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THE INDUSTRIALISATION OF LABOUR CONTRACT – Part II

Labour Contract in Japanese Labour Law:

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by

Shinya Ouchi

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***Direzione Scientifica**: Prof. Michele Tiraboschi*

ADAPT
c/o Centro Studi Internazionali e Comparati "Marco Biagi"
Università degli Studi di Modena e Reggio Emilia, Facoltà di Economia
Viale Berengario 51, 41100 Modena – Tel. ++39.059.2056745 – Fax ++39.059.2056742
e-mail csmb@*unimo.it*

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SUMMARY:

1. Individualization
2. Regulation of labour contract in Japan
3. Present Argument Situation in the Governement
4. Conclusive remark

1 “Individualization”

The discussion on the labour contract has been provoked by the “individualization” of the labour relation, accompanied by the diversification of the forms and style of employment. The “individual” in the labour law has a complicated implication. No one can deny the primary importance given to the dignity and the development of personality, of an “individual” employee. However, the “sphere” of an individual labour contract, where the parties to the labour contract, employer and employee, are free to determine the terms and conditions of the contract, has been notably restricted. For example, a series of labour legislations have limited the freedom of contract, especially through the mandatory statutory provisions and the collective agreement. The latter has the normative effect, according to which an individual labour contract cannot derogate, to the employees' detriment, from the working conditions established by the collective agreement. These principles apply not only to Japanese law, but also to the law in many European countries.

Recently, however, the individual labour contract is becoming more and more important everywhere, which may cause a radical and profound reform of the traditional labour law system based upon the collective regulation which consists of mandatory statutory provisions and collective agreements.

Then why is this kind of change appearing? As far as the Japanese situation is concerned, the following four points should be mentioned.

Firstly, the transformation of industrial structure, which has raised the importance of the service sector, and the increasing number of white-collar employees have made obsolete the Japanese labour law system which basically has been constructed for the protection of the workers of the manufactory industry. In particular as regards the white-collar employees, whose working conditions are based upon the ability and result of individual employees, it has become more difficult to realize the collective regulation of their treatment.

Secondly, the matured social life and the improvement of the level of life of citizens have contributed to the diversification of the personal needs of workers in their lives. Such a change causes the individualized needs of each employee for the working conditions and the forms of employment. In addition, taking into account the aging population and the low birthrate, the participation in the labour market of the women and the elderly, who have been underutilized as workforce, will be more required in the future. These new types of working population tend to have

intention to work in the way compatible with personal needs linked with their family responsibility or the physical conditions, while regular full-time employees have devoted much of their time to the work with high loyalty towards their employer.

Thirdly, the more and more fierce international competition in the globalization of market calls for more flexible labour organization in order to maintain and improve the adaptability. In Germany as for the determination of working conditions, the collective agreements (Tarifvertrag) at local and industry level are giving way to the work agreement (Betriebsvereinbarung) at enterprise level. while in Japan collective agreements, which are mainly enterprise one, are originally flexible and adaptable, because the results of the collective bargaining tend to reflect the economic and financial conditions of each enterprise. Certainly, until several years ago, in the "spring offence", collective bargaining at enterprise level was organized and advanced according to the schedule preestablished at industry and national level. But this practice is being transformed, leaving to the enterprise level much room for bargaining. Moreover, enterprises tend to treat their employees in accordance with their ability and results, gradually giving up the collective treatment of working conditions. As nowadays a stable economic growth cannot be expected in the future, the enterprise will not be able to maintain a collective and egalitarian management of working conditions, e.g. seniority-based wage.

In the period in which working conditions tend to be increased, what matters is the distribution of the gained "pie", but the way of distributing is indifferent to workers only if the egalitarian way is kept. On the other hand, when the working conditions go downward, the distribution of the "disadvantage" is at stake. In such a case, the employees are sensitive to the way of distributing. Especially if the disadvantage involves the risk of the employment, it is necessary to justify the way of distributing by demonstrating a difference in individual ability and result or a contribution to the productivity.

Fourthly, we must point out the change of employment practice as a reason proper to Japan. In the past, under the long-term employment security, a sort of community relationship is formed between the enterprises and their employees, so that the employees are rarely conscious of "contractual" relationship. But as recently such an employment practice is gradually collapsing and consequently the mobility of the labour market is advancing, the nature of the relationship between the enterprise and the employees is changing from "status" to "contract".

