Does the Unilateral Discontinuance of Dues Check-off by a Local Public Entity Constitute Unfair Labor Practices?

The *National Government and Central Labor Relations Commission vs. Osaka City (Dues Check-off)* Case
Tokyo High Court (Aug. 30, 2018) 1187 *Rodo Hanrei* 5

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I. Facts

City Y is an ordinary local public entity pursuant to the provisions of the Local Autonomy Act. Union X_1, Union X_2, Union X_3, and Union X_4 are all labor unions consisting of those City Y employees to whom the Local Public Enterprise Labor Relationships Act applies.[1] Unions X_1–X_4 each entered into a checkoff agreement with City Y, the earliest of which was concluded in 1957 and the latest in 1980. As these checkoff agreements were automatically renewed each year until 2011, the City Y employees who were members of Unions X_1–X_4 had their union dues deducted from their salary (checked off) for a number of years.

For City Y employees prescribed in the Local Public Service Act there is an employee organization in place, and the employees who belong to said employee organization had always had their dues checked off in accordance with the "Ordinance regarding Employee Salaries." From around 2004, employees' misconduct was a frequent issue in City Y. It was suggested that these problems could be attributed to the collusive relationships between City Y and the employee organization or labor unions, which are symbolized by the favorable treatment and the grant of convenience that City Y had traditionally provided to the employee organization or labor unions (including the checkoff arrangements). In March 2008, the Y City council therefore approved the "Ordinance for the Discontinuation of Dues Checkoff," which saw the discontinuation of checkoff for those employees belonging to the employee organization. In response to this, Union A, the employee organization of City Y, brought an action calling for the declaration of the invalidity of the "Ordinance for the Discontinuation of Dues Checkoff," but the Osaka District Court passed a judgment dismissing the action in February 2011.

Between February and March the following year, City Y also issued a notification (hereafter referred to as "this notification") to Unions X_1–X_4, informing them that their checkoff agreements would no longer be renewed as of April 1, 2013, thereby discontinuing the checkoff. In response, Unions X_1–X_4 engaged in collective bargaining with City Y from March to July 2012. During this process of collective bargaining, the explanations given by City Y included the fact that they needed to readdress their provision of the grant of convenience because it was a symbol of labor-management collusion; that the checkoff for the employee organization had been discontinued; that its (City Y's) claims in the aforementioned action regarding the "Ordinance for the Discontinuation of Dues Checkoff" had been upheld; and that it would be difficult to justify the continuation of the checkoff only for Unions X_1–X_4 to City Y citizens.

The course of events is shown in the next page (Process of this case). The Tokyo High Court case largely focused on whether this notification constituted "domination and interference" with a labor union, which would make it an unfair labor practice (Labor Union Act, Article 7, No. 3).[2]

Process of this case (Course of events leading up to the Tokyo High Court)

April/August 2012	Unions X_1–X_4 seek remedy from the Osaka Prefecture Labor Relations Commission on the grounds that the notification to discontinue the checkoff ("this notification") is an unfair labor practice as it constitutes "domination and interference" with a labor union (Labor Union Act, Article 7, No. 3).
February 2014	The Osaka Prefecture Labor Relations Commission issues an order-for-relief on the grounds that this notification is an unfair labor practice as it constitutes "domination and interference" with a labor union.
March 2014	City Y petitions the Central Labor Relations Commission to reexamine the case, as it objects to the order issued by the Osaka Prefecture Labor Relations Commission.
November 2015	The Central Labor Relations Communication issues an order-for-relief on the grounds that this notification is an unfair labor practice as it constitutes "domination and interference" with a labor union.
	City Y then brought an action with the Tokyo District Court to revoke the order issued by the Central LRC as it objects to said order.
February 2018	The Tokyo District Court quashed City Y's claims on the grounds that the notification is an unfair labor practice as it constitutes "domination and interference" with a labor union.
	City Y then appeals to the Tokyo High Court as it objects to the judgment of the Tokyo District Court.

II. Judgment

The Tokyo High Court concluded that City Y's notification was an unfair labor practice as it constituted "domination and interference" with a labor union (Labor Union Act, Article 7, No. 3). The judgment is summarized below.

