

A COMPARATIVE STUDY OF THE LAW OF DISMISSAL
IN JAPAN, GREAT BRITAIN AND THE UNITED STATES
FROM THE PERSPECTIVE OF EMPLOYMENT PROTECTION

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ABSTRACT

This thesis analyses the present state of the law of dismissal in Japan, Great Britain and the USA, with a view to evaluating the adequacy of regulation, accessibility of procedure and effectiveness of remedy in each of these systems from the perspective of employment protection. Possible improvements of these systems are considered, having regard to the policies underlying them.

In the first chapter, the development of the law of dismissal in each country is briefly reviewed. The second chapter considers the extent to which the protection of the law of dismissal covers different forms of the termination of employment in each country. The third, fourth, and fifth chapters examine the general law of dismissal in these countries and identify what kind of regulation, procedures and remedies apply to dismissals in each case.

The sixth chapter examines the legal status of provisions in collective agreements concerning dismissal in each country, and special attention is paid to how arbitration regulates dismissals in Britain and the US. The seventh chapter examines the grounds on which it is unlawful to dismiss employees, the administrative bodies which deal with discriminatory dismissal claims, and the procedures and remedies for discriminatory dismissals, in each country.

Chapter eight examines the regulation, procedure and remedies applicable to dismissals for redundancy or economic reasons in each country. The ninth chapter examines the effectiveness of the legal systems of dismissal of each country from the view-point of the employee's protection, and the tenth chapter considers the policy behind the system of each country. The final chapter considers the prospects for improvement of the systems and reflects on Japanese employment law.

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ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Service
ADA	Americans With Disabilities Act
ADEA	Age Discrimination In Employment Act
BNA	Bureau of National Affairs
CRE	Commission For Racial Equality
CLRC	Central Labour Relations Commission
EAT	Employment Appeal Tribunal
EEOC	Equal Employment Opportunity Commission
EOC	Equal Opportunities Commission
EP(C)A	Employment Protection (Consolidation) Act
F.Supp.	Federal Supplement (Reports)
KPLRC	Kyoto Prefectural Labour Relations Commission
LRC	Labour Relations Commission
L.S.L.	Labour Standards Law
L.U.L.	Labour Union Law
NLRB	National Labor Relations Board
PLRC	Prefectural Labour Relations Commission
RH	<u>Rodo Hanrei</u>
RHS	<u>Rodokeizai Hanrei Sokuho</u>
RMS	<u>Rodokankei Minji Saibanreishu</u>
SMS	<u>Saikosai Minji Saibanreishu</u>
TULR(C)A	Trade Union and Labour Relations (Consolidation) Act
U.S.	United States Reports
U.S.C.	United States Code

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- PART I -

CHAPTER 1

INTRODUCTION

It can be said that dismissal (or discharge) is the equivalent of capital punishment for the worker. Sometimes it may deprive the worker and his (or her) family of their only financial resources and therefore put them in jeopardy. It also means that the worker is excluded from the workplace community through which the worker derives his social status and self-esteem and which may provide the principal source of friendships and social status.¹ Today, in most of the industrialized market economies, there are some sorts of legal protection against unjust or unfair dismissal. However, this has not been the case until relatively recently even, in the earliest industrialized countries. Far from that, even legal equality between the employee and the employer could not be established and the former was bound to the employment of the latter by legal sanctions outside their contract until the late 19th century.

1.1. UP TO THE LATE 19TH CENTURY

Britain

In Britain, for example, which experienced the earliest industrial revolution in the world, for a long time under the Statute of Labourers after the Black Death, workers were compelled to enter employment for a

certain term. The Statute prohibited employees from leaving their employment and provided for imprisonment for those who did.² The term of employment had to be a year in many cases under the Elizabethan Statute of 1562.³ Such employment could only be terminated at the end of the term by a quarter's notice given before the end of the term.⁴ The employment relationship later came under the control of a series of Master and Servant Acts until 1875. The first of these Acts was passed in 1721 and by 1829 they covered most employment.⁵ Under these Acts, where manual employees breached their contract, for example by leaving their employment without due notice, they could be imprisoned.⁶

On the other hand, under the influence of the Statutes of Labourers and the Poor Laws,⁷ the common law presumption of a yearly hiring gradually developed.⁸ This presumption was not only applied to servants in husbandry but also to domestic and other servants in 1826.⁹ However, since the presumption of a yearly hiring is most suited to agricultural employment,¹⁰ its strict application became more and more irrelevant through the course of industrialization. Long fixed term contracts seem to have hampered the employers of industrial labour in adjusting their labour force quickly and easily in response to the state of trade.

Thus, the employers tended to abandon the practice of long fixed term contracts and instead to adopt the

practice of contracts terminable by a certain period of notice.¹¹ Accordingly, the presumption of a yearly hiring became very flexible and easily rebutted by 1844.¹² Even where courts could not find any custom of the trade under which the contract was terminable with notice, they had become willing to hold, by the end of the last century, that it was terminable with reasonable notice.¹³ In determining what was reasonable notice, the courts generally paid special regard to the period of remuneration and the duties of employment.¹⁴ Thus, in 1861 Pollock C.B. stated that "No doubt the general rule is, that notice need not be more extensive than the period of payment."¹⁵ For instance, a foreman who was paid a weekly wage was held to be entitled to a week's notice.¹⁶

However, the duties of employment seem to have been a more decisive factor for the court's determination of what was reasonable notice. Thus, "the more important and responsible are the duties of the employment, and the higher the remuneration, the longer will be the appropriate notice."¹⁷ For example, the following periods were held to be reasonable although it depended upon all the facts of each case. A year's notice to a newspaper editor, six months' notice to a general sales manager, three months' notice to a sales representative, a month's notice to a shop manager, and a week's notice to a milk carrier.¹⁸

United States

In the United States, when the American states were the colonies of Britain, they used English statutes and the common law as a model for themselves, because they thought English law well-suited to their relative dearth of labour.¹⁹ They adopted similar systems to the wage regulation provided under the English Statute of Labourers. Thus, the colonial courts punished those who, by the offer of higher wages or other terms, enticed an employee to quit the employment of his employer before the end of the contractual term.²⁰ The American colonies also imitated English settlement regulation which permitted a person to obtain a settlement in a parish by being employed for a year after 1691. If a person obtained settlement in a parish, he, on becoming poor, was given poor law relief by that parish. Many American colonies permitted a person to get a settlement in a town by proving that he had been employed for a year.²¹ However, settlement by hiring never came into wide use in the American colonies and by 1810 over half of the original thirteen states of the United States no longer allowed it.²²

In contrast to Britain, states in the United States never enacted any similar statute to the English Master and Servant Acts either before or after the Revolutionary War.²³ Nevertheless, even in the United States,

imprisonment for debt was imposed on employees who neither performed the work nor refunded the money. It was often used in the case of indentured labour²⁴ or contract labour where the worker was obliged to work for a definite period as well as in the case of a peon who was held in servitude in order to work off a debt or other obligations. It was left to each state to determine not only whether criminal punishment might be applied to breach of contract but also whether forms of forced labour such as peonage might be enforced.²⁵ However, imprisonment for debt was abolished in Kentucky state in 1821²⁶ and gradually abolished in many states. Finally it was prohibited under the 13th and 14th Amendments to the US Constitution and the federal anti-peonage act of 1867.²⁷

As in Britain, it seems to be that the presumption of a yearly hiring was applied at least to menial and agricultural employees in the United States until the mid-nineteenth century. Thus, Johnson, J. stated in a case in 1857 as follows: "The case strongly resembles those of the hiring of clerks, servants in husbandry, and other similar employments, in which, to avoid the inconvenience above alluded to, and to give each party the benefit of all the seasons during the year, an indefinite hiring is taken to be a hiring for a year, or from year to year, the compensation payable at the same time."²⁸ However, the presumption did not apply to

industrial employees. Some courts applied rate-of-pay rule to those employees. Thus, those courts held that a weekly or monthly wage paid to an employee implied a weekly or monthly hiring. But this rule was most often applied to the cases where the employees were paid an annual salary. Other courts rejected the rate-of-pay rule on the grounds that the period of pay was not sufficient evidence of the parties' intention for the duration of employment.²⁹

However, in 1877, Mr. Wood insisted in his book "Master and Servant"³⁰ that the English rule of the presumption of yearly hiring had never been approved by any American court. He argued that the English rule generally arose, not between master and servant, but in settlement cases which were peculiar to England. He further argued that a general or indefinite hiring in the United States was prima facie a hiring at will.³¹ His argument was quickly reflected in subsequent judicial decisions probably because the doctrine of employment-at-will would serve the employers of industrial labour well.³² Therefore, at the latest after 1887, most courts came to adopt the rule of employment-at-will in the United States.³³ The rate-of-pay rule was still applied to salaried employees for a while after 1877 but had almost died out by the 1910s.³⁴

The situation in the United States was very different from Britain where employees of higher status

enjoyed relatively long notice for dismissal. S.M.Jacoby explained this as based on differences in societal perception about status distinctions in employment and differences in trade union attitudes toward dismissal.³⁵ With regard to the latter difference, he stated that British unions did not seek statutory restrictions on the employer's power to dismiss. They instead relied on the closed shop and the lightning strike to protect their members against redundancies and what they viewed as unjust dismissal. In contrast, American unions were relatively weak and remedied their weakness by seeking both statutory and contractual restraints on dismissals.³⁶

Japan

Japan entered into industrialization after the United States during the Meiji Era between 1868 and 1911. During the Tokugawa Era between 1603 and 1867, the employment relationship was mainly controlled by private contracts with a strong feudalistic tinge.³⁷ Most employment was created by contracts. Many of these contracts were for a fixed term of half a year or one year but some of them had a longer fixed term, e.g. ten or twenty years. In some cases, the term was for life. Thus, some contracts could be classified in fact as contracts for a sort of peonage.³⁸ Every worker who entered into employment was obliged to be entered in his or her employer's family register.³⁹ During the

contractual term, only the employer could exercise the right to terminate the employment.⁴⁰ If the employee was missing from his employment during the term of his contract, the person who was a surety for the employee was obliged to search for him and, if he failed in both refunding the employee's advances and taking him back to the employer, could be punished. This punishment was handcuffing, imprisonment, banishment, exile or even death in the first half of the Tokugawa Era. But after the act of 1742, a surety who failed in taking an employee back to his employer was only fined and if he could not refund the employer's advances, execution by sale was made against his property.⁴¹

In 1872, just after the Meiji Restoration, the Government issued an ordinance which provided as follows:

Any sort of human traffic shall be banned. The term of apprenticeship shall not be over seven years. Every fixed term employment shall be a yearly hiring. Workers who are held in service against their will in order to work off debt shall be free.⁴²

However, the Government could not completely wipe out the feudalistic characteristics of the employment relationship all at once. A notification issued by the Judicial Department in 1874 provided that an employee who left his employment during its term should be imprisoned for 30 days.⁴³ Until the Japanese Civil Code was enacted

in 1898, employment still kept a feudalistic tinge, for example, a duty to reside with the employer's family.⁴⁴

1.2. FROM THE LATE NINETEENTH CENTURY TO THE END OF WORLD WAR II

In Japan, a Civil Code was enacted in 1898 which provided that "If no period of service has been fixed by the parties, either party may at any time give notice to the other party to terminate the contract; in such a case the contract of service shall come to an end upon the expiration of two weeks after such notice has been given."⁴⁵ Around this period of time, yearly hiring was still popular in industry. For example, among textile manufacturers in rural areas, the number of non-fixed term contracts only started to increase around 1905 and became the prevalent form of employment by 1925.⁴⁶ According to a survey carried out by the city of Osaka, however, only about a third of companies with a hundred employees or more made use of fixed term contracts in 1923.⁴⁷ Between the Sino-Japanese War (1894-5) and the Russo-Japanese War (1904-5) when Japanese industrial capital was established, the annual rate of labour turnover exceeded 100 per cent.⁴⁸ A survey of 1902 found that about 50 per cent of the ironworkers employed in seven large enterprises left their employment within a year.⁴⁹ This was because of an absolute shortage of skilled labour. There were a number of workers who

acquired skills and better pay by moving from one factory to another. In addition, in the depression after the first World War, large-scale strikes occurred frequently and most of them were led by these "mobile" workers.⁵⁰

Accordingly, companies started establishing their own training institutes, improving welfare systems and introducing seniority-based pay systems in order to encourage employees to stay longer as well as to eliminate the harmful influence of mobile workers.⁵¹ These institutions and systems gradually became rooted in Japanese industry. This happened partly because trade unions of skilled workers had not developed sufficiently by that time.⁵² This also led Japanese industry to establish the practice of lifetime employment and forced trade unions to reorganize along the lines of enterprise unions.⁵³

As described above, employees were bound to their employment by legal sanctions outside their contract until the 1860s in Britain and the United States, and until 1898 in Japan. Since then, at least in legal theory, the employment relationship has been regarded as purely contractual, and has not been enforceable other than by civil suit under a contract of employment. In other words, unless otherwise agreed, both parties became entitled to unilaterally terminate the contract of employment with due notice in Britain and Japan, and at

will in the United States around the end of the 19th century. This legal theory is based on the idea of equality between the employer and the employee as a legal entity. However, this in fact operates in favour of the employer since, in the real world, termination of employment generally has much harsher effect on the employee than the employer.

This state of law remained basically unchanged in all of the above three countries up to the end of World War II. The only exception concerned dismissal of an employee for union membership or union activities. In the United States, the unions started to seek both statutory protection against discriminatory dismissals and contractual restraints on dismissal through collective agreements around the end of the nineteenth century.⁵⁴ In fact, laws outlawing discrimination against union membership were enacted by many states but were outlawed by the courts.⁵⁵ In 1889, the Congress also enacted the Erdman Act which made it a misdemeanor for a railway company to discharge an employee for union membership.⁵⁶ The Supreme Court however held that this was unconstitutional on the grounds that personal liberty as well as the right of property were invaded without due process of law in violation of the Constitution, 5th Amendment.⁵⁷

However, following a strike by railway shopmen, Congress enacted the Railway Labor Act in 1926 which was

designed to protect the rights of the workers to organize, to establish governmental machinery for determining whether a union had the support of the majority of the workers, and to require the union and management to negotiate the terms and conditions of employment.⁵⁸ The Act was also challenged but the US Supreme Court rejected its unconstitutionality. Mr. Chief Justice Hughes, delivering the opinion of the court, stated that:

"We entertain no doubt of the constitutional authority of Congress to enact the prohibition. The power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement'...Exercising this authority, Congress may facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation....The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds."⁵⁹

In the circumstances of severe economic depression, Section 7(a) of the National Industrial Recovery Act was also passed by the Congress in 1933 in order to promote employees' right to organize and bargain collectively but it did not provide any substantial power to enforce these rights. However, in 1935 the Congress finally enacted the National Labor Relations Act which provided the right to organize, the right to bargain collectively, and the right to engage in strikes, picketing, and other concerted activities. It should be pointed out that American economists at this period claimed that it was necessary to strengthen employees' spending power in order to overcome the depression.⁶⁰ In fact, Section 1 of the Act provides that "the inequality of bargaining power between employees" and employers "tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industry."

The NLRA made an employer's discriminatory discharge for union membership and activities an unfair labor practice and established the National Labor Relations Board to issue an order requiring him to cease and desist from such unfair labor practices and to take appropriate affirmative action. The NLRA was challenged again based on the due process clause of the Constitution but the US Supreme Court held it to be constitutional. In NLRB v.

Jones & Laughlin Steel Corp., Mr. Hughes, C.J., delivering the opinion of the Court, stated: "Respondent asserts its right (under the Due Process Clause) to conduct its business in an orderly manner without being subjected to arbitrary restraints. What we have said points to the fallacy in the argument. Employees have their correlative right to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work....restraint for the purpose of preventing an unjust interference with that right cannot be considered arbitrary or capricious." The Court held that the Commerce Clause of the Constitution gave Congress the power to regulate the industrial relations of employers whose activities affected interstate commerce.⁶¹

1.3. AFTER WORLD WAR II

United States

The Labor Management Relations Act of 1947 amending the NLRA was based on a policy of encouraging dispute settlement through arbitration. Section 203 of the LMRA declares: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." Furthermore, Section 301(a) of the LMRA authorized suits in the federal courts for violation

of collective bargaining agreements. The US Supreme Court ruled that this section authorized the federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. The Court stated as follows:

"Other courts-- the overwhelming number of them-- hold s.301(a) is more than jurisdictional-- that it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreement. That is our construction of s.301(a), which means that the agreement to arbitrate grievance disputes, contained in this collective bargaining agreement, should be specifically enforced."⁶²

There are a series of leading cases in 1960 in which the US Supreme Court decided on labor arbitration disputes involving the United Steelworkers and which are accordingly called the "Steelworkers Trilogy". The first and second cases⁶³ of the Trilogy are those in which the Court decided on the enforcement of labor arbitration. The opinion of the Court may be summarized as follows: labor arbitration is the heart of the collective bargaining agreement in the sense that it is expected by the parties to settle all disputes arising from the

meaning and content of the agreement through the arbitrator who is believed to have reliable knowledge of the common law of the shop. Moreover, labor arbitration is the substitute for industrial strife and therefore congressional policy in favor of settlement of disputes through arbitration. Accordingly, the judicial inquiry must be strictly confined to whether the party agreed to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. In the third case of Trilogy⁶⁴, the US Supreme Court decided on the enforceability of the arbitration award. The statement of the Court can be summarized as follows: so long as the arbitrator's award draws its essence from the collective bargaining agreement, the courts have to enforce the award even if their interpretation of the agreement is different from his.

In the United States, the law of discriminatory dismissal based on race, colour, national origin, sex, religion, age, physical or mental handicap, and the like has also developed considerably especially since the enactment of Title VII of the Civil Rights Act 1964. Besides Title VII, the main federal legislation includes the Civil Rights Act 1866, the Age Discrimination in Employment Act 1967, the Executive Order 11246, and the American With Disabilities Act 1990. More recently, the Civil Rights Act 1991 was enacted to extensively amend the Civil Rights Act 1964.

Japan

Immediately after World War II, Japan established a new democratic Constitution in 1946 which declared the people's right to work⁶⁵ and workers' rights to organize.⁶⁶ Accordingly, the Labor Standards Law (L.S.L.) was enacted in 1947 in order to regulate the minimum standards of major working conditions and it prohibited dismissal without thirty days notice⁶⁷, dismissal of employees under special physical conditions⁶⁸, and retaliatory dismissal.⁶⁹ On the other hand, the Labor Unions Law (L.U.L.) enacted in 1947 provided for an unfair labor practice scheme modelled on the American one although its legal mechanism was substantially different from the latter. The L.U.L. also provided for the normative power of collective agreement between the union and the employer.⁷⁰ Therefore, the employer's right to dismiss can be regulated by the stipulations in collective agreement.

Furthermore, the courts have vigorously developed the rule making unjust dismissal void based on the abuse of the employer's right provided under the Civil Code after World War II. This rule is closely related to the lifetime employment practice in Japan which developed in large enterprises after the first World War and was established as an industrial rule between employers and the enterprise unions after World War II.⁷¹ In Japan, a company generally employs those who have just left

school, and educates and trains them by transferring and promoting them within the company according to business needs. The employees generally continue to work for the same company typically until their company's mandatory retirement age. This is generally called, the lifetime employment practice. The lifetime employment practice is supported by seniority-based pay and promotion systems. Employees' wages and other benefits are regularly increased with the length of their employment in the same company. Employees are generally promoted according to their service years. Although the lifetime employment practice is in effect workable only in larger companies, the courts generally developed the law of employment on the basis of this practice. However, it has been recently argued that the lifetime employment practice is losing its significance as a dominant employment practice.

Britain

In Britain, trade unions and employers developed dispute procedures in collective agreements in many industries after the beginning of the twentieth century.⁷² These procedures were sometimes utilized to deal with the problems of discriminatory dismissals and redundancies. However, although the provisions of the collective agreements may be absorbed into the individual contract of employment, collective agreements themselves have not been legally enforceable, except for when the

Industrial Relations Act 1971 (IRA) was effective.⁷³ In practice, they were not legally enforceable even in this period because all collective agreements stated that they were not legally enforceable agreements. Thus, such dispute procedures could not provide any basis for legal protection against unjust dismissal.

Therefore, until relatively recently, the trade unions' strength has been the only restraint on unjust dismissals. Partly because of this, dismissals for redundancy and discriminatory dismissals have become one of the major causes of strikes.⁷⁴ In 1971, the IRA established the right of employees not to be unfairly dismissed⁷⁵ and gave the industrial tribunals the power to determine whether a dismissal was fair or unfair and to make a remedial order to the unfairly dismissed employee.⁷⁶ The Consultative Document on The Industrial Relations Bill suggested that one of the major reasons for unfair dismissal legislation was to remove a significant cause of industrial disputes in Britain. It stated as follows:

"Britain is one of the few countries where dismissals are a frequent cause of strike action. It seems reasonable to link this with the fact that in this country, unlike most others, the law provides no redress for the employee who suffers unfair or arbitrary dismissal, if the employer has met the terms of the contract, e.g. with regard to giving

notice...Both on grounds of principle and as a means of removing a significant cause of industrial disputes, the Government proposes to include provisions in the Industrial Relations Bill to give statutory safeguards against unfair dismissal."⁷⁷

Although the Industrial Relations Act was repealed by the Trade Union and Labour Relations Act in 1974, the unfair dismissal legislation was re-enacted by the latter with modification. The 1974 Act was amended by both the Employment Protection Act 1975 and the Trade Union and Labour Relations Amendment Act 1976. The latter two Acts were then consolidated into the Employment Protection (Consolidation) Act 1978, but the Employment Acts 1980, 1982, 1988, 1989, and 1990 and the Trade Union Reform and Employment Right Act 1993 further amended the 1978 Act.

Another development in Britain is the law of discriminatory dismissal based on sex, marital status, colour, race, nationality, or ethnic or national origin. A Race Relations Act was the first enacted in 1968. The Sex Discrimination Act was enacted in 1975. It is to some extent based on the American experience with Title VII. Subsequently, the Race Relations Act 1968 was replaced by a new Act in 1976 which has a structure which is substantially the same as the Sex Discrimination Act. There are now similar provisions in the Disability Discrimination Act 1995, which is not yet enforce.

As described above, the introduction of legal

restraints on dismissal is a relatively new development in Japan, Britain and the United States. Especially in the United States, there has not been what can be called a general law of dismissal. However, in the United States, the courts have recently started to develop various exceptions of the traditional rule of employment-at-will at common law. In Britain, partly because of the defects of unfair dismissal legislation, the courts have similarly started to reconsider contractual rights of procedural justice for dismissal at common law.

Like these three countries, most of the advanced market economies also started to create legal protection against unjust dismissal after World War II (although some countries had done so even before then).⁷⁸ The trend towards regulating dismissal has been further facilitated by the increase in the number of mass dismissals for economic, technical or organizational reasons in the period of lower or even negative economic growth after the oil crisis of 1973. Thus, an ILO report in 1981 found that there had been a widespread introduction of specific rules applicable to termination of employment in the context of a workforce reduction.⁷⁹ These include procedural obligations, measures to minimize workforce reduction, criteria for the selection of workers to be redundant, measures of compensation, retraining and placement. However, under the circumstances of severe international trade competition, many western European

countries recently have started to remove employers' legal obligations concerning dismissal, especially for workforce reduction.⁸⁰ In addition, economists have been vigorously discussing what effect legal regulation of dismissal has on job security from the view-point of economics.⁸¹

1.4. THE THREE COUNTRIES TO BE STUDIED

In these circumstances, it is increasingly necessary to evaluate the legal regulation of dismissal in each country, to find its policy implications and to discuss the perspectives of legal regulation based on its policy implications. This will be done in this thesis by comparing the laws on dismissal in Britain, Japan and the United States. Such a comparison may be justified for the following reasons:

Firstly, comparison of the laws of the three countries may enable us to make a fair evaluation of each country's legal regulation while it would be difficult for us to compare a greater number of countries in depth. Secondly, the United States is the biggest market economy in the world. Britain is the first industrialized but presently rather declining market economy while Japan is rather lately industrialized but the most influential and expanding one. Thus, the three countries can fairly be said to represent different types of industrialized market economies. Thirdly, in the 1980's Britain has

tended to move towards deregulation of dismissal while the trend of the United States has been increasingly towards regulation. Compared to them, Japan has been more or less settled. Finally, although Japan adopted a civil law system under the influence of French and German laws, as far as labour law is concerned, since World War II it has been much influenced by American law. Although Britain shares a common law system with the United States, these two countries surprisingly have not been influenced by each other at the level of common law. American labour law has had very little influence on British labour law except for the 1971-4 period. Britain has more recently been influenced by other E.C. countries which have civil law systems.

It should be made clear here that this thesis will not extend its review and analysis to the special legal regulation of the dismissal of civil servants and other public employees who have special status, although it cannot be denied that such regulation is important. They are not included for two reasons. First, they are generally much better protected from dismissal and its adverse effects. Secondly, their inclusion would make this review and analysis too complicated.

NOTES

1. H.Collins, Justice in Dismissal: the Law of Termination of Employment, p.15 (Clarendon Press, Oxford, 1992).
2. The Ordinance of Labourers 1349 (23 Ed.III, c.1); the Statute of Labourers 1351 (25 Ed.III, St.2); the Statute of Artificers and Apprentices 1563 (5 Eliz., c.4), ss.3 and 7.
3. The Statute of Artificers and Apprentices 1563, s.3. See W.S.Holdsworth, "A Neglected Aspect of the Relations Between Economic and Legal History", 1 Econ. Hist. Rev. 114, at 114-115 (1927).
4. The Statute of Artificers and Apprentices 1563, s.6. See W.Blackstone, Commentaries on the Laws of England, Book the First, p.413 (Oxford, 1765).
5. The Master and Servant Act 1721 (7 Geo. I, St.1, c.13), s.4; the Master and Servant Act 1829 (10 Geo. IV, c.52). The last of these Acts was the Master and Servant Act 1867 (30 & 31 Vict., c.141) which was repealed by the Employers and Workmen Act 1875 (38& 39 Vict., c.90).
6. Under the Act of 1867, the employee could still be imprisoned for breach of contract if it was aggravated by misconduct, misdemeanor or ill-treatment.(30 & 31 Vict., c.141), s.14. See W.A.Hunter, The Master and Servant Act, 1867 and the First Report of the Royal Commission, 1874: A Lecture, (1875); D.Simon, "Master and Servant" in Democracy and the Labour Movement edited by Savill (London, 1954).
7. The Act of 1691 (3 Will. & Marry, c.11), s.6 and the Act of 1697 (9 Will. III, c.30), s.4, (1697). Also see F. Const, The Law Relating the Poor (4th Ed.), pp.188-209 (1800).
8. J.M.Feiman, "The Development of the Employment at Will Rule", 20 Am. J. Legal Hist. 118, at 120-1 (1976); A.S.Diamond, The Law of Master and Servant (2nd ed.), pp.175-6, (Stevens & Sons and Sweet & Maxwell, London, 1946).
9. Huttman v. Bouluois (1826) 2 C & P 510, at 511-2.
10. Blackstone, op.cit., at 413.
11. M.R.Freedland, The Contract of Employment, p.144, (Clarendon Press, Oxford, 1976).

12. Baxter v. Nurse (1844) 6 M & G 935, at 939-40.
13. Levy v. Electrical Wonder Company (1893) 9 TLR 195; Payzu v. Harraford (1918) K.B. 348.
14. M.R.Freedland, op. cit., at pp.151-4.
15. Davis v. Marshall (1861) 4 LT 216, 217.
16. Evans v. Roe (1872) 7 C & P. 138.
17. A.S.Diamond, op.cit., at 180.
18. F.R.Batt, The Law of Master and Servant (5th Ed.), pp.78-80, (Pitman, London, 1967).
19. S.M.Jacoby, "The Duration of Indefinite Employment Contacts in the United States and England: An Historical Analysis", 5 Comparative Lab. L. 85, at 86 (1982).
20. S.M.Jacoby, at 86. Also see R.B.Morris, Government and Labor in Early America, p.21, (Harper & Row, New York, 1965).
21. S.M.Jacoby, at 90. The Statute of Artificers and Apprentices 1562, ss.8 and 9.
22. S.M.Jacoby, at 104.
23. S.M.Jacoby, at 104.
24. Indentured labour was widely used in the United States between 1619 and 1819 but was diminished by competition with slavery. See Commons and Andrews, Principles of Labor Legislation, p.41, (Harper, New York, 1920).
25. F.Meyers, Ownership of Jobs: A Comparative Study, p.19, (Institute of Industrial Relations, California, 1964).
26. Commons and Andrews, op. cit., p.47.
27. The Revised Statutes, ss.1990 and 5526. See Bailey v. State of Alabama, 219 US 219 (1910); Clyatt v. United States, 197 US 207 (1904).
28. Davis v. Gorton, 16 N.Y. 255, at 257 (N.Y. Ct. App. 1857). 29. S.M.Jacoby, op.cit., at 108.
30. H. Wood, Master and Servant, (Albany, 1877).
31. Ibid., at 272.

32. J.M.Feiman, op.cit., at 129-35.
33. McCullough Iron Co. v. Carpenter, 11 A. 176 (Ct. App. Md. 1887). Also see Martin v. New York Life Ins. Co., 42 N.E. 416 (Ct. App. N.Y. 1895); Louisville & N.R.Co. v. Offutt, 36 S.W. 181 (Ct. App. Ky. 1896); Green v. Arlington Mill Mfg. Co., 43 A. 609 (Sup. Ct. Del. 1899).
34. S.M.Jacoby, op. cit., at 120.
35. Ibid., at 119-126.
36. Ibid., at 121-122.
37. H.Kaneda, "Tokugawa Jidai Ni Okeru Koyoho No KenKyu (1)", Kokka Gakkai Zasshi, Vol.1, No.7, p.103, pp.104-7 (1927).
38. H.Maki, Koyo No Rekishi, (Kobundo, 1977).
39. H.Kaneda, op.cit., p.134-9.
40. Ibid., at 148-50.
41. Ibid., at 101-8.
42. H.Maki, op.cit., p.266-8.
43. K.Hokao, "Rodo Keiyaku Sho Yori Mita Wagakuni No Rodo Kankei No Tokushitsu", Nihon Rodoho Gakkaishi, No.2, P.60, p.72, (1952).
44. H.Hattori, "Meiji No Koyoho", Kanazawa Daigaku Hogakubu Ronshu, Vol.8, p.1, pp.61-105, (1960). The employee was punished especially heavily when he committed a crime against his employer but he could not bring a suit against his employer under criminal law until 1880.
45. The Civil Code, s.627.
46. H.Hayashi, "Bisei Ni Okeru Meiji Kohanki No Koyo Rodo" in T.Ichikawa et al., Hoken Shakai Kaitai No Koyo Rodo, p.224, at 240-2, (Aoki Shobo, 1960). 47. T.Kikuchi, "Rodo Keiyaku Ko -- Kaiko Sono Ichi", Rodo-Hanrei, No.351, p.6, (1981).
48. Niho Rodo Undo Shiryo, Vol.1, p.197, (1962).
49. Noshomu Sho, Shokko Jijo, Vol.2, p.223, (Senkatsusha, 1903).
50. M. Sumiya, Nihon No Rodo Mondai, pp.173-5, (Tokyo-Daigaku, 1967).

51. M. Shimizu, Gendai Nihon Koyo Kanko, pp.14-9, (Rodo Shinbun, 1987).
52. This is partly because an act was passed to oppress trade union movements in 1900.
53. M.Sumiya, op. cit., at 183-209.
54. S.M.Jacoby, op. cit., at 121.
55. Ibid., at 122.
56. The Developing Labor Law (2nd Ed.), edited by C.J.Morris et al., Vol.1, pp.14-5, (1983).
57. Adair v. United States, 208 U.S. 161 (1907).
58. A.L.Goldman, Labor Law and Industrial Relations in the United States of America, p.49, (Kluwer, Netherlands, 1979).
59. Texas & New Orleans R.R. Co. v. Brotherhood of Railway & S.S.Clarks, 281 U.S. 548, at 578 (1930).
60. C.J.Morris (ed.), op. cit., at 25.
61. 301 U.S. 1 (1937).
62. Textile Workers Union v. Lincoln Mills, 535 U.S. 448, 450-1 (1957).
63. United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 576 (1960).
64. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).
65. The Constitution, Art. 27.
66. Ibid, Art. 28.
67. L.S.L., s.20.
68. Ibid, s.19.
69. Ibid, s.104
70. L.U.L., s.16.
71. M.Shimizu, op. cit., at pp.21-23.
72. Marsh and McCarthy, Disputes Procedures in Britain, Research Paper 2 (Part 2) of the Royal Commission on

Trade Unions and Employers' Associations, (1966).

73. IRA., ss.34-6.

74. Ministry of Labour, A Report on Dismissal Procedures, paras.8-10, (1967); The Report of the Royal Commission on Trade Unions and Employers' Associations 1965-1967, para.380, (1968).

75. IRA, s.22.

76. s.106.

77. The Industrial Relations Bill Consultative Document, para.52, (1970).

78. ILO, International Labour Conference, 46th Session 1962, Seventh Item on the Agenda: Termination of Employment (Dismissal and Lay-Off), pp.9-18, (Geneva, 1961); 67th Session 1981, Report VIII (1): Termination of Employment at the Initiative of the Employer, p.5, (Geneva, 1980).

79. ILO, Report VIII (1), at pp.70-91.

80. B.Hepple, "Security of Employment", in R.Blanpain (ed.) Comparative Labour and Industrial Relations, (3rd Ed.) edited by R.Blanpain, (Kluwer, 1987).

81. See M.Emerson, "Regulation or Deregulation of the Labour Market", 32 European Economic Review 775 (1988); J.L.Harrison, "The 'New' Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis", 69 Iowa L. Rev. 327 (1984).

CHAPTER 2

DEFINITION OF DISMISSAL

2.1. INTRODUCTION

It can be said that employment protection has been only applied to dismissal, and therefore the concept of dismissal is crucial for employment protection. However, the concept of dismissal has been interpreted and extended in various ways in Britain, Japan and the United States. This chapter will discuss the concept of dismissal and the relationship between the concept and employment protection.

Contracts of employment can be classified broadly into two types: contracts for a fixed term, and contracts of indefinite duration. In common law in Britain and the United States, as well as under the Civil Code in Japan, a contract of employment for a fixed term comes to an end at the expiration of the term. While a fixed term contract cannot be terminated unilaterally by either party without just cause before the end of the term, a contract of indefinite duration can be terminated unilaterally at any time by either party with due notice as in Britain and Japan or even at will as in the United States.

Contracts of employment can also be terminated by agreement of both parties, or through frustration (or impossibility). Such agreement can be made at the

formation of the contract or at any time after. For example, the agreement may be that the contract terminates on the completion of a specific task. In Japan, an agreement to compulsory retirement at a certain age can also be seen as an example of an agreement to terminate a contract -- more precisely, as an agreement on a condition subsequent. Indeed, termination of a contract on the expiry of a fixed term can also be viewed as example of a termination by agreement.

Frustration occurs where events supervening after formation of the contract make performance of the contract impossible. An example of this is the death of either party to a contract of employment. Frustration automatically terminates the contract without any further action by the parties.

Until relatively recently, an employee has had legal redress for the termination of employment only in two types of circumstances: where his employment is terminated by the employer before the end of the duration of his fixed-term contract or where a contract of indefinite duration was terminated without due notice. There have however been important developments in the law of dismissal in most of the industrialized market economies especially since World War II, and dismissal is now regulated in a variety of different ways.

Traditionally, 'dismissal' has been defined as "the unilateral termination of a contract of employment by the

employer." If this definition were exhaustive, it could be said that the employee is legally protected only from unilateral termination of his contract by the employer. There has however been an expansion of the legal concept of dismissal, particularly in recent years. I will now examine the present situation concerning the concept of dismissal in Britain, Japan and the United States.

2.2. FRUSTRATION

In Britain, an expansion of the concept of dismissal was introduced for the purposes of the law of unfair dismissal and redundancy pay as well as for the purpose of the employee's right to a written statement of reasons for dismissal. At present the concept of dismissal for those purposes is defined in Section 55(2) and Section 83(2) of the Employment Protection (Consolidation) Act, 1978:

"An employee shall be treated as dismissed by his employer if, but only if, - (a) the contract under which he is employed by the employer is terminated by the employer, whether it is terminated by notice or without notice, or (b) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract, or (c) the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct."

S.55(2)(a) is roughly equivalent to the traditional concept of dismissal in all of the three countries. With regard to this type of dismissal, the problem has sometimes arisen whether termination of the contract of employment resulted from frustration, mutual agreement or dismissal.

In Britain, the doctrine of frustration of contract has been applied to the contract of employment as well.¹ One of the effects of the doctrine of frustration is an automatic termination of contract. Thus, if the contract of employment is frustrated, it is not regarded as terminated by dismissal under the EP(C)A, ss.55(2)(a) and 83(2)(a) as well as at common law. In practice, the employer has often alleged that the contract is frustrated by illness of the employee. In Marshall v. Harland and Wolf Ltd.² where the employee was dismissed with four weeks' notice because of his illness after his absence from work for 18 months, the National Industrial Relations Court (the NIRC) instructed the tribunal to take account of the following factors in deciding whether a contract was frustrated by illness: (1) The terms of the contract, including the provisions as to sickness pay; (2) how long the employment was likely to last in the absence of sickness; (3) the nature of the employment; (4) the nature of the illness or injury and how long it has already continued and the prospects of recovery; (5) the period of past employment.³

Another case in which the doctrine of frustration has been applied is one relating to imprisonment of the employee. As a matter of fact, there has been disagreement between different EATs about whether the doctrine of frustration should apply to imprisonment cases. However, such disagreement was finally resolved by the judgment of the Court of Appeal in F.C. Shepherd & Co. Ltd. v. Jerrom.⁴ In that case, when the apprentice was some 21 months into his four-year apprenticeship with the company, he was convicted of offences arising out of his involvement in a motor cycle gang fight and sentenced to Borstal training for an unspecified period, but one of not less than six months or more than two years. He was released after minimum sentence, but the company refused to take him back. The Court of Appeal held that the training service agreement had been frustrated by the apprentice's conviction and custodial sentence. The Court laid down two essential factors to constitute frustration of contract. First, there must be some event capable of rendering performance of the contract impossible or something radically different from what the parties contemplated when they entered into it. Secondly, that event must occur without the fault or default of either party. The Court further held that the party against whom frustration is asserted cannot plead his own fault or default to avoid frustration.

From the above observation, it can be seen that, in

Britain, the doctrine of frustration is applied to employment contracts in some circumstances such as sickness or imprisonment and it leaves complainants fettered at the starting line for statutory protection. However, it should be noted here that the EP(C)A specifically provides that where any event affecting an employer (including his death) operates so as to terminate the contract, it is to be treated as a termination of the contract by the employer for the purpose of the law of redundancy pay.⁵

In the United States, the courts have cited with approval and generally followed the decisions of the British courts on the doctrine of frustration. The doctrine of frustration has been applied to contracts of employment as well.⁶ Thus, the contract of employment has been held to be terminated where either the employer or the employee has died or has become incapacitated by insanity. It has also been held that the contract of employment is terminated by the employee's sickness or permanent disability which renders him unable to perform his duty. One of the most popular American legal encyclopedias explains that this is because the employee's illness or injury for all or a substantial part of the term frustrates the purpose of the contract of employment or because substantial performance becomes impossible.⁷

However, the courts have ordinarily held that the

illness of the employee does not automatically terminate the contract of employment but may afford the employer an option to terminate it.⁸ In fact, in all or most cases in which the termination of employment for the employee's illness was questioned, it was disputed whether the employer had just cause to discharge the contract and not whether the contract was terminated by frustrating event or by the employer. For example, in Citizen Home Ins. Co., Inc. v. Glisson, the plaintiff was employed by the defendant company from 18th April 1941 to solicit applications for industrial life insurance and collect the weekly premiums. During the autumn of 1946 he suffered a severe illness and for more than a year was unable to resume his work. In September 1947, the defendant advised him that all remuneration to him was to cease. He took action to recover damages for unlawful termination. The appellate court held that the plaintiff's illness and inability to perform his duties under contract for more than one year constituted sufficient cause and justification for his employer to terminate his contract.⁹

Finally, one labour law academic wrote that the imprisonment of a worker for a substantial period of time was treated as making the performance of an employment contract impossible and thereby terminating that contract.¹⁰ However, it seems to be that courts do not easily apply the doctrine of frustration. In Leopold v.

Salkey, the employee agreed that he would continue to devote himself entirely the business of their firm for a period of three years from the commencement of his service. But about one and half years after the commencement, he was arrested under a court order and put in jail. When he was released on bail, the employers refused to receive him again into their employment. The Supreme Court of Illinois stated:

"Where neither party is at fault, the absence of the servant from the master's employ, without his consent, (by whatever cause occasioned,) for an unreasonable length of time, we are of the opinion, authorizes the master to treat the contract as abandoned; and what, in such case, is an unreasonable length of time, depends upon the nature and necessities of the business in which the servant is employed."¹¹

In Japan, frustration of the contract of employment has been discussed in cases of the death of the employer or the employee and the dissolution of the company. However, most academics consider that the death of the employer will rarely result in an automatic termination of the contract because his contractual status will ordinarily be inherited by his heirs.¹² It is also considered that the contract of employment is not automatically terminated by the decision of dissolution but that it is terminated by a notice of dismissal given

by the dissolved company which continues its existence as a juristic person during the liquidation procedure.

An incurable illness of the employee can be seen as an event similar to death with regard to termination of his employment contract. However, there can be found no case in which the court held that a prolonged illness itself automatically terminated the contract of employment. This is mainly because the employer generally provides in his shugyo kisoku that the employee who has been suspended from work due to illness will be regarded as retiring when his illness is prolonged beyond the stipulated period. As described in the next chapter, the shugyo kisoku is a form of works rules which the law requires the employer to draw up and to which it gives a special legal status. Accordingly, the question of a prolonged illness has very often been raised in the context of the legal effect of those provisions.

Most courts treated these provisions as stipulating a cause which terminates the contract of employment automatically. For example, in the Denkigakuen case, a high school teacher was terminated on the expiry of a one-year suspension period due to illness. When he was suspended due to illness, he had worked for two years and five months. The shugyo kisoku of the high school stipulated that the employee will be regarded as retiring when the period of suspension expires without the circumstance which caused the suspension coming to an

end. The teacher took action for abusive dismissal. He alleged that the employer should give notice of dismissal on the expiry of the suspension period. The Tokyo District Court dismissed the complaint and held that the provision of the shugyo kisoku meant that the contract of employment would automatically terminate without the employer's notice of dismissal on the expiry of the suspension period.¹³

However, the courts also generally investigated whether the employer was entitled to suspend the employee for illness and whether the employee's illness or injury had not been cured enough to perform his job. Moreover, some courts required the employer to prove that the employee's illness or injury on the expiry of the suspension period was so serious that he might be consequently be dismissed for it. For example, in the Air France case, the Tokyo District Court held that: "It is not sufficient for the employer to prove that the employee's injury has not healed enough for him to perform his previous work...The employer should prove that, taking into account all the circumstances such as the prospects of recovery, the existence of work to be reinstated, etc., his injury is so serious that they may consequently dismiss him for it."¹⁴

There are often provisions of shugyo kisokus which provide a similar suspension period (usually for one month) of employees for accidental events in general.

Thus, sometimes the employer applies such a provision to an employee who is arrested and imprisoned on suspicion of having committed a crime, and then he regards the contract with the employee as terminated on the expiry of the fixed period of the suspension. The majority of courts have treated the contract of the employment as terminated automatically on the expiry of the suspension period.¹⁵

Termination of employment contracts on expiry of suspension periods for illness or imprisonment can be seen as realization of a condition subsequently stipulated in the shugyo kisoku. As described in the next chapter, the legal status of shugyo kisoku is an unsettled question. But if it is construed that the shugyo kisoku becomes binding through explicit or implicit agreement of employees, then it can be understood that termination of employment contracts on the expiry of suspension for illness or imprisonment is an example of termination on the basis of agreement. Termination of the contract of employment at the compulsory retirement age can be seen as the same.

It is considered that there are two different ways of providing termination on the grounds of compulsory retirement age. Some shugyo kisokus provide that the employee will be dismissed for the reason that the employee has reached the stipulated compulsory retirement age. Others provide that the employee will be regarded as

retiring when the employee has reached the stipulated compulsory retirement age. The latter type is regarded as providing a cause for automatic termination of the contract of employment and therefore legal regulation of dismissal cannot apply to this type of compulsory retirement provision. This distinction between compulsory retirement provisions has been recognized by the Supreme Court in Shuhoku Bus Company case.¹⁶ It is sometimes difficult to determine which type of compulsory retirement a particular shugyo kisoku intends to provide. However, even if the court finds it provides a cause for automatic termination, it further investigates whether that particular provision is not in violation of public policy.

In short, in Japan, the doctrine of frustration is not used frequently with regard to contracts of employment. But it has been sometimes held that the contract of employment is automatically terminated on the basis of provisions of shugyo kisoku. Another important example of automatic termination on the basis of shugyo kisoku can be seen in cases of termination caused by compulsory retirement age. These judicial practices relate closely to the statutory requirement that every cause of employment termination should be written in the shugyo kisoku. British and American situations are different from this. In common law cases, most cases concerning frustrating events are those in which

contracts are for a fixed term or with a long notice period. The proportion of the period during which the employee is not able to perform his duty is a crucial factor as far as the contract is concerned. In many cases, the proportion will be smaller in Japanese cases than in British and American common law cases. In this sense, application of the doctrine of frustration is more difficult in the Japanese context. British unfair dismissal cases seem to be rather similar in nature to Japanese cases. Therefore, a distinction should also be made between common law cases and cases concerning statutory protection from dismissal.

2.3. TERMINATION BY MUTUAL AGREEMENT

It is sometimes questionable whether a contract has been terminated by dismissal or by mutual agreement; it is necessary to refer to termination by mutual agreement in relation to the concept of dismissal as defined by s.55(2)(a) as well as s.83(2)(a) of the EP(C)A in Britain.

Mutual agreement is constituted by one party's offer and the other party's acceptance of it. Thus, difficulties may arise when an employee revokes his offer to resign before the employer accepts it. After the employee has successfully revoked his or her offer of resignation, the employer cannot insist that the contract has been terminated by mutual agreement.

Mutual agreement to terminate the contract of employment is void or voidable on the grounds of mistake, mental reservation, fraud, duress, undue influence or the like¹⁷. In addition to the fact that the rule of undue influence does not exist in Japan and nor does the rule of mental reservation apply in Britain and the United States, the precise legal definition of these terms is also clearly different among the three countries.

In Japan, even where an employee agrees to resign when he is told that he would be dismissed if he did not agree, he may not rescind his agreement to resignation unless there are special circumstances. There have been a few cases in which courts found that an agreement to resignation was void because of duress. All but one of those cases were cases where either a female or minor employee received severe threats, violent language and humiliation.¹⁸

There are also a few cases in which it was held that an agreement to resign was void on the grounds of mistake. It may be easier to allege mistake rather than duress in order to make an agreement to resign void. An example is found in the judgment of the District Court in the Yamaichi Security Company Ltd. case.¹⁹ In that case, in the company there was a practice under which female employees had to resign when they got married. The court found that her agreement to resign was void because she had misunderstood the legal effect of the practice of

resignation at marriage. When she submitted her resignation to the company, she believed that the company's practice was effective in law. The company was aware of her misunderstanding since she submitted her resignation in response to the company's demand that she should do so in compliance with that practice.

There are also a few cases where the court held that an agreement to resign was void on the grounds of mental reservation. Section 93 of the Civil Code provides that a declaration of intent shall be void if the other party was aware, or should have been aware, of the real intention of the declarant. A typical case in which the court applied this rule to an agreement of employment termination is the Amagasaki Steel Co. case²⁰. The company accepted a letter of resignation from employees who had committed a misdemeanor outside their working place. However, before submission of their letter, the employees were told by the manager that the letter would be handed to the company president only for the purpose of showing their "sincere regret". The District Court held that the agreement was void on the grounds of mental reservation since the company knew that the employees did not intend to make an agreement for termination.

In the United States, it is not easy for an employee to claim that his agreement to resign is void on the grounds of fraud, mistake or duress. However, the doctrine of undue influence can be relatively easily

utilized for this purpose. The judgment of the California District Court of Appeal in Odorizzi v. Bloomfield School District²¹ provides a good illustration. In that case, a schoolteacher submitted his resignation after he had been arrested on criminal charges of homosexual activity which were subsequently dismissed. He afterward took action against school district for rescission of his resignation on the grounds of duress, menace, fraud, undue influence, and mistake. The teacher alleged the following facts: the school officials came to his apartment just after he had undergone a long period of arrest, police questioning, booking and release on bail; he had gone 40 hours without sleep; at that time, they told him that he should resign immediately, that otherwise he would be suspended and dismissed, and that the resultant publicity would probably cause him extreme embarrassment and humiliation. The court found that the above facts were insufficient to state a cause of action for duress, menace, fraud, or mistake, but they did find sufficient elements to justify rescission of consent because of undue influence.

This case was not concerned with the question of whether the contract was terminated by resignation or dismissal since the employee's complaint only asserted that his resignation was invalid on the grounds of duress, fraud, mistake, undue influence and incapacity. However, there is a case in which it was held that resignation under duress should be treated as dismissal

where there was a contractual provision for dismissal procedure.²² In that case, the employee was told that if he did not resign within two hours, he would be summarily discharged and if he was so discharged he would suffer a complete loss of all pension rights. The Appellate Court of Illinois cited the following statement made by Traynor, J. speaking for the California Supreme Court in Moreno v. Cairns:

"Whenever a person is severed from his employment by coercion the severance is effected not by his own will but by the will of a superior. A person who is forced to resign is thus in the position of one who is discharged, not of one who exercises his own will to surrender his employment."²³

In Britain, such cases have been treated somewhat inconsistently by tribunals for the purpose of the law of unfair dismissal and redundancy pay. Probably the first judgment made by an appellate court is that of the National Industrial Relations Court (NIRC) in East Sussex County Council v. Walker. In that case, a school cook was told that her contract was to be terminated and that she should resign. Accordingly, she wrote a letter of resignation but later claimed that she had been dismissed for redundancy. Sir John Brightman, giving the judgment of the court, stated as followed:

"In our judgment, if an employee is told that she is no longer required in her employment and is

expressly invited to resign, a court of law is entitled to come to the conclusion that, as a matter of common sense, the employee was dismissed within the meaning of s.3 of the (Redundancy Payment) Act."²⁴

In this case, the NIRC treated the submission of resignation under threat as a dismissal in law. However, the employer's threat in question need not amount to a coercion similar to that the California Supreme Court's requirement in the Moreno case as described above. It can be said in fact that this is not a legalistic criterion for deciding if employment has been terminated by resignation or by dismissal. For, in theory, the employee could reject the employer's invitation of resignation and wait to be dismissed since any clear harm was not shown against him to do so.

A later judgment of the EAT in Sheffield v. Oxford Controls Company Ltd. qualified this judgment to some extent. In that case, a company director and his wife were employed by the same company. One day the wife had a quarrel with the controlling shareholder and she was told that she would have to leave the company. Her husband became involved and he said "I go if she goes." He was then asked how much he wanted to go. He was later told that if he did not resign he would be dismissed. He resigned but later made a claim for unfair dismissal. The EAT held that he had not been dismissed in law.

Delivering the judgment of the court, Arnold, J. stated as follows:

"We find the principle to be one of causation. In cases such as that which we have just hypothesized and those reported, the causation is the threat. It is the existence of the threat which causes the employee to be willing to sign, and to sign, a resignation letter or to be willing to give, and to give, the oral resignation. But where that willingness is brought about by other considerations and the actual causation of the resignation is no longer the threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him, then we think there is no room for the principle to be derived from the decided cases."²⁵

This decision, however, has received severe criticism from some academics.²⁶ They said that it allowed an employer to reject an employee's statutory right for unfair dismissal by using a financial incentive to induce the employee to resign. A particular reason why this decision is criticized concerns Section 140 of the EP(C)A which imposes restrictions on contracting out of the Act. Sub-section (1) of that section provides as follows:

"Except as provided by the following provisions of

this section, any provision in an agreement (whether a contract of employment or not) shall be void in so far as it purports - (a) to exclude or limit the operation of any provision of this Act or ; (b) to preclude any person from presenting a complaint to, or bringing any proceedings under this act before, an industrial tribunal."

A similar problem has occurred in a number of cases in which an employee signs a document which provides that if he fails to come back to work on a stated date, his contract will automatically terminate on that date. The question is if the employment should be regarded as terminated by mutual agreement where the employee fails to do so. In Igbo v. Johnson Matthey Chemicals Ltd., the Court of Appeal answered this question in the negative. In this case, the employee wanted extended holiday leave and signed a document prepared by the employer in which it was stipulated that: "You are required to work your normal shift...immediately after the end of your holiday.... This has been explained to you and you have agreed to return to work on 28.9.83. If you fail to do this your contract of employment will automatically terminate on that date." She however failed to report for work on the 28th due to her illness. Both the tribunal and the EAT concluded that the employee was not dismissed. The Court of Appeal declared that the employee was dismissed and remitted the case to the industrial

tribunal to decide whether the dismissal was unfair. Parker, LJ, presiding, stated as follows:

"Having signed the Holiday Agreement her position was, however, if the automatic termination is valid, radically changed.In such circumstances it is impossible to avoid the conclusion that the proposition for automatic termination had the effect, if valid, of limiting the operation of the sections. It was therefore void by virtue of s.140."²⁷

According to the above review, it can be said that once the employee has some form of agreement of employment termination, it is difficult to make a claim that he is in fact dismissed in law in Britain as well as in Japan and the United States. However, in Britain, the existence of a special provision of Section 140 of the EP(C)A has sometimes played an important role in rejecting the effect of agreement to terminate employment. Moreover, in deciding whether the employee has voluntarily resigned, it seems to be that British tribunals and courts have more regard to the substance of the issue while Japanese courts take a more formalistic attitude.

2.4. TERMINATION BY EXPIRY OF A FIXED TERM

Under British laws of unfair dismissal and redundancy pay, the second part of the definition of dismissal is concerned with fixed term contracts of

employment. According to Sections 55(2)(b) and 83(2)(b) of the EP(C)A, an employee is regarded as dismissed where he is employed under the fixed term of his contract which expires without being renewed under the same contract. Section 53(1)(c) also provides that if the term expires without being renewed under the same contract, the employee is entitled to be provided by his employer with a written statement of reasons for dismissal. These provisions intend to make it difficult for the employer to evade statutory protection by making a series of contracts of fixed duration on the basis of the common law principle that a fixed term contract automatically terminates at the end of the term.

However, this statutory rule is not quite rigid since employees with fixed term contracts can waive their statutory rights to claim redundancy pay and complain of unfair dismissal on the expiry of a fixed term. Section 142 of the EP(C)A provides that where an employee is employed for a fixed term of a year or more he may agree in writing to exclude any complaint of unfair dismissal on the expiry of the term and, where employed for a term of two years or more, also any claim for redundancy pay.

If the phrase 'fixed term' in Section 142 is read broadly the statutory rights for an employee may be excluded too widely. For this reason, the Court of Appeal read it narrowly in B.B.C. v. Ioannou. Lord Denning, MR stated as follows:

"In my opinion, a 'fixed term' is one which cannot be unfixed by notice. To be a 'fixed term', the parties must be bound for the term stated in the agreement: and unable to determine it by notice on either side. If it were only determinable for misconduct, it would, I think, be a 'fixed term' - because that is imported by common law anyway. But determination by notice is destructive of any 'fixed term'."²⁸

However, in B.B.C. v. Dixon²⁹, the Court of Appeal did not follow its own decision in the Ioannou case to avoid coming to a decision which would have opened up a large gap in the context of statutory definition of dismissal. The Court held that a fixed term contract existed if it was for a specific term, even though it was terminable by notice on either side during that term.

However, a contract terminable on the completion of a specific task or some future event has been held not to be a 'fixed term' contract. In Wiltshire County Council v. NATFHE and Guy.,³⁰ Lord Denning, MR also stated that "It seems to me that if there is a contract by which a man is to do a particular task or purpose, then when that task or purpose comes to an end the contract is discharged by performance. Instances may be taken of a seaman who is employed for the duration of a voyage - and it is completely uncertain how long the voyage will last....It is a contract which is discharged by

performance. "31

Neither Japan nor the United States has any statutory provision which treats the expiration of an employment contract as a dismissal. However, in Japan, it has been held that a contract stated to be for a fixed term has been converted into a contract of indefinite duration after it has been renewed several times and therefore that the employer's refusal to renew that contract at the expiration of its term was in fact dismissal.³²

Most cases, however, have not followed this decision but nevertheless have held that a contract stated to be for a fixed term should be subject to legal regulation analogous to the law of dismissal.³³ One of the leading cases of this is the Supreme Court in the Hitachi Medico Kashiwa Factory³⁴ case in the context of workforce reduction. In this case, the appellant was employed as a "temporary employee" under a written contract for a term of two months. The contract was renewed five times. The "temporary employees scheme" in the Kashiwa factory was made for the purpose of adjusting the workforce in response to the state of the demand for their products. The standards used to recruit "temporary employees" were not very demanding, compared to those for regular employees. The company's policy was to engage "temporary employees" in simple work and in fact the appellant was engaged in relatively simple work.

The Supreme Court addressed this question in the following way: The "temporary employees" in the Kashiwa factory were not employed for temporary work such as seasonal work or work for particular products. Thus, their employment was expected to continue to some extent. The appellant's contract was renewed five times. According to these facts, legal regulation on analogy of the law of dismissal should be applied to the refusal to renew his contract on the grounds of the expiry of its term.

