Legal Liability Regarding "Power Harassment" and the Scope of That Liability

The *Fukuda Denshi Nagano Hanbai* Case
Tokyo High Court (Oct. 18, 2017) 1179 *Rodo Hanrei* 47

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I. Facts

Company Y_1 specializes in the sale of medical equipment. Y_2 took over as representative director ("CEO") of Company Y_1 on April 1, 2013.

X_1, X_2, X_3 and X_4 were employees of Company Y_1. In April 2013, the time of the incident, X_1–X_3 were in their fifties and X_4 was 48 years old. X_1–X_4 were the only female employees working at the head offices of Company Y_1. X_1 was a section chief (*kakarichō*) of sales management and administration, X_2 was a section chief of accounting and general affairs, and X_3 and X_4 were administrative staff members.

X_2 had been responsible for accounting under Company Y_1's former CEO, who had held said role for over 20 years. One of X_2's tasks was to deal with any incomplete or incorrect entries on the payment request forms submitted by the former CEO, by checking with the former CEO or other such means. X_2 would submit such documents for audits by the parent company's internal control department and other such purposes, and was never instructed to make improvements to her handling of such matters. Company Y_1 underwent an inspection by the local tax office in 2011, and in May 2012 submitted an amended return for corrections to entertainment expenses and other such items, on which basis it paid 20 million yen in corporation and other such taxes. The company subsequently also paid delinquent tax and other such charges around 6 million yen in October 2012.

In a speech he gave to introduce himself after taking up his post, Y_2 touched on the fact that Company Y_1's former CEO had held that post for a long period of time, and that most of the employees had therefore been accustomed to following said former CEO's leadership. Y_2 went on to note that the current choice of personnel and their positions was not his doing, and he would be demoting staff whom he felt incapable for their positions.

Shortly after, Y_2 started to look into the backgrounds of the aforementioned amended return and payments, as he had decided that they were a problem that needed to be addressed. On July 9, 2013, Y_2 summoned X_2 to talk to her about what he saw as her improper processing of the accounts. On this occasion, Y_2's statements to X_2 included such comments as: "My predecessor was strange, that's probably why it was done that way" and "So, would you steal if you were ordered to?" Y_2, who claimed that he felt offended because X_2 was "emotionally shut off" to him, also made comments such as: "You'd do anything my predecessor told you to? You're not an errand child" and "It's as if the company was run by gangsters." Company Y_1's committee for rewards and disciplinary action decided to impose the punishment of demotion ("the demotion") on X_2, on the grounds of "improper accounts processing." Y_2 also reduced the bonus paid to X_2 in July 2013.

In addition, Y_2 reduced the July 2013 bonus paid to X_1. When explaining to X_1 the grounds for reducing her bonus, Y_2 made comments such as the following: "We are going to implement a personnel rotation now, but if we get someone else to take over your position, could they properly carry out the tasks you have done? If one person has been

doing the same work for 32 years, it's impossible. Leaving a job to the same person for as long as 30 years is not right—the same goes for accounting. They just assume everything is fine—they barely recognize the potential problems. Women feel they have something to protect, so they will always resist when someone tries to do something new. You (X_1) and X_2 are both afraid of change." Y_2 also said to X_1, "If you are not responsible because you were doing exactly what the CEO told you to, that makes you an errand child." He also told X_1 that while X_2 was responsible, X_1 could also be held responsible, and that the company could seek criminal prosecution of the case, as well as commenting: "X_2 is strange, so she has shut herself off to me" and "I have spoken to X_2 many times, but when someone gets to the age of 57 or 58, they are not prepared to change their minds." Y_2 also commented that the salaries received by X_1 and her colleagues were too high.

X_2 and X_1 spoke with X_3, and the three decided to resign, forfeiting the few years of employment they had left before mandatory retirement age. They submitted their letters of resignation on July 16, 2013. On the same morning, X_4 heard from X_2 and the others that they were resigning and was persuaded by them not to resign from the company because she still had a considerable number of years of employment before mandatory retirement age. However, X_4 submitted her letter of resignation the following day, because she felt it would be difficult for her if only she continued to work at the company.

X_4 left her employment with the company on August 31, 2013, and X_1–X_3 left on September 30, 2013. X_1–X_3 each received a severance payment from Company Y_1 calculated using the coefficient for voluntary resignations (resigning for personal reasons), while X_4 did not receive a severance payment on the grounds that she was a person resigning voluntarily who did not meet the conditions regarding period of employment at the company.

