

## Commentary

## Legality of Restriction on the Use of Restrooms in the Worksite by Gender Identity Disorder Employee

The *State and National Personnel Authority (METI Employee) Case*  
Supreme Court (Jul. 11, 2023) 1297 *Rodo Hanrei* 68

IKEZOE Hirokuni

### I. Facts

Appellant X (Plaintiff X at the district court and Appellee X at the high court) is a national government employee working for the Ministry of Economy, Trade and Industry (METI), and a transgender female who has not undergone gender reassignment surgery and whose gender remains a male on the family register. X asked the National Personnel Authority (NPA) for free use of the restrooms for women that matched X's gender identity, but the NPA made an administrative judgment to refuse X's request (administrative action regarding the use of restrooms and compensation for damages; hereinafter referred to as the "disputed part of the NPA's administrative judgment"). X also suffered emotional distress due to the restriction on the use of women's restrooms at the worksite (though permission was given to use women's restrooms two or more floors away from X's work area) and the comments by X's supervisor, etc. that denied X's gender identity or were otherwise inconsiderate to X. For these reasons, X filed administrative case litigation and state redress litigation against the national government (Defendant at the district court and Appellant at the high court; hereinafter referred to as "Y"), seeking the reversal of the disputed part of the NPA's administrative judgment and claiming damages including solatium.

In the first instance judgment (Tokyo District Court (Dec. 12, 2018) 1223 *Rohan* 52), the Tokyo District Court ruled that in light of the current legal system and the facts found of this case, in exercising

the authority to manage government facilities, X's employer METI neglected the duty of care by restricting X's access to women's restrooms, and that X's supervisor's comments denying X's gender identity were illegal under the State Redress Act, and affirmed Y's liability for damages. Furthermore, the court reversed the disputed part of the NPA's administrative judgment that refused X's request, on the grounds that it constitutes deviation from or abuse of the NPA's authority of discretion and therefore is illegal.

In the second instance judgment (Tokyo High Court (May. 27, 2021) 1254 *Rohan* 5), the Tokyo High Court dismissed X's claim for the reversal of the disputed part of the NPA's administrative judgment, holding, in summary, that it should be said that the METI implemented and maintained the relevant manner of treating X (allowing X to use women's restrooms except for those located on the floor of X's work area and the floors immediately above and below that) for the purpose of fulfilling its responsibility to establish an appropriate work environment for all employees including X, and therefore, the disputed part of the NPA's administrative judgment cannot be regarded as constituting deviation from or abuse of the NPA's authority of discretion and cannot be judged to be illegal.

In response to the final appeal filed by X, the Supreme Court made a determination on the part of the second instance judgment which was against X, that is, the part that pertains to the disputed part of the NPA's administrative judgment regarding the

restriction on the use of women's restrooms.

## II. Judgment

The Supreme Court quashed the part of the second instance judgment which pertains to X's claim for reversal of the disputed part of the NPA's administrative judgment (the part of the second instance judgment which was against X), while dismissing Y's appeal (against the part of the first instance judgment which was against Y). The summary of the Supreme Court judgment is as follows.

“(1) In dealing with a request for administrative action on working conditions filed by X based on the provisions of Article 86 of the National Public Service Act, the NPA is required to make a professional decision on working conditions of a wide range of employees in accordance with the actual status of personnel administration and employees' engagement in work, from the viewpoint of ensuring impartiality regarding the general public and the persons concerned and developing and improving the employees' efficiency (Articles 71 and 87 of the same Act), and it is considered that a decision on this issue is left to the NPA's discretion.<sup>1</sup> Consequently, it is appropriate to consider that the abovementioned administrative judgment would be illegal if it is found to constitute deviation from or abuse of the NPA's authority of discretion.

(2) If this view is applied to this case, METI's treatment of X can be understood as the consequence of METI's attempt to make adjustment for the use of restrooms in the government office building from the viewpoint of securing appropriateness in the environment where its employees including X engage in work.

Being subject to METI's treatment, X, who has been diagnosed by a physician as having gender identity disorder, has no choice but to use men's restrooms which do not match the X's gender identity, or use women's restrooms on the floors that are away from where X works, and thus, it can be said that X is suffering considerable disadvantages on a daily basis.

On the other hand, although X has not undergone gender reassignment surgery for health reasons, X receives application of female hormone and has been diagnosed by a physician as being unlikely to commit sexual violence derived from sexual drives. In fact, after the explanatory meeting, no trouble has occurred as a result of X working in women's clothes and using women's restrooms that are two or more floors away from where X works. In addition, at the explanatory meeting, from the perspective of the employee in charge of the meeting, several female employees only appeared to feel uncomfortable about X's use of the women's restrooms on the floor where X works, and it does not seem that there was anyone who expressed clear disagreement. Nor does it seem, during the period of about four years and ten months after the explanatory meeting was held until the NPA's administrative judgment was made, that a survey was conducted again to identify whether there was any other employee to whom special care should be given in connection with X's use of women's restrooms in the government office building and that METI's treatment of X was reconsidered.