It may be said that by using the analogy of the law of dismissal, the courts have imposed certain legal restrictions on the employer's refusal to renew a fixed term contract based on inference of a tacit agreement with his employee or the employee's reasonable expectation of continuous employment. In addition, some courts have also utilized particular statutory provisions to hold that a contract stated to be for a fixed term becomes a contract of indefinite duration and is subject to the law of dismissal.

Those provisions are Section 14 of the Labour Standard Law and Section 629 of the Civil Code. The former provides that a contract of employment shall not be made for a period longer than one year, except for the completion of a specific task. Thus, even if the parties made a contract stated to be for two years, the contract is only effective as being for the term of one year.

Where the employee continued to render service after the expiration of the term for one year and the employer did not raise any objection to it, it should be considered that the parties entered into a new contract of indefinite duration.³⁵ The Civil Code, s.629 provides that "If, where the employee continued to render service after the expiration of the period of service, the employer fails to raise any objection thereto notwithstanding that he is aware thereof, he is presumed to have entered into a fresh contract of service on the same terms as before."

2.5. CONSTRUCTIVE DISMISSAL

In Britain, the third type of dismissal occurs under Sections 55(2)(c) and 83(2)(c) of the EP(C)A where the employee terminates the contract under which he is employed by the employer, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct. This statutory concept of dismissal in Britain is generally called 'constructive dismissal'.

However, even at common law, there can be found some cases in which it was held that an employee could terminate his employment without notice due to his employer's conduct. These cases can be explained on the basis of the common-law rule of repudiatory breach. In fact, McCardie, J. stated in re Rubel Bronze Metal Company:

"If the conduct of the employer amounts to a basic refusal to continue (to employ) the servant on the agreed terms of the employment, then there is at once a wrongful dismissal and a repudiation of the contract."³⁶

However, at common law, the application of repudiatory breach has traditionally been limited to those cases where an employer ordered his employee to do an unreasonably dangerous job, where an employer suspended his employee wrongfully, or where an employer did not provide his employee with actual work when he had a contractual duty to do so.³⁷

Most courts and tribunals interpreted the concept of 'constructive dismissal' as based on the rule of repudiatory breach and in 1978 the Court of Appeal authoritatively endorsed this approach in Western Excavating Ltd. v. Sharp. Lord Denning, MR stated the law as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."³⁸

Thus, if an employer breaks a fundamental term of his contract of employment, the employee can terminate the contract and claim constructive dismissal. Accordingly, the employee's resignation is usually treated as constructive dismissal where his employer has not paid him all or part of the remuneration to which he is entitled, such as wages, bonuses, overtime pay, holiday pay or fringe benefits due to him, or where his employer has unilaterally changed his contractually agreed status, working hours, place of work, or other important working conditions without either contractual right or the employee's agreement to the change.

On the other hand, this approach could exclude cases where an employer subtly compels an employee to leave his job without breaking any term of the contract, because the employee cannot claim that he has been constructively dismissed unless the employer breaks a fundamental term of the contract. However, courts and tribunals have been willing to recognize a wider range of implied responsibilities on the part of an employer toward his employees than traditionally recognized in order to accommodate such subtle conduct by employers within the concept of 'constructive dismissal'. These are variously called the duty of support, duty of care, duty of courtesy and most importantly, the duty of mutual trust and confidence. The meaning of these duties is best described by the following statement of Lord Denning, MR

in Woods v. W.M.Car Services Ltd.: "The employer must be good and considerate to his servants. Just as the servant must be good and faithful, so an employer must be good and considerate. Just as in the old days an employee could be guilty of misconduct justifying his dismissal, so in modern times an employer can be guilty of misconduct justifying the employee in leaving at once without notice."³⁹

Moreover, it is noticeable that the tribunals have repeated that the subjective motive or intention of an employer is irrelevant in determining whether he committed a fundamental breach.⁴⁰ In Lewis v. Motorworld Garage Ltd.,⁴¹ the Court of Appeal endorsed this approach in stating that an employer's subjective "intentions and their reasonable belief could not determine" whether their conduct amounted to a repudiatory breach.

In the United States, there have been some cases at common law where courts treated an employee's resignation during the fixed term of his contract as an employer's discharge in exceptional circumstances. Those cases are: (i) where an employer ordered his employee to do work which the employee was not contractually obliged to do; (ii) where an employer did not give his employee work which he was contractually obliged to give; or (iii) where an employer failed to pay contractual wages.⁴²

In more recent years, it seems to be that the courts have become more willing to extend the concept of

dismissal even at common law. For example, in Carlson v. Ewing where Ewing left the employment of the defendant and brought an action for breach of an employment contract, the Supreme Court of Louisiana stated as follows:

"We agree with the trial court that, 'the evidence shows that * * * Carlson resorted to various devices to disgust Ewing, to induce him to abandon his service, and to make performance by Ewing impossible; and that the actions of Carlson toward Ewing were tantamount to a discharge.'"⁴³

Moreover, in Beye v. Bureau of National Affairs, the Court of Special Appeals of Maryland adopted into common law the concept of 'constructive discharge' which had been originated by the National Labour Relations Board for the law of unfair labour practice. Although the Court affirmed the judgment of the lower court which sustained supervisor's demurrers, they stated:

"None of these cases involved actions for abusive discharge under Adler principles, but we see no reason why the basic concept and definition of constructive discharge established by them should not apply as well to an abusive discharge case. The ultimate facts necessary to establish an unfair labor practice under the Federal labor laws or an unlawful employment practice under the civil rights laws may differ from what is required for an abusive

discharge under Adler, but the considerations attendant to a determination of whether a resignation is voluntary or involuntary would seem to us to be essentially the same."⁴⁴

In relation to unfair labour practices, it may be said that the NLRB first used the concept of 'constructive discharge' in Sterling Corset Inc.⁴⁵ case where the Board ordered employees to be reinstated with back pay. However, it is much more recently that clear criteria were indicated by the NLRB and the courts. The NLRB stated in Cristal Princeton Refining Co.: "There are two elements which must be proved to establish a 'constructive discharge'. First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities."⁴⁶

The second element described above is not required to prove 'constructive discharge' in particular but to prove an employer's unfair labour practice in general. Therefore, only the first element is necessary to prove 'constructive discharge' itself. This element is satisfied only if it is proved both that an employer makes working conditions so intolerable that an employee is forced to quit, and that the employer intends to force the employee to quit.

In fact, the courts have made much of an employer's intent to force an employee to resign. Thus, a finding of an employer's intent to force an employee to resign is crucial for the NLRB to conclude that the employee is constructively discharged. However, such intent can of course be proved not only by direct evidence but also by circumstantial evidence. Thus, the NLRB has adopted a "reasonably foreseeable" standard in determining whether an employer intended to force an employee to quit. For example, the NLRB stated in the Central Credit Collection Control Corp. case: "Where there is no direct evidence of motive, the presumption that 'a man is held to intend the foreseeable consequences of his conduct' will supply that lack."⁴⁷

The doctrine of 'constructive discharge' has been utilized in civil rights laws as well. However, in the context of those laws, there has been some disagreement between the courts about whether evidence of the employer's intent to make an employee resign is indispensable to establishing constructive discharge. The majority of courts do not require an employee to prove that the employer actually intended to compel the employee to resign. These courts only consider whether the working conditions are intolerable from the viewpoint of a reasonable person. For example, the US Court of Appeals (Third Circuit) in Goss v. Exxon Office Systems Company stated as follows:

"We hold that no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine. The court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign."⁴⁸

There are a small number of cases in which the courts have required the employee to prove the employer's purpose of forcing him to resign in addition to his imposition of intolerable working conditions.⁴⁹ Although there does not seem to be any major difference between the result of applying 'the reasonable person test' and 'the intent test' to a particular case, the former test is more favourable for the employee because it could lead to a favourable result to the employee where the intent test would not do so. This may be illustrated in Clark v. Marsh.⁵⁰ In that case, the District of Columbia Circuit Court applied 'the reasonable person test' and affirmed the lower court's finding that the employee was constructively discharged. The following is an outline of the facts of the Clark case: Ms Clark was employed by the army as a clerk-typist and was subsequently promoted to the position of principal assistant to the director of the Office of Employment Policy and Grievance Review (OEPGR). Following the death of the then director of the OEPGR, she became the acting director. In that capacity

her performance was rated as 'outstanding' and 'satisfactory'. Despite her performance ratings and her substantial supervisory experience, she did not receive a permanent promotion to the director's position. After an employee of another office, who was a recent law school graduate with no supervisory experience was appointed to the post of director of the OEPGR, Ms Clark resigned.

If the court had applied 'the intent test' instead of 'the reasonable person test' to the Clark case, they could have come to a different conclusion. In fact, commenting on the Clark case, a law review article persuasively stated: "A court applying a specific intent test would have reached a contrary result. The employer in Clark had introduced evidence - which the appellate court dismissed as 'irrelevant' under a reasonable person test - that the plaintiff had in fact been 'encouraged' not to resign. Furthermore, the employer's actions reflected no consistent scheme: the promotional decisions were spread out over a period of many years and where made by a panel whose composition probably changed during that time. A court would thus have difficulty concluding that the employer intended the plaintiff to resign."⁵¹

Compared to British and American courts, Japanese courts have been more reluctant to apply any similar concept to 'constructive dismissal' or 'constructive discharge' in order to extend the concept of dismissal. In Japan, the shugyo kisoku generally stipulates that

employees should submit a letter of resignation when they resign, although such a stipulation can not be legally enforced since employees are free to terminate their employment by giving two weeks notice under Section 627 of the Civil Code; employers are very careful about the difference in the legal effect between dismissal and resignation and therefore they usually require the employee to submit a letter of resignation. As a matter of fact, there are few cases in which the employee left his employment without submitting such a letter. Thus, in most cases, the courts have easily rejected the employee's claim that he was in fact dismissed by his employer, on the grounds that a letter of resignation evinces the employee's intention to resign or to agree to his resignation. Thus, in such a case, the court questions whether the employee's resignation or agreement of resignation is valid or not.

There are ^a few cases where the employee left his employment without submitting a letter of resignation. Even in those cases, the courts have rarely found that the employee was dismissed instead of resigning. The Sugenuma Seisakujo case⁵², for example, presents a striking contrast to the British and American cases examined above. In this case, the plaintiff was employed on the basis of a fixed-rate daily pay on 20.11.1972. At that time he agreed with the employer's proposal that the wage system would be changed to piece-rate pay when he

got used to the work. In 30.12.1972, the employer, however, informed him that he would be paid on piece-rate from 6.1.1973. On January 6, the employer said to him, "You will be paid on the basis of fixed-rate daily pay, only today". The plaintiff was absent from work from January 7. After two weeks passed the employer treated him as having voluntarily quit. The plaintiff alleged that the employer's notice to change unilaterally fixed-rate pay into piece-rate pay was a notice of dismissal. The Tokyo District Court held that the plaintiff was not dismissed by the employer. Turning down the plaintiff's above allegation, the court stated that the question of the legal effects of change in the payment system was one thing and that the question of dismissal was another and that he should not confuse different things.⁵³

However, it cannot be said that Japanese courts have not recognized any similar concept to 'constructive dismissal' or 'constructive discharge'. There are some exceptional cases. Among them, the Namura Shipbuilding Co. case⁵⁴ is a case where it is clear that the court, in practice, applied a similar concept to an American 'constructive discharge'. The plaintiff was employed as a manual employee and was later promoted to a position of a low administrative grade. Just after promotion, he was ordered to operate an oil motor dynamo to generate electricity because of an electric power shortage. He had not done this before since there was an employee in

charge of the dynamo operation and he subsequently failed to operate the dynamo well. On the morning of 28.1.1948, the company president told him, in front of many employees attending a morning gathering, "Can you walk around as an administrative staff as if nothing had happened? An irresponsible man such as you is never called a foreman or an assistant engineer!" After this incident, the praintiff left the workplace and never came back. About nine months later, he started to work in another shipbuilding company. The Osaka High Court found that the plaintiff was dismissed instead of resigning. The Court stated:

"An ordinary person in his position feels that he was humiliated, his reputation was damaged, his confidence was lost, and that, as a result, he cannot continue to work. Thus, it is reasonable to say that the company president forced him to resign, and that the company dismissed the plaintiff for its convenience at the end of January 1948."

In the context of unfair labour practices, labour relations commissions and courts, although these same labour relations commissions and courts have not established a concept of constructive dismissal, they have given the employee and his union the same remedies as when he is dismissed. That is, they generally hold that, when a series of actions by an employer with anti-union motives had forced an employee to resign or to

agree to resign, this agreement or resignation could not prevent the employer's actions from constituting an unfair labor practice. In the Iijima Sangyo case, the Tokyo High Court⁵⁵ stated that

"When the employee reluctantly submitted a letter of resignation because he was wrongfully transferred, obstructed from work, and threatened in various ways on the grounds of his union activity, the employer cannot treat it as resignation because such treatment would constitute an unfair labour practice as an unfavourable treatment for the reason of union activity under Section (1) of The Labour Union Law. We consider that the employee's offer of resignation is caused by the employer's enmity to union activity because the offer would not be made but for the employer's enmity to the union. Unless the employee's resignation is nullified, the result of resignation is substantially equal to the one of punitive dismissal."

2.6. CONCLUDING REMARKS

On the basis of the above examination of the definitions of dismissal in Britain, Japan and the United States, it can be said that British law has been most eager to extend the concept of dismissal although it has recognized a concept of frustration most widely which excludes legal protection from dismissal. To recognize

frustration in a wide range of circumstances reducing the width of concept of dismissal. It does not however follow that Japanese law indeed gives a wider coverage of protection through the concept of dismissal; Japanese courts very often hold that employment is automatically terminated in accordance with a shugyo kisoku provision. This leads to a similar legal result as when the doctrine of frustration is applied.

The Japanese and American laws are less eager to extend the concept of dismissal. Japanese courts are the most reluctant to find that the employee has been constructively dismissed. Compared with Japanese courts, American courts are more liberal in finding that the employee has been constructively dismissed. In order to evaluate the extension of the concept of dismissal in the context of employment protection, we should however consider what role an extended concept of dismissal plays in employment protection and if there are any other ways to protect workers' rights to employment.

In Britain, the concept of dismissal is applicable only for the purposes of the laws of unfair dismissal, redundancy pay and a written statement of reasons for dismissal. We should however note that in such a case where 'constructive dismissal' is found for the purposes of laws of unfair dismissal and redundancy pay, there may also be found a repudiation at common law for which the employee may claim for a common law remedy.⁵⁶ Moreover,

as we will see in the next chapter, these laws do not impose an excessive financial burden on the employer.

On the other hand, in Japan, the concept of dismissal is subject to strict judicial interpretation of the parties' intent, since dismissal is usually questioned in the context of the Civil Code. Moreover, the concept is usually considered in the context of whether or not a dismissal is effective in law and is therefore an extension of a concept which would impose a great financial burden on the employer. Nevertheless, it is indisputably desirable that the employee whom the employer placed in an intolerable situation by unilaterally changing his working conditions or environments may quit and sue for damages for loss of employment. Furthermore, unlike British law, Japanese law as well as American law does not regard termination by expiry of a fixed term as dismissal; however, the Japanese courts have imposed certain legal restrictions on the employer's refusal to renew a fixed term contract based on inference of a tacit agreement with his employee or the employee's reasonable expectation of continuous employment.

It is probably necessary to show a practical reason why Japanese courts have not positively established a clear concept similar to the British or American concept of 'constructive dismissal'. It is closely related to the lifetime employment practice prevailing among larger

companies. With this practice, it is very difficult for a person to find another equivalent employment after he leaves his previous employment since many larger companies generally recruit few people other than new school leavers. In this situation, the employee tends not to leave his company because he is treated unfavourably to some extent. On the other hand, as we will see in the next chapter, dismissal is severely regulated by the legal doctrine of the abuse of the right to dismissal, and therefore the employer generally tries to get an agreement from the employee to terminate a contract of employment. Therefore, there are limited cases in which the court is not able to easily recognize that the employee is constructively dismissed. The type of remedy available for abusive dismissal is also closely related to this problem. Even if the court recognizes the concept of 'constructive dismissal', the only remedy it may give the dismissed person will be its decision to affirm his status as an employee, and therefore it may be meaningless for the employee who does not want to be reinstated.

In the United States, the concept of 'constructive discharge' has so far not been widely applied in wrongful discharge cases while it has been extensively applied in the context of anti-discrimination laws. Since anti-discrimination laws prohibit discriminatory treatment in general, it may be said that the concept of dismissal is

not necessarily crucial for them. For instance, the Japanese Labour Commissions have made orders to reinstate employees who were forced to submit their resignation by various sorts of harassment by their employers for anti-union motives. To do this, the commissions have not used any special concept such as 'constructive dismissal' but have merely found that the employer's conduct was discriminatory treatment and therefore an unfair labour practice.⁵⁷ This is because, in the context of unfair labour practice legislation, the effectiveness of dismissal is not questioned.

However, in the United States, the concept of 'constructive discharge' is indeed considered to be very important in deciding what remedy should be given to the employee. Even if the employer's conduct constitutes unlawful discrimination, the employee will not obtain reinstatement with back pay if the discriminatory conduct was not a 'constructive discharge'. In this respect, it is noticeable that British laws of employment discrimination based on race and sex do not have any special provisions defining the concept of dismissal. There is a possibility that the courts will interpret the term 'dismissal' in those laws so widely as to cover an employer's wrongful repudiatory conduct. This would be consistent with the judgment of the Court of Appeal in Marriott v. Oxford and District Co-operative Society,⁵⁸ where the employer's unilateral wage reduction was

treated as 'dismissal'. Even if it did not, which is unlikely, the same rights and remedies would apply for being subject to "any other detriment". Further, an employee in many cases could still seek redress under the law of unfair dismissal if the employee satisfied the the qualifying conditions.

Factors which are required to prove 'constructive dismissal' or 'constructive discharge' are different between Britain and the United States. American courts require an employee to prove subjective factors, such as "deliberate" and "intolerable" in the United States, while British courts interpret the concept of 'constructive dismissal' as based on the rule of repudiatory breach and therefore determine on it on the basis of whether an employer's conduct constitutes a breach of an express or implied contractual term.

Finally, it should be pointed out that termination by mutual agreement raises difficult problems in all three countries. Japanese courts often hold that the employee's resignation is void because of mistake, duress or mental reservation. American courts sometimes hold that an agreement to resign is void on the basis of the doctrine of undue influence. In this way, courts declare that the contract of employment subsists without finding dismissal. In Britain, Section 140 of EP(C)A sometimes plays an important role in rejecting the effect of an agreement to terminate employment. However, it is

generally considered in these three countries that, once an agreement to terminate employment is proved to have been made, it is very difficult to deny the effect of such an agreement.

NOTES

1. Morgen v. Manser [1947]2 All ER 666 (KB).
2. [1972]IRLR 90, at 92 (NIRC).
3. In a later case, The EAT laid down additional considerations which should be taken into in the case of short term periodic contracts. See Egg Stores Ltd. v. Leibovici [1976]IRLR 376, at 378 (EAT).
4. [1986]IRLR 358 (CA).
5. EP(C)A, s.93(1)(b).
6. Havens v. Rochester Popes, 46 N.Y.S. 536 (Sup.Ct., App.Div. 1944).
7. American Jurisprudence (2nd ed.), p.125 (Lawyer's Cooperative Publication 1970).
8. Fahey v. Kennedy, 243 N.Y.S. 396 (Sup.Ct., App.Div. 1930).
9. 61 S.E. 2d 859 (Sup.Ct. App.Va. 1950).
10. A.L.Goldman, Labor Law and Industrial Relations in the United States of America, p.75, (Kluwer, Netherlands, 1979).
11. 89 Ill. 412, at 423 (Sup.Ct.Ill. 1878).
12. T. Ariijumi, Rodo Kijun Ho, p.140 (Yuhikaku, 1963).
13. The Tokyo District Court in 1955, RMS, Vol.6, No.5, p.588.
14. The Tokyo District Court in 1984, RH, No.423, p.22.
15. e.g. the Ishikawajima Harima Juko case, the Tokyo District Court in 1977, RMS, Vol.28, No.1-2, p.49 affirmed by the Tokyo High Court in 1981, RMS, Vol.32, No.6, p.821; the Supreme Court in 1982, RHS, No.1143, p.8.
16. The Supreme Court in 1968, SMS, Vol.22, No.13, p.3459.
17. The Civil Code (of Japan), ss.93-6; Anson's Law of Contract (24th Ed.) edited by A.G.Guest, pp.191-317 (Clarendon Press, Oxford, 1975); J.D.Calamari and J.M.Perillo, Contracts (2nd Ed.), pp.230-45 (West Publishing, St.Paul, 1977).

18. F. Komiya, "Taishoku No Ishihyoji No Koryoku", Rodo Horitsu Junpo, No.1133, pp.43-45 (1985).
19. The Nagoya District Court in 1970, RMS, vol.21, No.4, p.1205.
20. The Kobe District Court in 1955, RMS, Vol.6, No.6, p.1167.
21. 54 Cal. Rptr. 533 (App.Ct.Cal. 1966).
22. Piper v. Board of Trustees of Com. Col., Etc., 426 N.E.2d 262 (1981).
23. 127 P.2d 914, at 916 (Sup.Ct.Cal. 1942).
24. (1972) 7 ITR 280, at 281 (NIRC).
25. [1979]IRLR 133, at 135-6 (EAT).
26. R. Upex, "Unfair Dismissal and Agreements to Resign", 9 I.L.J. 183 (1980); J. Bowers, A Practical Approach to Employment Law, p. 146 (Financial Training, 1982).
27. [1986]IRLR 215, at 218 (EAT).
28. [1975]IRLR 184, at 186 (CA).
29. [1979]IRLR 114 (CA).
30. [1980]IRLR 198 (CA); [1978]IRLR 301 (EAT).
31. [1980]IRLR at 200.
32. The Toshiba Yanagimachi Factory case, the Yokohama District Court in 1968, RMS, Vol.19, No.4, p.1033.
33. The Toshiba Yanagimachi Factory case, the Supreme Court in 1974, SMS, Vol.28, No.5, p.927.
34. The Supreme Court in 1986, RH, No.486, p.6. Also see the Toshiba Yanagimachi Factory case, the Tokyo High Court in 1970, HJ, No.606, p.3.
35. The Aoyamagakuin University case, the Tokyo High Court in 1978, RH, No.294, p.49.
36. [1918]1K.B. 315, at 323. Also see: Burton v. Pinkerton (1867)2Ex. 340; Collier v. Sunday Referee Publishing [1940]2KB 647 (KB).
37. M.R.Freedland, The Contract of Employment, pp.238-242 (Clarendon Press, Oxford, 1976).

38. [1978]ICR 221, at 226 (CA).
39. [1982]ICR 693, at 698 (CA).
40. Milbrook Furnishing Industries Ltd. v. McIntosh [1981]IRLR 309, at 312 (EAT).
41. [1985]IRLR 465 (CA).
42. Burden v. Woodside Cotton Mills, 89 S.E. 474 (Sup.Ct.S.C. 1916); Sigmon v. Goldstone, 101 N.Y.S. 984 (Sup.Ct.App.Div. 1906); Farmers' Co-operative Ass'n v. Shaw, 42 P. 887 (Sup.Ct.Okla. 1935).
43. 54 S.2d 414, at 419-20 (Sup.Ct.La. 1951).
44. 477 A.2d 1197, at 1202-3 (Ct.Sp.App.Md. 1984).
45. 9 NLRB 858, at 871 (1938).
46. 222 NLRB 1068, at 1069 (1976).
47. 201 NLRB 944, at 949 (1973).
48. 747 F.2d 885, at 888 (3rd Cir., 1984).
49. e.g. Johnson v. Bunny Bread Company, 646 F.2d 1250, at 1256 (8th Cir. 1981).
50. 665 F.2d 1168 (D.C. Cir., 1981).
51. S.Finnegan, "Constructive Discharge Under Title VII and the ADEA", 53 U. Chi. L. Rev. 561, at 572 (1986).
52. Tokyo District Court in 1978, RHS, No.1004, p.11.
53. As a similar case, se Sanwa Kaihatsu case, the Tokyo District Court in 1979, RHS, No.1031, p.20.
54. The Osaka District Court in 1951, RMS, Vol.3, No.4, p.364.
55. The Tokyo High Court in 1976, *ibid.*, p.237.
56. Bliss v. South East Thames R.H.A. [1985]IRLR 308 (CA); Norwest Holst Group Administration Ltd. v. Harrison [1985]IRLR 240 (CA).
57. e.g. the Hokkai Kogata Taxi case, the Sapporo District Court in 1960, RMS, Vol.11, No.1, p.95.
58. [1970]1 QB 186 (CA).

- PART II -

CHAPTER 3

GENERAL LAW OF DISMISSAL(1): REGULATION

This chapter examines the general law of dismissal in Britain, the United States and Japan, and identifies what kind of regulation the law in each country provides. We will first examine British law, then Japanese law, and finally American law.

3.1. BRITAIN

3.1.1. WRONGFUL DISMISSAL¹

At common law, if a contract of employment is for a fixed period, it will automatically terminate at the end of that period. Dismissal before the expiry of a fixed term constitutes a breach of contract, and therefore it may be the subject of an action for wrongful dismissal² By contrast, a contract of indefinite duration is usually presumed to be terminable by either party giving notice. There are exceptional cases, for example, where a contract was expressed to last indefinitely after the first three years, it was held that, in the absence of notice to terminate the employment at the end of the three years, the engagement of the employee was for his life.³ Where a contract restricted the reasons for which it could be terminated by the employer giving notice, it was held that it could not be terminated by notice for some other reason.⁴ The length of the notice period

depends on the intention of the parties. If the contract of employment is silent on the period of notice to be given on either side, it has been held that a reasonable period of notice is required. In practice, the requisite notice has been determined in accordance with certain factors such as what is customary in that particular job, the status of the job and the period of payment.⁵ Usually it has been quite short for manual employees, i.e. one week for employees who were paid by the week.⁶

However, the common law concept of "reasonable notice" is now subject to a statutory minimum period which was introduced by the Contracts of Employment Act 1963 and is currently contained in Section 49 of the EP(C)A. After one month's employment, an employee is entitled to receive, and required to give one week's notice. An employee who has been employed for more than two years is entitled to one week for each year of continuous employment, subject to a maximum of twelve weeks' notice. However, salaried employees are usually paid by the month or some longer period and therefore their contractual period of notice is normally much longer than the statutory minimum.⁷

Where an employee has committed a repudiatory breach of contract, the employer is entitled to summarily dismiss him without contractual or statutory notice. In order to constitute a repudiatory breach an employee's conduct must be such as to show that he disregarded the essential

conditions of the contract of service,⁸ or be inconsistent with the continuance of confidence between employer and employee.⁹

At common law, the employer is entitled to summarily dismiss the employee even though, at the time of the dismissal, the employer was not aware of the repudiatory breach in question.¹⁰ The test for determining whether the employee is guilty of the repudiatory breach is an objective one, which means that it is not sufficient for the employer to show a reasonable belief in the employee's repudiatory breach.¹¹

Where there is no reason to summarily dismiss an employee, the employer may give the employee pay in lieu of notice instead of giving proper notice. "If a man is dismissed without notice but with money in lieu, what he receives is, as a matter of law, damages for breach of contract."¹² Therefore, the pay in lieu of notice should be the net pay which the employee would have received had he worked during the notice period. However, if there is an express or implied agreement that pay in lieu of notice is to be made gross, it should be paid gross.¹³

Contracts of employment may contain express terms, or terms incorporated from external sources, which purport to guarantee job security. Examples include where the contract requires the employer to follow the contractual procedure, restricts the permissible grounds for dismissal or gives the decision to dismiss to an

independent body. Such terms are often found especially in public sector employment. In Gunton v. Richmond-upon-Thames London Borough Council, the Court of Appeal granted more extensive damages for a failure to observe the contractual disciplinary procedure than those which would have been awarded for a failure to give due notice.¹⁴

Further, in McClelland v. Northern Ireland General Health Services Board, the House of Lords held that the employee's contract was subject only to the possibility of dismissal for good cause and therefore granted her a declaration to the effect that her contract of employment was still subsisting.¹⁵ Moreover, in Jones v. Gwent County Council, in which the governors of a college decided to dismiss a college lecturer who had been cleared of accusations of misconduct by an internal disciplinary committee after a hearing carried out in accordance with her contractual disciplinary procedure, a permanent injunction was granted preventing the Council from acting on the governors' decision to dismiss her.¹⁶

There is the separate but related question of the public law rights of some employees whose employment is subject to some degree of statutory underpinning. However, as stated in the first chapter, this thesis does not consider civil servants and certain other public employees' special rights, and therefore, these additional rights are not being considered.

3.1.2. UNFAIR DISMISSAL¹⁷

Since the introduction of the law of unfair dismissal, every employee to whom the legislation applies has the right not to be unfairly dismissed by his employer. This law however excludes a number of employees¹⁸ from its application. In particular it excludes those who have been continuously employed for less than two years and those who have reached either the normal retiring age as laid down in their contract of employment or the age of 65 where no alternative age is specified.¹⁹ However, these employees still qualify for the right not to be unfairly dismissed for a reason relating to membership or non-membership of a trade union, pregnancy or childbirth, health and safety complaints, or assertion of statutory rights.²⁰

The method of determining whether a person has been continuously employed is complex. The basic requirement for continuity of employment is the existence of an employment relationship based on a contract of employment or a series of contracts with the same employer or successors of that employer.²¹

In order for the dismissal to be fair, at the first stage the employer has to prove what the reason, or principal reason, for the dismissal was. The reason must be related to the capacity, qualifications or conduct of the employee, that the employee is redundant, that the

employee cannot continue to work in the position held without contravention of a duty or restriction imposed by or under a statute, or "some other substantial reason" of a kind such as to justify the dismissal.²²

The final category, "some other substantial reason", blurs the edges of the other specific reasons. For example, even when the employer does not have contractual authority to order the employee to do something, under certain conditions he may fairly dismiss the employee for refusal to obey his order. In Hollister v. National Farmer's Union, the Court of Appeal stated that the employer's offer of contractual changes had to be accepted by employee where there was some sound, good business reason for the reorganisation. The Court, therefore, held that the employee's refusal to accept the new agreement based on reorganisation was "a substantial reason of a kind sufficient to justify this kind of dismissal."²³

The financial difficulties of the employer may also constitute "some other substantial reason". For example, in Wilson v. Underhill House School Ltd., the EAT held that "there may well be cases...where, when employers fall into financial difficulties and are obliged to dismiss employees, the employee is neither redundant nor unfairly dismissed; because there is no reason why the circumstances involving the financial difficulties of the employers should not constitute 'some other substantial

reason."²⁴

These cases indicate that the courts and tribunals tend to make dismissal for economic or reorganizational reasons (other than for "redundancy") relevant for dismissal as "some other substantial reason." However, there are other diverse cases in which the courts and tribunals apply "some other substantial reason" to justify dismissal. For example, the dismissal of an employee on grounds of character may be found fair. It was held that a maintenance handyman at a children's holiday camp was fairly dismissed on the grounds of this homosexual activities because the employer had a common and not unreasonable belief that homosexuals were more likely than heterosexuals to interfere with young children.²⁵ It may also be found fair for an employer to dismiss an employee for refusing to sign a covenant restricting his operation in competition with the employer's company,²⁶ for concealing his personal history at hiring²⁷ or for being sentenced for imprisonment.²⁸

It may be found fair for an employer to dismiss an employee on the grounds of the temporary nature of his work. The expiry and non-renewal of a fixed term contract may constitute "some other substantial reason."²⁹

It should be pointed out that there are cases in which a dismissal will be treated as automatically unfair. Those are where the employees are dismissed for a reason relating to (i) membership or non-membership of a

trade union; (ii) pregnancy or childbirth; (iii) assertion of statutory rights; or (iv) health and safety complaints. The law of dismissal for (i) and (ii) will be examined in Chapter 7.1.3. and Chapter 7.2.2. As far as dismissal for (iii) is concerned, the EP(C)A, s.60A provides that it is automatically unfair if the employee is dismissed because he brought proceedings against the employer to enforce, or alleged the employer's infringement of, his statutory rights. These rights include those conferred by the EP(C)A, the Wages Act 1986 under which the remedy for its infringement is achieved way of a complaint or reference to an industrial tribunal, the right to minimum notice for termination and the rights relating to deductions from pay, union activities and time off under the TULR(C)A.

The EP(C)A also makes dismissal for reasons relating to health and safety complaints automatically unfair (category iv above). The dismissal is regarded as unfair if the reason for it was that the employee was carrying out activities relating to his or her duties as a statutory health and safety representative, or in connection with their membership of a health and safety committee.³⁰ The Act provides special remedies for an employee who is found to have been unfairly dismissed for this reason. They are interim relief, a special award and a set minimum for the basic award. The remedies are the same as those applicable to dismissal for union-related

reasons.³¹ The dismissal is also regarded as unfair if the reason for it was that the employee advised his or her employer of dangers at work, stopped work or took other appropriate precautions because of imminent serious danger.³²

The method and burden of proving the reason for dismissal required under unfair dismissal law contrasts with that of proving reason for summary dismissal at common law which has been described in Chapter 3.1. The reason for dismissal which has to be proved by an employer in an unfair dismissal case was described as "a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".³² In deciding whether or not the employer has proved the reason for the dismissal, the tribunal, therefore, can take into consideration only matters which the employer knew of at the time of dismissal. This principle was laid down by the House of Lords in Devis & Sons Ltd. v. Atkins.³⁴

On the other hand, if an employer proves that he genuinely believed his employee to have committed gross misconduct, it does not matter whether his belief was factually correct.³⁵ This means that the law does not require the employer to prove the facts substantiating his reason for dismissal. Accordingly, in Taylor v. Alidair, the Court of Appeal held that "(wherever) a man is dismissed for incapacity or incompetence it is

sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent."³⁶

Moreover, a reason wrongly labeled by an employer at the time of dismissal is not fatal to his case if he can prove the facts which actually caused him to dismiss.³⁷ For example, in Abernethy v. Mott, Hay and Anderson where the employers honestly thought that the facts constituted redundancy but in law they did not, the Court of Appeal supported the tribunal's decision that the real reason for the dismissal related to the capacity of the employee for work of the kind which he was employed to do.³⁸ A further problem occurs when there are several reasons alleged and not all are proved. According to the judgment of the House of Lords in Smith v. City of Glasgow District Council, in such circumstances the employer has to show that what has not been proved did not form, or form part of, the reason or principal reason for dismissal.³⁹

With regard to proof of the reason for dismissal, it should also be noted that an employee is entitled to request a written statement of the reasons for dismissal if he has been continuously employed for more than two years before the dismissal. It must be requested within 3 months of the effective date of termination. The employer has to respond to the employee's request within 14 days.

The employee may present a complaint to an industrial tribunal either that the employer has unreasonably refused to give a written statement or that the statement given by him is false or inadequate. If the complaint is sustained, the tribunal can, at its discretion, make a declaration as to what was the real reason and it must make an award of two weeks' pay. The written statement is admissible in evidence in any proceedings⁴⁰ and the employer may be estopped from denying the truth of the written statement in subsequent litigation. Accordingly, he is likely to be bound by his written statement.

The fairness of a dismissal does not only depend upon whether the employer provided a reason for it which is one of the potentially fair reasons in s.57(1)(b) and (2) of the EP(C)A. It is also subject to the application of s.57A to 61 and to ss.152, 153 and 238 of the Trade Union and Labour Relations (Consolidation) Act 1992, under which an industrial tribunal must consider "whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee."(Emphasis added.)⁴¹

However, the burden of proof on this issue has changed several times. The Industrial Relation Act 1971, s.24(6) contained the same wording as s.57(3) of the EP(C)A as quoted above, except for the wording in

parentheses. In construing s.24(6), the tribunal applied "the general principle that, in the absence of a contrary provision, he who makes a claim must prove it." Therefore the burden of proving unreasonableness rested on the employee.

The Trade Unions and Labour Relations Act 1974 placed the burden of proof on the employer.⁴² The Employment Act 1980 however removed an explicit burden on the employer to prove to the tribunal that he acted reasonably.⁴³ When introducing this amendment, the government explained that this was because the imposition of the burden of proof on the employer had resulted in a widespread feeling among employers that they were guilty until proved innocent.

It has been considered that "the tribunal, with its tripartite composition, is expected to act as 'industrial juries', drawing on the industrial experience of its lay members to reach a conclusion based on common sense and common fairness." However, the tribunal is not free to substitute its own view for those of the employer. Lord Denning, M.R. stated in British Leyland UK v. Swift: "If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a

different view."⁴⁴

As the fairness of dismissal is determined by whether the employer acted reasonably or unreasonably in treating his reason as sufficient for dismissal, the procedure followed in reaching the decision to dismiss is one of the very important factors involved in deciding whether the dismissal is fair or unfair. The ACAS Code of Practice 1: Disciplinary Practice and Procedures in Employment (1977) issued under s.199 of the Trade Union Labour Relations (Consolidation) Act 1992 provides guidelines on what constitutes a fair procedure for dismissal. The Code is admissible in evidence in any proceedings before an industrial tribunal and if any provision of it appears to the tribunal to be relevant to any question arising in the proceedings it must be taken into account in determining that question.⁴⁵

According to the Code, a fair procedure should have several stages such as various warnings, investigation of the case, an opportunity for the employee to explain before making any decision to dismiss and the right of appeal against the decision. Where there are disciplinary rules and procedures and grievance procedures, the employer must give the employee written notice of them within two months of the commencement of his employment.⁴⁶ However, the code itself does not have the force of law, and the fairness of dismissal depends on whether in the circumstances the employer acted

reasonably or unreasonably. Accordingly, failure to comply with the code's provisions will not necessarily render the dismissal unfair since there may be good reasons for not complying, according to the facts of a particular case.⁴⁷

Nevertheless, the employer cannot argue that failure to comply with procedural requirements of the code would have made no difference to the outcome. In Polkey v. Dayton Services Ltd., the House of Lords reversed earlier decisions of the Court of Appeal to the effect that the failure to follow a fair procedure did not matter if he would have dismissed and would have done so fairly in any event.⁴⁸ In this case, the company dismissed a van driver for redundancy without any consultation with employees or their representative or earlier warning to him. The Industrial Relations Code of Practice in force at that time under the Employment Protection Act 1975 required an employer to consult with employees or their representative before redundancies and to give as much warning as practicable. Lord Mackay stated the following:

"(T)he subject matter for the tribunal's consideration is the employer's action in treating the reason as a sufficient reason for dismissing the employee. It is that action and that action only that the tribunal is required to characterize as reasonable or unreasonable. That leaves no scope for the tribunal considering whether, if the employer

had acted differently, he might have dismissed the employee. It is what the employer did that is to be judged, not what he might have done. On the other hand, in judging whether what the employer did was reasonable it is right to consider what a reasonable employer would have had in mind at the time he decided to dismiss as the consequence of not consulting or not warning."⁴⁹

Apart from the procedural defects of dismissal, to determine whether the employer acted reasonably, the tribunal has to consider all the circumstances of the case including the employer's business needs, the nature and the size of the business on the one hand, and the employee's length of service, previous behaviour, work performance, the possibilities of improvement or repetition, and the like. However, as mentioned above, the tribunals should determine the case under the so-called 'band of reasonableness' test, which means that dismissal is unfair only if no reasonable employer would have dismissed the employee.

3.2. JAPAN

3.2.1. STATUTORY PROVISIONS

In Japan, a contract of employment for an indefinite term may be terminated at any time by either party's with two weeks' notice under the Civil Code, s.627(1). However, Section 20 of the Labour Standard Law 1947 (L.S.L.) enacted under the new Constitution provides:

"When the employer wants to dismiss the employee, he must give at least 30 days advance notice. The employer who does not give 30 days notice in advance shall pay money equivalent to 30 days average wages or more." Section 114 also provides that, where an employer violates this provision, a court, pursuant to the request of an employee, may order the employer to pay, in addition to the unpaid portion of the amount owed, an additional payment of an identical amount. However, if the employer has paid that unpaid portion of the amount owed before the court makes its decision, the court cannot order an additional payment.⁵⁰

Exceptions to this notice requirement are where the continuance of the enterprise is made impossible by reason of some natural calamity or other inevitable cause, and where the employer dismisses the employee for reasons for which the employee is responsible. In both of these cases, the employer must obtain recognition from an administrative office regarding the reasons. The courts have held however, that the effectiveness of dismissal does not depend on the question of whether the employer has obtained such recognition from an administrative office.⁵¹

The employer may be punished by penal servitude or with a fine where he has not given notice of 30 days or more, or where he has not obtained recognition from an administrative office for reasons which fall into the

prescribed exceptions. However, the courts have generally held that the effectiveness of dismissal does not depend on the question of whether the employer has obtained such recognition from an administrative office.

There was conflict between judicial decisions on the effectiveness of dismissal where the employer had not given 30 days notice. In the Hosoya Fukuso case, the Supreme Court however held that, unless the employer insisted on the summary effectiveness of the dismissal, the dismissal became effective either when the 30 days passed or when the employer paid money equivalent to 30 days average wages or more (i.e. wages in lieu).⁵² However, how the court determines whether an employer has insisted on the summary effectiveness of dismissal is not clear. After the Hosoya Fukuso case, there was at least one case in which a court regarded the employer's refusal to pay wages as his insistence on the summary effectiveness of dismissal.⁵³ Most courts, however, have taken the view that the employer is not usually regarded as having insisted on the summary effectiveness of the dismissal.⁵⁴

Cases which fall into the two prescribed exceptions are very rare. The 'reason of some natural calamity or other inevitable cause' only includes, for example, factories destroyed by fire, factory collapse by earthquake, and the like. The 'reason for which the employee is responsible' only includes such grave or

wicked conduct that it is unreasonable for the employer to be required to give 30 days' notice to the employee.

Section 21 of the L.S.L. excludes the application of the minimum notice requirement of Section 20 from the following workers:(i) those employed on a daily basis; (ii) those employed for a fixed term of not longer than two months (four months in the case of seasonal workers); (iii) those working a probationary period. This means that the minimum notice period is required for dismissal from a fixed term contract intended to last longer than two months (four months in the case of seasonal workers).

Section 21 further provides that the application of the minimum notice requirement is not excluded where workers coming under (i) have been employed for more than one month, where workers coming under (ii) have been employed for longer than two months (four months in the case of seasonal workers) or where those under (iii) have been employed for more than 14 days. There are two conceivable cases in which workers coming under (ii) would have been employed for longer than the contract period originally envisaged: (a) where the worker continues to work after the expiration of the contract period without the employer's objection; (b) where the worker and the employer agree to renew the contract. Section 20, rather than Section 21, applies in the case of (a) since the Civil Code, s.629 provides that the employer is presumed to have entered into a contract of

an indefinite term.

There is some disagreement among academics as to whether the minimum notice requirement applies to the expiration of the contract period after the renewal in the case of (b). Academics of the negative view argue that Sections 20 and 21 deal only with dismissal and not with termination of a contract caused by the expiry of a fixed term. However, most academics agree with the view that the minimum notice requirement should apply to the expiry of a fixed term contract where such a contract has been maintained on the premise that they are to be automatically renewed unless either party gives notice of non-renewal.

Besides the L.S.L., ss. 20 and 21, several statutes prohibit dismissals for reasons relating to (i) membership of a labour union; (ii) pregnancy or childbirth, and child-care leave; (iii) assertion of statutory rights under the L.S.L. The prohibition of dismissal for (i) and (ii) will be examined in Chapter 7.1.2. and Chapter 7.2.3. As far as dismissal for (iii) is concerned, the L.S.L., s.104 provides that an employer should not dismiss or otherwise treat in a disadvantageous manner a worker by reason of the worker having made a report to the administrative office or to a labour standards inspector on a violation of the L.S.L. or of an ordinance issued pursuant to it.

3.2.2. ABUSIVE DISMISSAL

Japan has not enacted special statutory provisions requiring justification for dismissal although there have been demands for, and discussions concerning, the enactment of such provisions. The regulation of dismissal has, however, been developed by courts applying the principle of the abuse of rights as provided for by Section 1 of the Civil Code. However, it should be noted that although the asserting party should usually have to bear the burden of proving the other party's abuse, this is not the case in the doctrine of the abuse of the employer's right of dismissal. According to the Supreme Court's decision in the Nihon Salt Company case, "if dismissal is found to be without any rational reason and not to be permissible with regard to the common sense of society, such dismissal is void because of abuse of the employer's right of dismissal."⁵⁵

The courts have also been very reluctant to find dismissal valid unless the reason for it is very serious with regard to all the circumstances. A leading case is the Supreme Court's decision in the Kochi Broadcasting Company case.⁵⁶ In this case, the company dismissed the plaintiff, an announcer, who overslept and missed his ten minute news programme on two occasions within two weeks. As a result, the news broadcast was canceled on one occasion and shortened on the other. The Supreme Court recognized: that the cancellation and shortening of the

news broadcast caused by the plaintiff's oversleeping were, in their nature, damaging to the social credibility of the company; that the same kind of failure twice in two weeks showed his lack of responsibility as an announcer; that the plaintiff had not plainly acknowledged his failure in the second case. Nevertheless, the Court held that the plaintiff's dismissal was too harsh a measure for the following reasons: the plaintiff had not been intentionally or maliciously absent on the two occasions and had no other cases of misconduct; his work record was not particularly bad; the plaintiff apologized immediately after his first failure and eventually seriously apologized for his second failure. Moreover, a news writer also staying in the station's lodging house was merely reprimanded for oversleeping and failing in his duty to wake up the announcer. In view of these facts, the Supreme Court held that the appellate court was entitled to rule the dismissal void. The Court stated as follows:

"(The announcer's failure in his duty comes into the category of an 'ordinary dismissal' prescribed in the shugyo kisoku of the company)...But even where there is the reason of 'ordinary dismissal', the employer is not necessarily entitled to dismiss the employee for that reason. Even in such a case, the dismissal is void because of the abuse of the employer's right to dismiss where it is regarded to

be considerably unreasonable in the circumstances of the case and therefore is not permissible with regard to social norms...In this case, it may well be considered that the dismissal is not permissible with regard to social justice."

The Kochi Broadcasting Company case has been regarded as a leading case for judicial standards in determining whether a dismissal is abusive or not. The case is important not only in order to understand the Japanese standard for determining the abusiveness of dismissal but also to understand the position of the burden of proof in abusive dismissal litigation. According to the Supreme Court's decision in the Kochi Broadcasting Company case, it is generally considered that unless the employer proves a permissible reason for dismissal, the dismissal will be held to be abusive and therefore void. Thus, the employer bears the burden of proving of a permissible reason for dismissal. Once the employer discharges his burden,⁵⁷ the employee will take on bear the burden of proving that the dismissal is still impermissible with regard to social norms according to the circumstances of the case.

Furthermore, the employer is required to prove the facts to substantiate his reasons for dismissal while British legislation only requires the employer to prove that he genuinely believed his reasons actually exist. Shugyo kisoku plays a very important role where the court

has determined the effectiveness of dismissal. It is therefore necessary to explain shugyo kisoku and its legal status. Shugyo kisoku is a set of works rules which is given a special legal status. The L.S.L. requires the employer to draw up shugyo kisoku on specific items concerning conditions of employment,⁵⁸ to consult a labour union organizing a majority of employees or a representative of a majority of employees,⁵⁹ to submit the shugyo kisoku to the administrative office along with the union's or representative's opinion, and to inform the employees of it by displaying or posting it in conspicuous places.⁶⁰

Shugyo kisoku is submitted to the administrative office which is authorized to order changes to it if it does not accord with laws and ordinances or any collective agreement between the union and the employer. Section 93 further provides: "A contract of employment which stipulates conditions inferior to the standard fixed in shugyo kisoku is invalid as far as such conditions are concerned. Conditions which become invalid are replaced by the standard fixed in the shugyo kisoku."

However, besides the legal effect given by Section 93, there has been controversy over whether stipulations of shugyo kisoku generally have normative effects or only constitute contractual terms of employment. In the Shuhoku Bus case (in 1968), the Supreme Court stated as

follows: "We think that the employer is usually not entitled to deprive the employees of their vested rights or to impose unfavourable working conditions by unilaterally forming or changing shugyo kisoku. We think nevertheless that as long as the stipulations of shugyo kisoku are reasonable, employees are not entitled to refuse to comply with them on the grounds of their differences since shugyo kisoku aims to determine the terms and conditions of employment collectively and uniformly "61

This ruling is quite incomprehensible despite stating that the contents of the shugyo kisoku are binding if they are reasonable. Therefore, academic opinion is still divided on the question of whether the Supreme Court's decision suggested that shugyo kisoku in itself has normative effect. Some influential academics argue that the Supreme Court in the Shuhoku Bus case treated shugyo kisoku as a sort of standard form contract.⁶² However, irrespective of whether it has normative effect or only becomes binding through the explicit or implicit agreement of employees, the courts have generally held that stipulations of shugyo kisoku concerning dismissal have a restrictive effect on dismissal.

It has to be pointed out that there are two different types of dismissal in Japanese industries: ordinary dismissal and 'punitive dismissal'. An ordinary

dismissal is coincidental with 'dismissal' in usual terms. But a 'punitive dismissal' is a special sort of dismissal which is carried out as a punishment for the employee's wrongdoing in order to maintain discipline within an enterprise.⁶³ An important characteristic of 'punitive dismissal' is that the employee usually loses part or all of his retirement allowance along with his employment. This loss has a significant impact on the livelihood of both the employee himself and his family since the retirement allowance is usually quite a large sum.⁶⁴

Most Japanese companies provide for 'punitive dismissal' in their shugyo kisoku. The majority of employment contracts provide that the company will pay a fair amount of retirement allowance as an incentive for continuous service and good discipline. Thus, the amount of retirement allowance generally depends on the employee's base wage, length of employment and reason for retirement. In general, the longer the employee's duration of employment, the higher the amount of retirement allowance he is entitled to obtain. For example, in a chemical manufacturing company employing about 1,500 workers, the Regulations for Retirement Allowances drawn up under the shugyo kisoku provide that a retirement allowance will be paid to an employee in the following cases: (i) where he retired at the mandatory retirement age; (ii) where he retires or is dismissed

because he becomes unfit for work due to mental disability, injury or illness; (iii) where he died; (iv) where he retires for his own personal reasons; (v) where he retires or is dismissed due to unavoidable circumstances. The sum payable as a retirement allowance is smaller under reason (iv) than in other cases. The Regulations for Retirement Allowances provide the following table indicating how retirement allowances are calculated.

TABLE 1. AN EXAMPLE OF A COMPANY'S RETIREMENT ALLOWANCES SCHEME

Duration of Service	Figures to be multiplied by monthly base wage	
	[reason (iv)]	[other reasons]
more than 3 years	1.9	3.1
more than 4 years	2.5	4.2
.		
more than 10 years	6.7	11.1
.		
more than 20 years	19.5	24.4
.		
more than 25 years	28.7	31.9
.		
more than 30 years	40.0	40.0

What is most important here is that the Regulations for Retirement Allowances clearly provide that an employee who is subject to a 'punitive dismissal' action is not entitled to a retirement allowance. In fact, most companies have similar provisions under the shugyo kisoku or collective agreements. These provisions have generally

been accepted by the courts, who maintain that the right to retirement allowance does not accrue bit by bit throughout the period of employment but accrues at the time of termination of employment. The amount is determined by the standard stipulated in the shugyo kisoku according to the degree of the employee's contribution to the company which is squarely calculated by the employee's duration of service, the manner of termination, and the cause of termination. Thus, a reduction in the level of retirement allowance because of 'punitive dismissal' is not the same as a reduction of the acquired right. Reduction of the retirement allowance for 'punitive dismissal' is therefore permissible except where the consequences of the reduction are so harsh that they constitute violation of 'public policy and good morals'.⁶⁵ In comparison with British and American employers, Japanese employers have a very effective additional disciplinary measure in 'punitive dismissal'.

The causes behind an ordinary dismissal are normally to be stipulated in shugyo kisoku since matters concerning termination of employment are among those which the L.S.L. requires the employer to state in shugyo kisoku. There have been two different judicial views on the effectiveness of an ordinary dismissal made for a reason which is not specifically mentioned in shugyo kisoku. A small number have held that stipulated causes for dismissal should not be construed to be

exclusive. For example, in the Hitachi Seisakujo case, the Mito District Court stated that "generally speaking, it is rather exceptional that the employer himself restricts causes of dismissal to those listed in shugyo kisoku. It should be construed that the employer can still dismiss the employee where the employee has committed such serious misconduct that the employer is entitled to 'punitive dismissal' action against him for it."⁶⁶ However, the Supreme Court made it clear that causes of dismissal should be restricted to those listed in shugyo kisoku. In the Toshiba Yanagimachi case, the Supreme Court stated as follow:

"Where causes of dismissal are explicitly listed in shugyo kisoku, dismissal of an employee is regarded as an application of the rules provided by shugyo kisoku. Therefore, the effectiveness of the dismissal should be judged on whether the employer has one of the reasons for dismissal listed in shugyo kisoku."⁶⁷

However, a clause in shugyo kisoku stipulating causes for dismissal usually provides that any matter as serious as those stipulated shall be a cause for dismissal. Therefore, even if the stipulated matters are construed as the only causes for which the employer can lawfully dismiss the employee, it loses much importance if a court widely construes the meaning of such an additional clause. However, even if such a clause is

widely construed, a court may have difficulty in concluding that dismissal is not abusive according to the standard adopted by the Supreme Court in the Kochi Broadcasting Company case (Supra.).

In addition, some shugyo kisoku require advance consultation with or consent from the union about dismissal. In such cases, the courts have denied the legal effectiveness of dismissal carried out without advance consultation with or consent from the union.⁶⁸ It should be pointed out that procedural aspects are also taken into consideration in determining whether a dismissal is an abuse of the employer's right to dismiss.

As far as 'punitive dismissal' is concerned, it is totally unreasonable that the employer, without any justification, should have the power to deprive the employee of his retirement allowance. Thus, it is generally considered that, unless there is clear authorization for 'punitive dismissal' in some form, no 'punitive dismissal' may take place. The Tokyo High Court held in the Yosho Centre case that "the employer is entitled to dismiss the employee on a 'punitive dismissal' only where a statutory provision, a shugyo kisoku or an agreement between the employer and the employee, provides for what types of conduct on the part of employees can be subject to a 'punitive dismissal.' Thus, it is not acceptable that when an employer employs a worker the employer automatically obtains the power to

order a 'punitive dismissal' against him."⁶⁹

In practice, most enterprises have stipulations concerning 'punitive dismissal' in their shugyo kisoku or collective agreements. Those stipulations prescribe 'punitive dismissal' as only one of several disciplinary actions. Other disciplinary actions usually include reprimand, reduction of earnings, cancellation of regular pay rises, and suspension and demotion. Sometimes the reasons for 'punitive dismissal' are not stated independently of those for other disciplinary actions. Even if the reasons for 'punitive dismissal' are independently specified, there is often a stipulation such as "the action may be reduced to suspension in certain circumstances." In addition to a list of causes for 'punitive dismissal', there is often a general clause stating that "disciplinary action shall be taken against the employee where he has committed conduct similar to the above-listed conduct in nature."

The courts have been very careful in considering whether a particular type of conduct of the employee falls into the category of conduct which shugyo kisoku intended to include as a cause for a 'punitive dismissal'. For example, the Tokyo High Court held in the Mine Kogyo case that "even where there is a type of conduct which could lead to 'punitive dismissal', 'punitive dismissal' can be justified only if there are no mitigating circumstances and no prospects of the

employee's repentance, or if the conduct is so grave or vicious that it would be difficult to maintain the discipline of the enterprise without exercising 'punitive dismissal.'"70

Even if there is a type of conduct which constitutes one of those stipulated by shugyo kisoku as a cause for 'punitive dismissal', the courts have further determined whether the 'punitive dismissal' is abusive in certain circumstances. Thus, the Supreme Court held in the Daihatsu Kogyo case that, "We think that the employer's disciplinary action is void because of abuse of the employer's right, where it is found to be without any rational basis and not to be permissible with regard to social norms, having regard to the circumstances of the case."⁷¹ This ruling is basically the same as that of the Supreme Court on the effectiveness of an ordinary dismissal as described above.

It should be examined whether the employer is entitled to allege any reason other than the one which he indicated to the employee at the time of dismissal. There are several cases in which the courts have considered whether the employer was obliged to give the employee a reason for 'punitive dismissal' (or an ordinary dismissal) at the time of the dismissal. For an ordinary dismissal, many courts stated that it was not essential for the employer to give the employee a reason for dismissal⁷² and, therefore, that the employer was

entitled to allege a reason other than that indicated to the employee at the time of dismissal.⁷³ Some courts further stated that the employer was entitled to rely on a reason of which he was not aware at the time of the dismissal, if it existed at the time.⁷⁴ However, some courts stated that the court should determine whether the reason for the dismissal alleged by the employer actually existed based only on the facts of which the employer was aware when the dismissal took place.⁷⁵ Some courts also stated that a reason undisclosed at the time of the dismissal was prima facie one which the employer himself was not aware of, and, therefore, that it may not be an effective means of defence against the employee's allegation of abuse of the employer's right to dismiss.⁷⁶

It has been held that 'punitive dismissal' constituted abuse of the employer's right when he did not give any reason to the employee at the time of the dismissal.⁷⁷ However, it is generally considered that, even in a case of 'punitive dismissal', non-disclosure of the reason for it does not automatically make 'punitive dismissal' void by reason of abuse of the employer's right.⁷⁸ However, many courts considered that, in order to determine the abusiveness of 'punitive dismissal', the court could take into consideration only matters which the employer knew of at the time of dismissal.⁷⁹

Provisions in shugyo kisoku often not only prescribe causes for disciplinary action but also the proper

procedures which the employer should follow in taking disciplinary action. Shugyo kisoku sometimes stipulates as follows: "Disciplinary action shall be decided through consultation with the Reward and Punishment Committee"; "Disciplinary action shall be decided through the decision of the Reward and Punishment Committee"; "The employee shall be given an opportunity to explain his case before the Committee for Discipline"; "The employee shall be given an opportunity to appeal against the decision of the Committee for Discipline".

