Is an Owner-manager of a Convenience Store a "Worker" under the Labor Union Act?

The *Seven-Eleven Japan* Case
Order, the Central Labour Relations Commission
(Feb. 6, 2019) 1209 *Rodo Hanrei* 15

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I. Facts

X is a labor union with members consisting of owner-managers (hereinafter referred to as "franchisees") who operate convenience stores under member-store contracts with Company Y. Y operates a franchise chain of one of Japan's major convenience stores. X made a collective bargaining request to Y with agenda items including the establishment of rules for collective bargaining. Y, however, did not respond to the request, stating that the franchisees belonging to X were independent business operators and that they had no labor-management relationship with Y.

X asserted that Y's refusal to engage in collective bargaining constituted an unfair labor practice under Article 7 No. 2 of the Labor Union Act (LUA), and filed a complaint for remedy with Okayama Prefectural Labour Relations Commission (abbreviated below as "Okayama Pref. LRC"). Okayama Pref. LRC concluded that the franchisees as workers under the LUA and that Y's failure to respond to X's proposal for collective bargaining was an unfair labor practice, and issued a remedial order that Y must respond to X's request for collective bargaining (Okayama Pref. LRC Order 2014.3.13 *Bessatsu chuo rodo jiho*, June 2014, p. 1).

Y then appealed to the Central Labour Relations Commission (abbreviated below as the "Central LRC) for administrative review, seeking revocation of the order of Okayama Pref. LRC, and dismissal of X's complaint for remedy.[1]

II. Order

1. Worker status of franchisees under the Labor Union Act

(1) Framework for determining worker status under the Labor Union Act

A. The worker status under the Labor Union Act of those in labor-supply relationships is interpreted as follows.

a. Even if labor is supplied under contracts other than labor contracts, such as through outsourcing etc., the labor supplier should be considered a worker under the LUA[2] when it is deemed necessary and appropriate that collective bargaining protections should be given considering the following three criteria substantially: criteria ① to ③ substantially, defined in the LUA as "persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation."

① Whether the person providing the labor is integrated into the business organization of the other party, such as consistently supplying labor that is indispensable for the business activities of the other party.

② Whether all or important parts of the labor supply contract are determined in a unilateral and standardized manner by the other party.

③ Whether the payment for the labor supplier can be considered equivalent or similar to the remuneration for the labor supply.

b. Regarding the criteria a. ① above, the following supplementary factors (a) to (c) are also

considered for the judgment of "being integrated into the business organization."

(a) Whether the labor supplier is in a relationship where he/she is to respond to the other party's individual business requests.

(b) Whether the labor supplier is bound to a specific date, time and location of labor supply and engages in work in the manner directed or supervised by the other party in a broad sense.

(c) Whether the labor supplier provides labor exclusively to the other party.

c. On the other hand, if the labor supplier shows conspicuous characteristics to be qualified as business operator, such as having constant opportunities to gain profits by directing business operations based on their own independent management decisions, worker status under the LUA is denied.

B. Looking exclusively at the provisions of the franchise agreement, the relationship between Y and the franchisees is only a relationship between the franchise system provider and retailers who operate stores using it, and the latter cannot be said to be providing labor to Y. Therefore, in this case, a legal question arises that the focal point of dispute is whether the criteria for worker status under the LUA outlined in A above, which regulates those in labor-supply relationships, may not be applied.

However, in this case, it is recognized that (1) the provisions of the franchise agreement were determined in a unilateral and standardized manner by the other party Y, and there was no leeway for the franchisees to alter it by means of individual negotiation, (2) the franchisees have been bound by the unilateral and standardized contract while receiving advice and guidance from Y on managing the member stores, and in many cases, have been operating the stores themselves for a considerable amount of time, (3) based on the consistent appearance of store interiors and exteriors, signboards, uniforms and so forth adhering to design prescribed by Y, the franchise should appear to be a chain store with Y as its headquarters, and (4) Y, a franchise chain headquarters, conducted business activities and provided more than management support to the franchisees such as store opening plan and product development based on Y's own management strategies, and thus, Y is considered to increase its own profits through the business activities of the franchisees. Given these circumstances, it can be said that in the light of the relationship between Y and franchisees in reality, there is possibly scope for assessing franchisees themselves as providing labor for Y's business endeavors.

