Reduction in the Shifts of a Non-standard Shift Worker

The *Silverheart* Case
Tokyo District Court (Nov. 25, 2020) 1245 *Rodo Hanrei* 27

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I. Facts

Y is a private limited company that provides care services and after-school day care for children with physical or mental disabilities ("after-school care"). X entered Y's employment on January 30, 2014, and was engaged in providing care on a shift basis. The employment contract's only stipulation regarding working hours—aside from the times that work begins and ends—was "on a shift basis." In January 2016, X began to be assigned shifts providing after-school care (afternoons, i.e., half days) and, from February 2017 onward, was assigned exclusively to after-school care. Regarding this as a wrongful transfer within the company, X filed an objection, and, having joined a regional labor union, was pursuing collective bargaining.

X's work shifts were reduced from 15 days (78 hours) in July 2017 to 5 days (40 hours) in August 2017, and one day (8 hours) in September 2017, and in and after October 2017, X was no longer assigned any days at all. While X claimed to have an agreement with Y that X would be engaged in providing care services with working hours of 8 hours a day for 3 days a week (24 hours a week), Y filed a suit seeking confirmation that no such agreement existed. X filed a counterclaim in response.

II. Judgment

While X claimed to have an agreement with Y regarding working hours, the Tokyo District Court did not recognize the existence of such an agreement, given that the employment contract stated that the work was "on a shift basis," that previous schedules also showed variation in the number of times X worked per month between 9–16 times, and that it was difficult to set a certain number of days of work per month.

At the same time, the District Court recognized that the drastic reduction of shifts without reasonable grounds constitutes abuse of the employer's right to determine shifts, given that for shift workers, the drastic reduction in shifts directly results in decrease in income and thereby significant disadvantage to the worker.

Thus, while recognizing the August schedule of 5 days (40 hours) as reasonable, the Tokyo District Court found no reasonable grounds for the drastic reduction in shifts in September to only one day (8 hours) and in October to no days at all, and therefore the ruling determined that these reductions were illegal, as they constituted abuse of the employer's right to determine shifts, and ordered the payment of the difference with X's average wages in the prior three months (May–July).

III. Commentary

Non-standard shift work has been a significant topic of discussion in Japan in recent years. Standard shift systems such as the systems of "two shifts" (day shift and night shift) or "three shifts"

(day shift, early night shift, and late night shift) where, while working days or working times may vary, the scheduled working hours for a certain time period are predetermined. In contrast, non-standard shift work does not have scheduled working days or scheduled working hours that have been determined in advance. The days and time slots when non-standard shift workers work are sporadically determined—to be exact, they are assigned in shifts arranged on the basis of their requests submitted in advance—by their supervisor, such as their shop or restaurant manager, at weekly, monthly, or other such regular intervals. Given that they do not have scheduled working hours that have been predetermined, such non-standard shift workers may face the problem of receiving too few shifts or no shifts at all, and consequently not earning the income they expected to.

Such non-standard shift work poses the same issues as approaches such as on-call work, on-demand work, and zero-hours contract work—forms of work that have become an issue in EU countries in recent years. In the political field, there have also been calls for provisions similar to those of the EU's Directive 2019/1152 on Transparent and Predictable Working Conditions.

Since the onset of the COVID-19 pandemic in 2020, support has been provided in the form of the Employment Adjustment Subsidy (*koyō chōsei joseikin*) to subsidize compensation for leave taken at the order of the employer and the Support Allowance for Leave Forced to be Taken Under the COVID-19 Outbreak (*kyūgyō shienkin*), but issues have arisen regarding whether or not the reduction of the non-standard shift work constitutes the leave to which such financial aid applies. Since January 2021, the Ministry of Health, Labour and Welfare's Employment Security Bureau, which holds authority over employment-related subsidies, has declared that from January 2021 onward, those people who work on a shift or other such basis—and therefore whose working days are not specified in their labor contracts—are eligible for such payments under certain conditions. At the same time, it is unclear whether such leave qualifies for the leave allowances that employers are obliged to pay under Article 26 of the Labor Standards Act.

Under the existing legislation, there are few judicial precedents addressing the acceptability of reduction of shifts, and this case is one of them. With regard firstly to non-standard shift work itself, this judgment recognizes labor contracts that do not determine scheduled working days or scheduled working hours, on the grounds that "the very agreement for work to be shift based is not unthinkable, given that it is also beneficial for workers for working days and number of working days to be assigned in shifts on the basis of their requests regarding their work for the coming month, in the sense that the schedules may be suited to their convenience." On the other hand, based on the fact that "the drastic reduction in shifts directly results in reduction in income, and therefore significant disadvantage for the worker," the court recognized that "the drastic reduction of shifts without reasonable grounds may be deemed illegal as it constitutes abuse of the employer's right to determine shifts," and thereby set out a standard for judgment that "on the basis of Article 536, paragraph (2) of the Civil Code, a worker may demand the payment of wages for the equivalent number of working hours by which the work was unreasonably reduced."

At the same time, it is questionable whether this judgment can be viewed as a general standard for decisions regarding non-standard shift work. That is, given that in this case, X had sought to address what X perceived as a wrongful transfer within the company from care services to after-school care by joining an external labor union (that is, not Y's enterprise-based union) to pursue collective bargaining, and that to Y, this was an act of hostility toward Y, the reduction in shifts had strong connotations of a punitive action by Y in response to the perceived rebellious conduct. At the very least, given that in 2017—the year in question—Y was not forced to reduce its care services or after school childcare business or tackle other such circumstances, it would be natural to determine that the reduction of X's shifts by Y was unreasonable.

Since the onset of the COVID-19 pandemic in 2020, declarations of a state of emergency in Japan have led to a major slump in demand for many eating and drinking establishments and other such businesses directly offering services to customers, leaving such enterprises with a huge personnel surplus. As a result, while those workers other than non-standard shift workers were sent on leave and received employment-related subsidies, non-standard shift workers had their shifts reduced, as opposed to being ordered to go on leave. In that sense, if the concept of non-standard shift work by its nature assumes the possibility of workers' shifts being increased or decreased in number according to fluctuations in business conditions, it is difficult to conclude that it is unreasonable for shifts to be reduced on the grounds of poor business.

This case is one of the few judicial precedents regarding non-standard shift work. However, it is necessary to practice caution when considering whether it can serve as a direct reference in cases of shift reduction in the COVID-19 pandemic.[1]

1. Article 26 of the Labor Standards Act stipulates that "[i]n the event of an absence from work for reasons attributable to the employer, the employer must pay the worker an allowance equal to at least 60 percent of their average wage during that period of absence from work." Article 536, paragraph (2), of the Civil Code stipulates that "[i]f the performance of any obligation has become impossible due to reasons attributable to the obligee [i.e. employer], the obligor [i.e. worker] shall not lose his/her right to receive performance [i.e. wage] in return." Although Article 536, paragraph (2), of the Civil Code guarantees 100% of the worker's wages, reasons attributable to the employer are construed to mean an employer's intentional acts, negligence or other similar causes. Reasons attributable to the employer in Article 26 of the Labor Standards Act are broader than Article 536, paragraph (2), of the Civil Code and includes reasons arising in the management sphere rather than the worker sphere, such as the lack of materials because of transportation interruptions.

The *Silverheart* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1245, pp. 27–40, and *Rodo Keizai Hanrei Sokuho* (*Rokeisoku*, Keidanren Jigyo Service) no.2443, pp. 3–14 (available only in Japanese).

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