The Legal Issues Surrounding Professionals in Relation to Labor Law

Ikuko Mizushima
Osaka University

Workers are those who work subordinate to the orders of employers (subordinated labor), and who earn a wage and live on this income. The image of such workers could be considered to be in contrast to so-called professionals, who work autonomously, earning a high wage along with high levels of economic and social standards. Given their position, profession and attributes, professionals were seldom recognized as ordinary workers. Professionals include those to be categorized as workers and those not. In this paper, we initially consider the characteristics of a worker within the professional. The criteria for identifying "worker characteristics" is related to whether the professional in question is subordinate to an employer, and has no relation to their actual type of profession. In this paper, the various problems within labor law as it relates to professionals who are also workers are illustrated through examples of the working hours of doctors, and the dismissal of professionals.

I. Introduction

1. The Meaning of "Professional"

When writing a paper on law, it is important to first define the terms being used therein. In this paper, it is therefore necessary to define what we mean by "professional," since the term "professional" is ambiguous.

The word "professional" is often used to express the opposite meaning to "amateur," for example in the terms "amateur" or "professional" musician, or "amateur" or "professional" sportsperson. In comparison with a professional musician, who makes their living from music, an amateur musician in general does not work in the music profession. A professional sportsperson, similarly, makes their living from sport. Among amateur athletes, however, there are frequent examples whose paid work is within the sporting industry. Amateur athletes may also be company employees, or have other professions that are outside of sport entirely.

"Professional" can also be used as a term to describe people with high levels of specialist or unusual abilities and/or skills. A very limited number of people with special abilities or skills are known as "professionals." In the case of medical doctors, for example, these abilities are developed in a specialist training program, and only those who have undertaken this program and passed a state qualification may practice in the field of medicine. People with such a qualification are professionals. In the same way, there is no doubt that lawyers are professionals. The high level of their specialization demonstrates the fact that they are exclusively qualified to engage in their work. In addition to doctors and lawyers, there are many other professions that require high levels of skill and the passing of a state qualification, but it is difficult to draw a line above which such people would be referred to

as "professional." Perhaps it is not right to judge whether someone is a "professional" or not by whether they have a particular qualification or work in a particular profession. University teachers, for example, are assumed to have high-level skills, and it is by no means easy to gain employment in this field, but it is doubtful whether all such personnel could be referred to as "professionals." It is easier for people working in the fields of mechanical and technical engineering to gain employment than it is, for example, for a doctor or a lawyer. Becoming a mechanical or technical engineer with specialist skills, however, requires many years of experience and good instincts. Engineers with such specialist skills are undoubtedly worthy of being called "professionals."

2. Scope of This Paper

As pointed out above, the term "professional" is ambiguous and easily misinterpreted. In this paper, the term is used to refer to the professions that are recognized as "professional" by society as a whole.

There are some cases where legal problems may arise in regard to the period of time, hours, location, remuneration, contract termination, or other issues relating to how a "professional" executes his or her profession. The issue to be dealt with by this paper is that of problems relating to labor law, and as such, the scope of this paper is restricted to those professionals to whom labor law applies, in other words those professionals acknowledged as having the characteristics of a worker.

Let me give an example. When a musical theater puts on a performance of an opera, a diverse team of opera singers, the choir, the orchestra, stage staff, costume staff, hair and makeup artists, etc., work together to create the production. They are not amateurs, nor are they working on the project as a hobby. They are participating in the team as professionals. Obviously, they have their own individual artistic skills and techniques, such as singing or playing. From that perspective, they are all professionals.

The American Metropolitan Opera performed in Japan in June, but sadly, opera stars Anna Netrebko and Jonas Kaufmann cancelled their performances. Stars such as they are not exclusively attached to the Metropolitan Opera, but enter into contracts with opera houses throughout the world. They are paid large sums to perform on stage. The legal basis for their performances is a concluded performance contract (contract for work), and not a contract of employment. In comparison to this, the ensemble members and costume staff are more strongly affiliated to the organization, and the probability that they have an employment contract with the opera company is high.

As can be seen here, there are professionals who are not workers, and those who can be described as workers. Whether or not a professional is also a worker depends on the type and contents of the contract that person holds, and on the relationship he or she has with the contracting party (their employer or the person placing an order with them). The definition is unrelated to the type of profession in which they are engaged, or their professional level of specialization or abilities.

Subsequently, we will consider the worker characteristics of a professional (II). As examples of the labor law problems faced by professionals who are also workers, we will look at the working hours of doctors (III) and the dismissal of professionals (IV).

II. Characteristics of a Worker

1. General Remarks

Workers are subject to labor laws and regulations, and at the same time are protected by such labor laws and regulations. The characteristics of a worker differ slightly depending on the applicable labor laws and regulations.

