Employers' Obligation to Consider the Needs of Employees Returning from Childcare Leave

The *Japan Business Lab* Case

Tokyo District Court (Sept. 11, 2018) 1925 *Rodo Horitsu Junpo* 47

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Facts

In July 2008, Worker X entered into an open-ended labor contract with Company Y, a business specializing in language training and other consulting services. Worker X was engaged as a regular employee responsible for conducting coaching.

On March 2, 2013, X gave birth to a child, after which she took postnatal maternity leave, and subsequently childcare leave until March 1, 2014. In February 2014, X met with A, the president of Company Y, and B, the manager responsible for her place of work, to address the fact that she was unable to find a childcare facility to look after her child. It was determined that X's childcare leave would be extended to the date when her child would reach one year and six months of age—namely, September 1, 2014—which was the limit for extensions permitted by the Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members (Childcare and Family Care Leave Act, or CFCLA) at that time.[1]

On July 20, 2014, X met with A and other representatives to request a further three months' extension of her childcare leave on the grounds that she was unable to find a childcare facility for her child. Around August 23, A rejected X's request.

At Company Y there were three types of working arrangement: (i) working as a typical regular employee (seven hours a day, five days a week), (ii) working as a part-time regular employee (four to six hours a day, five days a week), and (iii) working as a fixed-term contract employee (three or four days a week, with the proviso that the employment contract was limited to one year, and had to be renewed each year for continuing the employment relationship). System (iii) was created as an option for workers returning from childcare leave, and it was assumed that a worker in this system would be reinstated as a regular employee should they request it. The treatment of fixed-term contract employees employed under system (iii) differed from that of regular employees in terms of not only the limit on their period of employment, number of working days, and prescribed working hours, but also the composition of their wages (such as that regular employees' overtime pay is fixed—that is, their actual overtime hours are not calculated, and instead they receive a set additional wage equivalent to a predetermined number of overtime hours, but such fixed overtime payment is not offered to workers under system (iii)). Work content also differed, as regular employment includes a specified minimum number of classes to teach and responsibilities such as acting as a role of project leader.

X requested permission to work three days a week while remaining a regular employee, but her request was rejected by Company Y. Of the aforementioned three types of work arrangement, she selected option (iii), and on September 1, 2014, she signed an employment contract with Company Y as a fixed-term contract employee. X then returned to work on September 2 as a fixed-term contract employee. Shortly after, X found a childcare facility to look after her child, and therefore requested B

to allow her to switch to the system (ii)—that is, to work as a part-time regular employee. Company Y rejected X's request. In July 2015, Company Y ordered X to stand by at home, and later informed her that her employment contract would expire on September 1 that year—in other words, that they would not be renewing her contract.

X filed a suit against Company Y with the following claims and demands: (1) the confirmation that she, X, is a regular employee of Company Y, given that she has the right to return to work as a regular employee once she has found a childcare facility to look after her child, (2) in the event that claim (1) is not recognized, the confirmation that Y's refusal to renew her fixed-term contract on September 1, 2015 was a violation of Article 19 of the Labor Contracts Act, and that she, X, is a fixed-term contract employee of Company Y, and (3) that Company Y harassed her due to her pregnancy, childbirth, and taking childcare leave—behavior that is referred to as "maternity harassment" in Japan—and, as such behavior is illegal, should therefore pay solatium (*isharyō*).

Judgment

Tokyo District Court partially upheld and partially dismissed X's claims. The judgment is summarized below.

(1) At Company Y, contracts for regular employees and contracts for fixed-term contract employees differ not only in the contract period and working hours, but also wages and other such working conditions, as well as work content and responsibilities. Consequently, the signing of a fixed-term employment contract by X and Company Y in September 2014 cannot be regarded as the revision of the former labor contract with changes to the terms and conditions of employment. Rather, it can be treated as the cancellation of the regular employment contract and the conclusion of a new contract, under which X was employed as a fixed-term contract employee. X's contract with Company Y as a regular employee has therefore already been canceled.