X_1–X_4 each sought consolation money (*isharyō*) and other totaling 3.3 million yen as well as other payments from Y_2 and Company Y_1 on grounds such as the fact that as Company Y_1 employees they had been subjected to "power harassment" (see commentary) by Y_2 which had forced them to resign. The claim against Y_2 was based on his having committed a torts, while the claim against Company Y_1 was based on the provisions of Article 350 of the Companies Act. (The other payments sought by X_1–X_4 included the amount of severance payment lost due to it being calculated using the coefficient for voluntary resignation, the amounts by which the bonuses of X_1–X_2 had been reduced, and the amount that the wages of X_2 had been reduced due to the demotion.) The court below (Nagano District Court Matsumoto Branch (May 17, 2017) 1179 *Rohan* 63) partially upheld X_1–X_4's claims. Company Y_1 and Y_2 filed an appeal with the Tokyo High Court and X_1–X_4 lodged an incidental appeal.

II. Judgment

The Tokyo High Court's judgment can be summarized as follows:

(1) The demotion of X_2 was extremely unjust, given that, in terms of substantial grounds, there was no premise for such a disciplinary action and, in terms of the procedures followed, the investigation into the circumstances was highly insufficient. The demotion is an abuse of the right to discipline and thereby invalid, and X_2 is therefore entitled to claim the amount that her wages were reduced.

(2) Y_2 made an arbitrary assessment to determine the reduction of X_1's and X_2's bonuses. Said assessment was a deviation or abuse of Y_2's discretionary powers and thereby invalid, and X_1 and X_2 are therefore entitled to claim the amount by which their bonuses were reduced.

(3) The judgment regarding power harassment by Y_2 was as follows.

(a) Regarding X_2

On July 9, 2013, Y_2 one-sidedly criticized and reproached X_2 at length, without responding to X_2's attempts to explain. His comments included: "You followed the former CEO's orders, but you won't follow mine," "Would you steal, just because you were told to?" "It's as if the company was run by gangsters," "It's wrong to place the blame on someone who's not here," and "That's what a child would do." As noted, there were no grounds for

X_2 to receive a disciplinary action and thereby the demotion was invalid and there was no cause to reduce her bonus. There are no grounds upon which it could be claimed that Y_2's decision to impose a disciplinary punishment and bonus reduction upon X_2 was unavoidable. After taking up his post as CEO of Company Y_1, Y_2 continuously criticized and reproached X_2 without due cause, reduced her bonus without due cause, and imposed an invalid demotion upon her, among other actions. As a result, X_2, a long-term employee of Company Y_1 who was intending to remain with the company until mandatory retirement age, abandoned her intention to continue working with the company and resigned. With this combination of circumstances, the series of actions by Y_2 constitute forcing X_2 to resign and are therefore illegal.

(b) Regarding X_1

As X_1–X_4 were the only four full-time administrative staff members employed at Company Y_1's head offices, X_1 was inevitably aware of Y_2's words and actions ("conduct") toward X_2 in and after April 2013. In July 2013, around the time that this was happening, X_1 was aware that X_2 would definitely receive a disciplinary action despite a lack of due cause. X_1 also had her own bonus reduced without due cause. As grounds for the reduction of X_1's bonus, Y_2 suggested to X_1 that she was not necessary for the future running of the company, with comments such as "X_2 is responsible but you (X_1) can also be held responsible," "The company has what it needs to make this a criminal case—we can sue, and we haven't forfeited that right," "If you keep this up, it'll be a case of whether we take this to court, and X_2 will inevitably face the same charges," "Your salary is too high. Staff in their fifties are no use to the company."

As a result, X_1, a long-term employee of Company Y_1 who was intending to remain with the company until mandatory retirement age, discussed with X_2 and others and consequently abandoned her intention to continue working with the company and resigned. With this combination of circumstances, the series of actions by Y_2 constitute forcing X_1 to resign and are therefore illegal.

(c) Regarding X_3 and X_4

As they shared a workplace with X_1 and X_2, X_3 and X_4 saw and heard Y_2's conduct toward X_1 and X_2 and were aware that Y_2 had imposed disciplinary punishments upon X_1 and X_2, and reduced their bonuses without due cause, as well as telling them that they were not necessary for the running of the company. It is natural that X_3 and X_4 should therefore assume that they should also be treated in a similar way in the future. Having seen and heard Y_2's conduct toward X_1 and X_2, and thereby believing that they would at some point be treated in the same way and be forced to resign, X_3 and X_4 consequently each decided to resign, despite having been intent on working at Company Y_1 until mandatory retirement age. With this combination of circumstances, the aforementioned series of actions by Y_2 toward X_1 and X_2 also constitute indirectly forcing X_3 and X_4 to resign, such that the actions were also illegal in the context of the relationship with X_3 and X_4.