Therefore, in this case, it is still necessary to take criteria A above into account when making judgments, and to examine whether the relationship between Y and franchisees can be viewed as, in effect, a labor-supply relationship.

(2) Integration into the business organization (1 (1) Aa① above)

In this case the franchisees, as retailers, raise their own funds and bear the costs of their business, and take on both losses and profits, as well as hiring employees and managing personnel at their own discretion. They use the labor force of others to manage stores at the locations of their choice. There are certain restrictions on the management of funds, purchase of products, and business days and hours, but managers have the character of an independent retailer with considerable discretion. On the other hand, Y conducts training, evaluations, and so forth on the management of franchisees' stores, and requires to present consistent external appearance of their stores showing that they are part of the Y's chain. However, even though there are constraints on aspects of franchisees' business operations and store management, this does not provide grounds for franchisees to be considered as part of the labor force integrated into Y's business organization.

The next point is that franchisees cannot be said to be supplying labor under time and location constraints from Y, and while engaging in the management of store operations, following a manual and receiving advice and guidance from "operation field counselors" (Y's employees who visit stores and provide advice and guidance to franchisees), these practices are not governed by binding rules, with the exception of acts that violate the Franchise

Agreement. Even if there are practical constraints on business operations at stores, these should be regarded as restrictions on store management as a business activity of franchisees, and therefore franchisees are not actually supplying labor under the supervision of Y, even in a broad sense. Also, while franchisees are exclusively affiliated with Y as far as convenience store management is concerned, in this case for judgment, that point should not be emphasized in considering the issue of integration into the business organization. With all these points taken together, franchisees cannot be assessed as being integrated into Y's business organization as an indispensable labor force of Y's business activities.

(3) Unilateral and standardized determination of contents of contract (1 (1) Aa② above)

It is appropriate to state that the contents of this franchise agreement have been determined in a unilateral and standardized manner by Y. However, as mentioned above, considering that franchisees are independent retailers, it is appropriate to say that this franchise agreement does not regulate the labor supply and working conditions of franchisees, but rather stipulates the manner of the business activities of franchisees' store management. Though the fact that Y decides the contents of the contract unilaterally may indicate a disparity in bargaining power between Y and franchisees, it is not grounds for recognizing franchisees' worker status under the LUA.

(4) Payment as remuneration for labor supply (1 (1) Aa③ above)

It should be said that the money that franchisees receive from Y lack the precondition to be considered as characteristics that remuneration for franchisees' supply of labor should have, given the purpose of the franchise agreement and the actual situations regarding the relationship between franchisees and Y. In addition, when the character of the funds is examined, it is not possible to affirm their nature as remuneration corresponding to labor supplied. Therefore, it cannot be said that franchisees are being paid by Y for the labor they supply.

(5) Conspicuous business-operator status (1 (1) Ac above)

Given the franchisees' form and scale of business and store management in reality, franchisees are independent business operators, and they constantly have the opportunity to gain profits through independent management decisions with regard to the overall management of their own retail business operations. Franchisees can make judgments on business forms and the number of stores, plan for the proper daily stock, the payment of expenses, and operational direction and so forth. Also, by bearing the costs of their own retail business, having a responsibility to accrue losses and profits, and utilizing the labor force of others, franchisees take risks on their own initiative. They clearly have the status of business operators.

(6) Conclusion

The franchisees are independent retailers, and can be said neither to be integrated into Y's business organization as a labor force integral to carrying out Y's business, nor to supply labor through a contract similar to a labor contract. Furthermore, it cannot be said that franchisees supply labor to Y and receive payment from Y as remuneration for labor, and in addition, franchisees' character as business operators is conspicuous. In view of the above comprehensively, the franchisees in relation to Y cannot be considered workers under the LUA, under which it would be deemed necessary and appropriate to apply protections of the LUA to ensure equal footing in negotiation with the employer.

