

# **Disciplinary Measures under Japanese and German Law**

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## I. INTRODUCTION

Work-related contracts create certain obligations for the employer and the employee. The main obligation is the exchange of labour by the employee for the salary payment by the employer. A breach of those obligations will in most cases render a work contract voidable. Both parties may terminate the work relationship and eventually claim damages for non-performance.

In addition to the main obligation of performing work, employees have several ancillary obligations: Employees have to follow the directions of their employers. These might be the requirement to work certain hours, the obligation to wear uniforms, the prohibition against sexual harassment, etc. Breaching these obligations will not always lead to an automatic termination of the employment.

German and Japanese law regulates these situations in similar ways but with some fine distinctions that illustrate the different cultures. This essay will describe the different ways in which both jurisdictions deal with unsatisfactory performance of employees of ancillary obligations. First, there will be a description of the applicable rules, followed by a comparison. Special attention will then be given to sanctions by the employer for private misconduct of their employees. The essay will conclude with an analysis of the main differences.

## II. BASIC LAWS AND APPLICATION

Both German and Japanese law deal with breaches of ancillary obligations.

### A. *Japanese Law*

In Japan two legal theories justify measures to maintain order in the workplace: The inherent power theory states that an employer has the intrinsic power to impose discipline. Under this theory, imposing discipline is even possible without work rules. The contract theory states that the employer has the right to impose discipline once the worker has assented to it in the employment contract. The Japanese courts have affirmed the right of employers without significant reference to these theories. Decisions indicate that the courts apply both theories.<sup>1</sup>

#### 1. *Applicable Statutes*

The right of employers to draft work regulations including sanctions is determined in Articles 89 to 92 of the Japanese Labour Standard Law.<sup>2</sup>

#### 2. *Available Sanctions*

Under Japanese law, five kinds of disciplinary sanctions exist: reprimands and warnings, wage decreases, suspension and disciplinary discharge.

A reprimand is an admonishment against future conduct and requires a written apology. A warning is described as an admonishment directed against future conduct without a written apology.<sup>3</sup>

Japanese labour law further allows a deduction from the fixed amount of a salary as a disciplinary sanction. Article 91 of the Labour Standard Law limits these deductions to 50 per cent of the daily average wage.

A Japanese employer may bar an employee from coming to work for a fixed period while the labour contract continues. For this period, the employee will not receive a salary. The law does not restrict the length of these suspensions.<sup>4</sup> In practice, many work suspensions are for one week or between 10 to 15 days.

A disciplinary discharge is the severest punishment allowed under Japanese labour law. There are two kinds of dismissals: The employer may unilaterally discharge the employee. A lesser form of discharge would be a counselled discharge where the employee voluntarily resigns from employment.

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1 K. SUGENO, *Japanese Employment and Labor Law* (2<sup>nd</sup> edn., Durham, NC, et al. 2002) 420.

2 *Rôdô kijun-hô*, Law no. 116/1974 as amended.

3 K. SUGENO, *supra* note 1, 421.

4 K. SUGENO, *supra* note 1, 422 – 423.

### 3. *Procedural and Progressive Discipline Requirements*

The employer needs to fulfil standards set by the rule of law. The work rules must be sufficiently clear. Punishment cannot be applied for actions before the rules were set. Double punishment is not permitted. Similar offences must be treated similarly and appropriately. Before a punishment decision, the employee has the right to be heard, to a fair process and to counsel.

### 4. *Off-the-Job Behaviour*

In Japan, an employer does not have the general right to control the employee's private life. The employee's private actions and expressions can, however, be subject to disciplinary punishment if they are directly related to enterprise activities and might damage the reputation of the employer.<sup>5</sup>

## B. *German Law*

In Germany, the employer may set general rules deemed necessary to keep order in the workplace and to ensure good cooperation from all employees. These rules typically stipulate certain sanctions in case of infractions.

