

## The Illegality of Differences in Labor Conditions between Regular Workers and Non-regular (Fixed-term Contract) Workers

### The Japan Post Case

Tokyo District Court (Sept.14, 2017) 1164 *Rohan* 5

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#### **F**acts

The plaintiffs, X et al., were employed by Y, a company currently known as Japan Post, as non-regular workers on hourly wages, under fixed-term labor contracts that were repeatedly renewed.

Non-regular workers on hourly wages engage only in specific routine tasks and are not given managerial duties. There are limitations on the scope of their assigned duties, potential personnel reassignments, and other such elements of their employment, meaning for instance that they are generally not transferred to different positions and are not scheduled for promotion to a higher position or rank. Based on the agreements concluded at the time each of them was hired, some may work part-time hours or only between certain times.

The personnel system changed and new work regulations applied to regular workers on April 1, 2014. Regular workers employed as non-career-track workers before the new system was introduced (hereafter “former non-career-track workers”) were expected to engage in a wider range of duties and might have been transferred inside or outside of a certain post office. It was also assumed that they would have been promoted to managerial positions and be expected to take on greater roles or responsibilities.

The non-career-track workers employed under the new system (“new non-career-track workers”) engage in general work duties such as counter service, and are not expected to be given managerial duties, but may be subject to personnel transfers within a scope that does not require them to relocate their place of residence. There are no prospects

for them to be promoted to a higher position or rank within the same course of employment.

X asserted that the fact that non-regular workers on hourly wages were not granted (i) allowances for outside duty, (ii) allowances for work during the New Year’s holiday period, (iii) early morning shift allowance, (iv) special pay for work on public holidays, (v) summer and year-end bonuses, (vi) housing allowances, (vii) summer and winter vacation leave, (viii) sick leave, (ix) special allowances for work conducted at night, and (x) performance-based allowance for external or internal postal service duties, was a violation of Article 20 of the Labor Contracts Act (LCA), which prohibits unreasonable differences in labor conditions between workers with contracts that do not specify a term of employment (“open-ended contract workers”) and workers with contracts that do specify a term of employment (“fixed-term contract workers”). X therefore filed an action calling for confirmation that the work rules provisions being applied to regular workers also apply to them. As a primary claim, the action called for the payment of the equivalent amount of allowances based on the labor contract, and for the secondary claim, for the payment of damages in tort under Article 709 of the Civil Code.



#### **J**udgement

The plaintiffs’ claims were partially accepted and partially rejected. The judgement is summarized

below.

(1)

(a) Differences in labor conditions between fixed-term contract workers and open-ended contract workers constitute a violation of Article 20 of LCA only when they result from factors relating to whether a term of employment is fixed.

(b) When it is not possible to clearly determine the differences in labor conditions to be unreasonable, said differences are not a violation of Article 20 of LCA.

(c) When assessing whether differences in labor conditions are unreasonable, decisions are made on the basis of consideration of the following three factors as a whole: (i) job content, (ii) the scope within which the job content and assigned position can be changed, and (iii) any other factors. Article 20 of LCA permits a certain extent of difference in wage systems between fixed-term contract workers and open-ended contract workers. While the defendant claims that it is inappropriate to consider each difference in labor conditions individually to determine whether the difference is unreasonable or not, this criticism is not justifiable.

(2)

(a) The regular workers whose labor conditions should be compared with those of X (fixed-term contract workers), are the new non-career-track workers under the new personnel system, and the former non-career-track workers under the former personnel system.

(b) Focusing on job content, there is a significant difference between the former non-career-track workers and the fixed-term contract workers on hourly wages in terms of the content of the work they engage in and the level of responsibility involved in said work. On the other hand, between the new non-career-track workers and fixed-term contract workers, there are some commonalities with regard to their possibilities for promotions to higher positions or ranks, and a certain level of difference in terms of factors such as their working hours and the content of the duties they are expected to take on.

(c) With regard to the scope of changes in job content and assigned position, there is a significant

difference between former non-career-track workers and fixed-term contract workers on hourly wages, and also a certain level of difference between new non-career-track workers and fixed-term contract workers.

(3)

(a) The differences regarding the payment of allowances for outside duty, summer and year-end bonuses, and performance-based allowance for external or internal postal service duties are not unreasonable, given overall consideration of the following grounds: the fact that these differences originates from the differences in the wage structures between regular and fixed-term contract workers, the fact that there are significant or certain differences between the two types of workers in terms of their job content and other such factors, the fact that it is to some extent reasonable for companies to adopt the personnel measure of establishing a wage system for regular workers based on the assumption of long-term employment, and the fact that there are benefits for fixed-term contract workers on hourly wages that may serve as a substitute for such measures.

