced serious competition due to an increase in many companies that had the same business (from 15 before 1953 to 85 in 1963). From 1960-1961, the market of acetylene gas deteriorated since the industry of iron, steel, shipbuilding and engine construction started to use oil due to its great abundance with a low price and low risk of danger of explosion. Accordingly, the price of the acetylene decreased from 300 Yen to 193 Yen per kilogram. In the acetylene business, the normal efficient productivity of a worker per one month was six tons. However, in the company, the productivity varied from 1 to 1.8 tons per worker. As a result, the percentage of the personnel cost included in the cost production of the acetylene was at a high ratio. The standard of wages of the workers in the acetylene section was favorably comparable with other companies. Therefore, this high wage led to high production costs and made the company unable to overcome the deterioration of the market position of the company. Because of this, the income and expenditure of the acetylene section reached a deficit, which kept accelerating every year.

Without expectations for improvement in income and expenditure in the acetylene section, the company could not ignore the situation. Furthermore, the oxygen section that was the main force in the company was falling behind in competition with other companies that had the same business in terms of investment in plant and equipment. The company feared that huge differences in the quality of the business with other competing companies

[399] The court accepted the necessity and validated the dismissal. Tokyo High Court, October 29, 1979, *Rouhan*, 330, p. 71.
[400] Ibid.

had serious effects on the administration of the company. In order to aid the administration of the company, the closure of the acetylene section (that became the main cause of many years of loss in in of the company) was an unavoidable necessity based on the administration of the company and was a reasonable measure. The Tokyo High Court accepted the necessity and validated this adjustment dismissal.

Fourth, the reduction of the workforce is necessary when an employer makes an effort to keep the worker who loses his or her post due to the closure of their workplace as a result of company's reorganization. For example, in a case decided by the Tokyo District Court in 2000, the employer closed a section which led to the loss of jobs for the workers.[401] In this case, the company proposed to the workers an agreement to terminate the employment contracts. The company offered resignation conditions that would provide a fixed amount of money and support reemployment activities. Because the worker in the case rejected this proposal and wished to continue working with the company, the company offered the position of clerk with annual income of 6,500,000 yen in another section. Though it was lower than his annual income of 10,520,000 yen, the annual income as the clerk was higher than that of other workers who were working in the same position. However, the worker rejected this proposal. Based on the reasonableness of the employment termination, the employer's consideration on worker's livelihood after discharge and the procedures carried out before dismissal, the court accepted the validity of the dismissal.

In another case, the Okayama District Court in 2001 accepted the necessity of personnel reduction when the company faced a long-term slump and there was a tendency that this long-term slump would keep continuing.[402] When the company faced deficits, it employed the policy of staff rationalization and the closure of unprofitable stores and shops. The company encouraged the worker in the case to choose a commission business or early retirement, but the worker refused both of these. Regarding job relocation, there was no position available in the area the worker was working in even though the company relocated him. Since before this the worker did not accept a transfer to Osaka, which was far from the current workplace, the employer decided that worker would not accept a transfer to a faraway workplace.

In addition, even though the court accepted the necessity in personnel reduction in the first step, the adjustment dismissal was still invalid as the scale of dismissal or number of workers to be reduced was more than what was recognized to be necessary in reality. For example, according to a decision of the Osaka High Court in 2007, judging from the company's economic situation, it was necessary to get rid of six workers through adjustment dismissal.[403] However, the employer dismissed 10 workers. Thus, the employer had to prove the necessity of letting go 10 workers. Even though the court accepted the necessity of personnel reduction by six workers, the dismissal of 10 workers that was done for the same

[401] Tokyo District Court, January 21, 2000, *Rouhan*, 782, p. 23.
[402] Okayama District Court, May 22, 2001, *Roukeisoku*, 1781, p. 3.
[403] The company was faced with the economic decline seen from the cancellation of the transaction of selling electricity with its main partner and losses at the company every month. The business situation of the company at the time of dismissal was a situation where the company faced with the considerable amount of losses, and the personnel costs compared to the amount sold was high. Meanwhile if the company reduced the present deposited money, the company could maintain the business. Considered from the amount of the business losses and the conditions of the cost of personnel, there was a high possibility in reducing the personnel costs in the company. The company did not make a proper procedure such as consultation or explanation to the workers about the adjustment dismissal. The dismissal was invalid. Osaka High Court, May 17, 2007, *Rouhan*, 943, p. 5.

reasons and on the same occasion was invalid because there was no proof of necessity for a personnel reduction of 10 workers. In other words, the court could not validate the dismissal of 6 workers and invalidate the dismissal of 4 workers.

When deciding the necessity in reducing the workforce, the court examined the situation of cash flow, gain and loss, movement of income of worker or personnel costs, personnel movement regarding irregular workers such as newly employment and part-time job workers, the quantity of the duty, and dividend of the enterprise.[404] Regarding the situation of the property or gain and loss of company, if the employer does not show financial statements (letters calculating gain and loss, or certificates of debt and credit), it is difficult for court to recognize the necessity in personnel reduction.[405]

3.2. Effort of dismissal avoidance

A valid adjustment dismissal requires the employer's effort in dismissal avoidance. For example, the Tokyo District Court in 2004 ruled that a dismissal was the termination of an employment contract and had great effect on the rights and duties of the worker. Therefore, the court did not accept the validity of a dismissal that violated the social consciousness because it was an abuse of this right.[406] Dismissal in this case was taken along with the closure of an Osaka branch. The court further ruled that even though the decision whether or not to close the branch belonged to the responsibility of the employer who was the chief of the enterprise, the employer could not immediately dismiss all the workers of that branch.[407] The dismissal was made in line with personnel adjustments caused by the decline of the business and was solely an administrative decision by the employer. As a result, although not the fault of the workers, the dismissal had a major effect on the livelihood of the workers. Accordingly, if the dismissal was not necessary, it was invalid. Even though there was such a necessity, the employer had a duty to make efforts to avoid making dismissals before ending the employment of the workers.

The concrete plans for dismissal avoidance are as follows: a plan for personnel payment cuts and cost reduction, a freeze in new recruitment, wage cuts or a shortening of working hours, transfers, temporary transfers, short leave, or voluntary retirement. The requirement of the employer's effort in avoiding dismissal has an interrelationship with the first requirement, the necessity of personnel reduction. Voluntary retirement and transfer are examples of the employer's effort toward dismissal avoidance.

3.2.1. Acceptance of voluntary resignation

Voluntary resignation is a reasonable method in terms of personnel reduction, which

[404] 君和田, *問題解決 労働法〈5〉解雇・退職*, 59.
[405] Ibid.
[406] Tokyo District Court, March 09, 2004, *Rouhan*, 876, p. 67.
[407] Ibid.

respects the will of the workers.[408] Therefore, there are many cases that decide on the non-compliance with a duty of effort towards dismissal avoidance in the case of sudden dismissal without any calls for voluntary resignation. For example, the Supreme Court in 1983 invalided a dismissal when the employer did not make an effort in calling for voluntary resignation from the worker.[409] In this case, the employer's business was to run a kindergarten. It started to adjust the numbers of day-care workers due to the decrease in the number of kindergarten children. At the time the employer decided to dismiss two workers including the claimant who was the party in the conflict. The employer designated the two workers and carried out said personnel adjustment. Before this dismissal, the employer did not make any effort at all to request their cooperation and did not explain the circumstances of personnel adjustment being unavoidable. Also, the employer did not take measures to ask for voluntary resignations. The Supreme Court ruled that the dismissal, of which the worker were notified suddenly six days before termination, violated the principle of good faith in the employer and worker relation and was considered invalid as an abuse of right.[410]

If no worker applies for the voluntary retirement, when the employer dismisses all the targeted workers the employer's conduct is not appropriate in terms of the acceptance of voluntary resignations that respect the freedom of the worker in making decisions and in terms of plans for reducing staff. This rule is extracted from the decision of the Kyoto District Court in 1996.[411] The acceptance of voluntary resignation means that the employer respects the freedom of the worker in making decisions as whether to resign or to continue to work. In this case, while inviting workers for voluntary resignation, the employer dismissed all the workers who were subject to dismissal and did not apply for early retirement. Accordingly, the worker in the case had no freedom not to resign. He had to resign when there was invitation to do so from the employer. Therefore, the method used by the employer was not appropriate within the meaning of the recruitment for voluntary retirement. In this case, in order to reduce personnel expenses, the employer dismissed three workers. The employer could also have achieved his aim if he changed the working conditions of two workers who continued working in the company by reducing their wages. However, when the employer dismissed five workers all at once, such an action was inappropriate according to the method for dismissal avoidance.

If an employer does not provide conditions that aim to promote free will in decisions of resignation, the acceptance of voluntary resignation of worker is not evaluated as being an effort towards dismissal avoidance. For example, in a case decided by the Nagoya High Court in 2006, an employer made the acceptance of voluntary resignation before dismissal under the condition that it provided an additional supply of one month of basic wage in addition to the resignation money according to the company's convenience.[412] The court further ruled that in the content of this condition, if the employer immediately fired the workers according to adjustment dismissal there was nothing besides the fact that the employer would have to give the retirement money and naturally have to pay the benefit going with the dismissal notice. The employer's proposal was not an appealing condition to make workers who wished to work to retire from their jobs. In the reality, not even one worker agreed to resign during the

[408] 君和田, *問題解決 労働法〈5〉解雇・退職*, 60-61.
[409] Supreme Court, October 02, 1983, *Rouhan*, 427, p. 64.
[410] Ibid.
[411] Kyoto District Court, February 02, 1996, *Rouhan*, 713.
[412] Nagoya High Court, May 31, 2006, *Rouhan*, 920, p. 33.

period when voluntary retirement was being sought. Therefore, the voluntarily retiring workers scheme was unreasonable as a way of avoiding dismissal.

The offer of voluntary retirement must be made to all workers in the company. According to the company, there was a fear that the acceptance of voluntary retirement would cause an outflow of talented workers necessary for the operation of company.[413] Hence, the employer managed to use individual persuasion or determine the people who were subjected to the collection. According to a decision of the Yokohama District Court in 2006, although the employer did not take the voluntary retirement due to such a fear, the court decided that the employer did not make enough effort to avoid dismissal.[414] The court ruled that the employer did not have to seek voluntary retirement for the workers if his business consisted of occupations that needed special skill, knowledge, and experience. The voluntary retirement would cause a great loss to the company due to the outflow of non-replaceable talented workers from the company.

However, in this case, the surplus workers who were first to be discharged were those who were working in the manufacturing section of the factory. Because this kind of business did not need someone to have special skill, knowledge or experience, the employer should not have feared the outflow of non-replaceable talented workers so long as the employer accepted voluntary retirement from workers in the manufacturing section. Consequently, the court ruled that it was unreasonable when there was no acceptance of voluntary resignation from these workers.

According to the above case, the employer has to offer retirement to all workers subjected to adjustment dismissal. An employer can also keep the talented people necessary for the operation of the company by excluding them from the list of those eligible for voluntary retirement. However, in planning to dismiss particular workers, the employer persuaded the other applicants for voluntary resignation to stay in their jobs. In this case, the Osaka District Court in 1979 decided that there was no administration of duty of effort for dismissal avoidance because the employer engaged in unfair persuasion that violated the principle of good faith in the process of accepting voluntary retirement of workers.[415]

3.2.2. Transfer

A transfer of a worker can be made in three forms: (1) *Haiten* where the worker is transferred inside the company, (2) *Shukko* where the worker keeps their status from the previous company but is transferred to another company, and (3) *Tenseki* where the worker is transferred to other company without carrying over the status from the previous company.[416] Adjustment dismissal without prior execution of transfer means that an employer does not conduct any effort towards dismissal avoidance. In addition, if the employment contract restricts the type of duty and service, and if such type of duty is abolished, from the point of view of dismissal avoidance (maintenance of employment), there

[413] 君和田, *問題解決 労働法〈5〉解雇・退職*, 61.
[414] Yokohama District Court, September 26, 2006, *Rouhan*, 930, p. 68.
[415] Osaka District Court, April 25, 1979, *Rouhan*, 331, p. 48.
[416] Araki, *Labor and Employment Law in Japan*, 130.

must be an attempt at transfer or temporary transfer of the worker concerned. Immediate dismissal without transfer or temporary transfer is evaluated to imply no effort towards dismissal avoidance.[417]

Regarding the approach of seeking transfer, the Osaka District Court ruled in 2000 that employers are required to transfer a worker before dismissal.[418] The court found that in the self-declaration paper made by the worker, although work other than that at the current working location was impossible, the worker in the past had also worked in work locations other than Chiba, Nagoya, and Osaka. In the company, there was no condition that required consent from the worker for a transfer. In addition, it was not the case that the worker refused the suggestion of transfer to other regions. Accordingly, the employer had to transfer the worker to another work location if his job at the existing workplace was impossible. Furthermore, when the worker hoped for duties in other operations, the employer had to examine the placement of the worker and the temporary transfer to the relative company.[419]

3.3. Reasonable selection of workers

Even though a dismissal is inevitable, there must a reasonable standard of selection of workers to be dismissed and there must be a fair selection. A dismissal that lacks reasonableness in personnel selection is generally invalid. Even though dismissal is inevitable, the employer explicitly violates the principle of justice when they fire workers who should not be essentially dismissed. For example, such a case could be when the employer preserves the cooperative union and weakens the opposing union by deliberately selecting workers who are leaders and activists in that opposing union as the target for adjustment dismissal.[420] Adjustment dismissal used for the purpose to weaken one union and provide favorable treatment to another union lacks reasonableness in terms of standards of personnel selection, and the dismissal lacks appropriateness.[421] The dismissal such a case would be invalid because of the abuse of right.