The court has generally held that if there is a grave departure from the prescribed procedure, it makes the 'punitive dismissal' void. For example, in the Tohoku Nissan Electronics case in which the employer exercised 'punitive dismissal' against an employee without giving him the opportunity to explain his case as was required by the shugyo kisoku, the district court stated that "the 'punitive dismissal', with regard to the employer's failure in complying with the procedure prescribed by the shugyo kisoku, was void unless the failure was so trifling that it would make no difference to the result."⁸⁰

In the Osawa Seisakujo case, where the employer decided upon 'punitive dismissal' without allowing the Reward and Punishment Committee to reach any conclusions, the court held as follows: "The Reward and Punishment Committee is not a consultative committee but decision

making machinery...It is clear that the Committee has been established to prevent the company from making an arbitrary decision and to make a just decision on reward and punishment. Thus, where disciplinary action, especially 'punitive dismissal' which deprives a worker of his status as an employee, is not based on the decision of the Committee, it is void unless there is an exceptional circumstance."⁸¹

There are, however, many cases where the court has held that 'punitive dismissal' is not void because of the existence of an exceptional circumstance. In the Nihon Tanko case, for example, the 'punitive dismissal' was held not to be void since the committee members from the union did not attend the disciplinary committee and had it postponed without giving any reason.⁸² Moreover, there are several cases where the court has held that the Reward and Punishment Committee was only a consultative committee which required the employer to make careful decisions on disciplinary matters and therefore that the employer might decide on a 'punitive dismissal' without abiding by the Committee's decision.⁸³ These cases seem to suggest that it depends on the courts' interpretation of a particular shugyo kisoku as to whether compliance with a particular procedure is a necessary condition of making a 'punitive dismissal' valid.

Even if there is no special provision about disciplinary procedures in shugyo kisoku, it is

conceivable that a 'punitive dismissal', ordered without giving an employee an opportunity to explain his case, may be invalid because the lack of fundamental procedural fairness in determining a disciplinary action constituted abuse of the employer's right to discipline. Yet, there are no reported cases where a court found a 'punitive dismissal' to be abusive on the basis of lack of procedural fairness alone. One court held that 'punitive dismissal' was abusive where an employer dismissed his employee without giving him an opportunity to defend himself on the day following his act of violence.⁸⁴ In this case, the court however considered that procedural defect to be only one of many factors combining to make the dismissal abusive. Indeed, the court found that the employer had intentionally harassed the employee by frequently ordering him on unnecessary business trips in order to compel him to resign, and that the employee's act of violence was merely a pretext for dismissal.

The legal situation is very similar in cases of an ordinary dismissal. However, many shugyo kisoku provide for prior consultation or an employee's opportunity to defend his case as a requirement only for 'punitive dismissal' but not for ordinary dismissal. Accordingly, there are cases in which the court has held that ordinary dismissal action should not be used as a means of evading the procedural requirements of 'punitive dismissal' action.⁸⁵ It is noticeable that there have been no

reported cases in which the court held that a dismissal was abusive solely because an employee was not given a warning against his misconduct.

As was seen in the Kochi Broadcasting Company case, in order to hold dismissal valid, the court has to find that there was a rational basis for dismissal and also that it was reasonable for the employer to have dismissed the employee with regard to the circumstances of the case. The courts have generally taken into consideration the following factors: the size and type of the company, the position which the company occupies in the economic community, the nature and extent of damages, the nature of the employee's misconduct, the extent of the employee's repentance after committing misconduct, the employee's history of misconduct or work-performance, the employee's occupation and position in the company and a comparison with disciplinary measures taken against other employees for the same and similar misconduct. In doing so, it is fair to say that the court has taken into consideration every aspect which may favour dismissed workers.⁸⁶

In addition a court may also consider the employee's general prospects of finding equivalent employment when determining abusiveness of dismissal. Thus, in the Margaret Beauty Parlor case, the court stated as follows: "The principle of abuse of the employer's right to dismiss is established for the purpose of the employee's

protection. Even if the beauty specialist is dismissed, she usually will not have difficulty in finding a job at another parlor because of an absolute shortage of beauty specialists. Therefore, from the point of view of the employee's protection, a beauty specialist should not be treated in the same way as other sorts of employee."⁸⁷

3.3. The UNITED STATES⁸⁸

Most courts in the United States began to adopt the rule of employment-at-will by the last quarter of the 19th century. Under this rule, indefinite employment is prima facie employment-at-will.⁸⁹ The employer can terminate the employment at any time, without incurring liability, "for any cause, good or bad, or without cause."⁹⁰ This harsh common law rule had not been challenged in any state until relatively recently, but it has gradually been eroded by judicial decisions in several states (especially California) since the 1950s. As a result, in most states, a discharged employee can recover damages in certain circumstances based on various theories. In this section, therefore, we will examine judicial decisions in several states to see how the courts have reformed the rule of employment-at-will. Judicial decisions concerning the contract theory of wrongful discharge will first be considered.

Contract Theory

As employment-at-will rule became prevalent, many

courts started to hold that, even if an employer promised that he would permanently employ an employee or would not discharge him without reasonable cause, such a promise was not legally binding because permanent employment was also indefinite employment. The courts, however, have ruled that a promise of permanent employment is enforceable where an employee had given independent consideration for that promise.⁹¹

The legitimacy of such a requirement became questionable since the principles of American contract law do not require consideration to be economically adequate for a promise.⁹² It cannot be said that it is only a promise to pay a wage but not a promise both to pay a wage and to refrain from arbitrary discharge that can be bargained for a promise to render service.⁹³ Moreover, the proposition that employment without independent consideration is employment-at-will is contrary to the essence of contract theory that the contents of a contract are determined by the free agreement of its parties.

In California, an appellate court has held that a contract for permanent employment, even without independent consideration, cannot be terminated at the will of the employer if it contains an express or implied condition to the contrary.⁹⁴ An implied condition that the employer would not discharge at will was found by an appellate court in a later case in California. In Pugh v.

See's Candies, Inc.,⁹⁵ Pugh who began working for the company washing pots and pans, became a vice president in 1971 following several promotions and was appointed to the board of directors of a subsidiary to the company "in recognition of his accomplishments". The following year he received a gold watch from the company "in appreciation of 31 years of loyal service". However, in 1973, Pugh was suddenly discharged without reason. When Pugh first went to work for the company, the then president frequently told him : "If you are loyal to the company and do a good job, your future is secure." Since then, the company has operated a policy of not terminating the employment of administrative personnel except for good cause. The trial court granted the defendant's motion for nonsuit.

The appellate court reversed this ruling: "The presumption that an employment contract is intended to be terminated at will is subject, like any presumption, to contrary evidence....It is settled that contracts of employment in California are terminable only for good cause if....the parties agreed, expressly or implicitly, that the employee could be terminated only for good cause....In determining whether there exists an implied-in-fact promise for some form of continued employment courts have considered a variety of factors in addition to the existence of independent consideration. These have included, for example, the personnel policies or

practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged."⁹⁶

Finally, the implied contract theory was confirmed by the Supreme Court of California in Foley v. Interactive Data Corp. The Supreme Court held that a presumption of at-will employment was rebuttable, stating: "This presumption may, however, be overcome by evidence that despite the absence of a specific term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on 'good cause'." Responding to the defendant's argument that evidential factors were inadequate as a matter of law in this case, the court then stated: "Length of employment is a relevant consideration but six years and nine months is sufficient time for conduct to occur in which a judge could find the existence of an implied contract...(The) plaintiff here alleged repeated oral assurances of job security and consistent promotions, salary increases and bonuses during the term of his employment contributing to his reasonable expectation that he would not be discharged except for good cause. ...(A)n allegation of breach of written "termination guidelines" implying self-imposed limitations on the employer's power to discharge at will

may be sufficient to state a cause of action for breach of an employment contract."⁹⁷

After the Pugh case, courts in many states started to recognize some form of implied contract exception to the well-established rule of employment-at-will. It was reported that forty-one states had recognized such an exception by 1992.⁹⁸ However, most of the cases where courts found that there was an implied contract of employment security were those where an employee manual stated that just cause or a proper procedure should be required for discharge. Toussaint v. Blue Cross & Blue Shield of Michigan⁹⁹ in the state of Michigan was one of these cases.

The plaintiff was employed by the defendant company in a middle management position for five years before he was discharged. In the course of a conversation during which he inquired about job security, he was handed a manual of Blue Cross personnel policies which reinforced the oral assurance of job security. It stated that the disciplinary procedures applied to all Blue Cross employees who had completed their probationary period and that it was the "policy" of the company to release employees "for just cause only". He brought an action against the defendant company claiming that the discharge violated their employment agreements which permitted discharge only with cause. A verdict awarding damages was rendered in favour of the plaintiff by the jury but was

reversed by the Court of Appeals. Finally, the Supreme Court of Michigan reinstated the jury verdict.

The Court's statement in Blue Cross indicates that a policy statement of employment security may be enforceable as part of an employment contract if it becomes known to the employee before discharge. The Court reasoned this by stating: "While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced."¹⁰⁰ This means that the employer's representation is an offer of a unilateral contract which becomes enforceable upon continuation of regular employment duties by the employee.¹⁰¹

In addition to the unilateral contract analysis, it should be pointed out that there are some courts which have made personnel policy manuals binding through the use of promissory estoppel. In Jones v. East Center for Community Mental Health, after hiring, the employee was given a personnel manual which provided for just cause for termination and termination procedure. The Court of Appeals of Ohio held that the promise contained in the manual was not an enforceable contract because there was no consideration or mutuality of obligation. The Court however stated: "Applying the doctrine of promissory estoppel to this case, I find that reasonable minds could conclude only that [the employer's] personnel manual,

when coupled with the suspension memo which [the employee] received, constituted a set of promises (or promissory representations) which [the company] should have reasonably expected to induce action or forbearance on [the employee's] part, and which did so induce action or forbearance."¹⁰²

Therefore, it can be said that in most states the courts may construe the policies for job security which are declared in personnel manuals or employees' handbooks as having binding force. Accordingly, employers started to insert into their personnel manuals a disclaimer that the policies spelled out in the manual did not have binding force.¹⁰³ Yet, in Dalton v. Herbruck Egg Sales Corporation, the Michigan Court of Appeals stated: "Where a policy manual provides both a 'for cause' termination policy and a terminable at will policy, the question whether an employment contract with a just cause termination policy has been formed is a question of fact to be resolved by the jury."¹⁰⁴

Many employers also began to include disclaimers in the employment application, but the California Court of Appeal, in McLain v. Great American Insurance Co.,¹⁰⁵ allowed the plaintiff to present evidence of an implied contract whereby the employment could only be terminated for just cause. The Court held that an employment application form which provided that employment could be terminated with or without cause was not an integrated

agreement because the application was a standardized form. It did not cover either the employee's salary or position, it did not contain an integration clause and it stated that the terms and conditions could be changed at any time by the employer.

Under contract theory, once the court has found that there is an express or implied contract that dismissal will only occur for just cause, it will examine whether the employer has just cause for dismissing the employee. Where personnel policy manual has provisions on termination of employment, the language of the manual will be referred to to construe what constitutes just cause. However, even then, the provisions can not be expected to define just cause unambiguously. Therefore, it is necessary for courts to develop standards for what constitutes just cause. In order to understand the meaning of just cause, W.J.Holloway and M.J.Leech examined recent cases that explore the nuances of each part of the definition under the following categories of just cause: reduction in workforce; failure to satisfy agreed standards of performance; conduct reflecting unfavourably upon the employer; intoxication; personality problems and disruptive conduct; a crime against the employer; punctuality and unauthorized absence; insubordination; disloyalty; false information given on employment application form.¹⁰⁶ Obviously, however, whether these actually justify dismissal or not will

depend on the circumstances of each case.

Theory of Public Policy

Even where there is not an explicit or implicit promise that an employee shall not be discharged except for just cause, many courts have held that the employee may sue the employer. These claims may be based on violations of public policy, the implied-covenant of good faith and fair dealing, intentional infliction of mental distress and so on. According to the Individual Employment Rights Manual,¹⁰⁷ it was reported that thirty-four states had recognized the public policy exception. A pioneer decision for the public policy exception was made by the appellate court of California in Peterman v. International Brotherhood of Teamsters.¹⁰⁸ Even though this decision was concerned only with California state law, it has been cited by courts in many other states as a leading case. It was held in Peterman that discharge from employment because of the employee's refusal to commit a crime prohibited by the penal code was contrary to public policy and therefore that the discharged employee might seek accrued salary from the time of his discharge.

However, Californian courts in later cases have interpreted the ruling in the Peterman case as establishing a general principle that the employer's right to discharge the employee shall be limited by

consideration of public policy.¹⁰⁹ Thus, even if there is no explicit declaration of public policy, the public policy exception may still be applied to a discharge if allowing such a discharge would substantially undermine the public policy arguments behind certain statutory provisions. For example, in Hentzel v. Singer Co., the appellate court stated: " It required little analysis to perceive that the legislative purpose underlying these provisions (concerning occupational safety and health standard in the California Labor Code) would be substantially undermined if employers were permitted to discharge employees simply for protesting about working conditions which they reasonably believe constitute a hazard to their own health or safety, or health or safety of others."¹¹⁰

Laws of wrongful discharge based on public policy have been recognized in many states other than California. Most of these states are unwilling to affirm the existence of public policies without statutory support. However, in Illinois, the Supreme Court stated: "There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens. ...Nor specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters....Public policy favors

Palmateer's conduct in volunteering information to the law-enforcement agency. Once the possibility of crime was reported, Palmateer was under a statutory duty to further assist officials when requested to do so. Public policy thus also favors Palmateer's agreement to assist in the investigation and prosecution of the suspected crime. The foundation of the tort of retaliatory discharge lies in the protection of public policy, and there is a clear public policy favoring investigation and prosecution of criminal offenses."¹¹¹

As seen above, the law of wrongful discharge based on public policy has been recognized in many other states. However, there are still states where the courts are not willing to recognize the public policy exception to the traditional rule of employment-at-will. For example, in Martin v. Platt, the appellate court of Indiana explained the reason why they would not recognize the public policy exception as follows: "Normally, of course, the determination of what constitutes public policies or which of competing public policies should be given precedence, is a function of the legislature. Even if we were to exercise our power in this regard, what would be the measure of actual damages? If the employment could be truly terminated at any time for no reason at all, how would one carry the burden of proving more than nominal damages? It appears to us that the practical remedy would come, then, from recovering punitive

damages. Such damages are allowable for reasons of public policy. We would thus create an action based upon an undeclared public policy where the measure of damages was governed only by the same source. We decline the opportunity to do so. Such broad determinations should be left for the legislature."¹¹²

From the above discussion, it can be concluded that regulation of dismissal through the theory of public policy is widespread in most state jurisdictions. However, there is some disagreement among states as to how widely the public policy exception to dismissal at will should be applied, since the application of a public policy exception may result in awards of punitive damages.

Theory of Implied Covenant of Good Faith and Fair Dealing

In addition to implied contract and public policy exceptions, Californian courts have recognized the implied covenant exception. This exception had been recognized by thirteen states by 1988.¹¹³ However, there has been disagreement over the nature and effect of the implied covenant exception among these states. California is not the first state to recognize breach of the implied covenant of good faith and fair dealing as a cause of action for wrongful discharge. The pioneer case for that was Monge v. Beebe Rubber Company in which the plaintiff requested a transfer to a press machine at a higher wage. The foreman suggested that she would have to be nice to

him if she wanted the job. She was transferred to a degreaser machine at a much lower wage after she refused to go out with him. She testified that the foreman also harassed and ridiculed her in other ways. She was finally discharged. She sued for breach of an employment contract for an indefinite period of time. Trial by jury resulted in a verdict for the plaintiff and a motion for judgment notwithstanding the fact that the verdict was denied. On appeal, the New Hampshire Supreme Court sustained the trial court's denial of the motion.

The Supreme Court stated: "In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two. ...We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract."¹¹⁴

This ruling has potential to displace the rule of employment-at-will depending on how widely "bad faith" is defined. However, within the jurisdiction on New Hampshire, no cases have ever been reported in which the possibility has become reality. Monge is an example of a case in which the court recognized a breach of the

implied covenant of good faith and fair dealing as a cause of action in contract. However, some courts in Montana and California have instead recognized it as a cause of action in tort.

In Montana, the leading case is Gates v. Life Mont. Ins. Co.. In this case, the plaintiff was employed as a cashier under an oral contract of indefinite duration. About three years later, she was suddenly given the option of resigning or being discharged by her supervisor, Mr. S. In a distraught condition and under duress she signed a letter of resignation. The plaintiff brought an action to recover damages for breach of the covenant of good faith and fair dealing implicit in an at-will employment contract. The Supreme Court reversed the judgment notwithstanding the verdict and returned the case to the trial court with directions to reinstate the award of punitive damages. The Supreme Court stated: "An action for breach of an implied covenant of fair dealing, at first blush, may sound both in contract and tort. The duty arises out of the employment relationship yet the duty exists apart from, and in addition to, any terms agreed to by the parties....Breach of the duty owed to deal fairly and in good faith in the employment relationship is a tort for which punitive damages can be recovered if the defendant's conduct is sufficiently culpable."¹¹⁵

In California, the breach of the implied duty of

good faith and fair dealing in the context of discharge has been regarded as cause of action in tort as well as a breach of contract, and therefore the employee might be awarded punitive damages in addition to compensatory damages.¹¹⁶ However, in Foley v. Interactive Data Corporation, the California Supreme Court declared that tortious damages were not available for breach of the implied covenant of good faith and fair dealing in employment contracts. Nevertheless, the Court went on to consider whether the potential effects on an individual caused by termination of employment justified additional remedies for certain improper discharges. The Court stated: "(T)he employment relationship is fundamentally contractual, and several factors combine to persuade us that in the absence of legislative direction to the contrary contractual remedies should remain the sole available relief for breaches of the implied covenant of good faith and fair dealing in the employment context. Initially, predictability of the consequences of actions related to employment contracts is important to commercial stability. In order to achieve such stability, it is also important that employers should not be unduly deprived of discretion to dismiss an employee by the fear that doing so will give rise to potential tort recovery in every case. Moreover, it would be difficult if not impossible to formulate a rule that would assure that only 'deserving' cases give rise to tort relief."¹¹⁷

In Montana, the newly-enacted Wrongful Discharge From Employment Act 1987 has overtaken the remedy under the theory of an implied covenant of good faith and fair dealing.¹¹⁸ These movements in California and Montana may affect judicial attitudes in other states and if so the theory of an implied covenant will be less attractive as the source of a possible remedy for employees. Also, some states have recently made it clear that an implied covenant of good faith and fair dealing only protects an employee from a discharge based on an employer's desire to avoid payment already earned by the employee.¹¹⁹

It has become clear that the application of the theory of good faith and fair dealing in the setting of contracts of employment is narrower than might be expected. The decision of the New Hampshire Supreme Court in Monge had the potential to substantially negate the doctrine of employment-at-will and, as a result, to establish legal regulation similar to that under the Japanese law of abusive dismissal. It may be thought that the court should balance the employer's interest in business and the employee's interest in employment in order to promote the public interest. However, such a view has not become popular in subsequent judicial pronouncements, even those in the State of New Hampshire. Neither has the view that a breach of the duty of good faith and fair dealings constitutes a tort been negated in most states. Therefore, the significance of the theory

of good faith and fair dealings in regulating dismissal does not seem to carry much weight in comparison with the implied contract theory. Nevertheless, it is very interesting that an implied duty of good faith and fair dealings has been recognized in the United States as placing a restraint on the employer's ability to dismiss in bad faith.

Theory of Intentional Infliction of Mental Distress

Some courts recognize a claim of intentional infliction of emotional distress as a cause of action in cases of discharge. Until comparatively recently, the courts have not recognized such a claim as the basis of an action independent of another tort. It had been considered that recognizing damages for mental anguish itself may "be open, not only to fictitious claims, but to litigation in the field of trivialities and mere bad manners."¹²⁰ However, judicial attitude have changed, and the Restatement of Torts (Second) provided as follows: "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results, for such bodily harm."

An exemplary case is Agis v. Howard Johnson Co.. The plaintiff here was employed by the defendant company as a waitress in a restaurant. Thefts were taking place at the

restaurant and the manager told all of the waitresses that he would be firing them in alphabetical order until the person responsible was discovered. Accordingly, the plaintiff was the first to be discharged. Although the complaint alleged that the defendants' actions had been intended to cause emotional distress and anguish, the trial court allowed the defendants' motion to dismiss. However, the Supreme Judicial Court of Massachusetts reversed the judgment and stated as follows: "(W)e hold that one who, by extreme and outrageous conduct and without privilege, causes severe emotional distress to another is subject to liability for such emotional distress even though no bodily harm may result. However, in order for a plaintiff to prevail in a case for liability under this tort, four elements must be established. It must be shown (1)that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct...; (2)that the conduct was 'extreme and outrageous', was 'beyond all possible bounds of decency' and was 'utterly intolerable in a civilized community',...; (3) that the actions of the defendant were the cause of the plaintiff's distress,...; and (4) that the emotional distress sustained by the plaintiff was 'severe' and of a nature 'that no reasonable man could be expected to endure it.'"121

3.4. CONCLUDING REMARKS

Before concluding this chapter, it may be convenient to identify briefly the different techniques for regulating dismissal in the three countries. In Britain, dismissal is mainly regulated by tribunals under the unfair dismissal legislation, and it is also subject to the common law rule of due notice. In addition, the contracts contain terms to guarantee job security, the courts are increasingly willing to enforce those terms. In the United States, there is no general law of dismissal at federal level. At state level, Montana is the only State which has statutory regulation of wrongful dismissal (See Chapter 4.2.2.). Dismissal is chiefly regulated by state courts applying common law. The courts have relatively recently developed a law of wrongful discharge on the basis of various contract or tort theories. In Japan, there are no special statutory provisions requiring justification for dismissal. However, the courts have developed regulation of dismissal by applying the principle of abuse of rights under the Civil Code on the basis of people's right to life and right to work as manifested by the Constitution (Arts.25 and 27).

NOTES

1. For a full analysis of this subject, see S.Deakin and G.S.Morris, Labour Law, pp.339-87 (Butterworths, London, 1995).
2. Isleworth Studios Ltd. v. Richard [1988]IRLR 137 (CA).
3. Salt v. Power Plant Co. Ltd. [1936]3 All ER 322 (CA).
4. McClelland v. Northern Ireland General Health Services Board [1957]2 All ER129 (HL).
5. See Chapter 1.
6. P.Davies and M.Freedland, Labour Law (2nd ed.), p.433 (Weidenfeld and Nicolson, London, 1984).
7. Nokes v. Doncaster Amalgamated Collieries Ltd. [1940]AC 1014, 1028 (HL).
8. Laws v. London Chronicle Ltd. [1959]1 WLR 698, 700 (CA).
9. Sinclair v. Neighbour [1967]2 QB 279, 289 (CA).
10. Boston Deep Sea Fishing and Ice Co. v. Ansell [1988]39 Ch.D. 339 (CA). The ruling was confirmed by Leonard (Cyril) & Co. v. Simo Securities Trust Ltd. [1971]3 All E.R. 1313 (CA).
11. Bonner v. H.Gilbert & Co. [1989]IRLR 475 (EAT).
12. Dixon v. Stenor Ltd. [1973]ICR 157 (CA).
13. Gothard v. Mirror Group Newspaper [1988]ICR 729 (CA).
14. [1981]ICR 355 (CA).
15. [1957]1 WLR 594 (HL).
16. [1992]IRLR 521 (QB).
17. For a full analysis of this subject, see S.D.Anderman, The Law of Unfair Dismissal (2nd ed.), pp.39-279 (Butterworths, London, 1985).
18. EP(C)A, ss.65, 141(2), 142(1), 144(2), 146 (2) and Sch.9.
19. *Ibid*, s. 64(1).

20. Ibid, s.64(3) and (4); TULR(C)A, s.154.
21. EP(C)A, Sch.13. Also see I.T.Smith and J.C.Wood, Industrial Law (5th ed.), pp.129-146 (Butterworths, London, 1993).
22. Ibid, s.57(1) and (2).
23. [1979]IRLR 238 (CA).
24. [1977]IRLR 475 (EAT).
25. Saunders v. Scottish National Camps Association Ltd. [1980]IRLR 174 (EAT).
26. R S Components v. Irwin [1973]ICR 535 (NIRC).
27. O'Brien v. Prudential Assurance Co. [1979]IRLR 140 (EAT).
28. Kingston v. British Railways Board [1984]ICR 781 (CA).
29. North Yorkshire County Council v. Fay [1985]IRLR 91 (CA).
30. EP(C)A, s.57A(1)(a) and (b).
31. Ibid, ss.73(6B), 75A, and 77-79. See Chapter 7.1.3.
32. Ibid, s.57A(1)(c), (d) and (e).
33. Abernethy v. Mott, Hay and Anderson [1974]ICR 323, at 330 (CA).
34. [1973]IRLR 314 (HL).
35. Trust House Forte Leisure Ltd. v. Aquilar [1976]IRLR 251, at 253 (EAT).
36. [1978]IRLR 82, 85 (CA).
37. See Gorman v. London Computer Training Centre [1978]IRLR 22 (EAT).
38. [1974]ICR 323, at 330 (CA).
39. [1987]IRLR 326 (HL).
40. EP(C)A, s.53.
41. Ibid, s.57(3)
42. TULRA, Sch.1, para.6.

43. Employment Act 1980, s.6.
44. [1981]IRLR 91, at 93 (CA).
45. TULR(C)A, s.207.
46. EP(C)A, ss.1-5.
47. Retarded Children's Aid Society Ltd. v. Day [1978]IRLR 128 (CA).
48. British Labour Pump Co. Ltd. v. Byrne [1979]ICR 347 (CA); W & F Wass Ltd. v. Binns [1982]ICR 508 (CA).
49. [1987]ICR 142, at 153 (HL).
50. The Hosoya Fukuso case, the Supreme Court in 1960, SMS, Vol.14, No.3, p.403.
51. The Nittsu Kashiwazaki case, the Tokyo High Court in 1951, RMS, Vol.2, No.4, p.455.
52. The Supreme Court in 1960, SMS, Vol.14, No.3, p.403.
53. The Senko case, the Sapporo District Court in 1975, HJ, No.800, p.105.
54. e.g. the Plus Shizai case, the Tokyo District Court in 1977, HJ, No.841, p.101.
55. The Supreme Court in 1975, SMS, Vol.29, No.4, p.456.
56. The Supreme Court in 1977, RH, No.268, p.17.
57. T. Chigusa, "Kaiko O Meguru Horitsu Mondai", in Senmon Koza Rodoho, p.189 (1953).
58. L.S.L., s.89.
59. Ibid, s.90.
60. Ibid, s.106(1).
61. The Supreme Court in 1968, SMS, Vol.22, No.13, p.3459.
62. K.Sugeno, Rodoho (2rd ed.), pp.94-8; T.Shimoi, Rodokijunho, pp.223-4 (Yuhikaku, Tokyo, 1990).
63. The Towada Kanko Dentetsu case, the Supreme Court in 1963, SMS, Vol.17, No.5, p.754.
64. According to a governmental survey in 1989, a male

employee with a bachelor degree who worked for more than 35 years for the same employer and retired at the mandatory retirement age, gets an average of 44.4 months pay as retirement allowance. The Japan Institute of Labour, Japanese Working Life Profile 1994-95, (Tokyo, 1995).

65. The Sankosha case, the Supreme Court in 1977, RHS, No.958, p.25.

66. The Tokyo District Court in 1974, RHS, No.868, P.4.

67. The Supreme Court in 1974, SMS, Vol.28, No.5, p.927.

68. The Toyo Sanso case, the Tokyo District Court in 1967, Hanrei Times, No.213, p.142; the Matsukiya case, the Aomori District Court in 1968, RH, No.72, p.52.

69. The Tokyo High Court in 1986, RMS, Vol.37, No.2/3, p.257.

70. The Tokyo High Court in 1972, HJ, No.688, p.262.

71. The Supreme Court in 1983, RH, No.415, p.16.

72. The Kumamoto Dentetsu case, the Supreme Court in 1953, SMS, Vol.7, No.12, p.1318.

73. The Taiyosha case, the Tokyo High Court in 1978, RHS, No.977, p.12.

74. The Tokyo Tsushin Kogyo case, the Yonezawa Branch, the Yamagata District Court in 1977, RMS, Vol.28, No.1, p.30.

75. The Yasuura Nokyo case, the Kure Branch, the Hiroshima District Court in 1985, HT, No.549, p.291.

76. The Yamato Transport case, the Osaka District Court in 1960, RMS, Vol.11, No.2, p.184.

77. The Sanyo Denkido case, the Shimonoseki Branch, the Yamaguchi District Court in 1964, RMS, Vol.15, No.3, p.453.

78. The Towada Dentetsu case, the Hachinohe Branch, the Aomori District Court in 1959, RMS, Vol.10, No.2, p.107.

79. The Sapporo Chuokotsu case, the Sapporo District Court in 1960, HT, No.226, p.127.

80. The Aizuwakamatsu Branch, the Fukushima District Court in 1977, RH, No.289, p.63.

81. The Kawasaki Branch, Yokohama District Court in 1976, Rodo Horitsu Junpo., No.914, p.80.
82. The Osaka District Court in 1967, Rodo Hanrei Sokuho No.130/1, p.3.
83. The Shoeisangyo case, the Yokosuka Branch, the Yokohama District Court in 1976, RHS, No.938, p.12.
84. The Hirosakikai case, the Osaka District Court in 1986, RH, No.487, p.47.
85. The Nagano Koseinogyo Kyodokumiai case, the Nagoya District Court in 1993, RHS, No.1508, p.11.
86. K.Sugeno, Japanese Labor Law, p.140 (U. Washington Press, Washington, 1992).
87. The Tokyo District Court in 1968, RMS, Vol.19, No.4, p.831.
88. For full analysis of this subject, see W.J.Holloway and M.J.Leech, Employment Termination: Rights and Remedies (2nd ed.), pp.3-275 (BNA, Washington DC, 1995).
89. H.G.Wood, A Treatise on the Master and Servant, (Albany, 1877).
90. Payne v. Western & Atl.R.R., 81 Tenn. 507, at 517 (Sup.Ct.Tenn. 1884). See also Adair v. United States, 208 U.S. 161, at 174-5 (1908).
91. See generally J.P.Shapiro and J.F.Tune, "Implied Contract Rights to Job Security", 26 Stanford L.Rev. 335, at 345 and 351 (1974).
92. Calamari & Perillo, Contract (2nd ed.), pp.136-9, (West, St.Paul, 1977); A.L.Corbin, Corbin on Contracts, Vol. 1A, pp.13-7 (West, St.Paul, 1963).
93. Corbin, op. cit., Vol.1, pp.534-6 (1963).
94. Drzeweicki v. Block Inc., 24 C.A.3d 695 (Ct.App.Cal. 1972).
95. 116 C.A.3d 311 (Ct.App.Cal. 1981).
96. Ibid, at 323-9.
97. 254 Cal.Rptr. 211, at 223 and 226 (1988).
98. R.Edwards, Rights at Work: Employment Regulations in the Post-Union Era, pp.233-40 (Brooking Ins., Washington DC, 1993).

99. 292 N.W.2d 880 (Sup.Ct.Mich. 1980).
100. Ibid, at 892.
101. H.H.Peritt, Jr., Employee Dismissal Law and Practice, p.148 (J.Wiley & Sons, New York, 1984).
102. Jones v. East Center for Community Mental Health, 482 N.E.2d 969, at 974 (Ct.App.Oh. 1984).
103. Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, at 1271 (Sup.Ct N.J. 1985).
104. 417 N.W.2d 496, at 498 (Ct.App.Mich. 1987).
105. 256 Cal.Rptr.3d 864 (Ct.App.Cal. 1989).
106. Holloway & Leech, op.cit., at pp.106-129.
107. See "Employment At-Will State Rulings Chart", p.51 (BNA, Washington, D.C., 1988).
108. 174 C.A.2d 184 (Ct.App.Cal. 1959).
109. Glenn v. Clearman's Golden Cock Inn., 192 C.A.2d 793 (Ct.App.Cal. 1961).
110. 138 C.A.3d 290 (Ct.App.Cal. 1982).
111. Palmateer v. International Harvester Co., 421 N.E.2d 876, at 879-80 (Sup.Ct.Ill. 1981).
112. 386 N.E.2d 1026, 1028 (Ct.App.Ind. 1979).
113. See "Employment At-Will State Rulings Chart", Individual Employment Rights Manual, p.51 (BNA, 1988).
114. 316 A.2d 549, at 551-2 (Sup.Ct.N.H. 1974).
115. 668 P.2d 213, at 241-5 (Sup.Ct.Mon. 1983).
116. Cleary v. American Airlines, Inc., 111 C.A.3d 443 (Ct.App.Cal. 1980).
117. 371 Cal.Rptr. 211, 236-7 (Sup.Ct.Cal. 1988).
118. See Chapter 3.3.3. (infra.).
119. 710 P.2d 1025, at 1040 (Sup.Ct.Ariz. 1985).
See also Metcaff v. Intermountain Gas Co., 778 P.2d 744 (Sup.Ct.Ida. 1989).
120. Prosser and Keeton on the Law of Torts (5th

Ed.), p.56 (West, St.Paul 1984).

121. 355 N.E.2d 315, at 318-319 (1976). See also Agarwal v. Johnson, 25 C.3d 932 (Sup.Ct.Cal. 1979).

CHAPTER 4

GENERAL LAW OF DISMISSAL(2): PROCEDURES AND REMEDIES

This chapter will examine the procedures and remedies applicable to dismissals in each country. British law will be examined first, followed by Japanese law and finally American law.

4.1. BRITAIN

4.1.1. WRONGFUL DISMISSAL¹

Remedies for wrongful dismissal are usually limited to damages. When an employer dismisses an employee, who is employed under a contract of indefinite duration, without giving due notice the employee is entitled to the net wage which he would have earned if he had been given the requisite period of notice. It is assumed that the employer would have terminated the contract at the earliest date at which he could properly do so² If the procedure laid down in employee's contract entitles him to a period of consultation or an appeal, the employee is entitled to his net wage or salary for such a period, beyond the period of notice,³ during which the procedure could have been completed. Where an employer dismissed an employee, who is employed under a fixed term contract, before the expiry of the term, the employee is entitled to the net salary which he would have earned from the remaining portion of the contract.⁴

The courts have looked at the specific contractual

liabilities of the employer when assessing damages, and therefore a discretionary bonus which an employee might have received during the notice period is not recoverable.⁵ However, any commission which an employer was contractually obliged to pay to an employee in return for his performance is recoverable.⁶ Damages for injured feelings caused by the dismissal are not recoverable,⁷ although damages may exceptionally be awarded for loss of reputation (e.g. to an actor)⁸ and for diminished future prospects (e.g. to apprentice).⁹

Damages for loss of income are calculated according to net income subject to deductions for tax and the social security contributions which would have been paid.¹⁰ Thus, jobseekers allowance (i.e. previously unemployment benefit) and income support (i.e. previously supplementary benefit) are deductible.¹¹ The compensatory award for unfair dismissal is deductible because it is designed to replace future earnings.¹² No deductions may not be made for statutory redundancy payments, long-term occupational sickness or pension benefits, or the basic award and additional award available for unfair dismissal because none of these is designed to cover for loss of future earnings.¹³

The employee is under an obligation to mitigate his losses. If he did not take reasonable steps to find alternative employment, damages would be reduced to take account of this. It is normally unreasonable for an

employee to refuse an offer of re-employment from the employer who has just been guilty of wrongful dismissal.¹⁴ It is not considered unreasonable for a dismissed employee to refuse an offer of re-employment involving a reduction in status or to seek employment at a level comparable to that of his previous salary.¹⁵ If the employee earns a salary or fees from work found after the dismissal, these earnings will reduce the employer's obligation to pay damages.¹⁶

Although the ordinary remedy for the employee is only damages as stated above, equitable remedies such as injunctions or declarations may be awarded by courts in exceptional cases on a discretionary basis. The Court of Appeal made this clear in Hill v. Parsons. In that case, the employee who refused to join a trade union under a new closed shop agreement was given one month's notice to terminate employment. The Court of Appeal granted an interlocutory injunction restraining the employer from terminating his employment. The Court's decision was based on the following special circumstances of the case: Firstly, if proper notice had been given to the employee his employment would probably have continued until unfair dismissal provisions in the Industrial Relations Act 1971 came into force, in which case his rights would thereafter have been safeguarded and he would not necessarily have been obliged to join the union. This fact renders damages an inadequate remedy. Secondly, the

employee had the full confidence of his employers in his work and they dismissed him solely because he would not join a trade union.¹⁷

As seen in Chapter 3.1.3., the courts have recently become willing to allow an action for wrongful dismissal in cases where the contract requires the employer to follow a contractual procedure, restricts the permissible grounds or gives the decision to dismiss to an independent body. There has been a noticeable development in that the court will grant an equitable remedy to an employee where the employer failed to follow the contractual procedure. This is closely related to the right to natural justice. Traditionally the right to natural justice has been applied to rather limited cases of dismissal (i.e. office-holders).¹⁸

In R. v. BBC ex parte Lavelle, one of the key issues was whether the court had jurisdiction to restrain a disciplinary tribunal set up by an employer to investigate alleged misconduct by an employee which would justify her dismissal, from proceeding with its investigations. The High Court finally refused the application but Woolf, J. stated the following:

"The existence of (an industrial tribunal's power to order the reinstatement of an employee) indicates that even the ordinary contract of master and servant now has many of the attributes of an office, and the distinction which previously existed between

pure cases of master and servant and cases where a person holds a office are no longer clear...In this case it seems clear to me that Miss Lavelle had a right to be heard and that there was a restriction as to the circumstances in which she could be dismissed. Although the restriction was largely procedural, it did alter her rights substantially different from what they would have been in common law...I have therefore come to the conclusion that in the appropriate circumstances, in the case of employment of the nature here being considered...the court can if necessary intervene by way of injunction, and certainly by way of declaration."¹⁹

Following the ex part Lavelle case, some court granted injunction or declarations to protect the contractual rights of employees dismissed in breach of a procedure specified in their contract. In most of these cases, the courts have made much of the above second reason as well as the first reason as stated in Hill when they determined whether the injunction should be granted: i.e. inadequacy of damages as the remedy and the continuance of mutual confidence.²⁰

However, A lack of mutual confidence does not necessarily preclude the possibility that the court will grant an injunction. Powell v. Brent London Borough Council provides a good example although it is not a case of dismissal. In this case, the Council attempted to

revoke Mrs Powell's promotion for reasons relating to an alleged procedural impropriety concerning her appointment. No complaint was made concerning her ability to do the job to which she had been appointed, and which she was carrying out at the time of the legal proceedings. The High Court refused to grant an interlocutory injunction on the grounds that mutual trust and confidence were lacking. However, the Court of Appeal allowed an appeal. According to the Appeal Court, the relevant test of confidence is to "be judged by reference to the circumstances of the case, including the nature of the work, the people with whom the work must be done and the likely effect upon the employer and the employer's operations if the employer is required by injunction to suffer the plaintiff to continue in the work."²¹

This ruling appears to be consistent with the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd. According to the House of Lords, providing that the plaintiff has shown that there is a "serious issue to be tried" the decision whether or not to grant an interlocutory injunction should not normally depend on the substantive merits but on the balance of convenience. Lord Diplock said that "unless the material available to the court at the hearing of the application for a interlocutory injunction fails to disclose that the plaintiff has any prospect of succeeding in his claim for a permanent injunction at the trial, the court should go

on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."²²

In determining where the balance of convenience lies, the court will consider primarily the extent to which damages would provide adequate compensation for the employee and the loss which would be suffered by the employer while awaiting.²³ Equitable relief may not be granted where the employee accepted the employer's repudiatory breach of contract, for example, by looking for or taking work elsewhere.²⁴

Besides the above-examined employer's breach of the contractual procedures, the possibility has emerged that an injunction may be granted to restrain a substantive breach of contract in an appropriate case. In Jones v. Gwent County Council, Mrs Jones who was employed by the Council as a lecturer had been subjected to two disciplinary hearings which were decided in her favour. The Council however brought further disciplinary proceedings on the ground that her return to the college would cause an irrevocable breakdown in relations between management and staff. The hearing was carried out without Mrs Jones's attendance and it was decided that she should be dismissed. The Council then issued a letter of dismissal. The court declared that the letter of dismissal was not valid, and they also granted a permanent injunction restraining the Council from

dismissing her pursuant to the dismissal letter. They also granted an interlocutory injunction restraining the Council from dismissing Mrs Jones without proper grounds and until a proper procedure had been carried out, both in accordance with her contract.²⁵

Gwent County Council is also important in that it decided that the issue of mutual trust and confidence between the parties was not relevant in determining whether to issue of an injunction under the Rules of the Supreme Court, Order 14A, rule 1 (introduced in 1991), which does not require trust and mutual confidence.

Finally, it should be mentioned when and how an action for wrongful dismissal may be brought. A claim for wrongful dismissal may be made in an ordinary court. A claim of up to £50,000 may be brought in the County Court, and claims of £50,000 and above should be brought in the High Court.²⁶ A claim for wrongful dismissal in either court is subject to the limitation period for all contractual claim - six years from the date of the breach of contract.

Industrial tribunals have recently gained jurisdiction to hear any employee's money claim arising out of the contract of employment, subject to specified exceptions.²⁷ The maximum payment which a tribunal can award for a contract claim, or for a number of claims relating to the same contract, is £25,000. The time limit for bringing a claim for wrongful dismissal is the three

months, beginning with the effective date of termination of the contract, or in the absence of such a date, with the last day of work. However, if the employee satisfies the tribunal that it was not reasonably practicable to bring the claim within the above-stated period, the tribunal may extend the time available for such further period as it considers reasonable.

4.1.2. UNFAIR DISMISSAL

(1) PROCEDURES

An employee should submit an application to the Central Office of the Industrial Tribunal within 3 months from the effective date of termination of employment.²⁸ A copy of the application will also be sent to an ACAS conciliation officer, who should make an effort to promote a settlement of the complaint without resort to an industrial tribunal either where he is requested to do so by the parties or, in the absence of such a request, where he considers that he could act with a reasonable prospect of success.²⁹ In doing so, the conciliation officer should seek to promote reinstatement or re-engagement, or to promote agreement on compensation where the applicant does not wish to be reinstated or re-engaged, or where it would not be practicable.³⁰

A tribunal usually consists of three members, a legally qualified chairman and two lay members. The tribunal may consist of a chairman alone in certain cases.³¹ No application fees or court fees are payable

and costs are not usually awarded by the tribunal, although an order for costs may be made if one party, in bringing or conducting the proceedings, has acted frivolously, vexatiously or otherwise unreasonably.³² If it appears to a tribunal that a case has little prospect of success, the tribunal may order the party concerned to pay a deposit of up to £150 as a condition for proceeding with the case. If the party subsequently loses and has costs awarded against him, the deposit will go towards payment of those costs.³³ Tribunal proceedings are designed to be informal compared to ordinary court proceedings.³⁴ A tribunal decision is subject to appeal on points of law to the EAT.³⁵ The EAT consists of a judge with either two or four lay members giving equal representation to both sides of industry.³⁶

(2) REMEDIES FOR UNFAIR DISMISSAL³⁷

(i) Reinstatement or Re-engagement

The primary remedy is intended to be an order for reinstatement or re-engagement, with monetary compensation designed as a secondary remedy where re-employment is not practicable.³⁸ An order of "reinstatement" means that the employer must treat the dismissed employee -in all respects- as if he had not been dismissed. In ordering reinstatement, the tribunal must specify any amount payable by the employer for the period between the date of dismissal and the date of

reinstatement, any rights and privileges which must be restored to the employee and the date by which the order must be complied with. The employee must receive the benefit of any improvement in his terms and conditions of employment which would have occurred but for the dismissal.³⁹

When the tribunal decides whether or not it will make an order for reinstatement, it has to consider (i) whether the employee wishes to be reinstated, (ii) whether it is practicable for the employer to comply with an order for reinstatement, and (iii) where the employee caused or contributed to his dismissal to some extent, whether it would be just to order reinstatement.⁴⁰ An order of re-engagement will be considered in cases where the tribunal decides not to make an order for reinstatement. Re-engagement involves that the employer, his successor or an associated employer engaging the dismissed employee in employment comparable to that enjoyed previously, or other suitable employment. When ordering re-engagement, the tribunal must specify the terms on which re-employment is to take place.⁴¹ Except in cases where the tribunal takes account of the employee's contributory fault in dismissal, the order of re-engagement must be made on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement. Re-engagement is intended as an almost comparable alternative remedy to reinstatement. When the

tribunal decides whether or not to make an order for re-engagement, it has to consider the same three basic criteria as when making an order for reinstatement.⁴²

Where an order of reinstatement or re-engagement has been made, but the terms of the order have not been fully complied with, the tribunal must make an award of compensation of such amount as it thinks fit, having regard to the loss sustained by the dismissed employee as a consequence of the failure of the employer to fully comply. Where the dismissed employee has not been reinstated or re-engaged despite the relevant order, the tribunal must award compensation for unfair dismissal. In cases other than those where the employer satisfies the tribunal that it was not reasonably practicable to comply with the order, the tribunal has to make an additional award of compensation. The amount is not less than 13 nor more than 26 weeks' pay in ordinary cases, and not less than 26 nor more than 52 weeks' pay in cases of discriminatory dismissals on the basis of race and sex.⁴³ The maximum amount in an ordinary case has been 52 x £210 since September 1995.

As far as the practicability of re-employment is concerned, the courts and tribunals have not construed 'practicable' widely. In Coleman v. Magnet Joinery Ltd., the NIRC stated: "If the job has not been filled by the time of the tribunal hearing there will be no room for a finding that it was not practicable to make the

recommendation. Such a narrow construction would lead to unfortunate results....When considering whether a recommendation is 'practicable', the tribunal ought to consider the consequences of re-engagement in the industrial relations scene in which it will take place."⁴⁴ The Court of Appeal agreed with the NIRC. Stephenson, LJ. stated that "I would agree entirely with what the Industrial Court said about the meaning of 'practicable' and indeed 'in accordance with equity'".⁴⁵

In deciding whether an order for re-employment is practicable, the tribunals have taken the following factors into consideration: non-existence of the employee's previous job or other suitable job, the likelihood of personal friction between the employee and supervisors or other employees, the size of the company, distrust between employee and employer, and the employee's ability or health.⁴⁶

Even where the employer refuses to comply with an order of re-employment, the tribunal cannot make an additional award of compensation if the employer satisfies them that it was not practicable to comply. The judgment of the Court of Appeal in Port of London Authority v. Payne makes it difficult for tribunals to deny the accuracy of an employer's commercial judgment that it is not practicable to comply with the order of re-employment. The Court of Appeal has stated that: "the tribunal should give due weight to the commercial

judgment of the management...The standard must not be set too high. The employer cannot be expected to explore every possible avenue which ingenuity might suggest. The employer does not have to show that reinstatement or re-engagement was impossible. It is a matter of what is practicable in the circumstances of the employer's business at the relevant time."⁴⁷

(ii) Compensation

Basic Award

Where the tribunal decides not to order re-employment, it has to make an award of compensation under two separate heads: a basic award and a compensatory award. It may be said that the basic award is designed to compensate the employee for loss of seniority or job. This is calculated according to three factors: the employee's age, the number of years of service, and weekly earnings.⁴⁸ The sum, however, has been subject to a maximum of 30 x £210 since September 1995. The following types of reduction may be made to the basic award: (i) reduction by a proportion which the tribunal considers just and equitable having regard to the employee's conduct prior to the dismissal.⁴⁹ (ii) reduction for the amount of any redundancy payment paid to the employee.⁵⁰ (iii) reduction for any money paid by the employer expressly or implicitly referable to the basic award.⁵¹ (iv) reduction by a proportion which the tribunal considers just and equitable with regard to the

finding that the employee has unreasonably refused an offer by the employer.⁵²

Compensatory Award

The compensatory award is designed to compensate the employee for any financial loss which has been sustained. This loss includes any expenses reasonably incurred by the employee as a consequence of the dismissal and the loss of any benefit which he might reasonably have expected to have but for the dismissal.⁵³ The measure of compensation for unfair dismissal is itself "the creature of statute...and the amount has a discretionary element." Therefore, for its calculation, "the common law rules and authorities on wrongful dismissal are irrelevant"⁵⁴ and the compensatory award is not limited by the application of the notice rule at common law. The total amount of the compensatory award is limited by statute and cannot exceed £11,300 since September 1995.

The employee is entitled to any lost earnings, net of tax and other deductions, from the date of dismissal to the date of the tribunal hearing. Deductions are made for income from other employment and from some other sources, plus any payment from the former employer. Where the employee receives earnings from new employment during what should have been his notice period with the former employer, the amount earned will not normally be deducted from compensation.⁵⁵ Receipt of jobseekers allowance is

ignored for this calculation because the Department of Employment can recoup such benefits from a successful applicant.⁵⁶

The employee is entitled to compensation for the loss of expected earnings for a reasonable period after the hearing. The crucial factors in ascertaining the loss, in a case where the dismissed employee is still unemployed at the date of hearing are, how long the dismissed worker is likely to be unemployed and whether he will have to take new employment at a lower rate of pay than his previous one.⁵⁷ In doing so, tribunals have taken account of the employee's ability and health, the local conditions of employment, and so on.⁵⁸ Where the dismissed employee has already obtained other employment by the date of the hearing, the tribunal ordinarily calculates the difference between the net earnings from the new employment and the former employment, and estimates how long such a difference in pay will continue.⁵⁹ Tribunals take account of the likelihood of changes in levels of earnings and the possibility of dismissal or voluntary retirement in both jobs.⁶⁰

Lost benefits which the employee might reasonably have expected to have but for the dismissal are recoverable, such as benefits under a share participation scheme, travel allowances, the use of a company car, telephone, and free housing.⁶¹ The loss of pension rights is recoverable. The method of calculating the loss of

non-pension rights is very technical. "There are two distinct types of loss to which dismissal from pensionable employment can give rise. The first is the loss of the pension position...The second is the loss of future pension opportunity": that is the opportunity of improving his position until the time at which pension becomes payable.⁶² The Government's Actuary Department provides some guidance.⁶³ The amount of compensation for the loss of pension entitlement can in some cases be very large.

Compensation for loss of statutory rights concerning employment is also recoverable. Since the dismissed employee will need two years in the new employment to build up continuous employment sufficient to found a claim for unfair dismissal and a redundancy payment, a tribunal will normally award nominal compensation for loss of this protection.⁶⁴ Expenses are also recoverable if they are reasonably incurred by the employee as a consequence of the dismissal.⁶⁵ Only financial loss may be recovered as injury to feeling or pride caused by dismissal is not subject to compensation.⁶⁶ The manner of the dismissal will be taken into account when assessing compensation where the manner of the dismissal caused financial loss as, for example, by making it more difficult to find future employment."⁶⁷

Duty of Mitigation

In ascertaining the loss, the tribunal must apply the

duty of mitigation which applies to damages recoverable at common law.⁶⁸ Where the employee obtains a new employment after dismissal, the net pay received from that employment is deducted from the loss of net pay which he would have been paid but for the dismissal. Even if he has not obtained other employment, there may be a deduction if he failed to make a reasonable effort to find other employment. There is no obligation on the employee to take a job "irrespective of what remuneration is available in that job and of what are the job prospects".⁶⁹

The dismissed employee's conduct in complying with the duty of mitigation is not limited to seeking other employment. The EAT stated in Gardiner-Hill v. Roland Berger Technics Ltd.: "Indeed, in our view, it was at least as prudent of him to seek to exploit his own expertise by conducting his own business and gaining an income from his own business to replace the income which he had previously received from his employment."⁷⁰

Contributory Fault

The amount of compensation will still be subject to two different types of reductions, reduction by a proportion which the tribunal considers just and equitable having regard to the employee's contribution to the dismissal and reduction by the value of any redundancy payment paid by the employer which exceeds the

amount of the employee's basic award.⁷¹ The former type of reduction is particularly significant because the rate of reduction may be very large. The amount of the reduction from compensation for this kind of contributory fault is a discretionary matter for the tribunal. Deductions for contributory fault are made from the total loss suffered before the statutory limit is applied.⁷²

In Nelson v. BBC (No.2),⁷³ the Court of Appeal held that the tribunal must make several findings when determining whether to make a reduction under s.74(6). Firstly, there must be a finding that there was conduct on the part of the employee in connection with his unfair dismissal which was culpable or blameworthy. Secondly, it must be found that the unfair dismissal was caused or contributed to to some extent by action that was culpable or blameworthy. Thirdly, it must be found to be just and equitable to reduce the assessment of the employee's loss by the amount specified.

Brandon, LJ. in Nelson defined the concept of 'culpability or blameworthiness' in wide terms. "The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action

which, though not meriting any of those more perjorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend upon the degree of unreasonableness involved."⁷⁴

The employee's 'culpable or blameworthy' conduct must be causally linked to his dismissal.⁷⁵ Subsequently discovered conduct cannot be relied upon to render the dismissal fair and therefore cannot constitute 'contributory fault'. However, it does not follow that the tribunal cannot take such subsequently discovered conduct into account when determining the amount of compensation. In Devis & Sons, Ltd. v. Atkins, Viscount Dilhorne stated: "(I)t is in my opinion clear that in assessing compensation the Tribunal is entitled to have regard to subsequently discovered misconduct and, if they think, to award nominal or nil compensation."⁷⁶ This is justified by s.74(1) of the EP(C)A which clearly provides that "the amount of the compensation award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant."

4.2. THE UNITED STATES⁷²

In the United States, as seen in Chapter 3.3., several causes of action for wrongful discharge have been recognized in many states. In addition, several states

have enacted laws making discharge for particular reasons a wrongful act. Montana is, however, the only state that requires the employer to justify discharge in general. This section will first examine the remedies for wrongful discharge and then look at the statutory regulations, procedures and remedies for wrongful discharge in Montana. As seen in Chapter 3.3., the main causes of action for wrongful discharge in the United States are (i) breach of express or implied promise of discharge only for just cause, (ii) breach of the implied covenant of good faith and fair dealing, (iii) violation of public policy, and (iv) intentional infliction of mental distress. At present, wrongful discharge constituting (ii) is recognized only as breach of contract in most states although California and Montana have recognized it as a tort. Therefore, the remedies for wrongful discharge constituting (i) and (ii) will be examined under the heading of "wrongful discharge in breach of contract" and those constituting (iii) and (iv) will be examined under the heading of "wrongful discharge in tort".

4.2.1. COMMON LAW REMEDIES

(1) WRONGFUL DISCHARGE IN BREACH OF CONTRACT

The procedures which apply to wrongful discharge are conventional civil procedures, and therefore they are not cheap, accessible or flexible. The only remedy for an employee who brings a successful action for wrongful

discharge is damages. This is because of the general rule that a court cannot grant specific performance of an employment contract. According to Professor D.B.Dobbs, four main reasons have been given for this rule: (1) Equitable intervention is not required because damages provide an adequate remedy. (2) Cooperation between employer and employee is crucial for an employment contract but it is so intangible a thing that it could hardly be enforced. (3) It is impracticable to supervise the employee's work in order to ensure good performance. (4) Granting specific performance to the employer would result in involuntary servitude, which is prohibited under the thirteenth amendment to the Constitution, so therefore specific performance cannot be granted to the employee based on the principle of remedial mutuality.⁷⁸ Although several scholars have discredited these rationales of the general rule, the courts have adhered to it in private employment cases except where a statute specifically authorizes the courts to make an order of reinstatement.

Due to the non-availability of equitable remedies such as injunction or declaration, damages are the only remedy for wrongful discharge. Damages for breach of an employment contract terminable only for good cause usually equal to the employee's lost earnings (for a reasonable period) minus earnings from any work obtained after the dismissal, plus any expenses reasonably

incurred in seeking work. In calculating lost earnings for a reasonable period, the trial court may take account of the value of fringe benefits as well as wages, bonuses and commissions.⁷⁹ It is very important to determine a reasonable period during which the employee would have remained in the same employment but for wrongful discharge. For example, the Supreme Court of Wyoming stated: "The trial judge here determined that it would be reasonable to infer that a person who had already worked eight years for a company, enjoyed favorable working conditions and benefits, and intended to stay until retirement, would be employed for a longer period than the average period of seniority. He decided that a figure of eight years of continued employment would be reasonable. ... (W)e think that the eight-year figure was reasonable in light of the evidence."⁸⁰

In Diggs v. Pepsi-Cola Metropolitan Bottling Co., an employee was discharged in violation of a "dismissal only for just cause" agreement. The district court entered a judgment for the employee and awarded backpay and advance pay until his retirement. The Sixth Circuit Court, applying Michigan law, rejected the company's argument that the award of 26.5 years' front pay award was wholly speculative, and stated Michigan law as the district court judge observed: "While the cases cited by (the) defendant may be accurate statements of the law in certain jurisdictions, they do not appear to reflect the

position of the Michigan courts. As long ago as 1897, the Michigan Supreme Court held that the measure of damages for breach of an agreement to employ a person for life or during his ability to work included the present worth of what he would have been able to earn in the future less any amounts he would be able to earn from other employment during that same time."⁸¹

In ascertaining damages, the court applies almost the same rules of the duty of mitigation as British courts and tribunals apply to determine the employee's loss in cases of wrongful and unfair dismissal. The court will reduce the award by the amount which could have been avoided by reasonable action by the employee to minimize the loss.⁸² In the context of a breach of an employment contract, the measure of damages due to the employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. The definition of "reasonable effort" is therefore very important.