In this regard, it is appropriate to mention the symptom of the change of the corporate governance of Japanese enterprises from employee's interest oriented model to shareholders' interest oriented model. In this trend the increasing number of the managers will respect the interest of shareholders and be asked to raise the profitability to satisfy the interest of shareholders in the short-term, even if at sacrifice of the interest of employees. It implies the pressure for the employees to raise the productivity in the short-term.

Anyway in such a change the number of the employees who are more conscious of the rights and the duties prescribed in the labour contract is increasing. In the past many employees accepted the authority to manage affairs of the employer in exchange for the long-term employment security.

In fact, the change of the reality is demonstrated by the increase of the number of the individual labour disputes. According to the statistic of Ministry of Health, Labour and Welfare, the matters which the authority coped with under the "system of assistance for the dispute resolution" introduced by the Labour Standards Law revision of 1998, regard dismissal (50%), deterioration of working conditions (19.2) farming-out and transfer(9.5) employment termination of fixed-term contract (4.7) encouragement of designation(3.2) and disciplinary measures(2.5). This figure shows that the diffused restructuring of enterprise brings about the disputes caused by the downsizing of the enterprise dimension or the cut of labour cost.

Furthermore the sexual harassment and the mobbing, which had not been recognized as an infringement on right, have become a legal problem. This is one of the main reasons for the increase of the number of the individual disputes.

Of course the trade union can cope with these kinds of dispute through the process of collective bargaining. But the purely "individual" disputes are not easily resolved by the collective bargaining. In addition, the rate of unionization is going down to about 20%, and in many small and medium-sized enterprises any trade union is not organized. In these non-unionized sectors, it needs the mechanism of the dispute resolution through outside organs like the tribunal or the labour administration.

As above-mentioned, in Japan, nowadays, the individualization of working conditions is gaining ground and the nature of labour disputes is individualized. This trend seems to be irreversible and cause the reform of the labour law system based upon the collectivistic philosophy. Indeed the Japanese Government thinks it indispensable to arrange the legal basis permitting individual

employees to exert fully their own ability, and begins to study the new concept of the legal system on labour contract. Recently the government made public the basic points on the rules on the labour contract; to arrange the alternatives of the forms of employment or the work styles permitting each employee to exert its own ability and personality, and to widen the possibility for the employees to choose among various work styles; to arrange the legal rules on labour contract that guarantee the working conditions appropriate for the forms of employment and to serve to the resolution of disputes; to involve employers and employees or their representatives in order to control the application and management of the above mentioned legal rules.

2. Regulation of labour contract in Japan

In Japan, the principal law governing the working conditions and the labour contract is the Labour Standards Law. The Labour Standards Law was enacted in 1947 in accordance with the request of the Constitution, Article 27, Paragraph 2, which states that the standards of wage, working hour, rest and the other working conditions shall be set forth by the law. The Labour Standards Law establishes the minimum standard of working conditions and Article 13 of the law states “A labour contract which provides working conditions which do not meet the standards of this law shall be invalid with respect to such portions. In such a case the portions which have become invalid shall be governed by the standards set forth in this law”. The labour administration bodies inspect the respect of the Labour Standards Law and the employers who contravene this law can be subject to penal sanctions. The Labour Standards Law is characterized by the strong intervention in the area of labour contract, which have played an decisive role in protecting the workers’ interest.

The matters covered by the regulation of the Labour Standards Law are as follows; Equal Treatment, Principle of Equal Wages for Men and Women, Prohibition of Forced Labour, Elimination of Intermediate Exploitation, Guarantee of the Exercise of Civil Rights, Limitation of Period of Contract, Clear Statement of Working Conditions, Ban on Predetermined Indemnity, Ban on Offsets against Advances, Ban on Compulsory Savings, Restrictions on Dismissal of Workers, Notice of Dismissal, Certificate when Leaving Employment, Return of Money and Other Valuables, Payment of Wages (Wages must be paid in cash and

