

Are Wage Disparities Unreasonable and Illegal? Between Fixed-term Contract Employees Rehired After Retirement and Regular Employees

The Nagasawa Un-yu Case

The Supreme Court (June 1, 2018) 1179 *Rohan* 34

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Facts

Worker X and his colleagues signed open-ended (non-fixed term) labor contracts with transportation company Y, and from 1980 to 1993 each worked as a driver of a tanker truck as a regular employee. X et al. retired from Y in 2014 at the age of 60. However, on the same day that X et al. retired, they signed fixed-term labor contracts with Y and continued to work as tanker truck drivers. Under the fixed-term contract concluded at the time of retirement, the work duties and operations and associated responsibilities of X et al. were not different from those of regular employees.

The wages of Y's regular-employee drivers consist of a basic wage mainly based on years of service and age, plus efficiency wages, performance-based wages, and various allowances, bonuses, and so forth. Meanwhile, fixed-term contract employees rehired at Y after retirement, including Worker X et al., are paid higher basic wages than regular employees, but do not receive additional efficiency wages, performance-based wages, and so forth. In the course of determining the working conditions of retirees rehired under fixed-term contracts, labor union Z to which X belongs requested that rehired persons receive the same amount of wages as before retirement. Y refused this request, but on the other hand, decided to raise the basic wages of the retirees rehired under fixed-term contracts, including X and others, and offered separate adjustment payment—allowance to make up for the remuneration-based portion of benefit during the blank period of old age employee pension, although these terms have not been determined through a collective bargaining

agreement).

X et al. argued that Y's non-payment of (1) efficiency wages and performance-based wages, and (2) perfect attendance allowance and various other allowances and bonuses

to non-regular employees rehired after retirement constitutes an unreasonable disparity in working conditions compared to regular employees, i.e. the disparity between working conditions of open-ended contract employees (regular employee) and fixed-term contract employees is irrational and violated Article 20 of the Labor Contracts Act, and filed an action seeking payment equivalent to the difference in wages under the system applied to regular employees and the wages they were actually paid.

At the first instance (Judgment of the Tokyo District Court [May 13, 2016] 1135 *Rohan* 11), the claim of X et al. was approved. However, this judgment was reversed at the second instance (Judgment of the Tokyo High Court [Nov. 2, 2016] 1144 *Rohan* 16) and the claim was dismissed. X et al. appealed.

Judgment

The judgment of the court below was partially dismissed and partially remanded to the court below. The Supreme Court decision is summarized as follows:

(1)

The Labor Contracts Act, Article 20 recognizes that differences may exist between the treatment



of fixed-term contract employees and open-ended contract employees, but stipulates that these differences should not be unreasonable taking the content of work duties, scope of reassignment of work and work place and other related matters into consideration, and that workers should be treated in a fair and balanced manner in accordance with differences in the content of duties and responsibilities, etc. (see the *Hamakyorex* case, the Judgment of the Supreme Court [Jun. 1, 2018]).

(2)

(a) At Y there is no difference between the work duties and accompanying responsibilities of fixed-term contract drivers rehired after retirement and regular employees, nor is there a difference between them in personnel management policies such as reassignment of work and work place.

(b) However, workers' wages are not automatically set in accordance with content of work duties and scope of change thereof. Employers determine workers' wages from the standpoint of business considerations, taking into account various circumstances besides their work duties and scope of their change. Also, it can be considered that workers' terms of conditions on wages ought to be largely entrusted to the autonomy between labor and management through collective bargaining, etc. Given the fact that Article 20 of the Labor Contracts Act explicitly mentions "other related matters" when judging whether disparities in working conditions of fixed-term contract and open-ended contract employees are unreasonable or not, it does not place restrictions on the circumstances taken into account other than content of work duties and scope of change thereof.

(c) X et al. retired from Y and were then rehired under fixed-term labor contracts.

(d) In general, companies with retirement systems have wage structures premised on long-term employment. On the other hand, when employers rehire retirees under fixed-term labor contracts, they do not generally intend to employ them over the long term. Also, retirees rehired under fixed-term contracts have enjoyed the benefits of a wage system premised on long-term employment up until their

retirement. Also, they are scheduled to receive old-age employee pensions. When judging violations of Article 20 of the Labor Contracts Act, it is necessary to take into account the status of fixed-term contract employees rehired after retirement as "other related matters."

(3)

When judging whether disparities in the wages of fixed-term and open-ended contract employees are unreasonable, it is necessary not only to compare their total wages, but also to consider the determinant factors of the wages respectively. However, when some wages are determined considering other wages, such circumstances should also be taken into consideration.

(4)

(a) Though X et al. were not paid efficiency wages and performance-based wages which are paid to regular employees, taking into account the fact that their basic wages were higher than those prior to retirement, that the coefficient used to calculate their percentage pay was higher than the coefficient used to calculate regular employees' efficiency wages, and that the total basic wages of X et al. were raised through collective bargaining between Y and the labor union, the comparison should be made between the total of regular employees' basic wages, efficiency wages, and performance-based wages and the total of X and colleagues' basic wages and percentage pay when determining whether the disparity is unreasonable or not. The disparity between them amounts to 2% to 12%.

(b) In addition, taking into account the fact that X et al. are eligible to receive old-age employee pension, and that Y determines to provide adjustment pay after collective bargaining with the labor union, it is not unreasonable for the company to pay percentage pay and not to pay efficiency wages and performance-based wages.

(5)

Y pays a perfect attendance allowance to encourage its employees to come to work every day except holidays. If the content of work duties of X et al. and regular employees is the same, there is no discrepancy in the need to encourage and reward full

attendance. For this reason, failure to pay X et al. an attendance allowance is unreasonable and a violation of Article 20 of the Labor Contracts Act.

