Study on Legal Issues Involving Intermediate Age Brackets: Aiming to Facilitate Work-Life Balance

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This paper divides problems facing workers in intermediate age groups (mid-30s to 40s) into four types—problems related to leave and disadvantageous treatment, problems related to reassignment, problems related to promotions and upgrades, and problems of non-regular workers. Each of these is discussed from the perspective of labor law studies based on labor-related case law. Workers in intermediate age groups are susceptible to problems that occur when taking lengthy leave or after returning to work, because they need to continue their working lives at the same time as addressing the changing needs of family life. These problems include vast reductions in wages, disadvantageous treatment on grounds of pregnancy or childbirth, reassignments that disrupt family life, and discriminatory treatment in connection with upgrades and promotions. And because this generation is polarized between regular and non-regular employment, the problems of non-regular workers are also examined.

I. Introduction

Workers in their mid-30s to 40s are not only at the peak of their working lives, having become a core presence in the workplace, but are also experiencing upheaval in their private lives, with changes in family composition due to marriage and childbirth (or childbirth by their spouse). Then as they approach their late 40s, the need to care for their parents gradually comes into play. As long as they are both parents and children, the responsibilities of childcare and family care affect men and women equally. Moreover, the Child Care and Family Care Leave Act (formally known as “the Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members,” and referred to below as “the Care Leave Act”) stipulates that leave is to be given to all male and female workers who meet certain conditions. As such, it is a widely shared fact that these responsibilities befall both men and women equally.

On the other hand, an increasing number of people in their 30s and 40s choose not to marry and to have no children. But this diversification of life courses is not something that has been voluntarily chosen by everyone; changes in the labor market provide a major reason why this situation has arisen. Since the enactment of the Worker Dispatching Act (formally known as “the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers”) in 1986, a subsequent series of deregulatory measures has led to an increase in dispatch workers, and this trend has had the knock-on effect of increasing non-regular workers in general. This in turn has led to a decrease in posts for regular workers, who are relatively expensive to employ.

Workers falling in the intermediate age groups highlighted by this paper have a higher rate of non-regular employment than workers in these same age groups have done in the past. We also know that a rise in the lifelong unmarried rate in recent years is closely related to the problem of non-regular workers. And there is a significant number of people who have a partner but hesitate to have children because their incomes are too low. Thus, workers reaching intermediate age groups are divided and polarized into those with regular employment and those without. This is a problem that cannot be overlooked, as it has a tremendous impact on their future life course, including the existence of partners or children.

Given this polarization of employment and diversification of life courses, it is very difficult to decide what standards should be used and how the issue should be discussed. Of labor law issues affecting intermediate age groups, the discussion in this paper will focus on areas where there has been an accumulation of case law doctrine until now, on the premise that this is a family-forming generation.

In light of the above, the image of workers positioned in intermediate age groups will be explored, while legal problems corresponding to the situations they face will be examined and discussed with focus on case law.

II. Problems Faced by Intermediate Age Groups (Mid-30s to 40s)

In this section, problems faced by workers positioned in intermediate age groups will first be enumerated more specifically and previous trends analyzed, followed by an attempt to assess the ideal direction for systems and policies in future. The discussion will be broadly divided into four perspectives. The first will address problems related to leave and disadvantageous treatment, the second problems related to staff reassignment, the third problems related to upgrades and promotions, and the fourth problems of non-regular workers.

1. Problems Related to Leave and Disadvantageous Treatment

Because the ages of marriage and childbirth are broader than they used to be, the 30s are now a time when many people are busy raising their children. And from the 40s onward, the need to care for elderly parents gradually increases. On the other hand, this is also a time when those in regular employment come to occupy a core position in the workplace. Therefore, workers in intermediate age groups are at a time in their lives when they have responsibilities and continue to work, but also have to keep their jobs while dividing time between childrearing and family care.

For people to continue working without inconvenience at this time, leave-related systems need to be established with more flexible and more varied options. However, just being able to take leave when it suits the system requirements is no longer sufficient. “Flexible” should mean a situation that meets a variety of conditions, including being able to take leave when necessary, with smooth workplace reinstatement after taking leave, no harass-

ment related to taking leave, and no disadvantage in treatment after returning to work.

The reality is different, however. Workers who take long periods of leave sometimes suffer various disadvantages both before and after taking leave, including a reduction in wages.

A reference case is the Toho Gakuen Case (Sup. Ct., 1st Petty Bench, Dec. 4, 2003. *Rodo Hanrei* 862-14).[1] X (Plaintiff / Appellee / Appellee of Final Appeal) was employed by Y (Defendant / Appellant / Appellant of Final Appeal), and used her maternity leave and Y's own system of childcare time when giving birth to a child. The maternity leave fell within the period for assessment of the FY1994 year-end bonus, and the childcare time within that of the FY1995 summer bonus. Because of this, the two bonuses were not paid, in that the conditions for payment of bonuses in Y's salary provisions (namely that "attendance during the assessment period must be at least 90%") had not been met.

