Legal Regulation of Unreasonable Treatment of Non-regular Employees in Japan

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This article aims to analyze the current situation concerning legal regulations prohibiting unreasonable disparities in terms and conditions of employment (i.e. treatment) between regular and non-regular employees. Article 20 of the Labor Contracts Act (LCA) has been the key to those issues. The article prohibits unreasonable treatment of fixed-term employees, taking into account three factors (content of duties, the extent of changes in the job content and work locations, and other circumstances). However, there are multiple points for debate regarding its interpretation, and judicial precedents have also been divided. Administrative draft guidelines were issued in 2016 to clarify the interpretation, and in June 2018 the Supreme Court issued its first judgment related to Article 20 of the LCA. In the same month, Article 20 of the LCA and Article 8 of the Part-time Workers Act (PWA) were integrated into Article 8 of the newly amended Part-time and Fixed-term Workers Act (PFWA). As a result, the framework for identifying unreasonableness based on the nature and purpose of each aspect of treatment has been established, but questions remain as to how to certify the nature and purpose particularly of treatment with mixed nature. In this regard, the court decisions on the substantial unreasonableness will be structurally unpredictable. Judgement of whether the difference in treatment corresponds to the difference of job will be also difficult in the majority of actual cases which involve differences in capabilities and experiences among employees. Actually, the labor and management of each workplace could most properly carry out the assessment of what is reasonable or unreasonable within the workplace. There is a need for legal interpretations that contribute to fundamental remedies, such as encouraging non-regular employees' participation in fixing their own working conditions.

I. Introduction
II. Principle of prohibiting unreasonable disparities in treatment under the current PWA and LCA
III. Supreme Court judgments on Article 20 of the Labor Contracts Act
IV. New Part-time and Fixed-term Workers Act
V. Conclusion

I. Introduction

Rectifying disparities in terms and conditions of employment between regular and non-regular employees has become a major challenge for Japanese labor law policy in recent years. The number of non-regular employees (part-time, fixed-term, and agency workers) has sharply increased over the past 20 years. During

the rapid economic growth period of the 1960s, with migration from rural to urban areas and the nuclear family replacing the extended family, households consisting of a male regular employee, a full-time housewife, and their children became the norm. After the first oil crisis of 1973 and the end of the rapid economic growth period, women's rate of labor market participation grew as households sought to supplement their income. Most women have worked short hours due to housework and child-rearing obligations, and these housewives working part-time primarily drove the rise in non-regular employees as a percentage of the total workforce. In 1986 the Worker Dispatching Act went into effect and the number of agency workers or with fixed-term employees gradually increased. The increase in non-regular work began in earnest after the collapse of the economic bubble (February 1991–). In the post-bubble era, the number of regular employees decreased while that of non-regular employees grew, reaching 37.3% of the total in 2017. Non-regular employees make up 21.9% of male workforce and 55.5% of female workforce. Incidentally, the number of households with only one of the spouses working was equal to that of households where both spouses work in the 90s, and the percentage of the latter has clearly been rising since 2001.

Terms and conditions of employment for non-regular employees are usually inferior to those of regular employees. There are major wage disparities between regular employees who are paid higher base salaries,[1] various allowances, and bonuses and non-regular employees who generally lack these add-ons. While more than 80% of regular employees earn three million yen or more annually, in contrast, more than 90% of non-regular employees earn less than three million yen per year. In households where a non-regular employee is the primary earner, these disparities are directly correlated with household income gaps. Therefore, rectification of disparities between the regular and non-regular employees is a significant social policy challenge.

Legal frameworks to correct these disparities operate on two levels: that of the whole labor market, and that of the individual employment contract. The former aims to boost the basic terms and conditions of employment by setting certain minimum standards by mandatory laws for the entire labor market. An example is raising the minimum wage. It is not often recognized as a means of correcting disparities because this is indirect, still it is an internationally verified fact that raising the minimum wage achieves compression of wage distribution (i.e. shrinking of wage disparities).[2] As long as individual workers' terms and conditions of employment meet the minimum standards, disparities among workers are not an issue, and modifications to the principle of freedom of contract would remain partial.

The latter is more direct methods which consider disparities between individuals' contract conditions to be illegal. The difficulty is with their legal justification, as these constitute a stronger intervention in the principle of freedom of contract. With this method, we encounter questions about (i) what kinds of disparities should be prohibited or avoided, and (ii) what kinds of remedy should be provided.