2. Whether unfair labor practices are recognized

It was concluded that, given the fact that franchisees do not have worker status under the LUA, Y's failure to respond to X's request for collective bargaining does not constitute an unfair labor practice under the Article 7, No. 2 of the LUA.

III. Commentary

In recent years, the rapid growth of new forms of work which cannot be defined as employment, including personal delivery of documents, food, and

other items via motorcycle or bicycle has seen in many countries. Are the people doing these "gigs" workers? Who has worker status? Problems have arisen regarding the scope of application of labor laws, which have drawn public attention.[3] In the same context the issue of owner-managers of convenience stores, like those in this case, involves worker status. Thus far the legal relationship between franchisee owner-managers and the franchise companies, and the regulation of the contents of their contract have been discussed from a judicial perspective.[4] Although this case is not a court decision but an administrative order issued by the CENTRAL LRC regarding a motion for review of the prefectural labour commission order in the first instance (therefore, this order is subject to a judicial review in the future),[5] we have focused on it here because of the widespread attention it drew.[6, 7]

In Japan, the concept of a "worker" under collective labor relations law (the Labor Union Act) is different from that under the individual labor relations laws (the Labor Standards Act, the Labor Contracts Act, abbreviated below as the"LSA," and the "LCA"). The issue in this case is the worker status under the LUA. Article 3 of the LUA stipulates that "the term 'Workers' as used in this Act shall mean those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation." On the other hand, the LSA and the LCA state as requirements for "workers" that they are "employed" and "receive wages."[8] In the area of individual labor relations laws, being "employed" based on a labor contract, in other words, the presence of control and supervision of an employer, is an important factor that determines worker status.[9] By contrast, as for collective labor relations law, worker status under the LUA does not require being "employed," as shown in the article quoted above. In other words, under the LUA, a labor contract relationship is not absolute, and rather worker status is broadly defined, and one can have the status of a "worker" if they receive remuneration by supplying labor. In addition, Japan's collective labor relations legislation is interpreted as focusing on the voluntary and autonomous setting of working conditions between labor and management, by promoting collective bargaining. The scope of "workers" is defined in terms of "who should reasonably be included in collective bargaining relationships." Thus, regarding "workers" under the LUA, the normative values for "workers to be included in collective bargaining" have greatly differed depending on the scholar, and there has been heated controversy regarding various legal judgments and theories.[10]

Under these circumstances, the Supreme Court of Japan issued three decisions in recent years (2011–2012)[11] on worker status under the LUA, making judgments comprehensively based on the factors summerized in 1. (1) A of II above. Later, Study Group on the Labor-Management Relations Law composed of labor law scholars, set in the Ministry of Health, Labour and Welfare (MHLW), organized the factors for consideration indicated in the Supreme Court's three decisions, and issued a report on criteria for worker status under the LUA (July 2011, hereafter the LMRL Study Group Report).[12] It can be said that the interpretation of this issue has almost established with this report.

To describe the factors for consideration specifically, in accordance with the summary of the decision and order in this case, the LUA concept of "workers," in comparison with the concept of "workers" under the individual labor relations laws of the LSA and LCA, is characterized by judgment based on considerations of "integrated in the business organization" (as described in 1 (1) Aa①, for details see 1 (2) of II above), and "unilateral and standardized determination of contracts contents" (as described in 1 (1) Aa②, for details see in 1 (3) of II above). These factors are not seen in the criteria defining "workers" under the individual labor relations laws. From the viewpoint of the labor-management relations law, facts that can be grasped through these factors should be appropriately dealt with by means of collective bargaining. This illustrates the uniqueness of the concept of "workers" under the LUA.

