

# Employment Guidelines

The purpose of these “Employment Guidelines” is to help newly created enterprises, global companies and others to accurately understand employment rules in Japan, to improve foreseeability and to make it easier to expand business without giving rise to labor-related disputes. The Guidelines are based on analyses and categorization of judicial precedents concerning labor relations, in line with Article 37 paragraph 2 of the National Strategic Special Zones Act (Act No. 107, December 13, 2013).

These Guidelines will be used by Employment and Labor Advisory Centers set up in National Strategic Special Zones, to assist in providing advice on employment management and labor contract issues in response to inquiries from companies and others.

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## **I Introduction**

- The style of personnel management practiced in typical Japanese companies is often said to bear the following “internal labor market type” characteristics.
  - (i) Every year, new school graduates are recruited and hired periodically, with no limit on job duties and working location, and they continue working for a comparatively long term under a fixed retirement age system. Promotions and pay raises are carried out under personnel and wage systems that take account of the progress of skill levels and accumulation of experience, among other factors.
  - (ii) Wide-ranging transfers (redeployment) and secondment (transfer to related firms) are undertaken.
  - (iii) Working conditions are established in detail through rules of employment.
  - (iv) In times of recession, etc., employment adjustments are made by reducing or canceling overtime work, reducing or canceling new recruitment, temporary shutdowns, or transfer and secondment (transfer to related firms), among other methods. When employment has to be terminated, voluntary early retirement is first offered and encouraged by increasing retirement allowances and other means, following labor-management consultation, and only then is adjustment dismissal considered.

\* This description is a generalization; the actual situation will differ from company to company.
  
- On the other hand, some employers in Japan, such as foreign-capital companies and newly created companies not premised on a system of long-term employment, practice “external labor market type” personnel management. Such employers are often said to bear the following characteristics.
  - (i) Whenever a post becomes vacant, it is filled through open recruitment within the company and mid-career hiring from outside; long-term continuous employment is not necessarily a prerequisite.
  - (ii) Job duties are clearly specified in job descriptions, while the scope of personnel relocation is not broad.
  - (iii) Working conditions, such as wages in line with job duties, are set in detail for each worker individually in labor contracts.
  - (iv) When a worker is employed for a specific post, the worker is dismissed when the post becomes redundant, after undergoing fixed procedures and receiving monetary compensation combined with job-search support (hereinafter “retirement package”).

\* This description is a generalization; the actual situation will differ from company to company.

- In individual judgments on employment rules in Japan, value judgment criteria including “objectively reasonable grounds” and “based on social acceptability” (normative requirements) are used in cases such as dismissal, under the principle of good faith and a general rule prohibiting the abuse of rights. When using these value judgment criteria (normative requirements), courts sometimes make judgments after taking account of factors such as differences in personnel management between the two types of company mentioned above – i.e. those that practice personnel management based on the internal labor market (hereinafter “internal labor market type companies”) and those that practice personnel management based on the external labor market (hereinafter “external labor market type companies”).

Specifically:

- (i) In internal labor market type companies, transfer or secondment (transfer to related firms) undertaken by the employer does not usually constitute abuse of personnel rights, while on the other hand, efforts to avoid dismissal (such as the broad use of transfers) tend to be expected of employers.
  - (ii) In external labor market type companies, if retirement packages are provided upon dismissal, the expectation that employers will endeavor to avoid dismissal (such as the broad use of positional transfers) tends to be smaller than in internal labor market type companies.
- The respective characteristics of “internal labor market type” and “external labor market type” companies mentioned above are at most generalizations; the combination of characteristics may differ according to the actual situation of individual companies. For example, an internal labor market type company may practice personnel management resembling that of an external labor market type company, depending on the department or post. It is not necessarily that the general rule is to pick one or the other.

Moreover, the trends in individual judgments mentioned above are also merely generalizations; individual judgments are made for each case, taking account of economic and industrial circumstances, the employer’s business situation and the status of labor management, among other factors. The same is true of these Guidelines, in which judicial precedents are analyzed and categorized.
  - While these Guidelines mainly analyze and categorize judicial precedents involving so-called regular employees and describe related systems, personnel management for non-regular employees often differs from that for regular employees. As such, laws and ordinances (\*) governing non-regular

employees are applied in some cases, while in others a judgment differing from that for regular employees may be made when making individual judgments on employment rules.

- \* The Act on Improvement, etc. of Employment Management for Part-Time Workers (Act No. 76, 1993), the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Protection of Dispatched Workers (Act No. 88, 1985), etc.

- The number of dismissals in Japan can be confirmed from the number of cases taken for consultation to administrative agencies (\*1).

Even when disputes have broken out over dismissal, relatively few cases are contested in litigation. Instead, they are resolved quickly and flexibly through conciliation by Dispute Adjustment Committees established in Prefectural Labor Bureaus, mediation and advisory decisions under the labor tribunal system established in district courts (\*2), or other means.

When litigation is filed in a dismissal case, a judgment is made to confirm whether the dismissal was valid or invalid – in other words, to confirm the continuation or discontinuation of the labor contract. In reality, however, few cases go as far as a court judgment; steps are more usually taken toward a flexible resolution, such as agreed termination by the worker in exchange for a monetary sum following a settlement procedure, etc. (\*3).

Meanwhile, cases resulting in a verdict are more or less equally divided into cases upheld and cases dismissed or rejected (\*4).

\*1 General Labor Consultation Corners handled 57,785 cases of disputes over dismissal, and provided mediation in 2,415 of these (FY2011).

\*2 Labor tribunals received 1,747 new petitions related to dismissal, etc., and arbitration was established in 1,242 of these (2011).

\*3 926 new suits related to dismissal, etc., were filed as ordinary litigation cases in the first instance (suits other than those related to money), and settlement was reached in 437 of these (2011).

\*4 In 2011, verdicts were reached in 284 suits related to dismissal, etc., in ordinary litigation cases in the first instance (suits other than those related to money). Of these, 148 cases were upheld while 136 were dismissed or rejected.

- \* To make it easier to distinguish between the analysis of judicial precedents and descriptions of judicial precedents provided as reference, on the one hand, and descriptions of employment customs, legal systems, and related information, etc., on the other, the former are surrounded by  and the latter by  in these Guidelines.

For topics particularly prone to disputes, meanwhile, the Guidelines

suggest points to bear in mind in order to prevent disputes from occurring.

As mentioned above, the analysis of judicial precedents in these Guidelines describes general trends, but individual judgments are made after considering the individual circumstances of each case.

## **II Detailed Analysis**

### **1 Establishment of Labor Contracts**

#### **(1) Freedom of hiring**

- In case law, companies are recognized to have freedom in entering contracts as part of their economic activities, and to be able to decide freely, in principle, whom to employ and under what conditions for the sake of their own business, unless there are special restrictions based on statutes or other laws.

#### **Relevant judicial precedent**

##### **Mitsubishi Plastics Case (Decision by the Supreme Court, Grand Bench, December 12, 1973)**

- ◇ In this case, the company refused to grant full employment at the end of the probationary period because the worker had given false answers in the interview as part of the hiring examination. The court ruled that the refusal to employ was valid.
- ◇ Companies are free to enter contracts as part of their economic activities, and may decide freely, in principle, whom to employ and under what conditions when employing workers for the sake of their own business, unless there are special restrictions based on statutes or other laws.

#### **Related information**

- ◇ Companies are deemed under obligation to grant equal employment opportunities regardless of gender when recruiting and hiring workers. Except in certain cases, moreover, they are deemed under obligation to grant equal employment opportunities regardless of age.
- \* Act on Securing, Etc., of Equal Opportunity and Treatment between Men and Women in Employment (Act No. 113, 1972; hereinafter “Gender Equality In Employment Act”) Article 5, Employment Countermeasures Act (Act No. 132, 1966) Article 10, and Employment Countermeasures Act Enforcement Regulations (Ministry of Labour Ordinance No. 23, 1966) Article 1–3.
- ◇ Companies are deemed under obligation not to acquire personal information from job seekers or other individuals that will lead to social discrimination, except when it is necessary in order to achieve their business objectives and they acquire it from the

individual in question after indicating the purpose of gathering it. Besides this, companies also bear certain obligations concerning the acquisition, management, use, and other aspects of personal information.

- \* “Guidelines on the Protection of Personal Information in the Field of Employment Management” (Ministry of Health, Labour and Welfare Notice No.357, 2012), “Guidelines for Proper Handling Concerning Equal Treatment, the Indication of Working Conditions, etc., Handling of the Personal Information of Job Seekers, etc., the Duties of Employment Introduction Agencies, Precise Indication of Recruitment Content, etc., by Employment Introduction Agencies, Persons Recruiting Workers, Recruitment Subcontractors, Labor Supply Businesses, etc.” (Ministry of Labour Notice No. 141, 1999).

## **(2) Withdrawal of a tentative job offer**

- Under Japan’s “long-term employment system”, periodic hiring is broadly practiced when hiring new school graduates. In many cases, time is taken while prospective graduates are still enrolled in education to hold company explanation sessions as well as implementing recruitment and selection processes, in order to secure superior human resources. Tentative job offers are then made at a time significantly earlier than the scheduled date of joining the company.

- In case law, although the legal nature of a tentative job offer is deemed to vary from case to case, if there is no plan to make a special declaration of intent with a view to concluding a labor contract (besides the notification of a tentative job offer), a worker’s response to a company’s recruitment is deemed to be an application for a labor contract, and the resultant notification of a tentative job offer from the company is deemed to be an expression of approval. As a result, a labor contract reserving termination rights including a time of commencement (\*) is deemed to have been established.
  - \* A labor contract containing an agreement to the effect that the contract may be terminated if some grounds for withdrawing the tentative job offer specified in the notification of tentative job offer or other documents have arisen, or if the prospective new employee has not managed to graduate before the scheduled date of joining the company.
- As for the legality of withdrawing a tentative job offer in case law, grounds for withdrawing a tentative job offer stated in the notification of

tentative job offer, etc., are endorsed to justify the withdrawal of the tentative job offer when they are applied to facts that could not be known (or could not be expected to be known) when the tentative job offer was made, and it is deemed objectively reasonable and capable of being endorsed as being socially acceptable to withdraw the tentative job offer, in light of the gist and purpose of reserving termination rights.