The summary of the judgment was that, although the 90% clause in this case had a degree of economic rationality, the rights and interests of prenatal and postnatal leave, among others, are guaranteed under the Labor Standards Act, etc., and stipulating bonus payment conditions that effectively extinguish the spirit of laws designed to guarantee those rights and interests is not permitted. In the formula for calculating bonuses, however, treating days of prenatal and postnatal leave and childcare time as absences justifying a reduction in the amount is not in itself invalid as a violation of public policy. In other words, although the basic rule is that wages are not paid as a consideration for labor during leave,[2] many workers feel unable to take leave if their wages would be reduced. Therefore, the application of this rule must be avoided if it encourages workers not to take their rightful leave. As such, provisions that reduce bonuses to zero, such as the calculation formula in this case, are violations of public policy, but a reduction within a range not reaching zero would be permitted. Nevertheless, since maternity leave is a mandatory right that must be observed regardless of the worker's wishes,[3] reducing wages because maternity leave was taken should be regarded as a violation of public policy.

Article 6, paragraph 8 of the ILO183 Convention (an amendment of the 103 Convention) states that cash benefits received by women on taking childbirth leave should be provided through compulsory social insurance or public funds, or in a manner determined by national law and practice. Besides exceptional cases, moreover, the employer should not be

[1] First instance, Tokyo Dist. Ct., Mar. 25, 1998 (*Rodo Hanrei* 735-5); second instance, Tokyo High Ct. Apr. 17, 2001 (*Rodo Hanrei* 803-11).

[2] For prenatal and postnatal leave, the Health Insurance Act specifies leave benefits (two-thirds of the standard monthly remuneration; Article 102). The Employment Insurance Act provides for allowances in the case of childcare leave (67% of the daily wage at the start of leave up to the 180th day after the start of leave, 50% from the 181st day; Supplementary Provisions Article 12) and family care leave (40%, 93 days; Article 61-6).

[3] Although prenatal leave is not compulsory unless a female worker requests it (Labor Standards Act, Article 65, paragraph 1), postnatal leave is mandatory for women within the first eight weeks after giving birth (Labor Standards Act, Article 65, paragraph 2, first sentence).

individually liable for the cost.[4] Not compelling employers to contribute cash benefits for childbirth leave means that employers will not have to exclude female workers who have no choice but to take leave for childbirth. This suggests that, under the ILO Convention, the right of female workers to take childbirth leave is regarded as worthy of more respect than any other. From this, one might assume that wages may not be reduced even slightly by reason of taking childbirth leave.[5]

The next case to be highlighted is one in which, on requesting a transfer to lighter work by reason of pregnancy, the employee was reassigned and at the same time demoted, was not reinstated to her former management position after returning from childcare leave, and also had her pay reduced. Although the Supreme Court ruling in the Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai (C Seikyo Hospital) Case (Sup. Ct., 1st Petty Bench, Oct. 23, 2014. *Rodo Hanrei* 1100-5) was reported as maternity harassment, in legal terms it came under Article 9, paragraph 3 of the Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment (referred to below as "the Equal Opportunity Act"), which prohibits disadvantageous treatment. When X (Plaintiff / Appellant / Appellant of Final Appeal) became pregnant, she requested a transfer to lighter work under Article 65, paragraph 3 of the Labor Standards Act. Y (Defendant / Appellee / Appellee of Final Appeal) agreed to this, but at the same time as ordering reassignment to lighter work, demoted her from her position as Deputy Manager. On subsequently returning to work after her prenatal, postnatal and childcare leave, X was ordered to be reassigned to her original department, but another employee had already been appointed Deputy Manager, meaning that she could not resume her original post. Since Deputy Manager status had been worth an extra 9,500 yen per month as a Deputy Manager allowance, X sued for payment of the Deputy Manager allowance, among others, in that her demotion violated Article 9, paragraph 3 of the Equal Opportunity Act, while the failure to restore her original status after her return to work violated Article 10 of the Care Leave Act.

The Supreme Court recognized Article 9, paragraph 3 of the Equal Opportunity Act as a mandatory provision, and confirmed that demotion accompanying a transfer to lighter work during pregnancy under Article 65, paragraph 3 of the Labor Standards Act in principle violated that provision and was thus invalid.[6] The framework of judgment indicated by the Supreme Court ruling was that it would not constitute treatment prohibited under said

[4] ILO 183 Convention, Article 6, paragraph 8, "In order to protect the situation of women in the labour market, benefits in respect of the leave referred to in Articles 4 and 5 shall be provided through compulsory social insurance or public funds, or in a manner determined by national law and practice. (Remainder omitted)"

[5] Mutsuko Asakura discusses the strong rights nature of childbirth leave, with attention to ILO 183 Convention, in "Can laws end maternity harassment?—With reference to judicial precedents on maternity harassment," *POSSE*, no.23 (2014): 85.

[6] Article 2-2 (vi) of the Equal Opportunity Act Enforcement Regulations specifies requests for transfer to lighter work during pregnancy, and the granting of such transfers, among the "other reasons relating to pregnancy, childbirth" in Article 9, paragraph 3 of the Equal Opportunity Act.

provision in exceptional cases, namely (i) when there are objectively reasonable grounds to deem that the demotion has been consented based on the worker's free will, or (ii) when there are special circumstances in which there is deemed to be no substantial violation of the spirit and purpose of said provision, when transferring to lighter work without demotion would be counterproductive to business necessity. It also held that a reinstatement to the position of Deputy Manager was not planned in this demotion, which was thus contrary to X's wishes, and therefore that special circumstances that do not substantially violate the spirit and purpose of Article 9, paragraph 3 of the Equal Opportunity Act could not be deemed to exist.