(d) As explained above, the aforementioned series of actions by Y_2 are illegal, and, given that X_1 and X_4 thereby suffered mental damage, it holds that Y_2 committed a tort, and that Company Y_1 is liable under Article 350 of the Companies Act. The suitable amounts of consolation money and other such compensation to be received for said mental damage are 770,000 yen for X_1, 1.1 million yen for X_2, and 440,000 yen for X_3 and X_4 respectively.

(4) As X_1–X_4 had no choice but to resign due to Y_2's actions, their resignations can be regarded as involuntary resignation (resignation at the convenience of the employer). X_1 and X_4 are therefore entitled to claim a severance payment calculated using the coefficient for involuntary resignation.

III. Commentary

Company Y_1 and Y_2 subsequently responded to this judgment by filing a Supreme Court appeal, but the appeal was dismissed (Supreme Court [May 15, 2018] *Hanrei Hisho* L07310102).

Workplace harassment is a recognized employment-related issue in many countries, and Japan is no exception. Before the introduction of

regulations prohibiting workplace harassment in respective labour laws, courts have accumulated many precedents related to sexual harassment and what is known as "power harassment."

"Power harassment," a term originally coined into Japanese, borrowed each word from English words (in total, no equivalent expression in English), first came into use in the early 2000s, generally to refer to harassment by a person in a superior position. Typical cases of power harassment are seen as those in which a person with some form of power inflicts harm upon someone lacking such power, such as a manager taking advantage of their superior position to discipline a subordinate, or a senior employee giving unjust training to a junior employee.

Below are five examples of the power harassment-related cases[1] that have been pursued in Japan to date.

(1) The *Mitsui Sumitomo Insurance Company* case (Tokyo High Court [Apr. 20, 2005] 914 *Rohan* 82), in which a manager sent an email containing comments such as "If you can't be motivated, you should quit the company" to not only the subordinate the comments were directed at but also the colleagues at the subordinate's workplace.

(2) The *Nippon Doken* case (Tsu District Court [Feb. 19, 2009] 982 *Rohan* 66), in which a supervisor's conduct toward new employee included saying "you can't even understand that?" throwing items, and kicking a table.

(3) The *Windsor Hotels International* case (Tokyo High Court [Feb. 27, 2013] 1072 *Rohan* 5), in which a manager forced a subordinate to drink alcohol, sent said subordinate reprimanding email in the middle of the night, and, when said subordinate did not follow orders, left an answerphone message in the middle of the night saying "Quit. Hand in your resignation. I'll beat you to death."

(4) The *Arkray Factory* case (Osaka High Court [Oct. 9, 2013] 1083 *Rohan* 24), in which a regularly employed manager said "I'll kill you," to an agency worker when said worker failed to follow instructions or made a mistake.

(5) The *Kano Seika* case (Nagoya High Court [Nov. 30, 2017] 1175 *Rohan* 26), in which a senior employee adopted a severe tone when reprimanding a junior employee who had made a mistake, making comments such as "always the same mistakes."

In all these cases, the claims of the person subjected to the harassment ("harassed person") were partially upheld. In contrast, the following are two examples of cases in which the harassed person's claims were not approved.

(6) The *A Hospital* case (Fukui District Court [Apr. 22, 2009] 985 *Rohan* 23), in which the hospital director reduced the number of patients assigned to the physician in charge of internal medicine.

(7) The *Maeda Road Construction* case (Takamatsu High Court [Apr. 23, 2009] 990 *Rohan* 134), in which a manager reprimanded a subordinate with comments such as: "You probably think you can solve this by quitting the company, but even if you quit, things won't get easier."

In both cases, the judgments were influenced by the recognition that the harassed person had committed serious misconduct. Namely, in case (6), there were found to be grounds for the dismissal of the harassed person under the provisions of the rules of employment, and in case (7), it was recognized that the harassed person had been improperly processing accounts and had failed to correct said conduct more than a year after receiving an order to do so.

