Commentary

Is a Part-time Instructor Whose Role is Exclusively to Teach University Language Classes a "Researcher"?

The *Senshu University (Conversion of a Fixed-Term Labor Contract to an Indefinite-term Labor Contract)* Case
Tokyo High Court (Jul. 6, 2022) 1273 *Rodo Hanrei* 19

HOSOKAWA Ryo

I. Facts

X worked as a part-time instructor (*hijōkin kōshi*) teaching German language at the School of Business Administration of University Y, under an approximately one-year fixed-term labor contract with the university commencing in April 1989. After the initial one-year period, X continued to work for University Y under the fixed-term contract, which was renewed each year.

X's academic experience included conducting research and publishing papers on German literature while pursuing a master's degree and a PhD program at graduate school. These research achievements were the basis on which X was employed by University Y as a part-time instructor. However, while X's role as a part-time instructor at University Y entailed teaching classes and conducting examinations in German language, it did not include engaging in research. X was also neither allocated a research office nor provided with research funding by University Y.

On June 20, 2019, X applied to University Y to have her labor contract converted from a contract with a fixed-term to a labor contract without a fixed-term (indefinite-term contract), on the grounds of paragraph 1 of Article 18 of the Labor Contracts Act (LCA), which entitled her to said conversion to an indefinite-term contract because her total contract term with University Y had exceeded five years (the "five-year rule" for conversion to an indefinite-term contract). University Y in return claimed that X was a "researcher" as prescribed under item 1 of paragraph 1 of Article 15-2 of the Act on the Revitalization of Science, Technology and Innovation (Science, Technology and Innovation Act) and thereby refused to recognize the conversion to an indefinite-term contract on the grounds that said item prescribes that for those classed as researchers the total contract term must have exceeded 10 years, as opposed to five years, for conversion to an indefinite-term contract to be possible (10-year special provision). X responded by filing a lawsuit claiming that University Y's refusal of her application for conversion to an indefinite-term contract was in breach of the law and seeking confirmation of her status—namely, that she held the rights provided by an indefinite-term contract with University Y—as well as payment of solatium (*isharyō*) and other such damages on the basis that University Y had committed a tort. Of X's claims, the court of first instance (Tokyo District Court (Dec. 16, 2021) 1259 *Rohan* 41) recognized her demand for confirmation of her status as an employee with an indefinite-term contract. University Y therefore appealed to the Tokyo High Court.

II. Judgment

Tokyo High Court dismissed Y's appeal and upheld the judgment of the court of first instance which had approved X's demand for confirmation of X's status as an employee under an indefinite-term contract. The judgment is summarized below.

Item 1 of the paragraph 1 of Article 15-2 of the

Science, Technology and Innovation Act stipulates that the 10-year special provision applies to researchers and technical experts in the field of science and technology who have concluded a fixed-term labor contract with a university (humanities also fall under “science and technology”). The purpose of this provision is to avoid the following situations, according to statements made during the deliberations pursued in the process of establishing the Science, Technology and Innovation Act and the wording of Article 15-2 of the Act. Namely, research and development are often conducted as part of projects with a predetermined durations exceeding five years. Recognizing the five-year rule for the conversion of contracts—the conversion prescribed in Article 18 of the LCA—for fixed-term contract workers who participate in such projects and thereby engage in research and development and related tasks entails the risk that employers will terminate the contracts of such workers before exceeding a total contract period of five years in order to avoid the said conversion to an indefinite-term contract. This, in turn, may hinder the pursuit of the project and prevent said worker from producing research results.

The School Education Act stipulates that “instructors may engage in duties equivalent to those of professors or associate professors” (Para. 10, Art. 92). It also prescribes that the duties of professors and associate professors are to “possess outstanding knowledge, ability and accomplishments in teaching, research or the practical pursuit of their discipline, and to instruct students, provide guidance for students’ research, and engage in research” (Para. 6 and 7, Art. 92). That is, in the duties of university professors, associate professors, and instructors, a distinction is drawn between teaching and research such that they may not be seen as an inseparable unit. It is assumed that there may be professors, associate professors, and instructors who exclusively engage in teaching and are not responsible for conducting research.

