

JAPAN LABOR BULLETIN

ISSUED BY THE JAPAN INSTITUTE OF LABOUR

July 1, 2003 (毎月1回1日発行)

昭和44年10月8日 第3種郵便物認可

<http://www.jil.go.jp/bulletin/index.htm>

Vol. 42 — No. 7

July 2003

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WORKING CONDITIONS & THE LABOR MARKET

Majority of Home Helpers Dissatisfied with Low Social Status

The public nursing care insurance system began operating April 2000 in response to the graying of society and the increase in the number of nuclear families. The system is intended to reduce the burden on families caring for elderly family members, and to have society as a whole support people in need of nursing care. The system separates “social hospitalization” (i.e., long-term hospitalization for nursing, rather than for medical care) from medical services to avoid undue pressure on finances set aside for public medical services.

The nursing care insurance system is operated by local governments, and is funded by residents who use the service (10%) and by taxes and insurance premiums collected from people 40 years old and over, and their employers (90%). Individual premiums and the budget differ according to individual municipalities, with the average national monthly premium being ¥3,251. The service is, in principle, available for those 65 years old and over, and the number of

those identified as in need of nursing care service has been steadily increasing over the years, and is expected to continue upward.

Nevertheless, there is a problem: there are not enough caregivers. In particular, the number of services available for home-based care, which accounts for some 70 percent of all nursing care, does not meet demand. (The remaining 30% of nursing care is available in institutions.)

A recent survey published by the Japan Institute of Labour showed that some 60 percent of the home helpers were dissatisfied with their social status, pointing to low salaries and the lack of job security, both of which serve as factors deterring people who would otherwise be willing to do this work.

The survey was carried out in January and February 2002, targeting home helpers registered at 855 nursing-care businesses across the country. Usable replies were returned by 6,643 workers. According to the findings, females accounted for 90 percent of all home helpers, 70 percent were in their 40s or 50s, and some 70 percent were second income earners for their households. A considerable number of these people work on a non-regular basis: some 20 percent were regular employees, 30 percent part-time workers, and about 40 percent were on-call. (The remaining 10% are

difficult to categorize.) As for the nature of their duties in terms of employment pattern, 38 percent of the regular employees were engaged in “planning of nursing services and organizing the helpers’ schedules” and 51 percent in “actually helping elderly people who have serious disabilities or are suffering from senile dementia,” implying that nearly 90 percent of regular home helpers are committed to considerably difficult jobs. At the same time, a large proportion of part-time workers who worked long hours take care of the elderly with serious disabilities or senile dementia, whereas a majority of part-timers with relatively short working hours and on-call home helpers visit the elderly to help with shopping, cooking and similar chores.

Unlike regular home helpers who are paid monthly salaries, part-timers and those on-call are paid piece rate or on an hourly basis. As for their wages, the highest proportion, 45 percent, of regular home helpers earned ¥150,000 to ¥200,000 per month, a mere 20 percent of them earning more than the average initial salary of a university graduate. As for the part-timers and those on-call, the substantial majority have to bear the cost of transportation, and do not receive extra allowances for holiday or night work. Although an average part-timer or an on-call home helper is paid ¥1,200 per hour (according to a Ministry of Health, Labour and Welfare survey), their actual earnings, if travel time is taken into account, is much lower.

Asked what they thought about their jobs, 93 percent of those surveyed expressed anxiety and dissatisfaction, the highest proportion, 62 percent, sensing that society has a low evaluation of their job. In particular, some made specific complaints, such as “customers and their families treat us like servants,” or “the government does not do enough to enlighten people as to the nature of the job.” At the same time, 43 percent of the workers surveyed feel dissatisfied with the fact that they are not paid for essential parts of nursing duties such as transportation, the time they spend

waiting, writing reports, and other duties. As to why home helpers were dissatisfied with their wages, regular home helpers thought their pay was insufficient, whereas part-timers and home helpers on-call said their salary was not stable.

This has led to a situation where an increasing number of people obtain qualifications to work as a home helper, but the number of people who actually have taken on the job has barely increased. Nursing care companies and employers of home helpers also seem to have quite a few concerns, such as being unable to provide a sufficient number of home helpers during meal time and other busy periods, the fluctuating demand for home helpers throughout the day, and the limits set on salaries which are financed by the limited funds available to the public nursing care insurance system.

Fiscal 2002 Saw the Largest Percentage Drop in Cash Earnings and Number of Permanent Employees

On May 15, the Ministry of Health, Labour and Welfare released results from the *Monthly Labour Surveys* for fiscal 2002 (April 2002 to March 2003). The findings show that average monthly cash earnings for fiscal 2002 dropped by 2.1 percent compared to the previous fiscal year, and that the number of permanent employees fell by 0.6 percent. Both figures represented the biggest drop ever.

Concerning trends in wage levels, various surveys previously conducted showed that the average wage for permanent employees rose only marginally, and that the monthly average scheduled cash earnings for general workers (excluding part-time workers) fell for the first time. (Concerning the results of the surveys in question, see the March and June 2003 issues of the *Japan Labor Bulletin*.)