Article 9 of the Labor Standards Act states that a worker is "one who is employed at an enterprise or office […] and receives wages therefrom, without regard to the kind of occupation." The characteristics of a worker according to the Labor Standards Act are the same as those applied in the Minimum Wages Act, the Industrial Safety and Health Act and the Industrial Accident Compensation Insurance Act. The same principles also apply almost exactly to the concept of a worker under the Labor Contract Act.[1]

Defining the characteristics of a worker requires a decision as to whether the worker can be considered to actually be supplying labor in a state of subordination to the employer, regardless of whether their contract is a labor contract, a contract for work or some other form of contract.[2] Specifically, this concerns factors such as whether or not there is a relationship in which directional orders are given during the implementation of work, the description of the job, the characteristics and value of the wage paid, whether the relationship between the employer and the worker allows for any freedom in accepting or rejecting specific requests or instructions in regard to the job, the existence and level of restrictions regarding time and location of work done, the possibility of substitution of the work supplied, which party bears the burden of supplying equipment, machinery and tools for the work to be done, the extent to which the worker is exclusively working for the employer, the application by the employer of service regulations, the relationship to public burden (taxes and social insurance) and various other considerations. When determining whether a worker is a professional or not, issues such as the existence of a director who issues orders, whether the remuneration paid is of a high level, and whether the worker has freedom to reject a request tend to be problematic.

The Labor Union Act, on the other hand, defines a worker as someone who lives on the income acquired from wages or salary, regardless of profession (Labor Union Act, Article 3). This is a broad definition compared with the definition of a worker within the Labor

[1] The Labor Contract Act does not require a worker to be employed "at an enterprise or office" (Labor Contract Act, Article 2, Paragraph 1). As such, strictly speaking, it offers a broader definition of "worker" than the Labor Standards Act.

[2] Shinjuku Labor Standards Office Director Case, Tokyo High Court, July 11, 2002, Rodo Hanrei 832, p. 13.

Standards Act or the Labor Contract Act, since the Labor Union Act contains no requirement for "employed." Under the Labor Union Act, a worker is someone who negotiates his or her wages with an employer fairly, through group activities, who lives on the wages or fees earned, whose labor conditions are decided unilaterally by the employer (economic subordination), and who carries out work that is part of the business organization.[3] "Professionals," on the other hand, do not tend to work to orders, but rather implement their work autonomously, and in many cases are not restricted as to the hours they spend at work. Such professionals may not appear to have the characteristics of a worker under the Labor Standards Act, but even in such cases, they may be acknowledged as having the characteristics of a worker under the terms of the Labor Union Act.

2. Musicians

Even court decisions have in the past been divided on the matter of whether or not musicians are "workers" under the terms of the Labor Standards Act.

A solo cellist with an orchestra may be said to have a leadership position, in that he/she directs the general members of the orchestra, but at the same time, he/she is contracted for certain hours, and is unable to refuse when the orchestra requests that he/she performs. For this, and other reasons, the cellist is in a position of subordination, and is acknowledged to have the characteristics of a worker under the Labor Standards Act.[4] Furthermore, the trumpeters and other individual musicians in a band working at a theme park have no freedom to negotiate their remuneration. The theme park management unilaterally specifies the number of performances, schedule, dates and times of performances, the performance location, the formation of the band, and the soloists, and in the case of musicians standing down, the theme park is also responsible for finding replacements. In addition, the musicians' remuneration is done in consideration of the labor supplied, and most of the band members are able to live on the income they receive in remuneration from their work at the theme park, without having to do other part-time jobs. This equates the musicians' contracts with labor contracts, and means they are acknowledged as having the characteristics of workers.[5]

In contrast to this, contracted chorus members within a theater company who were given a list of actual performances when their contracts are signed, and who had the ultimate freedom to refuse or accept individual requests to perform (and therefore have no specific rights to request payment for opera performances), were decided by the Tokyo High Court not to be in a relationship with their employer that was subject to the Labor Standards Act.[6]

Next, we introduce some examples where the characteristics of a worker have been

[3] Satoshi Nishitani, *Rodo Kumiai Ho* [Labor union act], 2nd ed. (Tokyo:Yuhikaku, 2006), 77.
[4] Yomiuri Nihon Orchestra Case, Tokyo District Court, January 27, 1987, Rodo Hanrei 493, p. 70.
[5] Chibori Japan Case, Okayama District Court, May 16, 2001, Rodo Hanrei 821, p. 54.
[6] New National Theatre Case, Tokyo High Court, May 16, 2007, Rodo Hanrei 944, p. 52.

contested under the terms of the Labor Union Act. The Supreme Court has acknowledged the characteristics of a worker for orchestra members where they are employed under a broadcasting and performance contract in such a manner that they are basically required to appear in designated performances, and where their remuneration is set not according to the value placed on the artistic merit of the performance but rather on the value placed on the supply of labor in the form of a performance, even in cases where they are free to perform with other orchestras, or even in cases where their contract does not include a clause that prohibits them from refusing to perform for the company in question.[7]