Approaches entailing justification of remedies for disparity on the individual contract level can be further subdivided into two categories[3]: a "non-discrimination" approach and a "regulatory policy" approach. First, the "non-discrimination" approach argues that (i) discriminatory treatment against factors such as nationality, religion, social status, and gender infringe on basic human rights and constitute illegal disparities, and that (ii) equal treatment is the remedy. In this approach, in principle, not only unfavorable but also favorable treatment of certain workers is prohibited. Typical examples are Articles 3 and 4 of the Labor Standards Act (LSA). However, the claim that disparities due to differences in employment forms, such as part-time employment and fixed-term employment, are on a par with discrimination due to gender or social status, as described in the above provisions, has been rejected by the court.[4] For this reason, as the number of non-regular employees increased and their low wages became a social issue, legislations aiming to achieve the social policy prohibiting unreasonable treatment of non-regular employees were established in the 2000s.

However, interpretations of the principle of prohibiting unreasonable disparity in treatment vary among judicial theory. Some observe that prohibitions on unreasonable treatment of non-regular employees can be fully equated with prohibitions of discrimination.[5] They align such kind of prohibition with conventional "non-discrimination" approach. The others consider that the principle of prohibiting unreasonable treatment

does not intend to guarantee human rights but to achieve social policies by specific regulations and it differs from the "non-discrimination" approach. From the perspective of this "regulatory policy" approach, the legislation has to be interpreted as indicating that it (i) makes limited part of "unreasonable" disparities illegal and (ii) explores flexible remedies, depending on the degree of disparity, to achieve the objective of social policy to improve treatment of non-regular employees.

This article examines how to deal with disparities in treatment of non-regular employees, based on the concept that the legal principle of the prohibition on unreasonable treatment is an embodiment of the "regulatory policy" approach. Below, I will discuss in order: Articles 8 and 9 of the current PWA, Article 20 of the LCA added as an amendment in 2012, the formulation of administrative guidelines issued under the political slogan of "equal pay for equal work" (II), judicial theory and precedents relating to interpretations of Article 20 of the LCA (III), and Articles 8 and 9 of the PFWA amended in 2018 to integrate the relevant articles of the provisions of the PWA and the LCA going into effect on April 1, 2020 (April 1, 2021 in the case of small and medium sized enterprises) (IV). Since there are special regulations for agency workers, they are not covered in this article.

II. Principle of prohibiting unreasonable disparities in treatment under the current PWA and LCA

1. Prior to enactment of Articles 8 and 9 of the current PWA and Article 20 of the LCA

Situations in which non-regular employees are treated inferior despite doing almost same jobs as regular employees are far from new. In lawsuits prior to the establishment of the current PWA and LCA, employees had no recourse but to seek remedy based on discrimination prohibitions under Articles 3 and 4 of the LSA, or based on the fundamental "equal pay for equal (value) work" principle, which is not expressly stated in any acts. In the *Maruko Keihoki* case, Nagano District Court Ueda Branch (Mar. 15, 1996) 690 *Rohan* 32, a well-known case as a preceding establishment of the current law, a temporary worker whose two-month fixed-term contract had been repeatedly renewed for many years requested compensatory damages for disparities compared to regular employees. The court holds that the "equal pay for equal (value) work" principle cannot be said to exist as a legal norm as there are no provisions in relevant acts, and therefore it is not recognized as a general rule of law governing labor relations, but the concept of equal treatment on the basis of this principle should be considered as one important element in judging the illegality of wage disparities. Thus, payment of wages less than 80% those of regular employees was recognized as abuse of employers' discretionary power and a violation of public order (Article 90 of the Civil Code). On the other hand, in the *Nihon Yubin Teiso Nippon Mail Transportation* (temporary employee, compensatory damages) case, Osaka District Court, (May 22, 2002) 830 *Rohan* 22, the court holds that as expectations for the future differ between regular and fixed-term employees, and it cannot be regarded as unreasonable to have a wage system that reflects these differences. As a consequence, it denied the illegality of the disparities because the "equal pay for equal (value) work" principle could not be called a general legal norm in light of the nature of Articles 3 and 4 of the LSA, and admitted that wage disparities between regular and fixed-term employees are within the freedom of contract. These two decisions have in common the denial of "equal pay for equal (value) work" as a legally binding principle that makes differences in treatment based on employment forms illegal.

2. The former Article 8 of the Part-time Workers Act

After this above, there were growing demands for effective measures to address the issue of disparities in treatment, and the former Article 8 (basis of current Article 9) was added in the 2007 amendment of the PWA, first enacted in 1993. In this article, discriminatory treatment of part-time employees was prohibited when it satisfied three requirements: (i) the same job content as that of regular employees, (ii) an indefinite-term contract including fixed-term contracts that can be equated with those of regular employees due to repeated renewals, and (iii) equivalent systems for human resource utilization. This was an example of the "non-

discrimination" approach focusing on part-time employees whose terms and conditions of employment, other than prescribed working hours, are regarded as equal to those of regular employees. Although this provided some hints on remedies under positive law, in fact only 1.3% of part-time employees met the above conditions.