On the "consent" referred to (i), it is questionable whether a demotion that could not be called entirely reasonable could then be made reasonable by virtue of consent based on free will.[7] That is, one feels that a measure that objectively violates Article 9, paragraph 3 of the Equal Opportunity Act is after all illegal and therefore invalid, and it should not be possible to sweep the said violation aside simply based on consent by the worker. Thus, although the Supreme Court's acknowledgement that demotion accompanying a transfer to lighter work by reason of pregnancy constitutes disadvantageous treatment under Article 9, paragraph 3 of the Equal Opportunity Act is highly influential,[8] questions remain over the framework of judgment thus indicated.

Although this was not a case of treatment (demotion) directly linked to taking leave, it was highlighted in this section as disadvantageous treatment linked to taking prenatal and postnatal leave, etc. There is considerable significance in the confirmation that disadvantage can arise if treatment such as demotion is implemented at a time close to taking this kind of leave. There seem to be not a few issues remaining for the future. For example, how to regulate "pure" harassment occurring at such times. And within the lengthy period of time needed for raising children, if we assume that the provision prohibiting disadvantageous treatment under Article 10 of the Care Leave Act can only be applied at times close to taking childcare leave, how can subsequent issues be raised as problems in terms of the law?

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[7] In a similar vein, Hiroyo Tokoro, "Demotion (Dismissal from Management Posts) Accompanying Transfers to Lighter Work Due to Pregnancy and Article 9, Paragraph 3 of the Equal Opportunity Act," TKC Law Library, LEX/DB Ref. no. 25446716; Satoshi Hasegawa, "Legal Validity of Demotion Triggered by a Request for Transfer to Lighter Work Due to Pregnancy," *Rodo Horitsu Junpo*, no. 1835 (March 2015): 6; Tamako Hasegaw, "Illegality of demotion triggered by a transfer to lighter work during pregnancy," *Hogaku Kyoshitsu*, no.413 (2015): 35.

[8] After this Supreme Court ruling, the Equal Opportunity Act and the Care Leave Act Interpretation Notice was partially amended on January 23, 2015 (Equal Employment, Children and Families Bureau Issue 0123 No.1). This states that "by reason of" in Article 9, paragraph 3 of the Equal Opportunity Act is construed as meaning that when disadvantageous treatment is "triggered" by pregnancy, childbirth or other circumstances, in principle the disadvantageous treatment occurs "by reason of" pregnancy, childbirth, etc. Subsequently, on March 30, 2015, the Ministry of Health, Labour and Welfare published a Q&A on the specific interpretation, including the statement that "In principle, when disadvantageous treatment occurs within one year after the end of pregnancy, childbirth, childcare or other circumstance, it is judged to be "triggered" by it."

2. Problems Related to Reassignment

Workers with responsibility for childcare and family care are sometimes given reassignment orders requiring them to relocate. These workers are either forced to live away from their families, or even if they move with their families, are compelled to go through an unsettled time as their children and spouses adjust to the new environment, or to make alternative arrangements for care facilities, home visits, and so on. This is another problem that workers belonging to intermediate age groups tend to experience.

The Toa Paint Case (Sup. Ct., 2nd Petty Bench, July 14, 1986. *Saiko Saibansho Saibanshu Minji* 148-281; *Hanrei Jiho* 1198-149; *Hanrei Taimuzu* 606-30; *Rodo Hanrei* 477-6)[9] may be cited as a reference case. X (Plaintiff / Appellee / Appellee of Final Appeal) refused an order to transfer from the Kobe office to the Nagoya office for reasons of family circumstances, in that he would have had to live away from his mother (aged 71), his wife (28) and his child (2). His employer, Y (Defendant / Appellant / Appellant of Final Appeal), then dismissed him on disciplinary grounds, and the original ruling that invalidated this dismissal was overturned—in other words, the final conclusion was that the disciplinary dismissal was valid. The judgment by the Supreme Court is summarized as follows.

An employer may not exercise the right to order transfers without constraint, and abuse of that right is not permitted. Therefore, such a transfer order is invalid when there is no business necessity. Even when a business necessity does exist, however, a transfer order will constitute an abuse of rights if there are exceptional circumstances, such as when said transfer order is made for other unlawful motives or objectives, or when a worker is made to bear a disadvantage significantly exceeding the level that should normally be tolerated. Using this framework of judgment, there was deemed to be business necessity in this transfer order, and the disadvantage in terms of private life was deemed not to significantly exceed the level that should normally be tolerated in conjunction with a transfer.

This Supreme Court ruling has been followed by a series of court judgments reaching the conclusion that, even though a reassignment order was refused on grounds of family circumstances, the reassignment did not cause the worker "to bear a disadvantage significantly exceeding the level that should normally be tolerated."[10] But against this trend, there have been cases in which a reassignment order causing inconvenience to family life is deemed an abuse of rights. These include the Hokkaido Coca Cola Bottling Case (Sapporo Dist. Ct., July 23, 1997. *Rodo Hanrei* 723-62), the Meijitosho Shuppan Case (Tokyo Dist. Ct., Dec.27, 2002. *Rodo Hanrei* 861-69), the Nestlé Japan Holding (Reassignment Main

[9] First instance, Osaka Dist. Ct., Oct. 25, 1982 (*Rodo Hanrei* 399-43); second instance, Osaka High Ct., Aug. 21, 1984.