The decision of the Supreme Court of California in Parker v. Twentieth Century-Fox Film Corp., provides one such definition. It was held that: "(B)efore projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to

that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages."⁸³ In California, unemployment payments which the wrongfully discharged employee received may not be deducted from the amount of damages.⁸⁴

(2) WRONGFUL DISCHARGE IN TORT

In cases of the tort of wrongful discharge, the courts have similarly awarded compensatory damages which included lost earnings and expenses involved in finding new employment.⁸⁵ Courts have also awarded damages for the employee's emotional distress and anguish.⁸⁶ Some courts have awarded further damages for loss of professional reputation.⁸⁷ In addition to compensatory damages, the courts have often awarded punitive or exemplary damages in tort suits for wrongful discharge. In order to award punitive or exemplary damages, the courts generally require "circumstances of aggravation or outrage, such as spite or 'malice', or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton".⁸⁸ In Kelsay v. Motorola, Inc., the Supreme Court of Illinois stated: "It has long been established in this State that punitive or exemplary damages may be awarded when torts are committed with fraud, actual malice,

deliberate violence or oppression, or when the defendant acts wilfully or with such gross negligence as to indicate a wanton disregard of the rights of others."⁸⁹

Damages both for breach of contract and for tort are usually assessed by the jury and the appellate courts will not normally interfere. Also, the question of whether to award punitive damages is left to the jury, although the court will say whether the plaintiff has sufficient proof of aggravated misconduct.⁹⁰ This has frequently led to erratic jury awards of large damages against highly visible corporations in cases of tortious wrongful discharge.⁹¹

Finally it should be pointed out that attorneys' fees will not ordinarily be recoverable in cases of tort or breach of contract.⁹² In the absence of a state statute, this also true for wrongful discharge claims.⁹³

4.2.2. STATUTORY REMEDIES

As discussed above, in many states the courts have recognized various legal theories in order to allow a wrongfully discharged employee to recover his damages. The theory of wrongful discharge based on an explicit or implied promise of dismissal only for cause enables the employee to recover his damages only if he can rebut the presumption of employment at will. The public policy theory of wrongful discharge can result in a recovery of damages for the employee only if it is necessary to do so

in order to maintain public policy. The theory of intentional infliction of mental distress is clearly to be applied only in extraordinary cases. In comparison, the theory of an implied covenant of good faith and fair dealing seems to provide more general grounds for action. Unlike public policy grounds, it does not require the employee to prove that there is a clear mandatory public policy whose existence is not easily proved except where a statute implies it. However, in reality, many courts have not recognized the theory of an implied covenant and the courts which have recognized it have applied it in rather limited circumstances.

Juries have a wide measure of discretion when awarding punitive damages in tortious wrongful discharge cases and they often award a far larger sum of punitive damages than compensatory damages. Many of the reported cases of wrongful discharge have been actions by employees who had held management positions which also lead to rather large amounts of compensatory damages.⁹⁴ In response, many states considered the introduction of some form of statute for wrongful discharge which not only limits the general protection available to the employee but also limits types and amounts of remedies. By the end of 1987, three wrongful discharge statutes had been enacted in Montana, the Virgin Islands and Puerto Rico under which the discharge of an employee for reasons other than those specifically prescribed is

considered to be wrongful.

The Wrongful Discharge From Employment Act (WDFEA)⁹⁵ was enacted in Montana in 1987. It provides an exclusive remedy for wrongful discharge. Under the WDFEA, a discharge is wrongful if: "(1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; (2) the discharge was not for good cause after the employee had completed the employer's probationary period of employment; or (3) the employer violated the express provisions of its own written personnel policy."⁹⁶

The employee must file his action within one year following the date of discharge. If the employer maintains written internal procedures, the employee has to exhaust these prior to filing such an action. However, the internal procedures are automatically considered exhausted if they are not completed within 90 days after the employee initiates them. The one year limitation period may be extended until the internal procedures are exhausted, but the provisions of the internal procedures may not extend the limitation period by more than 120 days in any one case. The employee need not comply with these requirements concerning the employer's written internal procedure unless the employer notifies him of the existence of such procedures and supplies him with a copy of them within 7 days of the date of the discharge.⁹⁷

A dispute may be resolved through final and binding arbitration under a written agreement between the parties. An offer to arbitrate must be in writing and must contain certain provisions because it may be so decisive. If a complaint is filed, the offer to arbitrate must be made within 60 days after the complaint is served and must be accepted in writing within 30 days of the date of the offer. If a valid offer is accepted, arbitration is the exclusive remedy for the wrongful discharge dispute.⁹⁸

As a remedy for wrongful discharge, an employee may be awarded lost wages and fringe benefits for a period not exceeding four years from the date of discharge, together with interest payable thereon. The employee may recover punitive damages if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in discharging the employee in violation of public policy. The employee is not entitled to damages for pain and suffering, emotional distress, compensatory or punitive damages, or other similar damages.⁹⁹ Consequently, neither damages for lost future earnings nor non-economic damages for pain and emotional distress nor damages for injury to professional reputation will be awarded.

The WDFEA does not apply to a discharge which is subject to any other state or federal statute which provides a procedure or remedy for the dispute, or to the

discharge of an employee who is covered by a written collective bargaining agreement or a written contract of employment for a specific term.¹⁰⁰ The WDFEA, does though, pre-empt common-law remedies.¹⁰¹ By way of this pre-emption, the theory of breach of the covenant of good faith and fair dealing finished its significant role in providing the basis for suits for wrongful discharge in Montana.¹⁰²

4.3. JAPAN

As Japanese courts have developed the law of abusive dismissal on the basis of the abuse of right provision which is contained within the Civil Code, there is no particular limitation to the coverage of the Japanese law of abusive dismissal. When the courts find that the employee's case for abusive dismissal has merit, they usually deliver a judgment affirming his status as an employee in the defendant's company, and order the defendant to pay the unpaid wages, plus interest, between the date of dismissal and the date of judgment. A declaration of provisional execution of the order for payment is also usually made¹⁰³ because without such a declaration the court's judgment ordering the employer to pay wages is not enforceable on appeal to the higher court. The court also usually orders the employer to pay wages accruing after the time of the judgment.¹⁰⁴ Wages include the wages, salary, allowances, bonus and every

other payment to the worker from the employer under the contract of employment as remuneration of labour under whatever name they may be called. The unpaid wages are those wages which the employee would have been paid but for being dismissed and therefore they include any pay increases which would have occurred after the time of the dismissal, but for the dismissal.

The sum of unpaid wages is subject to reduction for earnings from other employment in the period between the plaintiff's dismissal and the court's judgment. This is because Section 536(2) of the Civil Code applies to benefits resulting from the dismissal. Section 536(2) provides: "If performance becomes impossible for any reason for which the obligee (i.e. the employer) is responsible, the obligor (i.e. the employee) shall not lose his right to demand counter-performance (i.e. the paying of compensation); however, if he has received any benefit through being relieved of his own obligation, he shall return such benefit to the obligee."

It is noticable that the principle of Section 536(2) clearly differs from the principle of mitigation found in Britain and in the United States. First, Section 536(2) does not require the employee to make a reasonable effort to reduce the amount of damages. Secondly, because of the L.S.L., s.26, any reduction for interim earnings from other employment is limited to 40% of the unpaid wages. According to the Supreme Court, Section 26 of the L.S.L.

should apply in cases where the employee could not work for the employer as a result of the employer's abusive dismissal.¹⁰⁵

Section 26 provides that: "In the event of a suspension of business for reasons attributable to the employer, the employer shall pay an allowance equal to at least 60 per cent of the worker's average wage to each worker concerned during the period of business suspension." In the Akebono Taxi case, the Supreme Court held later that the 60 per cent limit only applied to the unpaid average wages which were calculated according to Section 12 of the L.S.L. Section 12(1) provides that: "According to this section, the average wage is defined as the quotient obtained by dividing the total amount of wages for a period of three months preceding the day on which the calculation of the average wage became necessary by the total number of days during the period."¹⁰⁶ However, Section 12(4) excludes extraordinary allowances, wages which are paid periodically during a period longer than three months and wages which do not fall within certain categories. Therefore, for example, an unpaid bonus may be reduced by 100 % due to earnings from other employment.¹⁰⁷

The court has often refused to issue an order to the employer to compensate the employee for mental distress or injured feelings where the employee has sought such a decision in a case of abusive dismissal. The court

usually concludes that the employee's injured feelings will be consoled by the decision to affirm his status as an employee and the payment of wages which are due.¹⁰⁸ However, in cases where the employer publicizes the non-existent reason for the employee's 'punitive dismissal' to other employees, the court may issue an order to the employer to pay damages for the employee's injured feelings.¹⁰⁹ Even where the employer's dismissal does not constitute defamation, there have been an increasing number of cases in which courts have held that dismissal without just cause may constitute a tort and therefore that the employee may seek damages for injured feelings. It may be inferred in such cases that the employer failed to prove the existence of just cause.¹¹⁰

The greatest difficulty with the Japanese remedy arises from the fact that abusive dismissal is held to be automatically void. This problem was first addressed in the Yoshimura Company case.¹¹¹ The plaintiff had been with the defendant employer for 23 years in their business sections and his work performance had been highly evaluated, but he was condemned to 'punitive dismissal' on the grounds of his criticism of the defendants. He was due to retire in 5 years, when he became 55. He brought an action against the defendant for damages on the grounds that the dismissal was abusive and constituted a tort. He claimed that he would have continued to work for the defendant for at least another

year but for the dismissal and therefore that he was entitled to damages for one year's wages. He also claimed that he would have remained with the defendant until the age of compulsory retirement but for the dismissal and therefore that he was entitled to a retirement allowance calculated on the basis of 28 years' employment according to the defendants' shugyo kisoku. He also claimed damages for injured feelings and for the lawyer's fees which he had incurred. However, it was found that he had been hired by another company about one month after his dismissal and that he had no intention to return to the employment of the defendant.

The Tokyo District Court held that, in relation to the provisions of the shugyo kisoku concerning retirement allowances, his dismissal was construed as being for business reasons and therefore that his retirement allowance should be calculated on the basis of 23 years' employment. The Court also held that the dismissal constituted a tort and awarded damages for injured feelings and for lawyer's fees. As to the reason why he was not entitled either to an allowance calculated on the basis of 28 years' employment or to wages accruing after dismissal, the Court stated that, as abusive dismissal is void, the dismissed employee may not lose his right to wages accruing from his employment after dismissal if he is ready to work for the employer; that, since a wage is remuneration for work, if an employee is not ready to

work for his employer, the tortious dismissal does not constitute the cause of the non-payment of wages. In short, this decision means that if the dismissed employee wants to gain the maximum amount of compensation, he must clearly indicate his intention to continue to work, and quit only after he is awarded a judgment of voidance of dismissal. It is advisable to only take temporary work for another company during the court's proceedings for unjust dismissal, for if he takes a regular job with another company, he will not be entitled to claim damages for 'wages which would have accrued but for dismissal' even if the level of pay for the new job is far lower than that of the former job. The same applies to 'any retirement allowance accrued but for dismissal'.

If this ruling is correct, it follows that the employee will choose litigation for affirmation of employee status rather than litigation for damages, as even where the dismissed employee has no intention of returning to the company, he may be awarded amounts of money equivalent to the unpaid wages, minus that part of his interim earnings which exceeds 60 % of the employee's "average wages" as defined in the L.S.L., s.12. In the Akebono Taxi case (Supra.), it was not questioned whether the dismissed taxi-drivers who were employed in the same capacity by another company after dismissal actually had the intention of returning to their previous company. Where the dismissed employee sues for affirmation of his

employee status, it is almost impossible for the employer to prove that the employee has no intention of returning to him. The taxi-drivers who were dismissed by the defendant company were also employed by another company during the litigation following their dismissal.

The remedy for abusive dismissal is fixed exclusively by the courts. Litigation involves many technicalities, so although the law does not require the employee to be represented by a lawyer in the court proceedings, in reality the employee needs the assistance of a lawyer. This means that litigation is time-consuming and expensive.

Provisional dispositions have been used widely in disputes arising from labour and employment relations. The provisional disposition procedure is subordinate one to the formal litigation procedure for the purpose of preserving the enforceability of the alleged right. In order to obtain a provisional disposition order, the applicant must show that his case is likely to have merits and that his rights are likely to be abused without such an order. The standard of proof required in the provisional disposition procedure is lower than that in the formal litigation procedure. It is enough for the applicant to convince the judge of his allegation that his claim is likely to be real; it is not necessary to convince the judge that it is real. A case may be conducted on the basis of ex parte testimony.

The court fee for the provisional disposition procedure is much smaller than that for the formal litigation procedure. The order of provisional disposition takes immediate effect and it is difficult for an employer to get the court's order suspended. The merits of provisional dispositions mean that there are some cases where the dispute has been settled by the provisional disposition order and has not gone through the the formal litigation procedure. For example, in 1994, the district courts received 576 applications from employees for provisional disposition orders to preserve their status as employees while they received only 326 applications from employees for the formal judgment to affirm their status as employees. (TABLE 2.)

TABLE 2. THE NUMBER OF APPLICATIONS FOR LEGAL RELIEF
IN JAPAN

Years	1989	1990	1991	1992	1993	1994
Number of Applications for						
Provisional disposition	267	241	257	385	506	576
Formal judgment	158	164	147	194	272	326

Sources: Hoso-Jiho, Vol.45, No.7 (1994); Vol.46, No.7 (1995).

In provisional disposition procedures concerning dismissal, the employee usually applies to the court for both an order to temporarily preserve his status as an employee in the defendant's company and an order that

the employer must make a provisional payment of some portion of the wages owed, between the period of his dismissal and the final judgment of the court. In practice, where courts have found that an employee's case is likely to be meritorious, they have issued an order of provisional disposition including an order for provisional payment of the employee's full wages from the time of dismissal to the time when the judgment is finalized in the formal litigation procedure. This is because the courts have generally considered that a worker whose only source of income is his job would otherwise be reduced to a state of poverty. However, since 1970, some courts have criticized earlier decisions.¹¹² This criticism stems from the length of proceedings for provisional disposition.

Of the 39 provisional disposition claims for preservation of employee status dealt with by the Tokyo District Court in 1967, only 6 cases took three months or less, 5 cases took between 3 months and one year, 16 cases took one to two years, and 17 cases took more than two years.¹¹³ Many courts started to believe that prolonged proceedings severely damaged the significance of provisional disposition as a temporary relief. These courts rigidly applied Section 760 of the The Code of Civil Procedure, which has now been replaced by a similar provision of Section 23 of the Civil Preservation Law of 1989. That section provides that the provisional

disposition "shall be made only in cases where it is necessary in order to prevent considerable damage to the lasting relation of (the employee's) right or to prevent an imminent danger thereon or any other reasons."

The Tokyo District Court made the following statement in the Toa Sekyu case. "The order requiring the employer to provisionally pay wages to the dismissed employee is neither designed to enforce the employee's right to be kept in employment nor to guarantee him the same standard of living as the other employees enjoy." In deciding whether the employer should be ordered to pay the whole amount of the employee's wages, the court should carefully consider what proportion of the wages can prevent both his and his family's livelihood from being endangered. Similarly, in deciding how long the employer is to be ordered to provisionally pay the employee a certain proportion of his wages, the court should take account of the period of time which the employee needs in order to find alternative resources to maintain both his and his family's livelihood.¹¹⁴

We can now see the variety of terms in which the courts may make provisional disposition orders. With regard to the cessation of provisional payment of wages, the courts state, for example, "until the judgment is finalized in the formal litigation procedure", "until a formal judgment is delivered by the court of first instance", "until one year after the order of provisional

disposition", "until one year after his dismissal", or "until one year after the end of the hearing in the provisional disposition order". The starting date of the payment is sometimes fixed, for example, "from the time of dismissal", "from the time of the issuance of the order of provisional disposition" and "from the time of the end of the hearing in the provisional disposition procedure". 115

In many cases the court still orders the employer to provisionally pay the whole amount of wages to the dismissed employee for a specified period of time, but in more and more cases it reduces the amount to a proportion of the total. The court sometimes holds that all or part of the wages are not to be paid to the employee for the purpose of protecting his or his family's livelihood either because he has enough income from other sources or he has income from alternative employment, or because his earnings are very high. It is sometimes ruled that it is not necessary for the employee to be provisionally paid all or part of his bonus in addition to his wages. Similarly, the court sometimes rules that it is not necessary to take account of pay increases which would have occurred but for the dismissal when making these payments.¹¹⁶ As a result of these efforts, the prolonged procedure has been improved upon to some extent.¹¹⁷ It is presumed that, in recent years, the proceedings for provisional disposition to preserve the status of an

employee have been reduced to less than one year in most cases.

NOTES

1. For a full analysis of this subject, see K.D.Ewing, "Remedies for Breach of the Contract of Employment", 52 Cambridge L.J. 405 (1993).
2. Gunton v. Richmond-upon-Thames London Borough Council [1980]ICR 775 (CA).
3. Ibid. See also Dietman v. Brent London Borough Council [1987]ICR 737 (QB).
4. Isleworth Studio Ltd. v. Richard [1988]IRLR 137 (CA).
5. Lavarack v. Woods of Colchester Ltd. [1967]1 QB 28 (CA).
6. Addis v. Gramophone Co. Ltd. [1909]AC 488 (HL); Turner v. Goldsmith [1891]1 QB 544 (CA).
7. The Addis case; Bliss v. South East Thames RHA [1985]IRLR 308 (CA).
8. Marbe v. George Edwards (Daly's Theatres) Ltd. [1928]1 KB 269 (CA).
9. Dunk v. George Waller & Son Ltd. [1970]2 QB 163 (CA).
10. Shove v. Downs Surgical plc. [1984]ICR 532 (QB).
11. Parsons v. BNM Laboratores Ltd. [1964]1 QB 95 (CA); Lincoln v. Hayman [1982]1 All E.R. 819 (CA).
12. Babcock FATA Ltd. v. Addison [1987]IRLR (CA).
13. O'Laoire v. Jackel [1990]IRLR 70 (CA); Hopkins v. Norcross plc. [1992]IRLR 304 (QB).
14. Shindler v. Nothern Raincoat Ltd. [1960]1 WLR 1038 (QB).
15. Yetton v. Eastwoods Froy Ltd. [1967]1 WLR 104 (QB).
16. Shove v. Downs Surgical plc. [1984]ICR 532 (QB).
17. [1972] Ch 305 (CA).
18. M.R.Freedland, The Contract of Employment, p.15 (Sweet & Maxwell, London, 1976).
19. [1982] IRLR 404, at 410-11 (QB).

20. Irani v. Southampton and South-West Hampshire Health Authority [1985] IRLR 203 (QB); Wadcock v. London Borough of Brent [1988] IRLR 55 (QB); Ali v. Southwark L.B.C. [1988] IRLR 100 (QB); Robb v. London Borough of Hammersmith and Fulham [1991] IRLR 72 (QB).
21. [1987] IRLR 466, at 473 (CA). See also Stevenson v. URTU [1977] ICR 893 (CA).
22. [1975] AC 396, at 408 (HL).
23. Powell v. Brent London Borough Council [1987] IRLR 466 (CA).
24. Dietman v. Brent London Borough Council [1987] ICR 737 (QB) affirmed by the Court of Appeal [1988] IRLR 299 (CA).
25. [1992] IRLR 521 (Ch.). See also McClelland v. Northern Ireland General Health Service [1957] 1 WLR 594 (HL).
26. High Court and County Courts Jurisdiction Order 1991 (SI 1991/724).
27. EP(C)A, s.131; Industrial Tribunal Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623).
28. EP(C)A, s.67(2); Industrial Tribunals (Rules of Procedure) Regulation 1985 (SI 1985/16).
29. EP(C)A, s.134(1).
30. s.134(2).
31. s.128.
32. rule 11(1).
33. EP(C)A, Sch.9, para.1; Industrial Tribunal (Constitution and Rules of Procedure) Regulation 1993 (SI 1993/2687), Sch.1, rule 6.
34. SI 1985/16, rule 8(1).
35. EP(C)A, s.136(1).
36. EP(C)A, s.168(1).
37. For a full analysis of this subject, See A.Korn, Compensation for Dismissal (Blackston, London, 1993); A.D.Anderman, Unfair Dismissal (2nd ed.), pp.280-316

(Butterworths, London 1985): L.Dickens et al., Dismissed (Basil Blackwell, Oxford, 1985).

38. EP(C)A, s.68(1).

39. s.69(2).

40. s.69(5)

41. s.69(4).

42. s.69(6).

43. s.71(1) and (2).

44. [1973]IRLR 361, at 363 (NIRC).

45. [1974]IRLR 343, at 345 (CA).

46. Anderman, op. cit., at pp.294-5. See also Rao v. Civil Aviation Authority [1992]IRLR 203, at 207 (EAT).

47. [1994]IRLR 9, at 16(CA).

48. EP(C)A, s.73(3).

49. s.73(7B).

50. s.73(9).

51. See e.g. Chelsea Football Club and Athletid Co. Ltd. v. Heath [1981]IRLR 73 (EAT).

52. s.73(7A).

53. s.74(1), (2) and (3).

54. Norton Tool Co. Ltd.v. N.I.Newson [1972]IRLR 86, at 87 (NIRC).

55. Babcock FATA Ltd. v. Addison [1987]IRLR 173 (CA).

56. Mullet v. Brush Electrical Machunes Ltd. [1977]ICR 829 (EAT).

57. e.g. Tradewinds v. Fletcher [1981]IRLR 272 (EAT).

58. e.g. Moncur v. International Paint Co. Ltd. [1978]IRLR 223 (EAT).

59. e.g. Scottish Co-operative Wholesale Society Ltd. v. Lloyd [1973]IRLR 93(NLRC).

60. e.g. York Trailer Co. Ltd. v. Sparkes [1973]IRLR

348 (NLRC).

61. e.g. O'Laoire v. Jackel International Ltd. [1991]IRLR 170 (EAT).

62. Copso v. Eversure Accessories Ltd. [1974]IRLR 247, at 249 (EAT).

63. See Industrial Tribunals: Compensation for Loss of Pension Right (HMSO, 1990), which tribunals may take into account. See also Bingham v. Hobourn Engineering Ltd. [1992]IRLR 298 (EAT).

64. S.H.Muffett Ltd. v. Head [1986]IRLR 488 (EAT).

65. e.g. Gardiner-Hill v. Roland Berger Technics Ltd. [1982]IRLR 498 (EAT).

66. Norton Tool Co. Ltd. v. Tewson [1972]IRLR 86 (NIRC).

67. John Millar & Son v. Quinn [1974]IRLR 105 (EAT).

68. EP(C)A, s.74(4).

69. A.G.Bracey Ltd. v. Iles [1973]IRLR 210, at 211 (NIRC).

70. [1982]IRLR 498, at 500 (EAT).

71. EP(C)A, s.74(6) and (7).

72. Braund v. Murray [1991]IRLR 100 (EAT).

73. [1979]IRLR 346 (CA).

74. *Ibid.*, at 351.

75. Hutchinson v. Enfield Rolling Mills Ltd., [1981]IRLR 318 (EAT).

76. [1977]IRLR 314, at 320 (HL).

77. For a full analysis of this subject, see W.J.Holloway and M.J.Leech, Employment Termination (2nd ed.), pp.687-734 (NBA, Washington D.C., 1993) .

78. D.B.Dobbs, Remedies, pp.929-30, (West, St.Paul, 1980).

79. Wiskotoni v. Michigan National Bank-West, 716 F.2d 378 (6th Cir. 1983).

80. Panhandle Eastern Pipe Line Co. v. Smith, 637 P.2d, at 1025 (1981).

81. 861 F.2d 914, at 924 (6th Cir. 1988).
82. G.D.Schaber & C.D.Rohwer, Contracts, p.249, (West, St.Paul, 1975).
83. 3 C.A.3d 176, at 182 (1970).
84. Billetter v. Posell, 211 P.2d 621 (1949). This seems to be the majority rule in the United States, See "Note: Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith", 93 Harvard L.Rev. 1816, at 1843 (1980).
85. In Starling Drug, Inc. v. Oxford, 743 S.W.2d 380 (Supreme Court of Arkansas, 1988). In Smith v. Atlas Off-shore Boat Service, a federal appeals court allowed a dismissed seaman to be awarded damages for lost future earnings. See 653 F.2d 1057, at 1064 (5th Cir. 1981).
86. Harless v. First National Bank, 289 S.E.2d 692, at 699-702 (Supreme Court of Appeals of West Virginia, 1982).
87. Wiskotoni v. Michigan National Bank-West, 716 F.2d 378, at 390 (1983).
88. Prosser and Keeton On the Law of Torts (5th ed.), p.8, (West, St.Paul, 1984).
89. 384 N.E.2d 353, at 359 (1979).
90. D.B.Dobbs, Remedies, pp.204-5, (West, St.Paul,1973).
91. W.B.Gould IV, Wrongful Discharge Litigation: Should There Be Unfair Dismissal Litigation?, a statement to Assembly Labor and Employment Committee, California Legislature, p.4, (1984).
92. Dobbs, op. cit., at p.194.
93. H.H.Perritt, Jr., Employee Dismissal Law and Practice, p.58 (J.Wiley & Sons, New York, 1984).
94. M.A.Robinson, "Fired Workers Turn to the Courts", San Francisco Sunday Examiner & Chronicle, Sept. 30, 1984.
95. Montana Code, Title 39, Chapter 2, Part 9.
96. Section 39-2-904.
97. Section 39-2-911.

98. Section 39-2-914.
99. Section 39-2-905.
100. Section 39-2-912.
101. Section 39-2-913.
102. J.Tompkins, "Legislating the Employment Relationship: Montana's Wrongful-Discharge Law", 14 Emp.Rel.L.J. 387, at 395-7 (Winter 1988). Also see Peritt, Jr., "Employee Dismissals: An Opportunity for Legal Simplification", 35 Lab. L.J. 407, at 412-3 (1984).
103. The Civil Execution Law, s.25.
104. The Isuzu Jidosha case, the Supreme Court in 1992, RH, No.608, p.6.
105. The Zenshuo Yamada case, the Supreme Court in 1962, SMS, Vol.16, No.8, p.1656.
106. The Supreme Court in 1987, RH, No.506, p.20.
107. The Akebono Taxi case, supra.
108. e.g. the Dainihon Insatsu case, the Tokyo District Court in 1984, RHS, No.1210, p.3.
109. e.g. the Joshi Gakuen case, the Tokyo District Court in 1979, RH, No.324, p.56; the Anzen Taxi case, the Nagasaki District Court in 1989, RH, No.547, p.63.
110. e.g. the Hirano Kinzoku case, the Osaka District Court in 1978, RH, No.310, p.28; the Wako Shoji case, the Osaka District Court in 1991, RH, No.559, p.65.
111. The Tokyo District Court in 1992, RH, No.617, p.31.
112. T. Okino, "Rodo Sosho No Kadai" in Jitumu Minjishosho Koza, Vol.9, p.149 (1970).
113. K.Hagisawa, "Kaiko To Karishobun" in Jitumu Minjisosho Koza, Vol.9, p.211 (1970)
114. The Tokyo District Court in 1976, RMS, Vol.27, No.5, p.489.
115. M.Iwade, "Kaikojiken Ni Okeru Rodokarishobun No Hitsuyosei", Nihon Rodokyokai Zashi, No.345, p.22 (1988); H.Toya, "Jugyoin No Chiihozenkarishobun Oyobi Chinginkaribarai-karishobun No Hitsuyosei Nitsuite", HJ,

No.1270, p.3 (1988).

116. S.Furudate, "Chingin-Taishokukin To Karibaraino Karishobun No Hitsuyousei" in Sinjitsumu Minjisosho Koza, Vol.11, p.147 (1981).

117. T.Okino, "Rodojiken Ni Okeru Honansosho To Karishobun Tono Yakuwari" in Shinjitumu Minjisosho Koza, Vol.11, p.3 (1982).

CHAPTER 5

GENERAL LAW OF DISMISSAL(3): COMPARATIVE CRITIQUE

The two preceding chapters have examined and summarized the statutory provisions and case law relating to dismissal in each of the three countries in order to ascertain whether there is a general law of requiring justification for dismissal and what general regulations, procedures and remedies apply to dismissal. On the basis of the above examination, we can identify the following features of the laws of dismissal in the three countries.

5.1. REGULATION

In the United States, there is no federal statute requiring justification for dismissal. The state of Montana alone has enacted a statute which affords general protection to employees from dismissal without just cause. No other state has enacted a statute which requires justification for dismissal. In contrast, there is a general law of dismissal in Britain as well as in Japan, which generally requires justification for dismissal. There is statutory regulation of unfair dismissal in Britain.

In Britain, there is also a separate contractual right against wrongful dismissal at common law, but the extent of such protection is limited. At common law, an employee who is employed under a contract of indefinite duration is generally only entitled to be given due

notice of dismissal. Only employees who have the status of office-holder, a special statutory status or a contractual right to procedural justice, may have the right to be dismissed only after the employer has complied with natural justice or a statutory or contractual procedure. This may cover a large and increasing number of employees.

The right to claim wrongful dismissal is still important for many employees because of the qualification period of employment, the inadequacy of compensation, and the infrequency of re-employment orders following on from unfair dismissal claims. It is particularly useful for highly paid persons who are employed under a fixed term contract or who are entitled to a long period of notice, and for those who possess the right to natural justice or a statutory or contractual procedure.

Unlike Britain, Japan does not have special statutes designed to regulate dismissal. However, Japanese courts have developed the doctrine of the law of abusive dismissal on the basis of the 'abuse of right' clause of the Civil Code. Accordingly, it can be said that, in Japan, there is a well-established law to regulate dismissal, i.e. the law of abusive dismissal.

In contrast to the limited functions of British common law regarding regulation of dismissal, American common law has been developed to protect the employee from unjust dismissal. American courts regulate unjust

dismissals on the basis of an implied promise that dismissal will only occur for just cause, an implied covenant of good faith and fair dealings, public policy and intentional infliction of mental distress.

It was once thought that an implied covenant of good faith and fair dealings might provide for a wide regulation of unjust dismissal similar to the Japanese doctrine of abusive dismissal. In most states, however, the application of that covenant so far has been limited to very exceptional cases. In some states it was made clear that the implied covenant of good faith and fair dealing only protects an employee from discharge based on an employer's desire to avoid payment already earned by the employee.

In the United States, the theory of public policy and the contract theory have been more frequently and effectively applied to provide a remedy for an employee who was unjustly dismissed. Most courts construed "public policy" a less strictly. In Japan, cases in which dismissal is held to be illegal in violation of public policy are mostly limited to those in which dismissal infringes the employee's constitutional rights. Since the legal effect is the same in cases of dismissal violating public policy and those of abusive dismissal, the public policy argument is less important in Japan.

In Britain, it is an implied term of the contract that the employer may not compel an employee to act

unlawfully.¹ It is unclear, however, whether, at common law, an employer's right to dismiss with due notice could be restrained by reference to such an implied term. Nevertheless, under unfair dismissal legislation, it would be held unfair to dismiss an employee because of his refusal to accept an order to act illegally.² Section 60A of the EP(C)A now provides that it is automatically unfair to dismiss an employee because he brought proceedings against the employer to enforce, or alleged the employer's infringement of, his statutory rights. However, due to several defects, particularly with the scope and remedy of that law, it is arguable that dismissal against the public interest³ should be permitted as a cause of action at common law.

Another cause of action in tort which has been recognized in the United States with regard to dismissal is intentional infliction of emotional distress. A similar tort liability exists in British law. In Wilkinson v. Downton, the defendant's intentional false representation gave a violent nervous shock to the plaintiff and rendered her ill. It was held that these facts disclosed a good cause of action.⁴ This tort liability has developed very little since this case in 1897 and there has been no attempt to invoke it in a dismissal case. However, where when dismissing an employee, the employer, actuated by malice, has made damaging and false statements about the employee to a

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third party, it constitutes defamation in tort. Defamation has also been recognized in cases of dismissal in Japan where it is also generally considered that such extraordinary speech and action that can injure a person's health constitutes a tort,⁶ although there is no relevant case concerning dismissal. What is clear in Japanese law is that dismissal without just cause is considered to be a tort if the employer dismisses his employee in spite of being aware (or unaware due to negligence) that he has no just cause for dismissal.

In the United States, the contract theory is another judicial method of providing a remedy for unjustly dismissed employees. Where the employer has expressly or impliedly promised job-security, the employee may rely on the contract theory if he feels that he has been dismissed without just cause. It is reasonable to assume that many employers recognize the necessity of declaring job-security in written documents for morale and to attract employees. There is a possibility that courts may recognize the existence of a contractual promise of dismissal only for just cause on the basis of the employer's written declaration of job-security. Under this theory, dismissal is regulated in a similar way to that in which dismissal is regulated under the Japanese law of abusive dismissal and the British law of unfair dismissal.

Unlike British common law, American common law does

not require dismissal to be preceded by due notice. In Japan, a statutory provision requires the employer to give at least 30 days notice to the employee before dismissal. This requirement is similar to that of minimum notice for dismissal under British law, but there are the following differences between Japanese and British law regarding minimum notice for dismissal: (i) the minimum notice is fixed at 30 days in Japan while in Britain it varies between one and twelve weeks depending on the employee's length of service; (ii) the minimum notice period should be given to workers employed on a daily basis or under a fixed term in Japan if certain conditions are satisfied, but there is no similar rule in Britain; (iii) in Japan, the employer may be exempt from the requirement to give notice only in the case of dismissal for very serious misconduct of the employee, while in Britain the employer may also be exempt in the case of dismissal because of a repudiatory breach by the employee; (iv) a court may order the employer to make an additional payment in Japan; (v) the employer's failure in his obligation to give notice may result in a criminal prosecution in Japan while in Britain the employer's failure to give notice only constitutes a breach of his contract. The Japanese rule of notice for dismissal is stricter than the British one, but the British may be better in that the minimum notice increases as the employee's length of service increases.

In Japan, there is what is called 'punitive dismissal', a special concept of dismissal. It is distinguishable from an ordinary dismissal which corresponds with 'dismissal' in the usual terms. A 'punitive dismissal' is usually accompanied by a reduction of the retirement allowance. It is considered to be legally effective only if the shugyo kisoku expressly provides that the employer can take 'punitive dismissal' action against the employee for the relevant sorts of wrongdoing. Since the consequences of 'punitive dismissal' upon the employee are harsh, the courts have generally required more serious misconduct for 'punitive dismissal' than for ordinary dismissal.

In both Japan and Britain, dismissal without a permissible reason is regarded as abusive or unfair. It can be said that the burden of proof under the Japanese law of abusive dismissal is identical to that under British unfair dismissal legislation. However, Japanese law requires the employer to prove the facts which substantiate his reason for dismissal while British unfair dismissal legislation only requires the employer to prove that he genuinely believes that he has reason to dismiss. On the other hand, British tribunals can only take into consideration matters which the employer knew of at the time of dismissal, while some Japanese courts permit the employer to allege a reason which he was not aware of at the time of the dismissal, provided that it

existed at that time. British law requires the employer to provide a written statement of the reason for dismissal if the employee requests this. Japanese law and American law do not have such a requirement.

Even if the reason for dismissal is proved to be permissible, dismissal may still be held to be abusive in Japan and unfair in Britain. In Japan, "dismissal is abusive where it is regarded to be considerably unreasonable in the circumstances of the case." In Britain, the fairness of dismissal depends upon "whether, in the circumstances, ...the employer acted reasonably or unreasonably in considering (a provided reason) as a sufficient reason for dismissing the employee." Thus, both in Japan and Britain, courts and tribunals have to take account of all the circumstances in addition to the facts directly connected to the alleged misconduct or incompetence. These include the employee's past record, type of work, duration of service, family circumstances, the employer's fault, treatment of similar cases, and type and size of business.

The standard which is applied to determine the reasonableness or admissibility of dismissal is clearly different in Japan and Britain. The British standard is what can be called the "no reasonable employer" test which has been expressed as "if no reasonable employer would have dismissed (the employee), then the dismissal was unfair". The Japanese Supreme Court uses a vague

standard which has been expressed by the use of such phrases as "permissible with regard to social norms" or "permissible with regard to social justice." These phrases should be understood in the context of the facts and decision in the Kochi Broadcasting Company case. If the "no reasonable employer test" were applied to the facts of the Kochi Broadcasting Company case, it would be rather difficult to reach the same conclusion. The Japanese standard may be described as the "balancing interests" test under which the courts consider the degree to which the dismissal would have detrimental effects on the employee and his family and the degree to which the employee's continued presence in the workplace would damage the employer's business. In other words, the courts balance the employer's right to business and the employee's right to his livelihood and apply the doctrine of abuse of the right to dismiss. Therefore, as the Supreme Court's decision in the Kochi Broadcasting Company case illustrates, the Japanese standard is generally far more favourable to the employee than the British one.

In determining whether or not dismissal is justified, the British tribunal takes a far more procedurally oriented approach than the Japanese court. In Japan, dismissal is void where it is held to be abusive. So, where the court holds that dismissal is abusive because of procedural defects, it cannot dispose of the case by

awarding financial compensation. In Britain, even where the tribunal holds that dismissal is procedurally unfair, it can still decide not to award compensation. Another important factor which explains the different attitudes of Japanese courts and British tribunals results from the existence of a Code of Practice in Britain which is admissible in evidence in any proceedings before an industrial tribunal.

As far as dismissals for incompetence are concerned, Japanese judicial decisions indicate that, before dismissing an employee, the employer has to ascertain whether or not the employee's work shows a total lack of working ability or an incurable working attitude. In order to do so, the employer is usually required to transfer the employee to a workplace which is more suitable to him or which may give him cause for reflection. The employer is generally required to give the employee adequate advice on how to improve his performance.

For example, the Tokyo District Court in the Rio Taint Jink case stated what an employer should be expected to do before dismissing an employee for incompetence as follows: "Before an employer dismisses an employee for bad work performance or inefficiency, he should make an effort to induce the employee to improve his performance or efficiency. The dismissal will only be permissible if the employer's effort cannot bring about

any substantial improvement in the employee's performance and after it becomes clear that the discipline of the workplace cannot be maintained unless the employee is discharged from the workplace. In deciding on dismissal, the employer has to consider whether the employee's bad work performance shows a total lack of working ability or a bad attitude to work."⁷

These rules appear to resemble those set out in the British decisions. However, the British decisions have never indicated that the employer has to make sure that the employee's work shows a total lack of working ability or an "incurable" working attitude. They have also allowed the employer to conclude that it would not be to advantageous to his business to give the employee alternative work even if it was available. Thus, in Harris (Bevan) Ltd. v. Gair, the EAT stated as follows: "The small scale of the appellants' business and the circumstances of the respondent's proposed demotion were such as would...entitle a reasonable employer to conclude that even if he had a job to offer it would not be to the advantage of his business that the employee should continue in it. We certainly cannot accept the Tribunal's reasoning that the alternative job, if one was available, should have been offered."⁸

Japanese law prohibits employer from dismissing employee for injury or illness incurred in the course of duty for three years and 30 days,⁹ while British law does

not provide any special consideration regarding dismissal for injury or illness suffered while on duty. In Japan, besides the above statutory regulation, there have been many cases in which dismissal for health reasons was held to be abusive. In Britain, there is also a body of case law in which dismissal for health reason was held to be unfair. In Japan as well as in Britain,¹⁰ the employer is required to discover the employee's true medical condition, and therefore, must refer to medical reports or certificates concerning the employee's physical condition. The opinions of medical experts on an employee's medical condition seem to be more decisive in Japan than in Britain when determining whether or not dismissal is permissible. Thus, in Japan, an employer usually refers to many medical reports or certificates before dismissing an employee and the credibility of medical reports is often disputed in the courts.¹¹ This difference stems from the fact that British legislation does not require the employer to prove the facts substantiating his reason for dismissal.

In both Japan and Britain, the availability of alternative employment is an important factor in determining whether dismissal for ill health is permissible. However, British tribunals look into whether the employer considered¹² the possibility of giving the employee an alternative job whereas the Japanese courts consider whether there was in fact no suitable job

available for the employee. In the Nippo Service case, the Tokyo District Court held that an employee who was engaged to design and draw should have been transferred to different work, or suspended when he became unable to design and draw due to illness. The court further stated that "it was not impossible for the employer to transfer him to a suitable job, even if the employer could not transfer him to the job to which the employee wanted to be transferred."¹³ This is indicative of the degree to which Japanese courts and British tribunals will intervene in an employer's decision to dismiss. It shows the difference between the "balancing interests" test and the "no reasonable employer" test. Unlike British tribunals, Japanese courts do not investigate the availability of a suitable alternative job for the employee from the view point of fair procedure but they do so to judge whether it is really necessary for the employer to resort to dismissal. The Japanese courts apply the "last resort" test to dismissals for incompetence or ill health. They also generally require the employer to retain the sick employee for much longer before dismissal than do the British tribunals.

The first question which the courts and tribunals look into when the reason for dismissal is disobedience, in both Japan and Britain, is whether or not the employer's order is lawful and within his contractual authority. To determine what authority was conferred on

the employer, in Britain, it is usually necessary to analyse the written statement of terms, custom and practice and collective agreement.¹⁴ It has often been held in cases involving workers in building and other contracting industries that there is an implied mobility clause because of the nature of the business.¹⁵ Japanese courts tend to find an employer's authority to transfer an employee to other jobs or working places more easily by interpreting their contracts on the basis of employment practices and provisions of shugyo kisoku.¹⁶

If the order is unlawful, dismissal for the employee's refusal to obey it is not permissible in Japan or in Britain. When an employer dismisses an employee for his refusal to obey an order which was not within his contractual duties, the means of determining the unfairness or abusiveness of dismissal is strikingly different between the two countries. Japanese courts invariably hold the dismissal to be abusive, whereas British courts further examine whether no reasonable employer would have dismissed in that particular case. If the employer has some sound, good business reason for issuing his order, then the dismissal may be held to be fair.¹⁷ Japanese courts have a tendency to construe the employer's contractual authority to change an employee's work assignment more widely than the British tribunals. This is due to the Japanese lifetime employment practice under which the job descriptions of employees are

generally very vague indeed.

In Britain, an employer is entitled to dismiss an employee for dishonesty if he believes, on reasonable grounds, that the employee has been dishonest. Thus, in determining whether or not dismissal for dishonesty is fair, it is very important to discover whether the employer has carried out as thorough an investigation into the matter as was reasonable in all the circumstances of the case.¹⁸ In Japan, an employer is entitled to dismiss an employee for dishonesty only if the employee has in fact acted dishonestly. So, Japanese courts generally do not make much of whether the employer has made a formal investigation of the facts.

As far as dismissal for criminal conduct outside the employment is concerned, the treatment of such a dismissal is almost identical in Japan and Britain. The most important factor is whether the offence is one that makes the worker unsuitable for his type of work or unacceptable to other employees.¹⁹ In Japan, however, the effect that the employee's offence has on the reputation of the company is another crucial factor when the court has to determine whether or not the dismissal was abusive. In the Nihon Kokan Company case, the Supreme Court held that: "In order to hold that the employee's disgraceful conduct (trespass on the premises of a US Forces base and confrontation with police officers defending the base) has damaged the reputation and image

of the company, the court need not find that that conduct resulted in a real disruption of business operations or real disadvantages for the company. However, the court may so rule, if the court considers that that kind of conduct may have a serious influence on the reputation and image of the company, having regard to all the circumstances of the case."²⁰

In Japan, there have been many cases in which an employer had taken 'punitive dismissal' action against an employee for misrepresentation or concealment of his personal history at the time of hiring. In many cases, the court has affirmed the effectiveness of the action on the grounds that the employee's dishonesty not only leads the employer to exercise misjudgment in deciding an appointment, terms and conditions of employment or his allocation but is also against mutual trust and therefore that it has a harmful influence on the discipline of the workplace.²¹ This shows that Japanese courts make much of trust and the confidential relationship between employee and employer when deciding on the effectiveness of 'punitive dismissal'. A common tendency may be found in the way the courts treat the employee's uncooperative or inharmonious character in cases of dismissal. The attitude of the court towards an employee's misrepresentation or concealment of personal history contrasts with its relatively tolerant attitude towards an employee's physical assault on his fellow employee.

This attitude of the courts may be said to reflect the necessity for a close relationship between the employee and the employer in order to maintain life-time employment practices.

Probably one of the greatest differences between Japanese law of abusive dismissal and British unfair dismissal law is that the latter often makes dismissal fair on the basis of "some other substantial reason" even if the employee does not breach his contractual duty. In Japan, the cases where the court allows dismissal without the employee's breach of contract are strictly limited to those in which there is a union-shop agreement and where the employer satisfies the requirements of dismissal for economic reasons.

5.2. REMEDIES

Japanese law provides a declaration of avoidance of dismissal with an order of back-pay as a remedy for abusive dismissal. American law awards for compensatory damages for breach of contract and both compensatory and punitive damages for tortious dismissal. In most cases, British common law only provides for compensatory damages equal to the remuneration which the employee would have received if he had been given the requisite period of notice, although there are exceptions in respect of lost pension rights or other fringe benefits. It should be noted that if the employee's contract entitles him to a period of consultation or appeal, the courts have

recently become more willing to award damages for such a period beyond the period of notice. British unfair dismissal law provides for specially defined financial compensation subject to minimum and maximum amounts, and, in very few cases, reinstatement or re-engagement. The rule of mitigation applies to compensatory damages under both American and British common law and the British unfair dismissal compensation. Thus, the amount of compensation that a wrongfully or unfairly dismissed employee may actually obtain is very small. In the United States, if dismissal is held to constitute a tort, the amount of compensation may be very generous since the jury have discretion to decide the level of punitive damages. In comparison, in Japan, any reduction made due to earnings from other employment after dismissal is limited to those exceeding 60 % of the employee's "average wages" as defined in the L.S.L., s.12. Unlike Britain and the United States, the employee is not required to make a reasonable effort to gain from other employment to minimize the loss.

The Japanese judicial declaration of avoidance of dismissal is almost identical to declaratory judgments in Britain and the United States. In Britain, a declaratory judgment has, so far, been of relatively limited use in cases of dismissal. It is only available, in special circumstances, for an employee who has the status of office-holder, a special statutory status or a

contractual right to procedural justice. The grant of a declaratory judgment in Britain is discretionary and the court may refuse it where the employer has lost trust and confidence in the employee. In the United States, declaratory judgments are not available in cases of termination of a private employment relationship.

In British dismissal cases, an injunction may also be available at common law. In practice, most injunctions which have been awarded are interlocutory, and final injunctions are rare. In the United States, the courts have never awarded an injunction in a case of termination of private employment. Nor do Japanese courts have the power to make an order to prevent a dismissal. However, they may issue a provisional disposition order. A provisional disposition is in fact very similar to a British interlocutory injunction. The employee may obtain a provisional disposition order on the basis of ex parte testimony. In Japan, non-compliance with a provisional disposition order cannot result in punishment whereas in Britain, failure to observe the requirements of an interlocutory injunction could be held to be contempt of court. A provisional disposition order usually not only preserves the employee's status but also requires the employer to pay some or all of the employee's wages until the employee's rights have been decided finally by the court. The main problem with a provisional disposition orders is the time spent on the proceedings.

The development of common law remedies for wrongful dismissal in Britain very much contrasts that for wrongful discharge in the United States. British courts have recently become willing to grant equitable remedies for breaches of the employee's contractual right to procedural justice. American courts, however, have recently become willing to award damages either for breach of contract or for tort. In Britain damages for wrongful dismissal are limited to compensatory damages, while in the United States punitive damages are also available in cases of tortious dismissal.

The Japanese declaratory judgment of avoidance of dismissal is not itself enforceable. It is accompanied by a judgment ordering the company to pay the unpaid wages plus interest from the time of dismissal. The judgment usually also orders the employer to pay wages accruing after the time of the judgment and therefore the employer must continue to pay wages after the time of judgment his contract with the employee has not terminated for any cause. Thus, reinstatement of the employee may be realized by such a declaration.

This remedy is not always suitable. For example, those employees who do not expect their employment to last for long, such as part-time workers, workers after their attainment of a compulsory retirement age, etc. do not usually desire reinstatement. Even if the employee does not want to return to his company, in theory, he can

use the litigation process in order to gain the court's affirmation of his status as an employee and quit the company just after winning his case, solely in order to get wages payable until that time. It is questionable whether an ordinary employee would have knowledge of such legal technicalities and even if he had, whether he would be ready to pursue his litigation while concealing his real intent. This litigation for affirmation of employee status cannot be entered in the summary court, which is designed to deal with litigation in a swifter way. Since an abusive dismissal is automatically void, it is not easy to recognize the concept of "constructive dismissal". It may therefore be better to allow the employee to claim damages for any future loss of wages on a tort basis. However, according to the Yoshimura case, the employee cannot be awarded such damages since abusive dismissal is void and he does not intend to return to the job. In other words, the employee is not expected to want to return to the job, and the consequences of avoidance of dismissal are too severe for the employer. According to the Yoshimura case, the employee cannot be awarded damages for future loss of wages when his claim is based on the principle of tort.

In contrast, American remedies are limited to monetary compensation. Damages for breach of an employment contract terminable only for good cause usually equal the employee's lost earnings for a

reasonable period minus earnings from any work obtained since the dismissal. The length of a 'reasonable period' during which the employee would have remained in the same employment but for wrongful discharge is determined by a trial judge. This has been held to be as long as eight years, ten years and even twenty-six years. This indicates that the dismissed employee should be paid a considerable amount of advance pay. This remedy is unable to relieve the unjustly dismissed employee of non-economic difficulties which are caused by his exclusion from the workplace community such as loss of social status, self-esteem and friendship. Nor does it assist the employee in adjusting himself to a new job and workplace community. An order or judgment restraining dismissal is a more effective remedy against unjust dismissal, and therefore British injunctions or declaratory judgments at common law or Japanese declaratory judgments are more favourable remedies.

British unfair dismissal law offers a more flexible remedy compared with Japanese and American law since a tribunal determines which remedy, re-employment or monetary compensation, should be awarded to the employee in each case. Despite the statutory preference for re-employment above compensation, tribunals rarely order re-employment. Less than 2 % of the total number of successful applications have resulted in orders for reinstatement or re-engagement in recent years. The vast

majority of successful complainants only receive compensation. Of the claims upheld between April 1994 and March 1995, 1.6 % resulted in orders for re-employment, 62.1 % in awards of compensation, 33.9 % in remedies left to the parties and 2.4 % in no award.²² The practice of infrequently ordering re-employment seems to reflect on the agreement of settlements at the stage of ACAS conciliation. In most cases settled by ACAS conciliation, the applicant obtains monetary compensation. In only 1.2 % of cases settled by ACAS conciliation between April 1995 and March 1996, could the applicant obtain re-employment.²³

It is reasonable that the tribunal must consider whether the employee wishes to be reinstated and whether it is practicable for the employer to comply with an order for reinstatement. However, from the view-point of the employee's protection, it is not advantageous for tribunals to have construed the practicability of re-employment in a very strict sense, since it should be the employer who bears the risk resulting from unfair dismissal. It may also be questioned whether it is for the tribunal to consider the employee's contributory fault in determining whether the employee should be re-employed. From the view-point of the employee's protection, it is a quite unreasonable requirement, especially when taking account of the fact that the tribunal has to apply the "no reasonable employer" test

to determine on fairness of dismissal.

The order for re-employment under the unfair dismissal legislation has also been criticized for the following reasons. Firstly, it assumes that the contract of employment has already been broken by dismissal and therefore, the status quo is the dismissal which the tribunal's order must reverse. Secondly, unlike an equitable order restraining dismissal, the order for re-employment may not be enforced by the sanction of contempt of court proceedings.

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Compared with monetary compensation under American common law, monetary compensation under unfair dismissal legislation is much more precisely structured. This is mainly due to the fact that a tribunal consists of two lay members as well as a lawyer. It appears to lead to smaller compensatory awards from tribunals especially as tribunals may reduce the amount of compensation by a proportion which they consider just and equitable having regard to the employee's conduct prior to the dismissal. Although it is reasonable to consider the employee's contributory fault in order to calculate monetary compensation for unjust dismissal, tribunals should be very careful about establishing the employee's contributory fault. Otherwise, monetary compensation might lose its influence as a means of protection for the employee against unjust dismissal. The concept of 'culpability or blameworthiness' as is necessary for

contributory fault, which was defined by the Court of Appeal in Nelson v. BBC (No.2)(supra.) appears to be too wide and not defined with sufficient clarity to be able to guide the tribunals' discretionary powers.

Tribunals cannot make an award of damages for the employee's injured feelings. They are also bound by the maximum statutory level of compensation. According to P.Lewis's investigation of successful complainants in unfair dismissal hearings in one area of Britain between 1 June 1976 and 31 May 1978, about 44 % of those who specified an amount of compensation felt that at least ²⁵ treble the amount actually awarded was necessary. Since then, the amount of compensation awarded has increased as in 1978, the median award was £375, and by 1995 it had risen to £3,289. ²⁶ This does not mean that the real value of monetary compensation awarded had risen because weekly earnings of employees also increased in monetary terms ²⁷ during this period.

In order to evaluate the adequacy of compensation awarded by tribunals, one should take into account how long the dismissed employees are likely to take to find new jobs and how much they are likely to spend on legal costs. The latter question is important because, between April 1990 and March 1991, 33 % of applicants sought advice from solicitors or barristers and 24 % were ²⁸ represented by them at industrial tribunal hearings. An investigation carried out by L.Dickens et al. in 1978

found that less than half of the successful complainants had found a new job within three months.²⁹ In the light of the unemployment rates in 1978 and 1995, it cannot be presumed that the duration has drastically changed. The Justice Committee's information in 1987 indicated that the legal costs of bringing a simple unfair dismissal case to a hearing were between £2,000 and £3,000.³⁰ It appears, therefore, the amount of compensation awarded is often neither enough to cover all the dismissed employees losses nor to have a deterrent effect on unjust dismissal.

5.3. PROCEDURES

Regarding the proceedings for unjust dismissal, only British unfair dismissal law has established a system which is expected to be a cheap, easily accessible, technicality-free and expert court system. Both Japan and the U.S. still make use of the conventional court system. In Britain, however, the above expectations have not been fully realised, as in reality, the tribunals are subject to the rules common in ordinary courts; legal oath, cross-examination, legal review by the higher courts and so on. The chairmen of tribunals are lawyers, and 44 % of the employers and 24 % of the employees are represented by lawyers at the tribunal hearings. As a result, it was reported that, in a quarter of all cases of unfair dismissal, the time taken to process cases was longer

than 20 weeks. Also, the average time taken for a case to go from the tribunals to a hearing by the EAT was two years in England and Wales in 1992.³¹

Britain is the only country that promotes an agreed settlement through a well organized conciliation system. In fact, a large proportion of applications for unfair dismissal are disposed of at the stage of ACAS conciliation. In 1995, 43.2 % of applications were settled by ACAS, 28 % were withdrawn, and only 28.8 % of the applications were heard by the tribunals.³² From the view-point of employees' protection, swift settlement of a complaint is extremely crucial in a case of dismissal. In this sense, Japanese law is highly unsatisfactory, since proceedings for abusive dismissal take far too long.

Finally, the range of employees intended to be covered by the laws of dismissal is very important. As the Japanese law of dismissal has been developed on the basis of an application of the general rules of the Civil Code, there is no particular limitation to its application, except that public employees alone subject to public law protection. British unfair dismissal legislation excludes a significant range of employees by excluding those who have not continuously worked for the same employer for more than two years, for example.

NOTES

1. Gregory v. Ford [1951]1 All ER 121 (Nottinghamshire Summer Assizes).
2. e.g. Morrish v. Henley (Folkstone) Ltd. [1973]IRLR 61 (NLRB).
3. G.Pitt, "Dismissal At Common Law: The Relevance in Britain of American Developments", 52 MLR 22, at pp.29-36 (1989).
4. [1897]2 QB 57 (QB). Cf. B. Burrows, Remedies for Torts and Breach of Contract (2nd ed.), pp.230-241 (Butterworths, London, 1994).
5. G.Pitt, op.cit., at p.36.
6. I.Kato (ed.), Chushaku Minpo, Vol.19, p.91 (Yuhikaku, Tokyo, 1960).
7. The Tokyo District Court in 1983, RHS, No.1178, p.3.
8. [1981]IRLR 520, at 520 (EAT).
9. The L.S.L., s.19. An employer who has violated this provision may be subject to penal servitude or fine. In addition, such a dismissal will be void.
10. e.g. the Makoto Taxi case, the Sapporo District Court in 1986, RHS, No.1264, p.3; Patterson v. Messrs.Bracketts [1977]IRLR 181 (EAT).
11. e.g. the Allied Force in Japan, the Kobe District Court in 1955, RMS, Vol.6, No.6, p.1115.
12. e.g. Carricks (Caterers) Ltd. v. Nolan [1980]IRLR 259 (EAT).
13. The Tokyo District Court in 1970, HT, No.247, p.251.
14. Deeley v. British Rail Engineering [1980]IRLR 147 (CA).
15. Jones v. Associated Tunnelling Co. Ltd. [1981]IRLR 477 (EAT); Courtaulds Northern Spinning Co. Ltd. v. Sibson [1988]IRLR 305 (CA).
16. The Nissan Jidosha Company case, the Tokyo High Court in 1987, RMS, Vol.38, No.6/7, p.681.
17. Hollister v. National Farmers' Union [1979]IRLR 238 (CA).

18. British Home Stores v. Burchell [1978]IRLR 379 (EAT); Weddel v. Tepper [1980]IRLR 96 (CA); Monie v. Coral Racing Ltd. [1980]IRLR 464 (CA).
19. e.g. Brandshaw v. Rugby Portland Cement Co. Ltd. [1972]IRLR 46 (T); the Yokohama Rubber Company case, the Supreme Court in 1970, SMS, Vol.24, No.7, p.1220.
20. The Supreme Court in 1974, SMS, Vol.28, No.2., p.265.
21. e.g. the Ebara Seisakujo case, the Tokyo District Court in 1972, HJ, No.677, p.100.
22. The Labour Market Trends, July 1996, p.306.
23. This figure was provided by the ACAS in response to this writer's written inquiry. See also the Annual Reports, 1981-86.
24. S.Deakin & G.S.Morris, Labour Law, p.436. (Butterworths, London, 1995).
25. P.Lewis, "Compensation in Unfair Dismissal Cases", 131 NLJ 115 (1981).
26. Employment Gazettes, Sept. 1979, p.867; Oct. 1994, p.369.
27. L.Dickens et al., Dismissed, at p.123 (Blackwell, Oxford, 1985).
28. The Labour Market Trends, July 1996, p.305.
29. L.Dickens et al., at p.129.
30. R.Lewis & J.Clark, Employment Rights, Industrial Tribunals and Arbitration, p.20 (Institute of Employment Rights, London, 1993).
31. Ibid., at pp.6-9; Employment Gazette, Oct. 1994, p.362.
32. ACAS Annual Report 1995.