Moreover, stipulations for qualification as an instructor set out in the Standards for Establishment of Universities (SEU)—which require instructors to be “deemed to have the educational abilities suitable for taking charge of the education offered by a university in their special major” (2007 SEU, Item 2, Art.16 (2022 SEU, Art.15, item 2))—also reflect the assumption that university employees whose role is to draw on their educational ability to exclusively provide instruction as instructors. Instructors, who are exclusively responsible for teaching as assumed in paragraph 10 of Article 92 of the School Education Act and Article 16 of the SEU, cannot therefore be seen to be engaging in duties equivalent to those of a professor or associate professor engaging in teaching and research. It is not assumed that such instructors are subject to “the 10-year special provision” as “researchers.”

To be classed as a “researcher” according to item 1 of paragraph 1 of Article 15-2of the Science, Technology and Innovation Act, a worker must have concluded a fixed-term labor contract to engage in research or development and related work and must be engaged in research or related work at the university with which said worker has concluded the fixed-term labor contract. Classing a part-time instructor who is not engaged in research or development at the university with which they have concluded the fixed-term contract as a “researcher” as prescribed in said item would not be consistent with the purpose of the legislating the Science, Technology and Innovation Act .

The judgment recognized that on June 20, 2019, when X applied to University Y for conversion to an indefinite contract, an indefinite-term contract between X and University Y commencing March 14, 2020, the day following the expiration of the term of the then fixed-term labor contract, was established on the grounds of paragraph 1 of Article 18 of the LCA.

III. Commentary

This case is the first precedent to have been brought to the court to determine whether the demand of a part-time instructor—who had teaching classes at a university over a number of years under a fixed-term labor contract renewed each year—to exercise

her right to the five-year rule (for contract conversion as prescribed under Article 18 of the LCA) could be dismissed on the grounds of applying the 10-year special provision prescribed in the Science, Technology and Innovation Act, given that the total contract period was less than 10 years. More specifically, it is the first to have contested whether a part-time university instructor falls under the category of "researcher" to which the Science, Technology and Innovation Act is applied.

In European countries, there is a tendency for legal systems applied to fixed-term labor contracts to operate on the assumption that such contracts will be used for temporary and therefore to place restrictions on the reasons for which such contracts can be used and limit the number of times that they may be renewed and the total contract period. In contrast, Japan's regulations on fixed-term contracts are limited to restrict the upper limit on contract periods. There are neither restrictions on the reasons for which fixed-term contracts can be used, nor restrictions on aspects such as the number of times such contracts can be renewed or the total period for which they can be used. There are consequently a considerable number of workers who work for the same employer for a number of years under a fixed-term labor contract that is repeatedly renewed. The part-time university instructor at the center of this issue in this case is one such worker.

Since the 2000s, Japan has seen a continuing rise in the number of workers working under fixed-term labor contracts—workers who are referred to as *hiseiki rōdōsha* (non-regular workers). This trend has also included growing numbers of not only those workers whose income is a supplement to the main source of income for their household (such as housewives or students working part time)—who formerly made up a significant portion of non-regular workers—but also non-regular workers (fixed-term contract workers) whose income from non-regular employment is the source with which they maintain their livelihoods. This prompted a 2012 amendment to the LCA aimed at protecting fixed-term contract workers (≈non-regular workers). One item covered in this amendment was granting the right to the five-year rule—namely, the right of a fixed-term contract worker whose fixed-term labor contract has been repeatedly renewed over a period exceeding five years to have their fixed-term labor contract converted to a labor contract without a fixed term (LCA Art. 18).[1]

