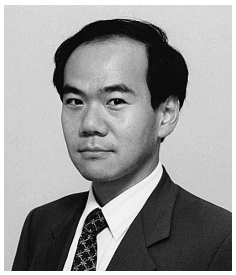
Worker Status of the Commercial Agent

The *Bellco* Case

Sapporo District Court (Sept. 28, 2018) 1188 *Rodo Hanrei* 5

Keiichiro Hamaguchi

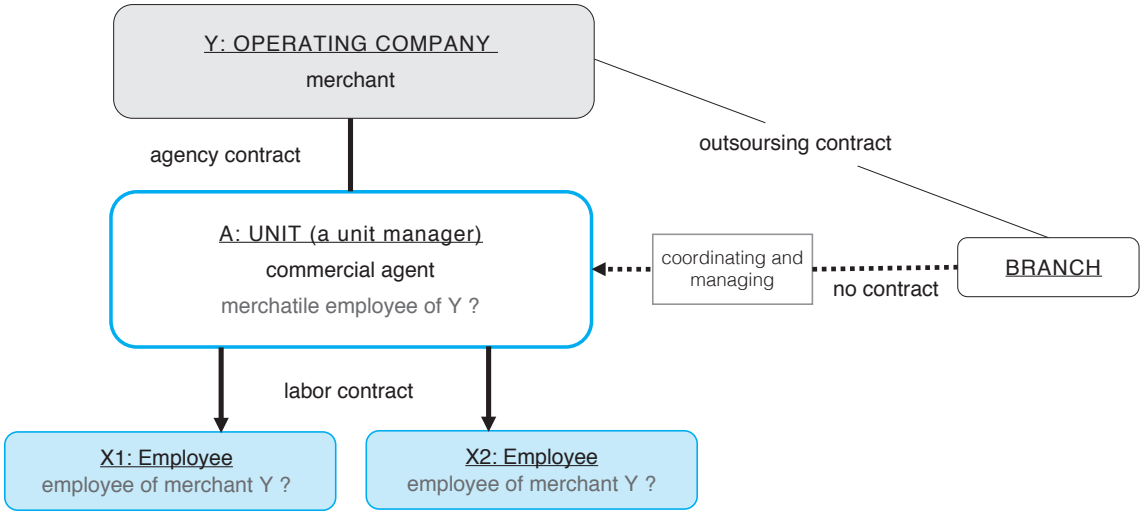


Facts

The defendant Y, the operating company of a ceremonial services, has concluded outsourcing contracts with independent proprietors or corporations nationwide to serve as agencies, and operations are carried out within areas known as "branches." A concluded an agency contract with Y and was in charge of sales activities in T district, with the title of "T unit manager." The plaintiffs X1 and X2 (hereinafter referred to as "X et al.") entered into one-year fixed-term labor contracts with A (subject to renewal every year), and were engaged in funerary services and sales activities. Y entrusted work such as coordinating and managing the agencies in each area to a third party with the title of "branch manager" (see the figure below).

On January 29, 2015, A requested the termination of the agency contract with Y, and the contract ended on the 31st of the same month. B, who had signed an agency contract with Y, took over operations in T district in place of A on February 1 of the same year, and concluded labor contracts with A's former employees other than X et al., but did not conclude similar contracts with X et al.

X et al. asserted that since Y delegated hiring of Y's employees to A, a mercantile employee, the labor contracts of X et al. should remain in effect under B which now occupied the former position of A with relation to Y. X et al. requested Y's confirmation of the employer status on labor contracts, payment of unpaid wages, etc. The Sapporo District Court rejected the request on September 28, 2018, and X et al. appealed to a higher court.



Overview of this case

Judgment

Whether persons qualify as employees of a merchant including a company should be determined by whether or not it can be said that they are substantively employed by the merchant and provide labor, regardless of the contract type. A received detailed instructions from Y on work policies and results, and was in a position where he would have considerable difficulty in refusing to carry them out, but on the other hand, A had a certain degree of discretion with regard to time, place, and specific procedures for performing labor. While there was little scope for substitution, he conducted his operation based on his own account, work and its results corresponding with remuneration. Therefore, A could not be interpreted as employee of Y.