- PART III -

CHAPTER 6

LEGAL PROTECTION AGAINST DISMISSAL
THROUGH COLLECTIVE AGREEMENTS

6.1. INTRODUCTION

We have reviewed the direct legal control of dismissal by statutes or case-law and found that far less direct control exists in the United States than in either Japan or Britain. However, dismissal may also be controlled indirectly, through collective agreements. The United States has developed a unique system of grievance arbitration for resolving disputes over dismissal which provided for by collective agreements. Under this system, it is not the court but the arbitrator who determines whether a dismissal has been carried out in contravention of the provisions of the agreement. In determining this, the arbitrator examines both substantive and procedural aspects of the dismissal. The court simply enforces the arbitrator's award¹ unless it clearly contradicts either those provisions or explicit public policy.²

Neither Japan nor Britain has any equivalent procedures operating within a similar legal framework. In these two countries, it is for the court or the tribunal to determine whether dismissal is unjust, although there are substantial differences between Japanese and British laws. In Japan, most collective agreements have just

cause provisions as well as provisions requiring certain procedures for dismissal. Violation of these provisions often makes the dismissal void. In comparison, just cause provisions are not prevalent in Britain. Moreover, British tribunals require the employer to take rather formal procedural steps when dismissing an employee whether or not they are collectively agreed. Thus, in practice, collectively agreed procedures appear to be less important in Britain than in Japan in determining whether dismissal is just. There are, however, arbitration clauses in some collective agreements in Britain, but no such clauses in Japan are rare.

In this chapter, we will first discuss grievance arbitration in American collective agreements, and then we will examine dismissal provisions of collective agreements and their effects in Japan and Britain.

6.2. GRIEVANCE ARBITRATION IN AMERICAN COLLECTIVE AGREEMENTS

6.2.1. COLLECTIVE AGREEMENTS AND ARBITRATION PROCEDURES

Employees in unionized sectors are protected against unjust discharge by grievance and arbitration provisions in collective agreements. BNA found discharge and discipline provisions to be present in 98 % of the 400 sample collective agreements. "Cause" or "just cause" is stipulated as a reason for discharge in 86 % of these agreements.³ Many agreements provide for the procedure to be followed on discharge.⁴

Most collective bargaining agreements contain arbitration provisions which provide that an arbitrator, or arbitrators, agreed upon by both parties shall decide on any difference involving the meaning and application of any provision of the agreement that has not been satisfactorily settled in the grievance procedure. Arbitrators are selected by the mutual agreement of both parties. Where the contracts stipulate selection of arbitrators on a case-by-case basis, many of them provide that, if the parties are unable to agree on an arbitrator, the Federal Mediation and Conciliation Service or the American Arbitration Association may select the arbitrator or present a list of arbitrators to the parties.⁵

Formal pre-hearing discovery procedures are very limited in arbitration. However, since grievance and arbitration procedures can only be maintained properly on the basis of the mutual good faith of both parties, facts are normally disclosed on an informal basis.⁶

The location and timing of an arbitration hearing is in principle determined by the parties but, if they cannot agree on this, the arbitrator is usually given the power to decide.⁷ The parties have to be notified of the time and location of the hearing under many state statutes. The arbitration hearing is not open to the public. The parties in arbitration proceedings are entitled to be represented by their counsel. The

arbitrator can issue a subpoena for the attendance of a witness which is enforceable by a federal court under Section 301 of LMRA.⁸

A party's choice of witnesses and the order of their appearance in arbitration hearings is subject to few restrictions. A witness may refuse to attend before an arbitration hearing for fear of reprisal and therefore some arbitrators accept statements from an informer whose identity is kept secret. Reprisals against witnesses may be held to be an unfair labor practice under Section 8(a)(1) of the National Labor Relations Act. An arbitration hearing may be held not to have been conducted where witnesses were subjected to the threat of retaliation.⁹

Some state statutes require all witnesses to be under oath. This is often preferred by the parties even if it is not required by statute. The parties are entitled to cross-examine witnesses and the cross-examination need not be limited to the scope of direct examination. The arbitrator normally has authority to decide whether an adjournment of the hearing may be granted. Failure to grant an adjournment for good cause may make the proceedings vulnerable to court challenge.¹⁰

It has long been understood that strict legal rules of evidence do not have to be observed in arbitration proceedings. A federal district court has stated: "In an arbitration the parties have submitted the matter to

persons whose judgment they trust, and it is for the arbitrators to determine the weight and credibility of evidence presented to them without restrictions as to the rules of admissibility which would apply in a court of law".¹¹ For example, the strict rules of hearsay evidence applied in the courts are not necessarily applicable to arbitration.¹²

The general rule is that the burden of proof is on the party who presented the claim.¹³ However, in disciplinary cases, it is a well-established principle that the burden is on the employer both to proceed first with its evidence and to prove the employee guilty of wrongdoing.¹⁴ The degree of proof required in the arbitration of discharge cases is still unsettled. Some arbitrators have required proof beyond a reasonable doubt but others a lesser degree of proof such as a preponderance of the evidence, or clear and convincing evidence, or evidence sufficient to convince a reasonable mind of guilt.¹⁵ As far as the evidential burden is concerned, once the employer has introduced sufficient 'just cause' for discharge, the burden passes to the union which must then successfully rebut the employer's case.¹⁶

6.2.2. "JUST CAUSE" FOR DISCHARGE

It can be said that arbitrators generally are liberal in finding discharge. They tend to find that the

employee was discharged unless it is shown clearly that he intended to resign. Even where a statement of intent to resign is shown, the arbitrators look into whether the statement was made after reasonable consideration and not while under unreasonable threatening or severe emotional stress. They do not easily conclude that the employee resigned voluntarily.

With regard to "just cause" for discharge, certain standards have become established through accumulated arbitration decisions. The following are widely accepted factors which arbitrators have taken into account in deciding whether the employer discharged the employee with just cause.

A fair balance between the offence and the severity of the penalty is always regarded as an important factor to be considered.¹⁷ Many arbitrators refuse to uphold the discharge where the employer fails to fulfill procedural requirements specified in collective agreements, such as giving written notice of the charge, warnings, making investigations, having a hearing or joint discussion of assessment of punishment. However, in many other cases, compliance with the spirit of such procedural requirements suffices where the employee has not been adversely affected by the employer's failure to fully comply with the procedure.¹⁸

Many arbitrators hold that the existence of a just cause must be proven objectively and that the employer's

genuine belief in its existence is not sufficient to justify discharge. They maintain that only evidence bearing on the charges made at the time of discharge should be taken into consideration when determining the existence of cause.¹⁹

Particularly in cases of discharge for incompetence, arbitrators generally expect the employer to demote, transfer, retrain, and supervise, resorting to discharge only when there is no alternative.²⁰ In cases of discharge for lack of work, arbitrators sometimes state that layoff is the appropriate action. Arbitrators ordinarily examine all circumstances relevant to a discharge and endeavour to find anything relevant to reduce discharge to an appropriate lighter disciplinary measure.²¹

6.2.3. REMEDIES

It is common practice for an arbitrator who finds that a discharge was not for "just cause", to award reinstatement with or without back pay. An essential part of the remedy is therefore reinstatement of the discharged employee.

Arbitrators sometimes make awards of reinstatement conditional. Elkouri & Elkouri list some examples of cases where reinstatement was conditional upon an employee taking specific action. "Reinstatement has been ordered on condition that the employee resign his outside job, that he furnish an indemnity bond required by the

employer, that he sign an agreement by which he promises to apply, and comply conscientiously with, company safety rules, that he reduce his weight from 340 to 215 pounds and quit smoking cigarettes, and that he accept counselling from his pastor or some competent social agency".²²

Other types of conditional reinstatement award may be ordered. If discharge was based on a defect in the employee's mental or physical capacity, the arbitrator often makes reinstatement conditional on proof of mental or physical fitness. Where the arbitrator considers discharge is too harsh a penalty against the employee for certain misconduct, he often orders reinstatement which is conditional on the non-recurrence of the misconduct.²³

The arbitrator sometimes orders reinstatement of the employee to a job different to the original. The reason may be the employee's physical condition, incompetence or disqualification from continuing his former job, a need to screen him from contacts with the public, personality conflicts, sexual harassment or similar problems.²⁴

Arbitrators usually award reinstatement with or without back pay to an employee who has been improperly discharged. However, arbitrators may award back pay without granting reinstatement. This has occurred where the employee's behaviour is considered to be incapable of improvement, where a minor procedural requirement is violated prior to discharge, and where the discharged

employee has already secured employment elsewhere and does not desire to be reinstated.²⁵

Arbitrators may reduce the amount of back pay in the following circumstances; "(i) the grievant or the union was guilty of unusual delay in seeking arbitration or in selecting the arbitrator, (ii) the grievant had outside wage earnings which should be deducted, (iii) the grievant 'failed to seek other employment which would have mitigated the amount of back pay', and (iv) the grievant had a poor attendance record."²⁶

6.3. COLLECTIVE AGREEMENTS AND DISMISSAL PROCEDURES IN JAPAN AND BRITAIN

6.3.1. PROVISIONS CONCERNING DISCIPLINE AND DISMISSAL

(1) JAPAN

In Japan, most collective agreements contain provisions concerning disciplinary action and dismissal. According to a survey made by the Central Labour Commission, out of a sample of 606 agreements, 433 (71.5 %) incorporated provisions concerning disciplinary action (including 'punitive dismissal'), and 501 (82.7 %) contained provisions concerning dismissal, i.e. 'ordinary dismissal'. Of the agreements which included provisions concerning disciplinary action, 312 (72.1 %) either specified standards for such action or provided the means of settling such standards, and 247 (40.7 %) stipulated procedures involving unions.

Of the agreements which contained provisions concerning dismissal, 402 (80.2 %) specified standards for dismissal and 68 (13.6 %) provided a way of settling standards for dismissal. The 402 agreements specifying standards for dismissal often stipulated the following matters as just cause; physical or mental disability (71.3 %), misconduct punishable by 'punitive dismissal' (57.1 %), expiration of suspension for illness or other justifiable reasons (38.5 %) and incompetence (35.0 %). 461 agreements contained provisions on dismissal procedure. Many of them did not provide for a high degree of union involvement, but 118 (25.6 %) required the employer to consult with the union and 20 (4.4 %) required him either to obtain consent from the union or to consult with the union before making his final decision. Among the remaining agreements, 95 (20.6 %) provided for the union to be given notice or explanation of the dismissal and 7 (1.5 %) for it to have the union's opinion heard.²⁷

It should be pointed out that union involvement in disciplinary and dismissal procedure is quite often found in provisions of the shugyo kisoku rather than within collective agreements. Since there are often unwritten agreements or practices between the employers and the unions, it cannot be denied that in practice unions are involved in dismissals or other disciplinary matters without formal procedures. A survey carried out by the

Ministry of Labour found the following: regarding dismissal, 35.2 % of the enterprises surveyed are required to consult with their unions, 12.2 % to obtain consent from their unions and 14.9 % to notify their unions prior to dismissal.²⁸

(2) BRITAIN

In Britain, the latest official Workplace Industrial Relations survey found that 90 % of the establishments surveyed had disciplinary and dismissal procedures, and 93 % of these were written procedures agreed with unions. It was also discovered that the procedure at establishment level often contained a provision for the appeal of an unresolved case to a body or person outside the establishment. Such provisions were found in 94 % of the procedures laid down at establishments in the public sector and 62 % in the private sector.²⁹

The third parties commonly specified in these provisions include higher-level management (64 %), union officials (11 %), ACAS (15 %), higher-level management and union officials jointly (12 %), employers' association and union officials jointly (7 %) and arbitration bodies other than ACAS (4 %). Of those respondents reporting provisions for third-party intervention involving ACAS, 60 % said referral involved both conciliation and arbitration, 20% - conciliation only and 9 % - arbitration only.³⁰

6.3.2. LEGAL EFFECT OF COLLECTIVE AGREEMENTS

(1) JAPAN

Section 16 of the L.U.L. provides: "Any clause of an individual contract of employment contravening the standards concerning conditions of work and other treatment of workers provided for in a collective agreement shall be null and void. In this case, the invalidated part of the individual contract of employment shall be replaced by provisions as contained in the collective agreement. The same rule shall apply to any part which is not laid down in the individual contract of employment." On the basis of this Section, the courts have held that a dismissal which is not based on the reasons specified in the collective agreement is void. However, in most cases, such a dismissal may also be considered abusive and therefore void. Thus, the legal effect of just cause provisions in collective agreements is not greatly significant.

In contrast, since the courts have made little of procedural aspects in determining the abusiveness of dismissal in ordinary cases unless a clear legal basis for doing so is proved to exist, procedural requirements contained within collective agreements have been a very important factor for the courts when determining whether dismissal is abusive. Where the collective agreement requires the employer to consult with or obtain consent

from the union before dismissal, the court usually denies the legal effectiveness of dismissals carried out without advance consultation or consent. It has though been questioned whether the requirement for such consultation or consent before dismissal can be considered as falling among "the standards concerning conditions of work and other treatment of workers".³¹

With regard to consultation, the courts have always inquired whether the employer engaged in substantial consultation with the union prior to dismissal. This is a crucial factor in cases of dismissal for redundancy where the courts require consultation with the union even if the collective agreement itself does not require it. The courts have always inquired why the employer did not or could not have consulted with or obtained consent from the union. Where they have found that there is a justifiable reason for such lack of consultation or consent, dismissals have been held to be valid.³² The courts have also held dismissal without consultation valid where the union refused to deal with the company's proposal for redundancy dismissals³³ and, also, where the union did not have a genuine intention to consult with the employer.³⁴

As regards provisions requiring the employer to obtain union consent, the courts have held that the union's refusal to give its consent to dismissal may, in exceptional circumstances, constitute abuse of the right

to consent.³⁵ Therefore, even if there is a provision requiring the employer to consult with or obtain consent from the union prior to dismissal, the dismissal may be valid due to the union's attitude.

Furthermore, it should be noted that there is disagreement as to whether or not the provisions of a collective agreement requiring the union's advance consultation or consent may apply to non-union members in the same undertaking. This is because Section 17 of the L.U.L. provides that: "When three-quarters or more of the workers of the same kind regularly employed in a particular undertaking are covered by a particular collective agreement, the agreement concerned shall be regarded as also applying to the remaining workers of the same kind employed in the undertaking concerned." Since the Supreme Court has held that only the provisions of a collective agreement relating to "the standards concerning conditions of work and other treatment of workers" can be applied to the remaining workers of the same kind,³⁶ it follows that if the provisions requiring union consultation or consent constitute such standards, those provisions may apply to these workers. However, courts generally deny such application.³⁷ This is reasonable in view of the fact that the union's duty of representation has not been recognised.

(2) BRITAIN

Written collective agreements are conclusively

presumed not to be intended by the parties to be legally enforceable contracts unless the agreement "contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract."³⁸ Accordingly, unions cannot enforce dismissal or dispute procedure agreements, at unless this is otherwise agreed with the employers. Certain terms of collective agreements may, however, become incorporated into individual employment contracts and become legally binding between the employer and individual employees. This will happen typically where the parties to an employment contract have expressly agreed that the relevant terms of a collective agreement will be incorporated into their contract.³⁹

There is a distinction between terms in a collective agreement which are designed and intended to govern the relationship between the employer and the union, and those designated and intended to benefit individual employees. Only terms which come within the latter category are apt for contractual enforcement by individual employees.⁴⁰ If they are substantive terms such as enhanced redundancy payments, they are normally incorporated.⁴¹ However, procedural clauses, even though they appear to be intended to benefit individual employees, have often been regarded as inappropriate for incorporation. For example, with regard to a last-in, first-out agreement for redundancy selection, divergent

opinions were given in the interlocutory injunction hearing and the full trial of Alexander v. Standard Telephones and Cable Ltd.. In the injunction hearing, it was held to be arguable that this agreement had been incorporated into individual contracts of employment on the grounds that it was designed and intended to benefit individual employees.⁴² By contrast after the full trial, it was held that there was no such incorporation.⁴³

Express incorporation fits in with the employer's duty to provide a written statement of particulars of employment as required under the EP(C)A, ss.1-4. In the statement, the employer is required to specify any disciplinary rules applicable to that employee or refer the employee to the provisions of a document which contains such information and which the employee has a reasonable opportunity to read. This document could well be a collective agreement. Where an employer includes a note in the particulars of employment which refers to the disciplinary rules and procedures provided by a collective agreement, it is easier for an employee to prove that those rules and procedures are incorporated into his contract of employment.

Even if it is held that a dismissal procedure stipulated in a collective agreement has been incorporated into an employee's contract, the common-law remedy for the employee, which may arise from dismissal contravening such procedure, has not, until very

recently, been significant except in cases of permanent or tenured employment.⁴⁴ However, as pointed out in Chapter 3.1.1., because of recent developments concerning contractual rights to procedural justice, there is a strong possibility that an employee, especially when employed by a large company or public authority, may have more effective common-law remedies, such as an injunction or a declaration. This is because mutual confidence will be easily maintained in such a company or authority. The court may infer that the employee has accepted the employer's repudiation in certain circumstances.⁴⁵

Agreements relating to dispute procedure agreements are also relevant in the context of the unfair dismissal legislation. It may be held that a dismissal contravening the provisions of a collective agreement is unfair.⁴⁶ In Bailey v. BP Oil Kent Refinery Ltd. (1980), the Court of Appeal, however, held: "In most cases, if not all, a failure to comply with [a disciplinary procedure] agreement would be a factor to be taken into account; but the weight to be given to it would depend on the circumstances. An Industrial Tribunal should not base its decision on reasoning to the effect that because there has been a failure to comply, the dismissal must have been unfair."⁴⁷

6.3.3. CONCILIATION, MEDIATION AND ARBITRATION

(1) BRITAIN

As has already been mentioned, some dismissal procedures provide for disputes regarding dismissal to be referred to arbitration bodies. However, even where there are no such provisions, the parties to these disputes may refer them to ACAS or some other arbitration body with their ad hoc agreement. The TULR(C)A, s.212(1) provides: "where a trade dispute exists or is apprehended ACAS may, at the request of one or more parties to the dispute and with the consent of all the parties to the dispute, refer all or any of the matters to which the dispute relates for settlement to the arbitration of -

(a) one or more persons appointed by the Service for that purpose (not being officers or employees of ACAS);

(b) the Central Arbitration Committee."

The "trade dispute" referred to in the TULR(C)A, s.218 includes a dispute connected with a wide range of matters, including discipline and termination of employment. Where the parties refer the dismissal dispute to ACAS for arbitration, ACAS first "shall consider the likelihood of the dispute being settled by conciliation" and, "where there exist appropriate agreed procedures for negotiation or the settlement of disputes, ACAS shall not refer a matter for settlement to arbitration unless (a) those procedures have been used and have failed to result in a settlement or (b) there is, in ACAS's opinion, a special reason which justifies arbitration...as an

alternative to those procedures".⁴⁸

Where ACAS considers a dismissal dispute to be suitable to be referred to arbitration, it will most frequently be referred to a single arbitrator. The Central Arbitration Committee, a permanent body, is not often used for voluntary arbitration. A board of arbitration is generally used for more important issues than matters of dismissal.⁴⁹ Since British arbitration is voluntary in nature, and since British collective agreements are not usually legally enforceable contracts, neither party, on the basis of the general provisions by which disputes are referred to arbitration, has a legal right to refer a dismissal dispute to arbitration without the agreement of the other party on that particular occasion. Furthermore, arbitration awards made as a result of voluntary arbitration arranged by ACAS are not legally binding.⁵⁰

Accordingly, in practice, ACAS utilizes the conciliation stage to ensure that the parties have committed themselves in advance to accept and implement the arbitrator's award even though arbitration is not legally binding.⁵¹ Where the parties are not able to give an undertaking to accept the award but want positive suggestions on how to resolve the dispute, ACAS is entitled to refer the dispute to mediation.⁵² However, mediation is not often used and is particularly rare in dismissal cases.⁵³

The parties to a dispute concerning dismissal may, instead of requesting arbitration by one or more persons appointed by ACAS, ask the Service to assist them by providing the names of suitable arbitrators. The Institute of Arbitrators and other professional bodies chiefly concerned with commercial arbitration will also nominate arbitrators who undertake industrial arbitration. The Industrial Society also offers assistance in nominating suitable arbitrators.⁵⁴

When arbitration is arranged by ACAS, the fees and expenses of the arbitrator are borne by public funds. The fee for a single arbitrator in 1993 was 177 pounds per day. Most cases involving dismissals are heard by arbitrators within 6 weeks of notification to the ACAS and awards are returned to ACAS within 10 days of the hearing.⁵⁵ Arbitrations are held privately in a conference or committee room at the place of employment.⁵⁶ In dismissal arbitration, cases are usually presented by full-time officials of the unions with shop stewards present.⁵⁷ Statements in the arbitration hearing are not taken on oath⁵⁸ "The arbitrator questions both sides and [the parties] may ask questions of each other but through the arbitrator rather than by cross-examination." Parties are "rarely represented by lawyers, and then only with the arbitrator's agreement and after consultation with the other side."⁵⁹ Most hearings only last between three and four hours.⁶⁰

A body of precedent has never been established, and even standing arbitration bodies do not operate by means of precedents. In fact, industrial arbitrators give reasons for their award in some cases and not in others,⁶¹ although H. Concannon discovered that it was common to find a statement of reasons when written arbitration awards have been made in dismissal cases⁶² However, the arbitration award generally does not give detailed reasons but rather general considerations.⁶³

The number of requests made to ACAS for arbitration and dispute mediation is rather small. In 1995, only 136 such requests were made. The majority of requests continue to be for the services of a single arbitrator. There were 129 such requests in 1995. Of the total number of requests, 35% were concerned with dismissal, 15% with annual pay, 20% with other pay and conditions of employment, 26% with grading and 4% with other matters.⁶⁴ There are also a smaller number of unknown arbitration cases not organised by ACAS.⁶⁵

Concannon found that the following remedies resulted from arbitration in 1977: "(T)here were 16 cases (out of a total of 24) in which dismissal was found to be 'unjustified', or its equivalent. Of these 16, reinstatement was awarded in 14 cases, but reinstatement was usually 'on terms'. In one case, the employee was downgraded - which was allowed for in the agreed procedure. In four cases, a formal disciplinary warning

was given in the award. In four cases, the employee was penalized by a disciplinary suspension. In the remaining five cases, there was a 'simple' reinstatement award".⁶⁶ This shows that arbitrators often make compromise awards and this can meet the very objective of arbitration. Dickens et al. said that "A 'compromise' award is likely to be one which, at least, allows both parties to feel that they did not lose their case completely and which, therefore, may be more acceptable and workable as a solution to the dispute".⁶⁷

(2) JAPAN

In Japan, when an employee is dismissed, the union often takes action against the dismissal. In fact, all prolonged strikes since World War II, without exception, have been caused by unions taking action against dismissals. Such action is taken seriously because dismissal will impose a harsh financial burden on the employee under the system where life-time employment and seniority-based wages operate.⁶⁸ It is not easy for Japanese unions to strike or to maintain strike action since they are enterprise unions and generally not well financed. Thus, the unions have made use of every means to defeat employers' dismissal decisions. The unions often encourage dismissed employees to take civil proceedings. In addition, they themselves often apply to the Labour Relations Commissions for relief on the grounds that the employer has committed an unfair labour

practice.

The unions often request the conciliation or mediation from the LRCs in dismissal disputes in accordance with the provisions of collective agreements which require the parties to resolve disputes through conciliation or mediation before resorting to industrial action. Under the Labour Relations Adjustment Law 1945 ss.12 and 18 the unions, alone, may request conciliation from the LRC but they can only initiate the request mediation either with the employer's agreement or in accordance with a collective agreement. It is also possible for unions to request arbitration under this Act, but this seldom occurs.

In 1995, the LRCs dealt with 501 requests arising out of industrial disputes and slightly more than 15 % of these disputes were concerned with management or personnel matters. 375 of those requests were not withdrawn and of these, 338 were disposed of through conciliation, 28 through mediation and 10 through arbitration. 74.4 % of conciliation cases concerning dismissal disputes resulted in an agreed settlement.⁶⁹

The reason why conciliation is so popular in Japan was explained by Professor T.Hanami in the following terms: "Conciliation is the most informal and closest to the traditional Japanese method of settlement by amicable mutual understanding, while arbitration is the farthest removed. In the case of mediation, the usual practice is

for the LRC to submit its proposal only after both parties have reached an 'understanding'. This is also true in cases where the LRC makes a conciliation proposal. It is often pointed out that the parties rarely refuse to accept an LRC proposal, since this would 'destroy the face' of the commissioners; similarly, the commissioners would not submit a proposal which might be rejected because they do not want to 'lose face'.⁷⁰

6.4. CONCLUDING REMARKS

In the United States, under the NLRA, a union may acquire the status of an exclusive bargaining representative in a bargaining unit through a bargaining representation election. If the union acquires that status, it has the right to bargain exclusively with the employer regarding all employees in the unit whether they are members of the union or not.⁷¹ A collective agreement concluded as a result of such bargaining will be legally binding on both parties. Disputes arising from interpretation of clauses of the collective agreement are dealt with through grievance and arbitration procedures.

The union have owes a duty of fair representation to the employees in the unit while it has an exclusive right to bargain for them.⁷² If an employee complains about his dismissal, the union has to proceed with or present the employee's grievance and, if necessary, bring it to arbitration.⁷³ The union must also represent the employee

adequately at the arbitration hearing.⁷⁴ If the union does not treat the employee fairly during grievance and arbitration proceedings, the employee may not only take action against the union in the courts for a breach of its duty of representation but may also make a charge to the NLRB for the union's unfair labour practice.⁷⁵

Since collective agreements generally require 'just cause' for dismissal, the arbitrator has to do more than merely interpret the meaning of 'just cause. It is arguable that the arbitrator has wide discretion to determine whether the employer had 'just cause' for dismissal. In determining this, the arbitrator inquires into the procedural as well as the substantive aspects of dismissal. When the arbitrator awards a remedy, the court has to enforce his award unless it clearly contradicts either agreed provisions or public policy. Therefore, in the United States, in undertakings where there is a majority union elected as a bargaining representative, all employees in the unit who are covered by a collective agreement may be effectively protected from unjust dismissal.

Neither Japan nor Britain have any equivalent procedures operating within a similar legal framework; they have no systems similar to exclusive bargaining representation, grievance arbitration or the unions' duty of fair representation. In Japan, collective agreements are usually only concerned with union members. Provisions

of collective agreements concerning dismissal are a legally binding on employers and employees, but, since the rule of abusive dismissal makes dismissal without 'just cause' void, the 'just cause' provisions of collective agreements are not very significant legally. The procedural requirements provided for in collective agreements have a significant legal effect only in cases of dismissal.

In Britain, collective agreements apply to all workers irrespective of whether they are union members or not. Collective agreements do not generally contain 'just cause' provisions, but collectively agreed disputes procedures have sometimes been used to regulate dismissal. These procedures may be incorporated into individual employees' contracts. This has not yet had a significant impact on the protection of employees because the law of wrongful dismissal often cannot provide an effective remedy for dismissed employees. Also, since dismissal procedures are important factors in unfair dismissal legislation, whether or not they are collectively agreed, violation of a collectively agreed dismissal procedure is not essential in order to establish the unfairness of the procedural aspect of a dismissal.

In Britain, arbitration clause in collectively agreed dispute procedures are not generally binding in law since neither the union nor the employer usually intend to

give them contractual status. By comparison, in Japan, any collectively agreed term relating to arbitration, mediation or conciliation, is generally binding in law, but it is considered not to be enforceable. All that the injured party may do is claim against the other party for damages on the grounds that the agreement has been broken.

It is interesting that, since American law provides legal enforcement for arbitration clauses as well as arbitration awards, dismissal is regulated through arbitration without the agreement of the employer on each occasion. Arbitration awards are widely published in several labour arbitration reports. Labour arbitrators formed a professional association, the National Academy of Arbitrators in 1947, and annual meetings are held to discuss various problems concerning labor arbitration. In this way, a modest system of precedents for grievance arbitration has been formed although settled cases may have neither binding force nor authoritative force in later cases. It is noticeable that Japanese law does not give settled court decisions binding force in late cases. Therefore, it is useful to compare the principle features of regulation through arbitrators in American with those of British tribunals and Japanese courts.

From the discussion earlier in this chapter, it can be seen that American arbitrators apply a "balancing interests" test to general dismissals and a "last resort"

test to dismissal for incompetence and ill health. Similarly to Japanese abusive dismissal law, American grievance arbitration law makes much of the substantive aspects of dismissal. In this sense, both laws can be called "substance oriented law" compared with the "procedure oriented law" of the British unfair dismissal system.

British private labour arbitration is purely voluntary in nature. Arbitration is initiated by the agreement of both parties on each occasion, and an arbitration award is not legally binding. By comparison, American grievance arbitration is not purely voluntary in that an arbitration clause as well as an arbitration award is enforceable in federal courts. Arbitration awards have been widely published in the United States but not in Britain. Unlike American arbitration decisions, the full reasons are never set out in British arbitration decisions. American arbitration awards are subject to judicial review although, in practice, this is extremely limited. Private arbitration awards may not be reviewed by the courts in Britain.

American grievance arbitration proceedings are far more formal than British arbitration proceedings. An American arbitrator often issues subpoenas for witnesses or documents, and requires witnesses to be under oath. The parties are entitled to cross-examine witnesses. This is not the case in British arbitration proceedings.

British hearings are inquisitorial rather than adversarial. An arbitrator questions both sides and the parties may ask questions of each other but through the arbitrator rather than by cross-examination.

Strict rules of evidence are not applied to either British or American arbitration proceedings, but the burden of proof and the quantum of proof are important subjects discussed among American arbitrators. While the parties are entitled to legal representation in America, the parties are rarely represented by lawyers in British since they must seek permission from the arbitrator and the other party in order to have such representation. For these reasons, it may be said that American grievance arbitration proceedings resemble those of British tribunals or courts more closely than those of British labour arbitration.

Arbitral remedies in Britain and the United States are almost identical. Where the dismissal is found to be unjustifiable, reinstatement is almost always granted by an arbitrator, but often reinstatement is not accompanied by full back pay. This enables the arbitrator to balance the interests of the workers and the employers. In the United States, the amount of back pay may also be reduced in cases where the employee or the union is guilty of unusual delay in seeking arbitration, where the employee had outside wage earnings or failed to seek other employment, or where the employee has a poor attendance

record.

In Britain, an employee may be downgraded, given a formal warning, or suspended as an alternative disciplinary measure awarded by an arbitrator. The same kinds of award are often made by American arbitrators along with many other awards. American arbitrators sometimes order re-employment of the employee in a different job from the former one on the grounds of physical or mental capability, incompetence or disqualification to continue the former job, a need to screen him from contacts with the public, personality conflict or similar problems. Arbitrators also may order reinstatement which is conditional upon action to be taken by the employee, such as resignation from an outside job, furnishment of an indemnity bond, promise of conscientious compliance with company rules, promise to accept counselling from a pastor or some competent social agency.

These differences and similarities between American and British dismissal arbitration have several important implications. In the United States, the time involved in arbitration and the expense of the process are seen as a serious problem by a large proportion of unions and employers. A study found that 42% of the unions considered time to be a serious or potential problem and 33% viewed the expense as a problem or potential problem. The figures for employers were slightly lower with 40% of

the respondents feeling time was a problem and 30% feeling cost was a problem.⁷⁶

J.C.Sigler gave several reasons for the cost and delay of the arbitration process. "Factors affecting both the delay and cost issues include the use of lawyers and advocates, the need for reporters to establish a record, the filing of pre-hearing and post-hearing briefs, the use of experts during the hearing, and the need for written arbitral opinions. Perhaps the single, most important factor responsible for delay is the time it takes the parties to decide on a mutually agreeable arbitrator. The parties will study an arbitrator's past decisions in the belief that doing so will help them predict how the arbitrator will decide the case at issue."⁷⁷

A different study indicates that where mediation is used to settle grievance disputes, the time and costs for each grievance will be reduced to some extent.⁷⁸ Sigler also wrote that mediation was more effective than arbitration because it allowed for a "'win-win' mindset" and that the parties entered the process knowing that no solution will be imposed on them and that any solution arrived at will be one they both can bear.⁷⁹ However, he also stated that "without the threat of arbitration waiting in the wings, the effectiveness of mediation in grievance resolution is dramatically lessened".⁸⁰

These studies and views appear, to some extent, to

illustrate the merits of British arbitration and to support the recent proposal of British academics to increase choice by allowing voluntary arbitration to operate as an alternative option for tribunal claimants.⁸¹

Arbitration cannot work well where the employee does not have the protection of a union. Although some non-unionized companies have voluntarily introduced grievance arbitration systems in the United States, often with the motive of avoiding unionization,⁸² adoption of this system "has been stymied by workers' unwillingness to implement them without the protection of a union and by management's actual unwillingness, in some situations, to accept unfavourable arbitral decisions."⁸³

NOTES

1. See a series of the US Supreme Court's decisions, the so-called Steelworkers' Trilogy: United Steelworkers v. American Manufacturing Co., 363 U.S.564 (1960); United Steelworkers v. Warrior & Culf Navigation Co., 363 U.S. 576 (1960); United States v. Enterprise Wheel & Car Corp., 363 U.S. 596 (1960).
2. W.R.Crace & Co. v. Rubber Workers, 461 U.S. 457 (1983); United Paperworkers International Union v. Misco, Inc., 198 S.Ct. 364 (1987). See T.J.St. Antoine, "Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny," 75 Mich.L.Rev. 1137 (1971).
3. BNA Collective Bargaining Negotiations and Contracts: Vol.2, Basic Patterns/ Clause Finder, 40:1, (Bureau of National Affairs, a loose-leaf bound up to 1987).
4. Ibid., at 40:3-121.
5. Ibid., at 51:1-321.
6. Fairweather, Practice and Procedure in Labor Arbitration (Second ed.), at pp.137-8 (BNA, 1983). For full analysis of the practices of American arbitration, see Fairweather, op.cit. and F.Elkouri & E.N.Elkouri, How Arbitration Works (Fourth ed.), (BNA, 1985).
7. Elkouri, op.cit., at p.244; Fairweather, op.cit., at pp.161-2.
8. Elkouri, op.cit., at pp.305-8; Fairweather, op.cit., at p.168-78.
9. Fairweather, op.cit., at pp.182-7.
10. Ibid., at pp.166-192; Elkouri, op.cit., at p.253.
11. Instrument workers v. Minneapolis-Honeywell Regulator Co., 54 LRRM 2660, 2661 (1963).
12. Fairweather, op.cit., at p.273.
13. Ibid., at pp.252-3.
14. M.Hill, Jr. & A.V.Sinicropi, Evidence in Arbitration, at p.13 (BNA, Wahington, DC 1980).
15. Elkouri and Elkouri, op.cit., at p.622.

16. Fairweather, op.cit., p.255.
17. Elkouri, op.cit., pp.630-3.
18. Ibid., pp.632-4.
19. Ibid., pp.634-5,
20. e.g. American Smelting & Refining Company, 59 LA 722, at 724-5 (1972).
21. Elkouri, op.cit, 641-7.
22. Ibid. at p.649.
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CHAPTER 7

LAW OF DISCRIMINATORY DISMISSAL

This chapter will examine the grounds on which it is unlawful to dismiss employees due to discrimination, the administrative bodies which deal with discriminatory dismissal claims, and the procedures and remedies for discriminatory dismissals in the three countries. This will be done in two separate sections; one concerning dismissal for union-related reasons and the other relating to dismissals on grounds such as race and sex.

7.1. DISMISSAL FOR TRADE UNION MEMBERSHIP AND ACTIVITY

7.1.1. THE UNITED STATES

(1) REGULATION

The National Labor Relations Act 1935 made an employer's discriminatory discharge of an employee for union membership and activities an unfair labour practice and established the National Labor Relations Board, an independent federal agency which has exclusive jurisdiction over charges of unfair labour practices. The application of the legislation is limited, as the Act excludes household servants, agricultural labourers, persons employed by their parent or spouse, persons employed as supervisors and independent contractors as well as all federal, state and local employees from its protection.¹ The NLRB does not have jurisdiction to determine unfair labour practice disputes which do not

affect "interstate commerce" since the Act was enacted on the basis of the "interstate commerce" clause in the Constitution. The Board has developed its own guidelines to determine whether particular employment may affect "interstate commerce".²

(i) Dismissal for Union Membership

Section 8(a)(3) makes it an unfair labour practice for the employer to discriminate against an employee not only by discouraging, but also encouraging, membership of any labor organization with regard to hire or tenure of employment or any term or condition of employment. However, the same section permits an employer to reach a union membership agreement with a union as an exclusive bargaining representative³ under which the employees are required to be members of the union as a condition of employment.

Section 8(a)(3), on the other hand, severely restricts such agreements in the following ways. There should be a grace period (i.e. thirty days and more) before an employee is required to pay periodic dues and initiation fees. An employee should be required to pay such dues and fees only where membership is available to the employee on the same terms and conditions as are generally applicable to other employees. A majority of the affected employees may rescind the union's authority to make such an agreement in a secret ballot conducted under Section 9(e). An employer is not permitted to

discharge an employee for non-membership of the union unless loss or non-acquisition of membership resulted from his failure to pay periodic dues or initiation fees which are uniformly required as a condition of union membership. Employees who belong to bona fide religious organizations with conscientious objections to joining or financially supporting a labour organization may not be required to join or support a union as a condition of employment but are instead required to pay an amount of money equal to union dues and fees to a charitable organization.⁴

Closed-shop agreements (i.e. agreements requiring workers to become union members prior to becoming employed) are therefore illegal. Union-shop agreements (i.e. agreements requiring workers, as a condition of continued employment, to become union members) cannot be enforced beyond requiring the payment of a fee equal to union dues.⁵ Agency-shop agreements (i.e. agreements requiring workers, as a condition of continued employment, either to become union members or to pay the union a service fee) have also been held to be legal. According to the US Supreme Court in NLRB v. General Motor Corp., this is because "it serves, rather than violates, the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bargaining agent."⁶ However, Section 14(b) still permits state law to make the above described union-shop

or agency-shop agreements unlawful. By 1992, a total of 22 states had statutory provisions prohibiting union security arrangements.⁷

(ii) Dismissal for Union Activities

The concerted activities guaranteed by Section 7 have been construed to include strike activities for the purpose of collective bargaining or other mutual aid or protection, and therefore it makes it an unfair labour practice for an employer to dismiss employees for participating in strikes. Although the Act requires the existence of a labour dispute between the striking employees and their employer as an indispensable condition for the protection of strikers, the types of strike that are protected are not prescribed by the Act. The Board and the courts have therefore been left to determine the extent of the protection afforded by this provision. According to their decisions, a strike is unlawful if it has an unlawful object or unlawful means are employed for the strike.⁸

Another important feature relating to dismissal is how the unfair labour practice law treats the employer's refusal to reinstate striking employees upon the termination of the union's strike. In NLRB v. Mackay Radio & Telegraph Company, the U.S. Supreme Court established the following rules:

It is not an unfair labor practice for the employer to displace striking employees with others in order

to carry on his business. If the employer hires those [replacement workers] on a permanent basis, he is not bound to discharge them in order to vacate the places of strikers upon the election of the latter to resume their employment. However, it is unfair labor practice for the employer, in re-employing striking employees to fill vacancies upon the termination of strike, to discriminate against certain of them for the sole reason that they had been active.⁹

Employees who went on strike and who could not be re-employed because of the presence of permanent replacements retain the status of employees. They are entitled to be re-employed in their former positions, as occupied by the replacements, when those positions become vacant. The Mackay ruling cannot apply to strikes caused by employers' unfair labour practices.¹⁰

(2) BURDEN OF PROOF

In cases where an employee claims that his dismissal amounted to unlawful discrimination, the employer's motive is determinative.¹¹ The question of the burden of proof arises when the employer asserts a legitimate business reason for the discharge after the General Counsel has demonstrated that a discriminatory motive existed. The approach of the NLRB is to hold that the employer's assertion will prevail if the discharge would have occurred even in the absence of the protected

activity. This test was adopted in the Wright Line case¹² and is known as the "motivating factor" test.

In the Wright-Line case, the NLRB stated: "First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that the protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."¹³ This decision was later approved by the U.S. Supreme Court.¹⁴

(3) ADMINISTRATION OF THE ACT AND JUDICIAL REVIEW

When an employee, a union or an individual files a charge with an NLRB office within six months following the employer's conduct which is alleged to be an unfair labour practice,¹⁵ an NLRB representative (a field examiner or an attorney) investigates the charge. If the investigation indicates that the charge is groundless, the regional director will generally recommend that the charge be withdrawn. If the charging party does not act on that recommendation, the director will dismiss the charge. On the other hand, if the investigation shows that the charge has merit, the regional director will try to settle the charge by informal agreement before he issues a complaint. The same or other informal means to seek a settlement are also often used after the complaint

has been issued.

Section 10(j) gives the Board the power, upon issuance of a complaint, to petition a federal district court for the appropriate temporary relief. Violation of the order for interim relief may constitute contempt of court.

At the complaint stage, an unfair labor practice hearing is conducted before an administrative law judge who presents findings and recommendations to the Board. At the hearing, a regional field attorney, on behalf of the General Counsel of the NLRB, presents the case against the respondent. The charging party is entitled to participate and supplement the case as presented by the attorney. After the hearing, the administrative law judge issues an order. If he finds a violation, he issues a remedial order. Any of the parties may appeal against the administrative law judge's decision. If the Board adopts it or if no timely appeal is made, then the order becomes the order of the Board.

If the employer refuses to obey an order, the Board has no inherent authority to enforce it. The Board must make an application to the appropriate federal court of appeals under Section 10(e) in order to secure enforcement. The aggrieved party, however, is entitled to petition the appropriate court of appeals for a review of the order under Section 10(f). The only orders which are subject to judicial review are those entered by the

Board, either dismissing a complaint in whole or in part, or finding an unfair labour practice and ordering a remedy. Accordingly, a decision of the General Counsel not to issue an unfair labour practice complaint is not judicially reviewable. A court of appeals may not only grant or deny enforcement of the Board's order but may also modify the order and enforce it as modified or the order may be remitted to the Board. After the court has granted enforcement, the party's non-compliance with the Board's order may constitute contempt of court.

Section 10(e) provides that "the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." Section 10(f) incorporates the same standard in this regard. Concerning the Board's findings on the question of fact, the courts therefore should examine only the records considered by the Board.¹⁶ The courts are also somewhat restricted in their ability to review the Board's decision on matters of law as well as on questions of fact. In Ford Motor Company v. NLRB, the Supreme Court stated that "if [the Board's] construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute."¹⁷

(4) REMEDIES

The Board invariably orders reinstatement of the employee with back pay and issues an order requiring the

employer to cease and desist from similar misconduct in the future. The Board also invariably orders the employer to post a notice in which he states that he has violated the law and will not in future engage in similar misbehaviour.¹⁸ Usually an order of reinstatement provides for "immediate and full reinstatement to the former position, or if that position no longer exists, to a substantially equivalent one without prejudice to seniority or other rights or privileges."¹⁹ If a substantially equivalent position is not available, the employer may be required to offer employment in another area of its operations, or place the employee in question on a preferential hiring list.²⁰

"A backpay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices."²¹ An employee who has been discriminatorily discharged may be paid net back pay which is equal to gross back pay less net interim earnings. "Interim earnings" include not only earnings actually received during the back pay period but also earnings which could have been received through the exercise of reasonable efforts.

7.1.2. JAPAN

(1) REGULATION

In Japan, the Labour Union Law (L.U.L.) as enacted in 1949, provides an unfair labour practice scheme

modelled on that in America. Labour Relations Commission (LRCs) which are administrative committees, were established under the L.U.L. to deal with unfair labour practices. Every aggrieved employee can bring a complaint before the appropriate Prefectural Labour Relations Commission (PLRC). A union can also bring a complaint about its member's dismissal if it can show that it is an independent worker's organisation and has a constitution stipulating certain items as prescribed by the Act. Public employees in the administrative sector are excluded from the application of the L.U.L. although they are also legally protected against dismissal for membership of and activities within their labour organisation. The armed forces, police, prison staff and firemen are not even entitled to freedom of association.²² Persons who represent the interests of the employer are excluded from protection against dismissal for union membership and activities.

An aggrieved employee can bring an action in the courts as well as presenting a complaint to a PLRC. In cases of civil litigation, if the employee proves successfully that the dismissal constitutes an unfair labour practice by the employer, the court will hold that the dismissal is void. The reason why it is void has not been made very clear. Section 27 provides : "Whenever a complaint that an employer has violated the provisions of Section 7 is filed with an LRC, the Commission shall make

an immediate investigation and shall, if it is deemed necessary, hold a hearing to consider the issues regarding the merits of the complaint." Thus, some academics argue that Section 7 only provides the basis for the decisions of the Commission. Others insist that it provides the basis for the decisions of the courts as well as those of the Commission. The Supreme Court once ruled, without giving any precise reason, that a dismissal in violation of Section 7(1) was naturally void.²³ This decision might be understood to mean that the Court took the latter view. However, the former view will lead to the same ruling since Article 28 of the Constitution establishes a mandatory public policy and dismissal contravening this policy is void because of Section 90 of the Civil Code which states that "transactions which are contrary to public policy or good morals are void."

(i) Dismissal for Membership

The Japanese unfair labour practice scheme under the L.U.L. does not provide special protection for the employee's freedom not to associate. Article 28 of the Constitution guarantees only the workers' right to organize since Article 21 also provides for the people's freedom to associate. It has been held that the right to organize is superior to the freedom not to associate, so a union-shop agreement can be concluded effectively between the union and the employer if such a union

represents the majority of the workers in the particular establishment.²⁴ As a result, the courts have held that the employer may dismiss the employee for non-membership in accordance with such a union-shop agreement without abusing his right to dismiss.²⁵

The courts have restricted the legal application of a union-shop agreement to some extent. According to the Supreme Court's decisions, it is not permissible to force employees to join a specific union under the threat of dismissal based on a union-shop agreement if it infringes an employee's freedom to choose the union with which he would like to associate. Therefore, any part of a union-shop agreement which obliges the employer to dismiss the following employees is void under the Civil Code, s.90: an employee who is a member of any other union; an employee who has joined any other union or organized a new union after withdrawal or expulsion from the union which has a union-shop agreement with the employer.²⁶

(ii) Dismissal for Union Activities

Section 7(1) prohibits an employer from dismissing an employee by reason of his having performed the proper acts of a labour union. The words "proper acts" have been construed to include proper strike activities. Unlike American law, Japanese law does not allow the employer to hire permanent replacements when employees go on a proper strike.

(2) BURDEN OF PROOF

Judicial views differs as to whether the employee or his union can win the case when the employer's legitimate business reason for the employee's discharge is proven at the same time as a union-related reason is proved. Some courts have adopted a "but for" test that where there is a reasonable causal relationship between anti-union intention and dismissal, the dismissal constitutes an unfair labour practice even if there exists another legitimate reason for it.²⁷ Yet, many courts and most LRCs have applied a "predominant motive" test, under which the test is that the anti-union motive must be shown to have been the dominant one for unfavourable treatment.²⁸ However, the order and burden of proof has never been articulated by either the LRCs or the courts.

(3) ADMINISTRATION OF THE SCHEME AND JUDICIAL REVIEW

The LRC system consists of the PLRC for the first trial and the Central Labour Relations Commission (the CLRC) for review. Both bodies consist of equal numbers of members representing employers, workers and the public interest. The members representing employers are appointed on the recommendation of an employers' association, the members representing workers on the recommendation of labour unions, and the members representing the public interest from the panel of scholars and men of experience with approval of both of

the other members of the commission. Their status is in principle part-time and most representatives of the public interest who are exclusively given power to make a decision on unfair labour practice are professors of law or labour economics, lawyers or people from similar professions. In contrast to American proceedings, the complaint is initiated and pursued by the dismissed employee, his union, or both throughout the whole LRC proceedings. When a complaint is filed with a PLRC within one year of the conduct by an employer which is alleged to be an unfair labour practice, the PLRCs will open an investigation and, if it is deemed necessary, will hold a hearing. Unlike the NLRB, Japanese LRCs do not have the power to issue subpoenas to every witness or to examine witnesses under oath. LRCs may demand, with the sanction of a fine against failure, the attendance of or the presentation of reports, books or documents from the employer, the employers' organisation, the labour unions or others who may be involved.²⁹

Japanese LRCs do not have the power to petition the courts for temporary relief for dismissed employees between an investigation and a hearing. After the hearing, members representing the public interest of the PLRC will meet in order to make a decision about the complaint. However, prior to this meeting, the members representing the public interest have to ask the opinions of the other members who have attended the hearing.

Complaints may be disposed of on the basis of an agreement between the parties at any of the above stages of the procedure. There are two different types of agreed settlement; that based on a recommendation, made formally, by the Chairman of the PLRC and the other made without such a recommendation. The former is generally considered as an agreed settlement on the premise that the employer has committed an unfair labour practice.

A party which is dissatisfied with the order of the PLRC may, within 15 days of receiving the order, file a request for a review by the CLRC. Where the dissatisfied party does not elect to request a review of the order of the PLRC or where the CLRC issues a reviewal order, the dissatisfied party may petition an appropriate district court for cancellation of the PLRC's or CLRC's order within 30 days of the date of issue of the order. In a case where the employer files such a petition, the court with which the petition is filed may, on appeal from the PLRC or, as the case may be, from the CLRC, issue an order, known as "kinkyu-meirei", requiring the employer to comply in full or in part with the order pending final judgment by the court.

Where an employer has violated the kinkyu-meirei, he will be liable to a non-penal fine not exceeding ¥100,000. In a case of dismissal, this amount will be multiplied by the number of days of non-compliance. The employer cannot appeal against the kinkyu-meirei but may

only request the court to cancel or modify it. The court may, on application from the parties or on its own motion, cancel or modify its kinkyu-meirei. The same rule applies in cases where an employer has violated the order of the LRC which has become irrevocable because he did not file a petition cancelling the order. Where an employer has violated an order of the LRC after all or a part of the order has been upheld by an irrevocable judgment of the court, he will be liable to imprisonment not exceeding one year, to a fine not exceeding ¥100,000, or both.³⁰

The proceedings in the LRC are rather similar to those of the ordinary courts. In judicial proceedings for cancellation of the LRC order, the findings of the LRC with respect to questions of fact do not have binding force and the presentation of new evidence is not restricted. Thus, the courts may rule on the facts for themselves and may decide the appeal for cancellation of the order based on their own view of the facts. This seems to encourage the aggrieved parties to file petitions for cancellation of the order. At the same time, this compels the LRCs to decide the facts as well as their conclusions with a great deal of care.

(4) REMEDIES

If the PLRC finds the complaint to be established, it will issue a remedial order. The remedy is normally an order of reinstatement with back pay and often includes

an order requiring the employer to post a notice in which he states that he has committed an unfair labour practice and will not engage in future similar unlawful activity.

There has been some disagreement between the courts and the LRCs on the question of whether interim earnings should always be deducted from the amount of back pay. The LRCs generally did not deduct the employee's interim earnings from other employment between the time of dismissal and the time of reinstatement. However, the Supreme Court held in the Dainihato Taxi case that an award of back pay not only purported to relieve employees of monetary losses arising from dismissal but was also intended to reduce the discouraging effect on union activity and therefore that interim earnings should not automatically be deducted. The Court continued to hold that if the LRC failed to give reasonable consideration to both purposes of the award, its decision would go beyond the limits of its discretion and would therefore be illegal.³¹ However, since it is not clear how to measure the discouraging effect on union activity, this ruling has not succeeded in settling disputes over the deduction of interim earnings. Many academics argue that the LRC is not a judicial body so it need not take account of provisions in the Civil Code relating to the calculation of civil damages.

7.1.3. BRITAIN³²

(1) REGULATION

There is no global scheme in Britain regulating employers' unfair practices which tend to reject or weaken the union's bargaining power. There exists, however, a scheme to regulate discrimination (i.e. dismissal and action short of dismissal) by employers which infringes the employees' freedom to associate. The law concerning unfair dismissal for a trade union related reason excludes from its application almost all the categories of employee which are excluded by the general scheme.³³ However, under TULR(C)A s.154, unfair dismissal legislation does not exclude an employee who has not been continuously employed for a period of more than two years, or an employee who has attained either the normal retirement age at the undertaking, or the age of 65.

(i) Dismissal for Union Membership

According to TULR(C)A s.152(1)(a) and (c), the British system concerning unfair dismissal for trade union membership protects not only the employee's positive right to associate but also his freedom not to associate. It is unfair for an employer to dismiss an employee who is not a member of a trade union even when there is a union membership agreement.

'Membership of a trade union' within the meaning of Section 152(1)(a) is not construed broadly. In Discount Tobacco and Confectionary Ltd. v. Armitage,³⁴ the EAT construed the meaning broadly to include approaching a

trade union officer to enlist his help in elucidating and attempting to negotiate terms and conditions of employment. However, in Associated Newspapers v. Wilson and Associated British Ports v. Palmer, a majority of the House of Lords held that membership of a union and making use of its services are in some way to be equated.³⁵ Such action may be considered to be taking part in the activities of a trade union, but then it will be subject to the qualification of 'appropriate time', as discussed below.

The British system does not permit an employer to dismiss an employee on the grounds that the employee has refused to make payments as a substitute for becoming or remaining a union member. Thus, Section 152(3) deals with the following reasons as falling within Section 152(1)(c).

"(a) the employee's refusal, or proposed refusal, to comply with a requirement...that, in the event of his not being a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, he must make one or more payments; or

(b) his objection, or proposed objection...to the operation of a provision...under which, in the event mentioned in paragraph (a), his employer is entitled to deduct one or more sums from the remuneration payable to him in respect of his employment."

(ii) Dismissal for Union Activities

Section 152(1)(b) makes it unfair for an employer to dismiss the employee for taking part, or proposing to take part, in the activities of an independent trade union at an appropriate time. 'An appropriate time' means a time which either (a) is outside his working hours; or (b) is a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employers, it is permissible for him to take part in those activities.

Section 152 (1)(b) has also been construed narrowly since the Court of Appeal decision in Carrington v. Therm-A-Star.³⁶ In that case, the union had succeeded in recruiting some 60-65 members out of a workforce of 70. The representatives of those employees asked the union's district secretary to apply to the company for recognition. The company then told the chargehands to select 20 employees for dismissal. However, the industrial tribunal found that what is now TULR(C)A s.152(1)(b) only applied where the reason for dismissal was the activities of the individual worker who had been dismissed. The EAT allowed the appeal. They considered that this was far too narrow a view of the provision. However, the Court of Appeal restored the decision of the tribunal, and held that it would be wrong to construe that provision to include the dismissal of employees not because of anything they had done as individuals, but because the employer took objection to what their union

had done.

The attitude of British law toward dismissal during a strike (including other industrial action) is very different from that of the American system. In the United States as well as in Japan, it is an unfair labour practice for an employer to dismiss employees because they have taken part in a proper strike. By contrast, British unfair dismissal legislation does not give the industrial tribunal jurisdiction to hear a complaint of unfair dismissal where an employer dismissed employees where, at the time of dismissal, the employer was conducting or instituting a lock-out, or the employee was participating in a strike, unless all other employees at the same establishment who were participating in the strike have not been dismissed or the complainant alone has not been re-engaged within three months of the dismissal.³⁷ Thus, the employer can re-engage selectively longer than three months after the dismissals without any fear of facing unfair dismissal complaints. If the dismissals are selective, or only some of the relevant employees are selected for re-engagement within three months, the tribunal will be entitled to consider the case in the ordinary way. Thus, an employer may still be able to show that it was reasonable in all the circumstances to dismiss or not to re-engage some of the strikers.

Moreover, TULR(C)A, s. 237 removes the employee's

right to complain of unfair dismissal if at the time of the dismissal he was taking part in an unofficial strike. For the purposes of this provision, a strike is unofficial unless the employee is a member of a trade union and the strike is authorised or endorsed by that union, or he is not a member of a trade union but among those taking part in the industrial action there are members of a trade union by which the strike has been authorised or endorsed.

(2) BURDEN OF PROOF

As far as the burden of proof is concerned, these provisions have to be read in the context of the general provisions concerning the burden of proof for unfair dismissal under Section 57(1). In ordinary cases, there is no onus on an employee to prove that the real reason for dismissal was his trade union membership or activity. The burden of proof to show the reason for dismissal remains with the employer. This rule can be seen in the judgment of the Court of Appeal in Maund v. Penwith District Council.³⁸

According to Maund, the employer should first produce evidence to the tribunal that appears to show a reason for the dismissal which is permissible under Section 57, and "then the burden passes to the employee to show that there is a real issue as to whether that was the true reason." However, this burden is not the burden of persuasion but only the burden of producing evidence

and "Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal."³⁹

This rule cannot apply to those employees who are excluded from the general scheme because of their length of service or age. In such a case, the employee cannot rely on the burden placed on the employer by Section 57(1) since he, the employee, alone can make a complaint to the tribunal by virtue of Section 64(3).⁴⁰ The onus is therefore on the employee to prove that the reason for his dismissal was related to union membership or activities. Moreover, the employee has to prove that the principle reason for dismissal is his trade union membership or activity if other reasons are put forward. It may be still more difficult for the employee to prove his case where the decision to dismiss was taken by a group of persons.⁴¹

(3) PROCEDURE

Only the dismissed employee himself may make an application to the industrial tribunal for unfair dismissal for trade union membership reasons. The case may be conciliated by ACAS conciliation officers. The tribunal has exclusive jurisdiction over complaints of unfair dismissal for trade union membership reasons. These provisions are the same as in other unfair dismissal cases. However, there is a special provision

for interim relief which applies to the complaints of unfair dismissal for trade union membership reasons and certain other reasons relating to health and safety issues and cases where the employee is seeking to enforce his statutory rights.