Still, the factors for the concept of "workers" under individual labor relations laws have not completely been neglected. In the supplementary factors for the judgment of the criteria "integration

into the business organization (1 (1) Ab above), reference is made to whether the labor supplier can refuse the orders of the client, and whether there are constraints on the time and place business operations are performed. These are factors considered upon the determination of worker status under the individual labor relations laws, the LSA and the LCA. However, in determining worker status under the collective labor relations law as well, these are considered "positive supplementary factors" that allow worker status (in two of the supplementary factors (a) and (b) of the above 1 (1) Ab). Similarly, business operator status (1 (1) Ac above) is also a factor that can be considered not only with regard to worker status under individual labor relations laws, but also worker status under the collective labor relations law, where business operator status is interpreted as a factor denying worker status.

The judgment procedures comprising these factors are comprehensive judgments. At the same time, in accordance with the worker-status judgment under the collective labor relations law of Japan, it is an interpretative approach in which "those who obtain wages under labor relationship similar to those of a labor contract ought to be recognized as 'workers' under the LUA, if it is deemed necessary and appropriate to provide collective bargaining protection."[13]

In this case, the CENTRAL LRC denied the worker status of an owner-manager of a convenience store. In this regard, this order seems to be characterized by the logical construction and the use of factors for consideration for the judgment.

The three Supreme Court decisions and the LMRL Study Group Report as well as the Okayama Pref. LRC order in the first instance of this case all appeared to interpret three factors for determining worker status to be considered based on (1) integration into a business organization, (2) unilateral and standardized determination of contents of contract, and (3) compensation as remuneration for labor supplied (1 (1) Aa①–③ of II above), and as supplementary factors, (4) relationship necessitating response to business requests and (5) supplying of labor under control and supervision in a broad sense and the imposition of certain spatial and temporal constraints (1 (1)Ab (a) and (b) above) to be considered respectively. Furthermore, (6) conspicuous business-operator status (1 (1) Ac above) was classified as a factor that could cancel out factors (1) to (5) above after consideration of these factors. It seems that a logical construction used above led to a comprehensive judgment as a result of the consideration.

On the other hand, in light of 1 (1) B above regarding the provisions of the franchisees agreement, the order in this case seems to have assumed the business-operator status of franchisees since the beginning of the review. Nonetheless, considerations were made using criteria that have been widely recognized until now, namely "it can be said that there is possibly scope for assessing franchisees themselves as providing labor for Y's business endeavors." In addition, as shown in 1 (1) Ab, when considering integration into a business organization, considerations included the supplementary factors listed above, (4) relationship necessitating response to business requests and (5) supplying of labor under control and supervision in a broad sense and the imposition of certain spatial and temporal constraints.

One could presume that there could be two reasons behind the fact—that criteria which have been used so far were restructured to give a new framework, while it premised on the business operator status of franchisees. First, the CENTRAL LRC would probably have had strong hesitation about a drastic alteration in the judgment framework (or factors) of worker status under the LUA in this case that may shake the judicial stability. Second, while X claims that under actual working conditions franchisees are supplying labor to Y, (it seems that) it is recognized as a premise that franchisees are business operators under a franchise agreement. Under these circumstances, the CENTRAL LRC recognized essential differences between franchisees and individual contractors[14] which had been set in precedents and orders thus far in the relationship with the company, contract forms, and the nature of work form. For these two reasons, it can be surmised

that in this case, the franchisees' worker status was denied from the start, that is, the underlying logical construction was based on the affirmation of their status as business operators. This is because without such a construction, as the Okayama Pref. LRC order in the first instance and some experts point out,[15] membership under a franchise agreement and execution of business operations would have to be recognized as the integration of franchisee into the business organization of Y.