From the above, at the time of the NPA's administrative judgment, at the latest, it was difficult to assume that trouble would occur due to X's free use of women's restrooms in the government office building, and the presence of any other employee to whom special care should be given had not been identified. Thus, it should be said that there were no specific circumstances due to which X should accept the disadvantages mentioned above resulting from METI's treatment of X. Considering the above, it must be said that in making the determination that led to the disputed part of the NPA's administrative judgment, the NPA overweighed the care to be given to other employees, without taking into account the specific circumstances in this case, and unduly downplayed the disadvantages suffered by X, and it did not make a decision from the viewpoint of ensuring impartiality regarding the persons concerned and developing and improving the efficiency of employees including X, and thus, the NPA's determination is extremely unreasonable.

(3) Consequently, it should be said that the

disputed part of the NPA's administrative judgment constitutes deviation from or abuse of the NPA's authority of discretion and therefore it is illegal.”

### III. Commentary

This is the first case in which the Supreme Court determined the illegality of the restriction imposed by the employer on the use of worksite facilities (women's restrooms) by an employee with gender identity disorder (a male-to-female transgender who has not undergone gender reassignment surgery and whose gender remains unchanged in the family register<sup>2</sup>). In this case filed to seek the reversal of administrative action, the Supreme Court made a determination only on the basis of the specific facts of the case. Precedents on cases involving workers with gender identity disorder are discussed in the commentary on the high court judgment on this case.<sup>3</sup>

Although the Supreme Court's determination in this case was made only on the basis of the specific facts of the case, it has extremely significant implications because the Supreme Court considered the “specific circumstances,” which is the essential element of the determination (hereinafter referred to as the “theory of specific circumstances”), more concretely than the high court by comparing the disadvantages suffered and the care required, and in this respect, that determination can be the starting point for considering the similar cases in the future.

The “specific circumstances” of the case described in this judgment consist of the following facts. While X is suffering considerable disadvantages on a daily basis, (i) X receives application of female hormone and has been diagnosed by a physician as being unlikely to commit sexual violence derived from sexual drives, and no trouble has occurred as a result of X working in women's clothes and using women's restrooms that are two floors away from where X works. (ii) At the meeting held to explain X's gender identity disorder to other employees, there was no one who expressed clear disagreement with X's use of women's restrooms on the floor where X works. (iii) During the period of about four

years and ten months after the explanatory meeting was held until the NPA's administrative judgment was made, no survey was conducted to identify whether there was any other employee to whom special care should be given in connection with X's use of women's restrooms in the government office building and METI's treatment of X was not reconsidered. In summary, for three reasons, that is, (i) X is unlikely to harm other employees, (ii) no clear disagreement was expressed by other employees regarding X's use of women's restrooms, and (iii) METI did not ascertain the subsequent situation or reconsider its treatment of X in terms of the use of women's restrooms, the Supreme Court concluded that there were no specific circumstances due to which X should accept the disadvantages on a daily basis.

Based on the above, the significant implications of this judgment are examined. The Supreme Court reached a specific determination through the interpretation of the National Public Service Act. Not only in cases like this one involving national government employees, it also seems possible to apply the theory of specific circumstances in cases involving local government employees, as the Local Public Service Act includes provisions that are similar to the relevant provisions of the National Public Service Act (Article 8 Paragraph 1, Article 14, and Article 41 of the Local Public Service Act).<sup>4</sup> Furthermore, it also seems possible to apply the theory of specific circumstances in interpreting and applying employment contracts (provisions of work rules) at private companies by way of the principle of good faith (although the legal remedy may be limited to compensation for damages). Therefore, this is an important court judgment that persons in charge of personnel and labor affairs at private companies must take note of.

The Tokyo High Court mentioned the legal interest that persons with gender identity disorder have, stating that “Leading a social life in accordance with one's gender identity is a legally protected interest.” The Supreme Court made no particular mention of this point and made a determination based on the interpretation of the provisions concerning the

treatment of employees under the National Public Service Act. In addition, the Supreme Court did not particularly deny the process of making adjustment among the persons concerned which was indicated by the high court, but rather, considered the special care to be given to other female employees in association with the disadvantages suffered by X.

