

DOWNSIZING IN JAPAN: A BRIEF LEGAL OVERVIEW

**By: Bonnie Dixon & Miho Niunoya
Atsumi & Partners
Tokyo, Japan**

Japanese work culture has for years been predicated on a concept of “lifetime employment”; this has been all but eradicated in the current global financial turmoil as lay-offs of both regular and “temporary” staff accelerate. This note deals with general issues that should be considered in formulating an employee “redundancy” plan in Japan (a “Redundancy Plan,” though note that “redundancy” is not a separate concept from other forms of employee dismissals in Japan – it is just dismissal for business reasons).

Introduction

The principles highlighted in this note are applicable even if a company is closing its Japan office. It is not uncommon for employees to unionize in order to fight dismissals and employee claims for wrongful dismissal before the Labour Bureau (a government entity which oversees labour law compliance) are not uncommon. Therefore, to minimize the risks that employee dismissals may be ruled invalid, a company needs to ensure that it follows the principles described below, with special attention being given to reasonableness and to communicating and collaborating with its employees or any union representative in the redundancy process.

This note does not address employee dismissals for cause, consensual dismissals, retirement or resignation, and relates to “permanent” employees (Sei-shain); “temporary” employees under a fixed term contract (Keiyaku-shain) are subject to a different regime, but similar considerations will apply to dismissals during the contract term.

Conditions to Proposed Redundancies

A Redundancy Plan should be structured in accordance with the company’s work rules and any employment contracts and collective bargaining agreements in effect. Also, the company should consider whether any precedent has been set regarding employee dismissals by reviewing previous restructuring/downsizing plans. The Redundancy Plan must be seen to be fair when taken as a whole and dismissals should be viewed as a last resort.

Pursuant to the Labour Standards Law, employees being dismissed must be given 30 days’ notice prior to dismissal or paid 30 days’ salary (this amount is pro-rated depending on the actual length of the notice period) in lieu of such notice. However, incentive packages to encourage early retirement or voluntary resignation are common and may be necessary to ensure the fairness and validity of a Redundancy Plan.

Several other requirements must be met; first, the employee dismissals must be essential. A company’s need to reduce the number of its employees will be found to be essential if the reduction is based on a business or economic decline or depression affecting the company or if

employee dismissals are “unavoidable”. In general, employee reduction measures are sufficiently justified if there is a “high degree of business difficulty” in the management of the business which can be alleviated by or requires the reduction. The standard appears to be that if a reasonable manager would be justified in reducing the number of employees under similar business or economic conditions then a Redundancy Plan will generally be upheld.

Second, the company must have made sincere and reasonable efforts to avoid dismissing employees. Even a seemingly justified Redundancy Plan may be held invalid if a company does not first exhaust all reasonable measures to avoid employee dismissals, for example by not renewing any expiring fixed term employment contracts, freezing external hiring, transferring or redeploying qualified employees into open positions in other departments or to subsidiary/sibling companies (subject to the employee’s consent if required), soliciting employee retirements or resignations and other non-employee related cost cutting measures.

A Redundancy Plan commonly includes an incentive package to persuade employees to retire or resign rather than be dismissed. Incentive packages should be structured in line with current industry practice, if ascertainable, or any precedent established from previous restructuring/downsizing plans. Even though voluntary, incentive packages should be structured carefully to be seen to be fair and should be negotiated with the employees or any union representative. Incentive packages may include additional termination payments (above the legal minimum of 30 days notice or payment of 30 days salary in lieu of notice), buying out any remaining annual paid vacation, treating the retirement or resignation as involuntary in terms of the calculation of retirement allowance and unemployment insurance and, if able, providing the services of a placement agency to assist employees to find new employment. In most cases there is no requirement that incentive packages be offered company-wide and they can be targeted to the departments that are affected by the required employee reduction.

The fairness of an incentive package will generally be determined based on the financial condition and size of the company, employee expectations of long term employment and the necessity for the dismissal, etc. There are different methods of calculating the incentive amount that may be offered to employees. The most common are: (a) a fixed amount of months’ of salary, generally 6 months is recommended (although, note that this amount may be lower or higher depending on the financial condition of the company, employee expectations of long term employment and the necessity for dismissal, etc.), offered to all employees regardless of the number of years of service or (b) a fixed amount multiplied by an employee’s number of years of service (this option is recommended if the company has the resources).

Third, the criteria for selecting which employees to dismiss must be based on objectively reasonable standards and applied in a non-discriminatory manner. Objectively reasonable standards may include substandard job performance evaluations, history of repeated absences or tardiness, violations of workplace disciplinary rules, and the economic impact of the dismissal on the affected employee.

Lastly, the company is required to discuss the dismissals with the employees or any union representative. An employer that unilaterally implements a Redundancy Plan may find employee dismissals held invalid. Recent court decisions have imposed a duty to include a good

faith explanation by employers of the need to dismiss employees, including the timing, scale and method, to all relevant employees, as well as to any union representative (both individually and collectively) even if no such duty exists contractually.

The Role of the Labour Bureau in Employment Disputes

There is no formal employment dispute mechanism for individual employee complaints, other than judicial proceedings. However, the Ministry of Health, Labour and Welfare, which administers employment laws, has established local Labour Bureaus to provide advice and guidance to employees and employers related to employment issues, including disputes. Employee claims for wrongful dismissal before the Labour Bureau are not uncommon. Claims for wrongful dismissal may be brought even if an employee has voluntarily resigned or retired as the employee may complain that the resignation or retirement was coerced by the employer and, in some cases, employees have asserted such claims as a strategy to influence larger incentive packages.

One of the roles of the Labour Bureau is to mediate the settlement of disputes between employees and employers and provide guidance to the parties. Settlements negotiated and guidance given by the Labour Bureau in relation to an employment dispute do not have binding legal effect. However, it is advisable that an employer take such advice into consideration in order to ensure the smooth implementation of a Redundancy Plan and decrease the chance that the dispute will be brought as formal litigation.

Summary

In order to ensure that a Redundancy Plan will be valid, a company should take the approach at the outset that employee dismissals will be a last resort. Generally, a company's intention throughout the restructuring/downsizing process should be to retain as many employees as possible.

A company is required by law to provide an employee 30 days' notice prior to dismissal or pay 30 days' salary in lieu of such notice. A successful Redundancy Plan will likely include an incentive package to encourage early retirement or voluntary resignation. Communicating and collaborating with employees and any union representative is essential.

Japanese employment law is very favourable to employees, and legal advice should be sought when contemplating structuring and implementing a Redundancy Plan.