3. Current Part-time Workers Act and Labor Contracts Act

(1) Article 20 of the LCA and Article 8 of the PWA

The legal effect of the former Article 8 of the PWA was limited because it adopted a strict interpretation of "equal (value) work."[6] Article 20 of the LCA and the current Article 8 of the PWA attempted to redress this by referring to the "factors for consideration" rather than "requirements" of job content, etc., and take a unique Japanese approach that does not insist on "equal pay for equal (value) work" by incorporating its own concept of "balanced treatment." Article 20 of the LCA recognizes the distinction between the prohibition on discrimination as a protection of human rights, and prohibition of less favorable treatment, by prohibiting "unreasonable" disparities between regular employees and fixed-term employees. In the same article, three "factors for consideration" with regard to unreasonable conditions are enumerated: (i) "the content of the duties of the Workers and the extent of responsibility accompanying the said duties," (ii) "the extent of changes in the content of duties and work locations," and (iii) "other circumstances." This and current Article 8 of the PWA provide a legal basis for requiring treatment that may be different but is not unreasonably so.

Article 20 of the Labor Contracts Act

(Prohibition of Unreasonable Labor Conditions by Providing a Fixed Term)

If a labor condition of a fixed-term labor contract for a Worker is different from the counterpart labor condition of another labor contract without a fixed term for another Worker with the same Employer due to the existence of a fixed term, it is not to be found unreasonable, considering the content of duties of the Workers and the extent of responsibility accompanying the said duties (hereinafter referred to as the "content of duties" in this Article), the extent of changes in the content of duties and work locations, and other circumstances.

(2) Issues with interpretation and lower court precedents

Judicial interpretation of Article 20 of the LCA is far from simple. Regarding the following points concerning this article, judicial theory and lower court precedents are outlined below.

First of all, there is the question of what is included in the "counterpart" "labor conditions" of the worker. In the Enforcement Notice of the Amended LCA,[7] labor conditions include not only wages and working hours but also all aspects of treatment of employees such as accident compensation, disciplinary rules, education and training, incidental obligations, and fringe benefits. The question is the extent to which this definition can be expanded. Does it include the exercise of personnel authority in terms of reassignment, advancement, promotion and so forth? On the other hand, there is the question of how detailed inspections of labor conditions should be, for example, whether each item of remuneration such as allowances, should be treated as a separate labor condition. Another question is the scope of indefinite-term employees to be compared. For example, in a case[8] where fixed-term employees engaged in sales operations at a shop contested differences in labor conditions compared to regular employees also engaged in sales operations of the same workplace, the plaintiffs insisted on comparison with regular employees engaged exclusively in shop operations. In this case, the Court rejected the limitation of the target of comparison because only 18 of the 600 regular employees fit this description, and they are subject to special circumstances such as transfers from affiliated companies and transition from fixed-term to regular employee. Theoretically, as the range of regular employees to be compared broadens and the career path of the regular employees to be compared more ambiguous and undefined, the equivalence of "factors for consideration" (i) and (ii) becomes harder to be recognized. Consequently, unreasonable disparity tended to be denied in such cases.[9]

The second question is whether the phrase "due to" means "as a reason of." In this respect, there have been some narrow interpretations asserted, but in court precedents, broad interpretations have acknowledged differences "related to" the existence of a fixed term.[10] The judicial theory has generally been supported.

Third, the biggest problem is how to judge whether differences in labor conditions are "unreasonable." These are controversial points that have been examined from multiple angles according to judicial theories, but here, in order to present these perspectives in an easily understandable manner, they are arranged as a dichotomy. On the one hand, there is the theory of individual judgment, which in line with the provision of Enforcement Notice, "judging labor conditions separately." It holds that unreasonableness should be judged separately in accordance with the purpose and nature of the payment items or allowances. On the other hand, there is the theory of comprehensive judgment, which holds that wages should be judged by the total amount rather than by separate payment items. In lower court rulings there have been conflicting precedents; some cases which judged on a strictly individual basis,[11] and others that judged whether wages were reasonable based on total amount.[12] But there has been increasing numbers of precedents where the nature and purpose of individual allowances are first individually judged as separate labor conditions, and then comprehensively judged along with other supplementary allowances, if any. With regard to specific methods of judging whether labor conditions are unreasonable, there is a black-and-white perspective in which case is judged as wholly reasonable or wholly unreasonable, but another perspective delves more deeply into the nature of unreasonableness, assuming the existence of a gray area that cannot be said to be unreasonable if not reasonable. Many lower court precedents took the latter position.

