Does the Conclusion of a Fixed-term Part-time Contract when Returning to Work after Childcare Leave Constitute the Cancellation of the Regular Employment Contract?

The *Japan Business Lab* Case
Tokyo High Court (Nov. 28, 2019) 1215 *Rodo Hanrei* 5

TAKIHARA Hiromitsu

I. Facts

Y is a stock company with around 22 employees. Its main lines of business are the operations and other tasks related to B, a school providing career development courses, and C, a school providing coaching for the improvement in English language skills and other languages. On July 9, 2008, X signed a regular employment contract (the regular employment contract) with Company Y and subsequently worked as a coach at C. As of November 2012, X's main terms and conditions of employment under the regular employment contract included scheduled working hours of seven hours a day and salary and related payments of 480,000 yen per month.

In January 2013, X took prenatal maternity leave because she was expecting a child. She gave birth to her first daughter in March that year, after which she took postnatal maternity leave and childcare leave (until March 1, 2014). On February 26, 2014, X informed Company Y of her wish to extend her childcare leave by six months because she was unable to find a childcare facility, upon which her childcare leave was extended.

On September 1, 2014, following a consultation with the Company Y president, the manager responsible for her job (the male supervisor D), and labor and social security attorney as an advisor, X signed and exchanged with Company Y a document entitled "employment contract" (the fixed-term part-time contract), under which her form of employment was cited as contract employee and her other terms and conditions of employment included a contract term of one year, working times and hours of "generally Wednesdays, Saturdays and Sundays; four hours a day," and a monthly salary of 106,000 yen (the agreement).

X officially returned to work on September 2, 2014, and the following day began her role as a contract employee working three days a week. X claimed to have found a childcare facility to look after her daughter and for this and other reasons requested Company Y to reinstate her as a regular employee working five days a week. Although X made several attempts at negotiation, her request was rejected by Company Y. Company Y ordered X to stand by at home from July 12, 2015 onward, on such grounds as the fact that X had recorded conversations in the office without consent and had used the email address and computer assigned to her for work to send personal emails. In a document dispatched via registered mail with certification of contents on July 31, 2015, Company Y then informed X that the fixed-term part-time contract would expire at the end of its term on September 1 that year (the non-renewal of the fixed-term part-time contract). On August 3, 2015, Company Y filed a suit with the Tokyo District Court seeking confirmation that X was no longer

entitled to the rights assigned under an employment contract (case *β*).

On October 22, 2015, X filed a suit with the Tokyo District Court against Company Y ("case *α* original action"). Her principal claim was for (i) the confirmation of her entitlement to the rights set out in the regular employment contract and the payment of unpaid salary and other payments. As a secondary claim for the event that said claim was dismissed, she sought (ii) confirmation of her entitlement to the rights set out in the fixed-term part-time contract and the payment of unpaid salary and other payments. She also demanded (iii) solatium (*isharyō*) and other such payments on the grounds that Company Y had committed torts, namely, refusing to reinstate her as a regular employee after making her a contract employee and a series of other related acts. Company Y, on the other hand, demanded solatium and other such payments from X (case *α* counterclaim), on the grounds that X had committed a tort in making false statements at a October 2015 press conference (detailed below) and thereby defaming the good reputation of Company Y.

On the day that she filed the case α original action (October 22, 2015), X and her legal counsel held a press conference at the reporters' club room (*kisha kurabu*) in the Ministry of Health, Labour and Welfare, where copies of the complaint were distributed as reference material; Company Y's name was made public, and an explanation was provided, detailing the fact that the case *α* original action had been filed and setting out the particulars of the complaint. As part of this explanation, X made the following statements ("Statements"): that when finishing childcare leave in September 2014 she had applied for leave of absence because she had been unable to find a childcare facility for her daughter, but her request had been denied, upon which Company Y had forced her to choose between becoming a contract employee working three days a week or voluntary resignation (Statement (1)); that after she had reluctantly signed an employment contract as a contract employee the contract had not been renewed after the initial one year term (Statement (2)); that when she had returned to work after giving birth, she had faced fundamental criticism of her character (Statement (3)); that a male supervisor D had said " I would make sure that I'm prepared to earn enough to support the whole family, and then, I would make my wife pregnant" (Statement (4)), and that when she had joined a labor union the Company Y president had referred to her as a "loose cannon" (Statement (5)).