In regard to the aforementioned theater group chorus members, due to the fact that members with contracts are built into the foundation's organization as a necessary labor provision (chorus) during performances, the fact that members are essentially in a relationship with the employer where they are required to respond if asked to appear in individual performances, the fact that the details of the basic performance contract are decided unilaterally and there is no room for negotiation by members, the fact that members are under directional orders when providing labor in the form of choral singing, and the fact that remuneration is given in respect of the value of the provision of labor in the form of choral singing, the Supreme Court acknowledged that they have the characteristics of workers under the terms of the Labor Union Act.[8] This decision differs from that based on the Labor Standards Act. This differing conclusion probably arises from the fact that the definition of a worker under the Labor Union Act interprets the subordinate relationship with an employer rather more loosely, and emphasizes the inequality in negotiating position and the position of the chorus as part of the business organization.

3. Professional Athletes

Among professional athletes, it is thought that professional baseball players, particularly first-stringers, are not workers under the terms of the Labor Standards Act, since they are able to engage in discussions regarding how their salaries are decided, and their own equipment, etc.[9] In contrast to this view, however, since Japanese players are restricted in their ability to transfer to other teams, it is also the case that they are controlled by their affiliated club, and from this perspective, there are some who say that they should be acknowledged as having the characteristics of workers, regardless of the higher or lower level of their remuneration.[10]

It is thought that the status of professional baseball players as workers would be ac-

[7] CBC Wind Orchestra Case, First Petty Bench of the Supreme Court, May 6, 1976, Rodo Hanrei 252, p. 27.

[8] New National Theatre Case, Third Petty Bench of the Supreme Court, April 12, 2011, Rodo Keizai Hanrei Sokuho 2105, p. 8.

[9] Hideo Nagano, "Puro-supotsu Sensyu no Rodosyasei [Can professional sports players enjoy an employee status?]," *Japanese Journal of Labour Studies* 47, no. 4 (2005): 21.

[10] Itaru Nemoto, "Puro-supotsu Sensyu to Kobetsuteki Rodoho [Professional players in the sports sector and individual employment relations law]," *Journal of Labor Law*, no. 108 (2006): 131.

knowledged under the Labor Union Act, since professional players are part of the working organization, they receive day-to-day and specific instructions from their manager and coach, their remuneration cannot in principle be reduced, and their wages can be assessed as valued against the labor provided.[11] In fact, the Japan Professional Baseball Players Association is registered as a labor union, so for the meantime we will acknowledge their status as workers under the terms of the Labor Union Act.

4. Patent Attorneys

Recently, there have been examples of disputes over whether contracts held by patent attorneys not running their own businesses, but working as employees in a patent office, are in fact labor contracts.[12] The parties involved initially agreed that such are labor contracts, but the patent office subsequently withdrew its agreement, emphasizing that the contract in question was, in fact, a contract for work. The court permitted the withdrawal of agreement, and judged that the contract in question was a contract for work not a labor contract, based on the facts that (i) the criteria for deciding the value of the work done was not based on length of hours worked, but on completing a task, (ii) the difference between running one's own business and being employed was no more than the method of handling taxes and social insurance, and (iii) there was a low level of subordination to the employer.

The Tokyo District Court also stated that since the plaintiff was engaged in patent attorney work with a high level of specialization, the defendant did not have the power of directional instruction over the specific contents of their work. It is difficult to agree with this point, since the Labor Standards Act envisages the employment of people with a high degree of specialization as workers (see Labor Standards Act, Article 14, Paragraph 1). The characteristics of a worker should be judged based on points (i) , (ii) and (iii) above.

5. Doctors

(1) Hospital Physicians

Hospital physicians are, generally speaking, workers under the terms of the Labor Standards Act. This is because they are, in general, subordinate to the directional instruction of the hospital, and they earn wages for engaging in treatment, etc., so providing there are no special circumstances that negate their worker status, they are by definition workers. In reality, however, most hospital physicians do not think of themselves as workers. Compared to general workers, hospital physicians receive extremely high salaries. Given the recent shortage of doctors, it is fairly easy for them to change posts. Furthermore, they can also choose to become self-employed (open their own practice). Within the hospital, they have an elevated position, both within the system and psychologically, when compared to nurses

[11] Satoshi Nakauchi, "Puro-supotsu Sensyu to Syudanteki Rodoho [Professional athletes and collective labor law], " *Journal of Labor Law*, no. 108 (2006): 145 onwards.

[12] S Patent Office Case, Tokyo District Court, December 1, 2010, Rodo Keizai Hanrei Sokuho 2104, p. 3.

and other medical and administrative staff. In other words, hospital physicians are usually in a strong position, and do not need to depend on the Labor Standards Inspection Office or collective labor organizations. They are able to solve legal issues by themselves. It is therefore, perhaps, inevitable that there is a low level of awareness among hospital physicians that they are workers.