An application for interim relief must be made to the tribunal within a period of seven days immediately following the effective date of termination. If the application alleges unfair dismissal because of trade union membership or activities, the employee must present a certificate in writing signed by an authorized official of the independent trade union of which he was, or had proposed to become, a member. No such requirement is necessary where the dismissal is alleged for non-membership of a union. If the tribunal finds that the complaint of unfair dismissal is likely to be successful, and the employer is willing to reinstate or re-engage the employee, then the tribunal makes an order of reinstatement or re-engagement. Otherwise, the tribunal will make an order for the continuation of the employee's contract of employment until the determination or settlement of the complaint. However, even if the employer ultimately rejects an order for the continuation of employment, then the tribunal can only order the employer to pay the employee compensation.⁴²

(4) REMEDIES

The remedies applicable in ordinary unfair dismissal

cases apply equally to cases of dismissal for a trade union-related reason. However, in the latter cases, the employee can obtain more favourable compensation. Firstly, where the employee makes a request for reinstatement or re-engagement but the tribunal refuses to make such an order, the tribunal might make a special award of 104 weeks pay subject to a statutory minimum and maximum (£13,400 - £26,800 in 1995).⁴³ Such an award cannot be made in ordinary unfair dismissal cases. Secondly, where the employer has failed to comply with an order for reinstatement or re-engagement then, unless it is proved impracticable to comply with it, the employee will also obtain a special award of 156 weeks pay, subject to a statutory minimum (£20,100 in 1995).⁴⁴ However, as seen in Chapter 4.1.2, the Court of Appeal has taken a broad view of the concept of practicability in this context.⁴⁵ Thirdly, for a dismissal for trade union membership reasons, the employee must be awarded a basic award, and a week's pay (not less than £2,700 in 1995).⁴⁶

7.2. DISMISSALS BASED ON OTHER PROHIBITED REASONS

The law of discriminatory dismissal on grounds such as race and sex only constitutes a small proportion of the regulations covering discrimination, which themselves apply to a much wider range of circumstances. As a result, most of the case law on such discrimination does

not concern dismissal. Therefore, we will analyse the law as a whole with reference to particular problems that have arisen in relation to dismissal.

7.2.1. THE UNITED STATES

(1) STATUTES AND THE PROSCRIBED REASONS

The United States is a leading country in this field of law. At federal level, the following are the main statutes and statutory provisions prohibiting employment discrimination including dismissal on one or more of these grounds.

--Title VII of the Civil Rights Act 1964⁴⁷--race, colour, religion, sex, pregnancy, childbirth, and national origin.

--The Age Discrimination in Employment Act 1967⁴⁸--age (the prohibitions are limited to individuals aged forty and above.)

--The Civil Right Act 1866, Section 1981⁴⁹--race, national origin, and status as an alien.

--Executive Order 11246⁵⁰-- race, colour, religion, sex, and national origin.

--The American with Disability Act 1990⁵¹--physical or mental handicap.

--the Rehabilitation Act 1973⁵²--physical or mental handicap.

At state level, many state laws (so called "fair employment practice laws") prohibit employment

discrimination including dismissal on the grounds of race, colour, religion, sex, national origin, age (e.g. some laws prohibit discrimination against individuals over the age of 18), physical or mental handicap, marriage and criminal history.⁵³ Many state laws provide protection beyond that provided by federal law and also provide broader coverage. Federal statutes require the complainant to resort to state remedies as a precondition of federal adjudication. In addition, there are individuals who may only resort to the anti-discrimination ordinances of counties or cities.⁵⁴

(2) COVERAGE AND PROCEDURES OF FEDERAL STATUTES

Among the above federal statutes, the most important statutes are Title VII of the Civil Rights Act 1964 (Title VII), the Americans with Disability Act 1990 (ADA) and the Age Discrimination in Employment Act 1967 (ADEA) because of their wide coverage, frequent use, and influence on the judicial interpretation of other anti-discrimination statutes. Our discussion below will be centred on these three statutes.

These Acts do not apply to all workers because they were enacted under the Interstate Commerce Clause of the Constitution. Title VII and ADA only apply to an employer with fifteen or more employees for each working day in each of twenty or more weeks in the current or preceding year, while ADEA only applies to an employer with twenty

or more employees. These Acts apply to private employment as well as employment by states or local governments.⁵⁵ The federal government is specifically exempt from definitions of "employer", but Title VII and the ADA separately prescribe different procedural methods of enforcement for employment discrimination by the federal government.⁵⁶

Title VII and the ADA exclude private membership clubs and corporations wholly owned by Indian tribes.⁵⁷ The provisions of Title VII do not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion.⁵⁸ The courts have refused to apply the ADEA to a religious organization which employs members of a particular religion even though the Act does not have a provision to the same effect as Title VII.

The Equal Employment Opportunity Commission (EEOC), an independent federal agency, was established to administer and enforce the provisions of Title VII.⁵⁹ Its powers and duties extend to interpretation and enforcement of the ADEA⁶⁰ as well as the ADA. The ADA incorporates the enforcement procedures of Title VII and therefore its procedures are the same as those of Title VII. Under these three statutes, an employee must first file a charge with the EEOC, which thereupon hears and investigates the charge. The EEOC has extremely wide powers of investigation. For example, in the case of

Title VII and the ADA, the EEOC can issue subpoenas, examine witnesses, administer oaths and affirmations, receive and copy evidence and in general conduct itself in the same manner as the NLRB. In a case of refusal to obey a subpoena, an appropriate federal district court, upon application by the EEOC, can order the person to appear before the EEOC to produce evidence or give testimony. Failure to comply with such an order may be construed as contempt of court.⁶¹ Moreover, although the EEOC is prohibited from making public any information obtained during its investigation,⁶² it has been held that the EEOC may disclose such information to the complainants and the complainants' attorneys.⁶³

If the EEOC believes a violation has occurred, it must attempt conciliation before it files a suit in its name in an appropriate federal district court. In the case of Title VII and the ADA, the EEOC can institute an action for temporary relief even before its own procedures have been completed.⁶⁴ It is undecided whether complainants can bring such an action prior to the completion of the EEOC procedures.⁶⁵ There are no comparable provisions in the ADEA and therefore an action for temporary relief can only be brought after the EEOC investigation has been completed.⁶⁶

If private parties want to file a suit in the courts after a charge with the EEOC, they must wait 180 days (in the case of Title VII and the ADA) or 60 days (in the

case of ADEA) before doing so to give the EEOC the opportunity to conciliate.⁶⁷ In the case of Title VII and the ADA, the private parties must, in principle, get a "right to suit letter" from the EEOC. The EEOC notifies the charging party of its right to bring an action in a federal district court when it finds that the conciliation has failed and it will not bring suit itself.⁶⁸ The charging party may also get this letter on request 180 days after the EEOC has assumed jurisdiction over his charge. Once a private party files a civil action under Title VII, the ADA or the ADEA, the plaintiff may seek preliminary relief.

(3) CONCEPTS OF DISCRIMINATION

The courts have developed two standards by which violations of Title VII are established and which may also apply to the cases under the ADEA as well as those under the ADA. These are "disparate treatment" (individual or systematic instances of disparate treatment on proscribed grounds) and "disparate impact" (practices that are ostensibly neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by "business necessity").

The standard of proof for "disparate treatment" was first adopted by the Supreme Court in McDonnell Douglas Corp. v. Green⁶⁹ and has been gradually shaped by subsequent decisions of the Supreme Court.⁷⁰ An example

of the application of the disparate treatment framework to an indefinite lay-off which may or may not result in a permanent termination of employment is EEOC v. Jones & Laughling Steel Corp.⁷¹ The plaintiff, a laid off female employee brought a sex discrimination action. It was found that she made out a prima facie case of sex discrimination where she was laid off from a position in which she was satisfactorily performing and was replaced by a male employee, Mr. Musante. However, the defendant company set forth the following non-discriminatory reasons for laying her off: (i) the company had experienced a serious decline in its business, which resulted in a reduction in the number of salaried employees; (ii) the company adhered to the policy of retaining those employees who best met its needs based on the individual's experience, performance, skills and ability; (iii) Mr. Musante was more experienced and qualified than the plaintiff. In reviewing the affidavits, depositions and other evidence, the court found that the defendant had set forth valid, non-discriminatory reasons for its actions. The burden passed to the plaintiff to demonstrate that the reasons set forth by the defendant were a mere pretext for discrimination. However, the plaintiff could point to no specific facts other than her own speculation that showed sex discrimination. The court therefore concluded that the plaintiff failed to prove sex discrimination.

The other form of discrimination is "disparate impact" which was first introduced by the Supreme Court's decision in Griggs v. Duke Power Co.⁷² The court stated: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."⁷³

The disparate impact framework, which was clearly affirmed by Section 105 of the Civil Rights Act of 1991, has been relatively infrequently used in dismissal cases under Title VII. An example of such a case, is Richardson v. Quick Trip Corp. where a black employee who was afflicted with a facial skin condition called pseudofolliculitis barbaes (PFB) was discharged for violation of his employer's no-beard policy. The trial court dismissed the employer's defence that his no-beard policy was justified by business necessity. The court stated: "The defendant can limit the perceived threat of customer dissatisfaction previously discussed by enforcing the no-beard policy against all employees except those who provide a medical certificate showing that they are afflicted by PFB. In addition, those employees who prove that they suffer from PFB, requiring beard therapy, can be required to maintain only short, neatly trimmed beards while on duty. The feasibility of

the implementation of these steps in the United States Army and other public bodies shows that there is no compelling need to enforce the no-beard rule against all."⁷⁴

(4) REMEDIES

As the ADA adopts the remedial provisions of Title VII,⁷⁵ the description of remedies will be limited to Title VII and the ADEA. Reinstatement (or re-engagement) is one of the primary remedies for discriminatory dismissal. Section 706(g) of Title VII provides that "the court may enjoin thepractice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement....with or without back pay....or any other suitable relief as the court deems appropriate." Section Section 7(b) of the ADEA also provides that "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of (the Act), including without limitation judgments compelling employment, reinstatement...or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation, as the case may be, and in addition an equal amount as liquidated damages."

Reinstatement and re-engagement may be granted as a form of equitable relief. The courts have wide discretion as to whether they should order employers to reinstate or

re-engage dismissed employees. This is different from unfair labor practice cases where the NLRB invariably makes an order of reinstatement irrespective of whether the dismissed employee desires to be reinstated or re-engaged.

In spite of the statutory language of Section 706(g), back pay is not refused other than in exceptional cases.⁷⁶ An employee who has been dismissed on the basis of the reasons proscribed in Title VII may be paid net back pay which is equal to gross back pay less net interim earnings (or amounts earnable with reasonable diligence). The courts have applied the same principle of back pay to age discrimination cases. However, in cases under Title VII, back pay does not accrue from a date more than two years prior to the filing of a charge with the EEOC.

In addition to back pay, the courts have held that payment of prospective "front pay" may be ordered as an equitable remedy in cases under Title VII as well as those under the ADEA. According to cases under Section 7(b) of the ADEA, liquidated damages may be awarded in addition to back pay but only in cases of "willful violation." The Supreme Court held that "a violation is 'willful' if 'the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by ADEA.'"⁷⁷ As Section 706 (g) only provides for equitable remedies, in Title VII cases the courts

have refused to award punitive damages as well as damages for injuries such as nervous shock, mental distress and loss of credit. However, this was changed by the Civil Rights Act of 1991 which allows for a remedy of both compensatory and punitive damages "in addition to any relief authorized by Section 706(g)" of Title VII. Recovery of punitive damages is allowed only if the employee demonstrates that the employer discriminated against him "with malice or with reckless indifference to" his protected right. The Act however places an upper limit on "the sum of the amount of compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses and the amount of punitive damages". The upper limit is prescribed on the basis of the number of employees employed by the employer.⁷⁸ Although the remedies under the ADEA are legal as well as equitable in nature, the weight of judicial authority has also denied punitive and compensatory damages except for back pay and front pay. The courts generally have held that those damages would be inconsistent with the statutory scheme of liquidated damages. Finally, it should be pointed out that both Title VII and the ADEA specifically provide for reasonable attorney's fees to be awarded to the successful private plaintiff.⁷⁹

7.2.2. BRITAIN

(1) STATUTES AND THE PROSCRIBED REASONS

In Britain, the list of statutes and statutory provisions regulating dismissal is as follows:

--The Race Relations Act 1976 (R.R.A.)--race, colour, nationality, ethnic or national origin.

--The Sex Discrimination Act 1975 (S.D.A.)--sex and marital status.

--Section 60 of the Employment Protection (Consolidation) Act 1978--pregnancy or childbirth.

--The Rehabilitation of Offenders Act 1974 (R.O.A.)--a criminal conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances. The rehabilitation period depends on the sentence imposed.

-- The Disability Discrimination Act 1995 (D.D.A.), which is not yet in force - disability (i.e. physical or mental impairment) (See below).

An employee who has been dismissed for a reason which is proscribed by the R.R.A. or the S.D.A. may not only seek the remedies which are provided by these Acts themselves but may also seek remedies for unfair dismissal under the EP(C)A. In contrast, the only remedy for an employee who has been dismissed for a reason proscribed by the R.O.A. or Section 60 of the EP(C)A is an action for unfair dismissal. Employees who are excluded from the right to complain of unfair dismissal cannot benefit from the provisions of the R.O.A. Those

who have been excluded because of their length of service or age now qualify to make a complaint of unfair dismissal for pregnancy or reasons connected with pregnancy.⁸⁰

Dismissal because of a "spent" criminal conviction as defined under the R.O.A. is normally regarded as unfair.⁸¹ Section 60 of the EP(C)A provides that a dismissal is automatically unfair if the reason for the dismissal is any of the following: that the dismissed employee is pregnant or any reason connected with her pregnancy; that she has given birth to a child or any reason connected with her childbirth, and the dismissal occurred within four weeks the end of the maternity leave period; that she took, or availed herself of the benefits of, maternity leave; that before the end of her maternity leave period she gave the employer a medical certificate stating that she would be incapable of work after the end of that period; that she has been suspended from work on maternity grounds; that she has been made redundant during her maternity leave period and has not been offered suitable alternative employment. An employee who is denied the right to return to her job after having complied with the requirements of the EP(C)A will be treated as having been dismissed for the purposes of the law of unfair dismissal.⁸² In such cases, however, the dismissal is not treated as automatically unfair.

As far as discriminatory dismissals are concerned,

at present, the Disabled Persons (Employment) Acts 1964 and 1958 only require employers who have more than twenty employees to ensure that three per cent of their employees consist of persons registered as handicapped by their disability. These Acts are replaced by a newly enacted statute, the D.D.A. which makes it unlawful to discriminate against people with disabilities. The D.D.A. exempts employers who employ fewer than 20 workers. This exemption is subject to review after a period of four years. However, the D.D.A. will not come into effect until late 1996. This thesis concentrates on an examination of the present state of the law, and therefore it will not examine the D.D.A. in detail.

(3) COVERAGE AND PROCEDURE UNDER THE S.D.A.
AND THE R.R.A.

By contrast with the EP(C)A, the R.R.A. and the S.D.A. exclude only a small number of categories of employee. For example, the R.R.A. excludes employees of private households.⁸³ Two public agencies were established for the purpose inter alia of assisting with the enforcement of the S.D.A. and the R.R.A.; the Equal Opportunities Commission (EOC) for the S.D.A. and the Commission of Racial Equality (CRE) for the R.R.A. They may conduct formal investigations into cases where they believe that the employer's conduct contravenes the relevant Act. In the course of such investigations, if the EOC or the CRE conclude that a person is committing

an unlawful act, they may issue a "non-discrimination notice" requiring the employer to cease the discrimination or the discriminatory practice which is alleged. The employer must comply with the requirements of the notice unless he appeals to an industrial tribunal within six weeks.⁸⁴ For five years after a "non-discrimination notice" has been served, or after there has been a court or tribunal finding of a contravention of the S.D.A. or the R.R.A., the EOC or CRE has the power to seek an injunction in a County court if the person concerned is likely to commit further acts of unlawful discrimination.⁸⁵ So far as the S.D.A. is concerned, it has been pointed out that the persistent discrimination provisions of sections 71-73 have not been used.⁸⁶ Neither have formal investigations been frequently undertaken.⁸⁷

One reason for this is that before the Commission contemplates a formal investigation, it must have reasonable suspicion of discrimination.⁸⁸ The investigation must be confined to the acts of named persons which the Commission states in the terms of reference. Before issuing a non-discrimination notice, the Commission must give the named persons an opportunity to make oral or written representations.⁸⁹ An appeal may be made against a non-discrimination notice, within six weeks, to an industrial tribunal, which may quash any requirement contained therein. On appeal, it is open to

the person against whom the requirement has been made to challenge the findings of fact on which the requirement was based.⁹⁰

The EOC or the CRE may assist an individual in preparing or presenting his or her complaint to the tribunal.⁹¹ This may be seen as the sole function of the EOC and the CRE in discriminatory dismissal cases. An employee may bring an action against dismissal on the grounds proscribed by the Acts without advance reference to the EOC or the CRE.

The proceedings for individual complaints of discriminatory dismissal based on the S.D.A. or the R.R.A. are similar to those for unfair dismissal under the EP(C)A. A key difference is that in discriminatory dismissal cases, an individual may get assistance from the EOC or the CRE. This assistance may include giving advice, procuring settlement, arranging for assistance from a lawyer, arranging for representation, or any other appropriate form of assistance.

The questionnaire is a new addition to enforcement procedures in industrial tribunal cases under the S.D.A. and the R.R.A. It enables the complainant to obtain information so as to decide whether to institute proceedings and how to organize his or her case if proceedings go ahead. The respondent's reply to it is admissible as evidence in the proceedings and his non-reply may raise an inference that he committed an

unlawful act.⁹²

(4) CONCEPTS OF DISCRIMINATION UNDER THE S.D.A.
AND THE R.R.A.

Both the S.D.A. and the R.R.A. define two different types of discrimination; "direct discrimination" and "indirect discrimination". These may be said to be the British versions of "disparate treatment" and "disparate impact". The Court of Appeal established the guidelines for the burden of proof for cases of "direct discrimination", which is similar to, but more flexible than, the burden of proof in American "disparate treatment" cases.⁹³

Both the S.D.A. and the R.R.A. expressly proscribe what is known as "indirect discrimination." Although there are necessary differences in the precise wording used in these Acts, both define the concept in basically the same way. The R.R.A., for example, defines it as follows:

"(A person discriminates against another if he) applies to that other a requirement or condition which he applies or would apply equally to persons not of the same racial group as that other but--

(i) which is such that the proportion of persons of the same racial group as that other who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it; and

(ii) which he cannot show to be justifiable irrespective

of the colour, race, nationality or ethnic or national origins of the person to whom it is applied; and (iii) which is to the detriment of that other because he cannot comply with it."⁹⁴

The complainant must establish that only a small proportion of the group of persons with the relevant characteristics can comply with a requirement or condition and that the application of that requirement or condition is to his detriment. The burden then passes to the employer to show that such a requirement or condition is justifiable irrespective of the proscribed grounds. According to the Court of Appeal, the word "justifiable" requires "an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition".⁹⁵

There have been a small number of cases in which it has been questioned whether a redundancy agreement that part-time workers should be selected for redundancy before full-time workers constitutes indirect discrimination under the S.D.A. Such agreement may be indirect discrimination. For example, in Clark v. Eley (IMI) Lynock Ltd., the company made 60 part-time women workers redundant. At the same time, 20 full-time men and 26 full-time women were also dismissed for redundancy. The dismissal of the part-time workers was in accordance with the redundancy agreement that part-time workers should be dismissed first. The EAT held that it was

unlawful sex discrimination for an employer to operate a policy of making all part-time workers compulsorily redundant before dismissing any full-time workers.⁹⁶ However, the agreement that part-time workers should be dismissed first does not necessarily have an indirectly discriminatory effect. It is a matter of evidence in each particular case. Moreover, even if the redundancy selection agreement has an indirectly discriminatory effect, the employer may be able to justify it.⁹⁷

(5) REMEDIES

In addition to a remedy under the S.D.A. and the R.R.A., an employee may seek a remedy under the unfair dismissal scheme. There are differences between the remedies for unfair dismissal and those provided for in the anti-discrimination Acts. Under the S.D.A. and the R.R.A., the tribunal can only make a recommendation which may be for reinstatement, while under the unfair dismissal scheme it must consider an order of reinstatement or re-engagement as the primary remedy.⁹⁸ Where the employer fails to comply with an order under the unfair dismissal scheme, the tribunal must make an additional award of between 26 and 52 weeks pay, subject to a statutory maximum (£10,920 in 1995). In contrast, under the S.D.A. or the R.R.A., the tribunal may make an award of increased compensation only if it thinks it just and equitable to do so.⁹⁹ On the other hand, there is no

upper limit on compensation awarded under the S.D.A. and the R.R.A.¹⁰⁰ and monetary compensation for injury to feelings can only be awarded under the S.D.A. and the R.R.A.¹⁰¹ There are no provisions for reductions in damages for the employee's contributory fault in the S.D.A. and the R.R.A.

Neither the S.D.A. nor the R.R.A. contain any detailed provisions stipulating the kinds of damages which the tribunal's award of compensation may cover. Compensation is payable according to the principles which would apply to a civil claim in tort.¹⁰² As a result of the decision in AB v. South West Water Services,¹⁰³ it is now not possible to award exemplary or punitive damages for sex or race discrimination.¹⁰⁴

Finally, it may be appropriate to add here that the Equal Treatment Directive of the EEC [No.76/207] has a great influence on the S.D.A. As far as dismissal is concerned it adds nothing to the S.D.A., but it has been influential in securing a broad approach to the interpretation of the S.D.A. and broad application of the S.D.A. The R.R.A. has also been, although to lesser extent, indirectly influenced by the Directive.¹⁰⁵

7.2.3. JAPAN

(1) STATUTES AND THE PROSCRIBED REASONS

In Japan, the following are the main laws and provisions prohibiting discriminatory dismissal or compulsory retirement:

--The Constitution, Article 14 --prohibiting discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

--The Labour Standard Law (the L.S.L.), Section 3 --prohibiting discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker.

--The Sexual Equality in Employment Law (S.E.E.L.), Section 11 --prohibiting an employer from discriminating against a female worker with regard to the compulsory retirement age and dismissal, from dismissing a female worker by reason of marriage, pregnancy, childbirth or for taking a leave as stipulated in the L.S.L., s.65, and from citing marriage, pregnancy or childbirth as a reason for the retirement of female workers.

--The Leave for Child-care and Family-care Law, Sections 10 and 16 --prohibiting an employer from dismissing an employee on the grounds that she or he applies for or has taken child-care or family-care leave.

Besides the above regulation of dismissal and compulsory retirement, Section 19 of the L.S.L. prohibits the dismissal of employees who suffer from particular physical conditions. It provides that "an employer shall not dismiss an employee injured, or taken ill while on duty during the period of medical treatment or 30 days

thereafter; nor shall he dismiss a pregnant woman or one who has given birth in accordance with the provisions of Section 65 or for 30 days thereafter." Section 65 provides that the employer shall not expect a woman to work for 6 weeks before childbirth (or within 10 weeks in the case of multiple births, etc.) when she requests a rest day or within 8 weeks following childbirth. An employer who dismisses an employee in violation of Section 19 shall be punished with penal servitude or a fine and the dismissal shall be void. 105

In addition, two laws provide special protection for elderly and disabled workers. It seems, however, that these laws do not function as anti-discrimination law. The Law for Employment Promotion of the Disabled 1960 requires all employers with regular employees to ensure that a prescribed percentage of employees are physically disabled persons. A financial burden is imposed on the employer in order to encourage him to achieve the prescribed percentage of employment. The Ministry of Labour collects a levy for employing physically disabled workers from employers who normally employing more than 300 workers. The sum collected from each employer is reduced in accordance with the number of physically disabled persons actually employed by him every year. Employers who exceed the prescribed rate for employing physically disabled or mentally retarded workers will be paid an allowance. The Employment of Older Persons Law

1971 requires employers who have a compulsory retirement age of below 60, to endeavour to set a retirement age of 60 years or above. However, there is no legal sanction against the employer's failure to comply with this law.¹⁰⁶

The most important laws among those listed above are Section 3 of the L.S.L. and Article 14 of the Constitution. S.3 of the L.S.L. provides that "no employer shall discriminate against or in favour of any worker by reason of nationality, creed or social status with regard to wages, working hours and other working conditions." If an employer violates this section, he is punished with penal servitude or a fine. Any measure which has legal effect such as a contract or notice of dismissal shall be null and void. Some criteria or terms for dismissing employees have been held to constitute "working conditions."¹⁰⁷ According to the administrative interpretation,¹⁰⁸ the term "social status" means status gained by birth. Thus, being a bankrupt, having being declared incompetent, or having a criminal record do not constitute "social status."¹⁰⁹ "Social status" also does not include contractual status such as the status of regular employee or temporary employee.¹¹⁰ The term "nationality" is generally construed to include the concept of "race". Cases related to "nationality" are rare. The only case that can be found is one where a man of Korean nationality was dismissed when he said he was

Korean.¹¹¹

The term "creed" has long been held to include both political and religious beliefs.¹¹² Where, in conformity with his creed, an employee engages in conduct which adversely affects the company's order or interests, the employer may take appropriate action to protect his interests. In the Nichibokaizuka case, employees were dismissed for engaging in activity inside the company's factory to extend the sphere of influence of the Communist Party, for inciting other employees not to work, and for informing people inside and outside the company of false facts so as to obstruct the company's operations. The Supreme Court upheld the decision of the Tokyo High Court that the dismissal of those employees was valid because it did not occur because of their political beliefs but for conduct which was serious enough to justify dismissal. It has also been held that where an enterprise operated by an employer is inseparable from a particular ideology or creed, the employer may dismiss a worker for harboring opposing beliefs.¹¹³

Section 3 of the L.S.L. does not proscribe employment discrimination including dismissal on the grounds of sex. An employer can dismiss an employee on the basis of his or her sex without violating the section. It does not necessarily follow that an employer can lawfully dismiss an employee on such a basis, as the

courts have held that dismissal on the grounds of sex as well as race, creed, social status or family origin is unlawful and void. The reasoning which the courts have applied in reaching this conclusion is as follows:

Article 14 of the Constitution provides that "there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." Article 24 provides for people's freedom of marriage. Section 1(2) of the Civil Code provides that "this Code shall be construed from the standpoint of....the essential equality of the sexes." On the basis of these provisions, the courts have held that a public policy has been established which prohibits discrimination on the grounds of race, creed, sex or social status. Therefore, dismissal on such grounds is not only void according to Section 90 of the Civil Code but also constitutes an unlawful act which is actionable under Section 709 of the Code. Due to this provision in Article 14 of the Constitution, the courts have been able to hold that dismissal on such grounds is void even if the dismissal itself cannot constitute "working conditions" under the L.S.L.

The Sexual Equality in Employment Law 1983 was passed in order to establish equal opportunities and treatment in employment for men and women. Section 11 of the Law provides as follows: "(1) An employer shall not treat a female worker differently to a male worker on the

grounds of her sex with regard to dismissal or the age of retirement. (2) An employer shall not make any rule that a female worker shall retire when she marries, gets pregnant or gives birth to a child. (3) An employer shall not dismiss a female worker because she has married, got pregnant, given birth to a child or received leave...(for childbirth)."

It is not expected that the S.E.E.L. will change the substantive law of dismissal which existed before its enactment, as there had previously been a number of judicial decisions which made dismissal or compulsory retirement on the grounds of sex unlawful and void as being in violation of public policy.¹¹⁴

(2) COVERAGE AND PROCEDURES UNDER THE STATUTES

There are no exclusions from the application of Section 90 of the Civil Code. The L.S.L. provides only a few exclusions from the application of Section 3. It excludes domestic employees, employees to whom the Seamen's Law applies, and an employer who employs only those relations living with him as family members or domestic employees. It also excludes workers employed by the national government except for those employed in the operational sector. The S.E.E.L. excludes workers employed by the national government or in local government.

In order to enforce the L.S.L., the inspectors in

the inspection offices in each Prefectural Labour Standards Office have the power to inspect workplaces, examine records and documents, and question the employer or the workers. They also have the authority to exercise the rights of a judicial police officer as provided by the Code of Criminal Procedure. When encountering a contravention of the L.S.L., the employee may complain to the administrative office or inspector. The employer is then prohibited from dismissing or discriminating against the employee who has complained. The Law also established the Director of Women's and Minors' Superintendence Bureau in the Ministry of Labour to oversee an internal subdivision whose task it is to consider labour problems which are peculiar to women and minors.

The S.E.E.L. authorizes the Directors of Women's and Minors' Bureau of all prefectures to provide administrative advice and guidance, or to make recommendations to the parties in disputes concerning sex discrimination in employment where one or both of the parties requests this. The Minister of the Labour Department himself may, if necessary, require the employer to provide a report on a dispute, give administrative advice or guidance, or make a recommendation. The S.E.E.L. set up in each Women's and Minors' Bureau, a Mediatorial Commission for Sexual Equality in Employment which consists of three persons with relevant knowledge and experience. It also

authorizes the Director of the Bureau to refer a dispute to the Commission for mediation where both parties agree to this. The Commission may develop a mediation plan and recommend that the parties should accept it.

Employee may therefore have the easiest access to legal or administrative relief in cases of discriminatory dismissal based on sex. However, since there is no compulsory arbitration for disputes concerning sexual discrimination and no punishment against discrimination, the S.E.E.L. does not provide for effective control of dismissal on the grounds of sex.

(3) CONCEPT OF DISCRIMINATION AND PROOF OF DISCRIMINATION

In contrast to the U.S. and Britain, neither the court nor the legislature has yet developed the concept of "indirect discrimination." Nor have the courts developed any precise method of proving discrimination. The courts will examine all relevant evidence in order to decide whether it is a reasonable inference that an employer intentionally discriminated against employees and whether there was a legitimate reason for the action as alleged by the employer. The courts have also held that the employee must prove that an improper motive was the dominant reason behind the dismissal.¹¹⁵ In practice, the employer always alleges a legitimate reason since the dismissal will be void as an abuse of his right unless he does so. This situation has often made it difficult for employees to prove that dismissal was discriminatory.

(4) REMEDIES

An employee who has been discriminatorily dismissed may seek a court judgment to affirm his status as an employee of the company and to order the company to pay unpaid wages. A discriminatory dismissal is usually considered to constitute a tort. For example, in the Hitachi Seisakujo case, the plaintiff, a Korean worker who was resident in Japan, was dismissed on the grounds of his Korean nationality two weeks after the defendant company sent a notice of hiring. The Yokohama District Court delivered a judgment to affirm his contractual status as an employee of the defendant and to order the defendant to pay unpaid wages with interest and future wages until the finalization of the judgment. In addition, the Court ordered the defendant to pay ¥300,000 as damages for the plaintiff's injured feelings since it found that the plaintiff suffered mental anguish from ethnic prejudice.¹¹⁶

NOTES

1. NLRA, s.2(2) and (3).
2. A.L.Goldman, Labor Law and Industrial Relations in the United States of America, p.276 (Kluwer, Netherlands, 1979).
3. See s.9(a).
4. s.19.
5. Goldman, op. cit., at p.233.
6. 373 U.S. 734, at 743 (1963).
7. W.J.Holloway and M.J.Leech, Employment Termination: Rights and Remedies (2nd ed.), p.294 and Appendix (BNA, Washington, D.C., 1993).
8. Ibid., at pp.996-1026.
9. 304 U.S. 333 (1937).
10. For more recent development of the Mackay ruling, see Belknap, Inc. v. Hale, 463 U.S. 491 (1983) and Trans World Airlines v. Independent Federation of Flight Attendants, 109 S.Ct. 1225 (1989).
11. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967).
12. Wright Line, Div. of Wright Line, Inc., 251 NLRB 1038 (1980).
13. Ibid., at 1089.
14. NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).
15. NLRA, s. 10(b).
16. Universal Camera v. NLRB, 340 U.S. 474, at 487-8 (1950).
17. Ford Motor Company v. NLRB, 441 U.S. 488, at 497 (1979).
18. s.10(c)
19. NLRB Casehandling Manual, para.10528.1.
20. McGuinness and Norris, How to Take a Case Before the

NLRB (5th ed.), p.429 (BNA, Washington DC 1986).

21. Sure-Tan, Inc. v. NLRB, 467 U.S. 177, at 194 (1984).
22. T.Kikutani, Bessatsu Jurist, No.101, p.148 (1989).
23. The Iryohojin Shinkokai case, the Supreme Court in 1968, SMS, Vol.22, No.4, p.845.
24. The proviso to Section 7(1) of the L.U.L.
25. The Nihon Salt Company case, the Supreme Court in 1975, SMS, Vol.29, No.4, p.456. For a review on this case, see F.Komiya, Bessatsu Jurist, No.101, pp.206-7 (1989).
26. The Shinshu Meitetsu Unyu case, the Tokyo High Court in 1969, Kotosaibansho Minji Saibanreishu, Vol.22, No.3, p.381.
27. K.Tanabe, Rodofunso To Saiban, pp.358-9 (Koubundo, Tokyo, 1965).
28. e.g. the Fuji Sangyo case, the Tokyo District Court in 1950, RMS, Vol.1, No.4, p.563. T.Mitsufuji, "Furieki Toriatukai" in Rodoho Koza, Vol.2, p.285 (Yuhikaku, 1956).
29. L.U.L., ss.27(2) and 22.
30. ss.27(8) and 32.
31. The Supreme Court in 1977, SMS, Vol.31, No.1, p.93.
32. For a full analysis of this subject, see S.Deakin and G.S. Morris, Labour Law, pp.629-39 (Butterworths, London, 1995); B.Simpson, "Recent Cases: Commentary - Freedom of Association and the Right to Organize: The Failure of an Individual Rights Strategy, 24 ILJ 235 (1995). However, these analyses are not limited to dismissal cases.
33. See Chapter 3, note 18.
34. [1990]IRLR 15 (EAT).
35. [1995]ICR 406 (HL).
36. [1983]ICR 208 (CA).
37. TULR(C)A, s.238.
38. [1984]IRLR 24 (CA).

39. Ibid., at 26.
40. Smith v. Hayle Town Council [1978]IRLR 423, at 416 (CA).
41. Ibid.
42. TULR(C)A, ss.161-167.
43. ss.157 and 158(1).
44. s.158(2).
45. Port of London Authority v. Payne [1994]IRLR 9 (CA). See Chapter 4.1.2.
46. s.156.
47. 42 U.S.C. ss.2000e-2000e-17.
48. 29 U.S.C. ss.621-634.
49. 42 U.S.C. s.1981. For nearly 100 years it was assumed that this provision was assumed that it was applicable only to governmental action. However, by 1970, the U.S. Supreme Court held that this provision was enacted pursuant to power granted by the Thirteenth Amendment and was therefore applicable to private contracts. See Runyon v. McCrary, 427 U.S. 160 (1976).
50. 30 F.R. 12319.
51. 42 U.S.C. ss.12101-12213.
52. 29 U.S.C. ss.705, 791 and 794a.
53. See BNA Labor Relations Reporter: Fair Employment Practice Manual, 451:102-7 (BNA, Washington DC, 1987).
54. Larson, Employment Discrimination, Vol.3A, s.110.30 (Mathew Bender, New York, June 1989).
55. Pub.L. Nos.92-261 and 93-259. Title VII, s.701(b); ADA, s.101(5); ADEA, s.11(b).
56. Title VII, s.701(b)(1) and s.717(a), (b), (c), and (d); ADEA, s.11(b)(2) and 15(a), (b), (c) and (d); ADA, s.101(5)(b)(i).
57. Title VII, s.701(b)(1) and (2); ADA, s.101(5)(b)(i) and (ii).
58. Title VII, s.702.

59. s.705.
60. Pub.L. Nos.98-532 (1984).
61. s.710.
62. s.709(e)(8).
63. EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981).
64. s.709(f)(2).
65. C.A. Sullivan et al., Federal Statutory Law of Employment Discrimination, pp.374-9 (Michie Company, Indianapolis, 1980).
66. ADEA, s.7(b).
67. Title VII, s.706(f)(1); ADEA, s.7(d).
68. Title VII, s.706(f)(1).
69. 411 U.S. 321 (1977).
70. Texas Depat. of Community Affairs v. Burdine, 450 U.S. 248, at 254 (1981).
71. 627 F.Supp. 126 (W.D.Pa. 1985).
72. 401 U.S. 424 (1971).
73. Ibid., a 431.
74. 519 F.Supp. 1151, at 1155 (1984).
75. M.Ziegler, "Disparate Impact Analysis and the Discrimination in Employment Act," 68 Minnesota L.Rev. 1038 (1984). D.R.Stacy, "A Case Against Extending the Adverse Impact Doctrine to ADEA," 10 Empl.Rel.J. 437 (Winter 1984/85.)
76. Albermarle Paper Co. v. Moody, 422 U.S. 405, at 421.
77. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985).
78. The Civil Rights Act of 1991, s.102.
79. Title VII, s.709(k); ADEA, s.7(b); Fair Labor Standard Act, s.16(b).

80. See Chapter 3-1-2; EP(C)A, s.63(3) as amended by TURERA, 24(3).
81. Property Guards Ltd. v. Taylor and Kershaw [1982]IRLR 175, at 177 (EAT).
82. EP(C)A, s.56.
83. R.R.A., s.4(3).
84. S.D.A., ss.57, 67 and 68; R.R.A., ss.48, 58 and 59.
85. S.D.A., ss.69-71; the R.R.A., ss.60-62.
86. Vera Sacks, 'The Equal Opportunities Commission: Ten Years On', 49 M.L.Rev. 560, at 577 (1986).
87. R. Townshend-Smith, Sex Discrimination In Employment, p.215 (Sweet & Maxwell, London, 1989).
88. C.R.E. v. Prestige Group plc. [1984]IRLR 166 (HL); London Borough of Hillingdon v. C.R.E. [1982]IRLR 424 (HL).
89. S.D.A., s.67(5); R.R.A., s.58(5).
90. C.R.E. v. Amari Plastics [1982]IRLR 252 (CA).
91. S.D.A., s.75; R.R.A., s.66.
92. S.D.A., s.74; R.R.A., s.65.
93. King v. Great Britain-China Centre [1991]IRLR 513 (CA).
94. R.R.A., s.1(1)(b). Similarly, S.D.A., s.1(1)(b).
95. Hampson v. Department of Education and Science [1989]IRLR 69, at 75 (CA).
96. [1982]IRLR 482 (EAT).
97. Kidd v. DRG Ltd. [1985]IRLR 190 (EAT).
98. S.D.A., 65(1)(c); R.R.A., s.56(1)(c); EP(C)A, s.69.
99. S.D.A., s.65(3); R.R.A., s.56(4); EP(C)A, s.71.
100. The Sex Discrimination and Equal Pay (Remedies) Regulations 1993 (SI 1993 No.2798), reg.2 repealed the upper limit imposed by the former Section 65 (2) of the S.D.A. The Race Relations (Remedies) Act 1994 also repealed the upper limit imposed by the former Section 56(2) of the R.R.A.

101. S.D.A., s.66(4); R.R.A., s.57(4).
102. S.D.A., ss.65(1)(b) and 66(1); R.R.A., ss.56(1)(b) and 57(1).
103. [1993]1 All ER 609 (CA). Cf. Alexander v. the Home Office [1988]IRLR 190, at 193 (CA).
104. Deane v. Ealing London Borough Council [1993]IRLR 209 (EAT); Ministry of Defence v. Cannock [1994]IRLR 509 (EAT).
105. See generally S.Deakin and G.S.Morris, op.cit., at pp.480-92.
106. The Kokura Tanko case, the Kokura Branch, the Fukuoka District Court in 1956, RMS, Vol.7, No.6, p.1048.
107. However, the 1995 amendment to that Law will make any agreement on a compulsory retirement age of under 60 void from April 1998.
108. The Mitsubishi Jushi case, the Supreme Court in 1973, SMS, Vol.27, No.11, p.1536.
109. Hakki No.17 (1967).
110. e.g. the Harima Zosen case, the Kure Branch, the Hiroshima District Court in 1959, Rohan Shu, No.6, p.189.
111. The Fuji Juko case, the Utsunomiya District Court in 1965, RMS, Vol.16, No.2, p.256.
112. The Hitschi Seisakujo case, the Yokohama District Court in 1974, HJ, No.744, p.29.
113. The Nichibokaizuka case, the Supreme Court in 1955, SMS, Vol.9, No.12, p.1793.
114. The Nicchu Ryokosha, the Osaka District Court in 1969, RMS, Vol.20, No.6, p.1806.
115. e.g. the Nissan Jidosha Company case, the Supreme Court in 1981, RH, No.360, p.23.
116. The Hitachi Seisakujo case, the Yokohama District Court in 1974, HJ, No.744, p.29.

CHAPTER 8

THE LAW OF DISMISSAL FOR ECONOMIC REASONS

Dismissal for economic reasons is generally regarded as permissible even in those countries which require a valid reason justifying dismissal. Market economies cannot be successful if employers are not permitted to increase and decrease their workforce in response to their changing financial circumstances. However, the employer's financial circumstances generally have nothing to do with the workers, and workforce reduction is not due to the fault of the workers concerned. Dismissal for economic reasons often arises on a large scale and therefore it may seriously affect the social and economic life of society. Even under severe economic conditions, dismissal is not necessarily a just reason for the employer to reduce his workforce. Thus, dismissals for economic reasons should be avoided or minimized not only to protect workers but also to protect social and economic stability. In cases where such dismissals cannot be averted, the effects which loss of employment may have on to the dismissed workers and their families should be minimized. This chapter examines the law regulating dismissal for economic reasons in Japan, Britain and the United States.

8.1. JAPAN

8.1.1. ABUSIVE DISMISSAL

As already seen in Chapter 3.2.2 in this thesis, dismissal is void as an abuse of the employer's right unless it is for a rational reason and is permissible with regard to social norms. The employer's economic position as well as the employee's incompetence or misconduct may constitute a rational reason for dismissal. However, where employees are dismissed for economic reasons, the dismissals are subject to the question of whether they are permissible with regard to social norms. Since there is no fault on the part of the employees in cases of dismissal for economic reasons, the courts have intervened actively in disputes concerning these dismissals.

The courts have gradually developed criteria for determining whether dismissal for economic reasons is valid. The following four criteria have been established judicially although there is no Supreme Court decision directly affirming them. They are (1) whether there was a genuine financial need to reduce the workforce, (2) whether the employer made a reasonable effort to avoid dismissal, (3) whether the employer bargained or consulted with the unions, and (4) whether the standards by which he selected the employees for dismissal were reasonable and whether the employees were in fact selected in accordance with that standard.¹

Regarding criterion (1), the courts decide whether it was probable that the company would have fallen into

severe financial difficulties unless it reduced the workforce. Many decisions have required the company to have had a large deficit.² Some courts required proof that the company was in danger of going bankrupt³ while others in more recent cases have only required the employer to show severe financial difficulties.⁴ For the purpose of determining whether there are financial difficulties, the courts often look into the company's financial documents such as the statement of profit and loss, the balance sheet, dividend rates on stocks, the quantity of orders from customers, and prospects for business recovery. The courts also take into account whether the company stopped recruitment, raised wages, cut overtime work or provided "rest days" around the time of dismissal.⁵

Under criterion (2), the courts look into whether the employer implemented measures such as voluntary retirement, transfer, or reductions in the numbers of temporary or part-time employees. In the Waterman case,⁶ for example, the court held that the dismissal for redundancy was void, partly because the employer did not make an adequate effort to avoid the dismissal. The court stated: "the company did not seriously consider the possibility that it might transfer the employee from the business department, which incurs enormous labour-cost per head, to a department which has a comparatively low labour-cost or that it might transfer him to its related

company. Furthermore, the company did not invite employees to accept voluntary retirement. In these circumstances, it cannot be said that the employer made a reasonable effort to avoid dismissal." It was also stated by the court in the Sumitomojuki Ehime Zousen case⁷ that the company did not make an adequate effort to avoid dismissal since it did not try to reduce the workforce reduction on a planned scale through a longer-term programme of voluntary retirement. In the Nishinihon Densen case,⁸ the court held that the company did not make an adequate effort to avoid dismissal even though it had once invited employees' to take voluntary retirement and also encouraged employees who came under the criteria set up in a collective agreement to retire. The court questioned why the company did not continue to encourage the employees to retire.

There have been several cases in which the courts have held that, if the company dismissed the employees on the grounds that they refused to accept an order of transfer to another company, made in order to avoid dismissal for economic reasons, the dismissal is still regarded as being for economic reasons. Therefore, its validity is judged in accordance with the above four criteria.⁹

A reduction in the number of temporary employees and part-time employees is usually required prior to the dismissal of full-time employees. In the Toyo Seiki

case,¹⁰ the court stated that the rationale for this is that the employment relationship between these employees and the company is temporary and that their contribution to the company is smaller. When a court determines whether temporary employees should be the first to be dismissed, it should consider whether their relationship with the company is genuinely temporary.

Even though legal regulations similar to the law of dismissal have been applied to the termination of the contracts of so-called "regularized" non-regular employees (i.e. employees employed under successive fixed term contracts), they may be treated differently to ordinary regular employees. According to the Supreme Court, this is because those employed under fixed term contracts only have a degree of expectation of continuous employment while those employed under contracts of indefinite duration have a legitimate expectation of lifetime employment.¹¹

Therefore, although many courts have applied four criteria similar to those applied to ordinary regular employees when they determine whether non-renewal for economic reasons is valid, their inquiry for each criterion is less severe for the employer in non-renewal cases than in dismissal cases. Nevertheless, in several cases, the courts have held that a decision not to renew a fixed-term contract with a particular employee is void because there was no genuine financial need for the non-

renewal, there was a lack of reasonable effort to avoid non-renewal, or unreasonable standards were applied for selection.¹²

With regard to criterion (3), if there is a collective agreement which requires the employer to consult with the union prior to dismissal for economic reasons, dismissal without adequate consultation is usually regarded as void. However, there have been many cases in which the dismissal was held to be void because of the employer's failure to consult with the union, even though there was no collective agreement which imposed the duty of advance consultation on the employer.¹³ Among these cases, there are several in which it was held that the employer has to consult with a minor union as well as a major union;¹⁴ cases in which it was held that dismissal was void partly because the employer had failed to consult with employees who were not represented by a union.¹⁵ It has also been held that it was sufficient for the employer to consult with a union which dismissed temporary employees did not belong to;¹⁶ and that, if there was a staff association, the employer had to consult with it.¹⁷ These cases indicate that the employer should explain the following items and should consult with the union or the employees about them in good faith: the necessity for a reduction in the workforce, the time and scale of reduction, the policies and procedures to be observed in carrying out the reduction, the criteria for

dismissal and the application of those criteria.

As to criterion (4), if the employer uses an unreasonable standard or unreasonably departs from the standard used in selecting employees for dismissal, then the dismissal is held to be void. However, since there is no rigid rule such as the American seniority rule or the British rule of "last in first out", the courts have had difficulty in deciding whether a particular standard is unreasonable or not. It is difficult to balance the efficiency of the company's business after dismissal against protection of the lifestyle of the dismissed workers and their families.

Some of the criteria which one court set out as being those which the employer should apply in selecting employees for dismissal were very vague such as the business efficacy of the company, the ability, experience, skill, and professional qualifications of the worker, the worker's family circumstances, and other socially justifiable criteria.¹⁸ Many courts have held that only arbitrary or discriminatory standards are unreasonable. These standards include "a married woman", "a married woman with two or more children", "a married woman and a woman aged twenty or older", etc.

Employers often use the worker's age and length of service as one of the criteria for selection for dismissal. For example, where the employer applied the criterion "persons born before 1925" (in a 1979 case),

"unskilled persons born after 1954" (in a 1980 case), "persons of thirty-six or younger employed after 1968" (in a 1980 case), and "persons of fifty-five or older", the court held that these criteria were not unreasonable. In the Takada Seikoujo case where the employer applied the criterion "persons of thirty-six or younger employed after 1968" to select employees for dismissal, the court stated as follows:

"The criterion used in the present case to select employees for dismissal is not directly related to the company's business necessity or needs for the improvement of its business. It is also a disadvantageous criterion for the company because it makes the company dismiss promising young persons with lower wages. Therefore, it appears that this criterion goes against the purpose of dismissal for redundancy and is unreasonable as a criterion for dismissal. However, although persons with long service and of higher age are costly for the company and are expected to contribute less to the company in the future, they have more skills acquired through experience and are more likely to stay with the company. Moreover, if the company sets up criteria by which it may substantially take into consideration its business necessity, the criteria would be abstract. The more abstract the criteria, the more difficult it is for the company to convince

employees that the criteria are fair and reasonable. In circumstances under which a severe dispute is predicted between the company and the union with regard to the fairness of criteria, it is not unreasonable for the company to set up the above criteria which are objective and without the question of fairness."¹⁹

Although there have been a small number of cases in which the court has held that the criteria to select employees for dismissal are unreasonable, there have been many cases in which the court has held that the dismissal of a particular employee is void because he was selected in contravention of the criteria. This often occurs where the employer set up a criterion related to employees' previous work performance such as "persons not transferable to any suitable position", "persons with low efficiency", "persons with a bad working record" and so on. Since these criteria are apt to be influenced by the employers' subjective evaluation, the courts have been very cautious in holding these dismissals to be valid.

It is useful to mention the relationship between dismissal for redundancy and the transfer of undertakings or amalgamation. If the contracts of employment made between the employees and the previous company are not automatically adopted by the new company, then the contracts of employment will be lawfully terminated and re-employment will be at the discretion of the new

employer. If this is the case, the employees cannot claim contractual status as employees of the new company after the transfer of undertakings or the amalgamation.

However, in Japan, so far as amalgamation is concerned, the Commercial Law provides that the new company acquires the rights and duties of the dissolved company. It is generally accepted that the contracts of employment are also automatically taken over by the new company. If the employer refuses to hire all or some of the employees of the dissolved company, those employees can dispute the refusal as dismissal. In such a case, the law of economic dismissal as discussed above may be applied. In contrast, in cases of transferred undertakings, it is considered that contracts of employment are transferred from the transferor to the transferee only where both the contract of transfer has provided for this and where the employees have agreed that their contracts will be transferred to the transferee. Accordingly, if the transferee does not agree to accept the employees of the transferor, the employees can make no claim against the transferee.

However, in many cases, the courts have regarded the transferor and transferee as having agreed to the transfer of contracts of employment. One of the reasons given by the Osaka High Court is that "the enterprise is not only a private and commercial organization but also an existence of public nature in that it is a legal

existence to be protected in the interest of its owners and management as well as its employees and their families. If the contracts of employment are construed to be transferred with the transfer of the undertaking, the problems which may otherwise arise, e.g. the problem of unemployment, can be avoided, and therefore the transfer of the undertaking will be carried out smoothly."²⁰ There has been one case in which the court held that even if there was a specific agreement between the transferor and the transferee not to transfer the contracts of employment, the agreement would be void because of abuse of their right unless there was a good reason behind the agreement.²¹

8.1.2. NOTICE REQUIREMENT FOR WORKFORCE REDUCTION

Where an employer reduces the workforce by more than 30 employees through dismissal or retirement in one establishment in any one month because of reduction of scale of operations or some other reason, he must give notice to the Public Employment Security Office one month prior to the date of that workforce reduction. However, where the entire reduction does not occur at the same time, notice may be given prior to the date of the last dismissal or retirement. If the employer fails to do this, he can be fined. The purpose of this requirement of notification is to make it easy for the government to take action to promote the employment of separated

workers through employment security agencies and public vocational training agencies. ²²

8.2. BRITAIN

8.2.1. DEFINITION OF "REDUNDANCY"

In Britain, dismissals for economic reasons are mainly regulated by three areas of the law; unfair dismissal legislation, redundancy payments legislation and legislation concerning redundancy notification and consultation. Dismissal for redundancy is defined in Section 81(2) of the EP(C)A for the purposes of unfair dismissal and redundancy payments. It is defined as dismissal which is attributable wholly or mainly to - "(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish."

According to the above definition, dismissal for redundancy arises in the three situations. The first is a cessation of the business for which the employee was employed. It includes not only a permanent cessation but also a temporary one.²³ The second situation is a

cessation of business in the place where the employee is employed. The question here is one of construction of the individual's contract of employment.²⁴ If an employee's contract contains an express mobility clause, his dismissal for refusal to move to a new location is usually not for reason of redundancy. In such a case, the court cannot formally limit its scope by reference to the concepts of good faith or reasonableness.²⁵ However, there has been a case in which the EAT held that a broad mobility clause should be qualified by ascertaining the employee's normal place of work by a factual test instead of relying on a contract test.²⁶ A mobility clause may also be implied into the contract. Such an implied term will normally be qualified in that the mobility requirement will be limited to a reasonable daily travelling distance from the employee's home.²⁷

The third situation is surplus labour due to a reduction in the employer's requirements for employees to perform "work of a particular kind." Therefore, even if the work in question remains to be done, an employee is still redundant if the company has so organized its affairs that fewer employees are required to perform the work, whether this is achieved by improved mechanization, automation, other technical advance or reallocation of functions.²⁸

The application of the phrase "work of a particular kind" is often difficult. For example, in Vaux Breweries

Ltd. v. Ward, the employer decided to relaunch one of their hotels by employing young "bunny girls" in place of older barmaids. The Divisional Court reversed the tribunal's decision that a dismissed barmaid was entitled to redundancy pay and remitting the case, the Divisional Court held that the whole question was: "Was the work that the barmaid in the altered premises was going to do work of a different kind to what a barmaid in the unaltered premises had been doing?"²⁹ The work had changed merely regarding the type of person the employer required to do that work. Similarly, in a case in which a manager of a garage who had been heavily involved in repair work was required to do more paperwork and less repair work, it was held that his work remained essentially the same.³⁰

The question of whether work remains essentially the same or not is difficult. For example, where a general plumber was dismissed on the basis that the employer needed a heating technician who could deal with both electrics and plumbing rather than a general plumber, the dismissal was held to be valid for reason of redundancy.³¹ It has also been held that night-shift work was a particular kind of work as opposed to day-shift work.³² In contrast, where two women who had worked as clerk from 9.00 a.m. to 5.30 p.m. were dismissed for refusal to work shifts of 8.00 a.m. to 3.00 p.m. and 1.00 p.m. to 8 p.m., the dismissal was held not to be for redundancy on the grounds that they would do the same

amount of work.³³

In the above cases, courts and tribunals attempted to identify redundancy by asking whether the requirements of the employer for employees to carry out work of the kind on which the employee was actually engaged had ceased or diminished. This approach has been described as the 'job function' test. There is however a line of cases taking a different approach. It has been described as the 'contract' test since it makes it necessary to show that such diminution or cessation was in relation to any work that he could have been asked to do. For example, in Cowen v. Haden Carrier Ltd.,³⁴ the plaintiff was employed as a regional surveyor and was later promoted to divisional contracts surveyor. His contract of employment provided that he would be required to undertake "any and all duties which reasonably fell within the scope of his capabilities." Due to a reduction in the volume of their business the defendant company decided to abolish the position of divisional contracts surveyor and the plaintiff was made redundant. He argued that he had not been made redundant, since his contractual duties were sufficiently extensive for him to have been redeployed to new work. The Court of Appeal held that the requirement that the employee should perform the duties was, following his promotion, restricted to the duties of a divisional contracts surveyor. Accordingly, the employer had no right to require him to transfer from that work to

assume the job of any one of their quantity surveyors. Since there was a diminution in the particular kind of work that the employee was required to do, the employee was redundant.³⁵

Finally, re-organisation which does not fit the definition of redundancy because there is no diminution in the requirements for employees is also a permissible reason as "some other substantial reason" in unfair dismissal law if there is "some sound, good business reason for it". Cases of dismissal caused by re-organisation were examined in Chapter 3.1.2.

8.2.2. SPECIAL PAYMENTS FOR REDUNDANCY DISMISSAL³⁶

The employer has to give redundant employees "redundancy payments" which are calculated according to their age, length of continuous employment and weekly pay. For the purpose of deciding whether the dismissal is due to redundancy, Section 91(2) of the EP(C)A provides that the dismissal is presumed to be by reason of redundancy unless the contrary is proved by the employer. Even if the dismissal is found to be by reason of redundancy, the employee may lose any right that he would otherwise have to a redundancy payment in the following situation. Where, prior to the dismissal, the employer makes an offer to renew the contract of employment or offers to re-engage the employee and the offer is to take effect either immediately as the old one comes to an end

or no more than four weeks after this date, either where the terms and conditions of the contract would not differ from those of previous contract, or where the former provisions would differ (wholly or in part) from the latter provisions, but the offer constitutes an offer of suitable employment for that the employee, and in either case the employee unreasonably refuses that offer.³⁷ The courts have regarded the 'suitability' of an offer on an objective basis and the 'reasonableness' of a refusal on a subjective basis.³⁸

The redundancy payments law purports to facilitate labour mobility and industrial efficiency by mitigating financial hardship to employees which would otherwise result from the loss of employment.³⁹ However, because of the above definition of "redundancy" and the tribunals' interpretation of it, the employee may not be entitled to a redundancy payment even though he is dismissed as a result of the employer's modernisation of his company.⁴⁰

8.2.3. UNFAIR DISMISSAL

Although redundancy is provided for by the EP(C)A, s.57(2)(c) as a permissible reason, it may be considered to be unfair under Section 57(3) which provides for a general test of fairness. It should first be noted that it is not open to the tribunal to investigate the commercial and economic reasons which prompted redundancy dismissals.⁴¹ What the tribunal has to consider is whether the employer acted reasonably in treating the

financial situation of the company as a reason for dismissal.

