The Worker Status of a Theater Troupe Member

The *Air Studio* Case
Tokyo High Court (Sept. 3, 2020) 1236 *Rodo Hanrei* 35

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I. Facts

Y is a stock corporation (*kabushiki gaisha*) that engages in theater production, audiovisual production, management of entertainers, studio management, and restaurant management. Y1, a theater troupe run by Y, has theaters at two locations in Tokyo, where it gives performances almost weekly, in addition to an annual performance at a theater not belonging to the troupe.

X joined Y1 in December 2008 on a provisional basis, and later became a troupe member upon signing a contract to join the company in August 2009. As a troupe member, X appeared in productions and participated in rehearsals for said productions, and, in addition, engaged in backstage work in areas such as stage setting, props, sound, and lighting. X initially received no salary at all, but from around 2013 onward, Y began to pay X and other troupe members 60,000 yen per month. Each troupe member also received a form of commission, determined according to the number of tickets sold, for each production in which they appeared (same amount for each performer; around 20,000 yen per production). X also received a wage for working at a café operated by Y.

X left Y1 in May 2016 and filed a suit in 2017 seeking payment of unpaid wages for duties such as backstage work and performance in productions and rehearsals, among other claims. On September 4, 2019, the Tokyo District Court passed a judgment partially in favor of X, whereby X's eligibility to be classed as a worker, or "worker status" (*rōdōshasei*), was recognized for the backstage work, but rejected for performance in productions, and Y was ordered to pay the unpaid wages for the backstage work only.

Both X and Y responded by filing an appeal to the Tokyo High Court. X asserted his worker status concerning performance in productions as well (that is, in addition to his worker status about the backstage work), while Y asserted that working backstage should not qualify for worker status either (namely, just as performance in productions had been determined ineligible for worker status).

II. Judgment

Unlike the Tokyo District Court judgment, the Tokyo High Court, on September 3, 2020, recognized worker status not only concerning the backstage work but also concerning the performance in productions and rehearsals.

The Tokyo District Court had determined that due to the fact that "appearing in productions is optional, and X was therefore able to refuse," "it cannot be said that X was providing labor in the form of appearing in productions under Y's direction," and "the payment of money as a ticket sales commission is a remuneration for the performer's ability to attract an audience and not a

compensation for the provision of labor in the form of performing."

In contrast, the Tokyo High Court recognized that while "X was able to refuse to appear in a Y1's production, and it cannot be inferred that any disadvantage would have been incurred as a result of refusing," "as troupe members become troupe members because they wish to appear in productions, they would typically be unlikely to refuse to perform, and, even if they were to refuse, it would be in order to allow them to engage in other duties for Y." As "such troupe members had to prioritize performing the work assigned to them by Y1 and Y, and were therefore effectively under the direction of Y, they are not considered to have been able to refuse." The judgment went on to state that "even if there were cases in which rehearsals were carried out at a location other than the theaters stated in this case, rehearsals themselves are, as a matter of course, conducted under Y1's direction, and therefore, even if the appearance in a production itself was optional, appearing and acting in the production falls under the direction of Y1." The court therefore concluded that "among X's duties at Y1, the work related to stage setting, props, sound and lighting (backstage work), appearing and acting in productions, and rehearsing, among other duties (excluding, however, participation in "end of run" parties and other such social events) can also be considered the provision of labor by X at specified times and locations under direction from Y1, namely, labor for which X was receiving a certain amount of wages. Therefore, it determined that X was employed by Y and thereby falls under the definition of a worker who is paid wages (as set out in Article 9 of the Labor Standards Act)."

III. Commentary

This judgment was a great shock to the Japanese theatrical world, which relies on the support of unpaid work by troupe members on the assumption that said members are not classed as workers. While the Tokyo District Court decision, and its recognition of worker status for the backstage activities, was itself a disquieting development for many theater companies utilizing troupe members as a source of unpaid labor, this Tokyo High Court judgment, and its recognition of worker status even for appearing in productions and attending rehearsals—the very fundaments of theatrical activity—delivered an extremely significant blow.