- The legal principle outlined above includes judicial precedents applied to the withdrawal of tentative job offers to new school graduates, as well as those applied to the withdrawal of tentative job offers to workers hired in mid-career by foreign-capital companies.

#### **Relevant judicial precedent**

##### **Dai Nippon Printing Case (Decision by the Supreme Court, Second Petty Bench, July 20, 1979)**

- ◇ In this case, a prospective graduate received notification of a tentative job offer from a company and submitted a promissory note to the company, but the company later suddenly gave notice that it was withdrawing the tentative job offer. The court handed down a ruling deeming the withdrawal of the tentative job offer invalid and confirming its status in labor contracts.
- ◇ From the outset, the company knew that the individual in question made a gloomy impression, which was given as the reason for withdrawing the tentative job offer, and could therefore have judged the individual's suitability as a worker. However, even while considering the person unsuitable, it still made a tentative decision to hire and then withdrew the tentative offer because there was no evidence to counter the lack of suitability. This action cannot be endorsed as socially acceptable, in light of the gist and purpose of reserving termination rights.

#### **Relevant judicial precedent**

##### **NTT Kinki Telephone Exchange Case (Decision by the Supreme Court, Second Petty Bench, May 30, 1980)**

- ◇ A case in which, after a tentative job offer had been made, it was revealed that the individual receiving the job offer had been arrested for an illegal act resulting in a suspended indictment, as a result of which the company withdrew the tentative job offer. The court recognized the withdrawal of the tentative job offer.
- ◇ Although the notification of the tentative job offer merely indicated that the company would withdraw the job offer if an abnormality



were found in the medical examination, or if documents such as a promissory note were not submitted by the prescribed deadline, the reservation of termination rights is not limited to these cases.

#### **Relevant court decision**

##### **Informix Case (Decision by the Tokyo District Court, October 31, 1997)**

- ◇ In this case, the company withdrew a tentative job offer made to a headhunted worker on grounds of a business downturn. The court deemed the withdrawal of the tentative job offer invalid and handed down a temporary disposition decision, confirming the status in labor contracts.
- ◇ Considering the process which gave rise to the tentative job offer, the expectation of the worker receiving the job offer, the fact that the recommendation to the worker to withdraw the job-offer acceptance came only two weeks before the scheduled date of joining the company, that the worker had already quit the previous job, and other factors, withdrawing the tentative job offer cannot be deemed objectively reasonable and cannot be endorsed as socially acceptable, even in light of the gist and purpose of reserving termination rights.

#### **Related information**

- ◇ Companies are obliged to report to the chief of the Public Employment Security Office and the school principal when withdrawing a tentative job offer to a new school graduate. Besides this, the Minister of Health, Labour and Welfare may, in certain cases, publish the content of such reports to facilitate appropriate career choices by pupils and students, etc.
- \* Ordinance for Enforcement of the Employment Security Act (Ministry of Labour Ordinance No. 12, 1947) Article 17-4, Article 35.

### **(3) Probationary period**

- Many Japanese companies adopt a “probationary period” system, whereby a period of time (typically three months) after a new school graduate, etc., is hired and has joined the company is set forth for the company to decide whether or not to fully employ the worker based on an evaluation of the worker’s personality and ability during this period.

- Of course, in Japan's "long-term employment system", in which new school graduates and others are periodically hired then trained and employed for the long term, as stated in (2) above, hiring of new school graduates and others is undertaken through a careful process of selection, so that aptitude assessment during the probationary period tends to be a formality, and full employment is rarely refused.

- In case law, employment contracts accompanied by a probationary period are deemed to take effect upon conclusion of the contract, with the reservation of termination rights, whereby the employment may be terminated simply for the reason that the worker was deemed to lack aptitude during the probationary period. Moreover, this reservation of termination rights is construed as being established with the gist of reserving the final decision based on subsequent investigation and observation, and as such, is deemed to be a reasonable condition of employment. Dismissal that is based on such reserved termination rights is acknowledged to have a broader range of freedom than normal dismissal.

However, considering that during the probationary period the worker gives up opportunities for employment in other companies, and in light of the gist and purpose of reserving termination rights, the exercise of reserved termination rights is only permitted when there are objectively reasonable grounds and it can be endorsed as socially acceptable.

- It is deemed acceptable to exercise reserved termination rights if, as a result of investigation after the decision to hire, or the working performance during the probationary period, etc., facts come to be known that could not have been known (or could not be expected to have been known) at the outset, and if, on the basis of such facts, it is deemed objectively appropriate to judge, in light of the gist and purpose of reserving termination rights, that it would not be appropriate to continue to employ the individual in the company.

#### **Relevant judicial precedent**

#### **Mitsubishi Plastics Case (Decision by the Supreme Court, Grand Bench, December 12, 1973)**

- ◇ In this case, the company refused to grant full employment on completion of the probationary period, because the worker had given false answers in the hiring interview. The court ruled that the

refusal to employ was valid.

- ◇ It was ruled that in this case involving alleged concealment of facts relating to the worker's potentially illegal acts in the course of hiring, the company must make an overall judgment as to whether or not there are reasonable grounds to exercise the reserving termination rights by evaluating the significance of the facts related to the existence or lack of concealed facts, the existence or lack of potentially illegal acts, etc., in terms of their impact on the worker's behavior and attitude after joining the company as well as evaluation of the worker's personality.

#### **Relevant court decision**

##### **Japan Foundation Engineering Case (Decision by Osaka High Court February 10, 2012)**

- ◇ In this case, a new school graduate hired as an engineer was dismissed under reserved termination rights after only four months of the six-month probationary period. The court deemed the dismissal valid.
- ◇ As an overall judgment, based on the fact that an accident caused by the plaintiff (worker) was an act that endangered the life and limb of the plaintiff as well as others nearby and could not be overlooked, that the plaintiff had a poor awareness of timekeeping and compliance with rules, and despite repeated cautions, suffered from a lack of sleep and an associated loss of concentration, there was no prospect of a dramatic improvement in ability or acquisition of the ability necessary as a technical employee, even with continued guidance in future, although four months had already passed.
- ◇ The employer had given ample opportunities for improvement and provided sufficient guidance and education with a view to full employment, and had therefore endeavored to avoid dismissal.

#### **To prevent disputes from occurring**

To prevent disputes concerning the probationary period (except new school graduates, etc.), companies engaged in external labor market type personnel and labor management could include the following content in their labor contracts or rules of employment, for example, and carry out such measures in accordance with these, when appropriately paid employees are hired for immediate deployment in managerial or highly specialized positions, provided this does not

compromise the professional interests of workers.

\* Rules of employment must be consistent with labor contracts.

- ◇ The probationary period should not be too long (for example, about three months, extendable to six months with the worker's consent).
- ◇ The duties undertaken by the worker, the expected performance and other details should be stated in as much detail as possible.
- ◇ It should be made clear that, during or after completion of the probationary period, the worker's performance will be judged and dismissal could result.
- ◇ The worker's performance should be evaluated regularly during the probationary period and the worker should be informed of the result, and if there is any problem with the performance, it should be pointed out to the worker.
- ◇ If a worker is to be dismissed, notice should be given, and a fixed allowance should be paid in consideration of the length of employment and other circumstances.

## **2 Development of Labor Contracts**

### **(1) Setting and changing working conditions**

- In principle, a labor contract is established between a worker and an employer by agreement on an equal basis, and working conditions are specified in it.
  - \* Labor Contract Act (Act No. 128, 2007), Article 3, Article 6; Labor Standards Act (Act No. 49, 1947), Article 2.
  - \* As well as the above, Article 3 of the Labor Contract Act includes provisions on equal treatment according to the actual conditions of employment, the concept of consideration for harmony between work and private life, contract compliance, good faith, and the prohibition of abuse of rights. Meanwhile, Article 13 of the Labor Standards Act states that a labor contract which provides for working conditions not compliant with the standards of the Act shall be invalid with respect to such portions, and that the portions which have become invalid shall be governed by the standards set forth in the Act.
  
- Any part of a labor contract contravening the standards concerning working conditions provided in a collective agreement between a company and a labor union shall be void. In such a case, the invalidated part of the contract shall be governed by the standards provided in the collective agreement. These standards shall also apply to matters not provided in the labor contract.
  - \* Labor Union Act (Act No. 174, 1949), Article 16.
  
- Meanwhile, businesses that continuously employ 10 or more workers are obliged to draw up and submit rules of employment, and labor contracts stipulating working conditions that do not meet standards established by the rules of employment shall be invalid with regard to such portions. In such cases, the working conditions shall be governed by the rules of employment.
  - \* Labor Contract Act, Article 12; Labor Standards Act, Article 89.
  - \* Article 89 of the Labor Standards Act provides that if there are stipulations on matters such as working hours, days off, leave, wages, retirement (including grounds for dismissal), extraordinary wages, costs borne by workers, safety and health, etc., these matters must be stipulated in the rules of employment.
  - \* Article 92 of the Labor Standards Act provides that rules of employment shall not infringe any laws and regulations or any collective agreement.

- Unlike US employee handbooks and others that mainly stipulate workplace discipline and basically differ from the content of the labor contract, Japanese law states that, if an employer has informed a worker of the rules of employment that provide for reasonable working conditions, the content of the labor contract shall be based on the working conditions provided by such rules of employment.

\* Labor Contract Act, Article 7.