Fourth, there is the issue of the legal effect of Article 20, which set forth that a different labor condition "is not to be found unreasonable." Judicial theory is divided as to whether to limit compensation to payment of damages, or to recognize additional effects such as reasonable conditions are to be incorporated into contracts. No lower court precedents thus far have affirmed such additional effects. Furthermore, in cases where labor conditions are judged to be unreasonable as a matter of degree, it is difficult to determine the amount that should be paid. The Judgment of the *Japan Post* case, Tokyo District Court (Sept. 14, 2017) 1164 *Rohan* 5, drew attention as the first case granting balanced remedy under Article 20 of the LCA in the form of 60% or 80% of the amount paid to regular employees.[13] It is particularly problematic that there is no established remedy for labor conditions in which plural purposes of payment types are mixed such as base salary and bonuses.

As we have seen, there were conflicting interpretations of Article 20 of the LCA (Article 8 of the PWA), and it was difficult to predict the outcomes of specific cases. To resolve this situation, the political slogan, the implementation of "equal pay for equal work," was proposed.

4. Draft guidelines for "equal pay for equal work"

(1) "Equal pay for equal work" as a political slogan

As described in II-1 above, the skeptical position toward "equal pay for equal (value) work" as a legal norm was dominant in Japan. Not only was it repeatedly denied by courts, but there was also strong opposition by labor unions. That was because as long as the practice of seniority-based pay increases for regular workers was affirmed, the "equal pay for equal (value) work" principle, based on job content rather than attributes of individuals such as age, length of service and number of dependents, was deemed not to comply with Japanese practice.

However, this previously denied the "equal pay for equal work" principle was suddenly adopted as a political slogan addressing the solution for disparity between the regular and non-regular employees, in the Cabinet decision on "Japan's Plan for Promoting Dynamic Engagement of All Citizens" of June 2, 2016. The plan clearly states that "toward equal pay for equal work, while giving due consideration to Japan's employment customs, we will not hesitate to advance preparations for legal revisions," and in order to establish appropriate application of the LCA, PWA, Worker Dispatching Act, "we will also formulate guidelines regarding what kinds of treatment gaps are reasonable or unreasonable, providing case studies."

We must notice that the "equal pay for equal work" principle, which the plan calls for realizing, is not

a principle of ensuring the same wages for the same work.[14] In a Ministry of Health, Labour and Welfare Working Group on the topic, it was explained that the goal was a prohibition of less favorable treatment without any rational basis while recognizing that "no country decrees by law that employers must pay workers the same wage for the same work." Thus, in the context of improving terms and conditions of employment for non-regular employees, the "equal pay for equal work" principle is subsumed into the concept of prohibition of less favorable treatment. For allowances not related to job content (such as commuting allowances, business travel expenses, etc.), equal treatment may be required without regard to the issue of "equal work." Conversely, unequal wages for equal work are permissible if there are objective and reasonable grounds. Therefore, the phrase "equal pay for equal work" is being used in a sense different from its original one. In interpreting the slogan, it must be noted that a broad concept is being given a name that is, in fact, both narrower and qualitatively different.

Furthermore, that "equal pay for equal work" principle, which was originally intended to bring the situation closer to that of Europe, applies only to disparities between regular and non-regular employees in the same company, as to preserve Japanese employment practices. Therefore the "equal pay for equal work" is not a universal benchmark applied across labor markets, which can also be used for comparing treatment between employees of different companies, or among regular employees working at the same company. In the author's opinion, it is a distinct feature different from universal non-discrimination principle for human rights protection.

However, as "equal pay for equal work" was used as a slogan encapsulating the current "prohibition of unreasonable treatment" (Article 8 of the PWA, Article 20 of the LCA), the qualitative difference between discrimination based on human rights and disparity within the freedom of contract became ambiguous. This impacted the "Draft Guidelines for Equal Pay for Equal Work" announced by the government at the Council for the Realization of Work Style Reform established at the Prime Minister's Office on December 20, 2016.

(2) Announcement of draft guidelines for "equal pay for equal work"

The contents of the draft guidelines[15] announced by the government in December 2016 were reaffirmed in the Action Plan for the Realization of Work Style Reform (draft)[16] released on March 28, 2017. These draft guidelines were highly unusual in that their formulation was neither legally delegated nor agreed on the labor-management negotiations. It is only a document presented as a government proposal at a meeting attended by labor and management. The absence of legal grounds was subsequently redeemed by amending the PFWA in June 2018 and the administrative guidelines have been issued after scrutinized in the Labor Policy Council in December 2018.

The current guidelines take the approach of breaking down elements in individual labor condition according to its nature and purpose, distinguishing between "balanced" and "equal" treatment, and judging whether the disparity in individual cases is unreasonable. For example, base salary is classified according to four standards ((i) ability or experience (ii) performance or result (iii) years of continuous service (iv) improvement in professional abilities in the course of service), and equal and balanced treatment will be implemented for each case as shown

Guidelines (excerpts):

For base salary, when paying according to the employee's abilities or experience, a part-time or fixed-term employee with the same ability or experience as a normal employee, must be paid the same base salary as a regular employee for work that relates to this ability or experience. Also, in cases where ability or experience differ, a base salary corresponding to the difference must be paid.