### 1. *Applicable Statutes*

There is no specific statute authorizing work rules. Several statutes mention the rights of employers without expressly granting such rights. The prevailing legal opinion is that these rules do not infringe on the exclusive judicial powers of the state regarding punishment.<sup>6</sup>

### 2. *Available Sanctions*

Under German law, sanctions by employers are divided by individual and collective sanctions. Individual sanctions are those that are stipulated in the employment contract. Collective sanctions are those stipulated in the rules of employment.

#### a. *Individual Sanctions*

The employer has several possible sanctions to unsatisfactory behaviour by an employee. The sanction most widely used is the "*Abmahnung*". The *Abmahnung* is a unilateral declaration by the employer that certain work is required of an employee and that the work has not been performed or has not been performed to the satisfaction of the

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5 K. SUGENO, *supra* note 1, 428.

6 A. KRAFT, Sanktionen im Arbeitsverhältnis, in: *Neue Zeitschrift für Arbeitsrecht* 1989, 779

employer.<sup>7</sup> The employer expresses dissatisfaction and states that future below-par performance will not be tolerated. The *Abmahnung* has two functions: It warns the employee and gives the employee a chance to improve the behaviour in question. In practice, the *Abmahnung* is a mandatory step before an employer can discharge an employee. Because of its significance, the employer has to consult with the work council before issuing an *Abmahnung*.<sup>8</sup>

In addition to the *Abmahnung*, the employer may cut fringe benefits as a result of bad performance.<sup>9</sup> The employer may also claim damages from the employee, but German courts seldom awarded damages. Only in the case of wilful misconduct or gross negligence will the employee be held fully liable. The burden of proof rests with the employer.<sup>10</sup> The employer may claim a penalty payment if such payment was agreed to by the employee.

Finally, bad performance may also lead to termination of the employment contract as stipulated in § 1 of the Discharge Protection Law and § 626 I of the German Civil Code. Termination requires a prior *Abmahnung* and is the harshest sanction available under German law.

#### *b. Collective Sanctions*

Collective sanctions have to be regulated in the rules of employment and require approval of the work council according to Article 87 I Nr.1 Company Constitutional Law. Sanctions include reprimands, pecuniary punishment and fringe benefit cuts. Contract termination is not considered a collective sanction but rather an individual sanction as described above.

### *3. Procedural and Progressive Discipline Requirements*

A sanction by the employer requires that several conditions be fulfilled. First, the rules of employment need to be lawfully enacted, including approval by the work council. The regulation needs to fulfil the standards of the rule of law, as would be required for a criminal law statute: The wrongdoing must be clearly defined. The employee is entitled to fair proceedings, including the right to be heard and the right to counsel, and the sanction needs to be reasonably appropriate to the wrongdoing.<sup>11</sup> Employer sanctions can be fully reviewed by the labour courts.

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7 G. SCHAUB, Die Abmahnung als zusätzliche Kündigungsvoraussetzung, in: Neue Zeitschrift für Arbeitsrecht 1997, 1185.

8 A. SCHLEUSENER, Die betriebsverfassungsrechtliche Abmahnung, in: Neue Zeitschrift für Arbeitsrecht 2001, 643

9 A. KRAFT, *supra* note 5, 782.

10 A. KRAFT, *supra* note 5, 782.

11 A. KRAFT, *supra* note 5, 783.

#### 4. *Off-the-Job Behaviour*

German law generally does not allow an employer to sanction an employee's behaviour outside the workplace. If the outside conduct influences the workplace in a negative way, the employer might be entitled to punish the employee.<sup>12</sup> For example, an employer may discharge an employee if the employee lost a driver's license for drunk driving and therefore is not able to work. In such a circumstance, the discharge is a factual circumstance rather than a punishment. The employee is discharged because, as a matter of fact, the employee cannot work.

### III. COMPARISON

The systems are similar to a striking degree. First, there is no express statutory right for the employer to punish employees for work rules infringements in either country. Second, the available sanctions are similar. For example, the upper limit of wage decreases is identical. The decrease is limited to one half day of salary in both Japan and Germany. Third, both jurisdictions apply rule-of-law standards for proceedings inside the workplace: The employee has the right to fair hearing and counsel.