Average monthly cash earnings for fiscal 2002 dropped to ¥343,120. Of this figure, regular cash earnings, which are predetermined under, for example, wage regulations at indi-

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Recent Labor Economy Indices

	April 2003	May 2003	Change from previous year (May)
Labor force	6,691 (10 thousand)	6,735 (10 thousand)	4 (10 thousand)
Employed ⁽¹⁾	6,306	6,360	4
Employees ⁽¹⁾	5,312	5,351	31
Unemployed ⁽¹⁾	385	375	0
Unemployment rate ⁽¹⁾	5.4%	5.4%	0
Active opening rate ⁽¹⁾	0.60	0.61	0.09
Total hours worked ⁽²⁾	156.4 (hours)	151.6 (hours)*	2.0 (%)
Monthly cash earnings ⁽²⁾	285.4 (¥ thousand)	281.8 (¥ thousand)*	0.5 (%)

Notes: ⁽¹⁾ Seasonally-adjusted figures.

⁽²⁾ Figures refer to establishments employing five or more people.

*Preliminary figures.

US\$1= ¥119 (July 1, 2003)

Source: Ministry of Public Management, Home Affairs, Posts and Telecommunications, *Rodoryoku Chosa* (Labour Force Survey); Ministry of Health, Labour and Welfare, *Shokugyo Antei Gyomu Tokei* (Report on Employment Service), *Maitsuki Kinro Tokei* (Monthly Labour Survey).

vidual companies, decreased a mere 0.8 percent to ¥279,024, while special cash earnings, which includes bonus payments, showed the biggest drop ever, 7.4 percent, to ¥64,096. The drop in bonus payments was particularly sharp among the mining (-31%) and construction (-11%) industries. Regarding regular cash earnings, scheduled cash earnings, excluding overtime and other allowances, fell by 1.0 percent to ¥260,893, a larger drop than the previous year (-0.6%). On the other hand, non-scheduled cash earnings, such as overtime payments, rose by 2.0 percent (¥18,126), with substantial increases in the manufacturing and real estate sectors, at 10.4 percent and 14.9 percent, respectively.

The number of hours worked conditioned the change in salaries. The average number of working hours on a monthly basis in fiscal 2002 decreased 0.4 percent from the previous year to 152.2 hours, the second successive drop. Included in this figure is a drop in the number of scheduled working hours, similar to the previous fiscal year (this time by 0.7 percent, to 142.5 hours), while non-scheduled hours increased for the first time in two years, by 3.2 percent to 9.7 hours. The increase in non-scheduled working hours in the manufacturing and real estate sectors was 11.0 percent and 22.8 percent, respectively.

Among permanent employees, the number of part-time workers grew to 9.5 million, an increase of 3.7 percent from the previous fiscal year, whereas the number of general workers, excluding part-time workers, and the total number of permanent employees fell by 1.8 percent and 0.6 percent to 33.54 million and 43.05 million, respectively, the biggest decreases ever, marking the fifth successive year of decline.

The survey results show that wage adjustments as registered in trends in annual salaries seem to be accelerating more progressively than in the previous fiscal year.

PUBLIC POLICY

Court Rules That Remuneration for Inventions Can Exceed Company Guidelines

On April 23, the Supreme Court handed down a landmark decision concerning remuneration paid to inventors. In one case in which an employee demanded a greater reward than that stipulated in his company's corporate rules the Court ruled that regardless of corporate guidelines an employee has the right to request payment to cover shortfalls in the remuneration. This was the first such ruling. The presiding judge noted that it is acceptable practice for a firm to decide terms such as the amount and timing of payment, but it is difficult to envision how rewards for inventions can be determined before the nature and value of patent rights are concretely established. In short, employees responsible for inventions have the *ex-post* right to seek additional remuneration when the initial amount does not correspond to the value of the invention.

Article 35 of the Patent Law states that in cases where an employee working as an inventor has developed something that results in his/her employer obtaining a patent, the employee has the right to receive appropriate remuneration. However, there is no criterion to calculate "appropriate remuneration," and this has been the subject of disagree-

ment for many years. Among recent cases, the inventor who developed the blue light-emitting diode (LED) demanded ¥2 billion from the firm he worked for at the time of the invention, and there are an increasing number of similar lawsuits involving large amounts. Several lower court decisions recognized the right of inventors to seek remuneration.

In the latest case, the Supreme Court supported verdicts delivered by lower courts, confirming that the inventor can ask for a reward appropriate to his/her invention. As a result, Olympus Optical Co., Ltd. was ordered to pay ¥2.28 million to the claimant, a former employee. In calculating the figure, the high court argued that Olympus made a profit of ¥50 million from the invention and that the proportion of the firm's contribution to the profit was 95 percent of the whole. Thus the employee is entitled to a reward equivalent to the remaining five percent, that is ¥2.5 million. As the employee had already received ¥220,000, he should receive ¥2.28 million. This method of calculation has raised some disagreement in business circles, claiming that it does not provide general criteria to determine the amount of remuneration.

A growing number of firms, concerned that they may be hit with lawsuits, have increased the financial award for inventions. This had lead the Japan Patent Office to consider revising the law so that the amount of remuneration would be determined beforehand, on a contract basis, between the firm and the employee involved. The proposal is expected to be submitted to an ordinary session of the Diet next year. (For related issues, see the November 2001 and December 2002 issues of the *Japan Labor Bulletin*.)

Revised Employment Insurance Law Enacted

On May 1, the revised Employment Insurance Law came into effect, the purpose of which is to stabilize the program's finances which have been steadily deteriorating under the weight of the growing number of unemployed people. The premium rate will remain at 1.4 percent for the first two years, but will be raised to 1.6 percent from April 2005. The rate and maximum amount of unemployment benefits have been lowered, and a single system determining the period of payments to both former regular employees and part-time workers has been established to cope with the diversification in employment patterns.