(Non-Problematic Case Example)
At Company A where X and Y are fixed-term employees engaged in the same type of work in the same workplace, Y who has a certain level of ability or experience transitions to a regular employee subject to periodic changes in job content and work location, and afterward Y's base salary is higher than X on the ground that there are changes in job content and work location.

below. This is followed by several "problematic case examples" and "non-problematic case examples."

In view of the purpose of clarifying the legal interpretation of Article 20 of the LCA, there are some questionable points about the guidelines. Who has to and how can judge the nature and purpose of treatment? Even if the nature and purpose of treatment are recognized the same, is there no leeway for justification for employers on disparities with objective and reasonable grounds? A more fundamental problem is that an overwhelming majority of actual cases will involve differences in capabilities and experience, etc. Then, how can one judge whether the difference in treatment "corresponds to the difference"? Furthermore, do the guidelines deny comprehensive judgment taking multiple treatments into account? And what kind of circumstances can be taken into account as the "other circumstances" which the text mentions? How should labor-management negotiation or consultation results be taken into consideration? It is hard to say that any of these questions have been answered.

Nevertheless, these administrative guidelines have no direct legal effect, and judicial decisions have been made without being bound by the released guidelines. In that sense, the first judgment of the Supreme Court relating to Article 20 of the LCA, issued June 1st, 2018, in particular, attracted practical interest.

III. Supreme Court judgments on Article 20 of the Labor Contracts Act

1. Judgment in the *Hamakyorex* case

At Hamakyorex Co. Ltd., a major logistics company with more than 5,000 employees, there were fixed-term employees working as truck drivers under contracts renewed repeatedly every six months. There was no significant difference between the job content of the fixed-term and regular-employee drivers. With regard to terms and conditions of employment, regular-employee drivers were paid a monthly salary, which basically comes with various allowances in addition to regular salary increases, bonuses, and retirement allowance, augmenting a commuting allowance calculated according to the distance to and from work, while fixed-term contract drivers were paid an hourly wage, which basically comes with no regular salary increases, bonuses, or retirement allowance, and a flat 3,000 yen allowance for commuting, regardless of distance. With these circumstances, the fixed-term employees claimed the sum of allowances as damages on the grounds that this represents an unreasonable disparity with regular employees. On the same day of the same petty bench of the Supreme Court handed down judgments on this and on the *Nagasawa Un'yu* case,[17] thereby clarifying its position on several issues related to Article 20 of the LCA. Although the LCA was amended on June 29 of 2018 after the ruling and Article 20 was integrated into Article 8 of the PFWA, both cases will serve as precedents and remain important in terms of both interpretation and practical significance.

2. Issues clarified and challenges remaining

(1) Gist and effects of Article 20 of the LCA

The Supreme Court understands Article 20 of the LCA as "a provision requiring balanced treatment in accordance with employees' differences in job content etc.," and while affirming its effect under civil law, denied its effect to supplement contracts. The legal basis are explained that there is no explicit provision affirming the article's effects in supplementing contracts.

(2) The meaning of "balanced treatment"

What is "balanced treatment"? In judging it, the Supreme Court didn't evaluate the numerical value of jobs, so as to allow leeway for consideration of labor-management negotiations and managerial discretion. The fact suggests that this approach differs from the principle of proportionality that forms the basis of the original "equal pay for equal (value) work" principle. The Supreme Court's "balanced treatment" is viewed not as a definition derived by strictly assessing the value of labor, but as having a certain gradation. Ultimately, "balanced" in this judgment is correlated with "not unreasonable."

(3) Specifics of "conditions found unreasonable"

As outlined above, the interpretation of "unreasonableness" has been divided in judicial theory. While one claims that it means all but reasonable, the other claims that unreasonableness has to be judged restrictively and strictly examined in the particular context. The Supreme Court has clearly denied the former based on literally interpretation and consideration of negotiations between labor and management and respect for the managerial discretion.

Generally, a variety of factors can be taken into consideration in the determination of wages. We should respect the intention of parties within the scope of freedom of contract. From such a point of view, the Supreme Court set a modest norm by allowing the extent of the disparity which is not apparently reasonable and making only unreasonable disparity illegal. When such attitude is accepted, the question becomes how great a difference must be judged as unreasonable. However, the judgment avoids general reference to the extent of unreasonableness, which the theory has thus far supplemented. This means the contents of judgments of unreasonable conditions will depend on the specific method of judging.

(4) Methods of judging unreasonableness

As a method of judging unreasonableness, the Supreme Court in the *Hamakyorex* case holds that conditions should be judged on an individual basis. However, the Judgment of *Nagasawa Un'yu* case holds that if multiple items of payments are related, this could be taken into consideration.