- Based on these rules of employment, to facilitate efficient, reasonable business management employing large numbers of workers, the common practice in Japan is to set forth detailed working conditions in rules of employment instead of in individual labor contracts.

- Moreover, when concluding labor contracts, employers must clearly indicate the wages, working hours and other working conditions to the workers.

Of these working conditions, employers must issue a document to workers detailing matters concerning the term of the labor contract, matters concerning the workplace and the work engaged in, matters concerning working hours, rest periods, days off and leave, matters concerning wages, and matters concerning retirement (including grounds for dismissal).

\* Labor Standards Act, Article 15; Ordinance for Enforcement of the Labor Standards Act, Article 5.

- Employers must ensure that workers gain in-depth understanding of working conditions and the content of labor contracts, and shall confirm the content of labor contracts whenever possible in writing.

\* Labor Contract Act, Article 4.

### **To prevent disputes from occurring**

To prevent disputes concerning wages for overtime work or days off in an annual salary system, for example, companies engaged in external labor market type personnel and labor management could include the following content in their labor contracts or rules of employment and carry out such measures in accordance with these, when appropriately paid employees are hired for immediate deployment in highly specialized positions, provided this does not compromise the professional interests of workers (such as being able to perform work at the worker's own discretion in connection with the nature of the work).

\* Rules of employment must be consistent with labor contracts.

- ◇ The method of paying allowances for overtime work or holiday work.
- ◇ If an allowance for overtime work is included in the salary, a statement to that effect.

It should be borne in mind that, in this type of case, portions corresponding to extra wages should be clearly distinguished from those corresponding to normal working hours, or if not clearly distinguished, a certain amount of overtime work and holiday work should be expected to arise in view of the previous year's performance, etc. Moreover, both labor and management should be aware of the fact that an annual salary amount has been decided to be included in this portion of extra wages.

- The rule is that any change to the content of a labor contract must also be agreed between workers and employers.

\* Labor Contract Act, Article 8.

- In court decisions, the existence of individual agreements on changes to the content of labor contracts tends to be stringently examined.

- In principle, moreover, an employer may not, without the agreement of the worker, change any of the working conditions in a manner that is disadvantageous to the worker by changing the rules of employment. However, if the employer makes the changed rules of employment known to the workers in the workplace, 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 content 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 shall be in accordance with such changed rules of employment.

\* Labor Contract Act, Articles 9 and 10.

### **Relevant court decision**

#### **Mitsui Wharf Reorganization Company Case (Decision by Tokyo High Court, December 27, 2000)**

- ◇ In this case, a reorganization company (i.e. a company subject to procedures under the Corporate Reorganization Act) reduced a worker's wages without the worker's consent on grounds of business difficulty, and the worker claimed payment of the full wage. The court upheld the worker's claim.
  
- ◇ A worker's expression of intent to accept reductions or deductions of wages not based on rules of employment should be regarded as equivalent to an abandonment of wage claims, and is only valid when there are objectively reasonable grounds sufficing to deem that it is based on the worker's free will.
  
- ◇ Although the Reorganization Company gave notification of the wage reduction, it did not adequately explain the justification for the reduction, nor did it clearly seek an expression of intent indicating acceptance or otherwise. Moreover, the worker thought that any statement of objection would result in dismissal, the 20% deduction from wages was extremely disadvantageous, and only a group of workers was made to bear this burden. As a result, there are no objectively reasonable grounds to deem that the worker's lack of action, which gave the outward impression of consent, was based on the worker's free will.

### **Relevant judicial precedent**

#### **Omagari Agricultural Cooperative Case (Decision by the Supreme Court, Third Petty Bench, February 16, 1988)**

- ◇ In this case, the retirement allowance ratio was reduced for employees of one of the former agricultural cooperatives involved in a merger, in accordance with newly established provisions on retirement allowances accompanying the merger. The court deemed this disadvantageous change to the rules of employment to be reasonable.
  
- ◇ When creating or changing rules of employment that cause a substantial disadvantage regarding wages, retirement allowance or other important rights and working conditions for workers, the



relevant clauses are valid if they are reasonable in content, based on a high level of need such that it may be permitted to expect workers to legally tolerate such disadvantages.

- ◇ The action was reasonable because the rate of retirement allowance was reduced but the salary was significantly increased. Moreover, the merger of cooperatives corrected disparity amongst workers, and generated a strong need to create and apply uniform rules of employment.

#### **Relevant judicial precedent**

##### **Daishi Bank Case (Decision by the Supreme Court, Second Petty Bench, February 28, 1997)**

- ◇ In this case, the fixed retirement age had previously been 55, but workers whose state of health made them fit for work could remain in employment until age 58. However, in a change to the rules of employment, the fixed retirement age was extended from 55 to 60 and wages after age 55 were reduced to 67% of the wage at age 54. As a result, the amount that could have been earned by working until age 58 could now only be earned by working close to the new fixed retirement age of 60. The court yet deemed this disadvantageous change to the rules of employment to be reasonable.
- ◇ While the extension of the fixed retirement age to 60 or more was a goal of national policy, there was a considerable need for a revision of wage levels to accompany the extension of fixed retirement, and the working conditions of the bank after the change were considerably high compared to other companies and society in general. Moreover, the change was made after concluding a collective agreement, following negotiations and agreement, in response to a proposal by the labor union comprising about 90% of the bank's employees. As such, the disadvantage cannot be deemed unreasonable in content, even if there were no transitional measures to mitigate the disadvantage.

#### **Relevant judicial precedent**

##### **Michinoku Bank Case (Decision by the Supreme Court, First Petty Bench, September 7, 2000)**

- ◇ In this case, a bank with a system of fixed retirement at 60 changed

its rules of employment to convert employees aged 55 and over to “specialist posts”. With this, the performance-based compensation that accounted for around half of their salaries would be slashed by a uniform 50%, with an associated decrease in the rate of bonus payment. The court deemed this disadvantageous change to the rules of employment unreasonable.

- ◇ Although the need to change the rules of employment can be acknowledged in terms of business management, the change to the wage structure improved working conditions for core workers but vastly reduced the wage levels of those aged 55 and over. Such a change cannot be deemed to have been based on the pressing need of the bank to vastly reduce the total wage cost.
- ◇ A labor union comprising 73% of the bank’s employees consented to the disadvantageous change, but considering the degree and content of the disadvantage, the agreement of the union cannot be taken as a major factor for consideration when judging reasonability.
- ◇ Considering that the part of this change to the rules of employment involving a wage reduction was disadvantageous solely to such older employees, it could not be made binding on the said employees, even taking account of other circumstances.

## **(2) Transfer (Redeployment)**

- The practice known as “transfer” (*haiten* in Japanese) means that a worker’s placement is changed, and the job content or working location is altered over a considerably long period. Changes of the place of work (department) within the same working location (place of business) are often called “reassignments” (*haichi tenkan*), while changes of the working location are often called “relocation” (*tenkin*).  
In Japan, regular employees scheduled for long-term employment are hired without restriction on job content or working location, and systematic, broad-ranging transfer is widely practiced for purposes of improving workers’ occupational skills and status within the corporate organization, as well as replenishing or adjusting the labor force.

- In case law, it has been held that, if there are provisions in the rules of employment to the effect that workers may be ordered to be relocated or reassigned for the convenience of business, and if there is no agreement to restrict the working location or job, a company may order relocations and reassignments without the worker's consent. However, transfer order rights may not be exercised without constraint, and it is deemed impermissible to abuse this right.  
Specifically, transfer is only deemed to constitute an abuse of rights if there is no necessity on business grounds, or if there is necessity on business grounds but the transfer is ordered for other improper motives or objectives, or when there are exceptional circumstances, such as that the worker is made to suffer a disadvantage markedly exceeding the degree that should normally be tolerated.
- Also, in court decisions, there have been cases in which a transfer order for purposes of causing the worker to retire has been deemed illegal.

#### **Relevant judicial precedent**

##### **Toa Paint Case (Decision by the Supreme Court, Second Petty Bench, July 14, 1986)**

- ◇ In this case, a university graduate worker responsible for sales in the Kobe Sales Office refused a relocation order to the Nagoya Sales Office on account of domestic circumstances (alleging that it would mean living away from his family due to his wife's work and his parents' difficulty in moving house) and was therefore subjected to disciplinary dismissal. The court deemed both the relocation order and the disciplinary dismissal valid.
- ◇ An employer may decide a worker's working location at its own discretion, in accordance with business necessity.
- ◇ Said transfer order would not constitute an abuse of rights unless there was no necessity on business grounds, it was ordered for other improper motives or objectives, or there were exceptional circumstances, such as that the worker was made to suffer a disadvantage markedly exceeding the degree that should normally be tolerated.

- ◇ The existence of necessity on business grounds should be endorsed, as long as elements that contribute to the reasonable operation of the company can be acknowledged, such as the correct deployment of the labor force, enhancing the efficiency of work, vocational development of workers, stimulation of work motivation, or greater ease of work operation.
- ◇ In the case of this transfer order, necessity on business grounds existed, and in consideration of the family situation, the disadvantage in family life caused by the transfer to Nagoya Sales Office should be described to be of a degree that should normally be tolerated in connection with transfers.

#### **Relevant court decision**

##### **Nestle Japan Case (Decision by Osaka High Court, April 14, 2006)**

- ◇ In this case, a worker who refused a transfer order to a remote region, on grounds that he had a wife who suffered from mental illness and a parent who required nursing care, sought confirmation that his employment contract did not oblige him to work in said remote region. The court deemed said transfer order an abuse of rights and therefore invalid.
- ◇ As it was clearly specified in the rules of employment and employment contract that the worker could be transferred, and moreover as workers in the company had previously been transferred, the company is entitled to order transfers without individual consent, while the need for transfer on business grounds is also acknowledged.
- ◇ However, the disadvantage suffered by the worker as a result of the transfer order would have been considerably large, markedly exceeding the degree that should normally be tolerated. This is because, if a transfer order caused the worker to live away from his family, the impact on the wife's mental illness would have been great, while it would have been impossible for the wife to spend all day looking after and caring for the parent who required nursing care, among other reasons.