On the day of said press conference, the case was covered in newspapers (online) and on a news program (of three reports, two clearly stated Company Y's name). The following day, October 23, 2015, Company Y received some criticism in the form of two emails. On the same day, Company Y posted an article on its official website denying the claims that X had made at the press conference.

The Tokyo District Court dismissed case *β*. In response to X's demands in the case *α* original action, the court concluded that the regular employment contract had been canceled as a result of the agreement, but declared the non-renewal of the fixed-term part-time contract null and void and accepted the claim for confirmation of X's entitlement to the rights set out in the fixed-term part-time contract, as well as partially recognizing her demands regarding the torts committed by Company Y. The Tokyo District Court also dismissed the demands put forward by Company Y in the case *α* counterclaim. Company Y responded to the District Court decision by posting an article on its official website denying claims from certain media outlets regarding the decision.

On the grounds of objections and other issues regarding the District Court rulings against them, both X and Company Y respectively filed appeals to the High Court. The four main points in dispute were: (1) the interpretation and validity of the agreement, (2) whether the fixed-term part-time contract should have been renewed, (3) whether Company Y had committed torts, and (4) whether X had committed a tort.

II. Judgment

(1) The interpretation and validity of the agreement

(a) Whether the agreement included an agreement that the regular employment contract had been canceled

"As X selected contract employment rather than regular employment from the forms of employment offered to her, signed the document entitled "employment contract" with Company Y, and entered, as a contract employee, into a fixed-term employment contract to be renewed annually (the agreement), it is reasonable to conclude that the regular employment contract had been canceled."

(b) Whether the agreement was in violation of the Equal Employment Opportunity Act (EEOA) and the Child Care and Family Care Leave Act (CFCLA) prior to its amendment in 2016

A comparison of the terms and conditions of employment set out in the contracts for regular employment and contract employment reveals undeniable disadvantages to contract employment, such as no fixed premium wages for overtime included in the salary, a specified term of employment, and periods of work as a contract employee not counting toward the calculation of severance pay. At the same time, for these to be deemed as disadvantages for X, she needs to have been able to work five days a week.

"At the time of the agreement, X was only able to work four hours a day, three days a week, rather than a five-day week, because she was unable to find a childcare facility for her daughter and did not receive sufficient assistance from her family. Therefore, if X had returned to work as a regularly-employed coach with a five-day working week despite still having no prospect of securing a childcare facility for her daughter, even with the support of measures to shorten working hours, she would have struggled to fulfil her role as a coach responsible for a class. Moreover, even if she had been able to take responsibility for a class, she would have been considerably hindered in her capacity to run said class, or would have been repeatedly absent, such that she would have faced such risks as being forced to resign due to personal circumstances, being dismissed on the grounds that she was unsuitable for employment due to poor work performance (Article 34, Paragraph 1, Item 2, of the work rules), or being subject to disciplinary discharge on the grounds that she was not regularly attending work and showed no prospect of improvement (Article 31, Item 2, of the work rules)."

"Company Y has established various forms of employment to accommodate employees returning from childcare leave and their capacity to work in relation to their childcare commitments and other such obligations. The company revised its work rules and other such provisions and introduced a contract employee system to allow such employees to choose between the options of "regular employee (five days a week)," "regular employee (five days a week with reduced working hours)" or "contract employee (four or three days a week)." X, who was on childcare leave at the time, had these changes explained to her individually, and had sufficient opportunity, within the around six months that remained of her childcare leave, to consider which employment type would be best suited to her when she returned to work. On the day before the end of her childcare leave, X received an explanation of aspects such as the particulars of the contract, the working styles of contract employees, and the method used to calculate salary. She signed the fixed-term part-time contract after going through such details."

"Given the explanations provided by Company Y regarding the forms of employment and the content of the explanations provided and circumstances at the time the fixed-term part-time contract was signed, X's situation at the time her childcare leave ended, and the fact that X had changed her mind and requested to return to work as a contract employee despite having declared her intention to resign, there are objectively reasonable grounds to deem the agreement to have been concluded on the basis of X's free will (see Supreme Court (October 23, 2014) 68–8 *Minshu* 1270)."