[10] For example, the Teikoku Hormone Mfg. Case (Sup. Ct., 2nd Petty Bench, Sep. 17, 1999. *Rodo Hanrei* 768-16) and the Kenwood Case (Sup. Ct., 3rd Petty Bench, Jan. 28, 2000. *Hanrei Taimuzu* 1026-91) produced similar judgments to that of the Supreme Court, and even in lower court rulings, the JR East Japan (Tohoku Region Vehicle Department) Case (Sendai Dist. Ct., Sep. 24, 1996. *Rodo Hanrei* 705-69) and the JR Hokkaido (Transfer Order) Case (Sapporo Dist. Ct. Nov. 30, 2005. *Rodo Hanrei* 909-14) may be cited.

Action) Case (Kobe Dist. Ct., Himeji Branch, May 9, 2005. *Rodo Hanrei* 895-5), and the Nestlé Japan (Reassignment Main Action) Case (Osaka High Ct., Apr. 14, 2006. *Rodo Hanrei* 915-60). All of these were lower court rulings, but they have tended to deem that "a disadvantage significantly exceeding the level that should normally be tolerated" has been suffered in cases where family members are ill or in need of care, where the current subsistence is premised on the family living together (including the worker in question), and where the balance of family life is likely to be significantly disturbed by the transfer order.[11] In the Teikoku Hormone Case,[12] conversely, the Supreme Court indicated a negative stance on the question of whether a transfer order in which one of the parents in the childrearing phase has no option but to live apart from the family constitutes a violation of public policy, though it was directly contested under the banner of "the right to lead a family life."

Currently, Article 26 of the Care Leave Act[13] obliges employers to give consideration when reassigning workers who have childcare and family care responsibilities. As a result, one would also expect to see changes in case law doctrine in future.

All of the above cases involve reassignment orders to remote locations, with the disadvantage that they disrupt the subsistence of the worker, including the worker's family. However, the next case to be highlighted—the Konami Digital Entertainment Case (Tokyo High Ct., Dec. 27, 2011. *Rodo Hanrei* 1042-15)—involves staff reassignment for the purpose of changing work duties but not requiring a house move. A particular characteristic of this case is that the reassignment caused a major disadvantage in terms of remuneration.

X (Plaintiff/Appellant) took prenatal and postnatal leave as well as six months' childcare leave. After returning to work, she was reassigned from her previous role of overseas licensing to domestic licensing (referred to below as "the change of work duties"), and her role grade was also reduced. Moreover, because remuneration grades are linked to role grades, X's remuneration grade was also reduced. Furthermore, because the performance bonus that forms a portion of the annual salary was assessed as zero, among other factors, X's annual salary for FY2009 was sharply reduced, with a very large wage decrease of 1.2 million yen (on a per annum basis) between before and after taking prenatal, postnatal and childcare leave. The court of appeal ruled that the change in assigned work duties after the leave was possible in view of the personnel rights of Y (Defendant/Appellee), but that the

[11] In the Hokkaido Coca Cola Bottling Case (Sapporo Dist. Ct. July 23, 1997. *Rodo Hanrei* 723-62), a transfer order from the Obihiro Factory to the Sapporo Factory under circumstances in which the claimant was effectively compelled to take over the family agricultural business because of the elder daughter's manic depression, the second daughter's retarded psychomotor development due to the after-effects of encephalitis, and the parents' ill health, was deemed to constitute an abuse of rights.

[12] *Supra* note 10.

[13] Article 26 of the Care Leave Act (effective from April 1, 2005) states that "An employer shall, in making a change to the assignment of an employed worker which results in a change in the said worker's workplace, give consideration for the worker's situation with regard to child care or family care, when such a change would make it difficult for the worker to take care of his/her children or other family members while continuing to work."

change in role grade was disadvantageous to the worker's career, and therefore deemed that the assigned work duties and role grade are not automatically linked. Moreover, it held that the role grade and remuneration grade are not linked unless stipulated in work rules, etc., or the worker's agreement has been obtained. The court of appeal mainly recognized the illegality of linking role grades to remuneration grades, and ruled that it would be reasonable for the role remuneration to be the same as in the previous year.

Normally, court cases challenging the legality of staff reassignment, like the Supreme Court ruling on the Toa Paint Case mentioned in the first paragraph of this section, first confirm whether the possibility of reassignment was specified in the labor contract, then if the labor contract permits reassignment orders, they apply the doctrine of abuse of rights. In this case, however, the order for the change of work duties after the return to work was deemed possible in view of Y's personnel rights, and the reassignment order (the change of work duties order) was not judged abusive. By ruling that assigned duties and role grades are not automatically linked, and limiting cases in which role grades and remuneration grades are linked, the court implied that a vast reduction in wages was unlawful.

The fact that vast reductions in wages were stopped as a result of this legal doctrine can be highly praised. But what X hoped for most of all in this case was to continue working in the same job as before she took leave.[14] The existing Care Leave Act has no provisions on reinstatement to the original post after returning from leave, as they only exist in the guidelines. Therefore, one would certainly hope that the notion of placing such provisions in the text of the law will be studied in future.

3. Problems Related to Discrimination in Upgrades and Promotions

Compared to male workers, who have been core components of the labor market for a long time, female workers have always tended to be slower in receiving upgrades and promotions.[15] Since upgrades and promotions are nearly always decided not only on seniority but also on ability and performance assessments, discriminatory treatment based on gender would be hard to prove. Even speaking generally, this is because ability is not always clearly quantifiable in numerical terms; depending on the workplace, there are cases where the standards governing upgrades and promotions are not made clear, cases where there are standards that rely on the subjective judgment of the employer, and so on. But even then, courts have been striving to clarify how discrimination in upgrades and promotions can be proved, how the disadvantage arising from discrimination can be identified, and how the upgraded status can be confirmed.