### **Relevant court decision**

#### **Fuji Seal Case (Decision by Osaka District Court, August 28, 2000)**

- ◇ In this case, a worker who rejected an offer of voluntary retirement was given a transfer order. The court deemed said transfer order an abuse of rights and therefore invalid.
- ◇ The rules of employment stated that personnel reallocation may be ordered when necessary on business grounds, and the worker was a regular employee with no restriction on work duties or working location. In such cases, transfers may be ordered without requiring individual consent, but when there is no necessity on business grounds, or when there are exceptional circumstances, such as that the order was made for other improper motives or objectives, the transfer order constitutes an abuse of rights and is therefore invalid.
- ◇ As there is no necessity on business grounds for a worker in a management post who is engaged in developing technology to be deployed in the simple work of manual labor, the transfer order should be seen as harassment in response to the worker's rejection of the voluntary retirement offer. As such, the transfer order constituted an abuse of rights and was therefore invalid.
- ◇ There was no necessity on business grounds for the worker to be deployed in waste collection work, which had previously been carried out by a temporary worker. As such, the transfer order constituted an abuse of rights and was therefore invalid.

### **(3) Secondment (transfer to related firms)**

- “Secondment” means that a worker, while still contracted to the original employer, works for another company and remains in that company for a significant period of time.

In Japan, regular employees scheduled for long-term employment are hired without restriction on job content or working location. As such, secondment is widely practiced for purposes such as management or technical instruction of subsidiaries and affiliates, workers' vocational development and career building, response to a shortage of posts for middle- and older-aged personnel, employment adjustment, etc.

- Article 14 of the Labor Contract Act states that “In cases where an employer may order the temporary transfer of a worker, if such order of temporary transfer is found to be an abuse of rights in light of the need for such temporary transfer, the circumstances pertaining to the selection of the worker to be temporarily transferred, or any other circumstances, such order shall be invalid.”

#### **Relevant judicial precedent**

#### **Nippon Steel Case (Decision by the Supreme Court, Second Petty Bench, April 18, 2003)**

- ◇ In this case, a company (the secondment originator) ordered its workers to be seconded to a cooperating company accompanying the outsourcing of work to that company, but some of the workers did not consent to the secondment order. The court deemed the secondment order valid.
- ◇ External work clauses were included in the rules of employment and collective agreements, while the external work agreement included detailed provisions defining external work, the secondment period, workers’ status, treatment and other details during secondment, and other matters taking the interests of the seconded workers into account. Under these circumstances, the company was entitled to issue a secondment order without the individual consent of the workers.
- ◇ Considering that it was necessary to undertake secondment measures, that the standards for selecting personnel subject to secondment measures were reasonable, that there was no change at all in the work content or working location, and that there were provisions for workers’ status, treatment and other details during secondment under the external work agreement, etc., the workers cannot be said to have suffered any significant disadvantage in their domestic circumstances, working conditions, etc. Moreover, there was no unreasonable element in the procedure leading to the secondment order. Thus, the secondment order could not be said to constitute an abuse of rights.

- Under the system of “employment transfer” (*tenseki*), a worker’s employment relationship is transferred from the original employer to another company, and the worker is engaged in working for the other company.

In Japan, regular employees scheduled for long-term employment undergo employment transfer for purposes such as securing employment opportunities for workers reaching the fixed retirement age, employment adjustment, and management or technical instruction of subsidiaries and affiliates.

\* Article 625 of the Civil Code (Act No. 89, 1896) states that an employer may not assign his or her rights to a third party without first obtaining the employee’s consent.

- In court decisions, employment transfers cannot be imposed unilaterally based on the employer’s inclusive personnel rights, and require the consent of the worker.

#### **Relevant court decision**

##### **Sanwa Kizai Case (Decision by the Tokyo District Court, January 31, 1992)**

- ◇ In this case, a worker who refused an employment transfer order was subjected to disciplinary dismissal, but the court deemed the disciplinary dismissal invalid.
- ◇ Between companies that have substantially independent corporate status, an employer may not unilaterally order an employment transfer based on the employer’s inclusive personnel rights.
- ◇ Whether or not the workers’ specific consent at the time of employment transfer must always be obtained when carrying out an employment transfer, an employment transfer order is invalid if there is no inclusive consent in advance, at least. Therefore, disciplinary dismissal based on refusing an employment transfer order is also invalid.

#### **Relevant court decision**

##### **Hitachi Seiki Case (Decision by Chiba District Court, May 25, 1981)**

- ◇ In this case, a worker (the plaintiff) who refused an employment transfer order to an affiliate refused to engage in work by the defendant company (the employment transfer originator). The court deemed the employment transfer order valid.

- ◇ Even if the defendant company and the affiliate have a close relationship, the worker's consent is required for an employment transfer because their corporate status is different.
- ◇ It had been explained during the hiring interview that the post could involve working for the affiliate, and the plaintiff had accepted this through a statement of personal position. Moreover, the plaintiff had no restriction on work duties or working location, while employment transfer to the affiliate was incorporated in the defendant company's personnel system and had been continued for many years. For these and other reasons, the plaintiff can be deemed to have given inclusive consent in advance to employment transfers to the affiliate.

#### **(4) Discipline (disciplinary action)**

- In order to maintain work discipline and corporate order, “disciplinary action” is imposed as a sanction against breaches of work discipline and corporate order. In companies, this is often codified in rules of employment as disciplinary dismissal, forced resignation (recommendation to quit on the premise that failure to accept the recommendation will result in disciplinary dismissal), suspensions, wage cuts, warnings, different levels of reprimand, etc.
- Grounds for disciplinary action include (i) falsification of personal history, (ii) neglect of duties, (iii) violation of a work order, (iv) obstruction of work, (v) breach of workplace discipline, and (vi) breach of discipline based on the position and status befitting a worker (delinquency in private life, moonlighting, breach of the duty of good faith, etc.).

- As for the legal justification behind disciplinary action, in case law, employers are deemed able to impose disciplinary action as a form of sanction or penalty on workers they employ who violate corporate order, in order to broadly maintain corporate order and thereby aim for the smooth operation of the enterprise.
- Meanwhile, in case law, it is deemed that, for an employer to discipline a worker, the types of and grounds for disciplinary action must be



stipulated in the rules of employment in advance. Since rules of employment have the nature of legal norms, for these to have binding force, procedures must have been taken to make them known to workers in the place of business to which their content applies.

- Article 15 of the Labor Contract Act states 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 action shall be treated as an abuse of rights and shall be invalid.”

#### **Relevant judicial precedent**

##### **Kansai Electric Power Case (Decision by the Supreme Court, First Petty Bench, September 8, 1983)**

- ◇ In this case, a company reprimanded a worker who had distributed fliers criticizing the company in the company housing, and the court deemed the reprimand valid.
- ◇ The content of the fliers criticized, attacked and slandered the company with no basis in fact, or by exaggerating or distorting facts; the act of distributing the fliers fomented distrust of the company among the workers and disrupted corporate order, or could potentially have done.
- ◇ Even though the fliers were distributed outside working hours, outside the workplace and with no connection to the performance of work duties, they corresponded to “When committing a particularly inexpedient act” as grounds for disciplinary action prescribed in the rules of employment.

#### **Relevant judicial precedent**

##### **Fuji Kosan Case (Decision by the Supreme Court, Second Petty Bench, October 10, 2003)**

- ◇ In this case, a worker caused problems with one of the company’s clients, adopted a defiant attitude and used verbal abuse toward superiors, thereby disturbing the order of the workplace, and was therefore subject to disciplinary dismissal, in that this behavior constituted grounds for disciplinary action in the rules of

employment. The court deemed disciplinary dismissal impermissible, since the worker had not been made aware of the rules of employment.

- ◇ For an employer to discipline a worker, types of and grounds for disciplinary action must be stipulated in the rules of employment in advance. For rules of employment to have binding force as having the nature of legal norms, procedures must have been taken to familiarize workers in the place of business to which their content applies.

#### **Relevant judicial precedent**

##### **Tanken Seiko Case (Decision by the Supreme Court, First Petty Bench, September 19, 1991)**

- ◇ In this case, a worker was subjected to disciplinary dismissal on account of absence without leave due to being arrested and detained, falsification of personal history, conviction for an offence carrying an imprisonment sentence, and distributing fliers inside the premises. The court deemed the disciplinary dismissal valid.
- ◇ Employment contracts constitute a continuous relationship between worker and employer based on a relationship of trust, and carry an obligation to report matters related to the maintenance of corporate order within a necessary and reasonable scope truthfully and in good faith. As the final educational level reached is also a matter that concerns the maintenance of corporate order, there is an obligation to report it truthfully.

#### **Relevant judicial precedent**

##### **Yokohama Rubber Case (Decision by the Supreme Court, Third Petty Bench, July 28, 1970)**

- ◇ In this case, a worker who had been convicted of breaking into and entering a stranger's home was subjected to disciplinary dismissal, but the court deemed the dismissal invalid.
- ◇ The appellee had entered another person's home for no reason while under the influence of alcohol, and had therefore been convicted of breaking and entering, but the appellee's act had been unrelated to the company's organization, business, etc., and had been committed within the scope of private life. Moreover, the punishment received

by the appellee was merely a fine of 2,500 yen, while the occupational status of the appellee within the appellant company was that of a factory worker responsible for steaming work and was not a leading one. Taking these and other circumstances of the original ruling into account, the appellee's act cannot be evaluated as having significantly damaged the appellant company's reputation.