"The agreement does therefore *not* constitute

"unfavorable treatment" as prohibited under Article 9, Paragraph 3, of the EEOA, and Article 10 of the CFCLA."

(c) Other points regarding the agreement

The agreement was concluded on the free will of the parties involved, and did not involve any mistake, the conclusion of an open-ended employment contract subject to a condition precedent, or an agreement that X would return to work as a regular employee.

(2) Whether the fixed-term part-time contract should have been renewed or not

The fixed-term part-time contract constitutes "a fixed-term contract for which there are deemed to have been reasonable grounds for the worker to expect the contract period to be renewed when the contract expired." However, X, "in violation of orders from the Company Y president and her own pledge, repeatedly made recordings in the office. Furthermore, in violation of her obligation to give undivided attention to duty, she also used the email address assigned to her for work to exchange personal emails on multiple occasions during her working hours. She also knowingly provided false information to news reporters and other persons outside of the company with the aim of creating the impression that Company Y had a culture of "maternity harassment," and consistently engaged in behavior that risked damaging the reputation of and public confidence in Company Y and behavior that damaged her trust relationship with Company Y, and, given that she also shows no sign of remorse, it can be concluded that there are sufficient grounds for her not to expect her employment to be continued."

"The non-renewal of the fixed-term part-time contract is therefore based on objectively reasonable grounds and is appropriate according to social norm."

(3) Whether Company Y committed torts

The fact that Company Y sent an email to a third party outside of the company stating that X had been put on standby at home because she had violated the work rules and leaked information was a violation of X's privacy, and therefore constitutes a tort. However, the other actions by members of Company Y—including D's words and behavior as described by X in Statement (4)—do not constitute torts.

(4) Whether X committed a tort

"Unlike a civil suit, where a judgment must be based on facts asserted and evidence submitted by parties to the litigation (the principle known as *benron shugi*), a press conference is a one-sided provision of information to news media representatives and guarantees no opportunity for the other party to offer a counterargument. Therefore, where the facts alleged in statements at a press conference diminish the reputation of the other party to the suit, these may be deemed to constitute the torts of defamation and damage to credibility. Furthermore, "judging on the basis of how the public would typically take note of and interpret" Statements (1), (3), (4) and (5), said Statements create a negative impression of Company Y and "can be deemed to diminish reputation of Company Y."

"In the case of defamation where facts are alleged, where the alleged facts are matters of public interest and the objective of alleging those facts is solely to ensure public welfare, if there is proof that the key parts of the alleged facts are true, said act is not unlawful. Moreover, even if there is no such proof, if there are sufficient grounds for the person who committed the act to have believed the key parts of said facts to be true, that person will not be found to have intentionally or negligently committed defamation." While the facts alleged in Statement (4) can be deemed to be true, the facts alleged in Statements (1), (3) and (5) can neither be deemed true nor be recognized to have been proved as such, and there cannot be deemed to have been sufficient grounds for X to have believed them to be true.

Statements (1), (3) and (5) therefore constitute torts.

III. Commentary

(1) Differences, etc. between the Tokyo District Court judgment and this Tokyo High Court judgment

The District Court judgment has already been the subject of an article in Japan Labor Issues Volume 3, Number 15 (Hosokawa 2019),[1] but we revisit it again here given the major changes made to it by this High Court judgment. The District Court judgment (i) did not recognize the confirmation of X's status as a regular employee, but (ii) declared the non-renewal of X's employment null and void, (iii) recognized that Company Y had committed a tort by violating its obligation of good faith in the process of preparing to revert X to regular employment (insincere attitude to negotiations) and (iv) rejected the claim that X's statements at the press conference constituted a tort. While reaching the same conclusion as the District Court on point (i), the High Court passed different judgments on the other points. Namely, the High Court declared (ii) the non-renewal of X's employment to be valid, (iii) recognized only the violation of X's privacy as a tort by Company Y, and (4) concluded that X's statements at the press conference constituted a tort (Statements (1), (3), and (5)).