If we consider that the Supreme Court also construes that leading a social life in accordance with one's gender identity is a legally protected interest, as is the case with the high court, we can understand that the Supreme Court has indicated the "theory of specific circumstances" as the criterion for determination that is suited to protect such legal interest, on the grounds, according to the facts of the case, that no objection was raised by other female employees and no specific trouble occurred. In addition, the Supreme Court seems to suggest that in examining each case specifically according to the theory of specific circumstances, it is necessary to compare and adjust interests of the persons concerned, while fully understanding that leading a work life in accordance with one's gender identity is a legally protected interest.

This judgment is accompanied by the concurring opinions given by all five Justices (one of the five Justices agreed to another Justice's concurring opinion), which is extremely rare, indicating their cautious attitude so as not to cause social unrest from the scope of this judgment and its impact on society. Each of the judges seems very worried about this judgment leading to misunderstanding of people and had addressed their concerns on various aspects of social life.<sup>5</sup> The Justices also expressed demands regarding institutional policies and personnel practices, which seems to indicate that this issue will need to be discussed in the society as a whole in the future. At the end of the concurring opinions, Presiding Justice Imasaki points out that this judgment is not a legal interpretation indicating how restrooms should be used as public facilities that are expected to be used by many and unspecified persons. The determination presented in this judgment is a determination on the use of restrooms at a particular worksite, which was made only on the basis of the

facts of the case.

In other countries, the case like this may be directly treated as an antidiscrimination law case. However, in Japan, it took many years even to establish law against gender discrimination that had been observed historically. In addition, although other laws against discrimination in terms of disabilities, workers' attributes or physical conditions (including personal background such as pregnancy and childbirth) are gradually being established, legal measures have been taken to have persons in the minority included in or adapt to the labor market or companies through moderate government intervention in employment management at companies, instead of directly determining whether or not the relevant case constitutes discrimination.<sup>6</sup> In light of such tendency in Japan's policies, it is presumed that with regard to transgender workers, as in this case, or LGBTQ workers, legal policies will be carried forward slowly over time and will penetrate into corporate practice in due course. With a view to realizing a society where people can accept each other's diversity, we should remain focused on the future development of legal policies and trends in corporate practice.

[Postscript] *In response to another recent Supreme Court decision*

On October 25, 2023, after the author had completed this commentary, the Supreme Court rendered a decision on the case that may affect the future determination on the legality of the treatment of people with gender identity disorder at each worksite. When a person with gender identity disorder changes gender on family register, the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (Act No. 111 of 2003) requires a condition that the person has lost their reproductive function.<sup>7</sup> The Grand Bench of the Supreme Court (Presiding Justice, Chief Justice Saburo Tokura) unanimously declared such a condition void in light of the people's "right to life, liberty, and pursuit of happiness" under Article 13 of the Constitution (see the decision at [https://www.courts.go.jp/app/files/hanrei\\_jp/527/092527\\_hanrei](https://www.courts.go.jp/app/files/hanrei_jp/527/092527_hanrei)).

pdf [in Japanese]).

In the future, if the loss of the reproductive function is not needed as a requirement for changing gender on the family register, there may be more people with gender identity disorder whose gender has been changed on the family register but who physically maintain their reproductive function and seek to use restrooms at their worksite depending on the gender with which they identify. In such cases, the understanding of other people who use the same restrooms will be more important than in the case discussed in this article. Then, employers will be expected to promote a better understanding among the people at the worksites, comprehend their opinions and feelings on an ongoing basis, and develop an environment to improve the treatment of people with gender identity disorder based on such other people's opinions. Whether these steps are taken will be an important point when determining the legality of the treatment of people with gender identity disorder at each worksite.

#### 1. National Public Service Act

Article 71 Paragraph 1: Effort must be made to fully develop and improve the efficiency of officials.

Article 86: Officials may make requests to the National Personnel Authority that appropriate administrative action be accorded by the National Personnel Authority, the Prime Minister, or the head of the competent authority, relating to salary, compensation, or any other working conditions.

Article 87: When a request provided for in the preceding Article is filed, the National Personnel Authority must conduct investigations, hearings or other fact-finding reviews as it finds necessary, and reach a determination on the case with due regard to impartiality to the general public and the persons concerned and in terms of developing and improving the efficiency of officials.

2. The Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder requires a person with gender identity disorder to have lost their reproductive function as a condition for changing their gender on the family register (Article 3, Paragraph 1, item 4). See below for the actual text of the article.

Article 3 (1) A family court may make a ruling of a change in the recognition of the gender status of a person who is a Person with Gender Identity Disorder and who falls under all of the following items, at the request of such person: (i) is not less than 20 years of age; (ii) is not currently married; (iii) currently has no child who is a minor; (iv) has no reproductive glands or whose reproductive glands have permanently lost function; and (v) has a body which appears to have parts that resembles the genital organs of those of

the Opposite Gender.