#### **Relevant judicial precedent**

##### **Nestle Japan Case (Decision by the Supreme Court, Second Petty Bench, October 6, 2006)**

- ◇ In this case, a worker who physically assaulted a superior was subjected to disciplinary dismissal. The court deemed the dismissal invalid.
- ◇ The disciplinary dismissal had been imposed more than seven years after the physical assault on the superior, and even if the facts claimed by the company as grounds for disciplinary dismissal had really existed, it is undeniable that, at the time of the disciplinary action, there were no objectively reasonable grounds that would necessitate such a severe disciplinary action from the perspective of maintaining workplace discipline. Moreover, the dismissal cannot be endorsed as being socially acceptable.

#### **(5) Disciplinary dismissal**

- Disciplinary dismissal is the most severe form of disciplinary action. It is normally imposed with immediate effect, with no dismissal notice or payment of notice allowance, and retirement allowance is wholly or partially withheld.
- Grounds for disciplinary dismissal are the same as the grounds for disciplinary action in discipline rights stated in (4) above. They can include (i) falsification of personal history, (ii) neglect of duties, (iii) violation of a work order, (iv) obstruction of work, (v) breach of workplace discipline, and (vi) breach of discipline based on the position and status befitting a worker (e.g. delinquency in private life, moonlighting, breach of the duty of good faith), among others.

- Since disciplinary dismissal is more disadvantageous to the worker than ordinary dismissal described in 3 (2) above, the courts take a more rigorous approach than for ordinary dismissal when judging the abuse of rights by employers. Generally, a breach of work discipline must be such that it is not enough merely to justify ordinary dismissal, but has reached a level justifying removal from the labor relationship as a sanction.

### **3 Termination of Labor Contracts**

#### **(1) Dismissal**

- In labor contracts with no fixed term, employers have the right to dismiss in principle, provided they give at least 30 days' notice.
  - \* Labor Standards Act, Article 20; Civil Code Article 627
  
- In case law, however, if the employer's exercise of dismissal rights lacks objectively reasonable grounds and cannot be endorsed as socially acceptable, it is deemed an abuse of rights and therefore invalid (legal principle on abuse of dismissal rights). Article 16 of the Labor Contract Act, which codifies the legal principle of judicial precedent, states that "A dismissal shall, if it lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as an abuse of rights and shall be invalid."
  - \* Article 17 of the Labor Contract Act states that, with regard to fixed-term labor contracts, an employer may not dismiss a worker until the expiration of the term of such labor contract, unless there are unavoidable circumstances.
  
- Under the Labor Standards Act, grounds for dismissal are to be specified in the rules of employment, and the applicability of grounds for dismissal specified in rules of employment is a central point of contention when examining the claim of "objectively reasonable grounds". Even when grounds for dismissal are deemed applicable, moreover, the reasonability of dismissal is still reviewed.
  - \* Labor Standards Act, Article 89
  
- "Objectively reasonable grounds" may generally be categorized as follows.
  - (i) Dismissal due to inability to provide labor.
  - (ii) Dismissal due to lack of skills, insufficient performance, inappropriate attitude or lack of aptitude.
  - (iii) Dismissal due to violation of workplace discipline or neglecting duties.
  - (iv) Dismissal due to necessity in terms of business management.
  - (v) Dismissal due to union shop agreement.

## **(2) Ordinary dismissal**

### **(i) Dismissal due to inability to provide labor**

- In court decisions, loss of the ability to provide labor due to personal injury or sickness has been deemed reasonable grounds for dismissal.
- On the other hand, in court decisions, dismissal has sometimes been deemed an abuse of dismissal rights when a quick recovery from injury or sickness is expected, or when a worker is dismissed without first being offered dismissal avoidance measures such as leave of absence.

#### **Relevant court decision**

##### **Tokyo Electric Power Case (Tokyo District Court, September 22, 1998)**

- ◇ In this case, a company dismissed a temporary worker with a Grade 1 disability because the worker was barely able to attend work due to poor health on a continuous basis, and was therefore deemed unfit to work. The court deemed this not to constitute abuse of dismissal rights.
- ◇ The worker in question was barely able to attend work due to poor health on a continuous basis, but for a certain time was paid wages with the assumption that his attendance at work was normal. However, the worker's status in the management of attendance was changed to non-attendance as the inability to attend work continued, and because said inability to attend work still continued thereafter, the worker was deemed unfit for work due to physical and mental infirmity. As such, there were reasonable grounds for dismissal in this case, and the means used for this were not unreasonable, as a result of which the dismissal did not constitute abuse of dismissal rights.

#### **Relevant court decision**

##### **K Company Case (Tokyo District Court, February 18, 2005)**

- ◇ In this case, a worker (the plaintiff) had frequently been absent due to manic depression, but even when attending work, could not fulfil work duties, and so was given leave of absence. Even after returning to work, absences were still frequent and symptoms of manic depression recurred, and because this started to have an impact

outside the company as well, the worker was dismissed. The court deemed the dismissal invalid.

- ◇ Although manic depression caused hindrance to the work performance, there was no evidence that the employer had sought the advice of the plaintiff's doctor in advance of the dismissal, while there was also room for improvement of the condition by having the worker receive proper treatment. Moreover, the leave of absence had not been completed, while two other workers who could not attend work normally due to illness remained employed by the company, and the plaintiff's dismissal therefore ran counter to equal treatment. As a result, said dismissal lacked objectively reasonable grounds, and constituted abuse of dismissal rights.

#### **To prevent disputes from occurring**

To prevent disputes from occurring, companies engaged in external labor market type personnel and labor management could include the following content in their labor contracts and rules of employment, for example, and carry out such measures in accordance with these, when appropriately paid employees are hired for immediate deployment in managerial posts or highly specialized positions, provided this does not compromise the professional interests of workers.

\* Rules of employment must be consistent with labor contracts.

- ◇ A statement that a worker may be dismissed if unable to perform work duties stated in the labor contract for a significant period of time for health-related reasons.
- ◇ Payment of a proper allowance in line with status, merit, length of employment and other circumstances.

#### **(ii) Dismissal due to lack of skills, insufficient performance, inappropriate attitude or lack of aptitude**

- In cases of dismissal involving workers serving under the long-term employment system, some court decisions do not easily recognize the validity of dismissals merely because of their lack of skills, insufficient performance, inappropriate attitude, or lack of aptitude. Such decisions also make a careful judgment on issues such as whether these are severe in degree, whether opportunities for improvement were given, and

whether there are any prospects of improvement.

- In court decisions, there have also been cases where dismissal is deemed valid when the worker, despite exhibiting insufficient performance or inappropriate attitude, makes no attempt at self-examination, no improvement is seen, etc.
- In court decisions, it has been relatively easy to deem dismissal valid when an upper ranking manager, engineer, sales employee or other employee has been hired in mid-career to be immediately effective for specialized work as their advanced skill or ability is valued and subject to expectation, but did not have the expected skill or ability.

#### **Relevant court decision**

#### **Sega Enterprises Case (Decision by the Tokyo District Court, October 15, 1999)**

- ◇ In this case, workers with low personnel evaluation were offered early retirement, and those who refused were dismissed for lack of skills. The court deemed the dismissals invalid.
- ◇ Because other grounds for dismissal in the rules of employment are limited in nature, failure to attain the average level of skills should also be construed so as to require the gravity to warrant dismissal due to lack of skills. Also, the working ability would have to be markedly inferior with no prospects of improvement.  
Although the dismissed workers cannot be said to have attained the average level and were in the bottom 10% of all workers in evaluation ranking, this personnel evaluation was based on a comparative assessment and was not an absolute assessment. As such, it did not necessarily mean that their work efficiency was markedly inferior and that there were no prospects of improvement.
- ◇ It should be said that there was still room for the company to improve the workers' efficiency by giving further systematic education and instruction. They still could not be said to correspond to a case of "inferior working ability with no prospects of an improvement" specified as grounds for dismissal in the rules of employment.



**Relevant court decision**

**ACE Insurance Case (Decision by the Tokyo District Court, August 10, 2001)**

- ◇ In this case, workers with long records of employment in a foreign-capital company under a long-term employment system were dismissed for a lack of skills. The court deemed the dismissals invalid.
- ◇ Insufficient performance alone is not enough to warrant dismissing a worker who has served continuously under a long-term employment system on grounds of poor performance or work attitude. Rather, the worker's poor performance would need to have adversely affected or damaged the company's management or operation, or potentially caused serious damage, to an extent requiring his or her exclusion from the company. Moreover, the abuse of rights must be judged in consideration of factors such as that, in spite of urging self-examination with a view to betterment, there are still no prospects of improvement.
- ◇ It was extremely inappropriate to base grounds for dismissal on a situation that arose from inappropriate transfer due to the company's unilateral rationalization strategy. Moreover, the company pressurized the workers to take voluntary retirement and made them stand-by at home for a lengthy period with the intention of excluding them from the organization as soon as possible, without providing training or appropriate guidance, and the fact given as grounds for dismissal is not particularly serious. Considering these factors in combination, the dismissals were an abuse of dismissal rights and therefore invalid.

**Relevant court decision**

**Nihon Storage Technology Case (Tokyo District Court, March 14, 2006)**

- ◇ In this case, a worker had been hired in mid-career by a foreign-capital company on account of English proficiency, PC skills and experience in logistics, but was dismissed for markedly low work performance ability and inappropriate attitude. The court deemed the dismissal valid.

- ◇ Based on the reasons below, among others, this case is deemed to correspond to “markedly lacking the ability necessary to perform the work” and others specified as grounds for dismissal in the rules of employment. The dismissal is thus deemed to have objectively reasonable grounds and be socially acceptable.
- Repeatedly made mistakes in work, leading to a series of complaints from other divisions and customers; failed to heed superior’s warnings.
  - Even after personnel reallocation, failed to obey superior’s instructions, neglected the obligation to report, received a series of complaints due to insincere attitude to customers, and failed to improve despite repeated requests to do so.
  - Slow to acquire proficiency in assigned work, was urged to improve work processing speed.
  - Received a reprimand for not obeying superior’s instructions, but refused to attend meeting.

