Japanese Employment Law Update

July 14, 2022

Discussions on Monetary Relief System for When Dismissal is Invalid

1. Study Group Report

On April 12, 2022, the Ministry of Health, Labour and Welfare released a report entitled, "Report by Study Group on Legal and Technical Issues Concerning Monetary Relief System for When Dismissal is Invalid" (the “Report”).

The study group consisting of legal experts examined the legal and technical issues relating to a monetary relief system under which an employee can request to terminate their employment contract in return for the employer paying a monetary amount, in the event of an invalid dismissal. The Report analyzes relevant issues and indicates possible options, but does not present a definitive proposal on how to structure such a monetary relief system. However, in addition to being a springboard for discussion, the Report does provide some useful insight into what such a mechanism might look like if introduced in Japan.

2. Premises: Strict Limitations on Dismissal and Reinstatement

In Japan, employment at will is unavailable, and an employer may only terminate an employee when both (i) an objective, justifiable reason exists AND (ii) it is considered to be appropriate under general societal terms (so-called “The Doctrine of Abuse of Right to Dismissal” adopted by the Supreme Court which later became a part of the Labor Contracts Act). Under this Doctrine/Act, the employer bears the burden of proof to show that a dismissal has “objectively reasonable grounds” and “is appropriate in general societal terms,” and the Japanese courts strictly interpret this standard, such that many dismissals have been found invalid unless there was a very significant reason for the dismissal. In short, in Japan, dismissals are generally considered invalid and would be regarded as valid in only extremely limited circumstances.

When a dismissal is found to be invalid, the ultimate risk to the employer is that the

employer must reinstate the employee and pay unpaid wages from the time of dismissal until the court's decision invalidating the dismissal has been rendered, along with an annual interest of three percent per annum. A labor tribunal procedure at a district court takes between three to four months on average, and litigation proceedings in the first instance usually take more than a year, which makes it time-consuming and costly for employers to resolve disputed dismissal cases. Additionally, even if it is difficult for an employee to return to the office and continue working as a practical matter, if a court determines that the dismissal is invalid, the employer must in principle reinstate the employee, unless the employee agrees to resign voluntarily.

3. Points at Issue

There are many detailed issues to be looked into and considered in adopting the system proposed in the Report, including providing how the monetary relief may be sought. The Report contemplates that employees are required to take legal action to utilize this system; namely, by filing a regular lawsuit or a labor tribunal hearing, and claiming before either forum that the employer should pay the employee a "labor contract cancellation fee" as calculated by the court or the tribunal. The Report discusses that the legal nature of the monetary relief may be categorized as payment separate from backpay or liability for damages due to tort, thus allowing the employee to make such claims separately. The most difficult part in establishing this system may be the mechanism for calculating the monetary relief amount. The Report discusses the need for predictability and the usefulness of having some type of formula (based on such factors as the employee's salary, service years, age, and reasonable period of time required for securing new employment), while pointing out the importance of individual circumstances and the need to be able to take them into consideration.

4. Outlook

Discussions regarding the possible introduction of monetary relief for dismissals have been ongoing since the early 2000s. As this is a highly controversial topic, it is expected that it will take a considerable amount of time for any new system to be established and enter into effect.

Prevention of Harassment

The amended Act on Comprehensive Promotion of Labor Policy which requires employers to take necessary measures to prevent "power harassment" (i.e., bullying at

workplace) initially applied only to large scale companies. However, it has started to apply to small and medium-sized companies from April 1, 2022.

Together with the Equal Employment Opportunity Law and the Childcare and Family Care Leave Law, employers are now required to take necessary measures to prevent sexual harassment, maternity/paternity harassment and power harassment in the workplace, regardless of the company size. These preventive measures include ensuring that the company's anti-harassment policy is announced to employees, setting up a point of consultation for employees who believe they have been subject to harassment, taking immediate and appropriate measures in the event any harassment occurs, and prohibiting the unfavorable treatment of employees who reported harassment or cooperated in an investigation of alleged harassment. If an employer is found to be in violation by not having such measures in place, the Minister of Health, Labour and Welfare may give advice, guidance or recommendations to the employer, and if the employer does not comply with any recommendations provided, the name of the company may be publicized. Consequently, small- and mid-sized companies are recommended to review their current policies and practices to confirm that they meet these requirements.

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