Starting from the points upon which the judgments differed, let us firstly make an overview of the issue of (ii) whether the non-renewal of X's employment contract was declared null and void (District Court judgment) or valid (High Court judgment). In addressing whether the non-renewal of the contract is invalid or valid, considerable weight was placed on two points: the fact that X made recordings without consent and the fact that X used her work email address for sending and receiving personal emails (these two points were clearly specified on the written order issued to X by Company Y instructing X to remain at home on standby from July 12, 2015 onward). With regard to the recordings, the District Court judgment states that "it was clearly necessary for X to record the conversations in order to be able to use them as evidence at a later date, given that it is obviously social norm that recordings of such conversations between labor and management regarding points of contention typically serve as important evidence in a labor-management dispute." The District Court also acknowledged the fact that X's recording of the conversations without consent did not in fact result in any damages for Company Y, such as the leaking of information to a third party. With regard to the receiving and sending of personal emails, the District Court judgment declared that while "the sending and receiving of non-work-related emails during working hours using a computer assigned for work purposes may be in violation of the obligation to give undivided attention to duty as set out in the employment contract," there is no evidence that sending and receiving private emails is prohibited at Company Y, and, even if X had been sending and receiving private emails, it is unclear to what extent this would have impeded her performance of duties, such that it is not possible "to suggest that X's said actions destroyed her trust relationship with Company Y." As a result, the District Court declared the non-renewal of X's fixed-term part-time contract null and void on the grounds that "the non-renewal of the fixed-term part-time contract lacks objectively reasonable grounds and cannot be deemed appropriate according to social norm" This judgment contrasts with that of the High Court (Judgment (2)).

Secondly, let us now look at the question of (iii) whether the claims that Company Y committed torts were upheld (Tokyo District Court judgment) or mostly rejected (Tokyo High Court judgment). The District Court judgment stated that "in response to X's request to revert to regular employment from contract employment on the basis of Company Y's stance that it was 'assumed' that X would change contract again to return to regular employment, Company Y consistently responded insincerely in the negotiations regarding the conclusion of an employment contract to return X to regular employment, and did not provide any concrete or reasonable explanation regarding matters such as the timing or terms for X's return to regular employment, such that it can be concluded that Company Y was in

violation of the duty of good faith of parties involved in negotiating in the process of preparing a contract" and that "Company Y is obliged to compensate X for the damage suffered as a result of the torts against X." Here, we see another contrast, as, unlike the District Court's comprehensive judgment, the High Court decision (Judgment (3)) recognized only the invasion of privacy as a tort on Company Y's part.

Thirdly, let us summarize the issue of (iv) whether the claim that the press conference by X constituted defamation was rejected (Tokyo District Court judgment) or upheld (High Court judgment). The District Court judgment stated that it "can be deemed that X and X's legal counsel held the press conference in order to widely inform the media that X had filed the case α original action," and that "other than the Statements specified in the case, it is not deemed that concrete statements were made that deliberately sought to criticize Company Y, nor that it was stated that behavior amounting to what is known as maternity harassment occurred at Company Y, nor that statements were made that gave such an impression." With regard to Statement (3), the District Court judgment declared that "it can be deemed that X described the impressions that she had received from the course of events and cannot be concluded that she alleged any facts." And, with regard to Statements (1), (2), (4) and (5), the District Court stated that "given the actual content of the Statements and context in which they were made, these statements would typically be understood as X's descriptions of the claims she was making in the case α original action, and not the alleging that the Company Y president and others committed the aforementioned acts." In contrast, the High Court decision, Judgment (4), declared that Statements (1), (3) and (5) constitute torts.