in full directly to the workers), Emergency Payments, Allowance for Business Suspension, Guaranteed Payment under Piece Work System, Working Hours, Monthly or Annual Working Hours Averaging System, Weekly non-regular Working Hours Averaging System, Flextime System, Extra Work at Times of Temporary Necessity, Rest Periods, Rest Days, Overtime Work and Work on Rest Days, Increased Wages for Overtime Work, Work on Rest Days and Night Work, Conclusive Presumption System on the number of the Hours of the Work outside the Workplace and of the Discretionry Work, Annual Leave with Pay, Exclusions from Application of Provisions on Working Hours, Special Provisions for Minors, Special Provisions for Mother Workers, Leave for Menstrual Periods, Training of Skilled Workers, Work Rules, Dormitories, Inspection Bodies, Penal Provisions. And the Minimum Wage Law of 1959, Industrial Safety and Health Law of 1972, Workmen's Accident Compensation Insurance Law of 1947 are considered the law attached to the Labour Standards Law. Furthermore many important laws have integrated the Japanese labour law system; here is made a particular mention to the following laws; Law on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment of 1985; Law for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers of 1985, Law Concerning the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave of 1991, Law concerning the Improvement of Employment Management, Etc. of Part-Time Workers of 1993, Law Concerning the Succession of Labour Contracts, Etc. upon the Divisive Reorganization of Company of 2000, and Law on Promoting the Resolution of Individual Labour Disputes of 2001 and so on.

The Labour Standards Law per se has been repeatedly revised. In particular in 1990, legal weekly maximum working hours were reduced from 48 hours to 40 hours, working hours averaging system was extended, and the flextime system and discretionary work system were introduced. In 1998, the reinforcement of the obligation of the clear statement of working conditions, the extension of discretionary work, and the introduction of the system of delivery of the certificate on the reason of dismissals on demand of employees when leaving the company were realized.

On the other hand, many matters remain not to be covered with the regulation of statutory laws. The Labour Standards Law is silent on the important legal problems which happen in the process of

the formation of working conditions, such as the binding effects of work rules established unilaterally by an employer, in particular in the case of the deterioration of working conditions through the revision of work rules, and the substantive requirements of dismissals. The Labour Standards Law doesn't cover many matters of practical relevance on labour contract such as transfer, farming-out, moving-out, disciplinary measure, suspension of employment, duty to refrain from competing and duty to keep secrets, tentative decision to hire probationary employment employment termination after repeated renewal, conditional dismissals to change working conditions.

Therefore the case law has developed the labour contract rules to fill up the lack of the statutory regulation. For example, as for the dismissal, the judge has established a rule that the exercise of the employer's right to dismiss shall be null and void as abuse of the right if it is not based upon objectively reasonable grounds and thus cannot be socially approved as an appropriate act. This rule is called "the doctrine of the abusive exercise of the right of dismissal"(hereafter, using shortened expression, "the doctrine of abusive dismissal"), whose legal basis the judge finds in the general principle of the Civil Code (Article 1, Paragraph 3) prohibiting abuse of the right. Due to this doctrine, the freedom to dismiss of employer has been considerably restricted. Thanks to this doctrine, in Japan the freedom of dismissal guaranteed by Civil Code is limited even if the statutory law against unjust dismissals as seen in many European countries has not been enacted.

With regard to work rules, the Labour Standards Law (Article 93) states that Labour contracts which stipulate working conditions inferior to the standards established by the work rules shall be invalid with respect to such portions, and that in such a case the portions which have become invalid shall be governed by the standards established by the work rules. This effect of work rules is similar to that of the Labour Standards Law (Article 13; see above). However this effect concerns only the case where the working conditions in the labour contract are inferior to those of work rules. Thus it remains open question whether work rules per se have binding effect or not. It is highly probable that the lawmaker tried to assimilate work rules to law. But theoretically speaking it is very difficult to justify the binding effect of the work rules, which are established or modified "unilaterally" by an employer. According to this theoretical position, work rules are not binding without the consent of an employee. However the Supreme Court attached importance to the collective treatment

of working conditions and recognized the binding effect of work rules, but on the condition that the content of work rules is rational.

As for the transfer, the case law, on one hand, recognized the right of the employer to change job or workplace, on the basis of a general clause included in the work rules or the collective agreements. On the other hand it limited the exercise of the right, taking into consideration the concrete situations. Precisely speaking, the order to transfer is null and void as an abusive exercise of the right if there is not business necessity, if the order is motivated by an improper or illegal reason or if the transfer may bring about the damage which ordinary employees are not usually expected to endure.