(b) With regard to early morning shift allowance, special pay for work on public holidays, and special allowances for work conducted at night, in the event that a regular worker is assigned a certain work shift, such allowances should be paid to ensure equitable treatment for the said regular worker when compared with another regular worker who was not assigned the shift. Given that fixed-term contract workers on hourly wages have their work times specified from the outset, and receive overtime pay and other such payments, it is not unreasonable for these allowances not to be paid.

(c) Allowances for work during the New Year's holiday period are fixed amounts paid in addition to base pay as compensation for work during the New Year's holiday period. There are no reasonable grounds for only regular workers who are employed on the assumption of long-term employment to be paid this special allowance while no allowance at all is paid to fixed-term contract workers on hourly wages, despite the fact that they also worked during the busiest period of the year.

(d) As the New Year's holiday period is the busiest of the year for both regular workers and fixed-term contract workers on hourly wages alike, there are no reasonable grounds for the fact that only fixed-term contract workers are not granted summer or winter vacation leave at all.

(e) Given that both new non-career-track workers and non-regular workers on hourly wages are not scheduled to be subject to personnel reassignments that require them to relocate their place of residence, there are no reasonable grounds for the fact that a housing allowance is paid only to the former, but not paid at all to the latter.

(f) Where fixed-term contract workers on hourly wages have had their contract renewed multiple times and therefore been in continuous employment with the employer for a lengthy period, there are no reasonable grounds for them not to be granted any paid sick leave.

(4)

(a) Labor conditions set out in violation of Article 20 of LCA are invalid, and cases that are judged to be a violation of said article constitute illegal conduct (Civil Code, Article 709). However, so-called supplementary effect is not admitted. In other words, it is not permitted to automatically replace the labor conditions of fixed-term contract workers with those of open-ended contract workers.

(b) While there is leeway to apply the work rules determining the labor conditions for open-ended contract workers to fixed-term contract workers through a reasonable interpretation of the work rules and other related regulations, given that company Y has set out separate work rules and other related regulations for regular workers and fixed-term contract workers respectively, it is not possible to apply the labor conditions of open-ended contract workers to fixed-term contract workers in this way.

(c) On the other hand, the differences with regard to the allowances for work during the New Year's holiday period, housing allowance, summer and winter vacation leave, and sick leave are violations of Article 20 of LCA, and the non-payment of these allowances to X constitutes illegal conduct.

(5)

(a) In the event that it is unreasonable for fixed-term contract workers to be subject to labor conditions that are not the same as those for open-ended contract workers, the employer should be expected to pay the total difference between the allowances and other such benefits as damages.

(b) In contrast, where fixed-term contract workers are granted no such allowances or other such benefits at all, or the difference in the quality or amount of the payments is unreasonable, it is extremely difficult to specifically determine the amount of allowances that should be paid. Therefore, for the allowances for work during the New Year's holiday period and housing allowance, a reasonable amount of damages shall be determined in line with Article 248 of the Code of Civil Procedure.\*

\*Article 248 of the Code of Civil Procedure stipulates that "If damage is found to have occurred, but, due to the nature of the damage, it is extremely difficult to prove the amount of damage that occurred, the court may reach a finding on the amount of damage that is reasonable, based on the entire import of oral arguments and the results of the examination of evidence."

## Commentary

Under the typical employment system in Japan, employers provide regular workers (namely, workers hired directly by the employer on full-time, and open-ended contracts) with substantial employment security, and focus primarily on their internal labor markets by providing seniority-based wages and opportunities for personnel development within the organization. At the same time, unlike European countries, which have relatively strictly regulated the use of fixed-term contracts and other such atypical employment, Japan has not legally regulated the use of atypical employment. Atypical employment in Japan generally supported the long-term employment system as a buffer alleviating the impact of economic changes, largely through the employment of workers wishing to earn a wage to supplement existing household income, such as housewives or students in part-time jobs. However, from the late 1990s, there was an increase in both the number of workers in atypical employment and the proportion of workers in atypical employment whose

work is the sole source of household income. Since the 2000s, particularly following the onset of the 2008 financial crisis, atypical employment has come to be recognized as a key issue to be addressed when developing employment policy.

Prompted by the factors described above, amendments were made to LCA in 2012 to prescribe new rules regarding fixed-term labor contracts. One of those provisions is Article 20 of LCA, which was the point at issue in this case. Article 20 prohibits unreasonable differences in labor conditions due to the existence of a fixed-term. However, Article 20 does not strictly stipulate the principle known as “equal pay for equal work.” That is, while it is not necessary for the work of fixed-term contract workers to be the same as that of open-ended contract workers in order for Article 20 to be applied, on the other hand, even if both types of workers engage in the same work duties, there is no demand for them to immediately have the same labor conditions. It is simply the case that in the event that a difference in labor conditions between the two types of workers is judged to be unreasonable when reviewed in light of the factors for consideration listed in Article 20, said difference is illegal.

