*Commentary*

# Can a Client Be Held Liable for a Breach of Obligation to Care for Employee Safety and Health Due to Harassment against a Freelancer?

## The *Amour (Aesthetic Salon) and Other Defendant* Case Tokyo District Court (May 25, 2022) 1269 *Rodo Hanrei* 15

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### I. Facts

Plaintiff X, a woman born in 1995, has operated her own website (hereinafter referred to as "X's website") in March 2019, calling herself a beauty writer or cosmetic concierge. After her graduation from university and until the end of July 2019, X engaged in part-time work (*arubaito*, a term originally used for student part-time work, but now used to cover any work on a casual basis that does not fit into any other categories) to write articles that were supposed to be posted on websites of beauty-related businesses, such as aesthetic salons. Although X thought of making her living as a freelance beauty writer in the future, she has not had a job from which she would earn a fixed amount of monthly income as a beauty writer.

Company Y (hereinafter, Y1) engages in operating an aesthetic salon and other businesses, and it operates a salon named *Kintore Esthe* (hereinafter, the "Salon"). The aesthetic salon offers hand and machine treatments exclusively for female customers. At the Salon, the man who founded Y1 and served as its representative (hereinafter, Y2) provided treatments to all customers.

On March 9, 2021, using an inquiry form available on X's website, Y2 sent an email to X, asking her to receive treatment at the Salon and write an article about her experience to be posted on Y1's website (hereinafter, "Y1's website"). Through negotiation on particulars such as the unit price per character and the number of characters in the article, Y2 reached an agreement with X that: X would write an article on her experience at the Salon and post it on Y1's website; X would post the same article on X's website; and X and Y2 would have a meeting at the Salon on March 20 to discuss the content of the article. On that day, X and Y2 met each other for the first time at the Salon, discussed the content of the article to be written by X, and agreed that she would write an article by comparing her experience at the Salon with her experience at other salons (hereinafter, the "Article"). On this occasion, Y2 asked X questions about her past sexual experience and masturbation.

Several times on March 28 and other days, X received treatment by Y2 at the Salon, without paying a fee to Y2. When providing treatment, Y2 requested X to show her breasts to him; touched her private parts several times and had her touch them herself as he requested; and further requested her to touch his genitals. In addition, at the time of the meetings, held several times, Y2 demanded that X kiss him, saying that he would take her dinner if she allowed him to have sex with her; ordered her and another woman to take off their tops and touch each other's breasts; and made her stand up and pressed his crotch against her buttocks, saying that this was necessary for training her pelvic floor muscles, even though X was crying.

On April 23, 2019, X posted the Article on X's website. On April 28, Y2 made a proposal to X to have her write articles for the purpose of SEO (search

engine optimization; measures to ensure that Y1's website would come up on the top page of the search results when internet users search certain keywords on a search engine) every day as Y1's exclusive writer and post these articles on Y1's website. After that, X and Y2 continued communication to discuss terms and conditions. Y2 explained to X that a service contract would be signed for a period of up to six months, although it may be terminated immediately if the proposed scheme failed to be successful, and that there was also a possibility that X would be appointed as an executive officer or regular employee of Y1.

From August 1 to 31, while receiving instructions from Y2 on the content of articles, X created a column article by taking SEO measures and posted it on Y1's website once every day. In addition, X refined Y1's website by analyzing websites of competing aesthetic salons and advertised Y1's website on twitter and other social media.

On August 31 and onwards, while communicating with X, Y2 told her that he would terminate the contact with her because the quality of the articles she had written were low.

In late October 2019, X consulted with the *Shuppan Nets* (a union of publishers network affiliated with Japan Federation of Publishing Workers' Unions) about the damage she had suffered, such as Y1 having not paid her fees for her services and Y2 having touched her private parts, and she joined the *Shuppan Nets*. On November 14, 2019, the *Shuppan Nets* requested for collective bargaining with Y1. At the first session of collective bargaining held on December 16, 2019, Y2 denied the conclusion of the service contract and refused to pay fees to X, and after that, deleted a large part of the column articles posted by X on Y1's website.

