

Commentary

Differences in the Base Salary and Bonus between Re-employed Entrusted Workers (*Shokutaku*) and Regular Workers, and Violation of the Former Article 20 of the Labor Contracts Act

The *Nagoya Driving School Case*

Supreme Court (Jul. 20, 2023) 1292 *Rodo Hanrei* 5

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I. Facts

X1 and X2 (plaintiffs; appellees of final appeal) concluded open-ended labor contracts with Company Y (defendant; appellant of final appeal) and engaged in duties of driving instructors of a driving school as regular workers. After retiring at the mandatory retirement age, they were re-employed as entrusted workers (*shokutaku*) by concluding fixed-term labor contracts (for a term of one year) with Company Y, under the continuous employment system prescribed in the Act on Employment Security of Elderly Persons. They continued to engage in duties of driving instructors after being re-employed, but there were differences between the base salary and bonus (lump-sum payment) paid to entrusted workers and those paid to regular workers. At Company Y, while the base salary and bonus for regular workers were stipulated in the work rules, the base salary and lump-sum payment for entrusted workers were stipulated in the rules for entrusted workers and the fixed-term labor contract. The base salary (monthly amount) for X1 and X2 was about 160,000 yen to 180,000 yen at the time of retirement, but it decreased to about 70,000 yen after re-employment (about 80,000 yen for the first year). The average amount of bonuses paid to X1 and X2 for the three years before retirement was about 220,000 yen to 230,000 yen per payment, whereas the amount of lump-sum payment paid to them after re-employment was about 70,000 yen to 100,000 yen per payment. After re-employment, X1 and X2 received employees' old-

age pension and basic continuous employment benefits for the elderly.

X1 sent a document to Company Y to demand that the company revise the wage and other working conditions applied to him as an entrusted worker, and exchanged communications in writing with the company. X1 also sent a document to Company Y as the head of the branch of his labor union (Union A) to request the company's answer regarding the differences in wages between entrusted workers and regular workers.

X1 and X2 filed a lawsuit against Company Y, alleging that the differences in the base salary and bonus between entrusted workers and regular workers as described above are in violation of the former Article 20 of the Labor Contracts Act (Act No. 128 of 2007, prior to the amendment by Act No. 71 of 2018).¹ The court of first instance (Nagoya District Court (October 28, 2020) 1233 *Rohan* 5) found that among these differences, the portion by which the base salary for X1 and X2 after re-employment is less than 60% of the amount of their base salary at the time of retirement, and the portion by which their lump-sum payment is less than the amount calculated on the basis of 60% of their base salary at the time of retirement, were unreasonable, and ordered Company Y to pay these portions to X1 and X2 as compensation for damage due to a tort. As the lower court (Nagoya High Court, (March 25, 2022) 1292 *Rohan* 23) upheld this conclusion, Company Y filed a final appeal to the Supreme Court.

Because of space limitations, the section below

focuses on discussing the part of the Supreme Court judgment concerning the base salary.

II. Judgment

The judgment in the lower court was partially quashed and the case was remanded to the lower court.

(i) Determining whether or not a difference in working conditions is unreasonable as prescribed in the former Article 20 of the Labor Contracts Act, “it is necessary to examine whether the difference can be evaluated to be unreasonable by considering various circumstances prescribed in the same Article in light of the nature of the base salary...and the purpose of their payment specified by the employer (see the *Metro Commerce* case, Supreme Court (Oct. 13, 2020) 74–7 *Minshu* 1901).”

(ii) The lower court only ruled that the base salary for regular workers had the nature of seniority pay in view of the changes in the amount of base salary paid to some regular workers according to the length of service, and did not examine any other characteristic, the content, or the purpose of payment of the base salary for regular workers, nor did it examine characteristic and the nature of the purpose of the payment of the base salary for entrusted workers.

(iii) In considering the circumstances concerning labor-management negotiations as “other circumstances” (as referred to in the former Article 20 of the Labor Contracts Act), not only the results of the labor-management negotiations such as any agreement reached on the working conditions and the content of such agreement, but also the specific circumstances of the negotiations, should be taken into consideration.

(iv) Company Y engaged in labor-management negotiations with X1 and his labor union, Union A, regarding the revision of the wage and other working conditions for entrusted workers. The lower court only paid attention to the results of the labor-management negotiations and did not take into consideration any specific circumstances, such as Company Y’s answer to the request for the revision and whether and how Union A reacted to it.

III. Commentary

1. Significance of this judgment

This judgment is the eighth judgment rendered by the Supreme Court regarding whether a difference in working conditions violates the former Article 20 of the Labor Contracts Act; it is the second case in which a difference in a working condition between a fixed-term contract worker re-employed after retirement and an open-ended contract worker before retirement, following the *Nagasawa Un-yu* case (Supreme Court (Jun. 1, 2018) 72–2 *Minshu* 202).² Compared with these precedents, this judgment is significant in that the Supreme Court clarified the following three points: (a) a difference in the base salary may also be subject to the determination as to unreasonableness under the former Article 20 of the Labor Contracts Act; (b) this determination should be made in light of the nature and the purpose of the base salary, which is an individual working condition; and (c) “other circumstances” referred to in the same Article include the specific process of labor-management negotiations. This judgment also has value as a precedent to be referenced under the Article 8 of the Act on Improvement of Personnel Management and Conversion of Employment Status for Part-Time Workers and Fixed-Term Workers (hereinafter referred to as the “Part-Time/Fixed-Term Employment Act”), which is the successor of the former Article 20 of the Labor Contracts Act.