The court decides the standard of personnel selection to be when the employer expresses their intention for dismissal and rejects any claims made by the employer after this expression, particularly during the litigation process. The Tokyo District Court in 2001 ruled on an exception where an employer made clear the standard of personnel selection after the dismissal.[422] At the time of dismissal, the employer could not make clear this standard to the workers. Though he established such a standard after the dismissal, this standard was fairly applied to select the dismissed workers. Only if there was a claim or proof of special circumstances that there were reasonable grounds dictating that the employer could not make clear the standard, these grounds would then be seen to affect the reasonableness of personnel selection.[423] In this case, the court decided that the personnel selection of the worker lacked

[417] 君和田, *問題解決 労働法〈5〉解雇・退職*, 62.
[418] Osaka District Court, May 08, 2000, *Rouhan*, 787, p. 18.
[419] Ibid.
[420] Tokyo District Court, March 09, 2004, *Rouhan*, 876, p. 67.
[421] Ibid.
[422] Tokyo District Court, May 17, 2001, *Rouhan*, 814, p. 132.
[423] Ibid.

reasonableness.

According to the judge-made law, in general, the concrete standard of selection is a consideration of the history of past disciplinary punishment, the number of days of lateness and absence without permission, the working results (level of contribution to the company), age, length of service, family support, degree of shock that would occur due to dismissal, and the form of employment.[424] In reality, whether or not the standard of selection is reasonable is decided individually according to the facts of each case. The following determinants are examples of criteria for the selection of personnel.

3.3.1. Working results

Employers seek for courts to accept the selection of dismissed workers based on the evaluation of working results and ability. The workers who are dismissed first are those who have poor working results or have made little contribution to the company. The employer has to make sure that the standard for the evaluation on the working results of the worker is appropriate. The following cases examine the evaluation of working results that affected the reasonableness of selection of workers for adjustment dismissal.

In a case decided by the Fukuoka District Court in 2004,[425] at the time of an employment freeze, the employer found that it necessary to let go 30 part-time workers. However, the employer selected candidates for termination according to their attendance rate within the regular period. Second, from these candidates, the employer evaluated their attitude in terms of duty, cooperation, work efficiency, and the condition of quality production, and selected workers for dismissal, but employment freeze impeded reasonableness in the standard of selection. The standard in selecting candidates included only the attendance rate within the regular period and excluded the working time outside the regular period such as periods of overtime work. However, from the point that the working hours within the regular period were the working hour in the contract of the part-time workers, the exclusion of the working time outside the stated period was reasonable. According to this standard alone, each dismissed workers could not become objects of dismissal. On the other hand, the standard of the second method of selection was not reasonably clear and was an item that easily fell into arbitrary judgment. When applying this standard as a standard of selection, the personnel performance evaluation was always done by employer. As the employer had not made personnel performance evaluation for each day, based on the premise that there was no preparation for the conduction of adequate investigations up until the selection, the court could not accept that the standard had reasonableness.

In a case presented to Kofu District Court in 1987, the court rejected the reasonable of the standard of the employer that showed total points for the most recent of three personnel performance evaluations.[426] Regarding the point of performance evaluation, the court could acknowledge only the total points because employer did not clearly explained the concrete content of the performance evaluation.

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[424] 土田 et al., 条文から学ぶ労働法, 257.
[425] Fukuoka District Court, May 11, 2004, *Rouhan*, 879, p. 71.
[426] Kofu District Court, May 29, 1987, *Rouhan*, 502, p. 88.

The Tokyo District Court in 2003 rejected the reasonableness of personnel selection where the employer had used his discretion to evaluate the future use of the workers in a group, without having concrete or reasonable criteria.[427] The standard of personnel selection was as follows: the targets for dismissal were those who were not in managerial posts and were judged as difficult for use in the group in the present and the future. The selection included those who could not find appropriate work in the company, based on the results of the employer's careful and comprehensive judgment about the possibility of future use according to the workers' technique, skill, and knowledge. The court could accept this standard of personnel selection as a reasonable standard that concretely and reasonably ensured the employer's judgment. However, regarding the point that the possibility of present use being also added to the possibility of future use, this was an uncertain factor in the judgment giving the employer great discretion. The judgment was concretely and reasonably guaranteed only when it was made according to sufficient evaluation standards, but not according to the employer's discretion. However, when scrutinizing the record, the court found that there was not enough evidence to show that the employer could guarantee the reasonableness of his judgment.

3.3.2. Age and length of service

An employee's age or length of service is one of the criteria for the standard for personnel selection. A worker is selected for dismissal according to age and long-term or short-term employment relations. From the perspective of the employer, the company benefits when there is a dismissal of a worker with a high salary and of old age (long-term employee). In contrast, from the viewpoint of the workers, dismissal has an adverse impact on their livelihood because being old might become a negative influence on the decision of the employer in recruiting them. That is why courts require employers to provide benefits to old-aged workers when selecting them as the target for economic dismissal.

According to case law, a reasonable selection occurs when the worker who has almost reaches retirement age receives a reasonable compensation or benefit. For example, in a case referred to the Fukuoka District Court ruled in 1992, there was dispute between the employer and workers on the reasonableness of the dismissal of workers who were more than 53 years old. The court ruled that even though it was the case that old age people faced more difficulty in re-employment compared with young people, the retirement age in the company was 55. In addition, though the workers continued working, they could work at most for only two years.[428] Furthermore, in consideration of other points, such as the payment of retirement money and the connection to public welfare, the standard of dismissal in this case was reasonable as a concrete standard without arbitrary decisions.[429]

In addition, the Tokyo District Court ruled in 2001 that based on the standard where the management worker was more than 53 years old, the employer could not ignore the

[427] Tokyo District Court, July 10, 2003, *Rouhan*, 862, p. 66.
[428] Fukuoka District Court, November 25, 1992, *Rouhan*, 621, p. 33.
[429] Ibid.

worker's expectation for wages in the period left until the retirement age.[430] Because being old (more than 53) meant it was difficult for re-employment, the court rejected the reasonableness of selecting workers for dismissal if the employer did not provide the workers with economic benefits for the cost of early retirement and support for re-employment.[431]

3.3.3. Types of employment relation

In consideration of the form or type of employment, the employer will dismiss irregular workers before selecting regular one for redundancy because the relationship between the company and irregular workers is weaker and the shock to the livelihood due to dismissal is very small.[432] However, recently there has emerged quasi part-time workers who are no different to regular ones in terms of working hours and content of duty, but the wage is lower than that of regular workers. Moreover, there is also a focus on the household economy of these workers.[433] There is a debate as to whether or not these workers should be selected before regular ones on the grounds that they are part-time employees.

According to case law, the difference between a regular and irregular worker is the level of attachment to the company.[434] The Supreme Court accepted the validity of adjustment dismissals when there was a need for personnel reduction, and the employer did not offer voluntary retirement for the regular workers, instead firing short-term workers.[435] When there was a need for personnel reduction, the first workers to be dismissed were those who were not regular workers. According to the Takamatsu District Court in 1998, quasi-regular workers were employed temporarily according to the amount of the work in the company without any guarantee of lifetime employment like regular workers.[436] There was a complete difference in the level of attachment of quasi-regular workers to the company when compared with the regular workers who were employed under the expectation of lifetime employment.[437] In the case of adjustment dismissal, as long as there was no special circumstance, the court interpreted that the plan for personnel reduction of quasi-regular workers before dismissal of regular workers was reasonable.[438] In this case, the court rejected the reasonableness of an adjustment standard that was established based on poor attendance without distinguishing the status of workers; that is, whether the workers in question were quasi-regular or regular. The adjustment dismissal in this case was invalid.

3.4. Appropriateness of procedure or duty of explanation and consultation

[430] Tokyo District Court, December 19, 2001, *Rouhan*, 817, p. 5.
[431] Ibid.
[432] 君和田, *問題解決 労働法〈5〉解雇・退職*, 65.
[433] Ibid.
[434] Supreme Court, December 04, 1986, *Rouhan*, 486, p. 6.
[435] Ibid.
[436] Takamatsu District Court, June 02, 1998, *Rouhan*, 751, p. 63.
[437] Ibid.
[438] Ibid.

Before dismissal, the employer must provide adequate explanation and engage in consultation with the labor union and workers regarding the details and necessity of adjustment dismissal (time, scale, and method) and the standard of personnel selection. An adjustment dismissal that does not pass or go through enough consultation is invalid since it violates the clauses of the collective agreement.[439] In fact, even in the case where there is no such clause in the collective agreement, a dismissal that takes place without explanation or consultation is invalid.

In addition, when the employer explains the business situation, using general expressions to say that the dismissal is inevitable due to economic difficulties, this does not mean that the employer has fulfilled their duty of explanation. For example, Morioka District Court ruled in 1979 that because the dismissal of all workers according to the closure of Hanamaki factory was not a simple case, the company should have added enough explanation about reasons for the closure of the factory, the necessity of dismissal, the reasons that workers in other factories did not become the target of dismissal, financial statements, and accounting statements.[440] However, the company from the beginning until the end of the procedure of dismissal provided abstract explanations saying that the closure of the factory and dismissal was an unavoidable measure in order to overcome a slump. There was no evidence that the employer provided an explanation understandable to the dismissed workers and the union.[441] The court invalidated the adjustment dismissal regarding the closure of the factory in this case because the employer violated the principle of good faith.

In cases where the labor union requests information on the company's financial situation, the company must present and explain with particular concrete documents or materials. For example, the Kyoto District Court in 1996 found that the employer did not honestly carry out an explanation or consultation in a case where the company only referred to the documents of debt and credit but did not allow workers to copy these documents.[442]

Also such an explanation or consultation is taken with the labor union under the understanding that the workers belong to that organization. However, where the workers do not belong to the labor union (in the case where there is no labor union this applies to all the workers), it is necessary to offer explanations or consultation with individual workers. Such explanations or consultations also have to go through the form of collective meetings. However, the employer has to guarantee an opportunity for adequate explanation or consultation with the workers subjected to the dismissal. Because there was no opportunity for direct consultation with the workers in non-managerial posts who had high a possibility of being dismissed or their representatives, the Fukuoka District Court in 1998 took the view that employer did not fulfill the duty of explanation and consultation.[443]

3.5. Adjustment dismissals in the case of closure of a factory, branch, or section

[439] 君和田, *問題解決 労働法〈5〉解雇・退職*, 66.
[440] Morioka District Court, October 25, 1979, *Rouhan*, 333, p. 55.
[441] Ibid.
[442] Kyoto District Court, February 02, 1996, *Rouhan*, 713.
[443] Fukuoka District Court, December 24, 1998, *Rouhan*, 758, p. 11.

In the life of a company, the employer might close or abolish a factory, branch, or special sections, which lead to the dismissal of workers who are engaged in those workplaces. In this case, the validity of dismissal is also decided according to the rule governing adjustment dismissal, the rule of four requirements. There are many conflicts over the efforts for dismissal avoidance and the requirement of adequate explanation or consultation.[444]

The Tokyo High Court in 1979 validated the adjustment dismissal when a company closed their acetylene section. This was because there was a surplus of people in other sections, and the employer feared that the acceptance of voluntary retirement in those sections would cause damage to the company.[445] As a result, adjustment through dismissal in the acetylene section was inevitable. In another case, the Sendai District Court in 2002 invalidated a dismissal when the employer did not engage in sufficient efforts at dismissal avoidance. Due to the fact that the adjustment dismissal was a result of the closure of the office, the employer sufficiently fulfilled three requirements, namely necessity for personnel reduction, reasonable selection of workers, and the appropriateness of the dismissal procedure. However, regarding the effort of dismissal avoidance, the employer seemed to have made no serious or earnest efforts in providing temporary or permanent transfers.[446]

There have also been cases where the courts invalidated a dismissal when the employer did not fulfill the requirement for adequate explanation or consultation with the workers. The Kyoto District Court in 2003 invalidated a dismissal when there was a lack of reasonable procedure for the dismissal. With the closure of a machinery section, the employer did not carry out enough of an examination into their newly built company regarding changes in business to avoid having to engage in dismissals. In addition, the employer failed to conduct proper dismissal procedures such as providing explanations or consultation.[447] The Fukuoka District Court in 2007 invalidated the dismissal.[448] In a dismissal due to the abolition of a cooking section at a special home for nursing old aged people, there was no examination of other possibilities and not enough explanation or consultation with workers was provided.

The dismissal of all the workers of the spinning section was due to the closure of that section after the decision of the management. The court invalidated the dismissal because the employer could not prove that it was necessary for company to dismissal all the workers who were in the spinning section.[449] The reasonableness of personnel selection is accepted by courts mostly in case of the dismissal of all workers who are engaged in specified duties in a particular section.[450] However, in cases where the workers are employed without restriction of place and type of duty, or where they are engaged in a particular post and subjected to dismissal, the employer has to fulfill the requirement of reasonableness of personnel selection.[451] For example, an employer did not establish the standard of selection for workers for dismissal. Subsequently the employer fired three workers who were engaged in the section that was closed.[452] The Tokyo District Court in 1998 ruled that the employer probably

[444] 君和田, *問題解決 労働法〈5〉解雇・退職*, 67.
[445] Tokyo High Court, October 29, 1979, *Rouhan*, 330, p. 71.
[446] Sendai District Court, August 26, 2002, *Rouhan*, 837, p. 51.
[447] Kyoto District Court, June 30, 2003, *Rouhan*, 857, p. 26.
[448] Fukuoka District Court, February 28, 2007, *Rouhan*, 938, p. 27.
[449] Nagoya High Court, January 17, 2006, *Rouhan*, 909, p. 5.
[450] 君和田, *問題解決 労働法〈5〉解雇・退職*, 68.
[451] Ibid.
[452] Tokyo District Court, January 07, 1998, *Rouhan*, 736, p. 78.

made the selection of workers by chance. Consequently, the method for selecting the dismissed workers was not appropriate because this standard lacked fairness.