While the District Court and High Court judgments differed on such points, they are consistent in that (i) neither confirmed X's status as a regular employee. On this point, the District Court judgment stated that firstly, "the regular employment contract and the fixed-term part-time contract differ on all of the following aspects: the defining of a contract period, the number of working days, the scheduled working hours, and the wage structure" and that "regular employment and contract employment at Company Y differ in terms of how the work rules are applied with regard to the scheduled working hours, and, in terms of work content, there are considerable differences in the duties covered by each form of employment; regular employees have a defined minimum number of classes that they need to cover in their role as a coach and take on leader roles in each project, while contract employees have no such defined number of classes and do not take on such leader roles." Thus, "it is difficult to interpret the regular employment contract and the fixed-term part-time contract as the same employment contract." The Tokyo District Court judgment then goes on to note that "when making the agreement, X and Company Y created a document entitled 'employment contract,' despite the fact that, according to social norm, it is not common for cases in which a contract is being extended and changes are merely being made to the employment terms and conditions to also involve creating and exchanging a document entitled 'contract' between labor and management." On this basis, the District Court determined that "it is reasonable to interpret the agreement as the consent that the regular employment contract would be canceled and a separate contract—namely, a fixed-term part-time contract—would be concluded" such that "it can be recognized that under the agreement the regular employment contract was canceled on the mutual consent of X and Company Y." The High Court reached a similar conclusion, as set out in Judgment (1) (a) above. The District Court and High Court (Judgment (1) (b)) likewise both determined that the agreement was not in violation of the EEOA or the CFCLA. The District Court and the High Court (Judgment (1) (c)) also shared the judgment that the agreement was concluded at her own free will of the parties involved, and did not involve a mistake or the conclusion of an open-ended employment contract subject to a condition precedent. (Note, the claims regarding the agreement to return to regular employment were put forward as additional claims at these High Court proceedings.)

(2) The cancellation of the regular employment contract

As explained above, the Tokyo High Court and the Tokyo District Court judgments were consistent with each other in that neither recognized the confirmation of X's status as a regular employee. That is, both courts determined that the regular employment contract and the fixed-term part-time contract are discrete, and the agreement resulted in the cancellation of the regular employment contract and the new establishment of the fixed-term part-time contract. At the same time, there is a commentary on the District Court precedent that casts doubt on such a judgment. Namely, it suggests that based on the logic of the judgment alone the regular employment contract cannot be said to have been terminated in the first place, and there is an undeniable possibility that the two contracts between X and Company Y —the regular employment contract and the fixed-term part-time contract—exist concurrently.[2] Such a suggestion has received support in other judicial precedent commentaries and similar criticism may apply to the High Court judgment, which reached almost the same decision as the District Court.

(3) Violations of the EEOA and CFCLA

The Tokyo High Court judgment on X's claims based on the EEOA and CFCLA is as summarized in Judgment (1) (b). Before investigating this point, let us look at the provisions of the EEOA and CFCLA that are relevant to this case, and, in particular, a Supreme Court judgment related to the EEOA.

Firstly, Article 9, Paragraph 3, of the EEOA prohibits the dismissal and unfavorable treatment of women workers on the grounds of pregnancy, childbirth, or other such factors,[3] and Article 10 of the CFCLA prohibits dismissal or unfavorable treatment of workers on the grounds of their application for or use of childcare leave.[4] The High Court responded to X's claim that the conduct of Company Y fell under these provisions with the decision noted in Judgment (1) (b).

Precedents of cases disputing violations of Article 9, Paragraph 3, of the EEOA include the *Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai* case (the *Hiroshima Central Health Care Cooperative* case) Supreme Court, (Oct. 23, 2014) 1100 *Rohan* 5. In said case, the plaintiff, a physical therapist employed in the role of deputy chief (*fuku-shunin*) by the defendant, a consumer cooperative operating multiple medical facilities, was relieved of her post as deputy chief when reassigned to light activities during pregnancy on the basis of Article 65, Paragraph 3, of the Labor Standards Act ("LSA"), and was not appointed deputy chief after the end of her childcare leave. She therefore sought the payment of the managerial (deputy chief) allowance and damages from the defendant on the basis of default or tort, claiming that relieving her of her position as deputy chief as described was in violation of Article 9, Paragraph 3 of the EEOA and therefore null and void. The Supreme Court declared that firstly, Article 9, Paragraph 3, of the EEOA is a mandatory provision, and, the "dismissal or other unfavorable treatment of a woman worker on the grounds of pregnancy, childbirth, application for prenatal leave, use of pre- or postnatal leave, or reassignment to light activities, is a violation of said paragraph and therefore unlawful and null and void," and, on that basis, "that the employer's use of a woman worker's reassignment to light activities during pregnancy as an opportunity to demote said worker can generally be deemed to fall under the treatment prohibited under said paragraph," while at the same time noting that in exceptional cases—such as where "there are objectively reasonable grounds to deem that the worker in question consented to the demotion at her free will," or, where there are special circumstances based on operational necessity—the demotion is not deemed to be in violation of Article 9, Paragraph 3, of the EEOA. The Supreme Court reversed the lower court decision and remanded the case for the court to determine whether such exceptional circumstances existed. In the remanded case, (Hiroshima High Court (Nov. 17, 2015) 1127 *Rohan* 5) the Hiroshima High Court did not acknowledge such circumstances, and largely upheld the plaintiff's claims.