An alternative explanation may be that, due to the fact that hospital physicians tend to work far longer than other workers, they lose any sense of themselves as workers or as subject to the protection of labor law over many years of continuous work. (See Section III below for further discussion of the issues surrounding hospital physicians' working hours).

Since hospital physicians, in general, are workers according to the Labor Standards Act, they are generally acknowledged as also having the characteristics of workers according to the Labor Union Act. Hospital physicians, however, do not tend to be members of a labor union of the same type as those usually formed and joined by workers. There are unions of hospital employees, but most of their members tend to be nurses, and very few doctors join them. The National Union of Physicians was only finally formed in 2009.[13] This is a nationwide labor union, which individual doctors can join, and it is anticipated that the rights of doctors as workers will be better protected, and improvements will be seen in labor conditions, as a result. The National Union of Physicians has been accredited as a labor union.

(2) Trainee Physicians

Earlier systems for trainee physicians paid extremely low wages of a few tens of thousands of yen per month, for which doctors worked in the medical department of the university from which they had graduated. Trainee physicians are undergoing training as part of their education, and their activities were not thought of as labor, so as a result they were not, in most cases, treated as workers. Trainee physicians could not live on what they are paid, with the result that most of them did other part-time jobs as a doctor on call.

A judgment on this issue by the Supreme Court in 2005[14] stated that trainee physicians are physicians registered and licensed by the Health Minister (currently the Minister of Health, Labour and Welfare), that former clinical training, while it had an educational aspect, envisaged the trainee doctor carrying out medical practice under the guidance of a teaching physician, and that the implementation of such medical practice, etc., included an unavoidable aspect of working for the hospital establisher. Given that they could be considered to be working under the directional instruction of the hospital when carrying out medical practice, the court found that trainee physicians are therefore workers under the terms of the Labor Standards Act. The Supreme Court did not acknowledge all trainee phy-

[13] The Okinawa Prefectural Public Sector Physicians Labor Union was formed in 2000, but the National Union of Physicians is the first nationwide organization of its type.

[14] Kansai Medical University Trainee Physician Case, Second Petty Bench of the Supreme Court, June 3, 2005, Rodo Hanrei 893, p. 14.

sicians as workers under the Labor Standards Act due to the fact that they practice medicine. The judgment only applies to those trainee doctors who are demonstrably working under the directional instruction of the hospital. For this reason, while it could be said that the judgment represents a cautious interpretation of Article 9 of the Labor Standards Act, it was also based on previous precedent.

A new clinical training system came into force in 2004, under the terms of which trainee clinical physicians were remunerated as workers based on both their actual status and the content of their work while training. Appropriate wages are now paid during training, and trainees are prohibited from doing other part time jobs.

(3) Medical Staff and Graduate Students

Previously, many university hospitals depended on the labor of unpaid medical staff. The medical practices carried out by unpaid medical staff were not of a level expected of unpaid volunteers. Rather, they were clearly equivalent to the execution of labor, but implemented either entirely unpaid or in return for an extremely small allowance. There were even some cases in which unpaid medical staff were required to pay medical costs. Since unpaid medical staff contravene both the Labor Standards Act and the Minimum Wages Act, it has now become impossible to manage a hospital in this way, but it appears that there are still some cases where staff are working for nothing, or for close to nothing.

Physicians who have passed their national medical examinations and completed their initial clinical training sometimes proceed to graduate school in order to carry out research or study treatment, or take further degrees. The Ministry of Education, Culture, Sports, Science and Technology (MEXT) issued a notification in 2008[15] requiring universities to take appropriate measures in regard to graduate students of this type engaging in research or treatment. According to this notification, "Where graduate students, etc., engage in work that is an aspect of treatment, appropriate measures are required, such as a contract of employment that makes possible the application of labor accident insurance."

People working as medical staff or graduate students, therefore, who are engaging in treatment under the directional instruction of the hospital or university, are acknowledged as equivalent to workers, since their work is labor.

III. Doctors' Working Hours

1. The Attributes of a Physician

Physicians engage in treatment and health education, which have a direct impact on the lives and health of patients. The provision of services by physicians is not done only for their own (or their hospital's) profit, but could be called a public vocation. In Japan, where the right to life is protected, it is only natural to expect that citizens should be able to live

[15] MEXT Notification on June 30, 2008 (No. 266).

healthy lives, and access appropriate medical treatment as and when they are injured or sick. This principle leads to the expectation that doctors should be available for patients all the time, at any time of day or night, and has led to the veneration of doctors as an almost "holy" profession.[16]

These attributes mean that doctors tend to be thought, both by themselves and others, as a particularly special type of professional, and therefore are unable to avoid working unreasonable hours in order to provide diagnosis and treatment. Such working conditions not only threaten the health of the physician, but can also lead to mistakes in treatment and errors of ruling. Doctors are forced to implement treatment and perform operations even when short of sleep. We should not be revering doctors as "holy." Rather, we should expect them to provide medical treatment within the bounds of their ability as physicians.