As for the farming-out, which means the transfer to the other company while keeping the employee status in the original company, the right to order the farming-out is admitted if you can see a clear statement authorizing such an order in work rules or collective agreement. And the judge tends to determine whether it is an abusive exercise of a right, weighing the business necessity against the disadvantage for the employee. In the case of the moving-out, which involves the termination of a labour contract with the original companay, the judge tends to require an individual and specific consent of an employee.

As for disciplinary measure, the Labour Standards Law requires the employer to indicate the grounds for discipline. In addition, disciplinary sanction should be appropriate in the light of the type and degree of the violation of discipline. According to the case law, disciplinary measures will be null and void as an abuse of a right, if they are not based upon reasonable grounds and do not conform to generally accepted social norms.

As regards suspension of employment, courts tend to decide the validity of concrete measures, addressing the objectives, functions, reasonableness and disadvantageous impact upon employees of various types of suspensions. For example, in the case of “prosecution suspension”, according to the general trend of judicial decisions, only the fact that an employee was prosecuted is insufficient for authorizing the application of the suspension of employment, and the additional following two conditions should be met. One is that considering the nature of job and the content of misconduct the continuity to work may produce the loss of public confidence of the company or the disturbance of enterprise order. The other is that the performance of the employee’s job is rendered impossible or difficult due to the employee’s arrest or detention.

As for duty to refrain from competing, a representative judicial decision held that such a duty, which is prescribed in work rules, is binding, only if it does not restrict improperly the freedom of the retired employee to choose an occupation. In this case, the judge should take into consideration the duration and scope of the restriction and the compensation in the light of the business necessity, the interest of enterprise, the disadvantage of the employee and the social interest.

As for the probationary period, the Supreme Court considered it as the period during which the employer reserved the cancellation. But because legally speaking this cancellation can be classified as a dismissal, it raised a question to what extent the reserved cancellation rights are legal. The Supreme Court said, "The exercise of a reserved cancellation right can be approved on the basis of the results of its investigation in making its subsequent hiring decision and during probation, as well as the actual work situation during probation. Where the employer could not know the reason at the beginning, but came to know it later and, therefore, determined that it would be improper to employ the worker continuously in the above-mentioned aims and objectives of a reserved cancellation right".

With regard to employment termination after repeated renewals, the Supreme Court admitted the analogous application of "the doctrine of abusive dismissal" in certain cases. According to the general trend of judicial decisions, when labour contract with fixed term became substantially contract without a fixed term as a result of repeated renewals, or if the words and the conduct of the employer created the expectation of continuous employment for the employee, the employment termination is not permissible only for the reason of the completion of the term.

On the validity of a "conditional dismissal to change working conditions" (using German term, Änderungskündigung) there was a lively discussion. In the past, academic opinions said that it was highly difficult to admit the validity of this kind of dismissal under the "the doctrine of abusive dismissal". But in 1995 there appeared a judicial decision of Tokyo District Court explicitly admitting the validity of the "conditional dismissal to change working conditions". According to the court decision, "Where the change in working conditions is essential for the company's operation; and its necessity overrides the worker's disadvantage resulting from the change in working conditions; and the proposal to conclude a new contract that accompanies the change in working conditions will be recognized as justifying a dismissal of

employees who have rejected it; and where the effort to avoid a dismissal has been sufficient, the company may respond by dismissing the worker if the worker has rejected the conclusion of a new contract".

These are main, not exhaustive, judicial rulings, which constitute the part of the Japanese legal doctrine on labour contract. This shows that in Japan, at least in the area of individual labour relation, the case law plays a more important role than the statutory law. Some academics point to the defects in such a regulation style by case law, asserting that both employers and employees find it difficult to access and understand the case law. They argue that the case law on labour contract should be codified in order to resolve the above-mentioned defect, especially with regard to the abusive doctrine on dismissal.

But there are defects in the codification of the case law on labour contract. For example, as the discussion on the dismissal typically shows, even if a bill is submitted to the Diet, it would be difficult for both labor and management to approve it. Because Labor would like to see legislation similar to, or stricter than, the present doctrine of abusive dismissal, while management desires a looser regulation. Moreover the doctrine of abusive exercise of a right to which the Japanese courts have frequent resort can contribute to a more equitable settlement of disputes. Even if the case law is codified, the lawmaker should make use of a "softer" regulatory measure, e.g. refraining from mandatory provisions as much as possible.