(2) A person who makes a request as referred to in the preceding paragraph must submit a medical certificate issued by a physician which contains particulars specified by Ordinance of the Ministry of Health, Labour and Welfare, such as the results of the diagnoses referred to in the preceding Article and the progress and results of treatment with regard to the Person with Gender Identity Disorder referred to in said paragraph.

3. For the lower courts' judgments, including the second instance judgment in this case, see *Japan Labor Issues* 6, no 38(July 2022): 13. [https://www.jil.go.jp/english/jli/documents/2022/038\\_03.pdf](https://www.jil.go.jp/english/jli/documents/2022/038_03.pdf).

#### 4. Local Public Service Act

Article 8 Paragraph 1 (extract): The personnel committee administers the following affairs:

(v) making recommendation to the assembly and head of the local public entity with regard to measures to be taken in relation to remuneration, working hours, or other terms and conditions of employment.

(ix) conducting examination, making determination, and taking necessary measures with regard to a request for measures concerning officials' remuneration, working hours or other conditions of work.

Article 14 Paragraph 1: A local public entity must take appropriate measures when necessary to ensure that remuneration, working hours, or other conditions of work prescribed under this Act are adapted to the situation in society in general.

Paragraph 2: The personnel committee may make recommendations to the assembly and head of the local public entity when necessary with regard to the measures to be taken pursuant to the provisions of the preceding paragraph.

Article 41: Welfare and protection of interests for officials must be appropriate and impartial.

5. Looking at the concurring opinions related to the court's holding, Justice Eriko Watanabe stated that the interests of other female employees should not be disrespected, but, at the same time, the transgender employee's gender identity is an important legal interest under protection, and therefore, it is necessary to compare and adjust interests objectively and specifically, and in this case, whether the interests of other female employees were actually violated or would have been violated should be examined specifically and objectively. Justice Watanabe also stated that in comparing and adjusting interests, it is difficult to decide a uniform manner of treating employees in terms of the use of restrooms and it is necessary to make a determination on a case-by-case basis. Presiding Justice Yukihiko Imasaki stated that in light of various situations surrounding the transgender employee and coworkers, this case is not suited to a uniform solution and there is no option but to explore an optimal solution by closely hearing opinions and reactions of the transgender employee and other employees.

6. Article 34 of the Act to Facilitate the Employment of Persons with Disabilities provides that "In recruiting and hiring workers, an employer must give persons with disabilities opportunities equal to (equal opportunities to [translation by the government]) those they give to persons without disabilities." Article 35 of the same Act provides that "An employer must not use the fact that a worker has a disability as a reason to engage in treatment that

unjustly differentiates that worker from persons without disabilities in terms of wage decisions, implementation of education and training, use of employee welfare and recreational facilities, and other elements of worker treatment.”

However, these provisions, despite their expressions, are not interpreted as immediately giving rise to illegality under private law in the event of their violation (although illegality may be found through general provisions under the Civil Code such as public order and the principle of good faith). Rather, the Act stipulates advice, guidance and recommendations to be given to an employer by the Minister of Health, Labour and Welfare in connection with the entry into effect of these provisions (Art. 36-6), stipulates advice, guidance and recommendations to be given by the director of the prefectural labor bureau in the event of a dispute between the parties (Art. 74-6), and also stipulates the dispute resolution procedure to be initiated by the dispute adjustment committee (*funso chosei iinkai*), an administrative body, upon an order of the director of a prefectural labor bureau (Art. 74-7).

On the other hand, the Act on Equal Opportunity and Treatment between Men and Women in Employment includes a provision that prohibits disadvantageous treatment due to pregnancy and childbirth (Art. 9). The nature of this provision, as in the case of other provisions of the same Act, is interpreted as giving rise to illegality under private law in the event of its violation. Almost similarly to the relevant provisions of the Act to Facilitate the Employment of Persons with Disabilities, the Act on Equal Opportunity and Treatment between Men and Women in Employment stipulates request of reports, advice, guidance and recommendations to be given to an employer by the Minister of Health, Labour and Welfare (Art. 29), and stipulates publication of an employer that has failed to comply with the minister’s recommendations (Art. 30). Regarding dispute resolution, it also stipulates advice, guidance and recommendations to be given by the director of the prefectural labor bureau and the dispute resolution system initiated as an administrative process by the dispute adjustment committee.

7. *supra* note 2.

### **IKEZOE Hirokuni**

Research Director, The Japan Institute for Labour Policy and Training. Research interests: Various issues relating to labor contract, legal concept of workers, labor dispute settlement, employment and labor law in the USA.

<https://www.jil.go.jp/english/profile/ikezoe.html>