The problem in judging based on individual terms and conditions of employment is how to verify their nature and purpose. In precedents thus far, the nature and purpose of specific treatment has been judged by considering the actual circumstances of operations while emphasizing the payment conditions specified in the company's work rules and so forth. The appellate judgment on the judgment of this case (the *Hamakyorex* case) allowed disparity with "the purpose of hiring and retaining talented personnel," while acknowledging the nature and purpose of each item of payment in more details. However, the Supreme Court has not acknowledged such a broad purpose for justification of the non-payment of allowances.

These cases (*Hamakyorex* and *Nagasawa Un'yu*) are relatively simple because there are comparable workers whose job contents are the same, and only allowances are being judged as an object of unreasonable conditions. The method of judging unreasonableness is still unclear in cases where the comparable workers in doing different job, or where the items of remuneration with complex characteristics such as base salary, bonus, and retirement allowance are claimed. In this regard, there does not appear to be a demand to precisely breakdown the relationships among various aspects of treatment with respect to conditions having complex and diverse properties such as base salary and retirement allowance. As I mentioned above, the prohibition of unreasonable treatment would not require a thorough application of the principles of proportionality. In addition, corporations must ensure discretion to build wage structure based on not only internal balance but also trends in external markets, shareholders, other companies, etc. Legal intervention will require careful consideration so as not to impede corporate investment or exercise excessive control over economic freedom.

IV. New Part-time and Fixed-term Workers Act

Following the release of the "equal pay for equal work" draft guidelines and the Action Plan for the Realization of Work Style Reform, discussions on specific legislation were handed off to the tripartite Labor Policy Council in 2017. The council's proposal outlined various points that differ from the rigid orientation of the draft guidelines: that there may be cases where it is necessary to judge whether multiple aspects of treatment can be viewed collectively as unreasonable, depending on the progress of labor-management negotiations that also include non-regular employees, that it must be kept in mind that "the nature and purpose of treatment" are to be judged based on the actual circumstances, and that care must be taken so that the scope of "other circumstances" is not too narrowly interpreted, such as clarifying that circumstances of labor

negotiations and so forth may be included according to the situation in individual cases.

However, the remarks in the proposal were not reflected in the bill for the amended PFWA outlined thereafter. Specifically, there is no clear explanation of examples of "other circumstances," and no mention of the progress of labor-management negotiations including non-regular employees. Articles 8 and 9 of the new PFWA are follows:

(Prohibition of unreasonable treatment)
Article 8. With regard to base salary, bonuses and other respective treatment of part-time or fixed-term employees, a business operator must not set unreasonable disparities compared to regular employees, taking into account the factors (the content of duties of the employees and the extent of responsibility accompanying said duties (hereinafter referred to as "content of duties"), the extent of changes in the content of duties and work locations, and other circumstances) which can be deemed appropriate in light of the nature and purpose of the treatment .

(Prohibition of discriminatory treatment of part-time or fixed-term employees that ought to be viewed as equivalent to regular employees)
Article 9. With regard to part-time or fixed-term employees whose content of duties is the same as that of regular employees . . . who, in view of practices at the business establishment and other circumstances, are likely to have changes in the content of duties and scope of reassignment within the same scope as changes in the content of duties and arrangement of regular employees over the entire period until the employment relationship with the business operators ends, (referred to as "part-time or fixed-term employees who should be viewed as equivalent to regular employees" in the next article and the same paragraph), the business operator must not practice discriminatory treatment in terms of base salary, bonus, or other aspects of treatment respectively for the reason that said employees are part-time or fixed-term employees.

Article 8 of the new PFWA shows an intent to judge unreasonableness individually for each treatment. However, in view of the Labor Policy Council's proposals and the Supreme Court judgments mentioned above, it should be understood that while individual judgment is the basic principle, there remains leeway for comprehensive consideration with other treatments.

Due to the structure of the same article, the method of certifying nature and purpose, directly linked to the weighting of three "factors of consideration," has greater significance than ever. The conclusion is likely to be influenced by the interpretation of the nature of each allowance. For example, even if a disparity in bonus between fixed-term and regular employees can be justified based on long-term employment concerns such as "hiring and retaining talented personnel" and "providing motivation or encouragement toward the future," these are not valid reasons for failing to give bonuses to indefinite-term part-time workers. On the other hand, if the post-wage-payment nature of bonuses is emphasized, the difference between fixed-term and part-time employees does not arise. In the *Hamakyorex* case, the Supreme Court recognized that the purpose of providing a housing allowance is to help regular employees cope with expected increases in housing costs due to reassignment, but the court might judge such an allowance unreasonable if it recognized it as simply assisting with the cost of living.