Under the previous system, unemployed people received 60 to 80 percent (50 to 80% for those 60 years old and above) of their previous wages (calculated on a daily basis) for 90 to 330 days. Now, however, the minimum rate will be 50 percent (45% for those aged 60 and above) of the wages which jobless people were paid by their former employers. The maximum daily benefit payment has also been lowered as shown in Table 1 on page 4.

The old benefit system had been criticized as possibly deterring people from seeking new jobs. For example, those who were high earners in their previous job were eligible for benefits higher than the wages they might have been paid when they secured a new job. Previously, unemployed people 60 years old and above received the equivalent of the higher of two wages, either the wages they received immediately before giving up their jobs or those at the time they

were 60 years old. Now, however, this favorable treatment has been abolished. The majority of private firms set their mandatory retirement age at 60 (see the September 2002 issue of the *Japan Labor Bulletin*), and because most workers who were re-employed after retirement earned less than before, the previous benefit system seemed to refer to the wages they were paid when they were 60.

The revision of the law also extends to the treatment of part-time workers. Formerly, they were eligible for benefit payments for a shorter period than those who previously were regular employees, but now the payment period for both types of jobless have been integrated into one scheme.

Workers who voluntarily give up their job (or reached the mandatory retirement age) will now be eligible for unemployment benefits for the same period that part-time workers were before the law was revised, i.e. a shorter period of time. On the other hand, workers who are unemployed due to company bankruptcy, dismissal, or for other involuntary reasons are now treated in the same manner as jobless people who were formerly regular employees. What this means is that workers who involuntarily lost their part-time job will be eligible for benefits for longer periods. In addition,

involuntarily unemployed workers between the ages of 35 to 44 who belonged to the unemployment insurance scheme for 10 years or longer are eligible for benefits for an additional 30 days or more. (See Table 2.) This measure is designed to counter the considerable impact of the worsening labor market on workers in this age group.

Under the old law, benefit recipients who found a new regular job and still had one-third or more of their period of eligibility remaining would receive 30 percent of the basic portion of the benefits during the remaining period. This scheme has been expanded to cover those whose new job is as a non-regular employee.

Incidentally, the Education and Training Benefits System, established in 1998, provides subsidies, on deferred terms, of 80 percent (or a maximum of ¥300,000) of the expenses required by education and training facilities designated by the Ministry of Health, Labour and Welfare. This scheme is applicable to individuals who have belonged to the employment insurance scheme for five years or longer. However, some critics had long argued that the amount of subsidies was excessively generous, and that an increasing number of people took advantage of the scheme to learn

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Table 1. Daily Unemployment Benefits Broken Down by Percentage of Previous Salary and Maximum Benefit

		Previous system	Revised system
Percent of previous wage		59 years old or younger: 80-60% 60 years old or older: 80-50%	59 years old or younger: 80-50% 60 years old or older: 80-45%
Maximum	up to 30 years old	¥8,676	¥6,580 (-24%)
	30-44 years old	¥9,642	¥7,310 (-24%)
	45-59 years old	¥10,608	¥8,040 (-24%)
	60-64 years old	¥9,640	¥7,011 (-27%)

Table 2. Revised Period of Eligibility

	Number of years the person has been a member of the program					
		Less than a year	1-4 years	5-9 years	10-19 years	More than 20 years
Workers who voluntarily left their job	All ages	90 days	90 days	90 days (R: -30 days)	120 days (R: -30 days)	150 days (R: -30 days)
	Unemployed due to bankruptcies or dismissal	up to 30 years old	90 days	90 days	120 days (P: +30 days)	180 days (P: +30 days)
	30-34 years old	90 days	90 days	180 days (P: +30 days)	210 days (P: +30 days)	240 days (P: +30 days)
	35-44 years old	90 days	90 days	180 days (P: +30 days)	240 days (R: +30 days) (P: +60 days)	270 days (R: +30 days) (P: +60 days)
	45-59 years old	90 days	180 days	240 days (P: +30 days)	270 days (P: +30 days)	330 days (P: +30 days)
	60-64 years old	90 days	150 days	180 days (P: +30 days)	210 days (P: +30 days)	240 days (P: +30 days)

Note: R = regular workers, P = those who work shorter hours (e.g. part-time workers). The number of days in parenthesis represents the change in the number of days one is eligible to receive benefits after the law was revised.

hobbies and knowledge remote from any practical vocational ability. The revised law provides for subsidies of 40 percent, with the maximum amount being reduced to ¥200,000. However, the membership period criteria has been relaxed to “three or more years,” though individuals who have belonged to the employment insurance scheme for three to five years will be granted only 20 percent of educational and training costs, to a maximum of ¥100,000.

Increasing Number of Individual Labor Disputes Reflects Gloomy Economic Situation

To resolve the growing number of individual labor disputes (disputes between individual workers and their employers), the Law for Promoting the Resolution of Individual Labour Disputes was enacted in October 2001.