The aforementioned Supreme Court judgment in the *Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai*

case was cited in this Tokyo High Court decision, Judgment (1) (b). However, it is not entirely clear whether the scope of the judgment in the *Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai* case, which was concerned with a demotion, could be extended to cases such as this one involving a change of status from regular employee to contract employee. This is due to the differing nature of the two issues (cases)—namely, the *Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai* case involved the exercising of authority over personnel matters (demotion under the same contract) while this case addresses the issue of the change from a regular employment contract to a non-regular employment contract (cancellation of the regular employment contract and conclusion of a fixed-term part-time contract). Moreover, even if the scope of the *Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai* precedent can be extended to this case, there are further questions to be addressed, such as the matter that it is difficult to conclude that X was acting on her own free will.[5] The government guidelines[6] also provide examples of "dismissal and other unfavorable treatment" as defined in Article 9, Paragraph 3, of the EEOA and Article 10 of the CFCLA, and while these include the example of employees being forced to accept changes to the content of their employment contract, such as being forced to switch from regular to contract employment, there are inevitably questions regarding how consistent this case is with such an example.[7] It is, however, also important to note that government guidelines are not legally binding.

(4) Defamation

In Japan, there are cases in which workers who have filed suits against their employer hold press conferences with their legal counsel. This case also involved the issue of a press conference by X and her legal counsel and whether it constituted defamation of Company Y. However, there appears to be few other precedents for cases in which an employer suffered defamation due to a press conference by a worker and their representatives.

The standard used by the High Court for judging the statements in this case—namely "judging on the basis of how the public would typically interpret and respond to" the statements—is based on a Supreme Court precedent.[8] Company Y did not file a libel suit against the newspaper publishers and a television station that actually reported the incident. Given that the process of creating articles and other such reports using the materials provided at X's press conference involves the intervention of reporters and others editing said information ("exercising editorial rights"), simple logic should lead us to question Company Y's choice to pursue a suit that seeks to place the ultimate responsibility for the articles and other such reports solely upon X. Moreover, as noted in the Tokyo District Court judgment, it is quite possible to conclude that the Statements are X's "impressions" and "would typically be understood as X's descriptions of the claims she was making in the case α original action." And yet, as noted in Judgment (4), the High Court judgment deemed Statements (1), (3) and (5) to constitute torts. This High Court judgment may to some extent indirectly restrain workers in their approach to publishing information.

Supreme Court issued a ruling on this case on December 8, 2020.

1. Ryo Hosokawa, "Employers' Obligation to Consider the Needs of Employees Returning from Childcare Leave: The *Japan Business Lab* Case," *Japan Labor Issues* 3, no. 15 (June 2019): 13, https://www.jil.go.jp/english/jli/documents/2019/015-03.pdf.

2. Yukiko Ishizaki, "*Ikuji shūryō go ni teiketsu shita keiyakushain keiyaku no yatoidome: Japan Bijinesu Rabo jiken*" [The non-renewal of a fixed-term part-time contract concluded at the end of childcare leave: The *Japan Business Lab* case], *Monthly Jurist*, no. 1532 (May 2019): 107.

