

Commentary

Legality of Restrictions on Use of Worksite Facilities by a Transgender Employee

The *State and National Personnel Authority (METI Employee) Case*
Tokyo High Court (May 27, 2021) 1254 *Rodo Hanrei* 5

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I. Facts

Plaintiff X is a government employee working for the Ministry of Economy, Trade and Industry (METI), and a transgender female who has not undergone gender reassignment surgery and whose gender remains a male on the family register. When X complained of restricted use of the METI's restrooms for women and asked the National Personnel Authority (NPA) for free use of the restrooms that matched X's gender identity, this request was not granted by the NPA administration. In addition, X was subject to restrictions on the use of women's restrooms at worksite (though permission was given to use women's restrooms two or more floors away from X's work area), and X suffered psychological damage due to comments by supervisors, etc. that denied X's gender identity or were otherwise inconsiderate. For these reasons, X has filed administrative case litigation and state redress litigation against the national government (hereinafter referred to as Y) seeking reversal of the NPA's administrative judgment (administrative action regarding use of restrooms and compensation for damages).

In the first instance judgment (Tokyo District Court (Dec. 12, 2018) 1223 *Rohan* 52), the Tokyo District Court ruled that in light of the current legal system and the facts found of this case, in exercising the authority to manage government facilities, X's employer METI neglected the duty of care by restricting X's access to women's restrooms, and

that X's supervisor's comments denying X's gender identity were illegal under the State Redress Act, affirming Y's liability for damages. Furthermore, the NPA's administrative judgment refusing X's request was reversed on the grounds that it was a deviation from or abuse of its authority of discretion, and therefore illegal.



This case is the one both X and Y appealed to the high court with its the initial judgment. When a lawsuit is filed against relevant government agencies (in this case, the NPA and METI), the litigant is the national government. (A further appeal has been filed with the Supreme Court.)

II. Judgment

X's appeal was dismissed; Y's appeal was partially admitted and partially dismissed. The main points of the judgment are as follows.

1. "Leading a social life in accordance with one's gender identity is a legally protected interest." Furthermore, under the State Redress Act, "If and only if there are circumstances where it is recognized that a public employee has acted thoughtlessly and neglected the duty of care that should normally fall under that employee's scope of duties... this behavior shall be deemed illegal."

2. In response to X's requests, and following discussions and explanations with relevant parties,

METI acted with consideration for X, such as leaving decisions on personal appearance to X's discretion and allowing use of nap rooms, while in terms of use of restrooms, limited use (restrooms two or more floors away from where X works) was allowed in consideration of other employees. Thus it is difficult to recognize that in METI's treatment of X, "a public employee has acted thoughtlessly and neglected the duty of care that should normally fall under that employee's scope of duties," and the handling of the restroom issue in this case is not deemed illegal under the State Redress Act.

3. With regard to various comments made by METI officials toward X, it can be said that these remarks lack the prerequisite facts or that "some aspects of them could be regarded as lacking in consideration," but it is still difficult to assess that these remarks were carried out "thoughtlessly" that could be evaluated to be illegal. However, among the remarks, a supervisor's comment to X—who wishes to undergo gender reassignment surgery but has been unable to do so due to factors such as a skin disorder—to the effect that "if you aren't going to have the surgery, you ought to go back to being a man," clearly deviates from METI's policy established in response to X's request and is illegal as defined by the State Redress Act.

4. As for METI's maintaining its current stance pertaining to use of restrooms, it cannot be said that the discretionary authority exercised by METI, which is responsible for creating a comfortable work environment for all employees including X, constituted deviation or abuse. With regard to the NPA, which has a duty to judge cases in a manner that is fair to the public and to all concerned, with a view to ensuring employees' potential is realized and advanced, the NPA did not deviate from or abuse its discretion in refusing X's request (to allow full and unrestricted use of women's restrooms in the workplace).

III. Commentary

1. Significance

This was the first suit on the merits and the first

high court judgment held with regard to restrictions on the use of women's restrooms by a transgender employee (male to female, who has not undergone gender reassignment surgery and whose gender remains unchanged on the family register). Regarding transgender employees, there are legal precedents in the case of private-sector company S (dismissal of a transgender employee) (Tokyo District Court ruling (June 20, 2002) 830 *Rodo Hanrei* 13) and the case of Yodogawa Kotsu (provisional disposition) (Osaka District Court ruling (July 20, 2020) 1236 *Rodo Hanrei* 79). (Both of these were provisional dispositions, and do not constitute suits on the merits.)