Since the enforcement of the law, some 300 Comprehensive Labour-related Counselling Desks were set up across the country. At the same time, two systems were established: a system of advice and guidance by the directors of Prefectural Labour Bureaus, and a system whereby a Dispute Adjustment Committee of scholars and experts provides aid to resolve the disputes. The Ministry of Health, Labour and Welfare recently published a report on measures taken under the law during fiscal 2002 (from April 2002 to March 2003). According to the report, the number of cases brought before counselling desks totalled 625,572. Of these, cases concerning individual labor disputes within the scope

of civil procedure accounted for 103,194 cases, an increase of 25 percent compared to the previous year. (The figure for fiscal 2001 was based on a six-month period.) “Dismissals” accounted for 28.6 percent of the total, followed by “a cut in wages or a deterioration in other working conditions” (16.5%). (See the figure below.)

In fiscal 2002, directors of Prefectural Labour Bureaus received 2,332 applications for advice and guidance (an increase of 63 percent over fiscal 2001); requests for conciliation by Dispute Adjustment Committees numbered 3,036 (98%). The substantial increases in the numbers reflect the current economic stagnation and company measures aimed at cutting back the workforce.

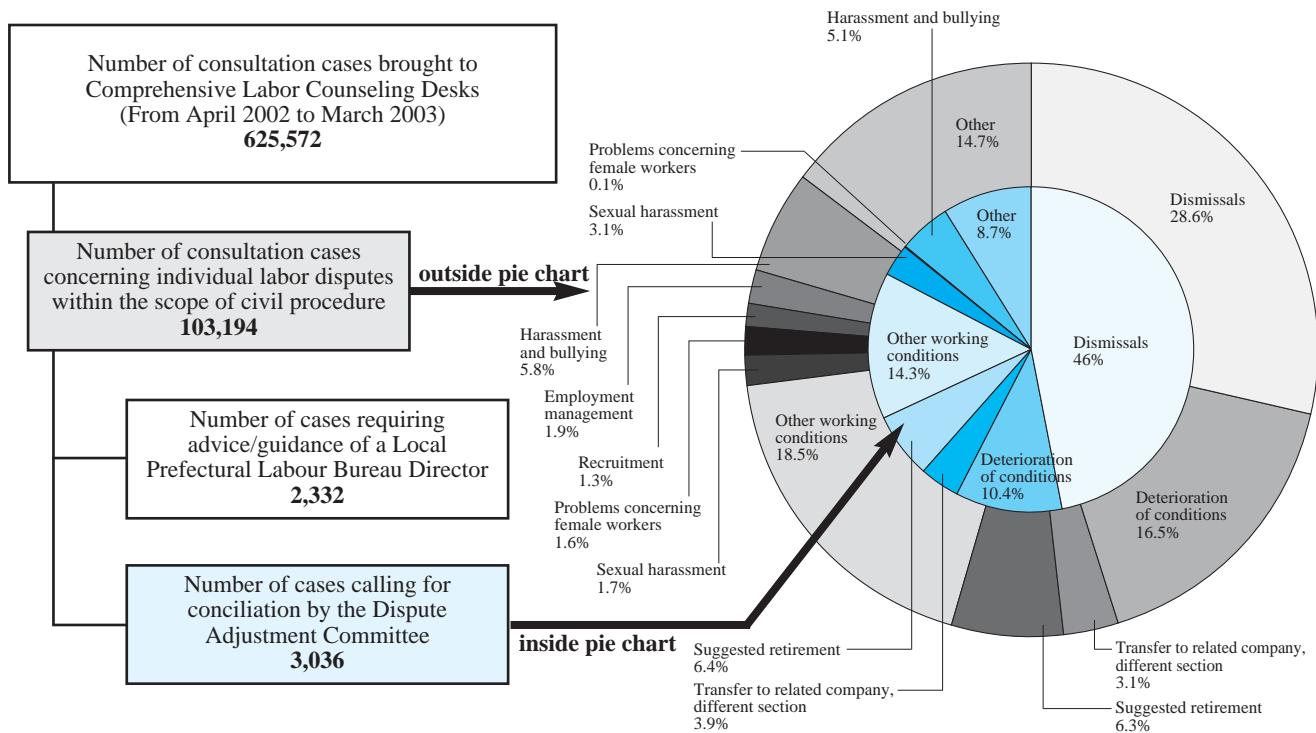
Workers accounted for the vast majority, 97.9 percent, of applicants calling for conciliation; of these, part-time, *arubaito* (temporary), dispatched, fixed-term contract, and other non-regular workers accounted for more than 22 percent. At the same time, 55.7 percent of these applicants were not unionized.

As for the time required for conciliation, 96.5 percent of the cases were settled within three months and 61 percent within one month, indicating that most labor disputes were handled promptly and in accordance with the law.

To strengthen its ability to resolve the increasing number of individual labor disputes, the Ministry of Health, Labour and Welfare made extra allocations in April to increase the number of Dispute Adjustment Committee members from 174 to 300.

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Figure 1. Consultation Cases Concerning Individual Labor Disputes Within the Scope of Civil Procedure



Source: Ministry of Health, Labour and Welfare

Legal Problems Surrounding the Practice of Farming Out: The Nippon Steel Corporation Case

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1. Introduction

Japan's so-called lifetime employment system has been widely discussed around the world. But in closely examining this practice, it turns out that employees hired by large companies rarely continue working in the same company; rather employees are transferred to another company to finish out their working lives. More often than not, the company to which an employee is transferred is a subsidiary or related company of the company that carried out the transfer, meaning that the transfer occurs within a company group, or *keiretsu*, and this forms a component of the long-term employment security system.