As explained above, power harassment cases involve the personal relationship that exists between a manager and their subordinate—namely, a relationship in which one party has some form of superiority over the other. Many of these cases also involve situations in which the superior was responding to misconduct by the harassed person with excessive discipline or unjust training. One distinctive characteristic of power harassment cases is perhaps therefore that they may also involve scenarios in which the victim (harassed person) committed misconduct.[2]

In the case addressed here, the point at issue was whether Y_2, in his role as CEO of Company Y_1, had committed power harassment that resulted in X_1–X_4 resigning, which included addressing the fact that Y_2 one-sidedly criticized and reproached

X_2 at length, and that Y_2 behaved in a discriminatory manner toward X_1 (which included comments such as: "Women feel they have something to protect, so they will always resist when someone tries to do something new" and "Staff in their fifties are no use to the company").[3] It is also a case in which a person in a position of seniority used excessive discipline in response to perceived misconduct, because Y_2 adopted such conduct due to his belief that X_2 had been involved in "improper accounts processing" (a belief which was, however, found to be unjust, as noted in item (1) of the judgment summary above).

A particularly distinctive aspect of the judgment in this case is that X_3–X_4 were also recognized as eligible for judicial remedy, despite not being direct targets of Y_2's conduct (as noted in (3) (c) of Judgment). The judgment that the series of actions toward X_1 and X_2 also indirectly forced X_3 and X_4 to resign is based on situations such that X_1–X_4 were the only four female employees working at the head offices of Company Y_1. In this respect, the scope of relevance of this judgment as a judicial precedent is relatively limited. It is, however, possible to build on this judgment to suggest that in cases that involve conduct toward a particular individual who is part of a group of people all sharing certain characteristics (in this case, the fact that X_1–X_4 were all women, of older age, and in full-time administrative roles), where that conduct is related to those characteristics, said conduct may be regarded as illegal not only in the relationship with the particular individual but also in the relationships with the other individuals who make up the said group. This judgment is particularly significant given that there does not appear to be any other clear judgments regarding indirect victims in the context of power harassment cases.

In Japan, harassment is often legally perceived as an infringement of personal rights (rights to protect personal interests). As a result, judgments on workplace harassment disputes may—as in this case—take the form of the conduct being considered to constitute a tort, or, of the conduct being held to constitute a default due to a breach of contractual obligations (Civil Code, Article 415[4]). There are many incidences in which cases are brought on the basis of a combination of the two.

As this case addressed whether Y_2's conduct constituted a tort, it was assessed whether that conduct was illegal in relation to Article 709 of the Civil Code.[5] The case also addressed Company Y_1's liability under Article 350 of the Companies Act,[6] an article that prescribes liability to compensate damages caused by the actions of "representative directors or other such representatives." As there are only a limited number of cases in which such conduct is committed by such a representative themselves, the majority of harassment-related judgments in Japan take the two forms described above (namely, whether the conduct constitutes a tort or whether it constitutes a default on obligations). This method of judging such cases in terms of whether the behavior constitutes a tort or default on obligations under the Civil Code originates from the fact that there is no existing legislation in Japan to substantiate the kind of compensation for damages generally appropriate in the case of workplace harassment.

However, that is not to say that there is no legislation in Japan regarding harassment in the workplace. At present, there are provisions covering the following forms of harassment.

(a) Provisions pertaining to sexual harassment
(b) Provisions pertaining to harassment related to pregnancy or childbirth, etc.
(c) Provisions pertaining to harassment related to childcare leave, etc.
(d) Provisions pertaining to power harassment (provisions newly established in 2019, as explained below)

Equal Employment Opportunity Act (Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment), which can be classified as public law if we assume a dichotomy between public and private law, contains the provisions pertaining to sexual harassment (type (a)) in Article 11 and Article 11-2. Said Act (Article 11-3 and Article 11-4) also contains provisions pertaining to harassment related to pregnancy or childbirth, etc. (type (b)). Likewise, provisions pertaining to harassment related to childcare leave, etc. (type (c)) are set out in Article 25 and Article

25-2 of the (Childcare and Family Care Leave Act (Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members), which can also be classified as public law. In Japan, a certain level of conduct that obstructs or interferes with a person to exercise the rights guaranteed to them as a worker in relation to pregnancy or childbirth, etc. is addressed as a type of harassment known as "maternity harassment." In the case of harassment related to childcare leave, etc., discussions are likewise directed at conduct that hinders a person from exercising the rights guaranteed to them as a worker. Provisions concerning these three types of harassment (types (a), (b) and (c)) share the common element that they ensure that "employers shall establish necessary measures in terms of employment management to give advice to workers and cope with problems of workers, and take other necessary measures so that said workers . . . . do not suffer any harm in their working environments" due to said conduct.[7] The measures that business operators (employers) are obliged to take regarding each type of harassment are set out in the respective guidelines established by the Minister of Health, Labour and Welfare. While employers may receive administrative guidance and or other such forms of direction on the basis of such legislation regarding their obligations to take measures, such legislation is not directly effective in a private law context. Namely, a violation of an obligation to take measures does not directly lead to the employer being liable to provide compensation for damages. At the same time, in the case of civil disputes where damage compensation is sought in relation to workplace harassment, courts may also refer to the extent to which the employer has fulfilled their obligations to take measures as prescribed under public law in making their judgments on the employer's liability regarding default on obligations or (the employer's) liability for torts,[8] or other such factors.