The unresolved issue is who is to verify the nature and purpose of treatment and to determine whether terms and conditions of employment are unreasonable. Under the PFWA, employers' new obligation to explain the content of and reasons for the disparities of treatments and matters considered when making decisions concerning measures required pursuant to the provisions of Article 6 to 13 was provided. After the PFWA is enforced, employers will be strongly requested to clarify the basis and the standards for each item of wages and treatment, and examine the consistency with the actual operations. However, the law will not be fulfilling its function if it simply accepts employers' explanations at face value. Does this mean the court

should positively deal with the matter?

The prohibition on the unreasonable disparity in treatment between regular and non-regular employees is not originally a universal principle applied across the entire labor market, as the prohibition of discrimination, but rather a matter for the judgment of what is reasonable or unreasonable within a particular workplace. This should mean that the labor and management of each workplace that could most properly carry out the assessment. If the process of reaching an agreement was carried out through reflecting the opinions of non-regular employees, this agreement on whether conditions were unreasonable would be respected as the determination of nature and "other circumstances." If labor-management consultations are respected in the court decisions, this will give employers a rational risk-aversion-based motivation to reflect opinions of non-regular employees, when determining their treatment. This process will then encourage non-regular employees to participate in decision-making in the workplace. If there comes mechanism that encourages the establishment of industrial democracy and they lead to the recovery of non-regular employees' autonomy regarding decisions on terms and conditions of employment that should be called "remedy" in the true sense.

V. Conclusion

How closely the principle of prohibition on unreasonable disparity in treatment of regular and non-regular employees is aligned to the strict "non-discrimination" approach depends on how they recognize non-regular employment; as a vulnerable category that should be protected, or as a specific way of working, for example, to be used as a stepping stone to stable employment. In this regard, it is important to note the differing circumstances of part-time and fixed-term employees, both of whom are "non-regular" employees. In fact, there is the situation that fixed-term contracts have been used to justify inferior treatment, rather than actually limiting the term of employment as they are originally intended. It can be understood why Article 20 of the LCA would be interpreted according to the "non-discrimination" approach to provide remedy to fixed-term employees with repeatedly renewed contracts.

However, in precedents on disparities between regular and non-regular employees, such remedy has been limited due to the emphasis on the range of job content and reassignment. By emphasizing these factors, the courts can be said to have reaffirmed traditional Japanese-style employment practices, which offer regular employees "lifetime" employment and seniority-based pay raises in return for accepting the broad scope of potential change. As long as this employment framework stays, the effect of guidelines under the PFWA will be limited in spite of a view that it will provide thrust for more rigorous correction of disparities. The enactment of guidelines also does not seem to fit the purpose of ensuring predictability of legal judgment.

The interpretation of Article 20 of the LCA should also be considered in relation to Articles 18 and 19 added together at the time of the 2012 amendment of that Act. Article 18 concludes that if a fixed-term employee fulfills repeated contracts with the same employer for more than five years, he or she gains the right to apply for conversion to indefinite-term employment, and if such an application is submitted, the employer is automatically deemed to accept it. April 2018 marked five years since this amendment went into effect. Article 19 clarifies judicial precedents concerning refusal to renew fixed-term employment contracts, and clearly stipulates that the abuse of the right to dismiss theory applies by analogy to fixed-term employment contracts in the case that (i) the contracts should be regarded as substantially the same as indefinite term contracts or, (ii) the fixed-term employees can reasonably expect will be renewed. Considering together with Article 20, this should mean that in the future the length of the fixed-term employment contract will literally be fixed up to five years, and employment that is not really fixed-term—i.e. is indefinitely renewed, or offers reasonable prospects of renewal—will be converted to indefinite-term contracts.

These regulations can be understood as a system that seeks to prevent the abusive spread of fixed-term contracts, rather than to restrict hiring employees with fixed-term employment contracts per se. In fact, many fixed-term employees are seeking to shift to stable employment. For these reasons, there is a need for

mechanisms to regulate fixed-term employment contracts as a special form of employment more than rigid disparity correction measures. On the other hand, since many part-time employees seek short working hours, it is necessary to rethink the framework for judging unreasonableness from a different viewpoint than that of fixed-term employees.

If it is not possible to get remedy without appealing to a court, regulations' effect in resolving disputes is limited. In addition, court decisions on the substantial unreasonableness are structurally unpredictable. Therefore, in order to avoid risks, employers might thoroughly divide the content of duties between regular and non-regular employees so as to make a clear basis for disparities. It may close off the career track of non-regular employees, accelerate the shift to outsourcing work to freelance workers rather than "employees," and in effect strip more workers of their rightful protection. In order not to cause such adverse effects and to avoid disputes, there is a need to encourage the labor-management consultation process that reflects non-regular employees' opinions in the workplace. The courts also need to reflect such procedural efforts of the parties in the judgement of unreasonableness.

* This paper is based on an article commissioned by the editorial committee of *The Japanese Journal of Labour Studies* for inclusion in the special feature "Disparity and Labor" in its December 2017 issue (vol.60, No.690) with additions and amendments in line with the gist of this journal.