Section 4: Remedies for unjustified dismissal

1. Definition of invalid dismissal

The Labor Contract Act (Article 16) stipulates that a dismissal that lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms is an abuse of rights and invalid. In theory, according to the effect of the abuse of rights, even though an employer has an obligation for compensation for damages, there may be consideration that the dismissal is valid. However, judge-made laws have long invalidated dismissals and the effects of an abuse of right to dismissal are incorporated into Labor Contract Act.[453] In Japan, the effect of an invalid dismissal is not limited to the case of an abuse of right to dismissal. A dismissal that violates the restricted grounds in law, internal work rules, or collective agreements is also an invalid one. When a dismissal is invalid, the employment relations continue to exist as if there was no dismissal. Consequently, an employer has to reinstate the worker to the same position with the same treatment.

2. Wages during dismissal

When the court invalidates a dismissal, there is a legal problem concerning wages during the period of dismissal from the day of discharge until the day of the issuance of the judgment. The effect of invalid dismissal implies the continuity of the employment contract, but it is very common that the fired worker does not supply labor or services from the day he or she has received notice of discharge from the employer. The court applies Article 536 (2) of the Civil Code regarding the assumption of risk to provide the dismissed workers with the right to wage during the dismissal.

Article 536 (2) reads, "If the performance of any obligation has become impossible due to reasons attributable to the obligee, the obligor shall not lose his/her right to receive performance in return. In such cases, if the obligor gains any benefit as a result of being released from his/her own obligation, the obligor must reimburse the obligee for the benefit."[454] The dismissed worker as an obligor cannot perform his or her duty because of the invalid dismissal taken by the employer who is the obligee. The dismissed worker does not lose his or her right to wages.

The discussion does not stop at the point where there is recognition of the worker's right to wages, but goes further to the issue that an employee earns income during the period of invalid dismissal. According to the second sentence of Article 536 (2), even though the

[453] 中窪, 野田, 和田, 労働法の世界, 326.
[454] The Civil Code of Japan of 1898, art. 536 (2) (1898).

worker has the right to wages during the period of invalid dismissal, he or she has an obligation to return benefits or money earned as a result of being released from his or her duties to the employer. As the litigation takes a long time, the worker during the dismissal period may work in other job to earn an income. In such a case, the worker has to return this amount of money to the employer. Then, there is the question of the amount of wages the worker would have received during the period of dismissal and the amount of money he or she has to return to the employer when the concerned worker earns the income during this period.

The Labor Standard Act (Article 26) provides that "In the event of an absence from work for reasons attributable to employer, the employer shall pay an allowance equal to at least 60 percent of worker's average wage to each worker concerned during the period of absence from work."[455] The Supreme Court ruled in 1962 that Article 26 of the Labor Standard Act was a special rule of Article 536 (2) of the Civil Code, and it required the employer to pay wages though the worker did not work.[456] Because work suspension (absence from work) and dismissal were only different in terms of the worker's freedom in getting another job during these periods, Article 26 of the Labor Standard Act also applied in the case of dismissal.[457] According to this interpretation, the employer has to pay a worker at least 60 percent of the average wage during the period of invalid dismissal. This allowance is a guarantee of the minimum livelihood of workers during the period of work suspension or dismissal.[458]

For the amount of wage the worker earned during the period of dismissal, the sum of up to 60 percent of the average wage, regardless of the worker's income during the dismissal, is the amount the employer has to pay as per Article 26 of Labor Standard Act.[459] On the other hand, the sum exceeding 60 percent of the average wage becomes the object of adjustment with the duty of redemption of the income earned during the dismissal, and the employer in this case can pay the worker by deducting this part of the income from the amount of wage concerned.[460]

The period that becomes the standard for calculation of these wages must correspond properly with the period that becomes the standard for calculation of the income earned during dismissal. For example, the Supreme Court in 1987 ruled that in the obligation to pay wages during the dismissal, the employer could deduct the amount of income earned in the period that properly corresponded with the period that was the object of a particular payment of wage from the part of the income that was more than 60 percent of the average wage.[461]

[455] Labor Standard Act of Japan, art. 26 (1947).
[456] Supreme Court, July 20, 1962, *Minshu*, 16–18, p. 1656.
[457] Ibid.
[458] 土田 et al., 条文から学ぶ労働法, 39.
[459] 中窪, 野田, 和田, 労働法の世界, 327.
[460] Ibid.
[461] Supreme Court, April 02, 1987, *Rouhan*, 506, p. 20.

3. Provisional disposition

In the process of disputes over invalid dismissal, there is the usage of provisional disposition by the worker during the procedure of the litigation where worker requests from the court an order to protect his or her status and to demand the payment of wages from employer. According to the Civil Provisional Remedies Act of 1989, a court's order of provisional disposition is necessary because it keeps the status of worker in the company and protects the worker's livelihood against difficulty, which is a consequent of the invalid dismissal.[462]

Workers started to apply for provisional disposition against the illegal action of employers, such as dismissal, after employers asked courts for orders of provisional disposition to impede the actions of workers, such as sit-down strikes, plant seizures, and union seizure of factory operations.[463] If there is a claim of invalid dismissal, the court usually orders the employer to provisionally keep the status that exists and the rights in the employment contract of the worker (provisional disposition of protection of status), and to pay the appropriate amount of wages until the day of the issuance of the decision (provisional disposition of payment of wages).[464] However, recently, when it is not necessary to protect the status of the worker, the court orders only the provisional payment of wages and even rejects the necessity of provisional payment of wages if the worker has enough assets or income.[465]

The provisional disposition of payment of wage provides discharged worker with an amount of money equal to all or part of their wage in order to avoid a poor livelihood during the litigation. It does not relate to the condition of whether or not the worker has to work. However, the court orders the worker to return the money paid by the employer when canceling the provisional disposition.[466] If the worker has received this payment, and the court cancels the particular provisional disposition of payment, the worker has an obligation to return the money.[467] Even though the provisional disposition is not cancelled, when the worker loses the litigation and the dismissal is valid, the employee has to return the received wage to the employer.

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[462] Article 23 (1): An order of provisional disposition relating to the subject matter in dispute may be issued when there is a likelihood that it will be impossible or extremely difficult for the obligee to exercise his/her right due to any changes to the existing state of the subject matter. (2) An order of provisional disposition to determine a provisional status may be issued when such status is necessary in order to avoid any substantial detriment or imminent danger that would occur to the obligee with regard to the relationship of rights in dispute. Civil Provisional Remedies Act of Japan, art. 23 (1) & (2) (1989).

[463] Matsuda, "Dismissal of Workers Under Japanese Law," 466.

[464] 中窪, 野田, 和田, 労働法の世界, 328.

[465] Ibid.

[466] Civil Provisional Remedies Act of Japan, Article 33 reads "Article 33 Where an obligee has, based on an order of provisional disposition, received the delivery or surrender of an object or received payment of money, or used or retained an object, a court may, upon the petition of the obligor, order the obligee to return the object delivered or surrendered by the obligor, return the money paid by the obligor or return the object used or retained by the obligee, in an order to revoke the order of provisional disposition under the provision of paragraph (1) of the preceding Article."

[467] Supreme Court, March 15, 1988, *Minshu*, 42–43, p. 170.

4. Dismissal and compensation for damage

In addition, if the worker requests confirmation of status and provisional payment because of invalid dismissal, he or she can also demand for compensation for damages such as consolation money according to the illegal conduct of the employer. According to the Civil Code of Japan, Article 709, "A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence."[468] Moreover, Article 710 reads "Persons liable for damages under the provisions of the preceding Article must also compensate for damages other than those to property, regardless of whether the body, liberty or reputation of others have been infringed, or property rights of others have been infringed."[469]

In the case of invalid dismissal, the employer does not always have to pay compensation for damages. According to the Tokyo District Court in 1996, there must be an examination of the conditions for creation of the illegal conduct, such as the intention involved or mistakes occurring based on the relationship of individual case, the violation of rights, the occurrence of damage, and the cause and results.[470] This implies that just because the dismissal is valid, it does not constitute an illegal conduct or tort liability. However, during the process of dismissal, if there is direct malice, explicitly inappropriate treatment, discrimination, damage of reputation, unfair labor practice, or an adverse situation, the court in practice accepts compensation for damages.[471]

For example, according to the Fukuoka High Court in 1980, if discharge due to a union shop agreement was invalid and the expulsion of the worker invalid, the dismissal could not immediately constitute illegal conduct. However, when the company has already known about this invalid expulsion and has fired the worker by ignoring this, the dismissal constitutes illegal conduct against the worker.[472] In this case, the company could not escape from their responsibility for illegal conduct in dismissing the workers. The court decided the compensation on the basis of the illegal conduct and provided the workers with consolation money because the employer discharged them from the workplace by taking inappropriate dismissal measures. The consolation money to each worker was appropriate to 500,000 Yen.

In another case presented to the Chiba District Court in 1993, the employer encouraged the voluntary resignation of workers when the investigation of the facts had not yet finished.[473] According to all the evidence in this case, even though there was no proof that the company recognized the absence of grounds for dismissal, there was evidence that there was no investigation into grounds for selection-decision being connected to disciplinary measures. In addition, the employer without conducting an investigation of necessary facts continued ordering workers to standby at home. The order was already evaluated as illegal, and the dismissal in this case took place due to the workers' disobedience of this order. The

[468] The Civil Code of Japan of 1898, art. 709 (1898).
[469] Ibid., art. 710.
[470] Tokyo District Court, May 27, 1996, *Roukeisoku*, 1614, p. 9.
[471] Fukuoka High Court, December 16, 1980, *Rouminshu*, 31–36, p. 1265; Chiba District Court, September 24, 1993, *Rouhan*, 638, p. 32; *Rouhan*, 935, p. 35.
[472] Ibid.
[473] 31–36 Rouminshu 1265.

workers faced a dilemma through the employer's recommendation to resign or get dismissed. Due to the effects of the dismissal, the workers suffered mental pain in that they were forced to degrade their working ability in specific skills as airplane mechanics. The consolation money for each worker was 1,000,000 Yen.

In the decision of Tokyo District Court in 2006, the adjustment dismissal took place without fulfilling the requirements for dismissal and was an abuse of the right to dismiss and was illegal.[474] When examining the process of adjustment dismissal in this case, there were four major facts. One, when the employer attempted to amend the rule for retirement wages by reducing the amount of money, the dismissed workers resisted these actions and consulted with the labor inspector and with the Tokyo Labor Bureau. Two, the company resented the consultation activities of the workers with outside organizations. Three, the workers consulted with the Tokyo executive office of social security about the cancellation of a room for health consultation at the company. Four, the employer warned the workers about consulting with organizations outside the company.

According to these facts, the employer was unhappy with the workers who resisted his activities. In view of the absence any requirement for adjustment dismissal, the court found that it was appropriate to accept that the resentment the company had towards the resistance of the workers led to the dismissal. Therefore, the economic dismissal in this case constituted an illegal conduct.

On the other hand, the Supreme Court in 2010 decided that dismissal of a management worker whose attitude was affected by alcohol was an unavoidable disciplinary measure, and that this discharge did not constitute illegal conduct.[475] In this case, the worker was a company director who held two posts concurrently. The company received complaints from other workers and customers about the attitude of the discharged worker. The worker was addicted to alcohol. Even though there was a warning from the representative company director, the worker did not restrain from drinking alcohol.

The worker was absent on the day of an appointment with a person who was in charge of a customer. On the day the chief of the company talked on phone with the worker. The worker under the influence of alcohol stated that it was as though he had resigned. In view of these facts, the ordinary dismissal did not constitute illegal conduct against the worker even though the employer did not take other methods other than dismissal as a disciplinary measure.

Because normally the wage is returned with an invalid dismissal, in practice, compensation for damages is limited to consolation money against mental damage. However, the worker in exchange for a request for confirmation of status and wages related to an invalid dismissal requested compensation for damage that includes lost wages.[476] In a case decided by the Nagoya High Court in 2005, the employer dismissed the worker on the grounds that she was married to a lawyer in another law office and feared that secret information from the office might be leaked to the other competitor law firm.[477] The Nagoya High Court ruled that

[474] 935 Rouhan 35.
[475] Supreme Court, May 25, 2010, *Hanji*, 2085, p. 160.
[476] Nagoya High Court, February 23, 2005, *Rouhan*, 909, p. 67; 2085 Hanji 160.
[477] 909 Rouhan 67.

it was very common present society for both husband and wife to be working, and the dismissal based on an abstract fear lacked reasonable grounds and social appropriateness. In addition, the dismissal was a violation of the law that provided both men and women with equal opportunity to employment. Hence, such conduct constituted illegal conduct and corresponded to lost wages for three months equal to 1,040,000 Yen, and 300,000 Yen as consolation money.

5. Severance pay

The rules of employment in many companies dictate a rule that employers do not provide all or even a part of the retirement allowance for workers who are dismissed according to disciplinary measure. In principle, the reduction or cancellation of this allowance can only take place if any clause in the internal work rules states clearly that there will be non-payment or reduction of retirement money.[478] This clause regarding the reduction or cancellation of retirement money must be concluded before the day of the disciplinary dismissal. This is based on the principle that there can be a reduction or cancellation of retirement money in the case of disciplinary dismissal. If the worker voluntarily terminates their employment contract, the employer cannot cancel or reduce the amount of the retirement allowance.