An exception to the five-year rule is in place for researchers, technical experts, and other such employees in the fields of science and technology, including the humanities. Namely, the 10-year special provision for researchers, technical experts and other such employees in the field of science and technology, as prescribed in paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act. This exception to the LCA is said to have been established due to concerns that the five-year rule may prompt universities and other such employers to seek to avoid having to convert to contracts without fixed terms for young fixed-term contract researchers engaged in projects lasting over five years by ceasing to renew such researchers' fixed-term contracts before the five years have passed, which would in turn adversely affect the teaching, research and career development provided by and pursued by such researchers.[2] The point at issue in this case was whether said 10-year special provision applied. A significant number of universities responded to the 2012 amendment to the LCA from April 2018 onward (once five years had passed from the starting date in 2013) by converting to indefinite-term contracts for those part-time instructors who requested said conversion.[3] On the other hand, many universities refused said conversions to indefinite-term contracts for part-time instructors with a total contract period of less than ten years, on the understanding that part-time instructors fall under the aforementioned provision set out in paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act (or Article 7 of the Act on Term of Office of University Teachers, which is covered below). University Y also adopted the latter stance. That is, in response to X's assertion of the five-year rule in accordance with Article 18 of the LCA, University Y rejected said request on the grounds that X did not possess the right to conversion to an indefinite-term labor contract because she fell

under paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act.

As it states, the judgment in this case addressed this point by determining that paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act was created on the assumption that the rule for conversion to an indefinite-term contract after a period of five years may not be appropriate for researchers such as those engaged in long-term project research or other such work. Therefore, in order to fall under the category of "researcher" to which said article applies it is necessary to be engaged in research or development and other such related work at a university or other such institution. The judgment also drew on the provisions of the School Education Act to clearly indicate that it is possible for there to be university teachers at a university who are exclusively engaged in teaching, and thereby appears to consider X to be a "university teachers exclusively engaged in teaching" as opposed to a "researcher." This judgment's interpretation of the definition of "researchers" as prescribed in paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act seems appropriate in light of the purpose of the provisions of the Act, as they are noted in the judgment. Given that a considerable number of universities such as University Y have refused the majority of part-time instructors who are effectively engaged exclusively in teaching (classes) the opportunity to convert a fixed-term contract to an indefinite-term contract even after their total contract terms have exceeded five years, this judgment is anticipated to have a significant impact on this issue in practical terms.

The judgment determined that X does not fall under the category of "researchers" for whom paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act is applied. This prompts the question of what condition requires a person to be considered as a "researcher," other than giving university lectures? A worker who is engaged in research activities conducted by the research institution with which they have concluded a fixed-term labor contract will obviously fall under the category of "researcher." However, some of university faculty members who, although not participating in research projects conducted on an institutional level by their university or research facilities within their university, pursue research independently and publish their results through extramural academic journals or academic conferences. While X was neither allocated a research office nor provided with research funding by the university, would X, despite being part-time instructors, be considered a "researcher" if X were conducting extramural research activities, having been allocated a research office or provided research funding by the university? There is still room for debate as to what makes up the criteria for "researchers" to whom paragraph1 of Article 15-2 of the Science, Technology and Innovation Act applies.

In addition to the Science, Technology and Innovation Act, the Act on Term of Office of University Teachers, etc. ("University Teachers' Term of Office Act") likewise establishes a "10-year special provision." This provision can only be applied if one of the three following conditions are satisfied: a worker must (i) be employed at an education and research institution with a particular demand for diverse human resources given the pursuit of advanced, interdisciplinary, or comprehensive education and research and given the unique nature of the field or methods of the other education and research conducted at said education and research institution, (ii) be *jokyō* (an assistant professor), or (iii) have a role that entails providing teaching and pursuing research for a predetermined period in accordance with a particular plan that the university has set out or is participant in (University Teachers' Term of Office Act, Art. 4). The University Teachers' Term of Office Act involves more stringent regulations and procedural requirements in comparison with paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act.

The application of the 10-year special provision under the University Teachers' Term of Office Act has been recognized by the court of first instance of the *Hagoromo University of International Studies* case (Osaka District Court, Jan. 31, 2022), and in the *Educational corporation Chaya Shirojiro Kinen*

Gakuen (*Tokyo University of Social Welfare*) case (Tokyo District Court, Jan. 27, 2022, 1268 *Rohan* 76), both cases in which the plaintiff workers were employed as full-time instructors (*sennin kōshi*).[4] Furthermore, the *Baiko Gakuin University* case (Hiroshima High Court (Apr. 18, 2019) 1204 *Rohan* 5), while not a case in which application of the 10-year special provision was disputed, addressed whether the fixed-term employment of a specially appointed associate professor (*tokunin junkyōju*) should be recognized under item 1 of paragraph 1 of Article 4 of the University Teachers' Term of Office Act (the plaintiff asserted that his employment did not fall under said item and was therefore under an indefinite-term contract). In this case, the judgment held that "given the demand for university autonomy, (the Act) clearly intends to allow universities that employ faculty members with a fixed term a certain amount of discretion." The judgment therefore found that the "particular demand for diverse human resources" specified in item 1 of paragraph 1 of Article 4of the University Teachers' Term of Office Act was applicable in this case, given one of the purposes for which said specially appointed associate professor was hired—namely, the fact that "his past successes in marketing activities to recruit students were also taken into consideration" when he was hired.