According to the Survey of Working Conditions of Physicians Relating to the Supply and Demand of Doctors, carried out by the Ministry of Health, Labour and Welfare (MHLW), hospital physicians worked for an average of 63.3 hours per week as of March 2006.[17] A simple calculation based on this figure means that hospital physicians do, on average, around 100 hours of "out of hours" work per month, indicating the extent of their extremely long hours.

The characteristics of hospital physicians' working hours do not end with the fact that they are extremely long. If a doctor is on duty at night, he or she may be required to work continual shifts that extend to over 30 hours continuous work. In addition, they are frequently required to respond to emergency callouts. From the hours worked and the style of work employed, hospital physicians seem to be working under far worse conditions than other workers.

2. The Problem of Night Duty

Hospitals that have inpatients, or provide emergency services, are required to respond to patient needs in the evening and overnight. Doctors working in such hospitals are required to perform night shifts. Whether or not a hospital can require a doctor to work night shifts depends on their labor contract. Whether or not such night shift work is counted as part of their working hours is determined not by the labor contract, but rather objectively,

[16] Although it is natural to require a system that gives appropriate treatment to people requiring it at the appropriate time, it is not necessarily possible to expect that individual doctors should always be available to meet patient needs, at any time of the day or night, even out of hours. The government needs to address this issue and establish a system to supply medical treatment at an appropriate level in response to such demands. Since most physicians have a strong sense of vocation, they tend to be forced to provide consultation and treatment out of hours, at night and during holidays, although the awareness of these issues among doctors is gradually changing.

[17] Furthermore, according to the "Report of Survey into the State of Reductions in the Burden Placed on Hospital Physicians" by Central Social Insurance Medical Council (survey in fiscal 2008), the average working hours of doctors in the week before the survey were 61.3 hours, showing similar results to the MHLW's survey.

according to whether the physician in question is considered to be working under the directional instruction of the hospital or not.[18]

According to the Labor Standards Act, people engaged in monitoring or intermittent labor, and whose employers hold a permit issued by an authority of labor standards office director, may be excepted from the application of regulations relating to working hours, break times and days off (Labor Standards Act, Article 41, Item [iii]). Since employers excepted in this way are no longer subject to regulations relating to working hours, the issue of working out of hours during night shifts (Labor Standards Act, Article 36) does not arise, and there is no need to pay increased wages as designated in the Labor Standards Act (Article 37). Many hospitals received such permits from authorities, but a notification in 1988[19] stated that, in regard to night shift work among monitoring/intermittent work types, which may be excepted from the application of regulations relating to working hours, the issuing of permits must be strictly considered from the perspective of protecting the worker, and only types of work that involved almost no labor equivalent to that provided under normal circumstances would be granted permission. The notification also stated certain conditions in regard to night shift work, including the provision of sleeping facilities.

Doctors who had few responsibilities in emergencies were, at one time, not required to do significant amounts during night shifts, and were able to sleep. More recently, however, increasing numbers of people present for diagnosis in the evenings and at night, and higher levels of patient care are required. This is meant that doctors on night shift are only able to sleep for intermittent, short periods.

The MHLW issued a further notification in 2002[20] with the intention of dealing with this issue, which attempted to regulate night shift work. According to this notification, night shift work was confirmed as, in principle, not being something workers could be forced to do as part of their regular work. In regard to criteria for permission issued to medical organizations, the notification stated that permission would only be granted to types of work "that involve almost no labor, such as regular patrol of patient wards, monitoring the pulses or temperatures of small numbers of patients requiring particular care, other light work that does not involve special measures, or tasks requiring only short periods of work. In principle, continuation of regular labor will not be approved, and if the doctor in question is required in rare cases to perform emergency treatment, etc., this must be at a level that does not interfere with him or her getting sufficient sleep." Night shifts that do not contravene these standards, therefore, may be considered equivalent to monitoring/intermittent labor and be exempted from the application of restrictions to working hours. Even if they are

[18] Mitsubishi Heavy Industries Nagasaki Shipbuilding Plant Case, First Petty Bench of the Supreme Court, March 9, 2000, Minshu 54-3, p. 801.

[19] Labour Ministry Administrative Vice-Minister's Notification on September 13, 1947 (No. 17), and Labour Ministry Labor Standards Bureau Chief's Notification on March 14, 1988 (No. 150).