If the worker resigns before the employer carries out a disciplinary dismissal, the worker cannot get retirement wages if he or she has engaged in misconduct that falls under the grounds for disciplinary discharge in the rules of employment. For example, the company creates a rule that no retirement money is provided to the worker in the case of dismissal du to violation of internal work rules such as engaging in disloyal conduct.[479] In one case, the worker was responsible for the evaluation of products bought by the company. The worker bought the products at a price 10 percent higher. This caused great damage to the company. Although the worker notified the employer about his resignation before the disciplinary dismissal, he could not receive retirement money because there were grounds for disciplinary discharge which would incur non-payment of retirement allowances.[480]

In addition, after retirement if there is an evidence of grounds for disciplinary dismissal,

[478] 君和田, *問題解決 労働法〈5〉解雇・退職*, 36.
[479] Osaka District Court, January 29, 1999, *Rouhan*, 760, p. 61.
[480] The court ruled that disciplinary dismissal was a ground for termination of the employment relation according to the execution of the right to discipline the worker. Just before the employer took disciplinary dismissal, the worker expressed an intention of retirement or resignation. The Employer also expressed his intention to terminate the contract on the same day. Therefore, the employment relation between employer and worker was terminated on the same day and it was impossible to use the right to discipline after this day. However, originally, the ground for disciplinary dismissal and ground for non-allowance of retirement wage were two different things. The rule of the company on the retirement money connects grounds for non-allowance of retirement money to disciplinary dismissal. The implication of this rule was even though it was the case that the employer took disciplinary dismissal, there was a notification of resignation from the worker that terminated the employment relation before the employer carried out the disciplinary dismissal. However, in this case where there was ground for disciplinary dismissal that was commensurate to the non-payment of retirement money, it was possible to interpret the rule thus, and hence there was no retirement money provided. Ibid.

as in explicit disloyal conduct by the worker, the right to claim retirement money is cancelled as an abuse of rights.[481] One year before resignation, a worker transferred information about customers from the current company the worker was working in to another competitor company whose business was a travel company. Just before the day of resignation, the worker deleted the data of 1,066 customers of the company. With the data for 809 customers left over, the worker deleted the history of travel and added a remark column. The method of business in the company was to gather clients for tours by using the data of customers in the computers. Through an investigation of the history of travel of the customers, the employer could use a program to send direct mail to the customers. When the worker deleted the data of the customers, the company could not restore operations and this caused inefficiency in the business activities. If the employer had known about these actions before resignation, the employer would have taken disciplinary dismissal because this was a situation that fell into disciplinary dismissal grounds under Article 40, Number 2 (4) for criminal acts such as stealing, embezzlement, and causing injury to the company.

Conclusion

The rule regarding abuse of right to dismissal in Japan is an abstract legislative rule in the Labor Contract Act. However, the courts developed comprehensively the content of rules before the incorporation of this judicial rule into legislative texts. Relying only on the legislative texts, parties in the conflict cannot understand the whole framework of the law governing dismissal in Japan. They have to refer to judicial rules. Even though there is no formal existence of the principle of *stare decisis* in Japan, there is a tendency that the courts in many cases refer to the previous decisions, particularly the decision of the Supreme Court. The courts normally refer to precedent to save labor and time, and to guarantee fairness and stability. Moreover, the lower courts do not wish the Supreme Court to cancel their decisions. This leads to consistency in the dismissal rules in Japan. The consistency of rules leads to the certainty and stability of law and finally the stability in the employment relationship.

The rule of the abuse of right to dismissal in Japan consists of two main requirements. The first requirement is the existence of a valid reason for the dismissal. In most cases, the court accepts the existence of valid reason through the employer's proof that the dismissal is based on grounds in the rules of employment. The second rule is the requirement that dismissal is an appropriate measure to end the employment relations. Whether or not a dismissal is appropriate depends on the courts' evaluation of each case according to societal common sense. The judge has discretion in evaluating this appropriateness. Consequently employers cannot always dismiss workers just by making detailed rules in their rules of employment. The courts checks the appropriateness of dismissal based on the general principles of laws, labor laws, employment practices, and the real facts of individual cases.

The remedy for a worker who is a victim of an employer's abuse of the right to dismissal in Japan is reinstatement with the right to the lost wages during the period of the invalid dismissal. The courts have long invalidated dismissals that fall under the abuse of

[481] Tokyo District Court, December 18, 2000, *Rouhan*, 803, p. 74.

rights. Invalid dismissal means that the employment relationship continues as if there was no dismissal. Although the worker does not provide labor for the employer during the period of dismissal, he or she still has a right to claim for wages because the discharge is due to the employer's abuse of right. Hence, the worker can return to their old position with the amount of wages lost during the dismissal being provided to them. Moreover, the worker even can claim for damage in addition to the lost wages during the dismissal if there was bad intention on the part of the employer in carrying out the discharge or if the dismissal caused damage to the worker's social relationship.

Chapter 3: Comparison of the rules on justified dismissal

This chapter aims at placing the rule of valid reason in Cambodia and the rule of abuse of the right to dismissal in Japan together not only for the sake of comparison but also for an analysis of the strong and weak points of each system. In addition, the two rules are compared in order to make the rules more understandable. Even though the two rules are different in many aspects, such as their nature or characteristics, the level of protection and effects, they both have the same purpose which is to protect workers against arbitrary dismissal. The comparison with Japan is of great importance for the development of rules for justified dismissal in Cambodia because Japan has a long experience with the application of justified dismissal rules, which restrict an employer from unjust unilateral termination of an employment contract.

Section 1. Characteristics

1. Existence or non-existence of right to dismissal

The rule of valid reason and the rule of abuse of right to dismissal have the same purpose in protecting workers against arbitrary discharge. However, when examined concretely, the two rules are different in substantive matters. The noticeable difference between the two rules is the existence or absence of the employer's right to dismissal which is the ideology behind as well as the basis for the establishment of the two. The rule of valid reason is founded on the idea of protecting the employee in the realization of the right to life; therefore, the employer originally does not have the right to dismissal.[482] The employer's right to dismissal exists only when there is the existence of a valid reason. On the other hand, the rule of abuse of rights is founded on the idea that the employer has the freedom to dismiss an employee.[483] The right of dismissal originally belongs to the employer who has the right to direct and control the business. The right of dismissal or freedom to terminate a contract is only restricted when it is used beyond the scope of protection granted by law or when it is not appropriate according to social common sense.

2. Abstract rules

The common feature of the rule of abuse of right in Japan and that of valid reason in Cambodia is that the legislative rules governing the two are general and abstract ones. For example, the Labor Contract Act (Article 16) reads, "A dismissal shall, if it lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be

[482] 池田, 解雇の法的問題, 56.
[483] Ibid., 52.

treated as an abuse of right and be invalid."[484] Though the Labor Contract Act has defined the abuse of right by providing two requirements, such as the existence of objectively reasonable grounds and the appropriateness of dismissal, there are cases where the workers and employers still fight over whether or not a discharge constitutes the abuse of right.

In response to the abstract legislative texts, judicial or judge-made rules have been developed to fill in the loophole of the law and give answers regarding the validity of dismissal or dismissal with valid reason by providing concrete content. According to the judicial rules in Japan, the reasonable grounds for dismissal are those written in the rules of employment in the company. These grounds are a worker's long-term sickness when it exceeds the period of work suspension, explicitly poor working ability or results, a worker's serious violation of the company's instructions or rules of employment, or necessity for business operations in the form of economic or adjustment dismissal. In case of adjustment dismissal, the courts accept the validity of dismissal only if the discharge meets four requirements, such as a necessity for personnel reduction, execution of dismissal avoidance measures, the reasonableness of the personnel reduction, and the execution of appropriate procedures. In addition, according to the Labor Contract Act, a dismissal that takes place without reasonable grounds and is not appropriate from the point of view of social consciousness is invalid. The judicial rules have long provided a dismissed worker with job protection with an order of reinstatement.

Whereas judicial or judge-made rules play an important role in governing the issues of dismissals in Japan, the arbitrator-made rules have much influence on the dismissal rules in Cambodia. The Labor Law (Article 74, Second Paragraph) reads "However, no layoff can be taken without a valid reason relating to the worker's aptitude or behavior, based on the requirements of the operation of the enterprise, establishment or group."[485] Similar with the legislative rule on the abuse of rights to dismissal in Japan which fails to mention what constitutes reasonable grounds, the Cambodia's legislative rule does not define valid reasons. However, the Labor Law of Cambodia categorizes the types of valid reasons for dismissal. These grounds relate to the worker's capacity or misconduct, and the necessity of the operational requirements of the enterprise. However, the rule of valid reason is still a broad principle through which parties in the conflict find it hard to say whether or not a dismissal takes place with a valid reason.

A review of the judicial rules likewise demonstrates the practice in Japan where courts play a major role in creating and developing rules to deal with conflicts of dismissal can help to resolve this matter. As already discussed in Chapter 1, most of the judges in Cambodia are passive in the creation of case-law while the arbitrators who only have jurisdiction over collective labor disputes are very active in establishing and refining the rules through their comprehensively rational interpretation of articles in the Labor Law or clauses in the ministerial orders. The decisions of previous panels have been used as reference or precedent by the next panel when dealing with similar cases. Another remarkable aspect of the Arbitration Council is that its decisions are publicized through its website.[486] These above-mentioned facts stress the important role of the Arbitration Council in shaping the employment practice in Cambodia through its rules that close the loopholes as well as the

[484] Labor Contract Act of Japan, art. 16 (2007).
[485] The Labor Law of Cambodia of 1997, art. 74, ¶ 2 (1997).
[486] *The Arbitration Council*, January 20, 2012, http://www.arbitrationcouncil.org/.

abstractness of the Labor Law. Accordingly, the analysis provided here on the rule of valid reason in Cambodia relies on these arbitrator-made rules due to the scarcity of court-made rules.

In line with the arbitrator-made rules, the rule of valid reason in Cambodia mainly focuses on the requirement for the existence of a valid reason. As long as the employer has reasonable grounds, the employer can dismiss the concerned worker. The Arbitration Council has a tendency to accept the existence of valid reason when an employer can prove that a dismissal took place based on grounds written in the Labor Law, ministerial orders, and internal work rules of the company. Regarding dismissal on grounds relating to worker's capacity, the dismissal can take place when an employee cannot perform their duties due to their sickness or due to their poor abilities. Most cases involving collective labor disputes brought to the Arbitration Council concern the dismissal of workers who cannot return to their work after the elapse of a period of work suspension for six months. In the case of dismissal due to misconduct, the arbitrator-made rule does not accept the reasonableness of dismissal ground unless the worker has engaged in serious misconduct which is written in the Labor Law and the internal work rules of the company. In contrast to Japan where courts adopted the four requirements as criteria for valid adjustment dismissal, in Cambodia, the legislative rule requires employers to follow certain procedures. For example, the Labor Law (Article 95) demands that employers who wish to reduce their workers do so by satisfying the requirements of reasonableness of personnel selection, to inform and consult with worker's representatives, to inform the labor inspector, to participate in the meetings chaired by the labor inspector, and to delay dismissal in exceptional cases.

Regarding the effect of dismissal without valid reason, the Labor Law (Article 91) entitles the dismissed workers the right to damages; however, there is no provision in the Labor Law that punishes an employer when they have violated the procedures for adjustment dismissal in Article 95. Therefore, according to the Labor Law, in the case of adjustment dismissal, the requirement of valid reason and procedures are not inter-related because they involve a different system of punishment. In addition, the Labor Law does not precisely entitle a worker to reinstatement when the dismissal takes place without valid reason. The arbitrator-made rules have been developed to provide the dismissed workers with remedies to some extend but are far from the benefits of the Labor Law. There are two options for remedies in the case of dismissal without valid reason. The two remedies are monetary compensation for damage and reinstatement. In cases where the employment relationship has been destroyed beyond reparation, the Arbitration Council has the power to select a monetary compensation for damages as the appropriate remedy for the workers. In contrast, if the employment relationship has not yet been broken, the Arbitration Council will order reinstatement with back pay to the dismissed workers. Regarding the effect of adjustment dismissal that takes place without following the procedures in Article 95, the Arbitration Council requires the employer to pay the worker the amount of wages and all kinds of benefits amounting to two months.

A summary of the rule of abuse of right in Japan and the rule of valid reason in Cambodia brings one to the conclusion that the court-made rules and arbitrator-made rules play an important role in providing a concrete vision of the dismissal rules. Parties in the conflict might question about the effects of judicial rule by arguing that they are not legislative rules but are just rules that the courts or arbitrators often use when resolving

conflicts over dismissal with similar facts. In addition, the general public cannot access and understand these judicial rules. A possible reply to this question is to suggest that the legislative rules in Cambodia and Japan are general and abstract because it is difficult to make detailed laws since grounds for dismissal will vary in nature and substance. The solution is to provide a judge or arbitrator with discretion in defining the reasonableness of grounds for dismissal and the reasonableness of each dismissal. Furthermore, though Cambodia and Japan are not common law countries where the principle of *stare decisis* formally exists, there are cases where judges or arbitrators use precedent or previous decisions as reference when dealing with similar cases. This is because reference to previous decisions guarantees fairness, equality, and the stability of the law and is convenient for judges or arbitrators time and labor.[487]

Section 2. Merit and demerit (strength and weakness)

1. The rule of valid reason: from legislation to practice

A review of the history of the labor law in Cambodia shows that the rule of valid reason goes from legislative rule to practice. The application of the rule of valid reason has a short history and needs to be refined. Cambodia adopted the rule of valid reason to restrict the freedom of employers in dismissal according to the enactment of the first Labor Code in 1972. Before the enactment of the Labor Code, there was an attempt to introduce restrictions on the employer's freedom of unilateral termination of contract according to the principle of abuse of rights in 1960s. For instance, Macel Clairon, a French attorney and professor at the Faculty of Law and Economic in Phnom Penh introduced the concept that led to restricting the employer's right to dismissal in his book Droit Khmer: Droit Du Travail in 1962.[488] According to Clairon, since unilateral termination would lead to an abuse of right and cause damage to the other party, there has to be an examination of the grounds for the termination of an employment contract.[489] The ideas of Clairon came from the practices of French judges who actively adopted the doctrine of abuse of rights to limit an individual's private autonomy, rights and freedom in consideration to the social norms.[490]

Along with the idea of restriction through the concept of abuse of rights, the ILO Employment Termination Recommendation adopted in 1963 introduced restrictions for dismissals through the requirement of valid reason. In 1971, Cambodia became a member of the International Labor Organization, and in 1972 Cambodia adopted its first Labor Code which included the rule of valid reason. Although there was no explanation as to why Cambodia did not employ the principle of abuse of rights to restrict the employer's freedom to dismissal, it may be the case that the rule of valid reason in the Labor Code was clearly influenced by the rule of valid reason in the ILO recommendation. In addition, the Civil Code

[487] 山田 et al., *民法 (1) 総則 第 3 版補訂*, 13‐14.
[488] Clairon, *Droit Khmer: Droit Du Travail*.
[489] Ibid., 56–63.
[490] Vera Bolgar, "Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine," *Louisiana Law Review* 35 (1975 1974): 1015–23.

of Cambodia adopted in 1920 did not have any regulation mentioning the principle of the abuse of rights.

