Judgment Declaring Fixed Overtime Pay Illegal and Upholding a Worker's Claim for a Solatium for Excessive Overtime Work despite No Resulting Health Damage

The *Karino Japan* Case

Nagasaki District Court, Omura branch (Sept. 26, 2019) 1217 *Rodo Hanrei* 56

HOSOKAWA Ryo

I. Facts

X signed an employment contract in 2012 with Company Y, a company that manufactures and sells noodles, and was engaged in manufacturing noodles and other such duties.

In addition to the basic salary, X received an allowance related to X's specific job duties, namely, "job-based allowance" (*shokumu teate*), of 30,000 yen per month, a "meal allowance" (*shokuji teate*) of 1,500 yen per month, and in some months, received a "good attendance allowance" (*seikin teate*). The notice of working conditions issued by Y when hiring X stated that "a portion of the job-based allowance constitutes overtime pay," but did not specify what amount of the job-based allowance would constitute overtime pay. Y's wage regulations (Article 13) similarly prescribe that "fixed overtime pay is paid as part of the job-based allowance," but do not explicitly indicate how many hours of the premium wages paid for overtime work (*jikangai rōdō*, namely, overtime exceeding the maximum working hours prescribed in the Labor Standard Act (LSA)) are covered in the job-based allowance. As described below, X engaged in large amounts of overtime work every month but was not paid premium wages for overtime work in addition to the basic salary, job-based allowance, and other such payments listed above.

Every month between June 1, 2015, and June 30, 2017 when leaving Y, X worked at least 90 hours of overtime a month. Moreover, in seven of those months, X's overtime work was no less than 150 hours. For the majority of this period, Y had not yet concluded a labor-management agreement on overtime work as stipulated in Art. 36, LSA (Art. 36 agreement) which Y had been obliged to enter into in the event that workers were to work overtime. An Art. 36 agreement was subsequently concluded on February 1, 2017. The Ordinance for Enforcement of the LSA (Art. 6–2 (1)) requires that the "person representing a majority of the workers" who concludes the Art. 36 agreement with the employer be elected by the workers by ballot, show of hands, or other such means. However, A, the worker representative who concluded the Art. 36 agreement with Y, was chosen as representative of the majority of workers on recommendation. Furthermore, Y did not take any measures to respond to the fact that, as described above, X was engaging in large amounts of overtime work, such as exercising special care, checking the content of X's work, or reducing the large amounts of overtime work. X was diagnosed with partial decline in lung function, although the diagnosis did not identify X's work at Y as the cause.

X demanded the payment of premium wages

and other such allowances for overtime work, work on days off, night work and other work, along with what is known as the "additional monies prescribed in Article 114, LSA"[1] owed for X's work in the period from June 1, 2015 to June 30, 2017, as well as the payment of a solatium and other such compensation for mental distress, on the basis of consistently having been subjected by Y to harsh long working hours over a long period of time.

Y responded by claiming that the job-based allowance paid by Y to X each month was paid as a fixed amount covering premium wages for the monthly sum of the one hour and a half of overtime worked each working day (fixed overtime pay) and should be excluded from the calculation of the premium wages demanded by X as unpaid wages. Y also claimed that merely allowing a worker to work long hours does not constitute a tort.

II. Judgment

The Nagasaki District Court partially upheld and partially quashed X's claims (*a settlement was reached after an appeal was filed with the higher court). The judgment can be summarized as follows:

(1) The job-based allowances at Y include the payment for ability-based remuneration in addition to that for fixed overtime pay. Therefore, in order to recognize that Y had paid the overtime pay required under Art. 37, LSA by paying the job-based allowance, it is necessary to clarify the portion of the job-based allowance paid for fixed overtime pay and that paid for ability-based remuneration.

However, there is no explicit indication of exactly what amount of X's job-based allowance represented fixed overtime pay. Moreover, Y's wage regulations also fail to explicitly indicate how many hours' worth of premium wages were accounted for the portion of the job-based allowances paid as a part of fixed overtime pay.