[20] Notification from the MHLW Labor Standards Bureau Chief, "On the Regulation of Holiday and Out-of-hours Work in Medical Institutions (Request)," on March 19, 2002 (No. 0319007).

exempted from the application of regulations, however, in cases where emergency care of patients becomes necessary, and the doctor on night shift has to work according to his or her normal labor practice, he or she is paid an increased rate in respect to that period in question, according to the Labor Standards Act.

3. Working Hours Characteristics of Night Shift Work

Doctors working night shifts in the obstetrics department of a prefectural hospital were unable to avoid this work being an extension of regular labor, and brought a case against the prefecture demanding increased rates of pay for work done out of hours and on holidays. The Nara District Court and the Osaka High Court approved the payment of increased rates of pay, on the basis that such night shift work was not intermittent labor.[21] In this case, the doctor on night shift frequently had to attend births during the night, and performed measures, treatments and operations for abnormal labor that were the same as during normal working hours. There was only one doctor on night shift at a time in the obstetrics department, and while sleeping facilities had been made available, it was difficult to get sufficient sleep during night shifts. The plaintiffs, who were doctors of obstetrics within the hospital, were acknowledged as implementing ordinary work because they were engaged for longer than 20% of the night shift time. The court considered that, in the light of the MHLW notification, the night shifts worked by the plaintiffs were not intermittent labor, and that the entire period of a night shift should therefore be paid at the higher rate.

4. Working Hours Characteristics of On-Call Night Shift Work

The issue of working hours characteristics also arises when doctors work night shifts based at home (on-call). In the Nara Prefecture Case, increased rates of pay were also demanded for on-call night shifts. The Osaka High Court stated that on-call work was an autonomous measure, which had occurred naturally among the doctors in the obstetrics department, as part of an agreement made between the doctors themselves, and that since the number of times a doctor would be called from home to the hospital was unlikely to be more than 6-7 times per year, this was an issue of professional awareness, and not something that could be considered to be based on an order from the hospital. As such, it denied that their night shift work has the characteristics of working hours.

In order to come to this judgment, the Osaka High Court focused on the professional stature of the doctors. According to the court, this profession was acquired through the learning of or training in specialist skills, backed up by the doctors' educational history, and based on this, the profession is required to work for the good of society as a whole, through specific acts of service in respond to specific requirements by individuals presenting voluntarily from among an undefined number of citizens. Doctors are always required to imple-

[21] Nara Prefecture Case, Nara District Court, April 22, 2009, Rodo Hanrei 986, p. 38, and Osaka High Court, November 16, 2010, Rodo Keizai Hanrei Sokuho 2093, p. 3.

ment emergency measures, and the expectation from society that doctors will perform appropriately in such cases is the basis for a physician's professional standing within society. This position is understandable, but emphasizing the expectations of society when applying and interpreting labor laws and regulations is problematic. Even if this could be permitted as one element for consideration when thinking about the characteristics of working hours, the extent to which it is prioritized should surely be restricted.

IV. Dismissal

1. Protection from Unfair Dismissal

The termination of a labor contract does not require the agreement of both parties. If one party requests the termination, it is possible for a contract to be cancelled. In general, if an employer has a labor contract terminated by a worker, it does not provide any obstacle to work, but on the other hand, if a worker has his or her contract terminated it may have a severe impact on the worker and his/her family. For this reason, the right of an employer to cancel a labor contract is restricted in law. Termination for reasons of nationality, belief, social standing or gender, for example, is prohibited as discriminatory (Labor Standards Act, Article 3, Equal Employment Opportunity Act, Article 6). An employer must give a worker a minimum of 30 days' notice of dismissal, and if no notice is given, must pay a dismissal allowance (equivalent to 30 days of the average wage) (Labor Standards Act, Article 20). Furthermore, dismissal must be done for an objective and rational reason, and must be considered generally socially acceptable (Labor Contract Act, Article 16). If no reason is given, or the reason is not generally socially acceptable, the employer is considered to have misused their right to dismiss, and the dismissal is invalid. Professionals considered under the terms of the Labor Contract Act to have the characteristics of workers are also subject to these terms, and are therefore protected from unfair dismissal.

2. Professional Athletes

As the end of the professional baseball season, a number of baseball players will receive notification that they have been removed from their teams. If a professional baseball player is considered to have worker characteristics according to the Labor Contract Act, he may consider such notification as an expression of intent by his team to terminate his contract. To date, no cases have been recorded of a player fighting to invalidate termination in the courts.

A professional baseball coach, who was formerly a player himself, had his contract terminated by the club for reasons of violence towards players. The hearing at which he claimed invalid dismissal is still ongoing. A request by the coach to retain his post has already been denied.