Notes

1. When base salary is converted into hourly wages, on average, there are disparities between regular employees (2,416 yen), full-time non-regular (fixed-term) employees (1,411 yen) and part-time employees (1,179 yen) as of 2016. See Ministry of Health, Labour and Welfare, *Basic Survey on Wage Structure* 2017.
2. Low Pay Commission, *National Minimum Wage -Low Pay Commission Report 2010* (Cm 7823), para 2.59, Mindestlohn Kommission, Erster Bericht zu den Auswirkungen des gesetzlichen mindestlohns, para 28.
3. This distinction was mentioned for the first time in *JILPT's Study Group Report on Balanced Treatment by Employment Form* published in July, 2011, using concepts organized based on the EU legal system. https://www.jil.go.jp/press/documents/20110714_02.pdf.
4. For example, judgments in the *Maruko Keihoki* case, and the *Nihon Yubin Teiso* (temporary employee compensatory damages) case, as will be seen later, and others.
5. There is also a skeptical view of the distinction between the two approaches, based on a common foundation of realizing legal tenets such as equality under the law and respect for individual rights.
6. In the *Kyoto Josei Kyokai (Kyoto Women's Association)* case, Osaka High Court (Jul. 16, 2009) 1001 *Rohan* 77, so-called the *Wings Kyoto* case, remedy was denied to part-time counselors employed where there were no regular employees doing equivalent jobs. The court holds that "There were no regular employees to compare and the recruitment conditions such as age differs from the general staff. The restraint on duties was weak even after recruitment, and the burden on performance of duties was more lightly than regular employees. It is recognized that there was a difference."
7. August 10, 2012 *Kihatsu* (a notice issued by the Director of the Labor Standards Inspection Office) No.2.
8. The *Metro Commerce* case, Tokyo District Court (Mar. 23, 2017)1154 *Rohan* 5.
9. In the above judgment of the *Metro Commerce* case, since the majority of regular employees were engaged in diversified operations and were subject to reassignment, they were recognized as showing "major differences" with regard to element (i) and "clear differences" with regard to element (ii). The system in which regular employees have seniority-based wage increases presupposing long-term employment, while fixed-term employees do not, was judged to be "acceptable as being reasonable in terms of personnel policy." As a result, with regard to the non-payment of housing allowance, bonuses, retirement allowance, and other allowances to fixed-term employees, the company's claim that favorable treatment of regular employees so as to "hire and retain talented personnel" was accepted as having a degree of rationality as a personnel policy, and the only payment ruled unreasonable was nonpayment of overtime allowances for coming to work early.
10. The judgments of Tokyo District Court on May 13, 2016 and Tokyo High Court on November 2, 2016 in the *Nagasawa Un'yu* case, and the judgment of Osaka High Court on July 26, 2016 in the *Hamakyorex* case.
11. The judgment of the Osaka High Court on July 26, 2016 in the *Hamakyorex* case.
12. The *Nagasawa Un'yu* case, *supra* note 10.
13. In the *Japan Post* case, Tokyo District Court (Sept. 14, 2017) 1164 *Rohan* 5, non-regular workers on hourly wages, under fixed-term labor contracts that were repeatedly renewed every six month contested a claim concerning the differential treatment with regular employees. In the judgment, the Tokyo District Court distinguished between "terms and conditions of employment that are immediately recognizable as unreasonable based on the difference from regular employees' terms and conditions per se" and "terms and conditions of employment recognized as unreasonable due to differences in quality and quantity of allowances compared to regular employees." While in the former case, disparities are unreasonable and as a result the entire amount of the difference in allowances, etc. compared to regular employees was awarded, in the latter, the reasonable amount of damages was determined

according to Article 248 of the Code of Civil Procedure on the assumption that calculating the specific amount of damages would be "extremely difficult." Specifically, 80% of allowance for work during the New Year's holiday period and 60% of housing allowance were awarded as damages.

14. It has been pointed out that realization of "equal pay for equal work" might runs counter to Japanese employment practices of using attributes of individuals criteria, and the stipulation of "taking Japanese employment practices sufficiently into account" is not compatible in principle.
15. See the website of Prime Minister of Japan, http://www.kantei.go.jp/jp/singi/hatarakikata/dai5/siryou3.pdf.
16. See the website of Prime Minister of Japan, http://www.kantei.go.jp/jp/singi/hatarakikata/dai10/siryou1.pdf.
17. As in the above *Hamakyorex* case, in the *Nagasawa Un'yu* case, the treatment of fixed-term drivers and regular-employee drivers was at issue, but the facts that Nagasawa Un'yu was a small company without wide-area reassignment, and plaintiffs worked in indefinite-term contracts till retirement were then rehired as fixed-term contract workers, were taken into account. For this reason, content of duties and scope of change of said content and reassignment were assumed to be equivalent.

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