(2) Article 9, Paragraph 3, of the Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment (Equal Employment Opportunity Act or EEOA) and Article 10 of the CFCLA prohibit the unfavorable treatment of a worker by reason of pregnancy, childbirth, or taking childcare leave. It was difficult for X to work five days a week because she was unable to find a childcare facility to look after her child, and X was unable to fulfill her work obligations as a regular employee at Company Y. When it is taken into consideration that concluding a contract with Company Y as a fixed-term contract employee enabled X to continue her employment, the fact that Company Y canceled X's contract as a regular employee and made a contract with her as a fixed-term contract employee cannot be described as unfavorable treatment of X.

(3) Company Y issued X with a written notification specifying that "employment as a fixed-term contract employee is on the premise that the worker in question will be able to switch back to a contract as a regular employee should they wish." This does not mean that a labor contract as a regular employee is immediately established as soon as X requests it. For X to return to the original form of employment as a regular employee, Company Y needs to agree to employ X as a regular employee once again. As Company Y has not agreed to X's request to return to employment as a regular employee, the court does not recognize the establishment of a regular employment contract between X and Company Y.

(4) Company Y's fixed-term contract employee system was established as an option for regular employees returning to work as a regular employee following childcare leave. Judging from the aims of the system, it can, for instance, be recognized that it presupposes that said employment relationship will continue until the worker's child starts school. The employee contract in this case therefore falls under the type of fixed-term labor contract for which "it is found that there are reasonable grounds upon which the worker expects said contract to be renewed," as specified in Article 19, Item 2, of the Labor Contracts Act.

The grounds were given by Company Y for its refusal to renew the fixed-term labor contract with X: that X continuously demanded that Company Y restore her to regular employment, that she spoke with colleagues about the process of negotiations with Company Y, that she spoke to the media regarding the matter, that she made an audio recording of the content of negotiations without Y's permission, and that she received and sent non-work-related emails during working hours. They cannot objectively be seen as reasonable grounds for refusal to renew said contract. Accordingly, X holds the status by the fixed-term employment contract with Company Y and may claim for the payment of damages such as unpaid wages dating back to Company Y's refusal to renew the contract.

(5) Company Y stated that fixed-term contract employees may have their contract changed to a regular employment contract should they request it. X entered into a contract as a fixed-term employee and then later found a childcare facility to look after her child. Given these circumstances, since X has requested to return to employment as a regular employee, Company Y is subject to good faith principle to pursue sincere efforts to negotiate with X and provide her with any information required. While X adopted the flexible stance for both parties to discuss the issue and come to a decision in such a way that neither would be disadvantaged, Company Y consistently adopted an insincere stance toward negotiations with pressuring X to compromise in the negotiations by implying the risk of disciplinary measures. Moreover, X's supervisor, C, made the following statement at a meeting with X: "If my wife and I were going to have a child, I would make sure I'm prepared to earn enough to support the whole family before her pregnancy." This thoughtless and inappropriate statement—which suggests that a woman who has become pregnant should leave her employment and depend on her partner's income—is unacceptable. As Company Y's insincere actions toward X can all be attributed to the fact that X is raising a young child, Company Y should pay solatium to X in the sum of one million Japanese yen.

Commentary

This case dealt with a worker who was unable to return to full-time employment as a regular employee at the end of the legally-prescribed period of childcare leave due to the lack of childcare facility to look after her child. It raised the following three issues: firstly, the worker was forced to switch to employment as a fixed-term contract employee, a form of employment which entailed not only different numbers of working days and hours, but also different job responsibilities and a different wage system; secondly, when the worker in question requested to return to regular employment after finding a childcare facility to look after her child, the employer rejected this request; and thirdly, the employer later refused to renew its fixed-term labor contract with the worker in question.