From a legal perspective, such transfers can be distinguished as farming out and moving out. Farming out is when an employee is transferred to another company but his/her employment relationship with the original company is maintained. This type of transfer is called *shukko*. On the other hand, moving out occurs when an employee is transferred to another company, and his/her employment relationship with the original company is terminated. This type of transfer is called *tenseki*.

The practice of *shukko* involving a manager or senior executive began as early as in the prewar era, but it wasn't until the 1960s that ordinary employees were transferred in the same manner. Since the first oil crisis in 1974, *shukko* has become a more common practice. According to Professor Inagami, *shukko* is a unique Japanese personnel arrangement not seen in other countries⁽¹⁾.

Shukko serves several purposes, such as providing a subsidiary and related company with technical or managerial support; giving workers an opportunity to develop their skills and career; securing positions for middle-aged and older workers; and restructuring or strengthening the international competitiveness of the entire group. Most workers transferred through a *shukko* scheme usually return

to the original company after several years of service at the receiving company, but for middle-aged and older workers it is usually a "one-way" transfer. In this sense, *shukko* of these workers is substantially equivalent to *tenseki*, but the employment of these workers can be secured.



2. How *Shukko* Works

In 2001, the Ministry of Health, Labour and Welfare released the results of the *Comprehensive Survey for Employment Conditions* (formerly known as the *General Survey on Wages and Working Hours System*)⁽²⁾. The survey found that 37.3 percent of firms had *shukko* schemes, an increase of 3.1 percent over the former survey conducted in 1995.

As for the form of transfer, 24.5 percent had schemes to farm out workers, while 29.5 percent accepted such workers, a respective increase of 2.9 percent and 3.3 percent from the former survey in 1995. Larger companies tended to have a *shukko* scheme, for example, 88 percent of firms with 1,000 or more employees, 77.5 percent of firms with more than 300 but less than 1,000, 53 percent of firms with more than 100 but less than 300, and 27.1 percent of firms with more than 30 but less than 100. By industry, *shukko* most frequently occurs in the real estate business (72%) and the finance and insurance business (71.9%).

Among the firms with farming out schemes, 39.1 percent set a limit on the period of transfer. Of these, 29.1 percent had periods of "more than two but less than three years," 28.7 percent with "more than one but less than two years," and 25.5 percent with "less than one year."

As for the period of time workers were transferred, 34.1 percent were farmed out for “more than five years,” 21.7 percent for “more than two but less than three years,” and 13.7 percent for “more than one but less than two years.” The percentage of transferred workers whose period of transfer was “more than five years” was considerably higher in firms which didn’t prescribe the period of transfer (48.4%).

Regarding the wage of the transferred workers, 78.9 percent of the firms which transferred workers applied their own wage system if the wage level was lower in the firms that the workers were transferred to. Among these, 51.8 percent of the firms which transferred workers made up the difference, while only 26.1 percent of the firms to which the workers were transferred did.

In 22.3 percent of the firms with farming out schemes, farming out was followed by moving out. The corresponding figure for companies with 1,000 or more workers was 42.6 percent.

3. Legal Aspects of Farming Out

Farming out is not regulated by legislation, but by case law or judicial precedent.

From a theoretical point of view, farming out involves a significant modification of the employment contract. Consequently, a company cannot order an employee to be farmed out without the consent of that employee. This conclusion derives from contractual theory.

Moreover, Article 625, Paragraph 1 of the Civil Code, which states that a company may not assign its workers to a third person without the worker’s consent, can be applied to cases involving farming out. Therefore, the requirement that the worker must consent to being farmed out can be grounded in this provision of the Civil Code.

However, there has been much discussion regarding this requirement. The discussion revolves around whether or not this consent should be obtained when the company orders the worker to be farmed out. Many scholars think it is not appropriate to authorize farming out orders solely on the basis of the prior and comprehensive consent the worker gave at the time of being hired. They argue that the right of the employer to farm out a worker can be confirmed only if there is a clear statement authorizing such in the work rules or collective agreement, and if the company instituted “rules that are not disadvantageous to workers in terms of

wages and other working conditions while they are farmed out, as well as to clarify the duration and arrangements for their return”⁽³⁾.

Courts also tend to rule that a general and comprehensive agreement is not sufficient to authorize farming out and require, if not individual specific agreements, at least concrete and explicit provisions regarding farming out in work rules and collective agreements. As farming out has become a common practice, linked with long-term employment security, a pillar of the Japanese employment system, the company’s right to farm out an employee has come to be widely confirmed⁽⁴⁾.

Nevertheless, rulings regarding farming out have not been the same as those for transfers within a company. According to case law, the company’s right to transfer employees within the same company can be based on a comprehensive agreement signed when the employee is hired, except when a job or a working location is concretely limited in the employment contract⁽⁵⁾. Transfers within a company, which do not involve a change of employer, should be legally distinguished from *shukko*. On the other hand, moving out, which involves terminating an employment contract with the original company, is still not as common as transfers within a company or farming out. Therefore, judges and academic opinions tend to require the individual and specific consent of the worker in these cases.

Even if the right to farm out is supported by an individual agreement or appropriate provisions in the work rules or collective agreements, courts must scrutinize the farming out order and decide whether it is an abusive exercise of the right (Art. 1, Para. 3 of the Civil Code). They do this by weighing the business necessity against disadvantages for the transferred worker. Usually farming out causes more serious disadvantages to the worker that has been transferred than a transfer within the company, so the right to farm out is more likely to be null and void, citing an abusive exercise of the right.