On the other hand, the appeal of the aforementioned *Hagoromo University of International Studies* case (Osaka High Court (Jan. 18, 2023) 2028 *Rojun* 67) found that item 1 of paragraph1 of Article 4 of the University Teachers' Term of Office Act did *not* apply. The judgment held that (1) regarding employment under item 1 of paragraph1 of Article 4 of the University Teachers' Term of Office Act, it is necessary, given the purpose with which the Act was enacted, for it to be "reasonable to determine a contract period," and (2) the position at issue needs to be an "advanced, interdisciplinary, or comprehensive education and research" position. It thereby determined that said article did not apply, given that the plaintiff, a full-time instructor on a fixed-term contract whose role was to provide teaching to prepare students for taking state examinations, (despite having accumulated professional experience before being hired) was engaged in work that "had little to do with" facilitating "practical education and research that draws on experience of the working world" or (advanced, interdisciplinary, or comprehensive) "research." As such precedents indicate, the application of the 10-year special provision under the University Teachers' Term of Office Act is also anticipated to prompt debate in the future.

The case was appealed to the Supreme Court and a petition for acceptance of appeal was filed, and the decision of the Supreme Court was the focus of much attention. On March 24, 2023, the Second Petty Bench of the Supreme Court (Koichi Kusano, Chief Justice) dismissed the appeal and the petition for acceptance of appeal, and therefore the High Court decision in this case became final.

1. For related survey results, see Yuko Watanabe, "New Rules of Conversion from Fixed-term to Open-ended Contracts: Companies' Approaches to Compliance and the Subsequent Policy Developments," *Japan Labor Issues* 2, no.7 (June-July 2018): 13–19. https://www.jil.go.jp/english/jli/documents/2018/007-03.pdf.
2. See Takashi Araki, *Rodoho* [Labor law], 4th ed. (Tokyo: Yuhikaku, 2020) 531; Statements by House of Representatives member Wataru Ito at the 7th Meeting of the Committee on Education, Culture, Sports, Science and Technology of the House of Representatives for the 185th Diet (November 29, 2013). https://www.shugiin.go.jp/internet/itdb_kaigirokua.nsf/html/kaigirokua/009618520131129007.htm.
3. For example, the university where I am employed converts labor contracts to indefinite-term labor contracts for those part-time instructors who demand such a conversion and whose contract has been repeatedly renewed such that the total contract period exceeds five years.
4. The first instance of the *Hagoromo University of International Studies* case, Osaka District Court (Jan. 31, 2022) 2476 *Rokeisoku* 3, was brought to the court to determine whether the 10-year special provision prescribed by the University Teachers' Term of Office Act should be applied to a full-time instructor employed under a fixed-term labor contract stipulating the contract term as three years and that the contract could be renewed once. The *Educational corporation Chaya Shirojiro Kinen Gakuen (Tokyo University of Social Welfare)* case, Tokyo District Court (Jan. 27, 2022) 1268 *Rohan* 76, was disputed whether the 10-year special provision prescribed by the University Teachers' Term of Office Act should be applied to a full-time instructor whose one year fixed-term labor contract had been repeatedly renewed for over five years. In both cases, it was recognized that the 10-year special provision prescribed by the University Teachers' Term of Office Act should be applied. The latter of the two cases also

involved a dispute over the termination (refusal to renew) of the plaintiff faculty member's contract, and on this point, the plaintiff's claims were recognized.

The *Senshu University (Conversion of a Fixed-Term Labor Contract to an Indefinite-term Labor Contract)* Case, *Rodo Hanrei* (*Rohan*, Sanno Research Institute) 1273, pp.19–24.

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