The manner in which the tribunals have been required to approach the question of reasonableness under Section 57(3) has been said to be highly controversial.⁴² In Vickers Ltd. v. Smith, the EAT overruled the tribunal's finding that the employer unfairly dismissed the employee when another employee had volunteered for redundancy. The EAT stated a proper test for deciding whether dismissal for redundancy is fair or not. According to the EAT, the tribunal should "ask themselves the question whether it was so wrong that no sensible or reasonable management could have arrived at the decision at which the management arrived in deciding who should be selected...for redundancy."⁴³

However, in Williams v. Compair Maxam Ltd., the EAT took a more interventionist stance. The EAT laid down guidelines which directed the tribunals to consider whether objective selection criteria were chosen and fairly applied, whether the possibility of transfer to other work was investigated, whether employees were warned and consulted and whether the union was consulted as to the most equitable manner of implementing the redundancy.⁴⁴ The guidelines laid down in Compair Maxam seem to have formed the framework for regulating the fairness of dismissal for redundancy since then. Analysis of these guidelines is useful therefore in examining what

factors the tribunals have taken into consideration in determining whether dismissals for redundancy are fair.

Selection Criteria

The employer must "show how the employee came to be dismissed for redundancy, upon what basis the selection was made and how it was applied in practice."⁴⁵ In Compair Maxam, the EAT considered that criteria for selection should be those which "can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service."⁴⁶

The selection criterion of "last in first out" (LIFO) is generally regarded as fair,⁴⁷ although the way in which LIFO is applied sometimes makes dismissal for redundancy unfair.⁴⁸ Factors such as performance and attendance are often used as criteria for selection. In these cases, the tribunals seem to examine the application of those criteria more cautiously.⁴⁹

If the employer uses a unlawful criterion for selection, the dismissal for redundancy is unfair. Thus, TULR(C)A, s.153 specifically provides that the dismissal is automatically unfair where the reason behind selection for redundancy is a union-related reason. However, this, of course, does not mean that reasons for selection other than union-related reasons may not make the dismissal unfair. The reasons which make selection for

dismissal unfair may include all the reasons which constitute discriminatory dismissal.

Warning To And Consultation With Employees

In deciding whether an employer acted reasonably in dismissing employees for redundancy, the tribunals have made much of the procedure which is followed. The dismissal is usually unfair if the employer has not warned and consulted the employee or a recognized union before dismissal. The Industrial Relations Code of Practice 1972⁵⁰ provided that warnings should be given and there should be consultation with employees or their representatives if redundancy becomes necessary. In Polkey v. Dayton Service Ltd., the House of Lords stated that "In the case of redundancy the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimize redundancy by re-employment within his own organisation."⁵¹

However, the House of Lords also stated that "where the employer could reasonably have concluded in the light of circumstances known to him at the time of dismissal that consultation or warning would be have been utterly useless he might well act reasonably even if he did not observe the provisions of the code. Failure to observe the requirement of the code....will not necessarily

render a dismissal unfair".⁵² In Duffy v. Yeomans and Partners Ltd., the Court of Appeal held that the question to be asked in the exceptional case contemplated by Polkey is not whether the employer in fact made a deliberate decision not to consult, but whether a reasonable employer could have decided not to consult in the light of the facts that were known at the time.⁵³

Investigation Of Alternative Employment

It has also been held that dismissal is unfair where the employer had made no effort to find an alternative job for the employee. In Vokes Ltd. v. Bear, the National Industrial Relations Court held that the dismissal was unfair because the company had not made any attempt to see whether the employee could have been employed within its company group. The 1972 Code of Practice also provided that management should offer help to employees in finding other work. The NIRC stated that "The employer had not yet done that which in all fairness and reason he should do, namely to make the obvious attempt to see if Mr Bear could be placed somewhere else in this large group."⁵⁴

Consultation With Unions Or Other Workforce Representatives

Failure to satisfy this requirement may result in the payment of a protective award (see below) and failure to consult with unions can in itself mean that a

dismissal is unfair.⁵⁵ Nevertheless, it is an important factor which the tribunal has to take into consideration in deciding the fairness of a dismissal. In Compair Maxam, the EAT stated that the employer must "consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible."⁵⁶ Consultation with unions does not preclude consultation with individuals.⁵⁷

8.2.4. TRANSFERS OF UNDERTAKINGS⁵⁸

At common law, if the undertaking is transferred from one owner (the transferor) to another (the transferee), there will be a change in the identity of the employer and thereby the contracts of employment made by the transferor will terminate. The transfer constitutes a repudiatory breach of the contract of employment by the transferor, and the employees are entitled to treat it as a wrongful dismissal.⁵⁹ This means that the employees do not have any right to continuing employment. However, under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) which was enacted under the European Communities Act 1972 to implement the provisions of EEC Directive [No.77/187], the contract of employment of any person employed by the transferor shall not terminate, but shall have effect as if made by the transferee [reg.5(1)].

Under TUPE, an 'undertaking' is widely defined as

including 'any trade or business'. It also covers a part of an undertaking.⁶⁰ TUPE applies to a transfer from one person to another of an undertaking situated immediately before the transfer in the United Kingdom or a part of one which is so situated. It applies whether the transfer is effected by sale, by some other disposition or by operation of law. It applies even if the transfer is governed or effected by law, or if the employees in the undertaking work outside the UK, or if their employment is governed by foreign law.⁶¹ TUPE does not apply to a mere transfer of assets or property from one to another employer. There must normally also be a transfer of business goodwill as well.⁶² Nor does it apply if the identity of the employer remains the same. Thus, it does not apply to the acquisition of control in a company by share purchase.⁶³ In deciding whether there has been a transfer of an undertaking, the critical question is whether the undertaking retains its identity and is carried on by the transferee.⁶⁴ The ECJ has held that a company's contracted out canteen service was within the EEC Directive [No.77/187],⁶⁵ and that one individual cleaner employed by a bank was protected by the Directive against dismissal when the bank contracted out its cleaning work.⁶⁶

Where an employee is dismissed either before or after the transfer, the dismissal will be automatically unfair [reg.8(1)]. However, if the dismissal is for an

economic, technical or organizational reason entailing changes in the workforce, for the purpose of Section 57(1) of the EP(C)A, the dismissal will be regarded as having been for a substantial reason of a kind such as to justify dismissal[reg.8(2)]. Where the prospective purchaser insists on the prior dismissal of existing employees, this is not an 'economic reason' within meaning of regulation 8(2), and therefore a dismissal in such circumstances will be unfair.⁶⁷ As regulation 8(2) covers only those economic reasons 'entailing changes in the workforce' as a whole, in Berriman v. Delabole the transferee's decision to cut the wages of the transferor's employees to bring them into line with those of his own employees amounted to unfair constructive dismissal because there was no change in the workforce involved.⁶⁸ The 'economic reason' exception in regulation 8(2) is narrower than the 'some other substantial reason' involving reorganizations. Furthermore, even if the reason for dismissal is considered to be an 'economic reason' under regulation 8(2), it will, of course, remain to be considered whether the employer acted reasonably in the circumstances. The ruling in Berriman raises a difficult question of how long the transferred employees can enjoy such a better protection in relation to unfair dismissal.⁶⁹

Regulation 5(1) only applies to a person employed in an undertaking, or part of one which is transferred, who

was so employed immediately before the transfer [reg.5(3)]. In Secretary of State for Employment v. Spence the employees were dismissed at 11.00 a.m. and the business was sold at 2.00 p.m. the same day. The employees were re-engaged by the transferee, but they sought a redundancy payment from the Secretary of State, as the transferor had gone into liquidation. The employees argued that they were not employed 'immediately before the transfer'. The Court of Appeal upheld the employees' argument that they were not employed 'immediately before the transfer' and therefore that regulation 5(1) did not apply to their case.⁷⁰ This result may, however, make it easy for a transferor without funds to agree with a transferee that employees should be dismissed a short time before transfer, thus leaving them with a worthless remedy.⁷¹

The House of Lords in Litster v. Forth Dry Dock & Engineering Co.Ltd. held that regulation 5(3) should be read as if there were inserted after the words 'immediately before the transfer' the words 'or would have been so employed if he had not been unfairly dismissed in the circumstances described in regulation 8(1)'. This broad interpretation of regulation 5(3) is based on the idea that: "under Article 4 of the Directive [77/187/EEC], as construed by the European Court of Justice, a dismissal effected before the transfer and solely because of the transfer of the business is, in

effect, prohibited and is, for the purpose of considering the application of Article 3(1), required to be treated as ineffective."⁷²

8.2.5. INFORMATION AND CONSULTATION IN ADVANCE OF REDUNDANCIES

The employers' obligation to provide information and consultation in the event of collective redundancies was first introduced in 1975 in order to give effect to EEC Directive [No.75/129].⁷³ However, the original British provisions concerning information and consultation for collective redundancies were condemned by the European Court of Justice in two cases,⁷⁴ on the grounds that the employer's obligation was limited to cases where the employer recognised a trade union for collective bargaining purposes and that there was no procedure for the designation of employee representatives in other circumstances. Accordingly, the Government has issued the Collective Redundancies and Transfer of Undertakings (Protection of Employment)(Amendment)Regulations 1995 to comply with the ECJ's rulings.

An employer who contemplates dismissing employees for redundancy must both notify the Department of Trade and Industry and consult the appropriate employee representatives. "Dismissal for redundancy" for the purpose of this obligation is defined substantially differently than that for the purpose of the law on redundancy payments and unfair dismissal. It is "the

dismissal for a reason not related to the individual concerned or for a number of reasons all of which are not so related."⁷⁵

Where the employer is proposing to dismiss 100 or more employees at one establishment, he must consult the "appropriate representatives" of the employees concerned at least 90 days before the first of those dismissals takes effect. Otherwise, consultation must begin at least 30 days before that date.⁷⁶ In the case of dismissal of less than 100 but 20 or more employees, he should consult within a period of 30 days or less.⁷⁷ This 20-redundancy threshold which was introduced by the 1995 Regulation is estimated to remove the requirement to consult employee representatives from some 96 % of UK business⁷⁸ although it is in the line with the provisions of the EEC Directive [No.75/129].

"Appropriate representatives" are defined as either (a) employee's representatives as elected by them, or (b) representatives of an independent trade union recognized by the employer for employees of that description, or (c) where there are both, either employee representatives or union representatives, as the employer chooses.⁷⁹ "Employee representatives" are defined as either persons elected by employees for the specific purpose of being consulted by their employer about the proposed dismissals, or (b) persons elected by employees other than for that specific purpose, if it is

appropriate for the employer to consult them about the proposed dismissals. In either case, the employee representatives must be employed by the employer at the time of their election.⁸⁰

For the purposes of the consultation the employer must disclose the following information in writing to the appropriate representatives: the reasons for his proposals, the number and description of employees to be dismissed as redundant, the total number of employees of any such description at the establishment in question, the proposed method of selection for dismissal, the proposed method of carrying out the dismissals with due regard to any agreed procedure, the proposed method of calculating the amount of redundancy payments otherwise than in compliance with a statutory obligation.⁸¹

The consultation should include discussion about ways of: avoiding the dismissals reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals. The employer should also undertake to try to reach agreement with the appropriate representatives.⁸² The trade union or the employee representatives or any of them or any employees concerned may complain to an industrial tribunal about an employer's failure to consult it and ask for a "protective award", the effect of which is that the employees concerned have to be paid for the period of the award. The length of the period will be what is

considered to be just and equitable by the tribunal in all the circumstances having regard to the seriousness of the employer's default. This will be (a) up to 90 days where 90 days' minimum notice should have been given, or (b) up to 30 days in any other case in which consultation was required, beginning on the date on which the first of the dismissals to which the complaint relates was proposed to take effect, or the date of the award, whichever is the earlier ⁸³

The purpose of the protective award is not very clear since TULR(C)A, s.189(4)(b) provides that the protected period should be 'just and equitable in all the circumstances having regard to the seriousness of the employer's default'. It has been construed so as to compensate the employees for the employer's failure to consult, not to penalise the employer. However, the tribunal should take account of the seriousness of the employer's default in determining the size of the award. In doing so, the tribunal should consider the default in relation to the employees and not in relation to the appropriate representative who have not been consulted.⁸⁴ In Spiller-French (Holdings) v. USDAW,⁸⁵ the EAT held that compensation should be based not on the loss or potential loss of actual remuneration during the relevant period by the particular employee but on the loss of days of consultation. Therefore, even if the employees have suffered no pecuniary loss, for example, through being

found immediate alternative employment, there may still be a protective award. On the other hand, if the employer has done everything that he can possibly do to find alternative employment for the employees, "the tribunal may well take the view that either there should be no award or, if there is an award, it should be nominal."⁸⁶

The employer is also required to notify the Department of Trade and Industry, in writing, of the proposed dismissals for redundancy at least 90 (or 30) days before the first of those dismissals in the case of dismissal of 100 or more (or 20 or more) employees. If consultation with appropriate representatives is required, the representatives concerned must be identified and the date when consultations began must be stated. Where consultation with the appropriate representatives is required, the employer must give a copy of the notice to those representatives. If the employer fails to give notice to the Secretary of State as is required, he is liable on summary conviction to a fine.⁸⁷

8.3. THE UNITED STATES

8.3.1. COLLECTIVE AGREEMENTS AND ARBITRATION

In the United States, termination of employment for economic reasons often takes place in the form of "lay-off". Lay-off terminates the employment contract on the condition that the employees will be recalled if the

demand for workers is recovered. Lay-off includes a temporary lay-off of a fixed duration, but it usually means an indefinite lay-off which may or may not result in a permanent termination of employment. In the United States, the use of wrongful discharge theory at common law is limited as seen in Chapter 3.3.. Therefore, in many cases, the common law does not provide much assistance to employees who have been discharged or laid off for economic reasons or because of plant closures.⁸⁸

If, however, there is found to be an express or implied promise of discharge only with just cause, then most state courts will seek to ascertain whether the dismissal is in fact for economic reasons. Adverse economic conditions constitute just cause,⁸⁹ but the employer may not use the defence of economic conditions as a pretext for discharge. The defence of economic conditions is reviewable by a jury to determine whether they were the true reason for discharge.⁹⁰

Moreover, where the company's written policy expressly declares criteria for selecting employees for lay-off, there is a possibility that, on the basis of the breach of an implied term or the duty of good faith and fair dealing, a court may award damages to employees who have been discharged in breach of those criteria.⁹¹

Collective agreements between employers and unions have not imposed substantive restrictions on the employers' rights to lay-off.⁹² For example, an agreement

(made in 1985) by Macy's provides that "the necessity for layoffs or reduction of staff shall be at the discretion of the employer." Collective agreements generally provide for a seniority system controlling the ranking of employees for layoff and recall from layoff.⁹³

In addition, the BNA survey found in 1986 that the majority of agreements have provisions for income maintenance during unemployment, including guarantee pay, severance pay or supplemental unemployment benefits.⁹⁴ The supplemental unemployment benefits plans are generally geared to the level of unemployment benefits in a particular state and most of these plans are designed to maintain the laid-off worker's income at 60 to 80 % of his ordinary pay. The BNA survey found that 16 % of agreements contain such plans.⁹⁵ Disputes concerning these provisions may be referred to arbitrators through the grievance process and then may be enforced by the courts.

The company's selection of employees for lay-off is mainly based on seniority, but the company can also take other factors into consideration. An agreement (made in 1987) by the Ford Motor Company provides: "The order of layoff and recall shall be governed first by seniority of employment, and secondly by ability. The Company shall consult with the Union before deviating from strict seniority except where prior consultation is rendered impracticable because of a sudden interruption or

resumption of work." According to the Bureau of Labor Statistics, seniority is the sole criterion in only 25% of the collective agreements. The remaining agreements also provide for other factors to be considered, in particular the ability to meet certain standards of performance.⁹⁶

Seniority is based on how long the employee has been continuously employed in the company, in the particular unit, department or factory, or at the particular job classification. However, most collective agreements provide for "bumping rights", the privilege of a senior person to "bump" a less senior person from another job in the event of lay-off. Thus, bumping rights may result in considerable sifting of job assignments before it is determined which employee is actually left without work in a case of lay-off.⁹⁷

When demand for its production or services recovers, the company will recall laid-off employees. Those employees will be recalled in reverse order of lay-off. Employees' rights to be recalled are normally conditional upon the worker responding to a recall notice within a given number of hours or days. For example, an agreement (made in 1985) of General Foods Mfg. Co. provides that "when after a lay-off an employee fails to reply within three working days from the time a return-to-work notice sent by Certified Mail has been delivered to his last known address recorded in the Personnel records", his

seniority will be cancelled.

Many non-union companies also seem to utilize seniority-based lay-off when it is necessary to reduce their workforce. This is partly because it is necessary for them to demonstrate their fair dealings when undertaking workforce reductions in order to maintain employees' morale or to avoid the possibility of litigation for wrongful discharge or discriminatory discharge. However, in such companies, it is considered that factors other than seniority have a more decisive role in selecting employees for lay-off. Most white-collar employees are exempt from the coverage of collective agreements and voluntary retirement with monetary incentives is often utilised to reduce the number of white-collar employees.

8.3.2. STATUTORY NOTICE REQUIREMENT FOR WORKFORCE REDUCTION

There are statutes concerning workforce reductions due to plant closures or relocation both at federal level and state level. At federal level, the Worker Adjustment and Retraining Notification Act (WARN)⁹⁸ was enacted in 1988. According to the Act, employers who employ more than 100 employees have to give 60 days notice prior to a plant closing or mass layoff to the employees' representatives or, if there is no such representative, to each affected employee and also to state and local government representatives.⁹⁹

The term "plant closing" in the Act is defined as "the permanent or temporary shutdown of a single site of employment...if the shutdown results in an employment loss at the single site of employment during any 30 day period for 50 or more employees excluding any part-time employees."¹⁰⁰; "part-time employees" mean those who are employed for an average of less than 20 hours per week or who have been employed for less than 6 of the 12 months preceding the date on which notice is required.¹⁰¹ The term "mass layoff" is defined as "a reduction in [the work]force which...results in an employment loss at the single site of employment during any 30 day period for...at least 33 percent of the employees...and at least 50 employees...or at least 500 employees (excluding any part-time employees.)"¹⁰² "Employment losses for 2 or more groups at a single site of employment, each of which is less than the above-specified minimum number of employees but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct action and causes" and are not his attempt to evade [his obligation]".¹⁰³

Some courts interpreted the "90-day" provision very narrowly. For example, in Jones v. Kayser-Roth Hosiery, Inc., the court held that in order for any layoffs within

a ninety-day period to be aggregated, none of the layoffs within this period might qualify as a plant closing or mass layoff in itself. If one layoff does, then none of the other layoffs within the same ninety-day period may be aggregated at all.¹⁰⁴ Similarly, in United Electrical Workers v. Maxim, the court held that only layoffs involving less than fifty employees could be aggregated within a ninety-day period, even if the layoff of fifty or more employees did not trigger WARN because the employees represented less than 33 percent of the work force.¹⁰⁵

The term "employment loss" means "(A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period."¹⁰⁶ However, "employment loss" is not experienced where the closure or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closure or layoff the employer offers to transfer the employee to a different employment site under certain conditions prescribed by the Act.¹⁰⁷

The employer may order the shutdown of a single site of employment before the conclusion of the 60 day period if the employer, at the time that that notice would have been required, was "actively seeking capital or business", which would have enabled him to avoid or

postpone the shutdown and he reasonably and in good faith believed that the advance notice would have interfered with or precluded him from obtaining the necessary capital or business.¹⁰⁸ The courts have construed this provision narrowly, as in Local 397, IUE v. Midwest Fastener, Inc., for example, the court held that attempting to sell a plant facility is not "seeking capital or business".¹⁰⁹

The employer may also order a plant closing or mass layoff before the conclusion of the 60 day period if the closure or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time when the notice would have been required.¹¹⁰ In UAW v. Shadyside Stamping Corp., the court held that a major client's "unexpected cancellation of a purchase order" was not reasonably foreseeable within the meaning of this exception.¹¹¹

If the employer fails to give the mandated notification to the employees, they can receive back pay for each day, up to a total of 60 days, that the employer was in violation of WARN.¹¹² Where the employer fails to give the required notice to local government authorities, he can be fined \$ 500 per day (up to a maximum of 60 days or \$ 30,000) unless he pays all amounts owed to aggrieved employees within 3 weeks of the plant closure or layoff order.¹¹³ This suit should be brought in an appropriate federal district court by aggrieved employees, a

representative of employees or an aggrieved local government.¹¹⁴ The court may allow the prevailing party a reasonable attorney's fee.¹¹⁵

It is stated that WARN does not alter or affect any other contractual or statutory rights and remedies available to the employees, except that the period of notification required by WARN shall run concurrently with any period of notification required by contract or by any other statute.¹¹⁶

8.4. CONCLUDING REMARKS

Based on the above examination in this chapter, we may make the following remarks on the features of the law of dismissal for economic reasons in each country.

In the United States, there is very little direct regulation of dismissal for economic reasons although anti-discrimination laws such as Title VII and ADEA often play an important role in the regulation of such cases. (see Chapter 7.1.) In the unionized sector, however, the law indirectly regulates dismissal for economic reasons through arbitrators' interpretations of collective agreements concerning lay-off, recall, work-sharing, and so on. In addition, unfair labour practice legislation sometimes plays an important role. In comparison, the Japanese law of abusive dismissal and the British law of unfair dismissal directly regulate dismissal for economic reasons.

Although both the Japanese law of abusive dismissal

and the British law of unfair dismissal regard dismissals for economic reasons as permissible, there is a significant difference in the interpretation of economic reasons, which permit employers to dismiss employees, between Japan and Britain. British law gives a unique definition to "dismissal for redundancy". According to the definition, it includes dismissals on the grounds of cessation of the whole or part of the business, or of cessation or diminishment of the business requirement for work of a particular kind. Moreover, it is not necessary that the cessation of the business or cessation or diminishment of the business requirement for work of a particular kind is caused by the employer's financial difficulty. The financial difficulties of the employer may also constitute "some other substantial reason" for which an employee may be fairly dismissed. (See Chapter 3.1.2.)

In comparison, Japanese law does not permit dismissal unless the employer proves he has severe financial difficulties. If there is no severe financial difficulty, the employer cannot dismiss the employees on the grounds that he needs to restructure or reorganize his company in order to improve its competitiveness or productivity. Dismissal for positive rationalization not caused by economic problem alone is permissible in Britain but not in Japan.

In Japan and Britain, consultation with unions prior

to dismissal for economic reasons is an important factor which the court or tribunal takes into consideration in deciding whether the dismissal is abusive or unfair. In Japan, dismissal of regular employees is considered to be a last resort to do when an employer resolves the imbalance in the scale of production and the number of employees in a certain undertaking or workplace; and whether the employer has transferred or has considered transferring employees from overmanned workplaces to other places is a very important factor as is whether the employer has implemented voluntary retirement. In Britain, dismissal is normally considered to be unfair where the employer made no effort to find an alternative job for the employee.

When British tribunals inquire about the employer's efforts to avoid dismissal, they only examine it from the view-point of fair procedure. This contrasts with the approach of the Japanese courts who judge whether it was really necessary for the employer to resort to dismissal. It can be said that Japanese courts apply the "last resort" test to dismissals for economic reasons as well as to those for incompetence or illness. (See Chapters 5.)

Certain criteria, especially those which are discriminatory, for selecting employees for dismissal for economic reasons in Britain and Japan, and employees for lay-off in the United States are unlawful. One problem

with Japanese law is the absence of the concept of indirect discrimination. (See Chapter 7.2.3.) Thus, in Japan, it is not illegal for employers to dismiss part-time employees first even if the vast majority of them are female. On the contrary, in Japan, it has been considered that the employer is obliged to dismiss part-time employees before regular full-time employees. The employer is entitled to terminate fixed-term employment contracts upon the expiry of the term before he dismisses regular employees. Part-time employees and employees under fixed-term contracts are therefore the most likely to be sacrificed when there is a need for a workforce reduction. In Britain, workers who have worked for less than two years are not protected by unfair dismissal law. In the United States, the law (i.e. WARN) requiring advance notice for a plant closure and layoff excludes part-time employees for the purposes of determining whether the numerical thresholds for a plant closing and layoff have been reached.

In Japan, courts have been faced with the difficulty of how to deal with the employer's non-renewal of fixed-term contracts in the situation of redundancy especially where such contracts have previously been renewed several times. Courts have generally applied similar criteria to those applied to regular employees, but their inquiry is less severe for the employer than in cases of regular employees. The courts have sought a balance between the

employee's expectation of renewal and the employer's business necessity. British law treats non-renewal of fixed-term contracts very differently from Japanese law, but not every case of non-renewal of a fixed term contract is subject to unfair dismissal protection. An employee is excluded from the protection of unfair dismissal law where the dismissal consists of the expiry of a fixed-term contract of one year or more without its being renewed if before the end of the term the employee has agreed in writing to exemption. (See Chapter 2.4.).

In Japan, there is no general rule such as the "seniority rule" or "last in, first out" in dismissal for workforce reduction. Therefore, the employer often sets ambiguous criteria which are convenient to improve productivity and to reduce labour costs. However, courts have had difficulty in condemning dismissals based on such criteria unless they are clearly arbitrary or discriminatory. As a result, older employees and physically weak employees have often been selected for dismissal. The rationale for selecting older employees is that they are generally highly-paid under the seniority-based wage system prevalent in Japan.

In Britain, "last in, first out" is a redundancy selection criterion commonly found in agreed procedures. Thus, the shorter the continuity of employment an employee has, the more likely he is to be dismissed for redundancy. However, the rule is not always strictly

applied since the selection of employees for redundancy is often subject to other factors such as employees' skill, capabilities, age, health and competence. It appears that tribunals do not interfere with agreed criteria unless they are deemed unlawful. In the United States, collective agreements stipulate rather rigid and precise seniority rules controlling the ranking of employees for lay-off and recall from lay-off. The seniority rule does not however exclusively control lay-off and recall; most collective agreements also permit employers to take the abilities of individual employees into consideration in selecting workers for lay-off. However, since the United States enacted the Age Discrimination in Employment Act, the employer may not select older employees without considering their actual ability. (See Chapter 5.2.1.)

Besides legislation determining the appropriateness of dismissal for economic reasons, laws exist requiring employers to provide notice to the union (in the United States), or employee representatives or union representatives (in Britain), prior to a mass layoff or plant closure (in the United States) or mass dismissal (in Britain) for economic reasons which take place within a relatively short period of time. In the United States, WARN does not oblige the employer to consult the union but only to give advance notice in order to provide the employees with time to adjust themselves to the loss of

employment and to enter job training. In Japan, there is no law which requires the employer to give advance notice or to consult with the union. However, under the law of abusive dismissal, dismissal without adequate consultation with the union is usually regarded as void. Yet, a lack of consultation with the union or employees may only be questioned in an individual employee's claim for abusive dismissal. In Britain, consultation with the union is also an important factor in determining the fairness of dismissal for redundancy. This implies that Japanese law has placed less stress on the collective regulation of redundancy dismissals.

In all three countries, laws exist obliging the employer to give notice to the public authorities, prior to a mass dismissal (in Britain), a mass employment termination (in Japan), or a mass layoff or plant closure (in the United States), for economic reasons which takes place within a relatively short period of time. This may assist the public authorities in providing support for redundant workers in finding an alternative employment.

Any transfer of undertakings may have a great impact on employment security. In Japan, in many cases, the courts have regarded the transferor and transferee as having agreed to the transfer of contracts of employment unless there is a specific agreement between them not to do so. In Britain, this issue is covered by statutory provisions. The contract of employment of any person

employed by the transferor shall not terminate, but shall have effect as if made by the transferee. Where an employee is dismissed because of the transfer, the dismissal will be automatically unfair. There is no comparable statute or case law in the United States. In addition, it should be pointed out that in Britain there is a statutory obligation on employers to provide information to and consult with employee representatives or the union representatives of any of the affected employees prior to the transfer.¹¹⁷

In addition to a decision of the law regulating dismissals for economic reasons, it may be useful to point out some features of the law which aim to avoid such dismissals. In Japan, under the Employment Insurance Law, a number of different type of subsidies are payable to the employer in order to prevent dismissals. For example, an employment adjustment subsidy may be paid to employers who give "rest-days" to their employees, transfer them to other firms temporarily, or make them undergo vocational training, so as to prevent unemployment and stabilize employment. In the case of a small or medium sized company, the subsidy given is equal to two-thirds (three quarters until June 1995) of the amount paid for wages or the "rest-day" allowance. In the case of a large company, the subsidy is equal to half (two-thirds until June 1995) of those amounts.¹¹⁸ This subsidy is financed by the employers' contribution to

employment insurance. The United States and Britain do not have such a subsidy scheme. Such subsidies did exist in Britain from the mid-1970s to the mid-1980s,¹¹⁹ but they would now be unlawful under EC Law.¹²⁰

The American lay-off practice is another device for employment security since it comprises the employee's right to be recalled. During the period of unemployment between the time of lay-off and the time of recall, employees who are union members are often entitled to guarantee pay, severance pay or supplemental unemployment benefits.

NOTES

1. The Supreme Court supported the decision of the Tokyo High Court in which the High Court applied these criteria and decided that the dismissal was valid, See the Asahi Hoikuen case in 1983, RH, No.427, p.63.
2. e.g. the Sumitomojuki Tamashima case, the Okayama District Court in 1979, RHS, No.1023, p.3.
3. e.g. the Hirano Kinzoku case, the Osaka District Court in 1976, RH, No.261, p.49.
4. e.g. the Toyosanso case, the Tokyo High Court in 1979, RMS, Vol.30, No.5, p.692.
5. e.g. the Kyokuto Denki case, the Osaka District Court in 1978, HR, No.310, p.59.
6. The Osaka District Court in 1982, RH, No.396, p.76.
7. The Saijo Branch, the Matsuyama District Court in 1979, RH, No.334, p.53.
8. The Oita District Court in 1984, RH, No.434, p.49.
9. The Osaka District Court in 1989, RH, No.545, p.15.
10. The Nagoya District Court in 1974, RHS, No.861, p.7.
11. The Hitachi Medico case, the Supreme Court in 1986, RH, No.486, p.6. See Chapter 2.
12. The Namiki Seimituhoseki case, the Yuzawa Branch, the Akita District Court in 1983, RH, No.417, p.57; the Sanyo Denki case, the Osaka District Court in 1991, RH, No.593, p.9.
13. e.g. the Radio Chugoku case, the Hiroshima District Court in 1967, RMS, Vol.18, No.1, p.88.
14. e.g. the Yamazaki Giken case, the Kochi District Court in 1979, RH, No.325, p.31.
15. e.g. the Asahi Hoikuen case (supra.) supported this position.
16. e.g. the Akasaka Tekko case, the Shizuoka District Court in 1982, RH, No.392, p.25.
17. e.g. the Omura Nogami case, the Omura Branch, the Nagasaki District Court in 1980, RH, No.242, p.14.

18. The Onoda Cement case, the Ichinoseki Branch, the Morioka District Court in 1968, RMS, Vol.19, No.2, p.522,
19. The Osaka District Court in 1980, RH, No.351, p.37.
20. The Harima Tekko case, the Osaka High Court in 1963, RMS, Vol.14, p.439.
21. The Kyushu Denryoku case, the Fukuoka District Court in 1973, RH, No.172, p.72.
22. The Employment Measures Law of 1966, s.21; the Enforcement Order for the Employment Measures Law, s.4.
23. Gommell v. Darngavil Brickworks Ltd. [1967]ITR 20 (T).
24. Sutcliffe v. Hawker Siddeley Aviation Ltd. [1973]IRLR 304 (NIRC).
25. Express Lifts Co. Ltd. v. Bowles [1977]ICR 474 (ETA).
26. Bass Leisure Ltd. v. Thomas [1994]IRLR 104 (EAT).
27. Courtaulds Northern Spinning Ltd. v. Sibson [1988]IRLR 451 (CA).
28. Sutton v. Revlon Overseas Corporation Ltd. [1973]IRLR 173, at 175 (NIRC). Also see Robinson v. British Island Airways Ltd. [1977]IRLR 477 (EAT); McCrea v. Cullen & Davison Ltd. [1988]IRLR 30 (NICA).
29. [1968]ITR 385, at 388-9 (QB).
30. North Riding Garages v. Betterwick [1967]2 QB 56 (QB).
31. Murphy v. Epsom College [1984]IRLR 271 (CA).
32. Macfisheries v. Findlay[1985]ICR 160 (EAT).
33. Johnson v. Nottinghamshire Combined Police Authority [1974]IRLR 20 (CA).
34. [1983]ICR 1 (CA).
35. See also Nelson v. BBC [1977]ICR 649; Nelson v. BBC (No.2) [1980]ICR 110 (CA).
36. The standard work on this subject is C.Grunfeld, The Law of Redundancy (3rd ed.), (Sweet & Maxwell, London, 1989).
37. EP(C)A, s.82.

38. See Grunfeld's full analysis of the EP(C)A, s.84. C.Grunfeld, op.cit., at pp.164-202.
39. Parker et al., Effects of the Redundancy Payments Act, p.3 (HMSO, 1971). See also, R.H.Fryer, "The Myths of the Redundancy Payments Act", 21 ILJ 1 (1973).
40. See the cases referred in Chapter 8.2.1.
41. James W Cook & Co. (Wivenhoe) Ltd. v. Tipper [1990]IRLR 386 (CA).
42. J.Bowers, A Practical Approach to Employment Law, at p.22 (Finance Training, London, 1982)..
43. [1977]IRLR 11, at 12 (EAT).
44. [1982]IRLR 83 (EAT).
45. Cox v. Wildt Mellor Bromley Ltd. [1978]IRLR 157, at 159 (EAT).
46. [1982]IRLR, at 87.
47. Bessenden Properties Ltd. v. Corness [1974]IRLR 338 (CA).
48. Thomas & Betts Manufacturing Ltd. v. Harding [1980]IRLR 255 (CA).
49. Paine and Moore v. Grundy (Teddington) Ltd. [1981]IRLR 267, at 268 (EAT).
50. This Code was revoked by the Employment Codes of Practice (Revocation) Order 1991, SI.1991/1264.
51. [1988]ICR 142, at 152-3 (HL).
52. Ibid., at 153.
53. [1995]ICR 1, at 7-8 (CA).
54. [1973]IRLR 363, at 365 (NIRC).
55. Forman Construction Ltd. v. Kelly [1977]IRLR 468 (EAT).
56. [1982]IRLR, at 87.
57. Wall's Meat Co. Ltd. v. Selby [1989]ICR 601 (CA).
58. Full analysis of this subject, see J.McMullen, Business Transfers and Employee Rights (2nd ed.),

(Butterworths, London, 1992).

59. Nokes v. Doncaster Collieries [1940]3 All E.R. 549 (HL).
60. reg.2(1).
61. reg.3.
62. Melon v. Hector Powe Ltd. [1981]ICR 43 (HL).
63. Systems and Instruments Ltd. v. Grist [1983]IRLR 391 (EAT).
64. Spijkers v. Gebroeders Benedik Abbatoir CV, Case 24/85 [1986]CMLR 296 (ECJ).
65. Rask v. ISS Kantineservice A/S, Case 209/91 [1993]IRLR 133 (ECJ).
66. Schmidt v. Spar- und Leihkasse der fruheren Amter Boedesholm, Kiel und Cronshagen, Case 392/92 [1994]IRLR 302 (ECJ).
67. Wheeler v. Patel [1987]ICR 631 (EAT).
68. [1985]ICR 546 (CA).
69. S.Deakin & G.S.Morris, Labour Law, at p.472 (Butterworths, London, 1995).
70. [1993]ICR 508 (CA).
71. Apex Leisure Hire v. Barratt [1984]ICR 452 (EAT).
72. [1989]IRLR 161, at 172 (HL).
73. This directive was amended by Directive No.92/56/EC.
74. Case-382/92 and Case-383/92, Commission of the European Communities v. United Kingdom [1994]IRLR 392 (ECJ).
75. TULR(C)A, s.195(1).
76. s.188(1A).
77. s.188(1).
78. M.Hall, "Beyond Recognition?: Employment Representation and EU Law", 25 ILJ 15, at p.17 (1996).
79. TULR(C)A, s.188(1B).

80. s.196(1).
81. s.188(4).
82. s.188(2).
83. ss.189-192.
84. Talke Fashion v. Amalgamated Society of Textile Workers and Kindred Trades [1977]IRLR 309 (EAT).
85. [1979]IRLR 339 (EAT).
86. Ibid., at 342.
87. ss.193-194.
88. D.Collins, "Plant Closings: Establishing Legal Obligations", 40 Lab.L.J. 67 (1989).
89. e.g. Bhogaonker v. Metro Hospital, 417 N.W.2d. 501 (Ct.App.Mich. 1987).
90. Zoerb v. Chugach Electric Association Inc., 798 P.2d 1258, at 1263 (Sup.Crt Alas. 1990).
91. Kern v. Levolar Lorentzen, Inc., 899 F.2d 772, at 776 (9th Cir. 1990).
92. H.Oaklander, "United States" in E.Yemin (ed.),Workforce Reductions in Undertakings, p.189 (ILO, 1982).
93. BNA Collective Bargaining Negotiations and Contracts: Vol.2, Basic Patterns/ Clause Finder, p.75:1 (BNA, a loose-leaf bound up to 1987).
94. Ibid., at p.53:1.
95. Ibid., at p.53:1 and p.53:601.
96. US Department of Labor, Bureau of Labor Statistics, Bulletin 2013 (Washington DC, 1979).
97. A.L.Goldman, Labor Law and Industrial Relations in the Uited States of America (2nd ed.), p.259 (Kluwer, 1984).
98. 29 U.S.C., ss.2101-9. See J.F.Feyers, "Notice of Plant Closing and Layoffs - Significant Cases Developments", 18 Emp.Rel.L.J. 299 (1992).
99. s.2102(a).

100. s.2101(a)(2).
101. s.2101(a)(8).
102. s.2101(a)(3).
103. s.2102(d).
104. 748 F.Supp. 1276 (E.D.Tenn. 1990).
105. 5 IER Cases 629 (D.Mss. 1990).
106. s.2101(a)(6).
107. s.2101(b)(2).
108. s.2102(b)(1).
109. 763 F.Supp. 78 (D.N.J. 1990).
110. s.2102(b)(2)(A).
111. 6 IER Cases 1640 (S.D.Oh. 1991).
112. s.2104(a)(1).
113. s.2104(a)(3).
114. s.2104(a)(5).
115. s.2104(a)(6).
116. s.2105.
117. TUPE, regs.10 and 11.
118. E.I.L., ss.62 and 68.
119. E.Szyszczyk, Partial Unemployment: the Regulation of Short-Time Working in Britain, pp.123-34 (Mansell, London, 1990); M.Freedland, "Leaflet Law: The Temporary Short Time Working Compensation Scheme." 9 ILJ 245 (1980).
120. The Treaty of European Union 1992, Art.92.

- PART IV -

CHAPTER 9

COMPARATIVE ANALYSIS(1) -

EFFECTIVENESS OF THE THREE SYSTEMS

We have examined the present state of dismissal law in the three countries primarily in relation to how the law regulates dismissals, the procedures for complaints of unjust dismissal and the remedies provided for the unjustly dismissed. Differences and similarities in the present laws on dismissal in the three countries have also been identified. This chapter examines how effectively the employee is protected by the law of dismissal in each of the countries.

9.1. THE METHODS OF REGULATING DISMISSALS

As far as the regulation of dismissals is concerned, it can fairly be said of the three different systems that the Japanese is the most effective. That system regulates ordinary dismissals in general through the law of abusive dismissal which in principle covers all employees. The burden of proof for abusive dismissal is fairly favourable for the employee. The courts restrict managerial prerogative by applying a "balancing interests" test and "last resort" test when they determine whether the dismissal is abusive or not. With regard to redundancy dismissals, only the Japanese courts require the employer to prove severe financial difficulty

in order to justify dismissal. This is linked to many of legal measures which provide for employers to be subsidized when experiencing economic difficulties so that they may retain their employees.

The Japanese law of unfair labour practice prohibits not only dismissals for union activities but also those for conducting or taking part in industrial action. Japanese law also prohibits a fairly wide range of discriminatory dismissals for non-union related reasons. In particular, it prohibits dismissals on the basis of inherent social status or origin. Dismissals are also subject to regulation through collective agreement provisions and provisions of shugyo kisoku. A clear inadequacy in the employee's protection in Japan, is that system fails to recognize the concept of 'constructive dismissal'.

Although the British system is generally less adequate than the Japanese system, unfair dismissal legislation also regulates dismissal in general. The common law on wrongful dismissal is only concerned with violation of due notice requirements in an ordinary case. The problem with British unfair dismissal legislation is that it provides a wide range of exclusions from its application. Most importantly, it excludes workers who have been continuously employed by the same employer or an associated employer for less than two years. Moreover, British tribunals have applied an objective "no

reasonable employer" test to determine whether the dismissal is fair or unfair. In fact, more attention is devoted to the procedural than the substantive aspect of dismissal. Therefore, tribunals do not go very far in challenging managerial prerogative.

The factor which is most favourable to the employee's protection in the British system is the concept of 'constructive dismissal' provided for under unfair dismissal legislation and the provisions on redundancy payments. A similar concept is also found in American law mainly in relation to anti-discrimination laws, where it is arguable that a remedy is available for an employer's discriminatory conduct resulting in termination of employment even though the termination itself may not constitute a dismissal. Thus, in the US, 'constructive discharge' is only concerned with what remedy may be awarded.

Furthermore, it may be said that, compared with the requirements of the American 'constructive discharge', those of the British 'constructive dismissal' are more objective. Little use is made of subjective criteria such as "deliberate" and "intolerable". In addition to this, British tribunals are willing to recognize a wide range of implied obligations owed by the employer towards his employees. Therefore, it appears to be easier for the employee to prove 'constructive dismissal' in Britain than 'constructive discharge' in America.

In comparison with the Japanese and British systems, the American dismissal regulation scheme is very fragmented and its coverage is far from comprehensive. Overall, it provides less beneficial protection for the employee. However, two areas of American dismissal regulation are commendable; regulation of discriminatory dismissals, and regulation of dismissal through collective agreement. The American system covers the widest range of discriminatory dismissals among the three countries. Notably, it is the only system to prohibit discriminatory dismissals on the basis of age and physical or mental handicap although Britain will do this when the DDA comes into force.

As far as regulation through collective agreements is concerned, most such agreements provide for a grievance procedure and arbitration. Regulation of dismissal by arbitrators is comprehensive. Arbitrators generally apply a "balancing interests" test and a "last resort" test similar to those applied by Japanese courts when determining abusiveness of dismissal. There is also reluctance to recognize the voluntary nature of an employee's resignation. In this way, a wide range of employment terminations may be regulated.

Unlike British arbitration, American arbitration is compulsory, and American unions are legally obliged to treat all employees within their own bargaining units properly with regard to grievance procedures and

arbitration, under the duty of fair representation. If they fail to do so, they will be subject either to lawsuits in federal courts or unfair labour practice charges to the NLRB. Thus, some 15 percent of non-agricultural workers are legally well protected by collective agreement.

Finally, it should be noted that since there are a number of anti-discrimination Acts prohibiting many forms of discriminatory dismissal and that the common law of wrongful dismissal based on tort or contract theories is undergoing rapid development. Employers may therefore in practice have considerable difficulty in effecting dismissals which may not be challenged by employees, especially at managerial level.

9.2. REMEDIES AND PROCEDURES

9.2.1. RE-EMPLOYMENT AND MONETARY REMEDY

In Britain, despite the statutory preference for re-employment of employees who succeed in claiming of unfair dismissal, several empirical studies show that that remedy is not frequently ordered by British tribunals. Less than 2 % of the total number of successful applicants in unfair dismissal cases result in awards of re-employment. The reason why tribunals infrequently award re-employment is related to the statutory provision which requires them to take account of (a) whether or not the employee desires to be re-employed, (b) the practicability of re-employment, and (c) the employee's

contributory fault.¹

With regard to criterion (a), the majority of complainants prefer monetary compensation to re-employment. A survey revealed that only 24 % of the complainants surveyed indicated a preference for re-employment on their application form.² As far as criterion (b) is concerned, tribunals have construed "practicable" in a very strict sense. Thus, in determining whether re-employment is practicable, they have taken the following factors into consideration; non-existence of the employee's previous job or other suitable job, the likelihood of personal friction between the employee and supervisors or other employees, the size of the company, distrust between the employee and the employer, the employee's ability or health, and so on.³ What is interesting is that in some cases tribunals made much of the close personal relationship in a contract of employment. This can be seen as the surviving influence of the refusal to order specific performance in cases of wrongful dismissal at common law.⁴ Furthermore, in Port of London Authority v. Payne, the Court of Appeal discouraged the tribunal from making a re-employment order by holding that the tribunal must give due weight to the commercial judgment of the employer on the practicability of compliance with the re-employment order.⁵ With regard to criterion (c), an empirical study concluded that a tribunal's finding of the employee's

contributory fault in excess of 60 % was unlikely to be compatible with an order re-employment, while one of 20 % or less would be compatible.⁶

It is believed that only re-employment may relieve the unjustly dismissed employee from non-economic damages which are caused by his exclusion from the workplace community: loss of his social status, self-esteem and friendship. Monetary compensation does not relieve the employee from having to adjust to a new job and workplace community.⁷ Viewed in this light, it is not appropriate for the tribunals to have construed the practicability of re-employment as to criterion (b) in a very strict sense since it ought to be the employer who bears the risk resulting from an unfair dismissal. Furthermore, it is questionable whether criterion (c) is a reasonable requirement, especially taking account of the fact that the tribunal has to apply the "no reasonable employer" test to determine the fairness of dismissal.

As a result of the application of the above criteria, most successful applicants for unfair dismissal are awarded monetary compensation. However, Dickens et al found that the average amount of compensation was around 8 times the average weekly wage in 1978 while less than half of those compensated found a new job within three months in the same year.⁸ This is partly because the amount of compensation is subject to various statutory deductions and partly because of the

tribunals' impossible guesswork in determining how long the employee is likely to be unemployed and the rate of pay which might be expected in a new job.

Under the present legislation, a basic award may be reduced because of an unreasonable refusal of an offer of reinstatement or the employee's conduct before dismissal. A compensatory award may be reduced because of the employee's contributory fault to his dismissal and his failure to take reasonable steps to get another job or otherwise minimize the loss. The latter reduction is the same as the duty of mitigation at common law. As result of these reductions, the employee may sometimes not receive any compensation at all. This is the case especially where the dismissal was unfair only because the employer did not follow fair procedures.

Furthermore, British tribunals do not normally order the employer who has lost his case to pay the successful employee's costs although the employee, his witness and a representative may be paid a small allowance for travel expenses or other expenses.⁹ Therefore, the compensation which the employee may finally receive is much less than what he loses. Thus, it can be said that a monetary remedy is inadequate to compensate the unfairly dismissed employee and that at the same time it does not have a great deterrent effect on unfair dismissals.

In Japan, remedies for abusive dismissal may be given by ordinary courts. Although employees may request

a provisional disposition from the courts as a temporary measure to preserve their contractual status with pay, they may eventually be forced to pursue litigation for a formal judgment. The formal judgment confirms the employee's contractual status as an employee and orders the employer to pay wages and other benefits which would have been paid, but for dismissal, between the date of dismissal and the date of judgment. Although the employee's interim earnings are deductible from back-pay, the court may deduct only those that exceed 60% of the employee's "average wages" defined in the L.S.L., s.12.¹⁰ Moreover, the court ordinarily orders the company to pay interest on damages.

Since such an order confirms that the employee retains his previous contractual status, the employer is legally obliged to continue paying him until the time of future lawful termination, even if he does not actually allow the employee to work. In this sense, it can be said that the Japanese law of abusive dismissal provides the most complete remedy for unjust dismissal. As discussed below in connection with the LRC's order of re-employment, a court's confirmation of the employee's contractual status appears to be more effective than the LRC's re-employment order, at least in so far as to make the employer re-employ the employee.

However, since the Japanese court holds that abusive dismissal is automatically void, if the employee gives up

the chance of returning to his previous employment, he will not be able to claim damages for wages which would have accrued, but for dismissal after that time. This means that the employee does not have the option of claiming damages other than those for injured feelings, lawyer's fee and the like. The court's devotion to the declaration of voidance of abusive dismissal is closely related to its recognition of lifetime employment practice although the practice is, in fact, often not quite practicable in smaller companies and has become less widespread, as seen later in Chapter 11. Indeed, it is very difficult for a dismissed employee to find another or equivalent job, since the labour market among larger companies is restricted due to the lifetime employment practice and it is difficult for a dismissed employee to be hired as a regular employee by another company equivalent to the former employer. Even if he is successfully employed by such a company, it cannot be expected that he would attain a wage and status equivalent to those of the former employment because of seniority-based pay and promotion systems accompanying the lifetime employment. Furthermore, since employees' job descriptions are generally vague under the lifetime employment practice, it is comparatively easy for a court to confirm the contractual status of an employee without inquiring whether the dismissed employee's previous job or other suitable employment remains available.

However, for employees in smaller companies who are not adequately covered by the lifetime employment practice, the declaration of avoidance of an abusive dismissal appears to be less attractive. Nor is it helpful for employees who do not wish to return to their former employers. Nevertheless, under the present law, these employees must resort to the declaration of avoidance of abusive dismissal. In fact, out of 46 reported cases in 1991 in which the court decided on the effectiveness of a dismissal, only 10 cases concerned companies employing more than 2,500 employees. The majority of the remaining cases concerned small and medium size employers with less than 300 employees, including three companies having less than 15 employees.

9.2.2. PROLONGED PROCEEDINGS

It is quite clear that this remedy is far less accessible to the employee than the remedy awarded by British industrial tribunals because litigation in Japanese courts is a very technical, costly and time-consuming business. Firstly, stamp tax must be paid in order to file a suit.¹¹ The amount of stamp tax is calculated as approximately 1/200 of the cost of the claim.¹² Lawyers are not obliged to comply with the standard fee table issued by the Japanese Bar Association, with the result that their fees are quite unpredictable.¹³ Unlike the US, there is no special

device such as contingency agreements for lawyer's fees. Nor may the employees have any expedient temporary relief other than a provisional disposition.

The average duration of the district court proceedings in formal civil trials concerning labour disputes is about 15 months,¹⁴ but that this is probably above average for trials of dismissal cases. In fact, even the provisional disposition proceedings which are frequently disposed of on the basis of ex parte testimony may take more than one year.¹⁵ The average duration of British tribunal proceedings is much shorter than that for Japanese court proceedings although the former has rapidly increased. The Department of Employment found that the time which elapses between application and hearing was less than half a year in 54% of all applications heard before the tribunals in 1993/4 and 79% of decisions were promulgated within 5 weeks of the hearing in the same year.¹⁶ Prolonged court proceedings in Japan make people feel that the court is inaccessible. This situation is well reflected in polls conducted by the Japan Culture Conference. They show that the reasons why people do not want to go to court are that doing so is "too costly" (64.6 %), "too time-consuming" (54.0 %), and also dislike of "the win-or-lose" solution (26.3 %).¹⁷ The infrequency of dismissal litigation seems mainly due to the inaccessibility of the court. If the accessibility of proceedings were to be improved, the

number of dismissal litigation cases would greatly increase. In 1993, the Tokyo Metropolitan Department of Labour Affairs received 7,341 requests from employees and 1,995 from employers for guidance on problems relating to dismissal.¹⁸ It is clear that it is very difficult for an employee to file a suit with the court without any financial and strategic assistance from a union or other supportive body.

Furthermore, prolonged proceedings also mean that the practicability of re-employment is made less likely even though a formal judgment may be the only way to force the employer to re-employ. This view is suggested by a British survey concerned with the reasons why employees do not opt for re-employment as a remedy for unfair dismissal. Their reasons are: irreconcilable destruction of the relationship with the employer (27.7 %), hatred of the company (21.7 %), fear of possible victimization (21.7 %), disappearance of the job (8.4 %), possession of another job (3.6 %), the employer's clear refusal to re-employ (3.6 %), likelihood of company closure (2.4 %), and other (4.8 %).¹⁹ The number of reasons may increase and become more serious as time passes. In fact, statistics concerning agreed settlement of civil litigation in Japan suggest that the parties should consider compromise rather than litigation. The proportion settled by agreement in 1995 was 44.6 % of the applications for provisional disposition and 44.5 % of

those for formal judgment.²⁰

Although there is no formal investigation into how court cases of abusive dismissal are finally settled, a common belief among Japanese academics is that many cases have been settled by a financial agreement at some stage after the formal judgment of a district court. Many employees know that the employer may retaliate against them, perhaps by refusing promotion, or transferring them to a disadvantageous post or location. Also, many employers do not want to spend time and money on litigation which might damage the company's image and the morale of other employees. A British study suggests that the re-employment remedy is not always effective even under much less prolonged tribunal proceedings. According to Williams and Lewis, of 304 employees reinstated between 1972 and 1977, 150 had later resigned or been lawfully dismissed and 154 were still employed at the time of the survey in 1977.²¹ Although it may be considered that over 50% is an acceptable record weighed against the normal labour turnover rate, it should be taken into consideration that reinstatement is very restricted in Britain because of the statutory provisions and tribunal practice. Yet, it would be too hasty to conclude that most Japanese employees do not eventually return to their previous employment and remain there long term, as the matter depends to some extent on the employee's loss and gain calculation.

In this connection, one again has to take account of the Japanese lifetime employment practice. Larger companies generally employ those who have just left school, college and university and train them by transferring and promoting them within the company according to business needs. Thus, employees typically remain with the same company until that company's mandatory retirement age. The existence of this practice may be confirmed to some extent by a comparison of the employees' average length of service with one company in Japan and Britain. The statistics revealed by OECD in 1984 indicate that 21.9% of workers in Japan, 12.1% in Britain and 9.9% in the United States had been employed for 20 years or more, and that the worker's average length of service is 11.7 years in Japan, 8.6 years in Britain and 7.2 years in the United State.²² Accordingly, compared with British employees, Japanese employees may have a stronger desire to return to their previous employment and to stay there longer.

Although in theory the law of abusive dismissal covers all employees, in reality the expense and duration of court proceedings clearly means that it is often meaningless and impossible for employees in smaller companies to pursue a suit in the courts for abusive dismissal. This is because they are probably low paid and unorganized employees who are able to find alternative jobs, equivalent to their former ones. with relative

ease.

9.2.3. THE DETERRENT EFFECT OF REMEDIES

The American law of wrongful discharge which has recently developed also contrasts strongly with the above-described British and Japanese laws in that monetary compensation may only be awarded on the basis of the common law theories of either breach of contract or tort. American laws of wrongful discharge provide the dismissed with a much better financial remedy. The damages for breach of an express or implied contract terminable only for a good cause usually equal the employee's lost earnings plus legal interest for a reasonable period although they are subject to reduction in accordance with the duty of mitigation. For example, a Californian appellate court supported a trial court decision that the employee would have completely and profitably performed his managerial services for an additional 10 years after discharge.²³ In cases of the tort of wrongful discharge, the courts have not only awarded compensatory damages but have often also made additional awards for the employee's emotional distress and anguish as well as loss of professional reputation.²⁴ Furthermore, the courts often award punitive or exemplary damages the amount of which is determined at the jury's discretion and is therefore often very generous. An attorney in San Francisco reviewed 51 wrongful discharge cases which went to trial in California between October

1979 and January 1984 and found that the dismissed employee won in 36 cases. The award for general damages averaged \$178,000 in the winning cases, of which 19 cases contained punitive damages averaging \$533,300.²⁵

This remedy, however, faces problems with technicalities, time and expense, although the accessibility of American courts may be much better than that of Japanese courts since lawyers are plentiful and contingent fees are available to employees for litigation. Since the duty of mitigation applies to monetary remedy, the amount of compensation payable to employees is probably not as generous as is widely believed, except in cases of tortious wrongful discharge where the jury decides the level of punitive damages. This tortious wrongful discharge is attractive to employees. Professor West pointed out that unionized employees argued that damages in tort were a more adequate remedy than reinstatement and therefore federal law deferring to collective agreements should not preempt state law. She suggests that a sufficient monetary detriment may deter that employer's unjust dismissal more effectively than re-employment.²⁶ From this point of view, the Japanese law of abusive dismissal may also have a deterrent effect on unjust dismissal. However, it can fairly be said that the British law of unfair dismissal does not provide an adequate monetary detriment to deter unjust dismissal - except in cases where the minimum

basic award and special award apply.

Despite Professor West's remark, it is undeniable that the American arbitration award of re-employment is superior to these alternative remedies with respect to both accessibility and remedial practicability. The arbitration is quicker and imposes no expense on the grievant. According to an investigation carried out by Malinowski in 1981, of the 73 employees whose reinstatement awards were reported between September 1977 and October 1978 in the BNA's Labour Arbitration Reports, 10 had not returned to work and 16 had subsequently resigned, retired, or been discharged or placed on lay-off. Of the 47 employees who were still at work during the survey, 22 had returned to work without back pay. In addition, of the 63 employees who returned to work following arbitrators' awards, only 5 were subsequently discharged.²⁷

However, another study indicates that the time between request and decision is approximately 200 days according to the figure of the American Arbitration Association and 260 days when using that of the Federal Mediation and Conciliation Service.²⁸ These delays are relatively low in comparison with the time spent on the NLRB proceedings, but they are not in comparison with compared to the time spent on British tribunal proceedings. The success of re-employment by arbitrators does not stem from the swiftness of settlement alone,

other factors must also be considered. Arbitration awards are based on a process agreed on by the parties. Arbitrators may flexibly balance the interests of the employee, the employer and the union by awarding different types of re-employment. Furthermore, union power normally backs up an arbitration award of re-employment.