The *S Co.* case was a disciplinary dismissal case in which the matter of dispute was the right of the employee (who is biologically male but identifies as female) to wear clothing at work that matched the employee's gender identity; and the legality of the employer's work order (to dress in accordance with the employee's externally recognizable gender) was examined. With regard to the employee's disciplinary dismissal on the grounds of violating said work order, the court that the employee's actions did not constitute a serious and malicious violation of employer's work order that would be grounds for disciplinary dismissal, and approved the request for a provisional disposition including contractual status with company.

At issue in the Yodogawa Kotsu (provisional disposition) case was the reasonableness of the employer's (a taxi company's) refusal to allow a transgender taxi driver (who is biologically male but identifies as female) to wear makeup on the job on the grounds that it violated company regulations. While the court did not deny the necessity or reasonableness of a service-industry employer prohibiting only male employees from wearing makeup on the job in order to avoid offending customers, it denied the reasonableness of the employer's refusal to allow the taxi driver, whose gender identity differed from their gender at birth, to wear makeup at work, recognizing the personal value of leading social life in accordance with one's gender identity, and the necessity of wearing makeup as being equivalent to that of female taxi drivers.

In contrast to these provisional dispositions, the Tokyo High Court heard a suit on the merits on the legal interests of transgender employee, i.e. the right “to lead a social life in accordance with one’s gender identity,” and as such, this is a significant court judgment. Also, although the case was in particular in that proceedings were based on the State Redress Act and the Administrative Litigation Act, it is an important judgment in the sense that it has a high practical value as a precedent for human resource management, because it makes a legal judgment on the presence or absence of illegality based on detailed facts found.

2. Legal theory and scope / Impact on human resource management

(1) At an issue in this case was whether the legal interests of a transgender employee are protected under the State Redress Act. For this reason, the scope of this judgment per se seem to be somewhat limited, and it is unlikely that the holding will be immediately applicable to cases involving private-sector companies. Nonetheless, it is quite conceivable that future cases will dispute on the tort (under Articles 709 and 715 of the Civil Code) of restrictions on the use of workplace facilities (restrooms), like those in this case, in civil cases involving private-sector employees. In this respect, while a judgment on illegality under the State Redress Act differs from the “intentional or negligent” infringement of rights under the Civil Code, given that the legal interests discussed by the High Court in this judgment are underpinned by the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder as well as the personality interests that have long been widely recognized, it is quite possible to interpret the right to “to lead a social life in accordance with one’s gender identity” as an interest protected under tort law. For this reason, while this judgment is limited in scope, it is considered to have significant value as a precedent for practices in the human resource management of private-sector enterprises.

(2) In this case, the issue raised was that of restrictions on the use of women’s restrooms, but what judgments

will be made regarding the use of other workplace facilities such as nap rooms, locker rooms, and shower rooms? This is not immediately clear about other facilities, as the judgment is on the specific matters of this case. In this regard, this judgment states that “it is undeniable that METI is responsible for creating a comfortable work environment for all employees, including X, while also taking into consideration the gender and sex-related interests of other employees such as sexual sense of shame and anxiety,” and that “a large portion of one’s life is spent at work, and it is understood that the desire of X, a transgender individual, to act based on gender identity at work is derived from the sincere intentions and true feelings, while at the same time the desire to feel happy in the workplace is shared by all those belonging to the organization.”

Considering this judgement, as the facts found of this case show, it is highly important that there be a “process of coordination” aimed at achieving mutual understanding and acceptance through discussions and explanations with the parties concerned, based on the wishes of the person(s) affected. The holding indicates that this will be a consideration in future legal judgments. It appears that in the future, with regard to the use of nap rooms, locker rooms, shower rooms and so forth, there can be a need for a more carefully considered “process of coordination” that includes the “consideration of sexual sense of shame and anxiety” on the part of organizations. In addition, medical treatments undertaken by transgender employees to advance their physical gender transitions, such as hormone replacement therapy and gender reassignment surgery, may become a prerequisite for granting their requests.

In other countries, issues related to identity and the body, as in this case, are often discussed as directly related to rights and obligations such as civil rights and anti-discrimination statutes. However, this judgment seems to show that in Japan, legal judgments are made from the perspective of managing the entire workplace organization, which encompasses impact on “interests of and consideration for other employees.”

The National Personnel Authority (METI Employee) case, Rodo Hanrei (Rohan, Sanno Research Institute) 1254, pp.5–27.

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