In cases where sumo wrestlers were terminated for using marijuana, the Tokyo Dis-

trict Court[22] ruled that the reason for termination (marijuana use) did in fact exist, and that since the wrestlers in question had been prohibited from using marijuana through receiving copies of the "Nihon Sumo Kyokai Doping Prevention Handbook", and the fact of their marijuana use had been widely reported in the press, and furthermore since the increasing misuse of drugs is becoming a serious social problem, it was in fact entirely natural that their contracts had been terminated. The reason for termination was approved, and the court stated that there was simply no possibility that the reason for termination—the fact that the plaintiffs' drug use had damaged their trustworthiness and reputation—could be lacking in objective rationality or general social acceptability, and therefore be considered a misuse of rights. The court also stated that since sumo is "considered our national sport, and is watched closely not only by the press but by wider society," but the fact that sumo wrestlers are considered "professionals" is thought not to have been a decisive factor in its judgment regarding justification of their termination of employment. Even if the workers in question had not been professionals, this case would surely have resulted in a decision that the termination was valid.

3. Religious Workers

Disaffiliation or excommunication of religious workers from their religious organization is subject to Article 16 of the Labor Contract Act relating to dismissal, providing the excommunicated religious worker is acknowledged to have the relationship of worker, as defined in the Labor Contract Act, with their organization.

In a case where 16 monks were excommunicated from their religious order (the defendant) in an internal dispute regarding the appointment of a new chief priest and organizational leader,[23] the Tokyo District Court ruled that the plaintiffs, who were equivalent to workers, since their legal relationship with the religious organization was based on a labor contract, were in a position where they had to obey work-related orders from leaders of the organization. The plaintiffs were excommunicated for not obeying such orders, but since excommunication bears the characteristics of termination, the court ruled that it cannot be construed that the termination lacked an objectively rational reason and was not generally acceptable to society, and therefore dismissed the plaintiffs' demands for confirmation of their position. This is interesting because the court recognized the legal implication of termination within excommunication, which could be interpreted as a religious act, thereby applying the framework of labor law to the issue. Other than in this point, the fact that religious workers are professionals appears not to have affected the judgment.

4. Doctors

There are extremely few judicial precedents relating to the termination of hospital

[22] Japan Sumo Wrestling Federation Case, Tokyo District Court, April 19, 2010, Hanrei Jiho 2090, p. 144.

[23] Myooji Case, Tokyo District Court, March 29, 2010, Rodo Hanrei 1008, p. 22.

physicians acknowledged to have the characteristics of workers under labor contract law. Of those that exist, I shall introduce two precedents in which it is considered that the attributes of physicians were taken into account.

The first involves the ruling in a case where the doctor concerned had his/her employment terminated based on inappropriate medical practice.[24] The plaintiff was a doctor in obstetrics, who instructed the use of an atonin drip in order to induce labor in a hospital patient. Lack of care for the patient during the administration of the drip can cause danger of damage to the uterus, but the plaintiff did not manage the patient's care sufficiently despite having stated that he/she would be responsible for doing so, and left the hospital without handing the case over to the doctor on night duty. As a result, the patient suffered a ruptured uterus, and required an operation to disconnect the uterus. The hospital terminated the employment of the plaintiff (doctor), stating that the case equated to "inappropriate behavior towards a patient, or behavior that invites error," which is listed within the employment regulations of the hospital as a reason for disciplinary (or instructed) termination. In this case, the court did not apply the legal principle of misuse of right to termination (currently Article 16 of the Labor Contract Act), but ruled that the incident in this case simply contravened the hospital's employment regulations, and that the termination was therefore concluded to be valid. At present, if similar cases arise, in addition to ruling that contravention of employment regulations can be a reason for termination, the court also rules that the use of the right to terminate, as stated in Article 16 of the Labor Contract Act, has not been misused. While this case differs slightly from the current legal framework, it is useful to refer to as an example of termination in the case of a doctor causing a serious medical incident.

A further case is an example where the termination of a doctor who headed a department of internal medicine was judged valid.[25] In this case, various reasons were given for termination, including failure to abide by clinic beginning hours, trouble with patients or patients' families (three incidences), the implementation of tests not covered by insurance without permission, the implementation of unnecessary tests, forcing nurses and administrative staff to perform unnecessary tasks, etc. The defendant (hospital) emphasized that these actions did equate to the reasons for termination listed in the hospital's employment regulations, which included "Extremely poor performance by a member of staff at work, which is considered inappropriate for a member of staff," and "Unavoidable reasons equivalent to those listed in the previous items."

The details of the trouble with patients or patients' families, listed as part of the reasons for termination, involved the plaintiff explaining to a patient and his/her family that if the patient was not careful he/she could die suddenly (the patient in question subsequently left the hospital of their own accord and demonstrated an extremely negative attitude), and expressing a negative view in relation to heart resuscitation to relatives of a patient who

[24] Tokyo Medical University Case, Tokyo District Court, March 15, 1978, Hanrei Times 369, p. 340.