**Relevant judicial precedent**

**Ono Lease Case (Decision by the Supreme Court, Third Petty Bench, May 25, 2010)**

- ◇ In this case, a worker with the status of General Business Division Manager and Director was dismissed for having a poor work attitude, and the court deemed the dismissal legal.
- ◇ The work attitude was so bad that complaints were received from other workers and clients, and because this originated in a drinking habit, a superior advised the worker to cut down on drinking, but no improvement was made.
- ◇ As the said work attitude (including absences from work) was such that it disturbed the order of normal workplace functions, and the prospects that the worker would improve this work attitude by himself were poor, it constitutes grounds for dismissal. Even if dismissal was imposed without taking any other disciplinary action, the dismissal cannot be said to significantly lack reasonability or to constitute tort.

### **Relevant court decision**

#### **Nihon Suido Consultants Case (Tokyo District Court, December 22, 2003)**

- ◇ In this case, a worker (the plaintiff) hired in mid-career as a systems engineer was dismissed on grounds of lack of skills and poor work, and the court deemed the dismissal valid.
  
- ◇ The plaintiff's technical skills, ability and aptitude had not only failed to reach the expected levels, but were markedly inferior and had hindered the execution of work duties. This was due to the plaintiff's disposition, which had a persistence that could not easily be corrected.
  
- ◇ The plaintiff's work record and performance were egregiously poor, exemplified by the fact that it took about eight years of employment in the Accounting Systems Section to complete work that would normally be finished in around six months.

The cause of this insufficient performance was that the plaintiff's temperament, ability and other attributes did not meet the aptitude expected of an employee by the defendant, and there was no room for improvement through guidance or education by the defendant. Besides, the plaintiff had also caused problems in interpersonal relations.

### **To prevent disputes from occurring**

To prevent disputes from occurring, companies engaged in external labor market type personnel and labor management could include the following content in their labor contracts and rules of employment, for example, and carry out such measures in accordance with these, when appropriately paid employees are hired for immediate deployment in managerial posts or highly specialized positions, provided this does not compromise professional interests of workers.

\* Rules of employment must be consistent with labor contracts.

- ◇ In labor contracts, state in as much detail as possible the work duties assigned to the worker, the responsibilities to be fulfilled, and the ability required for performing the duties and responsibilities. Also, state that dismissal may result if the stated duties and responsibilities cannot be fulfilled to a reasonable degree, or if an

evaluation is considerably low compared to the expected evaluation over a given period of time.

- ◇ A statement that performance will be periodically evaluated and workers informed of the results.
- ◇ A statement that proper allowances will be paid in line with status, merit, length of employment and other circumstances.

### **(iii) Dismissal due to violation of workplace discipline or neglecting duties**

- In court decisions, dismissal on grounds of unlawful acts that violate workplace discipline (violence or verbal abuse) or neglect of duties (e.g. absence without leave, excessive tardiness) has often been deemed valid.

#### **Relevant court decision**

##### **Daitsu Case (Decision by Osaka District Court, July 17, 1998)**

- ◇ In this case, a company dismissed a worker who had verbally abused and intimidated workers in a client company, broke tools, made defamatory remarks about the client's management personnel, and did not comply with a leave of absence order. The court deemed the dismissal valid.
- ◇ The dismissed worker had been employed for only just over 18 months, was still in his early 30s, had a license and would have had no difficulty in finding new employment. Considering these facts in combination, this dismissal cannot be described as markedly unreasonable in general societal terms, even though the worker had generally worked diligently and had no history of disciplinary action since joining the company, had withdrawn an expression of intent to quit two days after giving it, had shown an attitude of regret such as offering to apologize to the president, and had other jobs including that of a freelance driver, among other factors.

### **(3) Adjustment dismissal**

- The legal principle on abuse of dismissal rights in Article 16 of the Labor Contract Act also applies to adjustment dismissal implemented by companies for purposes of personnel reductions considered necessary for business reasons.

- In Japan's long-term employment system, employment adjustments are made at times of economic fluctuation; before reaching the stage of adjustment dismissal, adjustments are made by reducing or canceling overtime work, reducing or suspending new recruitment, transfer and secondment, terminating the employment of non-regular employees, temporary shutdowns, or offering voluntary retirement, among other methods, following labor-management consultation. Also, agreed termination of labor contracts is often achieved through measures such as offering voluntary retirement.

- Based on these facts, court decisions focus on the following four issues concerning the validity of adjustment dismissal, and judgments are based on a concrete and total consideration of these.
  - (i) The necessity to reduce the number of employees
  - (ii) Whether the duty to endeavor to avoid dismissal has been exhausted
  - (iii) The validity of selection of employees to be dismissed
  - (iv) The validity of procedures

**(i) The necessity to reduce the number of employees**

- In court decisions, there have been cases requiring a state of bankruptcy to occur if personnel reductions are not made. In most cases, however, the company's business judgment has been respected, and reasonable necessity in terms of corporate operation (e.g. excessive debts or cumulative deficits) is usually sufficient.
- Even if the company as a whole is not in a management crisis, there have also been cases where the need for personnel reductions in specific divisions for purposes of rationalizing business or strengthening competitiveness has been acknowledged.
- In other cases, however, the need for personnel reductions has not been acknowledged in cases where personnel reduction measures have been immediately followed by large pay raises or significant new hiring.

**(ii) The duty to endeavor to avoid dismissal**

- In case law, dismissal avoidance measures have not been uniformly required, but judgments have been made on whether sincere and reasonable efforts have been applied in each individual situation.

- In case law, abuse of rights has often been ruled in cases when adjustment dismissal has been implemented without attempting any dismissal avoidance measures, or when an employer embarks on adjustment dismissal without taking account of transfer to work in other departments, offering voluntary retirement, etc.
- In foreign-capital companies, dismissal has sometimes been deemed valid in cases where staff capacity is strictly managed with priority on the speciality level of divisions and occupations, manpower is procured and adjusted via the external labor market (career-change market), and high levels of compensation are given in line with job duties and results, when the employer implements adjustment dismissal to accompany the closure of specific divisions, when transfer to other departments is difficult, and when the employer significantly increases the scale of retirement allowances or supports job-search.

**(iii) The validity of selection of employees to be dismissed**

- In court decisions, the selection of employees to be dismissed has often been deemed appropriate if objectively reasonable standards have been set on the history of discipline violations, years of continuous service, age, etc., and selection is officially made on this basis.
- Moreover, as in (ii) above, when foreign-capital companies strictly manage staff capacity with priority on the speciality level of divisions and occupations, procure and adjust manpower via the external labor market (career-change market), and offer high levels of compensation in line with job duties and results, it has sometimes been deemed appropriate to target workers in specific divisions for adjustment dismissal when those divisions are to be closed.

**(iv) The validity of procedures**

- In court decisions, dismissal without consultation has been deemed invalid if there are clauses obligating consultation with a union in a collective agreement.
- In court decisions, even when there is no collective agreement, employers have often been deemed to bear an obligation of good faith toward labor unions or workers, to explain the necessity, timing, scale and method of adjustment dismissal in order to gain their understanding, and to conduct consultations with sincerity under the principle of good faith.

- Although a slightly different problem from the adjustment dismissal above, it has been relatively easy for dismissal to be deemed valid in some cases when a worker is hired in mid-career in anticipation only of performing work in a specific post but said post is closed down.

#### **Relevant court decision**

#### **Toyo Sanso Case (Decision by Tokyo High Court, October 29, 1979)**

- ◇ In this case, an acetylene division that had suffered cumulative losses due to increased competition, a market downturn, low productivity and other factors was closed, and all workers in the division were dismissed. The court deemed the dismissal valid.
- ◇ The slump in performance of the acetylene division was not temporary, and no improvement in earnings could be expected. If left unchecked, it could have caused the company's core oxygen producing division to lag far behind its competitors in terms of capital investments, etc., and this could have seriously impacted the company's business. Therefore, the closure of the acetylene division was a reasonable measure.
- ◇ Other divisions of the appellant company had surplus personnel, and offering voluntary retirement throughout the company to secure positions for transfer could have led to a loss of skilled workers in its oxygen division and elsewhere, as there was already a labor shortage in industry in general. If skilled workers had retired and acetylene division workers had been deployed, a loss of work efficiency would have been unavoidable at first, and it would therefore have been difficult to redeploy them to other divisions.
- ◇ With the closure of the acetylene division, its workers would all become surplus personnel, and since the division was independent from the other divisions, selecting all workers in the division was based on fixed objective standards, while the standards were not unreasonable.
- ◇ The policy of closing the acetylene division and dismissing all the workers had been conveyed to the union, and although there was very little time until the dismissal, the state of deficit in the acetylene division and the pros and cons of closing it had been

explained in advance. Moreover, collective negotiations, while suspended, had been terminated at the request of the union, and for these and other reasons there was no breach of good faith between labor and management.

#### **Relevant court decision**

#### **CSFB Securities Japan Limited Case (Decision by Tokyo High Court, December 26, 2006)**

- ◇ In this case, a foreign-capital company had to encourage voluntary retirement on a large scale because it had recorded massive losses over several years. It therefore decided to aim personnel reductions at its interbank desk, which made a small contribution and was in a poor market situation. The company then dismissed a worker who did not accept the voluntary retirement, and the court deemed the dismissal valid.
- ◇ The defendant had recorded huge net losses over several years due to a slump in securities markets, and had made no significant improvement in spite of cost reductions. As such, the dismissals were unavoidably necessary in terms of the company's operation.
- ◇ The interbank desk had been performing poorly, and it was not unreasonable to make it subject to personnel reductions, while the plaintiff made a smaller contribution to sales than other interbank desk workers despite receiving higher pay. As such, it was not unreasonable to select the plaintiff.
- ◇ The plaintiff had caused serious problems in interpersonal relations with other coworkers, and moreover, in view of the harsh business climate, it would have been impossible to redeploy the plaintiff to another department. As such, the defendant cannot be said to have neglected its obligation to avoid dismissal.
- ◇ The defendant had carried out collective negotiation with the plaintiff and the union three times after encouraging voluntary retirement, when it had discussed and explained the need to encourage voluntary retirement, the standards for selection, and the retirement package, and proposed a retirement package with a relatively good content compared to other retirees. Although no agreement was reached, the defendant had made certain efforts to gain the understanding of the plaintiff and the union.