Commentary

The Article 20 of the Labor Contracts Act stipulates that there must not be unreasonable disparities between the working conditions of open-ended contract employees (regular employees) and fixed-term contract employees. The Supreme Court handed down on two verdicts involving interpretation of Article 20 on June 1, 2018. This *Nagasawa Un-yu* case is one of them, following the *Hamakyorex* case (the Supreme Court, Second Petty Bench, June 1, 2018, 1179 *Rohan* 20)

In Japan, mandatory retirement age systems requiring workers to resign when they reach a certain age are legally recognized and in widespread use. At the same time, in order to ensure employment until the age of 65 when people can generally begin receiving pensions, the Act on Stabilization of Employment of Elderly Persons requires employers to take one of three measures: (i) raise the retirement age to 65 or over, (ii) rehire workers that have retired so that they can continue working until age 65, or (iii) abolish mandatory retirement ages.¹ Many companies take approach (ii), and rehire the retired workers under fixed-term labor contracts. In these cases their wages are often lower than when they were regular employees, and wage disparities among employees result. The case under discussion here questioned whether such wage gaps between retired workers rehired under fixed-term labor contracts and regular employees are a violation of Article 20 of the Labor Contracts Act.

Below is commentary on (1) general judgments the Supreme Court has handed down with regard to application of Article 20 of the Labor Contracts Act (including the *Hamakyorex* case), and (2) application of said Article to fixed-term contract employees

rehired after retirement.

(1) Objective and application of Article 20 of the Labor Contracts Act²

(a) There are many existing interpretations of the rules laid down by Article 20 of the Labor Contracts Act. These primarily revolve around three points, namely (i) that fixed-term contract employees and open-ended contract employees with similar duties and responsibilities must be subject to the same working conditions (equal pay for equal work, equal treatment), (ii) that even when differences between the work duties and responsibilities of fixed-term and open-ended contract employees exist, they must be treated in a fair and balanced manner (balanced treatment, and (iii) disparities between the working conditions of these two categories of employees must not be too large (while taking into account the general Japanese employment practice of implementing wage systems where wages do not necessarily correspond to work duties.)

The Supreme Court uses the term “balanced” in its judgments, and its viewpoint seems closest to point (2) above. However, in delivering judgments, it states that employers’ business decisions and negotiations with labor unions would be taken into account. This means that the court does not disregard point (3) above, which relates to the unique nature of Japanese companies’ wage systems.

(b) When wages are composed of multiple elements, there is a debate over whether (i) judgment should be made on whether disparities between each element of the wages are unreasonable or not, or (ii) judgment should only be made on whether disparities between the entirety of wages are unreasonable or not. On this point, the Supreme Court has adopted the first position. On the other hand, in this judgment, the court asserted that in cases like this one where multiple elements interrelate, it is possible for judges to examine them in their entirety and decide whether disparities are unreasonable. However, there is no

1. With regard to issues surrounding working conditions of employees rehired after retirement, ref. Keiichiro Hamaguchi, “Job Changes for Re-employed Retirees: The *Toyota Motor* case,” *Japan Labor Issues* 1, no.1: 20.

2. With regard to the background behind establishment of Article 20 of the Labor Contracts Act and related judicial precedents, see Ryo Hosokawa, “The Illegality of Differences in Labor Conditions Between Regular Workers and Non-Regular (Fixed-term Contract) Workers: The *Japan Post* case,” *Japan Labor Issues* 2, no. 7: 20.

clear standard for determining in which cases this sort of approach is acceptable. Further debate would be needed.

(c) In judging whether disparities are unreasonable, this judgment takes into account the fact that the employer raised wages based on requests from the labor union in the course of determining wages. Another likely point for future debate is whether disparities arising as a result of labor-management negotiations can be viewed as legitimate (in this case, however, no collective agreement on wage increases was concluded.)

(2) Workers rehired after retirement

In this case, the fact that X et al. were workers rehired after retirement had an impact on the Supreme Court judgment.

(a) This judgment interpreted the application of a wage system to fixed-term contract employees differing from that of regular employees as legitimate. It also views as acceptable a resulting drop in wages after reaching retirement age. As grounds for this, it cites for management decisions and the fact that X et al. had enjoyed the benefits of the wage system for regular employees until retirement. This appears to take into account the fact that at many Japanese companies, the wages of regular employees are determined not by the content of job duties but rather by age, years of service, experience, and general job competence. However, various different wage systems are in place at different Japanese companies, and at some, wages are determined on the basis of content of work duties. For this reason, there is a need for future debate on what kind of cases the above judgment will be applied.

(b) This judgment took into account the fact that X et al. were eligible to receive old-age employee pension payments, and decided that a 2% to 12% disparity in monthly wages with a lack of bonuses and allowances resulting in a total wage equivalent to 79% that of regular employees did not constitute an unreasonable wage gap. The Japanese legal policy of elderly employment presupposes that rehired workers would earn lower wages than before they retired. However, this also assumes that content of work duties and degree of responsibility would be lessened. This case is characterized by the fact that there was a wage gap even though the scope of work duties, responsibilities, and assignments had not changed compared to those prior to retirement. This judgment found, as described above, that the drop in X and colleagues' wages was acceptable. However, there are also precedents in which working conditions of employees rehired after retirement were judged to be too inferior and illegal in that they contradict the spirit of the Act on Stabilization of Employment of Elderly Persons (the *Kyushu Sozai* case (Fukuoka High Court [May 25, 2017] 1167 *Rohan* 49) There is an evident need for further discussion and debate on the specifics of how workers rehired after retirement should be treated.

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