Cases contesting upgrade discrimination are broadly divided into two types. The first

[14] It can be confirmed from the factual relationships that the appellee (plaintiff in the first instance) had arranged babysitters and others in order to continue the overseas licensing work after returning to work. District court ruling in this case (*Rodo Hanrei* 1027-38 to 39).

[15] "Upgrade" refers to a horizontal elevation in job grade, "promotion" to a vertical promotion in rank.

is upgrade discrimination under a personnel management system with different courses for male and female employees, while the second comprises other forms of discrimination. Examples of the former, i.e. in which upgrade discrimination has been recognized in that the personnel management system was effectively divided into male and female courses, etc., are the Nomura Securities Case (Tokyo Dist. Ct., Feb. 20, 2002. *Rodo Hanrei* 822-13), the Okaya & Co., Ltd. Case (Nagoya Dist. Ct., Dec. 22, 2004. *Rodo Hanrei* 888-28), the Sumitomo Metal Industries Case (Osaka Dist. Ct., Mar. 28, 2005. *Rodo Hanrei* 898-40), and the Kanematsu Case (Tokyo High Ct., Jan. 31, 2008. *Rodo Hanrei* 959-85). As gender-specific personnel management systems were outlawed when the amended the Equal Opportunity Act took effect from April 1, 1999, all cases where male and female employees are overtly subjected to different personnel management are currently against the law.

The latter, i.e. cases in which there is no gender segregation in the personnel management system, are rather more difficult. But even when an objectively gender-equal personnel management system is adopted, there are many cases in which upgrade discrimination has been tolerated in the actual operation of the system. The Suzuka City Case (Tsu Dist. Ct., Feb. 21, 1980. *Hanrei Jiho* 961-41), the Health Insurance Claims Review & Reimbursement Services Case (Tokyo Dist. Ct., July 4, 1990. *Rodo Hanrei* 565-7), the Shiba Shinkin Bank Case (Tokyo High Ct., Dec. 22, 2000. *Rodo Hanrei* 783-71), the Sharp Electronic Marketing Case (Osaka Dist. Ct., Feb. 23, 2000. *Rodo Hanrei* 783-71), the Shoko Chukin Bank Case (Osaka Dist. Ct., Nov. 20, 2000. *Rodo Hanrei* 797-15), the Sumitomo Life Insurance Case (Osaka Dist. Ct., June 27, 2001. *Rodo Hanrei* 809-5), the Showa Shell Case (Tokyo Dist. Ct., Jan. 29, 2003. *Rodo Hanrei* 846-10), the Hankyu Express International Case (Tokyo Dist. Ct., Nov. 30, 2007. *Rodo Hanrei* 960-63), and the Showa Shell Sekiyu K.K. Case (Tokyo Dist. Ct., June 29, 2009. *Rodo Hanrei* 992-39) all come under this description.

Here, one should mention a case that belongs to the latter type, in that the personnel management system is objectively not gender-specific but runs counter to the trend of these cases. This is the Chugoku Electric Power Case (Hiroshima High Ct., July 18, 2013. *Rodo Keizai Hanrei Sokuho* 2188-3; *Rodo Horitsu Junpo* 1804-76).[16, 17] X (Plaintiff/Appellant) asserted that she had received unfair discriminatory treatment in upgrades of job grade and promotion in rank because she is a woman. X claimed compensation for not being upgraded and promoted as she should normally have been, as well as attorney's fees and confirmation of the upgraded job grade and promotion in rank, but all claims were rejected. When upgrading staff to management positions, Y (Defendant/Appellee) looked not only at the individual's own performance but also at the individual's ability and performance in promoting workplace unity and improving teamwork, and had assessed that X had problems in terms of "the ability to improve cooperative relationships" and "leadership skills." It was also a

[16] First instance, Hiroshima Dist. Ct., Mar. 17, 2011, unpublished in law reports.
[17] The Supreme Court rejected the appeal on March 11, 2015. Unpublished in law reports.

fact, however, that there was considerable gender disparity in upgrades made by Y.[18]

Certainly, since employers have discretion over the specific skills required for management posts, it would be difficult to invalidate the requirements for upgrading in themselves. Nevertheless, while recognizing as a fact that, seen collectively, a large gender disparity has clearly arisen in the speed of upgrading, the summary of the judgment does not see this disparity as a violation of public policy. There are three reasons for this. Firstly, that the appellee's personnel evaluation system has objectivity. Secondly, that there is a tendency for women to shy away from appointments to management posts, voluntary retirement is not uncommon among women, and the situation of the former Women's Protection Act, which was in effect until March 1999, were also taken into account. And thirdly, that the evaluation of the appellant's own "ability to improve cooperative relationships" and "leadership skills" was low. Each of these reasons will be refuted below.

On the first point, although the personnel evaluation system might be deemed to have objectivity, the fact that a very large gender disparity arises as a result shows that there was clearly a problem in the operation of that system. On the second point, even if women do not aspire to management posts, it is out of the question to explain that they are not upgraded because of the former Labor Standards Act, which limited night work and others for women. Female workers and others could not engage in as much night work or overtime work as male workers because it was restricted by law, but this should not be reflected disadvantageously in upgrades and promotions. On the third point, it certainly is not discriminatory based on this standard, but because the wording is too abstract, there is room to question whether truly fair personnel evaluation was really carried out, in connection with a breach of duty by the employer.[19]

Thus, compared to cases in which it has been proved that the personnel management system is effectively operated separately for men and women, it is very difficult to certify that disparity arising in upgrades in gender-equal personnel management system constitutes gender discrimination. In future amendments of the Equal Opportunity Act and the Care Leave Act, the definition of discrimination will need to be clarified so that they can deal effectively with this kind of discrimination in upgrades and promotions as well.