According to the Labor Code in 1972, Article 70 stipulated that an employment contract of unspecified duration was terminated at will by either party with prior notice; however, no dismissal was to be taken without a valid reason relating to the worker's aptitude or behavior or to the necessity of the enterprise. Hence, the employer could dismiss the worker only when there was a valid reason of any kind specified in Article 70. Consequently, the employer's right to dismissal did not exist unless he or she had a valid reason. The restriction on the right to terminate the contract based on the requirement of valid reason applied only to the employer while the worker still enjoyed the freedom of termination of employment contract.

Though the rule of valid reason is stipulated in the Labor Code in 1972, it was never put into practice due to the subsequent civil wars until the adoption of the present Labor Code or Labor Law in 1997. The Labor Law categorizes the types of valid reason for dismissal, but it is still an abstract rule where the judge's interpretation is necessary in order to comprehend the rule of valid reason. After subsequent civil wars, the judges in Cambodia did not have experience in applying this rule in labor conflicts. As a result, in relying on judge-made laws, parties in a conflict cannot understand the whole legal framework behind the dismissal rule.

The establishment of the Arbitration Council in 2003 witnessed the application of the rule of valid reason in labor disputes. As discussed in Chapter 1, the arbitrator-made rules play a major role in stabilizing the rules for employment practices in Cambodia; however, the rules remain in the development process. The Arbitration Council may need years to mature in terms of the creation of rules that govern employment relations.

2. The rule of abuse of right to dismissal: from practice to legislation

In contrast to Cambodia where legislative rules that requires dismissal with a valid reason existed before practice, the dismissal rules in Japan were developed from the practice of judges before becoming legislative rules. The Civil Code of Japan which is the traditional rule dealing with employment relations also allows an employer to terminate the employment contract at will without worrying about valid reasons.[491] After the end of World War II, Japanese workers faced difficulties such as low employment opportunities and poor working conditions. The workers required more protection in these economic conditions in addition to the rules in the Civil Code. Thus, the government enacted the Labor Standard Act in 1947 and the Labor Union Act in 1949. However, there was no provision in the legislative laws that required a dismissal to take place with valid reason.

Since the 1960s, the local courts have restricted the employer's freedom of dismissal by applying the rule of valid reason and the rule of abuse of rights to dismissals.[492] In later

[491] Civil Code of Japan of 1898, art. 627, ¶ 1 (1898).
[492] 大内, 山川, 解雇法制を考える, 6.

years there was a tendency in courts for the judges to prefer apply the rule of abuse of right to dismissal because the application of the rule of valid reason lacked legal basis. The rule of abuse of right to dismissal was based on Article 1 (3) of the Civil Code that prohibited the abuse of this right. In addition, according to the rule of valid reason, the employer originally does not have the right to dismissal unless there is a valid reason. Hence, the rule of valid reason contradicted previous laws in Japan, namely the Civil Code, the Labor Standard Act, and the Union Act which allowed an employer to dismiss the worker freely. That meant that the employers in Japan had the right to dismiss the worker from the outset. In order to reach the same purpose as the rule of valid reason that protected workers against an employer's unfair dismissal, the courts applied the abuse of rights that was a general principle of the Civil Code.

However, the rule of the abuse of rights did not have concrete content until the Supreme Court in 1975 stated that even though an employer had the right to dismissal, a discharge that lacked concretely reasonable grounds and was not accepted as proper from the perspective of social common sense was an abuse of rights and invalid.[493] The Supreme Court in 1977 confirmed the content of the rule of abuse of right to dismissal that consists of two elements, namely "the existence of concretely reasonable grounds" and "the appropriateness of dismissal considered form social common sense."[494] This judge-made rule first became a legislative rule in 2003 when it was incorporated as Article 18-2 in the Labor Standard Act and finally in Article 16 of the Labor Contract Act in 2007.

The noticeable difference between the rule of justified dismissal in Cambodia and in Japan is the experience of judges or arbitrators. In Japan, though the legislative rule is abstract, the judges find this convenient, as they have worked on the issue of dismissal for years. Even a junior judge can find previous judgments as a reference in order to save labor and time. More importantly, after many years of application of the rule of abuse of right to dismissal, courts in Japan more or less have established a comprehensive and concrete rule to cover nearly all aspects of the issues of dismissal.

3. Rules on dismissal due to worker's aptitude

3.1. Worker's capacity

The rule of abuse of right to dismissal in Japan consists of two main requirements, namely the existence of reasonable grounds and the appropriateness of the dismissal. The employer has to prove that the worker's poor capacity or sickness falls under the grounds for dismissal in the rules of employment and the discharge is an appropriate measure considered from the perspective of social common sense. Regarding lack of ability, case law has ruled that only a remarkably low ability with no expectation of improvement is a reasonable ground for dismissal.[495] However, according to the requirement of appropriateness, immediate dismissal is not acceptable. Before discharging the worker, the employer is required to take dismissal avoidance measures, such as providing workers with a chance of searching for the

[493] Supreme Court, April 25, 1975, *Minshu*, 29–4, p. 456.
[494] Supreme Court, January 31, 1977, *Rouminshu*, 268, p. 17.
[495] Tokyo District Court, October 15, 1999, *Rouhan*, 770, p. 34.

possibility of education, training, or transfer to other positions that fit with the current capacity of the concerned worker.[496]

In the case where a worker who is employed under special treatment for a special purpose or for a managerial position and who does not achieve the expected results or what is written in the employment contract, the dismissal is still appropriate even if the employer does not provide these workers with a chance to receive education, training or a transfer to another position.[497] This exception in the employer's duty towards dismissal avoidance is because these employees are hired halfway (i.e. not from graduation) based on the specific needs of the company as written in the employment contract. Such a relationship is different from the ordinary way of employment where new graduates are recruited at the end of their graduation. Even where the work results is unsatisfactory to the employer, the dismissal is not an appropriate measure if the worker is not the only one who responsible.[498] Furthermore, a dismissal based on the evaluation of the worker's capacity in a short period of time after being placed in position is not also appropriate from the perspective of social common sense. [499] Therefore, as long as the employer makes an effort to keep the worker in the company and only uses dismissal as the last resort, the court considers such a dismissal to be an appropriate measure.

On the other hand, the rule of valid reason in Cambodia only requires an employer to have a reasonable ground for dismissal. According to arbitrator-made rules, reasonable grounds for dismissal are those specified in the rules of employment. Hence, an employer has to prove that the poor capacity of the worker is a ground for dismissal in the internal work rules. However, most of the internal work rules for companies or factories do not mention about the condition or rule for dismissal in case of poor capacity.[500] These internal rules mainly mention about the types of offences and level of disciplinary measures. In addition, in the practice of the garment sector, employers use the poor capacity of a worker taken as a form of offence to dismiss the worker.[501] Since poor capacity is not a case of serious misconduct that is a reasonable ground for discharge, the dismissal based on poor capacity is not accepted. This reflects the rule related to the issue of poor capacity or when the skills of a worker are obsolete and needs development.

3.2. Sickness or injury

In Japan, courts do not accept an immediate dismissal on the grounds of private sickness or injury. It is cruel according to social common sense to dismiss a worker immediately even when the cause of sickness or injury does not relate to work, particularly

[496] Tokyo District Court, August 10, 2001, *Rouhan*, 820, p. 74.
[497] T Tokyo District Court, April 26, 2000, *Rouhan*, 789, p. 21; *Rouhan*, 503, p. 32.
[498] Tokyo District Court, September 30, 1985, *Rouhan*, 464, p. 38.
[499] Tokyo District Court, August 09, 2002, *Rouhan*, 836, p. 94.
[500] Most of the companies in Cambodia treat their internal work rules as confidential documents that are handed only to their staff. The understanding of the rules of employment is possible when the Arbitration Council quotes parts of them in the awards. Moreover, the Arbitration Council mostly deals with the collective disputes of the garment sector, tourism sector such as hotel, and restaurant, and other labor-intensive industries.
[501] [2006] Case no 73/06 (kh The Arbitration Council, September 18, 2006).

a worker who has been working for the company for years. There is a system of work suspension that maintains the status of the worker while allowing them to be absent from workplace for a specified period for medical treatment.[502] A dismissal is allowed when the worker is unable to return to work after the expiration of the maximum period of work suspension, for example the period of six month. The evaluation of the possibility to work is decided according to an examination by a doctor and also to the evaluation by the judge of the worker's condition during the trial process.[503]

In cases where the type of work is unrestricted, in consideration of the worker's experience and responsibility, the size of the company, the real situation regarding the possibility or impossibility of transfer, and the principle of good faith, the appropriateness of dismissal on the grounds of sickness is allowed when there is possibility of returning to work incrementally. In this case, even though the employee cannot work in the same position, he or she should be provided with a chance to work in another position that fits with the condition of the his or her capacity.[504] In another case, the dismissal was an appropriate measure when the employer, after the expiration of the period of work suspension, provided the worker with another reasonable period sufficient for the worker to get back his working ability little by little.[505] According to the above judicial rules, the worker is protected to the extent that the dismissal is the last measure even if he or she cannot perform former duties after the expiration of the period of work suspension.

In Cambodia, the employer also can discharge the worker on the grounds of private sickness or injury. According to the Labor Law, private sickness or injury is one of the reasons for work suspension that cannot exceed the period of six month; however, this period can be extended until there is a replacement.[506] In practice an extension after the elapse of the six-month period seems to be impossible because it is not hard for the employer to find the replacement. In addition, most of the rules of the employment in companies have set a system of work suspension for a period of six months. If the worker cannot return to the former position after the elapse of this period, the court considers the dismissal to have taken place with reasonable grounds.[507] Therefore, the worker is only protected from dismissal to the maximum period of six months. When compared with Japan, there is no case in Cambodia that requires an employer to transfer a worker to an easier job or provide the worker with a reasonable time in order to regain his or her ability to do the previous work.

4. Rules on dismissal due to worker's behavior

Dismissal based on worker's offences plays a role as a disciplinary measure. A discharge combines rules for disciplinary measures in Article 15 and rules for dismissal in Article 16 of the Labor Contract Act. Accordingly, the dismissal must take place based on

[502] Tokyo District Court, March 30, 2007, *Rouhan*, 942, p. 52.
[503] Tokyo District Court, February 18, 2005, *Rouhan*, 892, p. 80.
[504] Supreme Court, April 09, 1998, *Rouhan*, 736, p. 15.
[505] Sapporo District Court, September 21, 1999, *Rouhan*, 769, p. 20.
[506] The Labor Law of Cambodia of 1997, art. 71 (3) (1997).
[507] [2004] Case no 29/03 (kh The Arbitration Council, February 02, 2004); [2004] Case no 62/04 (kh The Arbitration Council, September 09, 2004).

concretely reasonable grounds and be appropriate from the point of view of social consciousness. The existence of a concretely reasonable ground is accepted when the employer proves that the misconduct of the workers falls under dismissal grounds in the internal work rule of the company. Consequently, disputes between parties in conflicts over the interpretations of the clauses for the rules of employment are inevitable.

Even though an employer may succeed in showing a reasonable ground for discharge, judges will invalidate the dismissal if they see that the termination of the employment contract is not an appropriate disciplinary measure. The appropriateness of dismissal is an evaluation of all facts of the case. The review of the judicial rules has shown that inappropriate dismissals are those that violate the principles of proportionality, double jeopardy, equal treatment, or do not follow procedures in collective agreements. The requirement of appropriateness has made dismissal be the last method of disciplinary measures.

In Cambodia, dismissal in the case of worker misconduct also functions in the role of being a disciplinary measure. According to the Labor Law, disciplinary action must be proportional to the level of seriousness of the misconduct. According to the arbitrator-made rules, only serious misconduct is a reasonable ground for dismissal. The employer has to prove that the worker's offence was a type of serious misconduct prescribed in the Labor Law and internal work rules of the company. There is a tendency by the Arbitration Council to strictly interpret and define serious offences in the Labor Law and internal work rules to the extent that an alleged misconduct is not easily accepted as being a serious one.[508] In addition, even though the worker commits a serious misconduct, the dismissal is not an appropriate measure when the worker unintentionally misbehaves, or when the employee cannot control his or her behavior. [509]

According to the Labor Law, the right to disciplinary measures based on serious misconduct must be taken within seven days after the employer or his representative has acknowledged the act of committing serious misconduct.[510] If the employer fails to do so, he or she cannot punish the worker. Hence, the employer has to take action as soon as possible, if he or she does not want to lose their right to dismiss the worker. In this case, the employer is not required to respect the duty of prior notice.[511] The seven-day period for the extinction of the right to dismissal means that on the one hand employers can dismiss a problem worker as quickly as possible from their company. On the other hand, the Labor Law seems to favor the worker by depriving the rights of an employer who is careless in using their rights in time.