4. Recent Supreme Court Decision

On April 18, the second petty bench of the Supreme Court ruled that the farming out of two employees without their consent was valid. This was the first Supreme Court decision in a case involving farming out, and is bound to attract attention from legal scholars as well as those who are interested in personnel management. This is why it is important to precisely analyze the contents of this

decision.

The plaintiffs were two employees of Nippon Steel Corporation, a well-known Japanese company. In 1987, Nippon Steel Corp. planned a restructuring of its business according to a mid-term management plan to cope with the high-yen recession that began in September 1985. As part of the restructuring, the company decided to outsource the yard transportation business. In connection with the outsourcing of Nippon Steel Corp.'s Yahata Works' yard transportation business, in 1989, employees of the rail transportation section were ordered to transfer for three years to Nippon Steel Transportation, the majority of whose shares were owned by Nippon Steel Corp. The transfer was renewed three times, each time for three years. The plaintiffs had been continuously engaged in jobs related to the rail transportation section since they had been hired in 1961. They were reluctant to accept the transfer to Nippon Steel Transportation, but finally complied. However, they denied the validity of the order, and reserved the right to file a complaint with the court.

Nippon Steel Corp.'s work rules stipulate that it may order its employees to transfer to another company. The plaintiffs understood and signed the agreement when they were hired. Because the incidents of farming out connected with outsourcing continued to increase, the trade union, to which the plaintiffs belonged, and the company inserted in the collective agreement a clause on farming out that was similar to the provision laid down in the work rules, and also concluded a particular farming out agreement, containing many clauses about the maintenance and guarantee of terms and conditions of the employees transferred to the other company. Indeed, before the plaintiffs filed their case, many workers had been farmed out in connection with outsourcing.

The trade union had negotiated with and finally agreed with Nippon Steel Corp. on the question of farming out to accompany the outsourcing of the rail transportation section to Nippon Steel Transportation. Among the 141 workers who were transferred, only four, including the plaintiffs, did not accept the transfer. Nippon Steel Corp. initially tried to persuade the workers, but finally issued the transfer to them. The plaintiffs sued, asserting (1) because the outsourcing was expected to continue for a long time, the possibility that they would return to Nippon Steel was small; (2) in this sense, the farming out was in essence a moving out; (3)

therefore, individual and specific agreements with each worker were needed.

The Supreme Court upheld the validity of the Nippon Steel Corp.'s decision to farm out the workers, as did the Fukuoka High Court and Fukuoka District Court, Kokura Branch. The Supreme Court pointed to three factors as its legal basis: (1) in this case, in connection with the outsourcing of the rail transportation sector, the employees were transferred to the company which received the business that was outsourced; (2) Nippon Steel Corp.'s work rules contain a provision for farming out; (3) the collective agreement between the company and the enterprise union not only contains a provision on farming out, but also a particular collective agreement concerning farming out was concluded. Thanks to the latter agreement, the terms and conditions of the transferred employees were unchanged after they had been farmed out. Moreover, the Supreme Court stated that this incident of farming out could not be equated to moving out even if they had to work at Nippon Steel Transportation for a long period, because their employment relationship was maintained with the original company. The Supreme Court concluded that Nippon Steel Corp. could legally transfer the plaintiffs to Nippon Steel Transportation without their individual and specific agreement.

The Supreme Court went further by stating this incident of farming out was not an abusive exercise of the employer's right. In determining the abusiveness of the right, the Supreme Court stated that it should take into consideration four factors: the rationality of the managerial decision to outsource and the necessity to farm out; the criterion under which the transferred employees are selected and the appropriateness of its concrete application; what disadvantages does the transfer cause on the working and living conditions of the transferred employees; and the procedures under which the transfer was carried out. Regarding the third factor, not only did the terms and conditions remain the same, but the content of their job, where they worked, and the labor organization also remained the same even after they had been farmed out. As for the fourth factor, the trade union had negotiated with the company in good faith in order to protect as much as possible the interests of the transferred employees⁽⁶⁾. Finally, the Supreme Court stated that the orders to renew the period of transfer were not an abusive exercise of the employer's right as long as it

remained necessary to outsource and farm out.

The validity of the order is indisputable if one takes account of the frequent practice of outsourcing in this company, the fact that the transferred employees did not suffer any disadvantages, and the well-constructed arrangement provided by the farming out agreement. But theoretically speaking, some questions remain. At first, the Supreme Court didn't make clear what requirements are needed to carry out a transfer. As mentioned above, the Court referred to three factors: the connection between farming out and outsourcing the business of the transferring company, the provision of the work rules and the collective agreement, and the farming out agreement itself. But it seems that the Supreme Court did not make clear why and how these three factors could serve as the legal basis for a transfer. Moreover, the Supreme Court did not state that the provision of the working rules was binding for the plaintiffs. According to case law, provisions in working rules are incorporated in the employment contract if they are rational. But the Supreme Court did not place the validity of the order to transfer in the binding effects of the farming out provisions in the company's work rules. This could be because the Court thought the farming out provision in the work rules, which had been formulated before the outsourcing-related farming out practice had been stabilized, was inappropriate to authorize the farming out of the plaintiffs.