4. Problems Related to Non-Regular Workers

Awareness of labor problems affecting young people in Japan is thought to have aris-

[18] In the summary of the judgment, it was recognized that "It is also a fact that a disparity does exist, in that, as of 2008, the ratio of workers in job grades of *shunin* grade 1 or higher was 90.4% for male clerical workers with the same length of service and same educational background as the appellant (25.7% for female clerical workers). Moreover, the majority of male clerical workers had been upgraded to *shunin* grade 1 by the age of 40, while the first female clerical worker to rise to this grade was aged 41." *Rodo Horitsu Junpo,* no.1804 (2013): 83.

[19] There is a theory that employers bear an obligation to evaluate workers' vocational skills fairly in their personnel evaluation. Katsutoshi Kezuka, "Changes in Wage Compensation Systems and Issues in Labor Law Studies," *Journal of the Japan Labor Law Association,* no.89 (1997).

en in the period known as the "employment ice age," when young people had difficulty in finding work after the collapse of the bubble economy.[20] That this difficulty for young people in finding employment was not overlooked as a transitory social phenomenon can be gleaned from the fact that a "Young Persons' Career Support Research Group" was set up in the Ministry of Health, Labour and Welfare and published a report in 2003.[21]

On the other hand, we also know that, owing to the deterioration of the economy and the impact of employment deregulation, etc., it is now more difficult for people of any age to find posts in regular employment, and that the proportion of non-regular workers has increased among men as well as among women.[22] We know that, besides the generation of people now in their mid- to late 40s who were first employed during the bubble economy, young people who were in their 20s during the employment ice age are now in their 30s, and generations corresponding to intermediate age groups are indeed facing serious employment difficulty. Therefore, the current problems of non-regular employment are also problems for intermediate age groups.

Problems affecting non-regular workers take various forms. Since the employment format we call non-regular employment is unlikely to go away in future, we should consider eliminating disadvantageous parts of non-regular employment contracts and raising the base level of working conditions. From the perspective of whether the worker can choose a life course in which marriage and childbirth may be hoped for, the problem points of non-regular employment must be wage disparity compared to regular employment and the instability of labor contract continuity.

Firstly, let us examine wage disparity compared to regular workers. A reference case is the Maruko Keihoki Case (Nagano Dist. Ct., Ueda Branch, Mar. 15, 1996. *Rodo Hanrei* 690-32), in which two-monthly employment periods were formally repeated. X and other non-regular workers (28 in all) who had worked for between 4 and 25 years claimed discrimination, in that they were engaged in the same work as regular workers, worked more or less the same hours (15 minutes less, but because they made up for that in overtime, the hours were the same, as was the number of days worked), and their other employment obligations were identical (participation in QC circle activities). Yet in spite of all that, regular workers earned a far higher wage.

An important point of contention in this case was whether "the principle of equal pay

[20] Yuki Honda, "Reviewing the Special Nature of the Transition from University to Work in Japan," in *The Sociology of Transition from University to Work*, ed. Takehiko Kariya and Yuki Honda (University of Tokyo Press, 2010), analyzes changes in the transition from university to work by dividing the two decades up to 2010 into a "bubble phase," a "lost phase," a "post phase" and a "second lost phase." The "lost phase" is taken as between around 1993 and around 2004, thus coinciding with the "employment ice age."

[21] Young Persons' Career Support Research Group Report http://www.mhlw.go.jp/houdou/2003/09/h0919-5e.html (last confirmed date, September 9, 2015).

[22] "Analysis of the Labour Economy 2011." http://www.mhlw.go.jp/wp/hakusyo/roudou/11/ (page 105; last confirmed date, November 4, 2015).

for work of equal value" is confirmed in case law, in that there was wage disparity based on a difference in employment categories (regular employment or non-regular employment), even though they were engaged in the same work under effectively the same conditions. "The principle of equal pay for work of equal value" is set out in ILO Convention 100, which was ratified by Japan in 1967. In domestic legislation, Article 4 of the Labor Standards Act is generally construed as including the gist of this Convention.

However, the conclusion drawn in this ruling was that, since "no provision yet exists in positive law to espouse the principle of equal pay for work of equal value," it could not be recognized that the principle exists as a general legal norm governing labour relationships. Moreover, since many Japanese companies until now, using a wage structure based on seniority, have not simply paid an equal wage for work of equal value, the ruling also denied the existence of said principle as public policy, in that it is very difficult to objectively evaluate the equality of labor value.