In addition to the provisions of the Labor Law, the Arbitration Council has developed a concrete and proactive rule for the worker against arbitrary dismissal on grounds relating to serious misconduct. This development is because most of the disputes are collective labor disputes in the garment factories. Most of disputes are dismissals of union leaders for activities or workers on the grounds of their misconducts. There has been a noticeable

[508] [2004] Case no 13/04 (kh The Arbitration Council, March 30, 2004); [2009] Case no 79/09 (kh The Arbitration Council, July 15, 2009).
[509] [2004] Case no 13/04 (kh The Arbitration Council, March 30, 2004); [2005] Case no 59/05 (kh The Arbitration Council, October 27, 2005).
[510] The Labor Law of Cambodia of 1997, art. 26, ¶ 2.
[511] Ibid., art. 72, No. 2.

development in arbitrator-made rules in the case of dismissal due to worker's misconduct, which reach the same level of protection as the rules in Japan.

However, the weakness of the rules was inevitable. For example, a number of workers committed serious misconduct in one case, but the employer dismissed only one worker.[512] The employer has the freedom to dismiss or not to keep these workers but when the employer removes only one of them, then according to the "appropriateness of dismissal" of the rule of abuse of right in Japan such a dismissal would not be appropriate because it violates the principle of equal treatment. In contrast to the courts in Japan which is under rule of the abuse of right, the Arbitration Council in Cambodia rejected the legality of dismissal without taking care as to whether such a dismissal violated the principle of equal treatment where the employer has to treat all workers equally and fairly without discrimination. When considering whether a dismissal is proportional to misconduct, the Arbitration Council in many cases examines only the purpose or intention of the worker, but fails to examine whether the dismissal violates the principle of good faith or principle of equal treatment.

5. Rules on dismissal due to the necessity of the company

In Japan, the rule of abuse of right in the case of economic or adjustment dismissal consists of four requirements: (1) the necessity for personnel reduction, (2) the employer's efforts to avoid dismissal, (3) reasonable selection, and (4) the provision of explanations or consultation with the worker's representative about the procedure of dismissal. Accordingly, economic difficulty or closure of a section of a company that is part of a business strategy does not always give the company a reasonable ground for dismissal. Adjustment dismissal can only take place when the reduction of workers is necessary. The idea of necessity is recognized according to an economic situation in a business where it has almost reached the level of bankruptcy. Though there may be an economic difficulty, personnel reduction should be the last resort after other measures are undertaken to reduce expenses. When personnel reduction is inevitable, the employer has to make sure that the selection of a worker subjected to dismissal is made according to reasonable criteria or procedure of selection. In addition, the employer has to explain and consult with the workers' representative about the process of adjustment dismissal.

In Cambodia, the rule of valid reason in Article 74 of the Labor Law requires only that dismissal be taken with a reasonable ground and that in such cases, the reason for discharge relates to the necessity of the operation of the enterprise. Following the requirement for the existence of a valid reason, the Labor Law sets the procedures in Article 95 for only dismissal on the grounds of necessity of the operation of the company. These procedures concern the duty of employers before and after a dismissal. Before dismissal, the employer has to reasonably select the workers, consult with the worker's representatives, notify the labor inspector, and suspend layoff in the case of an order by the minster in charge of labor. In cases where the employer starts the business again within two years after the layoff, the employer has to contact the dismissed workers and employ them again.

[512] *13/04* (kh The Arbitration Council, March 30, 2004).

In the case of an adjustment dismissal, the courts in Japan have long established four requirements that make such a dismissal the last resort in dealing with economic difficulty or restructuring of the company. In Cambodia, the rule of valid reason remains weak in terms of protecting the worker. This weakness is because there is no requirement for the necessity for personnel reduction or requirement for efforts to be taken for dismissal avoidance. As discussed in Chapter 2, the two requirements are interrelated due to the fact that the necessity for personnel reduction is accepted if other measures to avoid personnel reduction take place. The two requirements are important in making sure that the dismissal is inevitable for the continuation of the company.

According to the Labor Law and arbitrator-made rules, the reduction of work or closure of part of the operations of a business is a valid reason for dismissal.[513] In the case of dismissal on the grounds of necessity of the operations of an enterprise, the Arbitration Council fails to clarify whether the reduction of the work or closure of a part of the operations reaches the level that necessitates for the reduction of the workforce entailing dismissal as the last resort. During the operation of business, the companies may face economic difficulty such as a reduction of work. However, such a difficulty is not a reasonable ground for dismissal unless it reaches the level where reduction of the workforce is inevitable. The Arbitration Council might consider this but this institution has yet to receive complicated cases regarding dismissal in the case of economic difficulty. What is known now is that most of the disputes resolved by the council belong to garment sector where the operation of production or work exists only when the buyer companies make orders with these factories. If they do not make an order, the factory closes a section or in a serious situation stops all sections. Consequently, there is no work for the employees.

6. Remedies for unjustified dismissal

In Japan, there is a consistent rule that each type of reason is under the umbrella of the principle of the abuse of right to dismissal which consists two requirements. If an employer's unilateral termination of a contract is an abuse of right to dismissal, then the courts have a tendency to invalidate this discharge. According to the invalid dismissal, the employment relationship between the employer and worker continues as when there was no such a discharge. The remedy is reinstatement that guarantees the worker job security and preserves the lifetime or permanent employment practice in Japan. The courts do not accept monetary remedy in lieu of reinstatement. Hence, the fired worker's only one option is to continue working for the employer, and he or she cannot choose money.

However, the reinstatement alone is not an appropriate remedy in the case of dismissal because the litigation concerning the dismissal takes a long period of time in which the skill of worker may become out of date. In addition, the courts can only rebuild the legal relationship but cannot repair the real relationship because the dispute will have broken the

[513] [2005] Case no 32/05 (kh The Arbitration Council, June 17, 2005).

trust between the employer and worker; therefore, there is a proposal that a court should provide workers with the option for remedies rather than having only reinstatement. The worker's interest and their relation with the employer might be damaged. There was also the claim that the workers who were reinstated often resigned shortly after they came to the company. These complaints explained the reason that there was an attempt to include monetary compensation in the legislative rule during the amendment of the Labor Standard in 2003. However, the worker's representative opposed this initiation. And so, reinstatement as the only remedy according the judge-made rules remained untouched.

In Cambodia, arbitrator-made rules have established a choice for remedies for dismissed workers. In cases where the worker requests monetary compensation in lieu of reinstatement, the Arbitration Council mostly accepts this request. However, in the case where a worker's demand is for reinstatement, the Arbitration Council examines the relationship of the employer and worker before ordering reinstatement. If the relationship has been broken beyond reparation, monetary compensation is provided instead of reinstatement. If not, the Arbitration Council orders reinstatement with the amount of wage and all kind of benefits the worker should have received from the day of dismissal until the day of the issuance of the award.

The Labor Law provides a monetary remedy; particularly Article 91 clearly mentions that the dismissal without valid reason entitles workers to damages. This article only applies to a dismissal that takes place without valid reason, but does not apply in the case of adjustment dismissal that does not follow the procedures in Article 95. This weakness in the rules of validity represents a loophole in the Labor Law, which is silent about the procedural rule governing dismissal and concerns only the existence of valid reason. The Labor Law (Article 95) requires employers to follow procedures such as selection of the workers, informing the worker's representatives and the government agency. The Labor Law fails to provide punishment when the employer violates these procedures.

The arbitrator-made rule has developed and refined the method of calculation for the amount of money. The interesting point about the arbitrator-made rule concerns the calculation of the amount of monetary compensation. If the employer violates the obligation to inform the worker's representatives or Labor Inspector, then the employer has to pay the amount of wage and all benefit the workers would have received for two months.[514] There is no arbitrator-made rule for punishment when the employer fails to conduct a reasonable selection of workers. Hence, the rule of dismissal in Cambodia, particularly the rule of valid reason is in the process of development. The rule is comparable to broken pieces that need to be configured in the right order.

In addition, the Labor Law does not state clearly that dismissal without valid reason entitles workers to reinstatement because Article 385 only empowers the courts when dealing with labor disputes to reinstate workers to same position with back pay. Accordingly, the court's decision regarding dismissal with reinstatement as remedy needs review. Since a ministerial order invalidates the dismissal on the grounds of discrimination against union's leaders, members, and union activities and reinstates workers,[515] the court will provide the

[514] Ouchi, "Special Topic: Change in Japanese Employment Security: Reflecting on the Legal Points."
[515] Prakas No. 305 SKBY on the Representativeness of Professional Organization of the Workers at the Enterprise and Establishment Level, and the Rights in Collective Negotiation for the Conclusion of Collective

dismissed worker with reinstatement as a remedy. However, it is a rare case to see a court's decision that provides reinstatement as a remedy in the case of dismissal without valid reason. Moreover, there is no ministerial order that provides workers with a reinstatement order in the case of dismissal without valid reason.

In contrast to the court, the Arbitration Council provides reinstatement as a remedy to a worker who is discharged without valid reason when dealing with collective labor disputes. In the same way that the Labor Law (Article 385) empowers the court to order reinstatement, the ministerial order known as *Prakas* No. 099 (Clause 34) also authorizes the Arbitration Council to order all kinds of remedies including reinstatement of the worker to the same position with back pay.[516] With this *Prakas* No. 99 the Arbitration Council provides reinstatement not only to workers who are dismissed on the grounds of union discrimination but also to those whose dismissals was made without valid reason. Based on the arbitrator-made rule, the worker's request for reinstatement is accepted after the Arbitration Council examines the possibility based on each individual case. For example, if the relationship of an employer and worker has not broken down beyond reparation, an order of reinstatement is given to the worker. If not, the Arbitration Council rejects the claim of reinstatement by an order of monetary compensation for damages as a remedy.

Even though reinstatement is seen as another mechanism that protects the worker's job security, the criticism on these kinds of remedies is that there is no legal ground that clearly entitles the worker who is dismissed without valid reason to return to their position. In addition, reinstatement is just an arbitrator-made rule but not the court's decision. Some scholars would say that reinstatement is a remedy provided only by the Arbitration Council in collective labor disputes, but no guarantee exists that the court will order reinstatement to a worker whose dismissal is taken without valid reason in the case of individual disputes. The reason for the above assertion is because the Appellate Court of Cambodia rejected the decision of the lower court that applied Article 385 to order reinstatement of the workers by interpreting Article 74 to mean that dismissal was the freedom of the employer and workers also committed offences.[517]

There is also a criticism by scholars that strict dismissal according to the rule of abuse of right in Japan may hamper the operations of companies. However, courts in Japan, while protecting the worker also care for the interests of the company. Courts' restriction on dismissal encourages workers' positive participation in job training inside the company and increases a worker's motivation to work and maintain loyalty towards the employer.[518] In addition, though modification of working conditions requires consent from the worker,[519] the employer can unilaterally modify a working condition that is disadvantageous to the worker as long as such a change is rational.[520] In consideration of the business necessity in long-term

Agreement at the Enterprise and Establishment Level (2001).

[516] Prakas No. 099 SKBY on the Arbitration Council (2004).

[517] [2002] Case no No.173 "CHH"/26–09–2002 (kh Appellate Court of Cambodia, September 26, 2002) ; cited in Channmeta et al., *Legal Methodologies: Khmer Law*, 88–98.

[518] Ouchi, "Special Topic: Change in Japanese Employment Security: Reflecting on the Legal Points."

[519] Labor Contract Act of Japan, art. 9 reads (2007)"An employer may not, unless agreement has been reached with a worker, change any of the working conditions that constitute the contents of a labor contract in a manner disadvantageous to the worker by changing the rules of employment; provided, however, that this shall not apply to the cases set forth in the following Article."

[520] Ibid., art. 10 reads "In cases where an employer changes the working conditions by changing the rules of

employment relationships, as long as the change is rational, the court accepts the validity of dismissal of a worker who is opposed to such a modification.[521] Moreover, under the long-term employment practices, most of the employment contracts, working rules, and collective agreements allow the employer to reassign and transfer workers within the company.[522]

In Cambodia, there is also the tendency in arbitrator-made rules to protect workers against dismissal and to also allow the unilateral change of working condition by requiring the management or order to be reasonable and lawful.[523] The Arbitration Council accepts reasonable or lawful management when there is no reduction of wage, no transfer to a far off place, no transfer from day shift to night shift, and no transfer that affects a substantial change in the skills required for work.

Conclusion

The comparison of the rule of abuse of right in Japan and the rule of valid reason have shown that though they are different in substantive rules and levels of protection, they have the same purpose that is to protect workers against unjustified dismissal. The rule of abuse of right and the rule of valid reason are different in terms of the existence of the absence of the employer's right to dismissal. The rule of abuse of right accepts that the use of dismissal is the freedom of the employer while the rule of valid reason claims that that right to dismissal does not adhere to the employer unless there is the existence of a valid reason. Another noticeable difference is that the rule of valid reason in Cambodia started from legislative rules being applied to practice whereas the rule of abuse of right in Japan started from actual practice and then becoming legislative rules. Since Cambodia has a short history of application of the rule of valid reason, the level of protection is still weak though the Arbitration Council has strived to close the loophole of legislative rules since its establishment in 2003.

If compared with the rule of abuse of right that requires the existence of a concretely reasonable ground and appropriateness of dismissal, the rule of valid reason in Cambodia mainly focuses on the existence of a concretely reasonable ground. Hence, as long as the employer in Cambodia can prove the reasonableness of the alleged grounds, the Arbitration Council accepts that the dismissal is taken with valid reason. In addition, the Labor Law

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employment, if the employer informs the worker of the changed rules of employment, and if the change to the rules of employment is reasonable in light of the extent of the disadvantage to be incurred by the worker, the need for changing the working conditions, the appropriateness of the contents of the changed rules of employment, the status of negotiations with a labor union or the like, or any other circumstances pertaining to the change to the rules of employment, the working conditions that constitute the contents of a labor contract shall be in accordance with such changed rules of employment; provided, however, that this shall not apply to any portion of the labor contract which the worker and the employer had agreed on as being the working conditions that are not to be changed by any change to the rules of employment, except in cases that fall under Article 12."

[521] Araki, *Labor and Employment Law in Japan*, 53.

[522] Komiya, "Dismissal Procedures and Termination Benefits in Japan," 159.

