reasons (b) ~ (d) are the reinforcing factors for determining whether a given asset-disposal is to come under the disposals of material corporate assets from the viewpoint of the value of a disposed asset (the reason (a) aspect).

This Supreme Court decision would not have regarded the transfer of the relavant shares as the disposal by a corporation of its material assets required to be determined by its board of directors based on reason (b) or reason (d), if the value of the disposed assets or the proportion of their value to the gross amount of the corporation's assets had been relatively small. In this sense, this Supreme Court decision should be analyzed to have held that the transfer of the relevant shares by X Corporation did come under the "disposal by a corporation of its material assets" referred to in Article 260(2)(i) of the Commercial Code, regarding the quantitative criterion, i.e. reason (a) as the central consideration for finding that Article 260(2)(i) applies. At the same time, the Court added qualitative criteria, i.e. reasons (b) ~ (c) above, as reinforcing considerations, and then took all the factors into account.

Prof. YASUHIRO OSAKI
Assoc. Prof. NOBUO NAKAMURA

7. Labor Law

A case in which it was held that when a high-school teacher sent the president of the Akita Lawyers' Association documents defaming his employer and gave similar information to a magazine reporter, it is lawful for the employer to dismiss him, because his act violated the confidential relationship existing in the employment contract. The case of Keiai-Gakuen eleemosynary Corporation (Kokugakukan High School).

Decision by the First Petty Bench of the Supreme Court, on September 8, 1994. Case No. (*o*) 734 of 1993. 657 *Rōhan* 12.

[Facts]

Y (defendant, *kōso* appellant, *jōkoku* appellant) is an eleemosynary corporation which established and manages K High School. X (plaintiff, *kōso* respondent, *jōkoku* respondent) is a teacher at K High School who had been employed by Y since 1966. In the beginning of 1982, the conditions at K High School deteriorated. The teaching declined, the school budget became tight, and the morale of teachers was affected. In order to improve the school conditions, E was appointed to be the chairman of Y and later he became the headmaster of K High School. However, as it was very different from the previous management, X could not accept E's policy at all. Also, X was opposed to the educational views of some supervisors. Because of these everyday conflicts and poor work performance of X, Y dismissed X on February 27, 1987 (first dismissal). Then, insisting the first dismissal was invalid, X filed a suit in the Akita District Court for a preliminary injunction to maintain his status as an employee of Y. His claim was upheld on November 18, 1987 (first judgment).

After the first dismissal and before the judicial proceeding, X sent a few documents to the president of the Akita Lawyers' Association asking for a remedy from the Committee for the Protection of Human Rights. Those documents included matters which distorted the facts and defamed Y and E. For example, they said the account of Y was dishonest, or that E had sexually harassed female students. Furthermore, during the judicial proceedings, X gave similar information to a magazine reporter, and according to the information, the reporter wrote an article for the magazine.

Therefore, on March 12, 1988, Y withdrew the first dismissal, and then based on its work rule, Y expressed a new intention to dismiss X, offering legal dismissal compensation and retirement payment (second dismissal). The work rule of Y provided that Y can dismiss an employee: whose performance is unsatisfactory; whose competence or qualifications are inadequate to perform his/her job; who has health problems which interfere with the performance of his/her job; or because of other compeling reasons comparable to the above three factors.

X again filed a suit against Y in the Akita District Court, claiming that this second dismissal was illegal and invalid. The Akita District Court upheld the claim and the Sendai High Court affirmed the decision of the Akita District Court. Y appealed to the Supreme Court.

[Opinions of the Court]

Appeal Allowed.

According to the facts, in the documents, X mixed falsehood with the truth, distorted the facts concerning the management, and blamed and attacked Y and E. That means on the whole that X defamed them. Moreover, the fact that X sent the same malicious information to a magazine reporter shows his intention to disseminate the defamatory information widely. X's acts caused substantial damages to the credit and reputation of Y, and it violated the confidential relationship between X and Y existing in the employment contract. Even if we take into account of the first dismissal, which seemed to be done rashly for the purpose of removing X, and the fact that it was during the court proceedings that X sent the information to the president of the Akita Lawyers' Association, we cannot change the findings. Also, considering the inadequate performance of X, we cannot say the second dismissal was abusive.

[Comment]

1. The general principle of dismissal

In Japan, if employment is not for a definite period, generally either party may make a request to terminate the employment contract at any time (Civil Code, Article 627). That is the principle of "freedom of dismissal". However, employer and employee do not actually stand equally and this principle puts employees in very uncomfortable situation. In other words, fear of dismissal is one of the biggest factors that makes workers subordinated to their employers. The Labor Law sets certain restrictions on the dismissal rights of employers; (a) prohibitions against dismissal of an employee who is on maternity leave or medical treatment for work-related injuries (Labor Standards Law, Article 19 (1)); (b) an obligation to give no-

tice 30 days before the dismissal or payment of 30 days' dismissal compensation (Labor Standards Law, Article 20 (1)); (c) prohibition of discrimination in dismissal (Labor Standards Law, Article 3 and Equal Employment Opportunity Law, Article 11 (1)); (d) prohibition of dismissals of employees because of their relationship with a union (Trade Union Law, Article 7). These provisions are very specific, but other kinds of abusive dismissal cannot be regulated under the statutes. Under Article 89 (iii) of the Labor Standards Law, it is the obligation of employers to provide information concerning termination of employment in their work rules. As we can see in this case, most companies provide very comprehensive provisions in their work rules, but they do not serve as restrictions.