Given the above, the job-based allowances at Y cannot be regarded as being clearly divided into a fixed overtime pay portion and an ability-based remuneration portion. It is therefore not possible to recognize that paying the job-based allowances constituted the payment of premium wages for overtime work as stipulated in Article 37 of the LSA. As a result, the amount of job-based allowances cannot be excluded from the calculation of the premium wages for overtime work that should be paid to X.

(2) As is common knowledge, consistently working long hours for extended periods of time can lead to an excessively accumulated fatigue and mental stress that may damage a worker's mental and physical health. Y was therefore obliged to exercise care when determining and overseeing the work it assigned X to ensure that there would be no damage to X's mental or physical health as a result of an excessively accumulated fatigue, mental stress, or other such strains from the pursuit of said work.

X engaged in overtime work as described in Section I above. Initially, Y had not yet entered into an Art. 36 agreement, and the Art. 36 agreement it concluded in February 2017 was invalid, as it did not fulfil the conditions stipulated in Art. 6–2 (1) (ii) of the Ordinance for Enforcement of the LSA. In addition to this, Y also failed to exercise care regarding X's working hours, which could be ascertained from the clock-in and clock-out times recorded on X's time card, to check the content of X's work, or to take measures such as providing guidance aimed at improving the X's work situation.

Y's actions as described above were in violation of its contractual obligation to give due consideration to a worker's safety (*anzen hairyo gimu*). This violation constitutes a tort and Y is obliged to compensate X for any damages that arose as result of its failure to fulfil that contractual obligation to consider safety.

(3) There is no medical evidence that X experienced mental or physical health difficulties as a result of working long hours. However, even if the long working hours did not ultimately result in X developing a specific illness, Y neglected its contractual obligation to consider safety, and, for more than two years, allowed X to work long hours such that there was a risk of causing X to develop mental or physical difficulties. It can therefore be judged that Y infringed upon X's personal interests.

It can easily be inferred that Y's violation of its contractual obligation to consider safety and in turn its infringement upon X's interests as an individual resulted in X suffering mental distress. Thus, Y is obliged to pay X compensation and other such payments for damages that arose as a result of its tortious act.

III. Commentary

This is a case that a worker having been compelled to engage in large amounts of overtime work sought the payment of premium wages for overtime work and, at the same time, claimed damages on the grounds that in compelling the worker to work long hours, the employer violated its contractual obligation to consider safety.

The first key point of discussion is what is known as "fixed overtime pay" (*kotei zangyōdai*). In some cases in general it may be recognized that an employer has paid the worker wages for monthly overtime work by paying nominally, in addition to the basic salary, a set amount of monthly allowance, which, as with the job-based allowance paid in this case, is often not explicitly indicated as premium wages for overtime work. At the same time, in many cases there is a lack of clarity regarding the role of the allowances that are treated as fixed overtime pay and the ways in which they are calculated. Furthermore, as these allowances are fixed amounts—regardless of the amount of overtime work— there is a growing number of cases of workers seeking the payment of unpaid premium wages on the grounds that the fixed overtime pay they have received does not sufficiently cover the amount that should be paid for their actual overtime work or demanding that the allowances treated as fixed overtime pay should not be seen as premium for overtime work.

The Supreme Court has ruled that in order for fixed overtime pay to be recognized as payment of premium wages in compliance with Art. 37, LSA, it needs to meet the following two requirements: (1) that it is possible to distinguish between the wages paid for standard working hours and the portion paid as premium wages, and (2) that the amount paid as premium wages is not less than the amount calculated on the basis of Art. 37, LSA (the *Kochi Prefecture Tourism* case, Supreme Court (Jun. 13, 1994) 653 *Rohan* 12).

In this case, the job-based allowance that Y claimed was fixed overtime pay constituting the payment of premium wages is, according to Y's system, intended to constitute not only premium wages for overtime work but also ability-based remuneration, and yet it is recognized that there is no explicit indication of the portions (amounts of money) assigned to each. It is also recognized that it is unclear how many hours of overtime work those premium wages should cover. On these grounds, the district court determined that the job-based allowances at Y cannot be recognized as the payment of premium wages for overtime work as prescribed in Art. 37, LSA. This decision, which follows the approach adopted in the Supreme Court judgment described above, appears to be the inevitable conclusion.