9.2.4. DISCRIMINATORY DISMISSALS

As far as dismissal for a union-related reason is concerned, reinstatement is a necessary remedy because the employer may destroy the union by dismissing all employees who are members. British unfair dismissal law applies basically the same principle to dismissals for union-related reasons as are applied to ordinary unfair dismissals. However, interim relief may be awarded and increased compensation including a special award of two or three years' pay are available.

In comparison, both Japanese LRCs and the NLRB of the US, in ordering re-employment, do not take account of the employee's contributory fault. Nor do they consider the practicability of re-employment as British tribunals do. While the Japanese LRC does not order re-employment when the employee does not want it, the NLRB makes such orders irrespective of the employee's wishes. Nevertheless, an American investigation found that 32 % of employees who were offered re-employment by the NLRB

or the federal courts under the unfair labour practice legislation between 1970 and 1979, refused to accept re-employment offered by the employers.²⁹ In Japan, as discussed below, there are many cases where the employees agreed not to return to their previous employment at all although they were awarded re-employment by the LRCs.

The reasons why employees do not go back to their previous employment in American unfair labour practice cases are somewhat similar to those in British unfair dismissal cases as described above. In the US, the reasons are fear of company backlash (88 %), possession of a better job (39 %), company's pay offer (16 %), hatred of the company (15 %), and other (15 %).³⁰

The above statistics indicate that the employee's fear of possible victimization is a much more important factor in the US than in Britain. This seems to be due to the fact that NLRB orders are only related to dismissals for union-related reasons. The employers who dismiss the employees for union-related reasons usually tend to have a persistent anti-union sentiment. Nevertheless, in cases of dismissals for union-related reasons, the reinstatement may be the most desirable remedy for the employees and his union because the employer's eventual purpose of dismissal is generally to exterminate the union organisation within his company. This may explain why the NLRB as well as the LRCs almost automatically order re-employment as a remedy and why the proportion of

employees who are willing to return to their previous employment is much higher in the US than in Britain. In fact, Dickens et al found that, even in Britain, 44 % of unfair dismissal complainants who were union members sought re-employment compared with 14 % of non-members.³¹

In the US, as in Britain, it is considered that re-employment may become more difficult the further the decision-making process is prolonged. In the US, Professor Chaney wrote: "Where reinstatement was ordered within two weeks, the success rate was 93 percent. As the length of time increased, the number of employees accepting reinstatement declined dramatically to five-percent after six months. Acceptance after one or two years was extremely small."³² Similarly, P.Lewis in Britain found that many employees (71.5 % - national figure) chose re-employment as a preferable remedy at the application stage of unfair dismissal procedure but far fewer employees (20.9 % - postal respondents in Northern Region) chose re-employment at the hearing stage.³³

From this point of view, the British unfair dismissal procedure is better than the NLRB procedure of the US. The median number of days to lapse between filing a charge and the issuance of the Board's decision was 535 in 1993 and 738 in 1994 for all types of unfair labour practices.³⁴ Even if the employee is willing to take his previous job back and successfully obtains an order of re-employment which can be enforced through an order of a

federal court, it may be very difficult for the employee to return to the job and remain there for long because of dislike of the employer and distrust of unionists. Professor Chaney's investigation revealed that, of the 72 employees who were offered re-employment during the years of 1971-72, 54 had terminated employment or had been discharged by January 1973, and eventually 68 had left within eight years.³⁵

The effectiveness of the Japanese LRC order, which is enforceable either by a non-penal fine or, if finalized by the court's decision, by imprisonment or a fine, appears not too different from that of the NLRB order. For example, an administration officer of the Ehime Prefectural LRC found in 1961 that, of the five employees who had once been re-employed by order of the EPLRC during the previous 10 years, four had retired or had been dismissed within two months and only one had remained in the same company for two years after re-employment.³⁶

Furthermore, this author discovered the following facts when he conducted an investigation in 1985 into the settlement of all of the cases (61 cases) in which the PLRCs issued re-employment orders between January 1980 and December 1984.³⁷ (i) Only 4 PLRCs' orders of re-employment were finalized without request of review or petition of cancellation, and half of them were complied with by the employer. (ii) Nobody had actually been re-

employed in 18 cases; all or some of the employees had actually been re-employed in 28 cases, and, in 14 cases, either disputes were still unsettled or results were unknown. (iii) After filing with the Central Labour Relations Commission (CLRC), the employer made an agreed settlement through the CLRC's conciliation stage in 15 cases. (iv) In at least 34 cases, the employees filed in the courts either for a formal judgment or a provisional disposition. (v) In the majority of cases in which the employees filed for a formal judgment, the employees actually regained their employment; i.e. 7 out of 10 cases. (vi) In cases where the parties reached an agreed settlement, the agreement typically included the following; (a) that the employer should retract his notice of dismissal, (b) that the employee should voluntarily retire on the day of settlement, and (c) that the employer should pay a certain amount of money to the union which thereafter might be distributed among the dismissed employees.

This serious failure to re-employ is, to some extent, caused by the administrative structure and legal rules concerning unfair labour practice. In Japan, with regard to the same dismissal for a union-related reason, the employee may file a suit with a court for a formal judgment confirming his contractual status or a provisional disposition as well as filing an unfair labour practice complaint with the PLRC.

Moreover, the employer may either request a review of the PLRC's order by the CLRC or file a petition with a court for cancellation of that order. An order of the CLRC may also be subject to judicial revocation. Furthermore, in deciding whether to revoke the order, the court may itself establish the facts independently of the findings of the LRC. Also, there is a strong tendency for courts to intervene excessively in the reasonableness of the LRC decisions. It is often pointed out that the courts do not have confidence in the decision-making ability of the LRCs because the representatives of public interest who make decisions on unfair labour practice are not always experienced in the legal profession and work only on a part-time basis.

These administrative, structural and legal rules may easily undermine the authoritative power of orders made by the PLRC. As a result, the PLRCs tend to be very careful in establishing the facts and in reaching decisions. This may make the PLRC procedure more legalistic and lead to prolonged proceedings. In fact, the average number of days between bringing a complaint and issuance of the PLRC's decision was 1,056 in 1995 and 1,211 in 1994. Also, the average number of days between the disposition of a request for review and actual review by the CLRC was 1,388 in 1995 and 1,476 in 1994.³⁸

However, another explanation behind the ineffectiveness of the PLRC's re-employment orders is

that the cases in which such orders are made are exceptionally devastating ones. In fact, according to national statistics, most of the unfair labour practice cases brought against employers are disposed of informally. In 1995 (and in 1994), for example, approximately 22.9 % (22.0 %) of the total number of applications to the PLRC were disposed of by remedial orders, about 9.9 % (5.7 %) were dismissed, about 11.0 % (16.3 %) were withdrawn, and about 55.9 % (55.6 %) were disposed of by agreement between the parties. (TABLE 3.)

TABLE 3. DISPOSITION OF UNFAIR LABOUR PRACTICE COMPLAINTS IN THE PLRC

	1981	1982	1993	1994	1995
Withdrawals	60 (11.3 %)	82 (16.1)	68 (21.1)	43 (16.3)	32 (11.0)
Agreement	331 (62.1)	318 (62.5)	179 (55.6)	147 (55.9)	164 (56.2)
Dismissals	13 (2.4)	12 (2.3)	7 (2.2)	15 (5.7)	29 (9.9)
Remedial Orders	129 (24.2)	97 (19.1)	68 (21.0)	58 (22.0)	67 (22.9)
Total	533 (100.0)	509 (100.0)	322 (100.0)	263 (100.0)	292 (100.0)

Sources: Chuo-Rodojiho, Nos.700, 893 and 910.

According to an investigation carried out by the Kyoto Prefectural LRC (KPLRC) in 1979, of 76 employees who were re-employed in their previous employment either by order of the KPLRC or agreed settlements arising out of the conciliation process between 1956 and 1975, 9 employees had stayed for less than six months, 4 for six

months to one year, 8 for one year to three years, 27 were still in their employment, and 20 were unknown. Although it is not clear in the case of those who remained longest quite how many were re-employed by order or by agreement, it may easily be inferred from the ineffectiveness of re-employment orders and the large proportion of agreed settlement cases, that a greater proportion of them were re-employed by agreement. Thus, it can be said that re-employment through agreed settlement is, by and large, successful.³⁹

The proportion of agreed settlements in Japanese unfair labour practice cases is noticeably high in comparison with the proportions of agreed settlements in comparable American and British cases. As far as American unfair labour practice cases are concerned, in 1994 (and in 1993), for example, approximately 3.0 % (and 3.0 %) of all cases were disposed of by compliance with Board or Court decisions, about 29.0 % (and 29.2 %) were dismissed, about 32.3 % (31.7 %) were withdrawn, and about 35.0 % (and 35.5 %) were disposed of by agreement by the parties either before or after issuance of a complaint.(TABLE 4.) In British unfair dismissal cases for union-related reasons, in 1982 (and 1981), about 2.6 % (and 6.6 %) were disposed of by remedial award, about 12.8 % (and 23.6 %) were dismissed, about 78.2 % (and 52.0 %) were withdrawn, and about 6.5 % (and 17.7 %) were disposed of by agreement.(TABLE 5.)

**TABLE 4. DISPOSITION OF EMPLOYER'S UNFAIR LABOUR PRACTICE
CASES IN THE UNITED STATES**

	1981	1982	1992	1993	1994
Withdrawals	10,090 (34.4%)	9408 (35.4)	7,541 (33.1)	7,467 (31.7)	7,705 (32.5)
Agreement	8,293 (28.3)	7,889 (29.7)	7,689 (33.7)	8,354 (35.5)	8,304 (35.0)
Dismissals	9,915 (33.8)	8,403 (31.6)	6,778 (29.8)	6,887 (29.2)	6,876 (29.0)
Compliance with Board or Court Decision	1,053 (3.5)	861 (3.2)	660 (2.9)	694 (3.0)	695 (3.0)
Others	0 (0.0)	20 (0.1)	117 (0.5)	145 (0.6)	125 (0.5)
Total	29,351 (100.0)	26,581 (100.0)	22,785 (100.0)	23,547 (100.0)	23,705 (100.0)

Sources: NLRB Annual Reports of 1981-82 and 1992-94.

**TABLE 5. UNFAIR DISMISSAL CASES ON GROUNDS OF TRADE UNION
MEMBERSHIP AND ACTIVITIES**

	1980	1981	1982
Withdrawals*	226 (36.4 %)	141 (52.0)	641 (78.2)
Agreement	140 (22.5)	48 (17.7)	53 (6.5)
Dismissals*	221 (35.5)	64 (23.6)	105 (12.8)
Complaint upheld	34 (5.5)	18 (6.6)	21 (2.6)
Total	621 (100.0)	271 (100.0)	820 (100.0)

Source: L.Dickens et al., *Dismissed*, p.247, Table 8.4
(1985)

*Dickens' book does not mention these items specifically. These calculations are derived from the other figures provided.

Proportions of agreed settlement cases between the three countries differ probably due to the different conciliation system each adopts. In both Japan and the US, conciliation is a compulsory process conducted by experts in unfair labour practice cases who are not independent from the decision-making body (in Japan) or the prosecuting body (in the US), while, in Britain, it is conducted by experts in the area of dismissals who are independent from the industrial tribunal. Since British conciliators do not specialize in discriminatory dismissal for union-related reasons and are not in a position to influence the outcome of the case, employees who are dismissed for union-related reasons may have less incentive to make an agreed settlement through conciliation in Britain.

On the other hand, in the US, an agreed settlement is very rigidly controlled by the regional director of the NLRB. Even before an issuance of complaint, he may agree a settlement with the employer and the employee, but only if he considers the employer's conduct does not constitute a serious unfair labour practice. After an issuance of complaint, the director and the employer may reach an agreed settlement only if they agree that the employer's conduct constitutes an unfair labour practice and the NLRB issues a remedial order which becomes enforceable by a court order. The parties, however, are always free to reach an agreed settlement at any stage of

the PLRC procedures although the chairman of the PLRC sometimes formally recommends an agreed settlement to the parties under the common understanding that the employer has committed an unfair labour practice. This may explain why the proportion of agreed settlements in the PLRC cases is higher than that in NLRB cases.

However, the proportion of agreed settlements does not necessarily mean that the parties agreed to re-employment. In relation to the above KPLRC cases, the KPLRC stated that the majority of cases of agreed settlements resulted in re-employment. Yet, it is clear that, without the threat of a potentially heavy detrimental award against the employer, an agreed settlement may often result in a solution unfavourable to the employee. This is probably the case in Britain with unfair dismissal conciliation in general. In Britain, the conciliator's duty is to settle cases, not to seek to promote the employee's protection and he is completely separated from the decision-making process. Moreover, the tribunal award itself is unlikely to impose a heavy financial burden on the employer who loses the cases.

The PLRC's order of re-employment may be said to place the heaviest financial burden on the employer. In the US, where the NLRB orders re-employment, the Board always reduces the amount of back pay in compliance with the employee's duty of mitigation, which is basically the same as the principle applied by British courts and

tribunals. The NLRB has developed very precise rules concerning how to decide the amount of reduction. In contrast, in Japan, although the Supreme Court held that the LRC should, in principle, deduct the employee's actual interim earnings gained from other employment, the LRCs maintain that they have discretion on that matter.

In practice, the LRCs do not calculate back pay, but only order the employer to pay the amount of wages and other benefits which would have accrued between the date of dismissal and the date of re-employment, but for dismissal. They are very reluctant to deduct interim earnings since they fear that their decision-making process will be delayed further by calculating the precise amount of back pay. Thus, in a sense, Japanese applicants may receive more favourable back pay than those in the US because interim earnings may not be deducted.

As far as discriminatory dismissal on grounds such as race and sex is concerned, Japanese law does not provide effective measures, other than administrative guidance, to assist the employee's claim. In contrast, both the US and Britain have well-organized administrative agencies to administer anti-discrimination Acts. The British EOC and CRE may offer various kinds of assistance. The American EEOC has the power to conduct a compulsory investigation of an individual complaint, file a petition with a federal court for temporary relief, and

bring a suit against the employer in its name.

However, in practice, neither the EOC, CRE nor EEOC prove to be very helpful; the EEOC has a severe backlog problem and will not file a suit unless the case involves a serious problem or a pattern and practice discrimination. The EOC and CRE do not provide full support, such as legal representation for the employee, unless the case involves legally complex matters or important issues of principle. As a result, in most cases of discriminatory dismissal, if the employee cannot get satisfaction through the conciliation process, he eventually has to go to court (in the US) or the tribunal (in Britain). Thus, the situations in Britain and the US are not totally different to that in Japan.

British and American employees may use the methods developed by courts and tribunals to prove discrimination. Yet, in Japan as well as in Britain, even if employees are unable to prove discrimination in dismissal, they may manage to obtain a remedy for abusive dismissal (in Japan) or ordinary unfair dismissal (in Britain). In fact, in both Britain and Japan, the remedies for discriminatory dismissal are not altogether different from those available for ordinary dismissal although, in Britain, damages for injured feelings may be awarded for discriminatory dismissal but not for ordinary dismissal. Thus, with regard to proof of discrimination, the most important difference between the three countries

is that Japanese law and courts have not recognized the concept of indirect discrimination.

In cases of discriminatory dismissal, re-employment is probably more practicable than in cases of dismissal for union-related reasons, since employers are less afraid to retain people from minority groups than unionists who may interfere with their future managerial prerogatives. As far as monetary detriment is concerned, employers suffer more in cases of discriminatory dismissal since they may be ordered to pay damages for injured feelings and lawyer's fees.

9.2.5. CONCLUDING REMARKS

From the above discussion, it may be concluded that of the three countries, the Japanese system generally offers the least accessible procedures and the most generous, though sometimes impractical, remedy to the employee. The British system, on the other hand, offers the most accessible procedures but the least generous, though practical, remedy. The procedures and remedies available under the American system are both mediocre. The British system does not provide effective deterrence against dismissal. The American law of tortious wrongful discharge and the Japanese law of dismissal generally provide an effective deterrent against unjust dismissal.

In Japanese cases of abusive dismissal, the courts confirm the employee's contractual status and order the employer to pay unpaid wages and other benefits, less

actual interim earnings, plus legal interests. Damages for injured feelings may not be awarded except in cases where the dismissal constitutes a tort. In all three countries, lawyers' fees are usually not usually recoverable in ordinary courts, but exceptionally in US cases of discriminatory dismissal, such fees may be awarded under statutory provisions. In Japan, if dismissal constitutes a tort, lawyer's fees may be awarded. Typical examples include discriminatory dismissals on grounds of sex or race or union-related reasons.

The American NLRB, British tribunals, and the Japanese LRC may not order an employer who has lost a case to compensate the employee for lawyer's fees. Furthermore, neither the NLRB nor the tribunals usually require an employer who has lost a case to reimburse the employee's legal expenses, and the LRC may not order the employer to make such a reimbursement. However, litigation costs as well as lawyer's fees will increase as time passes. Thus, unless trade unions or other organizations undertake these costs, the employee will eventually obtain very little net compensation. Thus, from a financial point of view, none of the systems in the three countries provide an adequate remedy to the dismissed employee. Financially, American arbitration protects only the employee since all costs are undertaken by the union and the employer.

NOTES

1. EP(C)A, s.69(5).
2. L.Dickens et al., Dismissed, p.115 (Blackwell, Oxford, 1985).
3. Generally see Anderman, Unfair Dismissal (2nd ed.), p.159 (Butterworths, London, 1985); P.Lewis, "Interpretation of 'Practicable' and 'Just' in Relation to 'Re-employment' in Unfair Dismissal Cases", 45 MLR 384 (1982).
4. Enessy Co. SA v. Minoprio [1978]IRLR 489 (EAT).
5. Port of London Authority v. Payne [1994]IRLR 9 (CA).
6. P.Lewis, "An Analysis of Why Legislation Has Failed to Provide Employment Protection for Unfairly Dismissed Employee", 19 BJIR 316, at 322 (1981).
7. This contrasts with the views expressed by H.Collins in Justice in Dismissal, pp.15-23 and 214-15 (Claredon, Oxford, 1992).
8. L.Dickens, op.cit., at p.129.
9. FORM IT 144.
10. L.S.L., s.26; Zenshuro Yamada case, the Supreme Court in 1962, SMS, Vol.16, No.8, p.1656.
11. The Civil Litigation Cost Act 1971.
12. M.Kato, "The Role of Law and Lawyers in Japan and the United States", 1987 Brigham Young U.L.Rev. 627, at 657, footnote 42 (1987).
13. Ibid., at 666.
14. Saikosaibansho Jimusokyoku, "Heisei 6-Nendo Rodo Jiken No Gaikyo, Hosei Jiho, Vol.47, No.7, p.172 (1995).
15. T.Okino, "Rodojiken Ni Okeru Honansosho To Karishobun Tono Yakuwari" in Shinjitsumu Minjisosho Koza, Vol. 11, p.3 (1983).
16. The Department of Employment, Resolving Employment Rights Disputes: Options For Reform, Cmnd.2707, p.14 (1994).
17. M.Kato, op.cit., at 676.

18. Tokyo-to Rodo Keizai Kenkyu Kyoku (the Tokyo Metropolitan Bureau of Economy and Labour), Heisei 5-nen Niokeru Rodosodan No Jokyo Nituite (1994).
19. P.Lewis, op.cit. at 319, Table 4.
20. Hosoi Jiho, Vol.47, No7, pp.171-4 (1995).
21. K.William & D.Lewis, "Legislating for Job Security: The British Experience of Reinstatement and Re-engagement", 8 Empl.L.J. 482, at 487-90 (1982).
22. "The Importance of Long Term Job Attachment in OECD Countries, OECD Employment Outlook(September 1984), p.55, at p.56, Table 31.
23. Drzewiki v. H & R Block, Inc., 24 C.A. 2d 695, at 705 (1972).
24. Wiskotoni v. Michigan National Bank-West, 716 F.2d 378, at 390 (6th Cir., 1983).
25. M.A.Robinson, "Fired Workers Turn to the Courts", San Francisco Sunday Examiner & Chronicle, Sept.30, 1984, Section D.
26. M.S.West, "The Case Against Reinstatement in Wrongful Discharge", 1988 U. of Ill. L.Rev. 1, at 40-44 (1988).
27. M.A.Malinowski, "An Empirical Analysis of Discharge Cases and the Work History of Employees Reinstated by Arbitrator", 36 Arb.J. 31, at 37 (1981).
28. J.C.Singler, "Mediation of Grievances: An Alternative to Arbitration?". 13 Empl.Rel.L.J. 266, at 268 (1987).
29. M.S.West, op.cit., at 28. Two empirical studies also found employees unwillingness to accept reinstatement. See L.Aspin, A Study of Reinstatement under the National Labor Relations Act (Ph.D. dissertation MIT, 1966); W.H.Chaney, "The Reinstatement Remedy Revised", 32 Lab.L.J. 357 (1981).
30. W.H.Chaney, op.cit., at 359, Table 11.
31. L.Dickens et al., op.cit., at 116.
32. W.H.Chaney, op.cit., at 364. Aspin also found that 80% of discharged employees initially indicated that they wanted to return to work, but only 50% actually accepted reinstatement when offered. See Aspin, op.cit., at 267.

33. P.Lewis, op.cit., at 319, Table 3.
34. NLRB Annual Reports of 1992-94.
35. W.H.Chaney, op.cit., at 363-4.
36. S.Takahashi, "Meirei Shuketsugo No Roshi-Kankei Karamita Futorodokoi-Seido Nituite", Chuo-Rodo Jiho, No.365, p.46 (1961).
37. This is an unreported investigation conducted by this author awarded a grant from the Japanese Ministry of Education in 1985.
38. Rodo-iinkai, "Roi Toriatukai Jiken No Gaikyo", Chuo-Rodo Jiho, No.893 (1995) and No.910 (1996)..
39. KPLRC, "Futorodokoi Niokeru Tuissekichosa", Chuo-Rodo Jiho, No.627, pp.16-33 (1979).

CHAPTER 10

COMPARATIVE ANALYSIS(2) - CONSIDERATION OF POLICY

We have examined the sufficiency of protection provided for employees in each of the three countries with regard to the adequacy of regulation offered by the different legal systems, ease of access to the systems and the adequacy of remedies available. It has been found that none of the three systems is truly satisfactory in protecting the employee's interests. The Japanese system has remedial and procedural defects, the British system has problems with loose regulation and inadequate remedies, and the American system is of very narrow application.

However, the Japanese law of abusive dismissal and the American law of tortious wrongful discharge have been found to have a great deterrent effect on unjust dismissals. To maximise the employee's protection, it is desirable to prevent unjust dismissal before it occurs. The Japanese system applies to a broad spectrum of employees as even those under contracts of indefinite duration have, at least potentially, the right not to be unjustly dismissed. Furthermore, of the three countries, the Japanese system provides the most rigid regulation and the most effective, though sometimes impractical, remedy. In this sense, it is fair to say that the Japanese legal system of dismissal is the best among the

three countries.

Why do the above-mentioned differences exist between the systems regulating dismissal in the three countries? A legal system is the product of complex political interests and therefore it can hardly be said that dismissal regulations exist solely to promote the employee's protection. An understanding of the policies behind the creation and maintenance of a legal system may assist us in considering whether and how the employee's protection may be improved.

Before examining the three systems, it should be pointed out that the law of discriminatory dismissal on grounds such as race and sex only constitutes a small proportion of the regulations covering discrimination, which themselves apply to a much wider range of circumstances. It therefore is inappropriate for such regulations to be considered in respect of policy implications for the general legal system of dismissal. Therefore, the examination will proceed mainly on the basis of laws of dismissal not specifically relating to discrimination on grounds of race, sex, and so on.

10.1. THE JAPANESE SYSTEM

In Japan, the system has been developed by the ordinary courts. Although not explicitly stated, it can easily be inferred that the courts have developed the law of abusive dismissal on the basis of the constitutional right to life and right to work conferred on the people.

In the early stages after World War II, there were three different academic and judicial views on the employer's right of dismissal. One view was that the employer had the freedom to dismiss the employee at will. The opposite view was that the employer was not entitled to dismiss the employee without just cause. The latter was based on the people's right to life and right to work provided for in the constitution.

For example, the Nagoya District Court stated that "If the employer is allowed to arbitrarily dismiss and expel the employee from the workplace, it will...result in denying the employee's right to life. Thus, the employer does not have the freedom to dismiss the employee."¹ However, most courts took the third view that the employer's decision to exercise the right to dismiss was not totally free but subject to the principle of abuse of right. This is because denial of the employer's freedom of dismissal clearly conflicts with Section 672 of the Civil Code, which provides that a contract of employment for an indefinite term may, at any time, be terminated by either party with two weeks notice.

Thus, in a different case, the Nagoya High Court stated "Article 25 of the Constitution declares that the state has the obligation to guarantee minimum standards of health and cultural life for the people in general. But it does not impose a specific obligation on individual employers. Similarly, although Article 27

declares that the people have the right to work, it should not be regarded as prohibiting the employer from dismissing the employee."² Yet, as reviewed earlier in this thesis, the Supreme Court formulated the principle that dismissal is void as an abuse of the employer's right to dismiss unless it is for a rational reason and is permissible with regard to social justice. Furthermore, the courts have been very reluctant to find dismissal valid unless the reason for it are particularly serious, having regard to all relevant circumstances.

It is necessary to point out that in Japan the principle of abuse of right has been widely utilized as a last resort in preventing unacceptable decisions which may result from rigid application of a specific statutory provision. This principle is commonly found in other civil law countries. In a sense, it seems to have a similar function to the rule of estoppel in common law countries. The abuse of right in the Japanese Civil Code is not subject to any specific limitation, while other civil law countries put some restriction on its application; the Swiss Civil Code, for example, requires "der offenbare Missbrauch" (clear abuse of right).³

Yet, this legal situation is unusual because the principle of abuse of right usually only applies in the case where one's exercise of right is exceptionally abusive. In cases of abusive dismissal, the opposite is true. How is this possible? The answer is that the courts

make use of the principle merely as a convenient means to give effect to the spirit of the aforesaid constitutional provisions. Those provisions along with that proclaiming the worker's right to "organization, collective bargaining or other concerted activities" (Article 28) are aimed at reducing pre-war quasi-feudalistic totalitarianism by giving rights and powers to working people.⁴ It is generally stated that the Labour Union Law was enacted to give effect to Article 28 and the Labour Standard Law to give effect to both Article 25 and Article 27.

It can be seen that the courts have thereby balanced the worker's right to work against the employer's property right, by applying the principle of abuse of right. As seen earlier in this thesis, Japanese judicial regulation of dismissal rather resembles American arbitral regulation of dismissal. This is not merely a coincidence, as arbitrators also have to balance the interests of the employer with those of the employee, although they do also have to take union interests into account.

A further question may be raised: Why is dismissal constituting abuse of right void? In Japan it has been held, in the context of continuing contract relationships that, if the exercise of right constitutes an abuse of right, it can have no legal effect. Thus, it was not difficult for the courts to establish the principle that

dismissal constituting abuse of right is void. This was considered to be a suitable cause of action for the dismissed in the context of the Japanese lifetime employment practice which prevails in the public sector and among larger companies in the private sector.

Finally, it must not be forgotten that despite the existence of the constitutional provision of the right to work, no statute has been enacted to reinforce it for over 40 years. In other words, the government has so far failed to perform the political duty proclaimed by Article 25. However, it should be recognised that the legislature has not interfered with the development of the law of abusive dismissal through the imposition of any restrictions, thus, at least implicitly, authorizing the law of abusive dismissal. This has allowed the law of abusive dismissal to have a considerable effect in further promoting the lifetime employment practice and in expanding it to include even smaller companies. As dismissal is very difficult in law, companies have to develop the practices under which they can retain their employees without impairing the flexibility of labour or workplace discipline. Employers once attempted to loosen legal regulation of dismissal for economic reasons, as a result of which, in 1965, the Japan Federation of Employers' Association proposed a new lay-off scheme, which was modelled on the American system. This scheme indicated that the criteria for selecting employees for

lay-off included not only seniority but also factors such as business necessity, age and family circumstances. Labour unions unanimously and strongly opposed this proposal, claiming that its purpose was to facilitate dismissal of middle-aged and senior employees. The proposal disappeared about six months later. This was not only because of the unions' opposition but also because employers themselves considered that, if they made middle-aged and senior employees anxious about lay-off, discipline in the workplace, which is central to good industrial relations, would be affected as would employees' loyalty.⁵

The government also became more willing to support the lifetime employment practice. A good example of this is provided by the temporary subsidies offered to employers in order to retain employees during economic depression. In fact, the government introduced various statutory schemes regarding temporary subsidies during the 1970's despite the fact that the level of unemployment was low in comparison with levels in Britain and the US⁶. These schemes are still available to the Japanese employers. Thus, it can be seen that the government is concerned to keep the number of dismissals as low as possible and that the government considers the lifetime employment practice to be necessary for good industrial relations and strong economic performance.

10.2. THE BRITISH SYSTEM

Britain is one of several advanced industrialized countries which have until quite recently maintained a common law rule that the employer may dismiss the employee at any time simply by giving due notice. It is widely believed that unfair dismissal legislation itself serves a dual purpose; protection of employees from dismissal and reduction of industrial action over dismissal. This legislation is also concerned to improve workplace discipline. In some workplaces, foremen often failed to deal properly with workplace discipline, overlooked employees' misconduct, or made informal arrangements with workers' groups. Thus, the Donovan report argued that "the availability of a statutory procedure which is fair, and known to be fair, could do much to clarify the situation and so to enable discipline to be improved."⁷

However, it is true that greater emphasis was placed on reducing of industrial action caused by dismissals. This is illustrated by the circulation of a consultative document by the Conservative government just before the Industrial Relations Bill in December 1970, which stated: "Britain is one of the few countries where dismissals are frequent causes of strike action...both on grounds of principle and as a means of removing a significant cause of industrial disputes, the government proposes to include provisions in the Industrial Relations Bill to

give statutory safeguards against unfair dismissal."⁸

This intention to reduce industrial action caused by dismissal was expressed not only by the Conservative government at that time but also by successive governments, both Labour and Conservative. It was a matter of great concern because the number of strikes caused by dismissals for reasons of either discipline or redundancy was over 230 per year in the 1960's, amounting around 8 % to 13 % of the total number of strikes. These circumstances were a major force behind the enactment of the Redundancy Payment Act 1965 by the Labour Government. Since the Government intended to improve labour mobility in order to increase the efficiency of the labour market, it needed an Act which entitled employees to payment for dismissal by reason of redundancy and which would thereby diminish their resistance to redundancies. Mr. Gunter, a Labour minister, explained that lump-sum payments such as redundancy payments were superior to income-related unemployment benefits for the purposes of promoting labour mobility.⁹

The Labour government was seriously concerned about damage to "the country's economic development" caused by strikes over discipline related dismissals.¹⁰ The Donovan Commission argued in 1968 that the right to a speedy and impartial decision on the justification for a dismissal may have averted many stoppages arising out of non-redundancy dismissals.¹¹ The Labour government, however,

saw much room for improvement, stating in In Place of Strife in 1969 that the government's proposals, including those for unfair dismissal, "will provide alternative remedies for matters which at present give rise to a large number of strikes."¹²

Accordingly, May 1970, the Labour government introduced a Bill which included unfair dismissal provisions, but it failed to become law as a general election was called the following month. A bill containing similar provisions became law under the newly elected Conservative government. Despite amendments by subsequent governments, the basic structure of unfair dismissal legislation remains unchanged. It can be seen that the principle motivation behind unfair dismissal legislation was "reducing the need for, and likelihood of, industrial action over dismissals."¹³ The same motive still prevails although such concerns have diminished with the decline in industrial action in the 1990s. An employment protection function also exists and a real, though arguably subsidiary, aim of the legislation concerns unfair dismissal.

The desire to reduce industrial action explains why unfair dismissal legislation provides highly accessible procedures. A swift resolution of an individual's complaint about dismissal is necessary to prevent industrial action which may result. The legislation fails to provide an adequate remedy for unfair dismissal

because too great a financial burden on the employer could hamper the nation's economic development which would be inconsistent with the motive behind reducing industrial action. The reason behind the application of the "no reasonable employer" test by tribunals can be explained from this viewpoint.

Finally, it should be noted that there remain differences between the Labour and Conservative Parties as to the degree of attention which should be paid to employee protection. When the Conservative government first introduced unfair dismissal legislation, the qualification period to be satisfied to make a claim was 104 weeks; an employee was excluded from the legislation where his employer had less than 3 other employees who had been continuously employed for at least 13 weeks; and the employee employed under a fixed term contract of two years or more was excluded from the legislation where he had so agreed in writing.

The Labour government in 1975 reduced the qualification period to less than 26 weeks and repealed the small employers exclusion. Subsequently, the Conservative government in 1980 extended the qualification period to two years in respect of employees working for an employer who employed less than 20 other employees and reduced the duration of the fixed term required to exclude a claim from two years to one year. In 1985, the government extended the qualification period

to two years for all employees.

In 1972, under the Conservative government, the burden of proving unreasonableness rested implicitly on the employee, but in 1974 the Labour government transferred the burden on the employer. The Conservative government, however, again removed that burden from the employer in 1980. Re-employment could only be recommended under the Conservatives' initial legislation in 1971, but in 1975 the Labour government made it possible to order re-employment. The Labour government in 1975 improved the compensation award system by drawing up a detailed formula for calculation, and established the minimum basic award. Subsequently, the Conservative government in 1980 allowed for the possibility that the basic award could be reduced on the grounds of an unreasonable refusal of an offer of alternative employment by the employer and of the conduct of the employee before the dismissal. The minimum basic award was also abolished.

In short, the history of successive governments indicates that Labour takes a more protection-oriented approach than the Conservatives although it cannot be said that the Labour government's amendments indicate any intention to change the main purposes of unfair dismissal legislation.

However, recent judicial attitudes toward wrongful dismissal appear to be more employee-protection oriented. Ironically, this is a result of unfair dismissal

legislation. For example, in Hill v. Parsons, where the Court of Appeal granted an interlocutory injunction restraining the employer from terminating employment, the court stated as an important reason for granting an injunction that the employee's rights were safeguarded under unfair dismissal legislation and therefore that damages were an adequate remedy for the dismissed employee.

Another example is R. v. BBC ex parte Lavelle. The High Court adopted the argument that the employment protection legislation had substantially altered the common law situation so far as dismissal was concerned. The court said that the tribunal's power to order reinstatement indicated that even the ordinary contract between master and servant now had many of the attributes of that of an office-holder, and that the distinction between the two forms of contractual employment was no longer clear. In these circumstances, the employee may have the contractual right to be heard before dismissal, which may alter the employee's right substantially from what they would have been at common law before the law on unfair dismissal was enacted.

10.3. THE AMERICAN SYSTEM

Some consideration should be given to the laws concerning unfair labour practice and grievance arbitration which are found within the National Labour Relations Act 1935 (the so-called Wagner Act) and under

the Labour Management Relations Act 1947 (Taft-Hartley Act) respectively. These two Acts form the basis of labour relations policy in the US. The law of unfair labour practice protects the employee from dismissal or other unfavourable treatment which is implemented because of the anti-union motive of the employer. The law of grievance arbitration also gives the employee protection from unjust dismissal so long as he is within a bargaining unit. Therefore, it is important to know whether these laws were enacted for the purpose of assuring the employee's protection by giving legal recognition to the unions and utilizing their strength.

The main purpose of the Wagner Act is twofold, to eliminate a reason for work stoppages and to remove "inequality of bargaining power and consequent deficiencies in consumer purchasing power upon the volume of economic activity."¹⁴ To promote the New Deal policy, Senator Wagner argued that the New Deal program has "made relatively slow progress in effecting that fair distribution of purchasing power upon which permanent prosperity must rest...this situation...can be remedied only when there is cooperation between employers and employees, on the basis of equal bargaining power."¹⁵ Where employees are in a weak bargaining position, "production is lagging behind profits because consumer income is too low and prices too high for more goods to be sold."¹⁶

The unfair labour practice legislation was amended by the Taft-Hartley Act which established the unions' unfair labour practices, gave legally binding force to collective agreements, and introduced various regulations concerned with industrial action.¹⁷ The dual function of the unfair labour practice legislation was maintained, although the balance of bargaining power shifted towards the employer and more stress was laid on the reduction of industrial action.

These objectives of the American legislation may explain the procedural differences between the NLRB and the Japanese LRC. Since Japanese unfair labour practice legislation was enacted to give effect to the worker's constitutional right to "organization, collective bargaining or other concerted activities", the procedure of the LRC is designed to be pursued by the party discriminated against. In comparison, the American legislation was enacted to promote the public interest; so the NLRB procedure is designed to be pursued by public representatives (regional field attorney).

The law of grievance arbitration has been enforced effectively under the Taft-Hartley Act. The Supreme Court has clarified the enforceability of arbitration clauses and arbitral awards as a substitute for industrial action, based on the Taft-Hartley Act.

Accordingly, the protection of the employee is not the main purpose of either the law of unfair labour

practice or that of grievance arbitration. In fact, until very recently, the American Congress considered there to be no need to regulate dismissal unless it involved some economic or societal wrongdoing.¹⁸

However, it may be perceived that the law of wrongful discharge has been created for the protection of the employee. In order to enable themselves to protect the dismissed employee on the grounds of the employer's violation of public policy, the courts have actually extended the range of public policy grounds available. Until quite recently, employment for an indefinite term was regarded as terminable at will, but the courts have now positively recognized the implied term of "dismissal for just cause" taking account of the personnel policies or practices of the employer, the employee's length of service, actions or communications by the employer reflecting assurances of continued employment, or the practices of the industry. Furthermore, despite the fact that it is considered difficult to establish the existence of a fiduciary duty in the contract of employment, some courts have been willing to recognize the employer's implied duty of good faith and fair dealing as a cause of action for wrongful discharge either in contract or tort.

Generally speaking, American courts appear far more willing to promote protection of employees in the law of dismissal than British courts. This is partly because

American courts traditionally have more freedom to change existing common law rules. British courts have less incentive to change the traditional common law of dismissal because of the existence of the unfair dismissal legislation although they have changed it a lot since 1972.

This judicial orientation toward employee protection forced the Montana Assembly to enact the Wrongful Discharge From Employment Act 1987, Montana is currently the only state to have such a comprehensive law of dismissal. Thus, the motive behind its enactment should be examined. It is clear that the purpose of the Act is not simply to protect employees from wrongful discharge. As reviewed in Chapter 4.2.2., the state of Montana is one of a small minority of states in which the courts have adopted the tort theory of an implied covenant of good faith and fair dealing as a cause of action for wrongful discharge. Accordingly, the jury may award punitive damages. Employers and insurance companies who paid the damages for tort actions came to believe that statutory regulation of unjust dismissal was a better option than judicial regulation and lobbied for the passage of the Act.¹⁹

Under the Act, "good cause" for dismissal is broadly defined, damages are limited to a maximum of four years of wages and fringe benefits and are subject to the duty of mitigation. No damages for injured feelings are

available, and punitive damages are available only where dismissal is contrary to public policy or where actual fraud or malice is proven. In short, the Montana legislation appears to provide neither a readily accessible procedure, nor strict regulation in return for a considerable cutback in the monetary remedy which had been available at common law. The Montana legislation is very much a reaction against common law developments and aims to exclude the possibility of an extraordinary amount of compensation being awarded as punitive damages.

The contents of the Wrongful Discharge From Employment Bill were much amended in relation to the employee's protection during the course of assembly discussion.²⁰ Moreover, in 1991, the Commissioners on Uniform State Laws passed a Model Employment Termination Act which would introduce a scheme of arbitrating just cause for most employees. Also, the AFL-CIO has recently announced its willingness to accept a law of dismissal²¹ although it earlier opposed to such a law on the grounds that it may remove an important incentive for employees to be members.²² Even at federal level, in 1988 the Congress, where the Democratic party which is more sympathetic to workers had a majority, enacted legislation requiring the employer to give advance notice to both the employees' representative and the local government before effecting mass plant closures and layoffs.²³ In 1993, the Democratic party took the reins

of federal governments. However, despite these events, there has been little further improvement to the law of dismissal through legislation.

NOTES

1. The Nihon Seitai Hozen case, the Nagoya District Court in 1968, RMS, Vol.19, No.6, p.1518.
2. The Nihon Sharyo case, the Nagoya High Court in 1951, RMS, Vol. 2, No.1, p.55.
3. S.Wagazuma, Shinpan Minpo Annai, Vol.II, pp.39-49 (Ichiryusha, Tokyo, 1967).
4. K.Hokao, "Nihon Rodoshi (2)" in Shin Rodoho Koza, Vol.1, p.268 (Yuhikaku, Tokyo, 1984); H.Kubota and Y.Yokoi (ed.), Shinpan Gendai Rodoho, pp.39-41 (Horitsubunkasha, Kyoto, 1990).
5. S.Fujita and H.Ishida, Kigyo To Roshikankei, pp.342-350 (Chikurashobo, Tokyo, 1970).
6. The unemployment rate during the 1970's was only around 2%.
7. Royal Commission, Report on Trade Unions and Employers Associations 1965-68, Cmnd.3623, paras.533-36 (HMSO, London, 1968); See also M.Mellish and N.Collins-Squires, "Legal and Social Norms in Discipline and Dismissal", 5 ILJ 164 (1976).
8. The Industrial Relations Bill Consultative Document, para.52 (1970).
9. Hansard, Vol.711, Col.37 (26 April 1965).
10. In Place of Strife, Cmnd.3888, para.86 (HMSO, 1969).
11. Royal Comission, op.cit., at para.528.
12. In Place of Strife, at para.81.
13. L.Diskens et al., Dismissed, p.9 (Blackwell, Oxford, 1985).
14. L.H.Keyserling, "The Wagner Act: Its Origin and Current Significance", 26 Geo.Wash.L.Rev. 199, at 218 (1960).
15. 78 Cong.Rec. 3444 (1934).
16. 81 Cong.Rec. 2945 (1937).
17. C.W.Summers, "A Summary Evaluation of the Taft-Hartley Act", 11 Ind.L.Rel.Rev. 406 (1958).

18. Among various federal anti-discrimination laws, the ADEA is the only law in which the primary concern of Congress was job protection of a class of employees. See D.P.O'Meara, Protecting the Growing Number of Older Workers: the Age Discrimination in Employment Act, pp.1-3 (Univ. of Pennsylvania, 1989).

19. L.H.Schramm, "Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins", 51 Montana L.Rev. 94, at 108-112 (1990).

20. Ibid., at 109.

21. The Worker Adjustment and Retraining Notification Act 1988.

22. W.B.Gould IV, "Stemming the Wrongful Discharge Tide: A Case for Arbitration", 13 Emp.Rel.L.J. 404, at 404 (1987).

23. H.H.Perritt, Jr., "Employee Dismissals: An Opportunity for Legal Simplification", 35 Lab.L.J. 404, at 413 (1984).

CHAPTER 11

PROSPECTS OF IMPROVEMENT IN EMPLOYEE PROTECTION AND SOME REFLECTIONS ON JAPANESE EMPLOYMENT LAW

From the above discussion on the intentions behind the legal systems of the three countries, it becomes clear that economic considerations are very often given priority over employee protection, and that, without the employers' support, it is impossible to create any effective system of statutory regulation of dismissal. In the US, the employers of Montana State lobbied to enact the WDFEA in order to restrict the common law liability caused by wrongful dismissal litigation. In Japan, the courts developed a law of abusive dismissal based on the then prevalent lifetime employment practice which private companies had promoted in order to improve productivity through employees' loyalty. In Britain in recent years, the government has placed considerable emphasis on the economic effects of employment rights on business. Therefore, in contemplating possible further alteration to the legal systems to improve employees' protection, we have to consider the potential any economic impact of any proposals made.

In recent years, there has been a perceptible growth in academic opinion opposed to regulation of dismissal. It is argued that for the employers, legal regulation may give rise to psychological costs, increased costs associated with less flexibility and increased litigation

expenses. Legal regulation of dismissal may thus lead to lower wages because the increase in costs must be partially transmitted to the workers themselves. Unless the supply of labour alters, this may result in a decrease in demand for labour as a factor of production, which will have a severe effect on workers with low skills and few alternative employment opportunities.¹

However, there is still a body of academic opinion, which maintains that legal regulation may foster rather than harm the national economy. It is argued that arbitrary or economically unjustified dismissal may result in relocation costs for the employee and a waste of training and expertise and broken continuity for the employer. Moreover, it is said that regulation of dismissal may assist a cooperative employer-employee atmosphere and employee loyalty. It may also, therefore, increase employees' willingness to accept technological change and internal mobility, while reducing absenteeism, employee turnover rate, and disruption.²

Unfortunately, there is no hard evidence as to what kind and what extent of legal regulation may foster or harm the national economy and employment opportunities. In Japan, however, it is noticeable that while the efficiency of workers and the nation's economic performance are far better than is the case in Britain and the US, the system of regulating dismissals is more effective than those in Britain and America in providing

protection for the employee. Many of those adhering to the above pro-regulation view refer to the lifetime employment practice which prevails in Japanese companies, where the employees are more loyal, efficient workers and willing to accept internal mobility than their British and American counterparts.

Since the author is not an economist, it is not appropriate here to consider which opinion is strongest from an economic perspective. Such examination should be left in the hands of economists and, perhaps, industrial relations experts. However, it should be noted that, even if Japan is a good model for legal protection of employment, adoption of any model should be considered in the wider context of general employment law. This is because the law of dismissal is only part of employment law and the former should be harmoniously integrated into the latter.

There are six principle factors which explain how Japan is able to operate its present law; the use of an extremely cautious recruitment policy, the existence of 'punitive dismissal', the stress on the importance of a relationship of trust and confidence in employment, the contractual breadth of job-description and location, the flexibility in working hours, and the use of many atypical or non-regular workers .

Many companies, especially larger ones, employ school-leavers and graduates as their employees in April,

immediately after the end of each academic year. These 'regular' employees comprise the nucleus of the labour force within companies. The company begins recruiting staff in the preceding year in order to compete with other companies in hiring good people. The companies generally examine the personal history, aptitude, academic ability or technical skill, and health or physical condition of the candidates thoroughly, through documentation, interview and other means. The companies often use agents to investigate the applicants' personal character.

Furthermore, after choosing those applicants to whom they want to make job offers, many companies require them to present written pledges, a suretyship document and other documents. A personal suretyship document generally states a comprehensive guarantee of the surety. For instance, a food manufacturing company requires an applicant to ask two persons to sign on a document whose terms are stated below. This document shows that the company acts extremely carefully in employing workers.

"I will be fully responsible in seeing that the aforesaid person, who has been employed, is a sound-thinking person with good references and therefore that he will never cause any trouble or annoyance to your company. I guarantee that the aforesaid person will serve your company sincerely in compliance with its 'shugyo kisoku' and other rules. I promise that

if the aforesaid person violates those rules and damages your company intentionally or due to a serious mistake, I shall make him compensate you for the damage caused and I accept the responsibility of recompensing you jointly with the other surety."

The Suretyship Law recognizes the binding effects of suretyship contracts such as that above under the following conditions: The duration of a suretyship contract must be for no more than 5 years; a suretyship contract without a definite term shall be treated as lasting for 3 years; the employer must give notice to the guarantor as soon as the employer becomes aware that the employee has become unacceptable in his position, has done wrong or when the employee's working position or place has changed; the guarantor can terminate the suretyship contract when he has become aware either by himself or by the above employer's notice that the employee has become unacceptable, has done wrong, or a change of working position or place has occurred; and the court has discretion to decide the amount of damages having regard to all relevant circumstances.

Post-appointment, company managers generally engage in a very careful personnel management policy. The employer evaluates the employee's fidelity and loyalty towards the company and makes much of the employee's cooperative and harmonious character in order to determine any increase in salary, promotion, etc. In

fact, as seen in Chapter 5., the courts also derive much from these factors in deciding whether dismissal or 'punitive dismissals' are abusive. The employer sometimes interferes excessively with the employee's personal affairs in order to protect workplace discipline and productivity. Therefore, it has recently been argued by academics that the employees' personal rights should be given greater protection in the workplace. However, it can be asserted that the company's grasp on the employee's personal and social life has been an important factor in maintaining the lifetime employment practice without damaging workplace discipline and morale.³

Another important factor is the existence of 'punitive dismissal'. As seen in Chapter 3.2.2., most Japanese companies provide for 'punitive dismissal' in their shugyo kisoku. Most employment contracts provide for the company to pay a fair amount of retirement allowance as an incentive for continuous service and good conduct or as a financial convenience for the company. The level of retirement allowance generally depends on the employee's age, length of employment and the reason for retirement and is usually highest at the mandatory retirement age. However, most shugyo kisoku also provide that, if the employee is guilty of grave misconduct, his retirement allowance will be reduced to, perhaps, half the full amount or even totally revoked. This provision

has generally been authorized by the courts.⁴ Accordingly, 'punitive dismissal' is widely utilized as an effective measure in maintaining discipline in the workplace and securing the loyalty of employees for Japanese companies, although it may prove quite harsh to employees in certain cases.

The most crucial element enabling Japan to maintain its present system of regulating dismissal is the contractual breadth of job-description and location. Where the employer cannot dismiss the employees easily he may have difficulty in reallocating the workforce in accordance with business demands. In Japan, companies resolve this problem by utilizing internal labour markets. Companies, especially the larger corporations, tend to employ young people who have just left school, college and university in order to educate and train them by transferring and promoting them within the company according to business needs. To attain this, there is a widespread understanding that the employee is employed as a 'generalist' and is not engaged in a particular job, position or location. Therefore, in practice, so long as it does not involve a wage reduction, the company may normally transfer the employee from the accountancy department to the personnel department for example, or from the iron furnace section to the maintenance section.

A typical example is the transfer of an employee to a different location. The legal basis for the employer's

right of transfer is considered to be the contractual agreement. Transfer within the company is common; the company's shugyo kisoku generally provides that the company is entitled to transfer its employees between positions and places in accordance with its business needs. It is also frequently provided that employees may not refuse to comply with such a request without just cause. Therefore, although the employee's agreement to be transferred may be questionable as a legal basis for effecting transfers , it is generally presumed by the courts that the employee has agreed an engagement to be transferred anywhere unless it has been agreed expressly that his working place is to be fixed.

The courts even appear willing to provide approval in cases where the employer transfers the employee to another company. In most cases of transfers of employees between companies, the employee's contractual status remains with the company which has transferred him although he works in and for the company to which he has been transferred. Compared with the law relating to transfer within a company, the law regulating transfer between companies is more restrictive. This is because such a transfer means that the employee must work for an employer with whom he does not have a contract of employment. Therefore, it is considered important that the terms and conditions of transfer to other companies are clearly stipulated in shugyo kisoku, or collective

agreement, on a legally enforceable basis.

The courts have, however, tended to affirm the effectiveness of transfer to another company without such a clear stipulation where the transferee company is an affiliated or closely related company, particularly where the employees are transferred to that company as a means of avoiding dismissal for redundancy. The contractual flexibility is the most important element in Japanese regulation of dismissal although transfer between locations or companies has often caused serious problems in employees' private and family lives.

The flexibility of working hours is also an important factor. Most Japanese manufacturing companies require workers to work overtime in order to comply with fluctuations in demand. The life-time employment practice supported by the law of abusive dismissal means that employers have to keep the number of production workers to a minimum in order to reduce both labour costs per head and risks of dismissal for redundancy. Thus, a significant amount of overtime work has been carried out in Japan. The law does not prohibit employers from ordering employees to work overtime where the employer has concluded a written agreement with the union which represents a majority of the workers or the representative of a majority of workers at the workplace. Under the legislation, the minimum amount of pay for overtime work is presently only 25% above the

normal wages. According to the Supreme Court decision in the Hitachi Musashi Factory case, where, in addition to the above mentioned agreement, there is a provision in the shugyo kisoku that the employer may request the employee to work overtime, the employee has a duty to comply with the request if it is considered to be reasonable.⁵

Finally, another important factor in maintaining the present Japanese system is the legal recognition of different treatment of atypical employees compared to regular employees. Although judicial law has developed to regulate the termination of employment contracts for a fixed term to some extent, employees under such contracts may be dismissed before regular employees. A considerable number of other non-regular or peripheral workers also suffer insecurity: part-timers, temporary workers, seasonal workers, day workers, 'side-job' workers, and so on. These atypical employees are subject to much less favourable terms and conditions of employment than regular employees.⁶ The proportion of non-regular employees among the total number of employees amounted to 20,2% in 1994. These non-regular employees are to those who are called part-timers, 'side-job' workers, semi-regular employees or those who are treated differently from regular employees at their workplaces.⁷

The Japanese cases described above imply that, if the US and Britain were to introduce more rigid

regulation and a more re-employment-oriented remedy for unjust dismissal, then it would be necessary to increase the flexibility of employment. Otherwise, companies' costs are likely to increase considerably, with the result that anti-regulation views will prevail. It must also be carefully considered how companies can maintain workplace discipline after the introduction of such improvements to the system. It is recognised that the Japanese system of dismissal has survived at the expense of many insecure non-regular employees. Those who benefit from the lifetime employment practice and strict legal regulation of dismissal often experience additional problems in their private lives due to factors such as frequent changes of location, persistent requests to perform overtime and a paternalistic or intrusive style of personnel management.

Although the Japanese legal system provides a very effective re-employment-oriented remedy, such a remedy is not very useful for employees in smaller companies where the lifetime employment practice is not practicable or those who do not want to return to the same employment. The Japanese system will, therefore, become more inappropriate in the long term as the lifetime employment practice becomes less widespread. Many companies which have begun to diversify initially employed workers with good experience but employees who have become dissatisfied with terms and conditions in these companies

have moved to the tertiary sector where their abilities and experience are reflected in their wage levels. Even in the manufacturing industry, under circumstances of severe trade competition, many companies have come to place much reliance on employees' ability and productivity when determining their pay and promotion, with the result that seniority-based pay and promotion systems have become less common. This is because employees have been encouraged to change their employment. Many companies will be forced to seek workers from sources other than school leavers as their numbers are set to fall due to Japan's aging population. This may also encourage employees to seek different employment. These phenomena will combine to gradually dilute the prevalence of the lifetime employment practice. This is probably reflected in recent changes in the ratio of employees changing jobs. The ratio of employees changing jobs among the total number of employees has steadily increased from 2.8 percent in 1984 to 4.4 percent in 1991. Although the ratio for 1992 was lower than that for 1991, it still remained as high as 4.1 percent.⁸

In the above circumstances, even in Japan, we should consider greater availability of a monetary remedy for an employee who did not expect to stay in his employment for long from the outset, or an employee who does not want to return to the company which has dismissed him. If we can utilize the tort theory or contract theory for the

purposes of awarding adequate damages as a remedy for abusive dismissal, other problems concerning the prolonged procedure and remedy for abusive dismissals may also be partly resolved. For example, an employee may bring an action in a summary court, designed to settle a controversy promptly, if the action is for damages of ¥900,000 or less. A judgment affirming an employee's status in the defendant company is an all or nothing decision, so therefore, damages are sometimes appropriate to resolve a delicate dispute over dismissal. Awarding damages against abusive dismissal may sometimes be a better choice. If a judgment for adequate damages is available, it may be easier for the court to adopt the concept of 'constructive dismissal'. Moreover, an adequate award of damages may allow for more flexible resolution of disputes where the employer refuse to renew fixed term contracts of employment. It has been stated that whether or not abusive dismissal should be void or only illegal is not prescribed by the Civil Code but depends upon a judicial policy decision. Therefore, it may be possible for courts to develop a tort or contract theory of dismissal. However, decision as to the amount of damages to be awarded following an abusive dismissal is problematic.⁹

Any substantial improvement in the level of protection provided for employees by dismissal regulation systems will not be easy. In the current economic climate

and with the present state of political and industrial relations opinion, it would be extremely difficult to improve the systems - particularly through legislative bodies - in the three countries. Furthermore, taking account of the wider context of employment law, there remains serious doubt as to the degree to which the protection of employees should be improved as employees cannot expect paradise without pain.

NOTES

1. J.L.Harrison, "The 'New' Terminable - At-Will Employment Contract: An Interest and Cost Incidence Analysis", 69 Iowa L.Rev. 327-361 (1984); R.A.Espin, "In Defense of the Contract At Will", 51 Chica.L.Rev. 947, at 962-77 (1984); S.Rottenberg, "Discussion: 'Property in Work'", 15 Ind.Lab.Rel. 402-5 (1962); M.Emerson, "Regulation or Deregulation of the Labour Market", 32 Euro.Econ.Rev. 775, at 778 (1988).
2. "Note: Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith", 93 Harv.L.Rev. 1816, at 1828-36 (1980); E.F.Vogel, Japan as Number One, pp.131-57 (Harv.U.Press, Massachusetts,1979); Special Task Force, Department of Health, Education and Welfare, Work in America, pp.96-100 (1972); M.E.Emerson, op.cit.
3. T.Doko, "Shokuba Niokeru Privacy No Hogo", H.T., Nos.721-3 (1990).
4. The Sankosha case, the Supreme Court in 1977, RHS, No.958, p.25.
5. The Supreme Court in 1991, SMS, Vol.48, No.7, p.1270. Also see K.Sugeno, "The Supreme Court's Hitachi Decision on the Duty to Work Overtime", Japan Labor Bulletin, May 1, 1992.
6. This problem was fully discussed in F.Komiya, "Protection of Non-regular Workers and the Law in Japan", a paper which was submitted to the Sixth Asian Congress of Labour Law and Social Security in Tasmania on February 13-15, 1994-95.
7. The Japan Institute of Labour, Japanese Working Life Profile, 1994-95 (Tokyo, 1994).
8. Somucho (Management and Coordination Agency), Tokubetsu Rodoryoku Chosahokoku (1984-1993).
9. F.Komiya, "Koyo Shuryo No Hori O Kangaeru (3)", Hogaku Seminar, No.490, pp.99-104.

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