Looking first at the issue of the worker status for backstage work—which the Tokyo District Court had already recognized—stage and prop setting, sound, lighting, and other such work for entertainment activity of a certain scale would typically be the responsibility of a specialist worker, and the recognition of worker status would be no issue. In this case, in addition to appearing in productions, participating in rehearsals, and engaging in backstage work, X was working at Y's café, and, as Y recognized X's worker status for said work at the café, it is clear that the same person can engage in work for which they have worker status and work for which they do not have worker status at the same corporation.

It has, however, been noted that small theater troupes in Japan are barely capable of financially sustaining themselves as business operations and are just about keeping themselves afloat by troupe members' efforts to sell tickets to friends and family. Therefore, it is seemingly typical for the backstage work that would normally be conducted by specialist workers to be carried out by troupe members free of charge. A factor behind this is the lack of perception of theatrical performance (in contrast to other entertainment) as commercial enterprise, and there also appears to be a tendency to see theatrical performance as artistic endeavors where no thought is given to the pursuit of commercial success. For such theatrical productions by students or other non-professionals performing as a hobby, it is no doubt normal for troupe members to take care of the backstage work by themselves. However, an enterprise such as Y, a stock corporation operating various businesses, can hardly suggest that its theatrical activities are not commercial enterprise. If Y also employed and paid workers from external sources to engage in backstage work when said work was too much for

the troupe members alone, it stands to reason that when the troupe members carry out the same work, they should be recognized as workers.

This judgment, which addressed this issue by recognizing worker status for appearing in productions and participating in rehearsals, is expected to have extremely far-reaching consequences. It is particularly important to note that the logic behind this recognition of worker status is based on the conclusion that troupe members are effectively unable to do so, despite officially being able to refuse to appear in productions, because "troupe members become troupe members because they wish to appear in productions." The typically adopted logic is that even a person who is officially able to refuse orders does not have that freedom in practice if they are under some form of tangible or intangible pressure from the other party (the theater troupe). In addition to this typical logic, this judgment adopts the somewhat peculiar conclusion that the troupe member himself was unable to refuse due to his own psychological mechanism of "not wanting to refuse." This is, however, highly disputable, as it seems to render this criterion for worker status (the lack of freedom to refuse orders) an empty concept.

This judgment also states that the presumption that a performer will arrange his or her replacement when they cease to appear in productions is the distinguishing factor that such performing is work conducted under an employer's direction. However, this logic is reversed; in the first place, if the person could hire another person to conduct his or her work, this indicates that the person is not under a direction and supervision of an employer (*Labor Standards Act Study Group Report*, 1985[1]). On this basis, it is necessary to object to this judgment recognizing worker status—as such status is defined under the Labor Standards Act—for troupe members concerning productions and rehearsals.

This case deals with a claim for the payment of unpaid wages, which addresses the issue of worker status as defined in the Labor Standards Act. At the same time, there is another concept of worker status: worker status as defined under the Labor Union Act, which would appear to be more applicable for allowing recognition of worker status in this case. That is, it can be suggested that the troupe members were retained by Y1 as a necessary or essential labor force for carrying out the organization's work, and the particulars of their contract were unilaterally determined. It is also possible to class the 20,000-yen ticket sales commission for each production as remuneration for the provision of labor (even if it is difficult to recognize it as wages for hours worked). Therefore, if X were to form or join a labor union and apply for collective bargaining to seek payment of appropriate remunerations for productions and rehearsals, there would surely be scope for recognizing his worker status under the Labor Union Act.

1. The Study Group on the Labor Standards Act, *Rodo kijunho kenkyukai hokoku: Rodo kijunho no 'rodosha' no handan kijun ni tsuite* [Labor Standards Act Study Group Report: The criteria for 'worker' in the Labor Standards Act] (Tokyo: Ministry of Labour, December 19, 1985). https://www.mhlw.go.jp/stf/shingi/2r9852000000xgbw-att/2r9852000000xgi8.pdf (available only in Japanese).

The *Air studio* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1236, pp. 35–62. See also *Journal of Labor* Cases (Rodo Kaihatsu Kenkyukai) no.106, January 2021, pp. 38–39 and *Jurist* (Yuhikaku) no.1554, February 2021, pp. 4–5.

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