(1) "In the event that union dues are checked off in accordance with an agreement between the employer and a labor union, it is on this assumption that the labor union pursues its activities and management and industrial relations are formed. Given that the checkoff system is in fact adopted by the great majority of private-sector business establishments across Japan, and discontinuation of such arrangements could be expected to have an impact on labor union activities and management and industrial relations; if an employer wishes to discontinue a checkoff, said employer is required to demonstrate reasonable grounds for doing so despite its inflicting a disadvantage. In addition, when discontinuing the checkoff, the employer must also give due consideration to the procedures that need to be followed for the labor union, such as providing an explanation of the grounds for discontinuing the checkoff, engaging in discussion on remedial measures and other such steps, and allowing a sufficient grace period. Moreover, where a discontinuation of checkoff fails to meet these requirements, the situation shall be assessed such that all elements are considered—including the purpose of, motivation behind, timing and conditions of discontinuation, and the disadvantages, impact and other such consequences that the discontinuation could have for the labor union's management or activities—and, where it can be said that the discontinuation may weaken the labor union, or disrupt its management or activities, the discontinuation shall be classed as "domination or interference" with the labor union."

(2) As its grounds for discontinuing the checkoff, City Y claimed that it needed to discontinue the provision of the grant of convenience in order to eradicate inappropriate industrial relations. However, "it is not clear what specific relationship exists, between their objective—that is, ensuring appropriate industrial relations—and the means that they took—discontinuing the checkoff—and there does not appear to be concrete grounds for it to be necessary for City Y to discontinue the checkoff with Unions X_1–X_4 in order to ensure appropriate industrial relations with Unions X_1–X_4 .... There is nothing to suggest that there would be reasonable grounds for City Y to discontinue the checkoff with Unions X_1–X_4 despite the fact that it creates a disadvantage for Unions X_1–X_4."

(3) Furthermore, "this notification was not only suddenly issued without any prior explanation or coordination, administrative-level negotiations, provision of information, or other such exchange

between City Y and Unions X_1–X_4," and it seeks the discontinuation of "a union dues checkoff arrangement that has consistently been in place for around a quarter to half a century, without any consideration of the individual circumstances of each of the labor unions (Unions X_1–X_4)." What is more, "in the collective bargaining conducted following this notification, City Y did not provide any of the unions (Unions X_1–X_4) with anything more than a general, abstract explanation of the need to discontinue the checkoff; City Y also merely spoke of the need to eradicate the mutual dependence between labor and management and develop industrial relations that are appropriate in the eyes of the citizens. City Y also failed to make any proposals for investigating the specific kinds of impacts the discontinuation of the checkoff could have on each of the unions (Unions X_1–X_4), or factors such as the necessity of and potential for tackling such individual circumstances." This suggests that City Y did not provide specific explanations of the grounds for or necessity of discontinuing the checkoff, did not engage in sufficient deliberation of remedial measures and other such responses, and did not allow for a sufficient grace period. Therefore, city Y cannot be said to have sufficiently fulfilled its duty to consider the procedures that need to be followed.

(4) "As the issuing of this notification indeed force Unions X_1–X_4 to take particular action and thereby coercibly placed them under considerable strain, it is recognized that there was a certain extent of hindrance to union activities." It is therefore possible to reach the conclusion that this notification had the effect of weakening Unions X_1–X_4, or disrupting their activities.

(5) "Therefore, it cannot be said that there were reasonable grounds for discontinuing the checkoff, or that sufficient care was taken when issuing the notification to take the necessary procedures into consideration. As the notification thus appears to have had the effect of weakening Unions X_1–X_4 or disrupting their activities, it is recognized to constitute "domination and interference" with Unions X_1–X_4."