The second key point is the question of whether to recognize X's claim for damages in relation to the fact that Y compelled X to consistently engage in large amounts of overtime work for a long period of time exceeding two years. Of the points raised by this judgment, this second one has gathered particular interest in Japan.

The employer's contractual obligation to consider safety has been recognized in Supreme Court precedents for many years. Namely, judgments have determined that employers bear a "contractual obligation to give due consideration in order to protect workers' lives and physical safety, etc. from danger (the *Kawagi* case (Apr. 10, 1984) 38–6 *Minshu* 557). In addition to this, Art. 5, Labor Contracts Act currently prescribes that "in association with a labor contract, an Employer is to give the necessary consideration to allow a Worker to work while ensuring the employee's physical safety." Employers are also expected to protect workers from health damage resulting from overwork given their "contractual obligation to take care that workers do not suffer damage to their mental or physical health due to an excessively accumulated

fatigue or mental stress, etc. in the pursuit of their work" (the *Dentsu* case, Supreme Court (Mar. 24, 2000) 54–3 *Minshu* 1155).

It should, however, be noted that in cases regarding violations of an employer's contractual obligation to consider safety, it is typical that a specific incident or damage to the worker's health has arisen, thereby allowing the specifics of the contractual obligation that the employer was obliged to fulfil to be clearly identified. It has therefore been considered difficult for a worker to request their employer to fulfill their contractual obligation to consider safety before such an incident or health damage occurs. That is, while there are many precedents recognizing an employer's contractual obligation to consider safety with regard to employers compelling workers to engage in large amounts of overtime work, all of these cases involved a specific incident of a worker suffering health issues or losing or severely endangering their life due to cerebral or cardiac diseases or mental illness (depression, etc.).

In contrast, this judgment recognized X's claim for payment of damages (solatium) on the grounds of the employer's violation of its contractual obligation to consider safety, despite the fact that it was recognized that—given the lack of medical evidence that the disease affecting lung function claimed by X was a result of X's work—this case did not involve the worker developing a specific illness as a result of work duties. It is, as this judgment states, theoretically possible to recognize that long working hours may incur mental health damage, even if a specific illness has not developed. This point is the major feature of this judgment and can be seen as a valuable precedent.

On the other hand, this judgment addresses the fact that in addition to the over two years of consistent long working hours, Y violated the law concerning the conclusion of an Art. 36 agreement which is necessary when ordering workers to engage in overtime work, as well as the fact that Y failed to take measures to oversee or ameliorate X's working hours or work situation. It is problematic that there are unclarity as to the relationships between the circumstances addressed by the judgment and the theoretical framework and conclusion adopted in the judgment, such as whether those circumstances were addressed in order to identify the specific nature of the contractual obligation to consider safety borne (violated) by Y or whether those circumstances had to be addressed in order to recognize the claim for damages despite no specific health damage having arisen.

While this case was settled following the filing of an appeal and will therefore not be tried in a higher court, there is significant interest in future developments concerning judgments that may be passed by courts in similar cases.

1. When an employer has failed to make a payment that is prescribed in the LSA—namely, an allowance to account for lack of advance notice of dismissal (Art. 20), an allowance for absence from work for reasons attributable to the employer (Art. 26), premium wages (Art. 37), or allowance for annual paid leave (Art. 39 Para. 9)—the court, at a request from the worker, may order the employer to make additional monies equal to the amount of unpaid wages or allowances (which is paid *in addition* to the payment of unpaid wages or allowances) (LSA Art. 114). This system is thought to have been established due to the influence of the "double damages" system (doubling of the amount of back pay) adopted in US law (See Takashi Araki, *Labor and Employment Law*, 4th. 2020, at 70). It is at the discretion of the court whether the company should be ordered to make the additional monies and how much the additional monies should be. In recent years, the courts have tended to make decisions on the additional monies depending on the nature of the case and whether the employer has acted in bad faith.

The *Karino Japan* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1217, pp. 56–66. See also *Rodo Keizai Hanrei Sokuho* (*Rokeisoku*, Keidanren Jigyo Service) 2402, pp. 2–11 and *Jurist* (Yuhikaku) no.1539, December 2019, pp. 4–5.

HOSOKAWA Ryo

Professor, Aoyama Gakuin University. Research interest: Labor Law.