The above judgment is not affected by the facts that Y payed wages to the employees of A through bank transfers, that remuneration for A was paid by Y in the form of "wage" that Y prepared the agency's bills required for the payment of the remuneration of A, that A's year-end tax returns and payments were carried out under Y's instructions, that Y referred to agents including A as "unit managers" of the operating company, and essentially treated them as a lower-level part of its own corporation in a manner demonstrating them as internal organizations to outside.

Commentary

In this case the plaintiffs did not assert their own status as formal employees of the operating company per se, but rather, based on their assertion that the agent acting as the plaintiffs' (contractual) employer was essentially employed by the operating company, claimed that the plaintiffs were regarded as workers of the operating company. As a matter of form, this is a question of employer status (i.e. who is the employer of X et al.?). However, the essential issue is the nature of worker status of commercial agents, raised in the disputed point (1). This article outlines the circumstances surrounding worker status in Japan, and perspective about this case.

The 1947 Labor Standards Act defines a worker as "one who is employed at an enterprise or place of business and receives wages therefrom, without regard to the kind of occupation" (Art. 9), and the 2007 Labor Contracts Act as "a person who works by being employed by an employer and to whom wages are paid" (Art. 2), but specific criteria are not given. Japanese labor administration set forth criteria for "a worker" in the Labor Standards Act Study Group Report 1985, with the major criteria of (i) whether the person in question can refuse the orders of the client, (ii) whether the person is bound to the client's directions in performing his/her work, (iii) whether the person is bound to a given working time and place, (iv) whether the person can hire another person to perform his/her work, and (v) whether the person remuneration is qualified as for his/her work, not for the product, and with the supplement criteria of (vi) whether the person can be qualified as a business trader, (vii) whether the person has only one client or many, and (viii) other circumstances, to be considered comprehensively. These criteria have been applied to many court cases including the Supreme Court rulings.

The judgment under discussion here was decided comprehensively based on these criteria. The criteria most emphasized are (ii) and (iii), which were conceived with traditional factory workers in mind and have little to do with white-collar workers in today's job market. Indeed, a discretionary work scheme was established under the 1987 amendment to the Labor Standards Act, and has been applied and expanded since then. Under the discretionary work scheme, there is no freedom to accept or reject work duties or targets, though it gives a high degree of discretion about specific procedures, time and place of performing work duties. Even more discretionary high-level professional work scheme was established in 2018. Telework and mobile work, which enable work at home or elsewhere via information technology devices, are also expanding. These workers are of course hired under labor contracts. In other words, insufficiently meeting criteria (ii) and (iii) are no longer sufficient to deny worker status.

In addition, the fact that amount of remuneration depends on performance is not grounds for a contract to be an outsourcing contract, and payment of wage under a piece work payment

system based on a labor contract is assumed in Article 27 of the Labor Standards Act. In recent years, there is an increasing tendency for wage systems to be performance-based, and interpreting criteria (v) too strictly is also not appropriate for contemporary white-collar workers. Thus, the judgment under discussion overly emphasizes worker status criteria assuming traditional factory workers, which are behind the times today, and reveals an inappropriate understanding of remuneration for labor, while underestimating criteria that are still relevant today, such as the freedom to accept or reject work duties or whether workers can be substituted.

These analyses not only reveal the inappropriateness of the judgement but also contains problems of the obsolete nature of the 1985 Report that has been cited for numerous judgments. While it may not be necessary to change the individual criteria themselves, the relative prioritization of their importance will need to be altered in response to changes in the times, such as discretionary work scheme and the growing prevalence of performance-based wages.

The Labor Union Act of 1945 defined workers somewhat broadly as "those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation" (Art. 3). The Supreme Court's decisions rely primarily on the basic criteria of the Act: (i) inclusion in a business organization, (ii) unilateral and standardized determination of the content of contracts, and (iii) remuneration for labor, as factors for judgments. (Details omitted.)

The *Belco* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1188, pp.5–22. See also *Journal of Labor Cases* (Rodo Kaihatsu Kenkyukai) no.82, January 2019, pp.1–23.

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