Also, because it cannot be denied that the franchise owner-managers in this case have the status of business operators, which contradicts worker status, a new judgment approach differing from precedents was presented, or perhaps the interpretation may be limited to franchisees with business-operator status.[16] Such implications are not stated in the order, and remain inferred. However, even on the presumption of this understanding, the order's unconventional interpretation seems to add ambiguity to the existing judgment framework (or the construction of the factors for consideration).[17] Specifically, it would seem that the "unilateral and standardized determination of contract contents" and "compensation as remuneration for labor supplied," which ought to be the main factors for consideration, have been relativized and belittled and their significance as factors greatly diminished. On the other hand, supplementary factors such as "a relationship necessitating a response to other party's business requests" and "supplying of labor under control and supervision in a broad sense, and the imposition of certain spatial and temporal constraints" are included in consideration of "integration into the business organization," and as a result, it occupies an important position in the overall judgment on the value or meaning of the relationship between franchisor company and franchisees, beyond its intrinsic supplemental significance. This point will be clarified through an examination of the judicial approach in similar cases in the future.

Furthermore, the CENTRAL LRC might have denied franchisees' worker status in relation to the conclusion of collective bargaining agreements and the guaranteed right to engage in labor disputes. Franchise agreements are contracts between businesses, this objective fact cannot be altered. Once a collective agreement is concluded, however, the question arises of how to interpret the collective agreement's normative effect (legal effect of the part of the agreement that determines working conditions) in a franchise contract, or of whether a franchise contract will be accepted as a (relative) labor contract. In addition, there may be a question of whether a franchise agreement can provide civil immunity in the event of a dispute.[18] Because the issue of worker status in this case was closely related to such interconnected issues in collective labor relations law, the CENTRAL LRC seems to have made a judgment in this case focusing on the business-operator status of the franchise owner-managers, and came to the conclusion that they were not eligible for worker status.

Considering the working conditions of franchise owner-managers, who work extraordinarily long hours due to operating businesses open 24 hours a day without being able to secure sufficient staff, contemplating the problems they face as a labor law issue is essential. Postulating franchise agreements between businesses which are the basis of relationships between the franchisor company and the franchisees as the unignorable, in the field of economic law as well, it would be necessary to consider institutional and policy measures to render more appropriate the business operations of franchise stores and the working conditions of owner-managers.[19] The CENTRAL LRC order in this case indicates the limitations of labor law, and also suggests a need for greater connection and coordination with adjacent legal domains.

1. Unfair labor practice remedial procedure in the labor relations commission and its relationship with judicial procedure, see https://www.mhlw.go.jp/english/org/policy/dl/08.pdf.
2. Article 3, LUA, defines "workers" as "persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation."
3. In Japan, unlike other countries, ridesharing services such as Uber and Lyft are not legally permitted. Thus, no legal judgments so far have been made on the worker status of those services' drivers.
4. See Yoko Hashimoto, "Can Owners of Convenience Stores

Be "Workers" under the Japanese LUA?" *Japan Labor Issues* 3, no. 12 (January–February 2019): 19.

5. According to newspaper reports, X has appealed to the CENTRAL LRC order and filed a suit in the Tokyo District Court for revocation of the administrative decision and order.

6. On the same day as this CENTRAL LRC order, an order was issued for a similar case. See *FamilyMart* case, Central Labour Relations Commission (Feb. 6, 2019). Ministry of Health, Labour and Welfare website: https://www.mhlw.go.jp/churoi/houdou/futou/dl/shiryou-31-0315-2z.pdf. Because the basic contents of that order are the same as the order in this case, this article deals only with the latter.

7. Commentary on this order includes Yoko Hashimoto "Konbini-ouna no rosoho jo no rodosha-sei" [Can Owners of Convenience Stores Be "Workers" under the Japanese LUA?] *Jurist*, no. 1533 (2019): 4; Yoichi Motohisa "Konbini-ouna no rosoho jo no rodosha-sei" [Worker Status of Convenience Store Owners under the LUA] *Rodo-Horitsu-Junpo*, no. 1943 (2019): 6; Yoichi Shimada, "Konbini chen kameitenshu no rosoho jo no rodosha-sei" [Worker Status of Convenience Store Chain Franchisees] *Rodo Hanrei*, no. 1209 (2019): 5; Susumu Noda, Kaoko Okuda, "Daiarogu: Rodo hanrei kono 1-nen no soten" [Dialogue: Labor law precedents 2018–19: The issues involved] *The Japanese Journal of Labour Studies* 61, no. 11 (2019): 2 (all commentary is only available in Japanese).