**Relevant court decision**

**Singapore Development Bank Case (Decision by Osaka District Court, June 23, 2000)**

- ◇ In this case, a foreign-capital company closed its Osaka branch, and workers responsible for remittance import-export work and foreign exchange export work in its Osaka branch were dismissed. The court deemed the dismissals valid.
- ◇ The defendant had decided to close the Osaka branch because of declining ordinary profits by its Japanese branches, and because no improvement in its balance of payments could be foreseen. Since the business volume in its Tokyo branch was also in a decreasing trend, the bank reduced its personnel. As such, the need for personnel adjustment was acknowledged.
- ◇ Simply closing the branch did not of itself mean that workers whose place of employment was limited to the branch could immediately be dismissed. However, since the Tokyo branch was small in scale, and moreover these were posts requiring specialist knowledge and advanced skill, it was not unfair to dismiss workers in the Osaka branch without offering voluntary retirement to those in the Tokyo branch.

Furthermore, the defendant had proposed a voluntary retirement package including the provision of an outplacement support service at the defendant's cost, as well as awards of increased retirement allowances and others to the plaintiffs and the union in collective negotiations. Therefore, it cannot be said to have neglected efforts to avoid dismissal. As transfers were not possible, it had no choice but to target the Osaka branch workers for dismissal.
- ◇ The company's approach to collective negotiations is not deemed to have been inappropriate in any respect.

**Relevant court decision**

**General Semiconductor Japan Case (Tokyo District Court, August 27, 2003)**

- ◇ In this case, a foreign-capital company (the defendant) dismissed workers on grounds that personnel reductions were needed in the group as a whole because its parent company (company A) had suffered massive losses. The court deemed the dismissal invalid.

- ◇ The defendant's sales had remained on a par or in a slightly increasing trend, and its surplus was equivalent to 3.5 years of salary payments, while the number of workers in the month before the dismissals had reached the parent company's reduction target. Moreover, contract employees and agency workers were engaged in customer support work, and as such, it is doubtful whether personnel reductions were necessary.
- ◇ Although the company had previously rationalized its business in response to a business downturn, these dismissals were carried out to improve the high-cost structure of the defendant by company B, which had acquired company A, and no efforts at all were made to avoid the dismissals.
- ◇ Standards for personnel selection were based on workers' ability, work evaluation, attitude toward improving skills, and contribution to the company. The dismissed workers (the plaintiffs) were unsatisfactory in English proficiency and PC skills as well as their contribution to the company. In view of such facts, the intention to dismiss the plaintiffs was not necessarily unreasonable. On the other hand, these skills were not made conditional upon joining the company.

#### **Relevant court decision**

##### **Credit Suisse Securities Case (Tokyo District Court, March 18, 2011)**

- ◇ In this case, a foreign-capital company withdrew from a high-risk financial product sales business and dismissed the workers engaged in that business (the plaintiffs). The court deemed the dismissal invalid.
- ◇ The defendant company withdrew from the high-risk financial product sales business due to a rapid downturn in financial markets, and the need for dismissal on business grounds can therefore be endorsed to an extent. However, the plaintiffs were dismissed more than a year after receiving an order to standby at home, and so the level of necessity for dismissal cannot be regarded as high.

- ◇ The defendant company made a very large “Incentive Performance Compensation Award” to workers in its Structuring Department, and after the plaintiffs had been dismissed, increased the workers’ annual salary. Moreover, immediately after offering voluntary retirement to four workers in the Structuring Department, it hired four new employees. Therefore, in comparison to the necessity of dismissal on business grounds, efforts to avoid dismissal were inadequate.

In addition, the defendant company made a proposal for monetary payments to the plaintiffs to accompany their retirement, and also indicated candidate positions for internal personnel reallocation, but this was not necessarily a proposal that the plaintiffs would be accepted as candidates for personnel reallocation.

#### **Relevant court decision**

#### **PwC Financial Advisory Service Case (Tokyo District Court, September 25, 2003)**

- ◇ In this case, a worker (the plaintiff) hired by a foreign-capital company as a manager was dismissed, as the Investment Banking Division to which the worker had been assigned was closed down. The court deemed the dismissal invalid.
- ◇ The Investment Banking Division was closed as a result of losses due to poor performance by the division, and the necessity of personnel adjustment may be acknowledged.
- ◇ There is no concrete evidence showing that the plaintiff lacked skills, or that reductions other than personnel costs could not have been made, and it is not deemed to have been difficult to take other dismissal avoidance measures.
- ◇ The low assessment achieved by the plaintiff immediately after hiring was due to a virtual absence of practical experience, and moreover, since the low assessment was made around the time when the defendant company started to consider dismissal, it is difficult to deem the plaintiff’s ability as a manager conspicuously inferior. Moreover, it cannot be acknowledged that the plaintiff could not have been redeployed elsewhere. Furthermore, it cannot be acknowledged as reasonable that the plaintiff was targeted for adjustment dismissal.

### **Relevant court decision**

#### **Chase Manhattan Case (Tokyo District Court, March 27, 1992)**

- ◇ In this case, a foreign-capital company dismissed a worker who had been hired as the General Manager of its lease business, due to its withdrawal from the lease business. The court deemed the dismissal valid.
  
- ◇ The purpose of the employment contract was to hire a General Manager for the lease business. If the lease business were closed down, or for some reason the worker were to lose the status of General Manager, it would have had an impact on the continuation of the employment contract.  
Although the worker was involved in banking work, his involvement was restricted to a temporary or incidental basis in relation with the company's lease business.
  
- ◇ Since the decision to withdraw from the lease business is not deemed particularly unreasonable, it was reasonable for the employer to make an expression of intent to dismiss, and this did not constitute an abuse of dismissal rights.

### **To prevent disputes from occurring**

To prevent disputes from occurring, companies engaged in external labor market type personnel and labor management could include the following content in their labor contracts and rules of employment, for example, and carry out such measures in accordance with these, when appropriately paid employees are hired for immediate deployment in managerial posts or highly specialized positions, provided this does not compromise professional interests of workers.

\* Rules of employment must be consistent with labor contracts.

- ◇ A statement that dismissal may occur for reasons other than those attributable to the worker, such as personnel reductions for business reasons or reorganization, or abolition of posts.
  
- ◇ A statement that a retirement package will be provided in line with status, merit, length of employment and other circumstances.

#### **(4) Restrictions on dismissal when for special reasons, etc.**

##### **Restrictions on dismissal when for special reasons**

- Various laws include mandatory statutes prohibiting dismissal when there are special reasons.
  - (i) Prohibition of dismissal during a period of absence from work before and after childbirth, or for medical treatment with respect to injuries arising out of and in the course of employment or occupational illnesses.
    - \* Labor Standards Act, Article 19
  - (ii) Prohibition of dismissal as discriminatory treatment by reason of nationality, creed or social status
    - \* Labor Standards Act, Article 3
  - (iii) Prohibition of dismissal as an unfair labor practice
    - \* Labor Union Act, Article 7
  - (iv) Prohibition of dismissal on the basis of sex, marriage, pregnancy or childbirth, or by reason of taking antenatal or postnatal leave, child care leave, family care leave, etc.
    - \* Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment, Article 6, Article 9; Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave (Act No. 76, 1991), Article 10, Article 16, Article 16-4, Article 16-7, Article 16-9, Article 18-2, Article 20-2, Article 23-2, etc.
  - (v) Prohibition of dismissal as discriminatory treatment of part-time workers equivalent to ordinary workers
    - \* Act on Improvement, etc. of Employment Management for Part-Time Workers (Act No. 76, 1993), Article 8
  - (vi) Prohibition of dismissal on grounds of making reports to Labor Standards Offices, etc.
    - \* Labor Standards Act, Article 104; Minimum Wages Act (Act No. 137, 1959), Article 34; Industrial Safety and Health Act (Act No. 57, 1972), Article 97; Act on Promoting the Resolution of Individual Labor-Related Disputes (Act No. 112, 2001) Article 4, Article 5 etc.
  - (vii) Prohibition of dismissal on grounds of having been a whistleblower, a lay judge, etc.
    - \* Whistleblower Protection Act (Act No. 122, 2004), Article 3; Act on Criminal Trials Examined under Lay Judge System (Act No. 63, 2004), Article 100.

### **The fixed retirement system**

- When stipulating a fixed retirement age in a fixed retirement system (whereby a labor contract is terminated when a worker reaches a certain age), by law, the age may not be set below 60.

\* Act on Stabilization of Employment of Elderly Persons (Act No. 43, 1971), Article 8.

## **(5) Encouragement of voluntary retirement**

- In Japan, voluntary retirement is often encouraged before a situation goes as far as dismissal.

- In case law, there are examples in which encouraging voluntary retirement has been deemed to constitute an illegal infringement of rights, as it impedes the worker's freedom to make a decision.

