

Validity of Wage Rules Deducting an Amount Corresponding to Premium Wages in Calculating Percentage Pay

The Kokusai Motorcars Case

The Third Petty Bench of the Supreme Court (Feb. 28, 2017) 1152 *Rohan* 5

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Facts In this case, 14 appellees including Appellee X (plaintiffs in the district court trial, appellees in the high court trial) who were employed by Appellant Y (defendant in the district court trial, appellant in the high court trial) and were working as taxi drivers, claimed that the stipulation in Y's wage rules that an amount corresponding to premium wage for overtime and night work would be deducted when calculating percentage pay was invalid, and that Y bore an obligation to pay an amount corresponding to the deducted premium, and thus demanded payment from Y.

In Y's wage rules, premium wage and commuting expenses are treated as costs subject to deduction when calculating percentage pay, which constitutes a part of the normal wage. The gross amount from which these expenses are deducted is called the "base amount." It is calculated by subtracting a fixed basic deduction from sales per shift for each of weekdays, Saturdays, and Sundays or public holidays, and multiplying the amount thus calculated by a fixed coefficient. The overtime and night work premiums (etc.) calculated severally using calculation formulae stipulated in Y's wage rules are deducted from this. The use of this procedure to calculate percentage pay leads to a situation in which, although the premiums for overtime and night work are initially calculated, the amount paid to drivers is the same whether they work overtime and night work or not, as long as the sales turnover is the same as the sum of the premium and commuting expenses (as the initially calculated premium is deducted from the calculation of percentage pay, the premium is consequently offset even if it is paid). Therefore, the premium wage is, in effect, not paid.

Both the district court and the high court ruled that Y's wage rules are a circumvention of the gist of Article 37 of the Labor Standards Act, obliging employers to pay premium wage, and are invalid as a violation of public order and morals, and therefore upheld the claim for unpaid wages.



Judgment Loss of suit by Appellant in high court's judgment was reversed and remanded. The judgment is summarized below.

(1)(a) Article 37 of the Labor Standards Act only obliges employers to pay premium wage in an amount not less than the amount calculated using the method stipulated in said Article.

(1)(b) To judge whether an employer has paid the premium wage stipulated in said Article, it should first be considered whether or not the portion corresponding to wages for normal working hours can be distinguished from the portion corresponding to the premium wage stipulated in said Article. If they can be distinguished, it should then be considered whether or not the amount paid as a premium is less than the amount calculated using the method stipulated in said Article, taking the amount of the portion corresponding to wages for normal working hours as a basis.

(1)(c) On the other hand, since Article 37 of the Labor Standards Act does not provide for a method of determining wages for normal working hours in an employment contract, a rule stipulating that wages for normal working hours shall be calculated by

deducting an amount corresponding to the premium wage stipulated in said Article from an amount corresponding to a fixed ratio of sales turnover, etc., in an employment contract naturally cannot be deemed a circumvention of the gist of said Article or invalid as a violation of public order and morals.

(1)(d) The high court only judged that deducting an amount corresponding to the premium when calculating percentage pay is a circumvention of the gist of Article 37 of the Labor Standards Act and invalid as a violation of public order and morals. It did not judge whether or not, in Y's stipulation of its wage rules, the portion corresponding to wages for normal working hours can be distinguished from the portion corresponding to the premium wage stipulated in said Article, or, if it can be distinguished, whether the amount paid as a premium wage based on Y's wage rules is less than the amount calculated using the method stipulated in said Article. As such, the assertion that the claims of X et al. should be upheld is thus unlawful, based on the principle of inexhaustive review.

(2) Of overtime work, the high court made no distinction between portions corresponding to overtime work within statutory working hours and non-statutory holiday work, and portions other than these. However, Article 37 of the Labor Standards Act does not oblige employers to pay premium wage for overtime work within statutory working hours or non-statutory holiday work, and whether or not employers should pay premium wage for this kind of labor is entrusted to the employment contract. Of the overtime work performed by X et al., therefore, a distinction needs to be made between portions corresponding to statutory overtime work and non-statutory holiday work, and portions other than these.

(3) In view of the above, the portion of the high court's judgment relating to the loss of suit by the Appellants shall be reversed and remanded to the high court.

Commentary

Article 37 of the Labor Standards Act obliges employers to pay a premium of 25% of the normal wage for labor exceeding the statutory working hours of 8 hours per day and 40 hours per week, as well as for night work (work between the hours of 10 p.m.

and 5 a.m.), and a premium of 35% of the normal wage for labor on statutory holidays (basically one calendar day per week) (Cabinet Order No.309 of June 7, 2000). These premium wages are generally paid in accordance with the hours actually worked, but in some professions, overtime work, night work and holiday work are treated as part of the job and premium wages are included in the normal wage. A fixed premium wage may already be included on the assumption of certain labor outside statutory working hours, regardless of actual hours worked. Such practices are called "fixed overtime pay system" and "fixed amount payment system." In the case of wage systems that incorporate a premium wage, the premium is paid together with the normal wage. This is deemed a violation of Article 37, in that it is impossible to distinguish whether the premium prescribed by Article 37 has been paid. In the case of the fixed overtime pay system and the fixed amount payment system, meanwhile, although the premium prescribed by Article 37 is paid separately from the normal wage and can be calculated, it is in violation of Article 37 unless the missing portion corresponding to actual hours worked beyond statutory working hours and others actually worked at night is paid in addition. In cases involving Article 37, these two types of violation are also seen besides simple non-payment of premium wages, and workers often file suits claiming unpaid wages in such cases.