#### 1. *Major Differences*

The major difference is that, in Germany, the *Abmahnung* and termination are the only major sanctions used by employers. Germany does not allow employers to suspend employees from work, nor does it allow counselled discharge. Minor sanctions such as cutting fringe benefits are hardly applied. Finally, there is no obligation in Germany for an employee to apologize to the employer for wrongdoing. Sanctions available under German law seem to be more directed at the separation of the employee. In most cases, the work contract will be finally terminated.

In Japan, the focus of the sanctions seems to be to maintain the work relationship and to repair the relationship between employee and employer. The employer is not limited to harsh measures such as the *Abmahnung* or termination. Japanese employers may – and do – choose from a wider range of sanctions. The employer can ask for an apology letter and may suspend the work contract of an employee for a certain period. The Japanese employer has more possibilities to express a lack of satisfaction with the employee.

In Japan, it is relatively easy for an employer to punish an employee for private wrongdoing as long as the action diminishes the reputation of the employer. This is unthinkable in Germany. Only if the employee is no longer able to work can the employer punish an employee for off-the-job behaviour.

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12 W. BERKOWSKY, Die Verhaltensbedingte Kündigung, in: Neue Zeitschrift für Arbeitsrecht – Rechtsprechungsreport 2001, 56.

## 2. *Cultural Reasons*

The major reason for the differences can be seen in the different cultural backgrounds of the two countries. Work is much more associated with pride and status in Japan than in Western cultures such as Germany and the United States. Whereas it is bad for a Westerner to be unemployed, it is an unspeakable shame for Japanese. This might be a reason why contract termination does not occur in Japan as often as in Germany. The gravity of discharge is fundamental, and employers as well as employees will try to avoid this as much as possible. In addition, loss of employment leads to often harsh results in Japan, where there is little unemployment insurance compared with Germany. The employee will immediately be left with insufficient financial support.

A Westerner may be surprised that work suspension is effective as a punishment for Japanese. A German might welcome such a punishment as a free but unpaid holiday. In the Japanese culture, everybody is constantly observed by family members, neighbours, friends and co-workers. If a person does not work for a certain period, those people will become suspicious and start rumours. This poses stress for the affected employee, which leads to a substantial loss of face.

Loss of face is the reason why apology letters are very effective sanctions in Japan. In Germany, in contrast, such letters are basically meaningless.

The overall importance of the workplace for Japanese is illustrated in the punishment for private wrongdoing. Off-the-job activities of an employee are not only done in a person's private capacity. A person is always an employee as well, and even purely private behaviour might influence the workplace.

Finally, striving for harmony is another factor that affects the sanctions available under Japanese law. Apology letters and work suspension are the sanctions mainly used in Japan and are mainly directed at reconciliation. They are aimed at restoring balance in the workplace and rectifying employee wrongdoing. The final goal is to restore peace while keeping the employee employed. The German system of *Abmahnung* and termination focuses on the final sanction of separation. The goal is not to restore harmony but to separate the employee from the workplace.

## IV. CONCLUSION

The different sanctions for violation of workplace regulations illustrate the different cultures of Germany and Japan. In Japan, work and the company play a much more significant role than in Germany. Punishments by the employer pose an immediate threat to the employee and the employee's status in society. In Germany, workplace loyalty does not play such an important role; therefore, employees seem to be more relaxed about workplace sanctions. A German worker will not be as emotionally attached to the workplace as would a Japanese worker.

This does not mean that Germans are indifferent to sanctions. On the contrary, a termination is a huge problem for every employee. In times of globalization, jobs are becoming rarer in all industrialized countries. It can be assumed that persons whose contracts are terminated will have difficulties finding new jobs. A termination because of work rule infringements means a significant loss of income because unemployment insurance is naturally not as high as the salary.

These concerns are rather materialistic. Emotional concerns such as loss of face and harmony are very important in Japan but not as relevant in Germany. Overall, it remains to be seen whether Japan will be able to maintain its attitude towards sanctions for work rule infringements. The striving for harmony requires the use of employer resources and the willingness of all involved to compromise their own interests and to reconcile. The growing trend towards more individualism and materialism in Japanese society poses a threat to its ability to reconcile. This will be a major challenge in the years to come.