III. Commentary

According to the "Actual Situation Survey on Labour Unions" conducted by the Ministry of Health, Labour and Welfare (MHLW) in 2008, most Japanese labor unions determine union dues by a fixed-rate method—that is, multiplying each union member's (worker's) basic salary by a set percentage (for instance, 1%). For the labor unions that apply this method, it is important to ensure that the exact salary of each union member is used when calculating and collecting dues. The practice of checking-off—by which an employer deducts union dues from each union member's (worker's) salary at the time of payment each month according to a predetermined rate, and pays those dues to the union as a lump sum—is therefore widely pursued in Japan. Results of the MHLW's "Survey on Collective Agreements," which is conducted in 2011, showed that 91% of Japan's labor unions collected their dues using checkoff. In the case we are addressing here, the labor unions (Unions X_1–X_4) also collected their dues using checkoff conducted according to a fixed-rate method.

It also should be noted that such checkoff is a form of the grant of convenience provided by an employer to a labor union, and employers are not legally obliged to implement a checkoff. The checkoff is therefore implemented on the basis of an checkoff agreement between a labor union and the employer (a labor-management agreement; where, according to the Supreme Court's interpretation, a labor union may only enter into such an agreement when said labor union is organized by a majority of the workers at the workplace, in accordance with Article 24 of the Labor Standards Act and the fundamental principles it prescribes on the payment of wages [The *Saisei-kai Chuo Byoin* case, Supreme Court (Dec.11, 1989) 43 *Minshu* 1786]). In that sense, it can be said that employers in Japan have, at the least, the freedom to decide whether to start a checkoff arrangement.

However, this does not automatically mean that an employer is entitled to unilaterally discontinue a checkoff arrangement that has already been started,

by such means as later refusing to renew the labor-management agreement. Court precedents and Labor Relations Commission orders have traditionally established interpretation that in order for a checkoff to be discontinued, (i) there needs to be reasonable grounds, and (ii) even if there are reasonable grounds, the employer must give consideration to the procedures that need to be followed beforehand, such as engaging in deliberations with the labor union on remedial measures and other such steps, and allowing a sufficient grace period. If either of these two conditions—(i) or (ii)—has not been met, the discontinuation of the checkoff has typically been classed as an unfair labor practice (Labor Union Act, Article 7, No. 3) on the grounds that it constitutes "domination and interference" with a labor union.

Amid such a trend, the Tokyo District Court case on this matter (Tokyo District Court [Feb. 21, 2018] 1187 *Rohan* 14) is notable for the fact that the court followed different judgment criteria to those typically adopted. That is, the Tokyo District Court held that "in the event that an employer discontinues (a checkoff) without giving sufficient consideration to the procedures that need to be followed, despite being aware that the discontinuation having the effect of…weakening the labor union, the discontinuation constitutes 'domination and interference' with a labor union." According to such judgment criteria, even if an employer has no reasonable grounds for discontinuing the checkoff—condition (i) above—as long as said employer has given consideration to the procedures that need to be pursued with the labor union, the discontinuation could avoid being classed as domination and interference with a labor union.

In contrast, the Tokyo High Court judgment that in addition to sufficient consideration of the necessary procedures, there also needs to be "reasonable grounds for discontinuing the checkoff despite its inflicting a disadvantage on the labor union" for the checkoff to be discontinued (as reflected in II (1) and (2)). That is, the Tokyo High Court reverted to the judgment criteria adopted in prior cases and Labor Relations Commission orders.

This difference in the judgment criteria adopted by the Tokyo High Court and the Tokyo District Court on this matter is thought to be attributable to divergence in their interpretations of checkoff itself. The Tokyo High Court judgment placed emphasis on the impact (disadvantage) that discontinuing the checkoff could have for the activities or management of the labor union, and therefore adopted the interpretation that it was needed for the employer to not only give consideration to the necessary procedures—(ii) above—but also have reasonable grounds—(i) above—in order to discontinue the checkoff.

In contrast, the Tokyo District Court adopted the interpretation that a checkoff is nothing more than the employer providing a grant of convenience to the labor union, and because "there are no legal grounds for the employer to have to automatically continue the arrangement," "it cannot be said that reasonable grounds are also required" in order to discontinue the checkoff. Thus, in this case the Tokyo High Court and the Tokyo District Court are divided on the question of whether the emphasis should be placed on the usefulness of checkoff as a means for collecting union dues, or on the employer's freedom with regard to starting and continuing the checkoff.