Of course, making clear legal rules serves to clarify the guideline for the conduct of the employer and raise the consciousness of compliance, and at the same time promote the exercise of rights and the defense of the interest from the part of employees. Already in 1998, the system of the assistance in resolving individual disputes between workers and employers was founded as an administrative service for advice and guideline to the parties to an individual labour dispute. In 2001 the Law on Promoting the Resolution of Individual Labour Disputes was enacted to introduce the system of referral of conciliation at Dispute Adjustment Commission. Actually there is a lively argument on the foundation of a comprehensive system for resolution of individual labour disputes. There are some proposals; for example, some propose extension of the functions of the Labour Relations Commissions which are administrative organ, now competent only for the collective labour disputes; some say that the civil conciliation procedure in the tribunal should be

utilized for individual labour disputes; others assert promotion of dispute resolution function at level of municipality or prefecture.

3 . Present Argument Situation in the Government

For the moment, the Council of the Ministry of Health, Labour, and Welfare is examining the perspective of a legal regulation regarding working conditions; in particular, the items discussed are specification of the terms and conditions of the labour contract, term of the contract, termination of labour relations, and working hours.

(1) Specification of the terms and conditions of the labour contract

The Article 15 of the Labour Standards Law imposes on the employer to clearly state the worker's working conditions. According to the Enforcement Regulation of the Labour Standards Law, Article 5, Paragraph 1, the working conditions which must be clearly stated are term of contract, working place and job to perform, working hours, wage, retirement, retirement allowance, extraordinary wages, cost of food born by workers, safety and health, vocational training, accident compensation, commendation and sanction, and suspension of employment. In particular term of contract, working place and job to perform, working hours, wage, retirement, and retirement allowance must be rendered clear in writing. However, because these matters subject to the duty of clear statement are almost the same as the matters that must be dealt with in the work rules according to Article 89 of the Labour Standards Law, the duty of Article 15 is considered as carried out if the employer furnishes to its employees copies of the work rules.

Furthermore, the duty of explicit statement of working conditions is prescribed by the employment security law. When engaged in job referral, worker recruitment or labour supply, public employment-security agencies and private employment-service enterprises must specify working conditions to job seekers and persons responding to recruitment, etc.

However, notwithstanding that the law is aware of the importance of the clear statement of working conditions, the situation seems unsatisfactory mainly due to the fact that all the important working conditions need not be indicated in a document. The small enterprises usually make little use of the work rules for the purpose of informing working conditions of the employees. In addition, since the employer's duty of the clear

statement of working conditions is imposed in the time of the stipulation of labour contract, which in the case of hiring of new graduates, is carried out usually many months before the employee begins to work, the employer cannot specify working conditions even if it wants. Though disciplinary reasons and dismissal reasons are of great interest for employees, it may be almost unrealistic to demand employer to indicate precisely such reasons in advance.

Above all it should be mentioned that if the content of labour contract is not clear enough, there is a risk of employers' unilaterally determining the content of the contract at its will, which would prevent a secure work life of employees. Within the Government Tripartite Council, the labour representative requests to oblige employers to clearly state the rules concerning the development of labour relations like those of farming-out etc., which now are not included in the items of the duty of clear statement of working conditions.

The labour disputes, which have been quite frequently caused by termination of labour relations like dismissal, may be able to minimize, or easily lead to satisfactory resolution, if substantive and procedural rules on these matters are clearly individualized. By the revision of the Labour Standards Law of 1998, the provision, which requires employers to certificate the reason of dismissal, was introduced. The employer's side says that this regulation is sufficient to satisfy the needs for the specification of the rules on employment termination. But this regulation doesn't cover the information of the reason of dismissal at the very time when the dismissal is noticed. In this regard, the present legal regulation is not satisfactory.

Anyway under the Labour Standards Law, if employer contravenes the duty of the clear statement of working conditions, the penal sanction is imposed upon the employer. But a penal sanction for the contravention of the civil rules concerning contract is too severe for employers. Of course, now no one can deny the necessity of the correction of information gap between the parties to contract, so that many civil law scholars affirm the duty to furnish information and explain of the party who retains more information, i.e. usually an enterprise (see the Consumer Contract Act of 2000). Taking into account the discussion in the field of civil law, the duty of the clear statement of working conditions should be positioned as a duty in the framework of the civil contract law, which leads only to compensation for damage or nullity of agreement.