[523] [2003] Case no 17/03 & 18/03 (kh The Arbitration Council, November 11, 2003); [2006] Case no 06/06 (kh The Arbitration Council, February 16, 2006); [2008] Case no 137/07 (kh The Arbitration Council, January 10, 2008); [2009] Case no 61/09 (kh The Arbitration Council, June 17, 2009).

provides punishment only in the case of dismissal without valid reason as stated in Article 91 but does not punish the employer when he or she does not follow the procedures in the case of economic dismissal as provided in Article 95. Because the requirement of the existence of reasonable ground in the rule of abuse of right, it is possible to say that the rule of valid reason in Cambodia is a part of the rule of the abuse of right to dismissal in Japan. The Labor Law or even the arbitrator-made rules have not made termination by the employer as the last resort for all kinds of dismissal grounds.

Chapter 4: Recommendations

The rule of justified dismissal in Cambodia lacks consistent content for securing workers to their jobs, and it is even weak in providing compensation to workers. The Labor Law of Cambodia mainly focuses on the existence of valid reason, and it lacks provisions that require appropriateness for all kinds of dismissal grounds. The arbitrator-made rules require dismissal that is a disciplinary measure to be proportional to the misconduct. The requirement of appropriateness applies to some extent in the case of dismissal on grounds relating to worker's misconduct. However, the arbitrator-made rules limit the scope of appropriateness to the principle of proportionality between the dismissal and the level of seriousness of the misconduct while paying little attention to other principles, such as the principle of good faith or equal treatment.

There is no requirement of appropriateness of dismissal on grounds relating to worker's aptitude. For adjustment dismissal, the Labor Law (Article 95) requires an employer to reasonably select the workers, notify and consult with worker's representatives, and notify the Labor Inspector about the process of dismissal. When compared with the rule of abuse of rights in Japan, these procedures are the elements used for the evaluation of the appropriateness of dismissal. Since the Labor Law requires an employer to pay damage (consolation money) to a worker in the case of dismissal without valid reason but fails to punish the employer who violates procedures in collective layoffs in Article 95, the rule of valid reason in Cambodia is not consistent and pays little attention to the requirement of appropriateness in dismissal.

As a contribution to the development of the rule of justified dismissal in Cambodia, this study aims to suggest that the content of the rules should be based on the rules and practice of justified dismissal as to be found in Japan. This study considers the requirement of appropriateness of dismissal in addition to the requirement of the existence of valid reason being introduced into the rules for justified dismissal in Cambodia. Concretely, the argument is made for the introduction of the rule of abuse of right to dismissal as used in Japan into Cambodia with some modifications that best fits for the employment practices and current situation of Cambodia.

Section 1: Introduction of abuse of right in dismissal

1. Reasons for introducing the rule on abuse of right to dismissal to Cambodia

The rule of abuse of the right of dismissal in Japan, which consists of requirements for the existence of reasonable ground and appropriateness of dismissal, makes dismissal be the last resort. In contrast, in Cambodia, the existence of a requirement of appropriateness of dismissal does not exist because the rule of valid reason demands only the requirement of the existence of reasonable grounds. This study proposes that judges or arbitrators should also take on board the requirement of appropriateness of dismissal to protect workers against

unfair employment termination by employer.

There are four reasons that are the inspiration for the introduction of the rule of abuse of right to dismissal to Cambodia. First, the Labor Law of Cambodia has a general tendency in favor of long-term employment relations through the automatic transformation of a fixed-term contract to non-fixed term contract.[524] In 2003, the Arbitration Council when establishing the rule of contract transformation also stated that the Labor Law encouraged employer and worker to conclude undetermined duration contracts because such a contract guaranteed job security and promoted the commitment of workers towards their duties.[525] Accordingly, if the total length of a fixed-term contract including the periods of initial contract and its renewal exceeds two years, then a fixed-term contract automatically becomes an employment contract of undetermined duration.[526]

Second, the arbitrator-made rules also have a tendency to promote long-term employment relationships through restrictions on employer's freedom for dismissal and in ordering reinstatement for dismissal that takes place without a valid reason. In the case of dismissal on grounds relating to worker's behavior, the Arbitration Council requires a discharge to take place on grounds of serious misconduct and to be proportional to the level of the seriousness of the mistake. The proportionality between mistake and punishment is a result of the arbitrators' evaluation of the concrete case surrounding the execution of dismissals, namely the intention of the workers, situation that provoked the workers to commit misconduct.[527]

According to the Labor Law and ministerial orders, reinstatement is a remedy in the case of unlawful dismissal on grounds relating to discrimination on the basis of union membership, union activities, the discharge of union leaders without authorization from the Labor Inspector, and other prohibited dismissals. However, the Arbitration Council in collective labor disputes has provided workers with protection to job security through reinstatement in the case of dismissal without valid reason.

Third, along with the promotion of long-term employment in the Labor Law and the arbitrator-made rules, there is a commitment by the companies that wish to employ their workers for a long-term relation. The review of several internal work rules in manufacturing industries (garment sector) and service industries (including banks and legal service) indicates a commitment of employers in providing their workers with sound and safe working environments.[528] The companies promote inside training and provide workers with a chance of education. In addition, the employers have a system of disciplinary measures that treat dismissal as the last resort for disciplinary action. In these cases, dismissal only takes place in the case of serious misconduct or in cases where the worker has repeatedly committed offences and received a series of disciplinary actions during a certain period (for example six months).

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[524] The Labor Law of Cambodia of 1997, arts. 67 & 73 (1997).
[525] [2003] Case no 10/03 (kh The Arbitration Council, July 23, 2003); [2011] Case no 105/11 (kh The Arbitration Council, September 13, 2011).
[526] [2003] Case no 10/03 (kh The Arbitration Council, July 23, 2003).
[527] [2004] Case no 13/04 (kh The Arbitration Council, March 30, 2004).
[528] In Cambodia, companies considered their internal work rules to be confidential documents. The collection of these materials was very difficult. A few companies were kind enough to give me full versions of their internal work rules while some companies just handed the parts that related to the issues of dismissal.

Fourth, the introduction of the rule of abuse of right can help resolve the inconsistencies in the rule of valid reason that mainly relies on the existence of valid reasons. In Japan, regardless of the type of grounds for discharge, there is a consistent rule that consists of the requirement of valid reason and appropriateness with in judging the dismissal as valid or invalid. If Cambodia applies the rule of abuse of right, this rule can solve the problem of separation between the requirements of the existence of a valid reason from procedures in case of economic dismissal. In this sense, the procedural rule in Article 95 of the Labor Law is one of the requirements of appropriateness. More importantly, there will be a consistent rule that requires the existence of concretely reasonable grounds and the appropriateness of dismissal for all kinds of grounds. These grounds are concerned with a worker's capacity or misconduct or the necessity of the operations of the company.

2. Legal ground (Abuse of right in Civil Code)

The present Civil Code of Japan focuses on the principle of freedom, namely the principle of absoluteness of the right to property, the freedom to complete contracts, and the principle of misconduct liability.[529] Accordingly, one's property is absolutely protected as the right to property, contracts can be performed freely, and the conduct of people does not involve responsibility if there has been no offence. Even if it is a right according to the regulation of the law, when the exercise of such a right leads to socially undesirable results, the exercise of the right is not allowed.[530] This idea explains why after the end of the World War II, the Civil Code of Japan placed restrictions on the exercise of civil rights according to three fundamental principles in Article 1. The three principles are (1) private rights must conform to the public welfare, (2) the exercise of rights and performance of duties must be done in good faith, and (3) no abuse of rights is permitted.

Since the employer's right to terminate a contract is a civil right, the courts have restricted the right to dismissal by applying the general principle of the abuse of rights in the Civil Code. Article 1(3) prohibits the abuse of rights. As long as there is a right, it is unable to say that certain conduct is an abuse, but if certain conduct is an abuse, it is able to say that there is no right.[531] Before being amended in 1947, the Japanese Civil Code of 1898 did not have any provision that clearly prohibited the abuse of rights though it borrowed many principles from the first draft of the German Civil Code of 1891 and a few principles from the French Civil Code.[532] However, this general rule had long been introduced by Japanese scholars and used by the courts when resolving conflicts relating to the exercise of property rights. Eiichi Makino was famous for his pioneering study on the doctrine of the abuse of rights in French legal scholarship.[533] The writings of Makino in 1905 showed that in Europe

[529] 川井健, *はじめて学ぶ民法 -- 所有、契約、不法行為、家族* Start Studying Private Law -- Ownership, Contract, Torts, Family (有斐閣, 2011), 14.
[530] 山田 et al., *民法 (1) 総則 第 3 版補訂*, 21‐22.
[531] Ibid., 24.
[532] Hiroshi Oda, *Japanese Law* (Oxford ; Tokyo: Oxford University Press, 1999), 127–35.
[533] John Owen Haley, *The Spirit of Japanese Law*, Spirit of the laws (Athens: University of Georgia Press, 1998), 158.

there was a limitation on individual rights according to considerations of the collective needs inside society and the community.[534] In addition to the introduction of the doctrine of the abuse of rights by scholars, in 1919 the highest court of Japan adopted this doctrine in a case where the owner of an ancient pine tree filed a lawsuit for damages against the state-owned national railway.[535] The pine tree died due to the dirty smoke from the trains and the vibrations due to the sound. The owner of the tree in this case claimed damages of 2000 Yen with consolation damage of 100 Yen. The highest court stated that:

> Even with the exercise of a right, it is necessary to be in the reasonable scope accepted in the law, when the exercise of the right exceeds the level that cannot be tolerated by the victim or the level that is generally accepted based on the social common sense, it goes beyond the appropriate scope because of the intention or mistake, and invades the right of the other because of unjust methods, the illegal conduct exists.[536]

This decision reflects a linkage between the abuse of rights and social sense.

Therefore, the exercise of right is abused if it produces a result (damage) that exceeds the scope to an extent considered unacceptable or unreasonable from the point of view of social conscience. The abuse of right has been applied in the case of dismissal. The courts have made the content of the abuse of right to consist of two main requirements: "the existence of a valid reason" and "the appropriateness of dismissal."

Cambodia enacted its new Civil Code in 2007, which came into enforcement in 2011, and was also founded based on the principle of freedom and private autonomy and at the same time introduced the general principle that restrict the exercise of private rights. The Civil Code (Article 4) provides that "The abuse of rights shall not be permitted. If a right is used beyond the scope of the protection originally anticipated, the exercise of such right shall not be valid."[537] The Civil Code of Cambodia was drafted under support from the Japanese government. From the close relationship between the Civil Code that is the general rule and the Labor Law that is the specific rule, it can be concluded that the regulations in the Labor law must be interpreted according to the principles of the Civil Code. In this sense, this study suggests that even if the employer has a valid reason to terminate a worker's employment, if the discharge is not an appropriate measure or takes place without following reasonable procedures, then it will constitute an abuse of right.

In Japan, the principle of proportionality and equal treatment are determinants of the appropriateness of dismissal. In the practice of collective labor relations in Cambodia, the Arbitration Council requires dismissal to be an appropriate measure to some extent. That is to say, the council also applies the principle of proportionality to balance the seriousness of offences and the choice of dismissal according to worker's intention. However, the council fails to apply the principle of equal treatment when deciding the legality of dismissal. According to principle of the equal treatment, in cases where there are many workers committing a serious offence, the employer has valid reason to dismiss all the workers. When the employer fires only one worker, the dismissal is not appropriate as it violates the principle

[534] Ibid., 159.
[535] 川井, *はじめて学ぶ民法 -- 所有、契約、不法行為、家族*, 15‐16.
[536] 土田 et al., 条文から学ぶ労働法, 15.
[537] The Cambodia Civil Code of 2007, art. 4 (2007).

of equal treatment. Consequently, the employer's unilateral termination of contract constitutes an abuse of the right to dismissal.

In order to have consistent rules for the sake of secure and stable employment practices, there should be a uniform rule of dismissal regardless of the types of reasons, namely grounds relating to capacity, misconduct, and necessity of the operations of the enterprise. Therefore, the content of the rule of justified dismissal in Cambodia consists of the requirement for the existence of a valid reason and the requirement of appropriateness of dismissal. Accordingly, in the case of dismissal due to the necessity of the operations of the enterprise, the employer has to prove that economic difficulty reaches a level that necessitates the reduction of personnel. Even if the employer has a valid reason to lay off the workers, the employer has to abide by the procedures in Article 95 of the Labor Law. If the employer fails to respect these procedures, such a dismissal constitutes an abuse of right. In conclusion, the rule of the abuse of right resolves the problem of violation of the procedural rules in Article 95 by including it as one of the elements in the rule of the abuse of right to dismissal.

Section 2: Content of rule of justified dismissal for Cambodia

1. Dismissal due to worker's aptitude

This study concludes that the rule of justified dismissal on grounds relating to worker's capacity consists of two requirements: the requirement of a valid reason and the requirement of the appropriateness of the dismissal. Being poor in capacity is not an offence on the part of the worker. An employer cannot dismiss the worker on grounds relating to poor capacity unless there is a regulation in the internal work rule. The internal work rule of the company should regulate that only explicitly poor capacity noted through appropriate methods of evaluation can lead to the dismissal of the worker.

The appropriateness of dismissal is a case where the concerned worker receives an opportunity for education or training or transfer to another position that fits with the capacity of worker. This rule is practicable because the internal work rules of many companies encourage their workers to keep updating their skill and knowledge through in-house and outside education or training. The possibility of transfer is also feasible for large companies in Cambodia.