In relation to such obligations for employers to take measures, new provisions regarding power harassment (type (d)) have been established in Japan in 2019—namely, Article 30-2 and Article 30-3 of the Act on Comprehensive Promotion of Labour Policies (promulgated on June 5, 2019; to be enforced on June 1, 2020).[9] Firstly, Article 30-2 (1) obliges employers to take measures on power harassment, as is the case with the other three types of harassment (types (a), (b), and (c) above). Moreover, while there was no legislation prescribing the definition of power harassment, the text of Article 30-2 (1) in fact states (i) language and conduct based on the superior position in the working relationship in which one party has a superior position, (ii) exceeds the necessary and suitable boundaries according to the business, and (iii) causes harm to the worker in their working environment can be treated as power harassment.[10] (The Ministry of Health, Labour and Welfare has distributed a pamphlet to essentially the same effect.) Article 30-2 (2) also prohibits dismissal or other such disadvantageous treatment on the grounds that a worker sought advice regarding power harassment or other such reasons, and Article 30-2 (3) prescribes matters such as the creation of related guidelines. Secondly, Article 30-3 also addresses (1) power harassment by prescribing the national government's responsibility to pursue measures to share information and raise public awareness, (2) employers' responsibility to conduct training and pursue other such means to support the measures developed by the national government as well as (3) their responsibility to draw attention and promote understanding and to take the necessary care, and (4) workers' responsibility to support the measures taken by their employer to develop attention and understanding and to take the necessary care—although in all cases the parties involved are only under the "duty-to-endeavor" (*doryoku gimu*) to do so. The guidelines regarding the measures that employers will be expected to take (that is, the guidelines to be created as prescribed in Article 30-2 (3)), are under consideration by the Labour Policy Council at present (as of October 2019).

As we have seen, legislation regarding power harassment is now being introduced along the lines of Japan's existing public law provisions addressing harassment in the form of sexual harassment, harassment related to pregnancy and childbirth, etc.

and harassment related to childcare leave, etc. We have also addressed the fact that there are various judicial precedents regarding power harassment in the context of private law. Amid such developments and precedents, the judgment here is noteworthy as a significant decision regarding legal liability on power harassment in particular, the scope of that liability, and more specifically, the fact that not only the direct victim, but also indirect victims were entitled a remedy.

1. For the purpose of this paper, "power harassment-related cases" refers to judicial precedents in which the term "power harassment" appeared in any part of the judgment and a judgment was passed regarding it.

2. Cases in which the harassed person was repeatedly harassed even though they had not committed serious misconduct may be referred to with the term "workplace bullying" or other such terms. Such workplace bullying is often regarded as power harassment where it involves a personal relationship in which one party has a superior position. Misconduct by the harassed person is therefore not a requirement to be considered power harassment.

3. In the original text of the judgment, the part that corresponds to the case summary (3) of this judgment is titled "Regarding power harassment by Y_2."

4. Article 415 of the Civil Code reads: "If an obligor fails to perform consistent with the purpose of its obligation, the obligee shall be entitled to demand damages arising from such failure. The same shall apply in cases it has become impossible to perform due to reasons attributable to the obligor."

5. Article 709 of the Civil Code reads: "A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence."

6. Article 350 of the Companies Act reads: "A Stock Company is liable for damage caused to third parties by its Representative Directors or other representatives during the course of the performance of their duties."

7. In the provisions pertaining to harassment related to pregnancy or childbirth, etc. the phrase "said *women* workers" is used in place of "said workers."

8. Regarding an employer's liability, Article 715 Paragraph 1 of the Civil Code states: "A person who employs others for a certain business shall be liable for damages inflicted on a third party by his/her employees with respect to the execution of that business; provided, however, that this shall not apply if the employer exercised reasonable care in appointing the employee or in supervising the business, or if the damages could not have been avoided even if he/she had exercised reasonable care."

9. For small and medium-sized enterprises, the obligation to take measures shall be treated as duty-to-endeavor until March 30, 2022.

10. It is, however, important to note that the term "power harassment" does not appear in the main clause of the law.

The *Fukuda Denshi Nagano Hanbai* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1179, pp. 47–70. See also *Journal of Labour Cases* (Rodo Kaihatsu Kenkyukai) no. 70, January 2018, pp. 1–22.

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