In interpreting Article 37 of the Labor Standards Act, the Supreme Court has until now tended first to consider whether or not the premium wage portion can be distinguished from the normal wage portion. This enables it to judge whether or not the statutory premium wage has been paid as part of the overall wage (possibility of distinguishing). If the two can be distinguished, the Supreme Court has then judged whether or not the amount paid in the premium wage portion is less than an amount calculated using the method stipulated by law (appropriateness of the amount paid). Like existing Supreme Court precedents, the present judgment by the Supreme Court also focuses on the above two points (Judgment (1)(b)).

The first characteristic of this case is the special nature of the work of taxi drivers. Taxi drivers often exceed statutory working hours in a single shift, and

night work is often assumed. These hours qualify for payment of statutory wage premiums. On top of that, percentage pay constitutes a significant proportion of the overall wage. For this reason, taxi companies are inclined to suppress total wages, and sometimes set up a system of fixed overtime pay or fixed amount payment, or, as in this case, a very complicated wage system that could enable them, in effect, to avoid paying premium wages. Thus, the second characteristic of this case is that the very complex problem of whether statutory premium wages were effectively being paid or not has become a point of contention, given that the legal validity of the rule for calculating percentage pay (the portion that constitutes the majority of the normal wage) is brought into question. On this point, the Supreme Court, in (1)(b)(d) of the Judgment, follows existing precedent in raising the question of whether the premium wage portion can be distinguished from the normal wage portion when calculated in accordance with Y's wage rules.

The calculation formula used in Y's wage rules, brought into question in this case, was generally (basic pay¹ + service allowances²) + percentage pay (1) [base amount³ — (night work, overtime and holiday allowances + commuting expenses)⁴] + percentage pay (2)⁵. As stated above, statutory overtime and night work are assumed to be part of the job for taxi drivers. Even if overtime and night work allowances were calculated under these rules, therefore, the amount would be offset by deducting the overtime and night work allowance from the calculation of percentage pay that forms the majority of the normal wage. As a result, the statutory premium wage might effectively go unpaid (although the base amount would have been calculated as a negative figure if total deductions

had exceeded the base amount, the treatment in this case was rather that the premium at last started to be added from this point). In their understanding of this point, the district court and the high court judged Y's wage rules to be a circumvention of the gist of Article 37 of the Labor Standards Act and invalid as a violation of public order and morals. By contrast, the Supreme Court, in its interpretation of Article 37 of the Labor Standards Act, stated that the very fact that appropriate premium wages are paid in accordance with the law is the point (Judgment (1)(b) (d)). On the other hand, it judged that Y's wage rules naturally cannot be deemed a circumvention of the gist of said Article or invalid as a violation of public order and morals (Judgment 1(c)), since Article 37 of the Labor Standards Act does not include a specific provision on the manner of prescribing wages for normal working hours in an employment contract (wages including percentage pay, in this reviewer's understanding).

In this case, there are aspects of the Judgment that are difficult to understand, in that it differs from other similar cases because there are concurrent problems on the validity of a single wage rule — namely, that of calculating the percentage pay that constitutes the normal wage, and how to treat premium wages in the process of this calculation. One possible understanding is that (i) it is not clear whether the premium wage portion can be distinguished from the normal wage portion as a result of calculating the wage amount according to Y's wage rules, and therefore, while strictly calculating actual hours worked beyond statutory working hours and statutory holidays, it would need to be ascertained whether the premium wage portion can be distinguished from the normal wage portion, in line with Judgment (2); if it can be distinguished,

1. **basic pay**: 12,500 yen per shift of 15 hours and 30 minutes.

2. **service allowances**: Allowance if working without driving; 1,000-1,200 yen per hour.

3. **base amount**: (Contractual shift takings — contractual shift basic deduction) x 0.53 + (Non-contractual shift takings — Non-contractual shift basic deduction) x 0.62). The basic deduction differs depending on whether contractual or non-contractual, and whether on weekdays, Saturdays or Sundays and holidays (generally 8,000-30,000 yen).

4. **allowances for night, overtime and holiday work**: The formula for calculating night, overtime and holiday allowances is the total of {(basic pay + service allowance) ÷ (days worked x 15.5 hours)} x 1.25 (*night work = 0.25, holiday work = 0.25 to 0.35) x overtime and other non-contractual hours, plus (base amount ÷ total working hours) x 0.25 (*of allowances, statutory holidays = 0.35) x overtime and other hours.

5. **percentage pay (2)**: Wage paid in lieu of a bonus.

it could therefore have been construed that Y's wage rules cannot be deemed illegal, although whether the premium was appropriate or not is a separate problem. Another understanding is that (ii) it could have been construed that the legal evaluation of Y's wage rules in reference to Article 37 of the Labor Standards Act is that the rules cannot be deemed invalid because they are a question of calculating the normal wage, since the Article is not concerned with the calculation of the normal wage. The understanding is that this would hold true even if the possibility of distinguishing the normal wage portion from the premium wage portion, and the problem of calculating and paying an appropriate premium wage amount were separate problems. In other words, the understanding is that the high court is stated to have somewhat misunderstood the problem. Of course, these two interpretations are not mutually exclusive, and it is also possible that the understanding in (i) above was adopted on the assumption of (ii) above (that is to say, it was judged that Y's wage rules

could not be deemed invalid in two senses).

Further study is needed on the assessment and impact of this judgment, but in any case, the remanded-trial will surely give further scrutiny to the possibility of distinguishing between the normal wage portion and the premium wage portion, and whether or not premium wages were paid in appropriate amounts, as a result of using Y's wage rules, based on Judgment (2). This means that judgment will probably be passed on the validity of Y's wage rules. One awaits with interest the remanded-judgment of the high court.

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