On January 16, 2020, X visited a mental health clinic and complained that she had continued to have insomnia and other symptoms since around October 2019. On February 8, 2020, she was found to have symptoms such as insomnia, depressive mood, a lack of concentration, palpitations and shivering when thinking about her job for Y1, and was diagnosed as needing outpatient treatment for the time being.

In the second session of collective bargaining held on February 21, 2020, Y2 stated that no column article written by X had been posted on Y1's website, but after that, he stated that X had posted her column articles on Y1's website without permission, so he deleted these articles. Y2 also stated that X had created accounts for Y1 on Twitter, etc. and posted updates on these accounts although Y1 had not asked her to do so. In addition, Y2 demanded X to pay 350,000 yen as a fee for the treatment she had received at the Salon.

On March 9, 2020, the process attorneys for X filed claims against Y1 to seek consolation money due to sexual harassment by Y2 against X, and the unpaid amount of fees owed to X for her work.

## II. Judgment

**1. Whether X has a claim to seek fees for her services under the Service Contract**

Since June 2019, X and Y2 repeatedly held specific discussions on the content of the services that Y1 would entrust X to perform and the amount of fees to be paid to her. On July 1, 2019, they prepared a draft contract based on what they had discussed until then, and from August 1, 2019, X actually performed the services while confirming the intention of Y2. In light of these facts, it is appropriate to find that by around July 1, 2019, a service contract (hereinafter, the "Service Contract") had been formed between X and Y1 to the effect that X would begin the services from August 2019 and that Y1 would pay her 150,000 yen as a monthly fee.

It is appropriate to find that the Service Contract has the nature of a quasi-mandate contract mainly for providing services.

According to the above, X has a claim against Y1 to seek 382,258 yen in total as the fees based on the Service Contact, which consists of 150,000 yen as the fee for August 2019, 150,000 yen as the fee for September 2019, and 82,258 as the fee for the period from October 1 to 17, 2018 (150,000 yen / 31 days ×17 days).

**2. Whether there was harassment against X, committed by Y2 and whether it constitutes a tort**

In this case, it is found that Y2 behaved as follows: (i) on March 20, 2019, when Y2 had a meeting with X at the Salon, he asked her questions about her sexual experience and masturbation; (ii) on March 28, on the occasion of the first treatment at the Salon, Y2 requested X to show her breasts to him, saying such things as that the treatment would tickle less if she was naked even against her will; (iii) on June 3, 2019, after X received the sixth treatment at the Salon, Y2 instructed her to take off the paper underwear used for treatment, touched her private parts three times, and then had her touch them herself as he requested, and he further requested her to touch his genitals; (iv) on June 17, when Y2 had a meeting with X at the Salon, he demanded that she kiss him, saying that he would take her dinner if she allowed him to have sex with her, and he touched her waist and pressed his crotch against her buttocks; (v) on August 31, 2019, Y2 told X that he would terminate the contact with her because the quality of the articles she had written were low, and sent her messages that he was disappointed to learn that she had not worked exclusively for Y1; (vi) on September 1, 2019, Y2 sent messages to X stating that the way she works was not professional and that her articles were pointless unless they came up on the top page of the search results; (vii) on September 4, Y2 expressed displeasure with X about the low quality of her services and her status of having another job; (viii) and he hugged her and tried to kiss her, and pressed his crotch against her buttocks; (ix) on October 7, 2019, when Y2 had a meeting with X, he hugged her and tried to kiss her, and then ordered her and another woman A, to take off their tops and touch each other's breasts; (x) on October 21, when X requested Y2 to have a meeting to discuss how to verify or assess her services, Y2 sent her messages stating that she should not demand fees if she was unable to understand these things unless she was taught them, that Y1 had not signed any contract with her and could not sign any contract with her because her skills were poor, and that she should not demand fees if she wished to be taught and trained by Y2.