Therefore, in the area of statutory law, workers are powerless in face of employers' "freedom of dismissal", unless they make collective agreements. In order to overcome the workers' powerlessness, precedents have established the doctrine of "abuse of the right of dismissal", using Article 1 (3) of the Civil Code, which provides that "abuse of rights is not allowed". That is, "even where there are good reasons for a dismissal, an employer does not always have the right to dismiss. If, under the specific circumstances of the case, the dismissal is unduly unreasonable so that it cannot receive general social approval as a proper act, the dismissal will be declared void as an abuse of the right of dismissal" (See the case of *Kochi Hoso*, the Second Petty Bench of the Supreme Court, on January 31, 1977, 268 *Rōhan* 17). According to this doctrine, even a formally lawful dismissal may be invalid, if it lacks reasonable grounds. Reasonable grounds which make the dismissal valid are, for example; (1) the worker's incompetence, or the worker's lack or loss of skills or qualifications necessary to perform the job; (2) the worker's violation of a disciplinary rule; (3) business necessity; (4) union demands according to a union-shop agreement. In the instant case, the main point was whether the second dismissal was grounded on (2) or not. The first decision and the original decision responded negatively and the Supreme Court responded affirmatively.

2. Analysis of the Instant Case

(A) According to the facts, X sent the information after the first

dismissal and this was the period when Y refused to reinstate X. That is, the act which directly caused the second dismissal was done outside the workplace. Most litigation concerning dismissals because of the critical speech against employers outside the workplace are related to union activities. Most of them are cases in which the courts held the dismissals invalid. All of them are cases of disciplinary dismissal, but this case is a case of the ordinary dismissal, because the second dismissal was done on the grounds of the work rule provisions of ordinary dismissal and Y offered X a retirement payment. Therefore, we cannot refer to the trend of the previous decisions concerning disciplinary dismissals directly. In fact, there are examples in which employees who claim the unfairness of their disciplinary dismissals accepted ordinary dismissals instead. Therefore, if the first dismissal of this case was a disciplinary dismissal (although it is not clear from the report) and the second dismissal was an ordinary one, the courts reviewing the second dismissal could take account of the grounds on which the first judgment had declared the first dismissal unreasonable.

(B) The Supreme Court concentrated on X's libelous speech. However, the character of this speech is very critical. X was making this kind of speech before and during the judicial proceedings concerning the first dismissal. It was part of the appeal activity seeking support from another entity. The Akita Lawyers' Association and the Commission for Protection of Human Rights are semi-public institutions established to protect human rights. They must keep client information confidential. To dismiss an employee because of documents which were sent to the Lawyers' Association extremely limits the terminated employee's opportunity to seek support for his/her case. Similarly, the access to mass media is very important for workers who are claiming unlawful treatments by employers. The right of speech in order to protect or claim his/her rights should be highly protected.

However, even if the speech was making as part of the activity to appeal for support, it is not worth protecting when it has no direct relation to the protection of his/her rights, is done with an intention to defame, and has substantial, serious consequences. We have to

read the statement of the Supreme Court in this context: "X mixed falsehood with the truth and distorted the facts, and blamed and attacked Y and E. That means on the whole that X defamed them" and "his intention to disseminate the defamatory information widely" was shown.

3. Further considerations.

As mentioned in 1, in Japan, the law allows the right of dismissal to employers at first. The courts provide remedies to the workers only in cases in which the dismissal is "abusive". Using this framework, the courts have provided effective limits on the employers' ability to dismiss employees. Also, this framework allows the courts to apply case-by-case judgment. However, this doctrine means that the effect of a dismissal becomes clear only in court, because there are no explicit rules or criteria in the statutes. Therefore, it leaves the parties (especially the worker's rights) unsettled. For example, in this case, the first and second decisions recognized X as an employee of Y, although the Supreme Court refused to recognize him as an employee, and it took six years until the status of X was finally determined. Also, it is not a worker's right to be protected from unfair dismissal under this doctrine, and this means that a worker who does not have enough time or money to file suit has to give up. In order for each worker to freely express his/her own opinion, it is indispensable to mitigate the fear of dismissal, but the doctrine which is dependent upon only subtle balancing by the courts can not mitigate, but supports the fear of dismissal. The doctrine of "abusive dismissal" has helped to protect employees' rights, however, we also have to recognize the limitations it imposes.

Prof. KAZUHISA NAKAYAMA
TOMOKO SASANUMA