In addition to this divide, there is also another point on which the theories adopted in the Tokyo High Court and the Tokyo District Court's judgments are in conflict. There is a question whether the employer's intent of "domination and interference" (as prohibited under Article 7, No. 3 of the LUA) is necessary for the determination of unfair labor practice. The majority of legal theories argue that for an act to constitute the unfair labor practice of "domination and interference," the employer needs to have intent of dominating and interfering, in the sense that they are aware that their action will weaken or risk weakening the labor union (the theory that intent is required). There are also examples of court precedents that have adopted such an interpretation (The *IBM Japan* case, Tokyo High Court [Feb. 24, 2005] 892 *Rohan* 29). However, there are also theories that strongly argue that it is not necessary to demonstrate subjective factors regarding the employer, such as said employer's intent to "dominate and interfere," in order for an act to constitute "domination and interference." That is,

if the act can be objectively seen to weaken the labor union or entail the risk of doing so, it is classed as "domination and interference" (the theory that intent is *not* required).

Looking at this case in light of the above, the Tokyo District Court judgment, as we have seen, addressed as part of its judgment criteria the subjective factors regarding the employer—namely, the employer's awareness that discontinuing checkoff would weaken the labor union—and thereby took an interpretation that echoes the theory that intent is required. On the other hand, the Tokyo High Court focused on the ways in which in this notification to discontinue the checkoff weakened Unions X_1–X_4 (as shown in II (4)), an evaluation that seems to follow an interpretation that echoes the theory that intent is *not* required.

In this case, the notification of the unilateral discontinuance of the dues checkoff had been issued to all of the unions (Unions X_1–X_4) without any discussion being pursued regarding remedial measures and other such steps suited to the individual circumstances of each union and without a grace period being put in place. This was done on the grounds that discontinuing the dues checkoff system was necessary in order to ensure consistency with the treatment of the employee organization (Union A), to which the Labor Union Act did not apply in the first place. The Tokyo District Court—and of course the Tokyo High Court (see II (3) and (5))—also concluded that this notification to discontinue the checkoff constituted "domination and interference" with a labor union, on the basis that City Y had failed to give consideration to the necessary procedures. (Moreover, the Tokyo High Court also determined that the notification to discontinue the checkoff was not based on "reasonable grounds" as specified above—II (2). As we have seen in this case, there is a marked contrast between the respective theories that the Tokyo High Court and the Tokyo District Court followed in the process of reaching these judgments.

1. In Japan, employees who work for local public entities fall under the Labor Union Act depending on their job type. In this case, among the employees working for City Y, those employees to whom the Local Public Enterprise Labor Relationships Act applies, such as the members of Unions X_1–X_4, fall under the Labor Union Act as a general rule, as prescribed in Article 4 of the Local Public Enterprise Labor Relationships Act. It is therefore possible for such employees to form or join a labor union and also to use the system of unfair labor practices (Labor Union Act, Article 7). On the other hand, for workers who are regular service employees engaged in clerical work in City Y, like the employees who are members of Union A in this case, the Local Public Service Act applies. Therefore, as these employees do not fall under the Labor Union Act due to the specifications of Article 58, Paragraph 1, of the Local Public Service Act, they are not able to form or join labor unions. These employees are able to form or join employee organizations, but as they do not fall under the Labor Union Act, they are not able to utilize the system for unfair labor practices.

2. Labor Union Act, Article 7 (Unfair Labor Practices), No. 3
The employer shall not commit the acts listed in any of the following No. 3:
(iii) to dominate and interfere with the formation or management of a labor union by workers or to give financial assistance in paying the labor union's operational expenditures, provided, however, that this shall not preclude the employer from permitting workers to confer or negotiate with the employer during working hours without loss of time or wage, and this shall not apply to the employer's contributions for public welfare funds or welfare and other funds which are actually used for payments to prevent or relieve economic adversity or misfortunes, nor to the giving of office of minimum space.

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https://www.jil.go.jp/english/profile/yamamoto.html