Additionally the Supreme Court did not refer to the normative effect of the collective agreement in the sense of Art. 16 of the Trade Union Law. If the normative effect had been affirmed in this case, solely the farming out clause inserted in the collective agreement could have served as the legal basis upholding the employer's right to farm out. The Supreme Court chose not to use this because among academics the normative (binding) effect of a clause so disadvantageous to union members is highly controversial.

Anyway, in this case, if the employees had refused to be transferred to Nippon Steel Transportation, it is highly probable that they would have been dismissed as their job had disappeared when Nippon Steel Corp. had abolished its rail transportation section. Of course, according to case law, when an employee is dismissed for economic reasons, four requirements must be met: there must be a need to reduce the number of employees; the company has made efforts to resort to alternative

measures to avoid the economic dismissals; an appropriate selection of employees to be dismissed; appropriate procedures have been taken, such as consulting with the employees' representatives. But in the case of the plaintiffs, they had been continuously engaged only in rail transportation, and it appears it was extremely difficult for the employer to find other jobs for them. Therefore, they had no other choice than to transfer to Nippon Steel Transportation or be dismissed.

5. Conclusion

Taking all the circumstances of this case into consideration, the Nippon Steel Corp. employees who were outsourced had no other choice than to accept the transfer. In particular, two points should be mentioned. First, thanks to the efforts of Nippon Steel Corp.'s trade union, the interests of the transferred employees were fully protected. Secondly, in this company, the majority of the employees had complied with the order to be farmed out.

Certainly the Supreme Court ruled that in this case it did not need the individual agreement of the worker. But this decision was deeply connected with the peculiarities of this particular case. That is why this decision's range is quite limited, and can not be used extensively as a precedent upon which to base future cases.

Notes:

- (1) See Takeshi Inagami, *Kigyō Group Keiei to Shukko Tenseki Kankō* (Corporate Group Management and Employee Transfer Practices), University of Tokyo Press, 2003.
- (2) The survey targeted 5,326 private corporations with 30 or more regular employees working at headquarters, with an effective reply rate of 90.1 percent. The results are as of January 1, 2001. For details, see "Recent Trends in Transferring Employees," *Japan Labor Bulletin*, Vol. 40, No 12, December 1, 2001 (<http://www.jil.go.jp/bulletin/year/2001/vol40-12/02.htm>).
- (3) See Kazuo Sugeno (translated by Leo Kanowitz), *Japanese Employment and Labor Law*, Carolina Academic Press and University of Tokyo Press, 2002, p.449.
- (4) For example, in the *Kowa Case*, the Nagoya District Court (Mar. 26, 1980) held that an implied and comprehensive agreement was sufficient as the legal basis to order an employee to be farmed out. But in this case, after the company explained its position, the employee agreed when hired that farming out was within the scope of the group companies.
- (5) See Takashi Araki, *Labor and Employment Law in Japan*, The Japan Institute of Labor, 2002, p.133 f.
- (6) Because the trade union had concluded a union shop clause, almost all employees were union members.

A Review of the 2003 *Shunto*

Mitsuru Hirata

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Japan Business Federation (Nippon Keidanren)

This year's spring labor-management negotiations were held during the height of the struggle to revitalize the Japanese economy. With the socio-economic situation at home and abroad changing rapidly, the Japanese economy, paralyzed by its attempt to recover from the post-bubble hangover, has been unable to keep up with changes in global trends. Nor has the vicious circle created by the prolonged economic recession and an unstable financial system been broken. Action to tackle bad loans is urgently needed, and reform of a whole range of problems related to the political, economic and social structures is lagging. Nippon Keidanren (Japan Business Federation) understands in principle that the lowering of Japan's business competitiveness on the international field is attributable to the delay in structural reforms, a fact which has recently come to the fore.

In this situation, Nippon Keidanren, in its "Report of the Committee on Management and Labor Policy" published in December 2002, noted that wages in Japan were still among the highest in the world, and that labor share (the proportion of labor cost to the overall added value of private firms) had been increasing, putting the squeeze on corporate management. As a basic position, we also stressed that employers are obliged to keep international competitiveness firmly in mind when setting wage levels, and that it is difficult to raise wage levels further if corporate competitiveness is to be maintained and strengthened. This meant that basic pay raises were out of the question, and that the freeze or revision of annual wage increments in line with reforms of wage systems should be dealt with during labor-management negotiations. Accordingly, we stressed that this year's negotiations, while giving pre-eminence to employment maintenance, should serve as an opportunity for thorough discussion between labor and management concerning optimization of labor cost and improvement of productivity in order to survive.

Negotiating sessions at most large individual firms have resulted in no basic pay raises with only annual wage increments. According to a survey by Nippon Keidanren, as of June 5, the average pay hike at 185 large firms was ¥5,391 a month, representing an annual increase of 1.65 percent, more or less the same increase as the previous year.

The following were the main features of this year's negotiations:

- With differentials in business performance widening among industries and firms due to the prolonged recession and an increase in competition, an increasing number of firms set wage levels according their own ability to pay personnel costs, scrapping the traditional practice of lock-

step decision. The rate of growth in wage levels remained more or less the same as the previous low, set last year.