Nevertheless, the ruling recognized the significance of the principle as a guiding concept, and just as the notion of equal treatment lies at the root of Articles 3 and 4 of the Labor Standards Act, it deemed the same principle to lie at the foundation of "the principle of equal pay for work of equal value." At the same time, this is also an important element for judging the illegality of wage disparity. The court judged that the disparity violated the aforementioned concept of equal treatment lying at the root of the principle of equal pay for work of equal value, and was illegal as a violation of public order and morality. This was because (i) the content of labor performed by X and the other temporary employees was exactly the same as that of Y's female regular employees, both in its external form and internally in terms of the awareness of belonging to Y; and (ii) Y continued to employ X and the others as temporary employees with formal repetition of renewal of employment terms every two months, and moreover continued long-term employment while maintaining or widening the pronounced wage disparity compared to female regular employees, even though Y, as the employer, should have prepared means for the temporary employees to become regular employees after working for a fixed period of time, or else should have established a wage structure based on seniority similar to that of regular employees in a case such as this. However, the judgment also ruled that the wage disparity between X and the other temporary employees compared to female regular employees was not entirely illegal in this case either, since a difference in remuneration must inevitably be left to the employer's discretion within a certain range. Nevertheless, considering that Y provided no assertion or proof of any sort that the principle of equal pay for work of equal value was not in line with public policy, or of circumstances justifying the wage disparity—in addition to the facts, as prerequisite elements, that the content of labor was the same, that the element of seniority should also be considered even for temporary employees who had served continuously for long periods, and all other circumstances of the case—the ruling was that, if the wages of X and the others were no more than 80% of those of female regular employees with the same length of service, this would clearly exceed the acceptable range of wage

disparity and would be illegal as a violation of public order and morality.

Although the "public order nature" of the principle of equal pay for work of equal value has not been recognized in law, its significance as a norm has been recognized, and this case was judged to violate the principle of equal treatment lying at the root of that. In the process, the similarities in work content, working hours, awareness of belonging, and others between regular employees and the plaintiff and other temporary employees were taken as a basis for judgment.

With non-regular workers now increasing in number, steps should be taken to facilitate objective comparisons and other analyses of labor volume compared to regular workers in Japan, and to substantially achieve the spirit and purpose of ILO Convention 100. If base levels of wages for non-regular workers could be raised, it should also to be possible for them to choose a life course involving marriage and children.

Next, a case concerning the continuity of employment of non-regular workers will be raised. Non-regular employment includes a diversity of employment formats. The "temporary employees" in the previous case were "contract employees" with fixed contract terms. Other types are "part-timers" and "*arubaito* workers" working short hours, and "dispatch workers." The latter have the special characteristic that, although the dispatch agency is the employer, this is a labor format in which labor is provided for client companies other than the employer. Also, there are similarities between dispatch and subcontracting as defined in the Civil Code, the difference being that, in dispatch, the dispatch client has the right to issue commands and orders to dispatch workers.

A reference case is the Toshiba Yanagi-cho Case (Sup. Ct., 1st Petty Bench, July 22, 1974. *Hanrei Jiho* 752-27; *Rodo Hanrei* 206-27).[23] This was the first Supreme Court ruling on the termination of employment of fixed-term workers (employees). "Termination of employment" means requiring a worker on a fixed-term contract to quit when the contract term comes to an end.

X and others (Plaintiffs / Appellees / Appellees of Final Appeal) were core temporary workers who had entered the company on two-month labor contracts, and strongly wished to be upgraded to full employee status. Subsequently, company Y (Defendant / Appellant / Appellant of Final Appeal) renewed contracts with X and the others between 5 and 23 times, but when each of the final contract terms ended, the employment was terminated. Company Y did not always necessarily follow the procedure for drawing up new contracts immediately every time the previous term expired. The summary of the judgment held that "It must be said that these labor contracts existed in a state not substantially differing from contracts with no fixed term, as they were renewed as a matter of course every time the term came to an end," and that the termination of employment effectively constituted a declaration of intent to dismiss. The doctrine on dismissal was therefore applied by analogy. The judgment

[23] First instance, Yokomaya Dist. Ct., Aug. 19, 1968 (19 *Rodo Kankei Minji Saibanreishu* 4-1033); second instance, Tokyo High Ct., Sep. 30, 1970 (*Rodo Keizai Hanrei Sokuho* 724).

held that the employment could not be terminated merely for the reason that the term of the labor contracts had ended, and that, because X and the others expected and relied upon this, and the contracts had been maintained on the basis of this kind of reciprocal relationship, terminating employment because the contract term had ended would have to be deemed unacceptable in terms of the principle of good faith—that is, provided there were no exceptional circumstances in a case like this, such as a staff surplus caused by fluctuation in the economic situation, whereby it would be deemed unavoidable for company Y to change its previous treatment and to terminate the employment because the contract term had ended. In other words, the Supreme Court ruled from a position of protecting workers, in that the renewal procedure was ambiguous even with fixed-term contracts, and there seems to have been a mutual expectation of long-term employment by both worker and employer. Thus, the termination was not seen merely as the end of the contract term but as virtually indistinguishable from dismissal, and so the doctrine related to dismissal was applied by analogy.

However, the Supreme Court made a different judgment on a similar case in 1986—the Hitachi Medico Case (Sup. Ct., 1st Petty Bench, Dec. 4, 1986. *Rodo Hanrei* 486-6). This case also involved termination of the employment of temporary workers, but unlike the ruling in the Toshiba Yanagi-cho Case, the judgment in this case reached the conclusion that the termination of employment was lawful. The ruling held that "It cannot be deemed that these labor contracts were transformed into contracts without fixed term through the five contract renewals, or that a relationship not substantially differing from cases in which labor contracts without a fixed term exists arose between the Appellant and the Appellee." It thus ruled that there was a need to reduce personnel for unavoidable business reasons in the factory of Y (Defendant / Appellee of Final Appeal), and when doing so, the action was unavoidable even if it was because workers on open-ended contracts were not offered voluntary redundancies before terminating the employment of the temporary workers.