3. Women who are pregnant or have recently given birth ("expectant or nursing mothers") may not be able to deliver their typical standards of work due to certain changes in their physical condition or other such symptoms, such as morning sickness during pregnancy, decreased physical strength after birth, or postnatal depression. Such issues are addressed in laws or by certain regulations that have been prescribed by law to address expectant or nursing mothers' medical or physical need for protection, such as the provision of prenatal or postnatal leave under the Labor Standards Act (LSA), and the prohibition of unfavorable treatment on the grounds of a worker having used such leave or other measures. More specifically, there are provisions for leave before and after childbirth (LSA, Article 65, Items 1 and 2), for prohibiting dismissal during said leave or within the 30 days thereafter (LSA, Article 19, Paragraph 1), for limitations on belowground work and dangerous and

injurious work for expectant or nursing mothers (LSA, Article 64-2, Item 1 and Article 64-3, Paragraph 1), for reassignment of pregnant women to light activities (LSA, Article 65, Item 3), for limitations on overtime work, etc. (LSA, Article 66), for health care measures (EEOA, Articles 12 and 13), which specifically include measures to alleviate commuting and to provide breaks, etc. (EEOA, Article 13, Paragraph 2 Guidelines), and for time for nursing mothers to care for their children (LSA, Article 67). Moreover, as also noted in this article, Article 9, Paragraph 3, of the EEOA prohibits dismissals or other such unfavorable treatment on the grounds of pregnancy, childbirth, a worker requesting or taking prenatal or postnatal leave or using other measures or restrictions such as the above example of reassignment to light activities, or decline in working ability, etc. Seemingly emphasizing the point, Article 9, Item 4, of the EEOA prohibits the dismissal of expectant and nursing mothers as a general rule and also shifts the burden of proof to the employer. This could be deemed to constitute a legal framework that could be described as "a legal system for the protection of expectant and nursing mothers." It can be seen as a legal system that not only seeks to maintain the health of expectant and nursing mothers and thereby support childbirth, but also to strongly protect the employment of such women in a period where working ability and other such aspects of professional performance tends to decline. The legal provisions on harassment related to pregnancy and childbirth, etc., which were enforced on January 1, 2017 (EEOA, Article 11-3), are also included in this legal system.

4. Legal provisions regarding harassment concerning childcare leave, etc. (CFCLA, Article 25) were enforced at the same time as the provisions on harassment related to pregnancy and childbirth, etc. touched on in note 3.

5. The *Yamanashi-kenmin Shinyō Kumiai* case (*Yamanashi Prefectural Credit Association* case), Supreme Court (Feb. 19, 2016), 70–2 *Minshu* 123 demonstrates strict judgment criteria regarding a worker's consent to unfavorable changes to employment terms.

6. The guidelines related to the EEOA which are relevant to this case are the "Guidelines for appropriate measures for employers regarding items determined in provisions concerning the prohibition of discrimination on the grounds of a worker's sex, etc." (Ministry of Health, Labour and Welfare Notification 614, 2006). The guidelines related to the CFCLA are the "Guidelines regarding measures that employers need to implement to support workers who take or will take care of children or other family members to combine their professional lives with their family lives" (Ministry of Health, Labour and Welfare Notification 509, 2009). The applicable clauses are Article 4-3 (2) (iv) for the EEOA guidelines and Article 2-11 (2) (iv) for the CFCLA guidelines.

7. Shozo Yamada, "*Japan Bijinesu Rabo jiken ni okeru ikuji kaigo kyūgyōhō 10 jō tou ihan ni tsuite*" [The violation of Article 10, etc. of the Child Care and Family Care Leave Act in the *Japan Business Lab* case], (2019) 1942 *Rodo Horitsu Junpo* 27 draws on the text of each law and each guideline to elucidate the nature of the agreement as a violation of the mandatory provision.

8. Case seeking compensatory award and restoration of good reputation. Supreme Court (July 20, 1956), 10–8 *Minshu* 1059). https://www.courts.go.jp/app/hanrei_jp/detail2?id=57514 (in Japanese), accessed 1 October, 2020.

The *Japan Business Lab* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1215, pp. 5–45. See also *Jurist* (Yuhikaku) 1550, pp. 128–131 and *Journal of Labor Cases* (Rodo Kaihatsu Kenkyukai) 94, pp. 1–50.

TAKIHARA Hiromitsu

Ph.D. in Law. Researcher, The Japan Institute for Labour Policy and Training. Research interest: Labour and Employment Law, especially contract of employment, unfair labour practices, workplace bullying / harassment, restorative justice, and comparative labour and employment law.

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