[25] A Hospital Case, Fukui District Court, April 22, 2009, Rodo Hanrei 985, p. 23.

were hoping to prolong the patient's life, among other incidents. In regard to these, the court stated that "… such problems arose because the doctor did not take due care to meet the emotional needs of either the patients or their families. In general, clinical doctors engaged in patient treatment are not only required to use their knowledge of medicine to make appropriate decisions regarding patient care, but they are also required to provide appropriate explanations of the patient's symptoms and treatment methods to both the patient and his/her family, and where possible provide a response that takes into account the situation in which the patient finds him/herself… the behavior and attitude of the plaintiff did not meet these requirements, and the plaintiff was not demonstrate either behavior or attitude that is considered appropriate as a clinical doctor at the hospital." As such, the court recognized the employment regulations of the hospital as a valid reason for termination. In any labor relationship, appropriate levels of explanation are required in regard to customers and trading partners, but the court here could be seen to have expressed a greater than ordinary requirement for appropriate explanation and consideration from doctors.

Furthermore, it was confirmed in advance that the implementation of tests not covered by insurance was prohibited in principle by this hospital, and doctors were required to consult with the hospital director before implementing any treatment not covered by insurance. Despite this, the plaintiff implemented tests not covered by insurance without contacting or consulting the hospital director, indicating clear inappropriate behavior. The court also acknowledged that such implementation of tests not covered by insurance without permission constitutes one reason for termination. The implementation of unnecessary tests involved the commissioning of CT scans for almost all patients suffering from pneumonia, despite the fact that the necessity for this is generally doubted. It appears that the hospital had not taken any steps to caution the plaintiff about this behavior, and the court made the following statement in relation to whether or not the reason for dismissal was commonly acceptable to society. "In general, physicians who have high levels of medical knowledge and skill and bear the responsibility for making decisions regarding the treatment of patients, are in special positions superior to other working staff in hospitals, and their positions and opinions are widely respected. In fact, the plaintiff had worked continually for the defendant for 14 years before this dismissal occurred, and was head of the department of internal medicine, receiving an extremely good wage. It is assumed that the only people within the hospital who could have issued directional instruction to the plaintiff would be the chair of the board, or the hospital director, and since the plaintiff was seen by other staff at the hospital as being in a position of authority only exceeded by the hospital director, the plaintiff, as a doctor, and as the long-term head of the department of internal medicine, was in a position of leadership over, and should have been setting an example to, other doctors and staff. It could be said that as such, it is natural to require the plaintiff to strive for self-improvement, and regulate his own behavior… As a clinical doctor working in contact with patients, and as a doctor at the hospital, which implements medical procedures as an organization, it is natural to expect appropriate behavior and medical practice, and since it is

considered that such things should not have had to be stated to the plaintiff in advance, it is not appropriate to focus on the fact that little clear, specific caution or instruction was provided by the defendant to the plaintiff." The view of the court in this case was that doctors in superior positions within hospitals are expected naturally to behave in a way that is appropriate, without having to be issued with specific or clear warnings or instructions.

This judicial precedent appears to place a special emphasis on the labor relationships within medicine. Appropriate behavior and medical practice is a natural component in the labor contract of a doctor. If a doctor is unable to provide appropriate behavior and/or medical practice, he/she will be judged inappropriate for the post. Termination for reasons of lack of working ability or appropriate qualifications tends to be judged severely for its potential lack of common social acceptability within general labor relationships, but the nature of work required of a doctor means that appropriate qualification and high levels of ability are a fundamental requirement, and this fact therefore has an impact on the social acceptability of reasons for termination.

V. Conclusions

Examples of legal disputes involving professional workers have been few and far between to date. The following three reasons can be thought of for this. Firstly, not only is the absolute number of professionals in the workplace small, but also the number who are additionally considered workers is even smaller. Secondly, given the position and attributes of the posts held by professionals, they have not traditionally been considered as "workers." Professional musicians and athletes give enjoyment and dreams to others and these professions are considered far removed from the concept of "work." Furthermore, it cannot be denied that religious workers and doctors have aspects of their work that equate to service. Professionals tend to have high-ranking positions within their organizations and within society, and earn high wages. They have high levels of specialist abilities and techniques, and for many of them, changing job or going into self-employment is not difficult. Considered from these perspectives, professionals and workers seem almost to be the opposite of one another. Thirdly, when solving legal problems involving professionals, it is not always necessary to show that they equate to workers. Demands for unpaid wages or disputes over unfair contract termination may occur involving professionals who are not workers, as well as those who are. The only difference is the laws that are applied in such cases. Given this, it may be the case that only those seeking protection as workers, and those who are clearly demonstrable as workers, ever bring lawsuits based on labor law.

Recently, the fact that professionals are also workers has come to be more emphasized, with the result that the number of dispute cases is increasing. When dealing with legal disputes involving professionals who are workers, the accumulating judicial precedents will in the future shed further light on how significant is the issue of whether or not one is a professional.