(2) Term of labour contract

There is increasing need for flexibility in setting the term of labour contract. The Civil Code of 1896 prescribes that either party can terminate a contract of employment when five years have passed, which substantially means that the length of the term of fixed-term employment is limited to five years. According to the Labour Standards Law of 1947, Article 14, labour contract, excepting those providing that the period shall be the period necessary for completion of a specified project, shall not be concluded for a period longer than one year. After the revision of the Labour Standards Law of 1998, the maximum of the period is three years only with respect to labour contracts that come under any of the following items; (a) labour contracts concluded with workers who have the professional knowledge, skills and experience that are necessary for developing new products, services or technologies or for scientific research; (b) labour contracts concluded with workers who have the professional knowledge, skills and experience that are necessary for activities to stand up, convert, expand, downsize or close down an enterprise which are expected to be completed within a definite period; (c) labour contracts concluded with workers aged 60 years or older.

The intention of the Labour Sandadrs Law is that long-term period of labour contracts may restrain on freedom to leave the company, especially in view of the past experience that fixed-term contracts used to be utilized as a means of “feudal” labour practice.

But today fears about the evil effects of fixed-term labour contracts diminished. The present legal regulation rather functions as a constraint on freedom of contract. Employers are demanding to restore the maximum of the length of term of 1 or 3 years to 5 years.

From a comparative viewpoint, Japanese legal regulation seems not to be based upon a stable principle against the term. For example, in the Japanese law there is no legal thinking that labour contract without fixed-term is a rule, as opposed to many European countries where labour contract with fixed-term is only an exception Certainly it may be true that in Japan only regular employees enjoy the stable employment, but such a status of regular employees is not required by law. In addition it should be mentioned that in Japan there is no legal regulation that require a temporary need in order to conclude fixed-term contract as in European countries. Consequently there seems to be no great barrier for loosening the regulation of the term of labour contract.

On the other hand, as for the fixed-term employment, what is more focused on is the legality of employment termination after repeated renewals of fixed-term labour contract. The case law, as above mentioned, have developed a rule that such a termination can be admitted only if there is a rational reason. In this sense, the limitation of the length of the period of contract should be examined not from a viewpoint of evil effects of long-term restriction, but of long-term security of employment. In this regard we must bear in mind that a regulation of dismissal and that of fixed-term labour contract are intimately related. Under a stricter regulation of dismissal, a regulation of fixed-term contract should be the stricter in order to avoid the evasion of the dismissal regulation. On the other hand, under a not strict regulation of dismissal, a regulation of fixed-term contract would not be needed. Thus we must examine a revision of present legal regulation of fixed-term contract, taking into account a revision of present legal regulation of dismissal, in the general perspective, i.e. from a viewpoint of labour market policy.

The principle of freedom of contract requires that the parties to labour contract are free to determine term of contract if the term is not too long. In addition, in principle fixed-term employment relation must end when the term is completed, even if the contract has been renewed many times. Anyway if the judicial ruling, according to which termination after repeated renewal of fixed-term contract should be justified by a reasonable reason, is maintained, the conditions for continuity of fixed-term contract, i.e. criterion of reasonablness, must be rendered clear.

By making clear a rule regarding employment termination, an employer can know in advance in which conditions employment relation can be terminated, and it will reduce a risk that an employer may have to hold unnecessary workforce in a bad economic situation. Consequently it may become an incentive for new hiring and therefore become an effective measure for combating against unemployment.

However, the labour side often indicated a risk that an increase of the number of employees who are hired with fixed term may result in replacing stable employment with unstable one. Similar discussion was made with regard to discussion of temporary or dispatched work. In this regard, it should be pointed out that in the Japanese Law the principle of equal pay for equal work was not clearly recognized. The labour side is afraid that without such a principle an employer may exploit employees with fixed term as cheap workforce. According to the recent discussion, with regard to an equal treatment between part time workers and full time

workers, the wage of part time workers should not be inferior to 80% of the wage paid to the regular full time employees if in a similar working situation. Anyway this question will be able to be dealt on more appropriately, if taken into account the discussion as to what extent the difference of working conditions among various types of employment, especially between regular employees and non-regular employees, can be socially accepted as proper one in Japan.