While there are no Supreme Court precedents regarding Article 20 of LCA, there has already been a succession of judgements in the lower courts. The main judicial precedents include:

A. The *Hamakyorex* case (Osaka High Court, July 26, 2016. Judgement: It was determined unreasonable that the employer was not paying fixed-term contract workers allowances such as commuting allowances, allowances for accident-free driving, and temporary leave allowances, which were paid to regular workers. In this case the fixed-term contract workers and regular workers both engaged in the same work as truck drivers, but were subject to different personnel management systems, covering elements such as the scope of potential job transfers and possibilities for promotion).

B. The *Nagasawa Unyu* case (Tokyo High Court, November 2, 2016. Judgement: While both regular workers and fixed-term contract workers reemployed after mandatory retirement age engaged

in the same duties (transportation services), it was determined that it was not unreasonable for there to be a 20 percent difference in wages between the two types of workers).

C. The *Metro Commerce* case (Tokyo District Court, March 23, 2017. Judgement: The differences in labor conditions between typical regular workers and fixed-term contract workers working as kiosk sales staff in the subway were determined not to be unreasonable).

The key points of the Tokyo District Court’s decision in the *Japan Post* case (September 14, 2017) are as follows.

(i) This judgement is significant in that it determined differences in labor conditions (namely, the allowances or leave granted) between regular workers and fixed-term contract workers (non-regular workers on hourly wages) who pursue different duties to be unreasonable. This differs from the aforementioned case A and case B, in which the actual job contents of the regular workers and the fixed-term contract workers were the same, and also differs from case C, in which it was ultimately concluded that the differences in labor conditions were not unreasonable.

(ii) This judgement is significant in that it determined that when comparing the differences in job content and labor conditions of fixed-term contract workers with regular workers, the comparison was only made with the job content and labor conditions of (new and former) non-career-track workers—that is, those regular workers employed by Y who are closer in position to non-regular workers (fixed-term contract workers)—as opposed to regular workers in general. This differs from case C, in which the labor conditions of fixed-term contract workers were compared with those of regular workers in general, consequently emphasizing the differences in job content and resulting in hardly any relief measures being approved at all. Regarding the type of workers that should be used as comparison, Article 20 of LCA does not stipulate any provisions. Since it is unclear on what grounds the court selected (new and former) non-career-track workers as the subject

for comparison, this will continue to be a point of contention in the future.

(iii) This judgement is in line with the overall trend in judicial precedents in regards to the following points. First, with regard to the differences in labor conditions, it was determined that when considering whether the differences in the labor conditions are unreasonable, the differences should each be addressed separately, rather than as a whole. Second, it determined that employers are not necessarily expected to provide proof that differences in labor conditions are reasonable, and in cases where it is not possible to determine differences to be unreasonable, said differences in labor conditions are not in violation of Article 20 of LCA (however, this is a point of contention in academic theories).

(iv) This judgement determined that it is to some extent permitted to establish differences in wage systems between regular workers employed on the assumption of long-term employment and fixed-term contract workers employed on the assumption of short-term employment, and for there to be differences in labor conditions as a result of such wage systems. This approach seems to have been adopted to account for the distinctive characteristics of the Japanese employment system.

(v) In this judgement, the decision is in line with previous judicial precedents and the general trend in academic theory, in that it is a violation of Article 20 of LCA for there to be significant differences in the payment of certain allowances and other such benefits where there are no significant differences in the job content or other such factors related to the

purpose of those allowances.

(vi) In this judgement, it was determined that where there is a violation of Article 20 of LCA, the labor conditions of regular workers cannot automatically be substituted for the labor conditions of fixed-term contract workers. While there are some arguments against this, this is in line with many academic theories and previous judicial precedents. Moreover, it determined that when calculating the damages on the grounds of illegal conduct (Civil Code, Article 709), it is necessary to determine a reasonable amount of damages on the basis of Article 248 of the Code of Civil Procedure. As mentioned above, Article 20 of LCA prohibits unreasonable differences, rather than strictly prescribing the principle of equal pay for equal work. Namely, as Article 20 permits a certain level of difference, it is difficult to determine an amount of damages based on illegal conduct. This appears to be why it was decided that damages would be determined at the discretion of the court under Article 248 of the Code of Civil Procedure.

As of June 1, 2018, after completion of this article, the Supreme Court made a decision in the aforementioned *Nagasawa Unyu* case (Tokyo High Court, November 2, 2016). The detail of the case will be covered in October 2018 issue.

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