A worker's illness is a reasonable ground for dismissal when the period of work suspension has expired, but the worker cannot return to the same position. In Japan, if type of duty is not restricted, when the worker request to work in another position that is less burdensome than the previous one after the expiration of a work suspension, then the employer has a duty to accept the worker to this position. In Cambodia, there should be such a rule that after the expiration of maximum period of work suspension the worker cannot return to previous position, but the worker can request for another position. A worker who has just recovered from illness or injury should not be involved in any job with major responsibility or heavy burdens or a large amount of work. There is a period when the worker

needs time to recover from illness or injury step by step. This consideration can be implied from a rule that the employer is prohibited from involving a woman with heavy work during the first two months after returning from maternity leave.[538] Hence, there should be a reasonable period in which the worker can recover slowly so as to take on the previous position. Moreover, the dismissal is not appropriate if the employer fires only one worker while keeping the other workers who have similar health conditions.

2. Dismissal due to worker's misconduct

The rule of justified dismissal in the case of worker's misconduct also consists of the existence of a valid reason and the appropriateness of discharge. First of all, there must be an examination of whether or not the misconduct of the worker was a type of serious misconduct enumerated in the Labor Law, Ministerial Orders, or internal work rules of the company. Then, the employer has to comply with the following rules such as extinction of the right to disciplinary measures, proportionality of dismissal to the level of seriousness of the misconduct, and the prohibition of double punishment for the same misconduct. The proportionality of dismissal in this case requires a consideration on the worker's intention or situation that led to the committing serious offences. A dismissal cannot target one worker when he or she makes a mistake unintentionally. In addition, the Arbitration Council should consider the legality of a dismissal based on the principle of equal treatment.

The Arbitration Council has developed a comprehensive rule of justified dismissal on grounds relating to worker's misconduct because most of the collective labor disputes arise from the garment sectors. The dismissals mostly concern the employer's allegations against the worker on the grounds of committing serious misconduct. In addition, the Labor Law has enough provisions that provide rules for dismissal in cases of worker's misconduct. The rule of the Arbitration Council and the Labor Law in this case seem to have a similar level of worker's protection with the rules in Japan. However, the Arbitration Council should evaluate the appropriateness of dismissal not only based on the principle of proportionality, but also on the principle of good faith and principle of equal treatment.

3. Dismissal due to necessity of enterprise

The rule of justified dismissal on grounds relating to the necessity of operation of enterprise should consist in the requirement for the existence of a valid reason and the appropriateness of the dismissal. Appropriateness in such cases should also include the procedural rules provided by Article 95 of the Labor Law. The Arbitration Council has defined the necessity of the operations of an enterprise to mean that there is a reduction in work or the closure of a part of the company. The interpretation is made in the context of collective labor in of the garment sector where workplaces are more likely to be close

[538] In Cambodia, women are entitled to maternity leave for 90 days. The Labor Law of Cambodia of 1997, art. 182 (1997).

whenever there is no work for the workers due to a decline in orders from buyers.

Judges or arbitrators should interpret the reasonable grounds for dismissal in the case of the necessity of enterprise as the necessity for workforce reduction. This is because reduction of work or closures of the buildings where the workers are working do not always reach the level of serious economic difficulties that make dismissal unavoidable. The necessity for workforce reduction is recognized when the employer has tried to reduce other expenses and personnel reduction is the last resort to deal with economic difficulties. Therefore, the employer must take other measures to avoid dismissal such as transfer to other sections.

The employer has to follow the procedures in Article 95. First of all, the employer has to select the workers for dismissal according to considerations regarding professional qualifications, seniority, and family burden. Second, the employer has to inform the worker's representatives and obtain their suggestions upon the announcement of the layoffs and take measures to minimize the impact of the dismissals. Third, the employer should continue informing and participating in meetings summoned by the Labor Inspector according to the request of the worker's representatives to examine the impact of the proposed layoff. Fourth, in exceptional cases, the employer must delay the layoff for a period of not more than 30 days according to the regulation of the Minister in charge of labor in order to find a solution. In the case where the employer violates these procedural rules, even though there is a valid reason in regard to the operations of the enterprise, the dismissal is still an abuse of right.

Section 3: Remedies (modification of the abuse of right to dismissal)

This study suggests that a worker who is a victim in the case of an abuse of right to dismissal in Cambodia has the choice to demand monetary compensation or to request reinstatement with back pay or retroactive wages. In such a case, the judge or arbitrator is the one who decides the appropriateness and the possibility of this request according to the real condition of the employment relationship between the employer and the workers. The suggestion is made according to the current practice in collective labor disputes. The Labor Law provides workers who are dismissed without a valid reason to monetary compensation while the Arbitration Council provides workers with reinstatement as another protection in the practice of collective labor disputes. If the relationship between the employer and the worker is unbroken, the reinstatement is an appropriate measure for securing the employment for the worker. If not, monetary compensation for emotional damages becomes a better solution.

1. Monetary compensation

Under the Labor Law, monetary compensation is consolation money or compensation for non-economic harm in cases of dismissal without valid reason. Article 91 of the Labor Law stipulates, "The termination of a labor contract without valid reasons, by either party to

the contract, entitles the other party to damage."[539] Article 91 does not apply in the case where the worker unilaterally ends an employment contract of unspecified duration because Article 74 does not demand the worker have a valid reason for the termination of the employment contract of undetermined duration. In addition, according to Article 91, the use of damages is different from dismissal indemnity.[540] Furthermore, in cases of dismissal without a valid reason, the worker can request for an amount of money equal to the amount of dismissal indemnity, and in this case, the worker is exempted from any obligation to prove the damage.[541]

Article 91 does not apply in case of adjustment dismissal where the employer violates the procedures in Article 95 of the Labor Law. In addition, there is no provision of the Labor Law that punishes an employer who does not abide by the procedures in Article 95. Because the rule of abuse of right consists of the requirement for the existence of valid reason and the requirement of appropriateness of dismissal, the procedural rules in Article 95 of the Labor Law are also the requirement for the appropriateness of adjustment dismissal. Though the employer may have a valid reason relating to necessity of the operations of the enterprise, if the employer violates the requirement of appropriateness, then the dismissal is an abuse of rights.

While the rule of valid reason is located within the scope of the Labor Law, the rule of the abuse of rights is under the umbrella of the Civil Code of Cambodia. According to the Civil Code, there are two kinds of monetary compensation: one for economic loss and the other for non-economic damage. They are a result of the application of the rules on tort in the Civil Code of Cambodia that came into force in 2011. From the relationship between the code that is the general law and the Labor Law that is the specific law, provisions on tort in the code apply in the case where the employer dismisses the worker without a valid reason and the execution of dismissal or the discharge itself is not appropriate according to social consciousness.

Article 743 of Civil Code on elements of general tort and burden of proof reads:

> (1) A person who intentionally or negligently infringes on the rights or benefits of another in violation of law is liable for the payment of damages for any harm occurring as a result.
> (2) Paragraph (1) shall apply mutatis mutandis to cases where a harm has occurred due to non-performance of a certain act with respect to which the actor owes a duty to perform such act.
> (3) Except as otherwise provided in this Code or in other laws, the person seeking damages must prove the intent or negligence of the tortious actor, the causal relationship between the actions of the tortious actor and the harm that occurred, and the harm suffered by the injured party.

Article 744 of the Civil Code on damages for non-economic harm reads:

The person liable under the provisions of Article 743 (Elements of general tort and

[539] Ibid., art. 91, ¶ 1.
[540] Ibid., art. 91, ¶ 2.
[541] Ibid., art. 91, ¶ 3.

burden of proof) must also pay damages for non-economic harm.

According to Article 743 and Article 744 of the Civil Code, the worker does not lose his or her right to claim for damages in cases where the dismissal is an abuse of right. Article 743 is an application of Article 709 of the Civil Code of Japan that provides the general rule for damage in all kinds of tort, and Article 744 is the application of Article 710 of the Civil Code of Japan concerning the rules on liability for damage for non-economic harm. However, a worker has to prove that (1) there was an employer's intention or mistake, (2) there was a causal relationship between the illegal action of the employer and the damage sustained by the worker, and (3) the conduct of the employer is illegal as it is a violation of law.[542]

The compensation for economic harm depends on the employer's concrete violation of the worker's rights or benefits provided by the laws. For example, under Labor Law (Article 95), the worker has the right to be protected from dismissal in cases of economic dismissal by requiring the employer to conduct a reasonable selection of workers to be dismissed, to inform and consult with the worker's representative to find solutions for minimizing the effects of dismissal, and to inform Labor Inspector in order to gain their intervention when needed. If the employer intentionally or negligently fails to follow these procedures, the employer has to be responsible for economic damage arising for such a violation. In practice, if the employer fails to reasonably select the worker and fails to inform the worker's representative, the Arbitration Council decides the compensation by ordering the employer to pay wages and benefits the worker should have received from the period of dismissal to the date of issuance of the award.[543] In another case, if the employer fails to inform the worker's representative and the Labor Inspector, the council will order the employer to pay the compensation equal to an amount of two months of wages and all kinds of benefits because the worker loses a chance to have intervention from the government to delay the layoff for two months.[544]

In addition to compensation for economic harm, the worker can also claim for compensation for non-economic loss, known as consolation money or money for repairing damage to reputation, or emotions. Article 744 of the Civil Code is the general rule used as a basis to claim for consolation money. Article 91 of the Labor Law is the special rule providing a worker with consolation money when he or she is fired without a valid reason. In this case the discharged worker automatically receives consolation money that is equal to the amount of dismissal indemnity without having an obligation to show proof of damage. In addition, the worker can claim for consolation money according to the requirement of the appropriateness of dismissal. For example, during the process of dismissal, if, for example, the employer treats the worker unfairly or unequally, discriminates against the worker, causes damage to reputation or has a malevolent intention to dismiss the worker, the dismissed worker has to show evidence of facts and damages arising from employer's illegal conduct.

[542] There are four requirements in order to have compensation in case of tort: (1) there is intention or mistake of tortious actor, (2) there is causal relationship between tortious conduct and damage, (3) there is competence to assume liability, and (4) the conduct of the tortious actor is illegal. 野村豊弘, *民事法入門 第 5 版* Introduction to Civil Law (5th Edition), 第 5 ed. (有斐閣, 2007), 112.
[543] [2004] Case no 02/04 (kh The Arbitration Council, April 16, 2004).
[544] [2010] Case no 21/10 (kh The Arbitration Council, April 23, 2010).

2. Reinstatement

The reinstatement of a worker is the remedy granted to employees in cases where there is an employer's violation of the prohibition of dismissal. In the practice of collective labor disputes, the Arbitration Council expands such protection to the worker in cases where dismissal takes place without valid reason. A reinstatement secures workers to their jobs because the employer cannot merely pay the money and dismiss the workers. According to arbitrator-made rules, the council has authorization to consider whether monetary compensation or reinstatement is an appropriate remedy for a dismissal made without valid reason. Even if the worker requests reinstatement, the Arbitration Council may reject the claim and offer monetary compensation instead. In contribution to the efforts of the Arbitration Council in protecting workers in their job, this study recommends that reinstatement should be provided to workers when dismissal takes place without a concretely reasonable ground and is not appropriate based on social common sense. There are many legal grounds that can support the courts and the Arbitration Council in reinstating workers.

First of all, the power to order reinstatement belongs to the court. The Labor Law (Article 385) reads:

> Any labor dispute covered by Chapter XII of this law that could not be settled through conciliation can be brought before the Labor Court…Within its mission to find a settlement for a dispute, the Labor Court can take a number of necessary measures as follows: (1) Order the reinstatement of a dismissed worker, by retaining his former position and paying him a retroactive wage…[545]

Since there is no Labor Court, the ordinary court has authority to resolve a labor dispute and accordingly can order the employer to reinstate the worker in the previous position with payment from the date of dismissal until the issuance of the judgment.

Second, the power for an order of reinstatement belongs to the Arbitration Council. Ministerial Order/Prakas No. 099 (Clause 34) authorizes the Arbitration Council when dealing with the collective labor dispute to issue "orders to reinstate dismissed employees to their former or another appropriate position."[546] The Arbitration Council uses its power to reinstate the worker not only in the case of the prohibited dismissals such as discrimination against union or union activities, but also in the case of dismissal without valid reason. The arbitrator-made rules that consist of monetary compensation and reinstatement are commonly practiced in collective labor disputes.

The Labor Law (Article 385) empowers judges and Prakas No. 099 (Clause 34) empowers arbitrators to reinstate the worker. In the practice of collective labor disputes, the Arbitration Council has provided reinstatement to workers whose dismissal took place without valid reason. The Arbitration Council should further provide reinstatement to a worker who is fired without valid reason and when the dismissal is not appropriate from a social common sense point of view. And then, in the case of adjustment or economic

[545] The Labor Law of Cambodia of 1997, art. 385.
[546] Prakas No. 099 SKBY on the Arbitration Council, Clause 34 (2004).

dismissal, when an employer has a valid reason but fails to follow the procedures in Article 95, the discharge is not appropriate and is an abuse of right.

A reinstatement is provided to a worker according to the rule of the abuse of rights that is a general principle in the Civil Code of Cambodia. Article 4 reads, “The abuse of rights shall not be permitted. If a right is used beyond the scope of the protection originally anticipated, the exercise of such right shall not be valid.” When the content of the rule of justified dismissal in Cambodia consists of the requirement of reasonable grounds and the appropriateness of dismissal, a discharge that lacks valid grounds and cannot be accepted as proper is void. Hence, the employment relationship continues as if there was no dismissal. According to Article 385 of the Labor Law and the arbitrator-made rules, the wages during the dismissal is the total amount of wage the worker would have received during the discharge up until the date of the issuance of the judgments or awards. In addition to this back pay, the worker can claim for consolation money according to Article 744 of the Civil Code in the case of dismissal that takes place in line with discrimination, unfair treatment, damage to reputation or the ill intent of the employer. Moreover, the workers can claim for consolation money according to Article 91 of the Labor Law when the employer fails to dismiss them with valid reason.

Hence, the content of the rule of abuse of rights in Cambodia has two requirements: “existence of valid reason” and “appropriateness of dismissal according to social common sense.” There are two kinds of remedies for the abuse of right to dismissal: monetary compensation and reinstatement.

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