(3) Dismissal

As above-mentioned, in Japan the right of dismissal is limited by the case law. Since the legal basis of "the doctrine of abusive exercise of the right of dismissal" is found in the general principle of the Civil Code (Article 1, Paragraph 3), application of this doctrine of abusive dismissal is mostly left to the discretion of the judge. Thus it is difficult for both employer and employee to know in advance whether a dismissal is effective or not. Certainly an analysis of accumulated cases in which judges applied this doctrine shows a general trend that dimissals are justified in the following four reasons: first, where there is a union-shop agreement; second, incompetence or lack of the skills or qualifications required to perform a job; third, violation of disciplinary rules; fourth, business necessity. The last type of dismissal, that is, dismissal for business necessity, is called "adjustment dismissal." In this case, the judge has ruled that, to justify this kind of dismissal under the doctrine of abusive dismissal, it is necessary to satisfy the following four requirements: a need to reduce the number of employees, a need to resort to adjustment dismissals, an appropriate selection of employees to be dismissed, and appropriate procedures such as consultation with the employees' representative. This rule is called the "four requirements of adjustment dismissals" rule.

Among these justifying reasons for dismissal, however, incompetence or lack of the skills or qualifications required to perform a job has been narrowly interpreted. Even if an employee's incompetence is evident, judge tends to take account of the circumstances which are favorable to employees as much as possible. In fact it is quite rare that the validity of dismissal for the reason of incompetence is upheld by judge. For example, the validity of dismissal for the reason that the employee's performance is poor is upheld only if its performance is "notably" poor and if there is no room for improvement even with much assistance from the employer. Consequently it remains unclear in which case an employer can legally dismiss its

incompetent employees. As for adjustment dismissals, likewise, it needs a complex judgement of four requirements, thus it remains unclear in which case in a bad economic situation an employer can legally dismiss its employees.

Some academics are afraid that such legal uncertainty may prevent rational activity by an enterprise and employee. Certainly it may be useful to codify the case law in order to resolve the above mentioned defects. Nevertheless, we should bear in mind the merits of case law: case law can adapt more elastically to socio-economic changes than statute law. Furthermore, the government is currently preparing a series of policies aimed at enhancing the mobility of the labor force. Since restrictions on dismissal are linked closely with the low degree of employee mobility, a policy toward a higher mobility might dispense with strict restrictions of dismissal.

As far as a procedural requirement is concerned, there is a defect in the case law. No one can deny importance of dismissal procedure for defence of the interest of dismissed employees. According to the common interpretation of the case law, this procedural requirement is not indispensable for the validity of dismissal. As for adjustment requirement, an appropriate procedures such as consultation with the employees' representative is merely one of the requirements. In this regard, there can be an option for a legal intervention that requires consultation procedure with employees or their representative. In my opinion, it must be better to urge the judge to change its way of interpretation of "the doctrine of abusive exercise of the right of dismissal" than a legal intervention; precisely speaking, only a lack of consultation with dismissed employee or its representative, in the process of dismissal must lead to nullity of the dismissal. Such an interpretation induces employers to endeavor to get agreement from employees and can lead to a satisfactory termination of employment, e.g. offer of increased payment of retirement allowance or assistance for finding another job.

Another discussion point concerns remedy of an unjustified dismissal. In Japan, according to case law, an unjustified dismissal is null and void and the relationship between employer and employee is considered never to have been severed. In these cases, the judge must order reinstatement and back pay covering the period from dismissal to judicial decision. Thus in Japan, an employee does not have the option of choosing compensation in lieu of reinstatement. The Japanese process of redress is not necessarily suitable to resolving dismissal disputes, as the relationship of trust between employer and employee has

been lost. The judicial order to reinstate cannot recover a relationship of trust even if it can recover a legal relationship. Considering this, some academics say that it should give the employee a choice for compensation in lieu of reinstatement. In my opinion, it is desirable to induce an employer to a resolution by compensation, by adopting an interpretation according to which the circumstance where an employer offers some options lessening the disadvantage the dismissed employee suffered from, mainly pecuniary compensation, is considered favorably to the employer in the decision of validity of dismissal.