Let us start by looking at the background to this case. In Japan, the CFCLA prescribes a worker's right to take childcare leave. As a general rule, childcare leave lasts until the worker's child "reaches one year of age." Under the CFCLA at the time of this incident, there was also the proviso that, in the event of special circumstances such as the worker not finding a childcare facility to look after their child, the childcare leave could be extended until the child "reaches one year and six months of age." (Currently, two years of age.) Despite such legal provisions and parents' demand, in Japan there is a severe shortage of childcare facilities—this is referred to in Japanese as "the problem of '*taiki jidō*'" (literally, "children on the waiting lists to enter the childcare facilities").[2] In fact a considerable number of workers are unable to find a childcare facility for their child when their child turns one year and six months of age.

In order to support workers who have returned to work after completing their period of childcare leave and to assist them in combining work and childrearing, the CFCLA obligates employers to take measures to shorten prescribed working hours (in other words, to offer a reduced schedule work) or other such measures for those workers with children under three years of age who request such assistance.[3] However, no explicit provisions regarding a worker's rights upon returning to full-

time work after childcare leave or a reduced schedule work, such as their right to return to the position they held prior to childcare leave have not been set. The CFCLA merely obligates employers to endeavor to set out provisions regarding the related matters in advance and take measures to make them known to workers.

While the law does not explicitly protect a worker's right to return to their original position, as we shall look at below, it prohibits "unfavorable treatment." Namely, the EEOA expressly prohibits employers from giving the unfavorable treatment of workers on the grounds of pregnancy and childbirth, and the CFCLA prohibits such treatment on the grounds of childcare leave.

The prohibition of such unfavorable treatment was addressed in the *Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai* case (*Hiroshima Central Health Care Cooperative* case) Supreme Court, (Oct. 23, 2014) 1100 *Rohan* 5.[4] In said case, the Supreme Court determined that measures taken by an employer to demote a woman worker upon transferring her to light activities during pregnancy, in principle, constitutes treatment that is prohibited under Article 9, paragraph (3) of the EEOA. In this case, a worker had been demoted from a managerial level post as a deputy chief (*fukushunin*) to a non-managerial level position when said worker had requested to be reassigned to light activities due to her pregnancy (as was her right under the provisions of the Labor Standards Act). The issue at question was whether this demotion was in violation of the aforementioned the prohibition of unfavorable treatment in the EEOA. The Supreme Court appears to have taken the stance that in principle any form of unfavorable treatment due to pregnancy, childbirth or other such circumstances is a violation of the EEOA. On the other hand, the same Supreme Court judgment specified exceptions where such treatment is not classed as a violation of the law: (a) Where there are objectively reasonable grounds to deem that the demotion has been consented based on the worker's free will, in light of factors such as the content or extent of the favorable and unfavorable impacts of the measures taken by the employer, the content of the employer's explanation, and other such aspects, or (b) If the employer had difficulties in transferring the woman worker to light activities without taking a measure to demote her due to the operational necessity such as ensuring smooth business operations, or securing proper staffing, and there are special circumstances due to which said measure is not found to be substantially contrary to the purpose and objective of said paragraph, said measure does not constitute treatment that is prohibited under said paragraph and if there are special circumstances that do not substantially go against the purpose and objective of the statutory prohibition of unfavorable treatment in light of the content or extent of operational necessity and aforementioned favorable or unfavorable impacts. Justice Ryuko Sakurai also added a concurring opinion to this case. In the opinion, she suggested that the same logic for the violation of EEOA could be applied to CFCLA as well,—namely, unfavorable treatment on reassignment to light activities during pregnancy—might also be applied for judgments regarding whether treatment in response to a worker taking childcare leave falls under "unfavorable treatment" prohibited by the CFCLA.