It is appropriate to conclude that the series of behavior of Y2 described in (i) to (x) above constitutes sexual harassment that violates X's sexual freedom, and it also constitutes power harassment (explained below) in that Y2 had X engage in various services under his instructions based on the Service Contract, and yet, he refused to pay fees to X without legitimate grounds and, thereby, caused economic disadvantage to her.

**3. Whether Y1 is liable for default on obligations due to the company's breach of the obligation to care for employee safety and health**

X was entrusted by Y1 to engage in services such as writing articles that would be posted on Y1's website and create and operate Y1's website as the company's exclusive website manager, and performed these services while receiving instructions from Y2, and thus, it is found that X was in effect in the position to provide services to Y1 under its direction and supervision. Therefore, Y1 had an obligation under the principle of good faith and fair dealing to give the necessary consideration to enable X to provide services while ensuring her life and physical safety.

Y1 is found to have violated X's sexual freedom by way of the behavior of Y2 that constitutes sexual harassment or power harassment and, thereby, breached this obligation. Consequently, Y1 is liable for default on obligations due to the breach of this obligation.

**4. Amount of damage suffered by X due to the tort by Y2 and the default on obligations by Y1**

**(1) Consolation money**

It is appropriate to find that an amount sufficient to compensate X for the mental distress she suffered because of the tort by Y2 and the default on obligations by Y1 is 1.4 million yen.

**(2) Lawyer's fee**

100,000 yen

## III. Commentary

The issue of this case is sexual harassment or

power harassment against a freelancer. "Power harassment" is a term that was originally coined in Japanese, with each of the two words borrowed from English (the same expression does not exist in English), and first came into use in the early 2000s, generally to refer to harassment by a person in a superior position. In the judgment on this case, the court determined that the service contract concluded between the plaintiff freelancer and the defendant company has the nature of a quasi-mandate contract, and found the company's breach of the obligation to care for employee safety and health, which is an accessory obligation attached to the service contract. This case is significant in that it found a breach of the obligation to care for employee safety and health in the context of purely bilateral entrustment of services, and it can be evaluated as a case the consequence of which can lead to the protection of freelancers, the number of whom is increasing.

**1. Relationship between the parties that serves as the prerequisite of the obligation to care for employee safety and health**

In the third point of this judgment, the court examined whether Y1 is liable for default on obligations due to the breach of the obligation to care for employee safety and health, and it found the company to be liable. This determination has a certain degree of significance in that it held Y1 to be liable for default on obligations (due to the breach of the obligation to care for employee safety and health) in the case in which the tort committed against X by Y2 was disputed.

The precedent case that cannot be ignored when discussing the obligation to care for employee safety and health is the *Ground Self-Defense Force (SDF) Hachinohe Maintenance Facility* case.[1] This is the case in which the court established the concept of the obligation to care for employee safety and health for the first time in case law. That case is about the accident in which an SDF member who was engaged in vehicle maintenance was run over and killed by a heavy vehicle driven by another SDF member. In this case, the Supreme Court defined the obligation to care for employee safety and health as the "obligation assumed by one party to the other party or by both parties to each other under the principle of good faith and fair dealing as an accessory obligation attached to the legal relationship based on which the parties have entered into a relationship of special social contact."

The obligation to care for employee safety and health that is based on such relationship of special social contact is applicable to various types of contracts for providing services. It is pointed out that the obligation to care for employee safety and health has been established as a contractual obligation (or an obligation based on a relationship similar to a contract) that is applicable to a wide area including school accidents.[2]

Currently, the obligation to care for employee safety and health under a labor contract is prescribed in Article 5 of the Labor Contracts Act. However, this judgment is significant because it specifically affirmed that the obligation to care for employee safety and health exists with regard to freelancers, who does not have "worker status." It can be evaluated as meaningful at the present time when attention is being paid to the protection of freelancers.