- Firms paid more attention to the overall management of total labor costs, which comprises wages, bonus and other lump-sum payments, retirement allowances, other fringe benefits, as well as the level of employment. Bonus and other lump-sum payments, in particular, were determined, reflecting the business performance of individual firms. An increasing number of firms adopted bonus payment systems whereby payments were calculated according to a formula linked with business conditions.
- Depending on the firm, wage increases were either below the amount of annual wage increments, or annual wage increments were frozen or postponed, or the overtime premium rate was lowered to the statutorily set minimum level.
- The tendency to place excessive emphasis on the seniority-wage profile came under review, and firms moved toward revising the practice of giving annual wage increments or the existing wage system, and focused on individual performance.

"The Report of the Committee on Management and Labor Policy" acknowledges that the "spring struggle" is turning into a "spring debate." (Both terms are pronounced *shunto* in Japanese.) Until recently, labor unions set targets for their wage demands, and "struggled" to achieve them, backing this up with the threat of strikes to win across-the-board wage increases. Now, however, the *shunto* has to become more discussion-centered. Either way, the essential part of *shunto* remains the same as before, in that it is an annual interface between labor and management, and the two parties discuss various issues concerning the future development of firms and the improvement of working conditions.

From now, the primary concern of labor and management will no longer be wage levels or the margin of wage increases. Labor and management will be expected to realize an appropriate portfolio of types of employment, concentrating on building up a wage and personnel system conducive to high value-added work, and pursuing comprehensive reforms of various systems relating to wages, bonus and retirement payments, and other personnel treatment, thereby bringing to the fore the full abilities of workers. At the same time, with the needs of workers diversifying, it will become important to create mechanisms which allow firms to display new potential by skillfully using varied human resources and the combination of employment patterns.

from Labor and Management

Tomoru Yamaguchi

Director of the Working Conditions Division
Rengo (Japanese Trade Union Confederation)

During the 2003 spring struggle for a better life, Rengo (Japanese Trade Union Confederation, JTUC-RENGO) set protection of jobs and the livelihood of workers as its principle goal amidst the harsh realities produced by the prolonged economic recession, record high unemployment rates and progressive deflation. Seeking to improve the overall environment affecting the livelihood of workers, Rengo placed top priority on “a change of course designed to promote economic recovery involving policy and institutional measures and strengthening employment.” All unions were to concentrate on job security, protection and improvement of existing wage curves (i.e., maintenance of the current wage level), wage raises and the contractualization of intra-firm minimum wages for part-time and other non-regular workers, and the elimination of unpaid overtime. In line with this, Rengo began a review of how the *shunto* works so that trade unions will undertake tasks in cooperation with each other, and to ensure that unorganized workers will also benefit from the results that have been achieved. For this, Rengo singled out minimums (minimum issues that all trade unions should tackle) to be achieved, including identification of the annual pay raise portion of wages that keeps the wage curve intact and the preservation of the wage curve, contractualization of intra-firm minimum wage agreements, and contractualization of working time control and regulation.

Although, as of mid-June, some 30 percent of labor-management negotiations had not yet been concluded — mainly those involving small and medium-sized company unions and labor unions of local industries — I would like to express my opinion, as an intermediate general overview, on this year’s spring struggle.

Our efforts to realize changes in policies and institutional measures have not borne fruit, and unions therefore will have to grapple with the tasks more intensively. As for job security, industrial federations and individual enterprise unions have made various efforts, but nothing can put the brake on the growing number of involuntarily unemployed people. Rengo intends to give more advice and support throughout the year to unions which organize employees of companies suffering poor business performance.

The result of this year’s agreements on wage increases, at present, was a weighted average increase in monthly pay of ¥5,082, or a year-on-year increase of a mere 1.64 percent, lower by some 0.1 percentage point than the figure achieved last year. The most important factor regarding these increases is that the average increase in monthly pay among enterprises with an annual wage hike system was 1.79 percent, or ¥5,692, just above the target figure of 1.76 percent. On the other hand, the figure for unions whose companies do not have regular wage increase systems was 1.36 percent, or ¥4,076; thus bipolarization was observed between firms with annual wage increment systems and those without. The bipolarization was also observed among small and medium-sized firms, which means that a re-organization of wage systems is an essential task. Moreover, when analyzed from the viewpoint of wage curve maintenance, each enterprise union did its best on this subject. Of course, the number of enterprise unions, which have been in the forefront of raising the basic wage rate, has decreased due to the severe business environment, however, the number of enterprise unions that have maintained wage curves has increased. At the same time, there has been a dramatic decrease in the number of enterprise unions which were not able to check wage curve maintenance between employer and employees.

Meanwhile, industrial federations have been formulating measures toward the elimination of unpaid overtime, seeing steady progress and impacting society considerably. They will study the measures which have been implemented on the level of the enterprise unions, continuously monitoring the issue until decent working hours become reality.

Turning to next year’s spring struggle, we will continue to push efforts related to policies and institutional measures and the minimums that need to be achieved, along with ensuring that the results impact society as a whole. At the same time, we would like to organize and share with others our basic ideas concerning maintenance of wage curves and improving wage systems, as well as stepping up advisory activity and assistance to small, medium-sized unions and labor unions of local industries.

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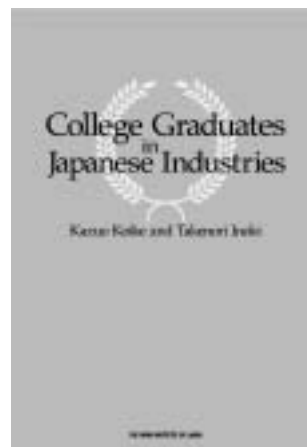
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