(4) Working hours

As far as working hours are concerned, what kind of a legal regulation is more suitable to flexible and diversified work styles is now being discussed. With regard to white-collar employees, who increasingly are paid on the basis of the quality and outcome of their work rather than its quantity, the present strict regulation of working hours is ill-suited, particularly taking into consideration the legal provisions that require employer to pay premium wages according to the quantity of overtime work. The management side requests not only extension or the simplification of procedure of the discretionary work system, but also the introduction of exemption system for white-collar employees modelled on US law.

In relation to working hours regulation, it is said that so-called health problem has been caused by excessive work, which is intimately connected with the “non-paid”, i.e. illegal overtime work problem. In the past, long working hours of white-collar employees were not taken seriously, but recently a judicial sentence applied strictly the statutory regulation of working hours to the employees in a bank. Certainly a present rigid legal regulation of working hours need be revised, but until such a revision will be realized the legal regulation should be strictly observed.

Already in the area of Workmens Accident Insurance and the damage claims by the contravention of the employer’s duty to care for safety and health of employee, there were some cases concerning health damage that was caused by excessive work. Now more and more people request the compliance of the statutory regulation of working hours in order to prevent from health damage, particularly mental health damage such as depression. In this regard, the discretionary work system, which permits to separate a calculation of working hours from performed work, on one hand is expected to respond to the

needs for working hours regulation suitable for white-collar employees, but on the other hand the expansion of the system is being considered dangerous because it may be a promoter of excessive work and consequent health damage.

4. Conclusive remark

As for the future of legal regulation of labour contract, first of all we must answer the following three questions; who is subject to the legal regulation; what kind of matters are covered by the legal regulation; what kind of methods are used for the regulation.

First, as regards the subject, the Labour Standards Law, Article 9 defines a "worker" to whom the law is applied, stating that worker shall mean one who is employed at an enterprise or place of business and receives wages therefrom, without regard to the kind of occupation. Generally speaking, the worker in the sense of the Labour Standards Law is considered a person who is legally and/or economically subordinated to its employer, and therefore a person, who performs work without such subordinate relationship, has been classified as a self-employed and as such excluded from the legal protection.

However, increasingly the self-employed are dealing only with particular enterprises and as a result are substantially dependent on such enterprises. Moreover some people point out that, in order to evade the labour protective law, some enterprises are employing simulated independent contract workers who are engaged in practically the same job as the regular workers of the same enterprises do.

Anyway the latter illegal case is produced by the striking gap in the protection between dependent workers and independent ones. Now we must try to arrange common rules that apply universally to workers irrespective of dependence on those who utilize the work performed by workers. In this regard, the discussion of "Statuto dei lavori" (Statute of works) in the Italian Law is remarkably interesting.

Second, as for the matters, the "individualization" of working conditions is raising the importance of information and explanation of the content of each labour contract at the time of its stipulation. Additionally when working conditions are modified, there are similar needs, too. In these matters, it needs a legal intervention or a development of case law. On the other hand, today some regulations included in the Labour Standards Law are considered unnecessary; e.g. ban on predetermined

indemnity (Article 16) should be expelled from the labour protective law to trust to the general principle of contract law. Anyway regulations which are attached to penal sanction need to be reduced.

Third, as for the method of regulation, it should be mentioned that a "package" of mandatory provisions, administrative inspection and penal sanction has not to be necessarily maintained. Ironically too strong a sanction has reduced the effectiveness of the law, because the authority is very discreet in applying the provisions. Of course the penal sanction has an intimidating effect that can make smooth the administrative inspection. But since a labour contract is a kind of contract, it is desirable that regulation of labour contract has as much as possible in common with general rules of contract law. Thus a penal sanction should be limited the case where there are extremely high needs for preventing illegal act of employer, e.g. regulation for the protection of the health and safety of employees. In other matters we should advance "depenalization".

As far as civil law principles are concerned, non-mandatory provisions will be more utilized in order to make room for freedom of contract. Non-mandatory or dispositive provisions can function as orienting the parties to contract into a typical content of contract and as such can strengthen the self-determination of employees. In addition, the idea of semi-mandatory provisions is recommendable in some matters; this type of provisions are in principle mandatory, but can be derogated only by an individual agreement that is objectively rational or by a collective workplace agreement stipulated between employer and employees' representative elected by all the employees of the workplace.

Softer regulation methods such as non-mandatory provisions or semi-mandatory provisions can contribute to make legal regulation of labour contract more flexible and adaptable to the "individualization" of working conditions.

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