### **Relevant judicial precedent**

#### **Shimonoseki Business High School Case (Decision by the Supreme Court, First Petty Bench, July 10, 1980)**

- ◇ In this case, teachers at a public senior high school were persistently encouraged to take voluntary retirement, but the court deemed the encouragement of voluntary retirement to constitute tort.
- ◇ “Encouragement of voluntary retirement” is the act of persuading or otherwise inducing a person in an employment relationship to form a voluntary wish to retire; the worker being encouraged is free to make a decision without being bound in any way.
- ◇ Even though the teachers had declared themselves unwilling to accept voluntary retirement, retirement was encouraged frequently in a short period and persistently over a long time, with repeated statements that the encouragement would continue until the teachers retired. Moreover, the school showed an attitude of not responding to the teachers' union requests for abolition of night duty and filling vacancies unless they retired. Under such circumstances, the encouragement of voluntary retirement was deemed illegal.

## **(6) Termination of employment by non-renewal of fixed-term contracts**

- In Japan, when there are no provisions on the purpose of use of a fixed-term labor contract, and when the term of a labor contract that specifies a contract term is complete<sup>Z</sup>, that labor contract is normally terminated.

- However, it became case law that the legal principle on abuse of dismissal rights has been applied analogously, when fixed-term labor contracts have been repeatedly renewed (i) to make such labor contracts become effectively identical to labor contracts with no specified term due to their being repeatedly renewed, or (ii) to make the worker conceive a reasonable expectation of continued employment in view of the repeated renewal, the course of events when the contract was concluded, etc. Applying such case law, there are court decisions in which the termination of employment has not been recognized as valid.

- Article 19 of the Labor Contract Act states that, in cases such as (i) and (ii) above, when a worker applies for renewal of a fixed-term contract before the end of the contract term, if there are no objectively reasonable grounds and it is not deemed socially acceptable for the employer to refuse said application, the employer shall be deemed to have accepted the application under the same working conditions as before.

### **Relevant judicial precedent**

#### **Toshiba Yanagi-cho Factory Case (Decision by the Supreme Court, First Petty Bench, July 22, 1974)**

- ◇ In this case, temporary workers who had joined a company based on labor contracts with a term of two months had their employment terminated after having their contracts renewed between 5 and 23 times. The court deemed the termination of their employment invalid.
- ◇ When there is some indication or action from a company leading workers to expect long-term continuous employment, when no new contract conclusion procedures are undertaken at the end of each contract term, and when there are other circumstances such as that no examples of termination of employment on completion of a 2-month term for temporary workers can be found within the period in question, the legal principle on abuse of dismissal rights should

be applied analogously when judging the validity of termination of employment.

#### **Relevant judicial precedent**

##### **Hitachi Medico Case (Decision by the Supreme Court, First Petty Bench, December 4, 1986)**

- ◇ In this case, temporary workers who had been hired for an initially stipulated period of 20 days, and whose labor contracts with a term of two months had subsequently been renewed five times, had their employment terminated by the employer at the end of the contract term. The court deemed the termination of their employment valid.
- ◇ Since the employment relationship was expected to have continuity to a certain extent, the legal principle on abuse of dismissal rights should be applied analogously when judging the validity of termination of employment.
- ◇ Under certain circumstances, such as when personnel cuts are necessary in a factory where a self-supporting system is adopted, and it is not unreasonable to judge that the employment of all temporary employees needs to be terminated since there is no room for excess personnel for transfer, termination of employment of such workers cannot be deemed invalid, even when it was executed without attempting to reduce personnel by offering voluntary retirement to the workers with indefinite term of employment.

#### **Related information**

- ◇ When a fixed-term labor contract is repeatedly renewed for a total period of more than five years, it may be converted to a labor contract with no fixed term upon request by the worker.
  - \* Labor Contract Act, Article 18
- ◇ When terminating employment under a fixed-term labor contract, an employer must give at least 30 days' notice, and when the worker requests written certification of the reason for termination of employment, the employer must provide this without delay.
  - \* Standards on the Conclusion and Renewal of Fixed-Term Labor Contracts and Termination of Employment (Ministry of Labour Notice No. 357, 2003), Article 1.



## **(7) Withdrawal of voluntary retirement**

- When a worker and an employer agree to terminate a labor contract in the future, it is called agreed termination.

- In case law, there have been cases in which it was deemed that a resignation desire (termination request) submitted as an application for agreed termination may be withdrawn before the point at which the employer expresses the intention to accept the same.

### **Relevant court decision**

#### **Hakuto Gakuin Case (Decision by Osaka District Court, August 29, 1997)**

- ◇ In this case, a teacher (the plaintiff) submitted a resignation desire (termination request) to the Principal, but before it reached the President (the person responsible for appointments and dismissals of teaching staff), expressed the intention to withdraw the resignation desire (termination request). The court acknowledged the withdrawal of voluntary retirement, and deemed the agreed termination of the labor contract invalid.
- ◇ A worker's application for agreed termination of an employment contract may be withdrawn by the worker until the employer's expression of intent to accept the same reaches the worker and the termination of the employment contract becomes valid, unless there are special circumstances whereby it may be deemed to be a breach of good faith in that the employer has suffered unexpected damages.
- ◇ The plaintiff withdrew the application for agreed termination about two hours after submitting it, and there was no discernible sign that there were special circumstances whereby it might be deemed to be a breach of good faith in that the defendant (school) suffered unexpected damages. The plaintiff is thus deemed to have withdrawn the application for agreed termination validly before the President's expression of intent to accept reached the plaintiff.

### **Relevant judicial precedent**

#### **Okuma Steelworks Case (Decision by the Supreme Court, Third Petty Bench, September 18, 1987)**

- ◇ In this case, after a resignation desire (termination request) had

been submitted to the Manager of the Human Resources Department and the Manager had received it, the employee applied to withdraw voluntary retirement on the following day but the company rejected the application. The court did not recognize the withdrawal of voluntary retirement.

- ◇ As the Manager of the Human Resources Department had authority for approving resignations, the Manager immediately expressed the intention to accept the application for agreed termination of an employment contract immediately upon receiving the resignation desire (termination request), and the agreed termination of an employment contract was established. Therefore, the application for agreed termination based on a resignation desire (termination request) could not be withdrawn.

#### **(8) Duty of non-competition after retirement**

- On the duty of non-competition after retirement, in court decisions, it has been deemed in breach of public morality and invalid when restrictions on competition exceed a reasonable range and the freedom to choose jobs is unfairly constrained. When judging whether such restrictions are within a reasonable range, consideration has been given to factors such as the length and geographical range of the restriction, the range of jobs subject to restriction, and whether or not compensation is forthcoming, from the angle of the company's interests and the disadvantage to the former employee.

- In case law, moreover, when there are no provisions or contract clauses restricting competition after leaving an employer, some cases where the former employee has started transactions with a client of the employer through a rival company have been deemed not to constitute tort, as the transactions have not used the former employer's confidential sales information or damaged its creditworthiness, and the act of competition has not deviated from the scope of free competition in general societal terms.
- Furthermore, in court decisions, there have been cases in which placing certain time restrictions on taking up employment with a rival company is not necessarily recognized as unfairly restricting an employee's freedom to choose a job, while reducing the amount of retirement allowance to

half when a former employee has joined a rival company, based on provisions in retirement allowance regulations, cannot be deemed an unreasonable measure, given that retirement allowance also has the nature of reward for merit.

#### **Relevant court decision**

##### **Foseco Japan Limited Case (Decision by Nara District Court, October 23, 1970)**

- ◇ In this case, a worker who knew technical secrets and was bound by a contract clause prohibiting competitive acts after leaving a company was appointed a director of another company in a competitive relationship, which manufactured and sold the same products as the former company. The company therefore sought a temporary disposition order to cease and desist from the competitive acts based on the contract clause, and the court granted it.
- ◇ On the premise that the claimant could be said to have technical secrets that should objectively be protected, the length of the restriction in the contract clause was a comparatively short period of two years, and given that the company operated in the specialized field of chemical metal industry, the scope of the restriction was comparatively narrow. Moreover, although there was no geographical restriction, this was unavoidable in view of the fact that the claimant's sales secrets are technical secrets, and a confidentiality allowance had been paid while the worker was employed by the company. Considering these and other circumstances in combination, the restriction on competition cannot be said to have exceeded a reasonable range.

#### **Relevant judicial precedent**

##### **Success Corp et al. (Miyoshi Tec) Case (Decision by the Supreme Court, First Petty Bench, March 25, 2010)**

- ◇ In this case, two workers quit a company that had stipulated no contract clause or other provision on the duty of non-competition after retirement, and started a business in the same sector using another company as the business entity. They continued to receive orders for work from clients of the company they had quit, as a result of which their former employer claimed compensation from them based on tort. The court deemed the case not to constitute tort.

- ◇ The workers had been engaged in sales with these clients under the former employer, and had used such personal relationships to approach the clients. Moreover, the orders the former employer received from the clients decreased in terms of monetary amounts,
- The workers, nevertheless, did not use confidential sales information, diminish their former employer's creditworthiness or otherwise engage in sales activity using unfair methods.
- Transactions with the clients started five months after the workers quit, no circumstances whereby free transactions between the company and the client were obstructed can be discerned, and the workers cannot be said to have made particular use of the weakened state of their former employer's sales.

Under circumstances such as these, their action did not deviate from the scope of free competition in general societal terms and did not constitute an act of tort.

#### **Relevant judicial precedent**

##### **Sankosha Case (Decision by the Supreme Court, Second Petty Bench, August 9, 1977)**

- ◇ In this case, a worker who had quit one company took up employment in a rival company, and so the first company demanded that half of the retirement allowance already awarded to the worker based on retirement allowance regulations be repaid as unjust gains. The court upheld the claim for repayment of unjust gains.
- ◇ Placing a time restriction on employment in a rival company is not necessarily recognized as unfairly restricting an employee's freedom to choose a job.
- ◇ Given that a retirement allowance has the nature of reward for meritorious performance, stipulating that the retirement allowance of former employees who join rival companies in breach of this restriction should be half of that paid to voluntary retirees cannot be deemed an unreasonable measure.