Thus, the Supreme Court's judgment was changed, and it was made clear that, just because fixed-term employment is renewed several times repeatedly, that does not automatically lead to a judgment that the doctrine on dismissal should be applied by analogy. This judgment has had a huge impact on similar cases since then.[24]

The final case to be raised is one in which a worker who provided labor to a company other than the employer by means of subcontracting offered to be directly employed by that company. This is the Panasonic Plasma Display Case (Sup. Ct., 2nd Petty Bench, Dec. 18,

[24] Since the Hitachi Medico Supreme Court judgment, there have not been many cases in which termination of fixed-term employment has been deemed to constitute a case for applying the doctrine on dismissal by analogy. They include the Panasonic Case (Part-Time Employment Termination No. 1) Case (Osaka Dist. Ct., Oct. 22, 1991. *Rodo Hanrei* 595-9), the Honan Gakuen Case (Tokyo Dist. Ct., Mar. 31, 1992. *Rodo Hanrei* 605-27), and the Shinshindo Case (Osaka Dist. Ct., May 20, 1996. *Rodo Hanrei* 697-42).

2009. *Rodo Hanrei* 993-5).[25]

Subcontracting and worker dispatch are working styles in which, instead of providing labor under the employer with whom the labor contract is concluded, the worker is engaged in work for another company in that company's premises. However, the difference between the two styles is that, in subcontracting, the worker only follows commands and orders from the employer, while the labor receiving client cannot issue commands or orders, while conversely with worker dispatch, the worker follows commands and orders from another company, i.e. the labor receiving client (dispatch client).

X (Plaintiff / Appellant / Appellee of Final Appeal) was employed by company A, which had concluded a subcontracting contract with company Y (Defendant / Appellee / Appellant of Final Appeal). From there, X provided labor in Y's premises, but offered to be directly employed by Y on grounds that this labor situation violated the Worker Dispatching Act, etc. Because no reply was received, the worker subsequently notified the Osaka Labour Bureau, as a result of which a corrective recommendation was made to the effect that the previous contract should be canceled and switched to a worker dispatch contract, as X's labor format was not subcontracting but worker dispatch. X then quit company A, and Y employed X directly on condition of a fixed-term employment contract with no renewal. Subsequently, however, the aforementioned employment contract ended on January 31, 2006, and from the next day onwards, Y refused to employ X. The Supreme Court ruled as follows, and denied that the labor contract between Y and X was ongoing.

Even if worker dispatch were carried out in violation of the Worker Dispatching Act, that alone would not invalidate the employment contract between a dispatch worker and a dispatch undertaking. Therefore, the employment contract between company A and X was valid. On the relationship between X and Y, meanwhile, it cannot be acknowledged that an employment contract relationship was implicitly established in the period up to July 20, 2005. It can only be recognized that an employment contract relationship was established from August 19, 2005, when this contract was exchanged between Y and X. And since this labor contract was not renewed once and there were no plans to renew it, the contract cannot be said to have existed in a state that was virtually indistinguishable from a contract without a fixed term. Moreover, it should be said that this does not correspond to a case in which it could be deemed reasonable for X to expect that the employment relationship would continue after the end of the contract term. Therefore, the termination of employment was valid.

It should be noted here that worker X, not an employee of Y but under a subcontracting contract, asserted that a separate labor contract had been validly established with company Y because the subcontracting contract was in violation of the Worker Dispatching Act. Because the original ruling (High Court) accepted this, there was considerable interest in

[25] First instance, Osaka Dist. Ct., Apr. 26, 2007 (*Rodo Hanrei* 941-5); second instance, Osaka High Ct., Apr. 25, 2008 (*Rodo Hanrei* 960-5).

what judgment the Supreme Court would make, but as stated above, the Supreme Court did not acknowledge the existence of an implicit labor contract.

Thus, there is always some sense of employment uncertainty in subcontracting and worker dispatch contracts, whereby labor is provided to persons other than the employer who is the other party to the labor contract. At present, however, it would be difficult to acknowledge the existence of implicit labor contracts with dispatch clients who receive the provision of labor. In fact, there have been no cases in which the application of Article 40-4 of the Worker Dispatching Act has been recognized.[26]

III. Conclusion

In the above, four categories of problems facing workers in intermediate age groups have been raised, and the case law trends in each to date have been overviewed. The four categories are problems related to leave and disadvantageous treatment, problems related to staff reassignment, problems related to promotions and upgrading, and problems of non-regular workers.

Beside these, intermediate age groups are sometimes pressurized by stress arising from management posts and family life, and one feels that the associated problems of mental health cannot be overlooked either. However, lack of space has prevented these issues from being discussed in this paper.

The problems faced by intermediate age groups cannot be considered separately from labor. This is a generation that seeks a working life in balance with private life, including family issues, and the concept of work-life balance is thus even more essential for them. For this very reason, problems faced by intermediate age groups are problems related to workers in general. This is because we will all tread the same path within the long working life that occupies such a major part of our lives, and a revision of working styles seen as problematic by intermediate age groups is actually required for all generations. In future, this author plans to continue tracking moves toward legislation in the fields raised in this paper.

[26] Worker Dispatching Act Article 40-4 provides that a dispatch client may not in principle employ a dispatch worker beyond the period in which dispatch is possible, and when intending to employ the same worker beyond that period, must offer direct employment if the dispatched worker wishes it.