8. "In this Act, 'Worker' means one who is employed at a business or office and receives Wages therefrom, regardless of the type of occupation." (Labor Standards Act Art. 9); "The term 'Worker' as used in this Act means a person who works by being employed by an employer and to whom wages are paid." (Labor Contracts Act Art. 2 (1)).

9. In a lawsuit in which the worker status of a convenience store owner-manager under the LSA and LCA was disputed, the court denied worker status. The *Seven-Eleven Japan (franchisees)* case, Tokyo District Court (Nov. 21, 2018) 1204 *Rohan* 83.

10. For the history of legal decisions and debates on theories, see Takashi Araki, *Rodoho* [Labor and Employment Law], 3rd ed. (Tokyo: Yuhikaku, 2016) 573–576.

11. *Central Labour Relations Commission* v. *Shin-Kokuritsu Gekijo Un'ei Zaidan* case, Supreme Court (Apr. 12, 2011) 65-3 *Minshu** 943; *Central Labour Relations Commission v. INAX Maintenance* case, Supreme Court (Apr. 12, 2011) 1026 *Rohan* 27; *Central Labour Relations Commission* v. *Victor Service & Engineering* case, Supreme Court (Feb. 21, 2012) 66-3 *Minshu* 955. All of these decisions determine only whether the union members in the cases have worker status under the LUA, and do not provide a general definition of the concept of a worker.

**Minshu*: Saikosaibansho Minji Hanreishu (Supreme Court Reporter)

12. Labor-Management Relations Law Study Group, "Report of the Labor-Management Relations Law Study Group: Criteria for Worker Status under the LUA (July 2011, only available in Japanese) (Chair: Takashi Araki, Professor of The University of Tokyo). This report identified criteria based on the Supreme Court decisions cited in the note 9, and classified (1) integration into a business organization, (2) unilateral and standardized determination of contract contents, and (3) compensation as remuneration for labor provided [(1) to (3) are defined as "basic criteria" by the Report], (4) relationship where the labor supplier is to respond to the other party's business requests and (5) supplying of labor under the other party's control and supervision in a broad sense and the imposition of certain spatial and temporal constraints [(4) and (5) are defined as "supplementary criteria"], and (6) conspicuous business-operator characteristics [defined as a negative criterion that could cancel out factors (1) to (5) above].

13. Kazuo Sugeno, *Rodo ho* [Labor law]. 12th ed. (Tokyo: Kobundo, 2019), 830 (only in Japanese).

14. In addition to the three cases cited in note 11, there is also a decision and order in the *Sokuhai* case, Central Labour Relations Commission (July 7, 2010)1395 *Bessatsu chuo rodo jiho* 11.

15. Hashimoto, *supra* note 7, 5.

16. Noda and Okuda, *supra* note 7, 9, 11 (Comments by Professor Noda and Professor Okuda); Shimada, *supra* note 7, 12–13.

17. Hashimoto, *supra* note 7, 5; Shimada, *supra* note 7, 12–13.

18. Noda and Okuda, *supra* note 7, 9–10 (Comments by Professor Noda).

19. Shimada, *supra* note 7, footnote 17 at 13. Japan Fair Trade Commission, which has jurisdiction over the Antimonopoly Act, has published implementation standards for the act, entitled "Guidelines concerning the Franchise System under the Antimonopoly Act" (April 24, 2002, revised June 23, 2011) (only available in Japanese). However, this is merely an approach to implementation of laws and regulations regarding relationships between business operators, and does not provide views on how franchisees supply labor.

The *Seven Eleven Japan* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1209, pp. 5–63. See also *Labor Law Studies Bulletin* 2708.

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