In relation to the aforementioned (a) of the Supreme Court's "special exceptions," in the *Japan Business Lab* case the point in dispute is that when X completed her period of childcare leave and it was difficult for her to return to her job as a regular employee, the only viable option offered to her by Company Y was employment as a fixed-term contract employee, a form of employment with differing work-related responsibilities and in turn a differing wage system. On this point, the Court determined that without the system for continuing employment as a fixed-term contract employee, X would have had difficulty continuing to work and been forced to leave her employment (this stance appears to be based on the premise that the worker has completed the legally-prescribed period of childcare leave, and the fact that the CFCLA only obligates employers to take measures to "shorten prescribed working *hours*" and does not obligate them to take measures to reduce the number of working days). The court

therefore came to the conclusion that the continuation of work as a fixed-term contract employee was not in violation of the law because although it meant that X's wages and other such conditions were lower than these prior to her childcare leave, it could be seen as a treatment that was favorable to X when compared with the alternative option that would ultimately mean her having to leave her employment. The court also determined that while X requested to return to employment as a regular employee on finding a childcare facility to look after her child, she could not expect to automatically return to regular employment on her request, as this also required the agreement with Company Y.

The reasoning adopted in this judgment seems valid when we consider that the measures taken by Company Y were not directly in violation of the provisions prescribed by the CFCLA regarding childcare leave and a reduced schedule work. On the other hand, it can be suggested that the series of actions taken by Company Y were in violation of the purport of the CFCLA given the following circumstances: the fact that Company Y was aware that X would have ultimately been forced to leave her regular employment due to needing to care for her child unless she had accepted the option of working as a fixed-term contract employee with different responsibilities and lower wages, the fact that X's original request at the time of returning from childcare leave of being able to continue her employment as a regular employee while working fewer days was only considered as a temporary measure until she had found a childcare facility, and the fact that if X were to become a fixed-term employee under (iii)—namely, work as a fixed-term contract employee—for a long period of time, she would be subject to a significant reduction in her income (although it is also necessary to take into account the fact that this reduction is due to the decrease in her working hours). Therefore, while it did not recognize a violation of the CFCLA, the court appears (although not explicitly stating as such in its judgment) to have taken such circumstances, along with Y's insincere response to X's request to return to regular employment, into consideration as a factor when deciding whether or not Company Y's behavior was illegal and violation of their duties in good faith. It must be noted, however, that it is somewhat difficult to form legal reasoning by which X's claim (i)—confirmation of her status as a regular employee—is recognized in addition to (iii), her request for payment of damages. In any case, there is considerable interest in what judgment will be reached by the High Court.

1. The Childcare and Family Care Leave Act (CFCLA) entitles workers to take childcare leave until their child reaches one year of age. Under the CFCLA at the time of this case, the proviso attached to this was that the workers could take childcare leave until their child reached one year and six months of age, in the event that the workers were unable to find a childcare facility to look after their child or other such circumstances.
2. Under the 2017 amendment to the CFCLA, workers are currently able to extend their childcare leave until their child reaches two years of age. This amendment has on one hand been positively received as a measure to address the problem of long waiting lists for childcare (the *taiki jidō* issue), while on the other it is criticized on the grounds of the potentially negative impact that the extension of childcare leave could have on workers' career development, and other such factors.
3. For workers with children between the age of three and the time at which they start elementary school (April of the year in which they turn seven years of age), the employer is only obligated to make efforts to take similar measures.
4. For details of the *Hiroshima Chuo Hoken Seikyo (C Seikyo Hospital)* case, see the Supreme Court judgment at http://www.courts.go.jp/app/hanrei_en/detail?id=1297 (English) and http://www.courts.go.jp/app/files/hanrei_jp/577/084577_hanrei.pdf (Japanese).

The *Japan Business Lab* case, *Rodo Horitsu Junpo* (*Rojun*, Junposha) 1925, pp. 47–78. For the Supreme Court judgment, see http://www.courts.go.jp/app/files/hanrei_jp/404/088404_hanrei.pdf (in Japanese).

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