Before this judgment, there was a precedent, the *Waka no Umi Unso* case,[3] in which the court determined that the plaintiff (freelance truck driver) was not "worker" but affirmed that there was a "relationship of employment and subordination that is equivalent to an employment contract" between the plaintiff and the defendant (transport company), by stating that "although there is no employment contract between them, there is a relationship in which the plaintiff provides services under the direction and supervision of the defendant." It is not certain, but the Tokyo District Court may have made reference to this precedent judgment when handing down the judgment of the present case.

**2. Scope covered by the obligation to care for employee safety and health**

In the third point of this judgment, the court stated that "Y1 is found to have breached the abovementioned obligation by way of the behavior of Y2, who violated X's sexual freedom by

committing sexual harassment or power harassment against her." However, the court should have demonstrated certain reasoning as to whether the obligation to care for employee safety and health covers a person's "sexual freedom."

Originally, employer's obligation to care for employee safety and health has been generated and has developed as an obligation to protect people's lives and bodies as their legal interest from personal damage, that is, death and injury, and it can be said that the core area of concern of this concept is interest that is physically violated. If "sexual freedom" is considered to be freedom to sexual self-determination or freedom as to sexual feelings, it is somewhat surprising that it is covered by the obligation to care for employee safety and health (having said that, it may not be surprising if "sexual freedom" also means freedom from sexual violation (freedom from sexual violence); it should be noted that there can be various views on this point).

Obviously, it is clear that the doctrine of the obligation to care for employee safety and health actually exists and it has developed to a certain degree from the level where it was generated. However, in past cases in which the violation of the victim's sexual freedom was disputed, such as the *Mie Sexual Harassment* case[4] (a case in which the plaintiffs were subject to indecent words and were touched on their buttocks and other body parts several times by the defendant, who was their superior, at a hospital established by the defendant corporation), the obligation to consider the work environment (described in the judgment on the *Mie Sexual Harassment* case as the "obligation to take care to maintain a comfortable work environment for employees") basically applied. In short, it can be pointed out that "sexual freedom" may be more directly protected by the obligation to consider the working environment, rather than the obligation to care for employee safety and health.

Therefore, in light of the history of the concept of the obligation to care for employee safety and health and its relationship with theories of other types of obligations, the view adopted by this judgment that the obligation to care for employee safety and health covers "sexual freedom" may sound odd (but there is no such oddness if "sexual freedom" is considered to mean freedom from sexual violation (freedom from sexual violence) as well). In the present case, due to the violation of X's sexual freedom by Y2, X was diagnosed as having depression at a mental health clinic and was found to have symptoms such insomnia, depressive mood, a lack of concentration, palpitations and shivering. Such a consequence can be identified as personal damage. Therefore, there would be no objection to the view that the obligation to care for employee safety and health ultimately applies to the consequence mentioned above. However, it may be a leap of logic to consider that the obligation to care for employee safety and health directly covers "sexual freedom."

In this judgment, the court determined that Y1's refusal to pay fees to X without legitimate grounds constitutes "power harassment that causes economic disadvantage to her." Although this point is not particularly discussed in this commentary, it has a significant meaning for freelancers, who could face the same problem as X. Given that it is highly likely that similar lawsuits will be brought to court along with the increase in the number of freelancers, this judgment can be an important precedent in that it raised a question regarding the argument on an accessory obligation attached to a quasi-mandate contract.

1. The *Ground Self-Defense Force (SDF) Hachinohe Maintenance Facility*, Supreme Court (Feb. 25, 1975) 29-2 *Minshu* 143.
2. Takashi Uchida, *Minpō III, Saiken sōron, tanpo bukken (dai 4 han)* [Civil Law III, generalities on claims, security interest (4th edition)] (University of Tokyo Press, 2020), 152.
3. The *Waka no umi unso* case, Wakayama District Court (Feb. 9, 2004) 874 *Rohan* 64.
4. The *Mie Sexual Harassment* case, Tsu District Court (Nov. 5, 1997) 729 *Rohan* 54.

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