2. Characteristics of this case and the rulings by the court of first and the lower court

In light of the *Nagasawa Un-yu* case and other similar cases in the past, the following five points can be cited as the characteristics of this case. (1) X1 and X2 continued to engage in duties of driving instructors of Company Y throughout the period before and after retirement, and there was no difference in the “content of duties” or “the extent of changes in the content of duties and work locations” referred to in the former Article 20 of the Labor Contracts Act. (2) The base salary for X1 and X2 after re-employment was reduced to about slightly more than 40% to slightly less than 50% of their base salary before

retirement, and the absolute amount of the base salary was quite low. (3) The average amount of base salary for regular workers of Company Y was about 110,000 yen to 120,000 yen for those who have worked for one year or more but less than five years and 160,000 yen to 180,000 yen for those who have worked for 30 years or more. (4) After re-employment, X1 and X2 received employees' old-age pension and basic continuous employment benefits for the elderly. (5) X1 sent a document to Company Y via Union A regarding the differences in wages between entrusted workers and regular workers, and also personally exchanged communications in writing with the company, demanding the revision of the wage and other working conditions.

Given these facts of the case, the first instance regarded the following two facts as the facts serving as a bar to an evaluation of unreasonableness: i) while the base salary for regular workers paid on the assumption of long-term employment has the nature of seniority pay (mentioned in (3) above), the base salary for entrusted workers is not based on the assumption of long-term employment and does not have such nature; and ii) the fact in (4) above. On the other hand, the court took into consideration the following facts as the facts serving as the basis for the evaluation of unreasonableness: iii) the fact in (1) above; iv) the base salary is the "core of the compensation for labor under a labor contract"; and v) the amount of base salary for X1 and X2 after re-employment was reduced to 50% or less than the amount they received as regular workers at the time of retirement, and it was lower than the amount for regular workers who have worked for one year but less than five years (mentioned in (2) and (3)); and vi) such consequence was not the result of labor-management autonomy (mentioned in (5) above). In conclusion, the lower court found that the differences in the base salary were partially unreasonable. The lower court upheld this conclusion.

In drawing the conclusion mentioned above, the court of first instance compared the base salary paid to X1 and X2 at the time of retirement with the average wage of workers in the same age group (55 to 59 years of age) based on the statistical data on the

average wage of workers, etc., which was obtained by compiling the results of the *Basic Survey on Wage Structure* (generally called "*Wage Census*") conducted by the government every year. Based on the result of the comparison, the court pointed that the base salary for X1 and X2 falls below the average wage, and held that the base salary for X1 and X2 as entrusted workers, which had been reduced to 50% or less of the base salary for regular workers at the time of retirement, has "reached a level that cannot be overlooked from the perspective of securing workers' livelihood." The lower court deleted the description of the comparison with the *Wage Census* but upheld the abovementioned holding. This holding can be evaluated as the stance to take the viewpoint of ensuring the absolute level of working conditions for fixed-term contract workers as a factor in the determination of unreasonableness (hereinafter referred to as the "livelihood security theory").

3. Nature and purpose of the base salary

On the other hand, the Supreme Court remanded the case to the lower court to have it further examine the base salaries of regular and entrusted workers in terms of the nature and the purpose of payment of the base salary payments. In this respect, as indicated in point (i) of the judgment, the Supreme Court made reference to the judgment rendered in 2020 by the Supreme Court on the *Metro Commerce* case (first instance: Tokyo District Court (Sept. 14, 2017) 1164 *Rohan* 5). In this case, the difference in the retirement allowance was disputed, and the Supreme Court presented a framework for the determination in which the nature and the purpose of the retirement allowance are examined individually, followed by an evaluation of unreasonableness under the former Article 20 of the Labor Contracts Act. Such a framework itself was also referred to by the Supreme Court in the *Nagasawa Un-yu* case in 2018 (Supreme Court (Jun. 1, 2018) 1179 *Rohan* 34), but the Supreme Court judgment in the *Nagasawa Un-yu* case also left room to determine unreasonableness by comparing the total wages.

The reason why the Supreme Court made reference to the Supreme Court judgment on the

Metro Commerce case, instead of the *Nagasawa Unyu* case which was related to re-employment after retirement as in this case, may be that the Supreme Court intended to present a framework for determination of unreasonableness regarding the base salary, with an awareness of the wording and structure of the Article 8 of the Part-Time/Fixed-Term Employment Act,³ which was revised after this case. The existing Article 8 of the Part-Time/Fixed-Term Employment Act clearly provide that, in determining unreasonableness, the nature and the purpose of individual working conditions (treatment of workers) should be taken into consideration. In addition, with regard to differences in the base salary, in many cases the standards and rules for determining the base salary may differ between open-ended contract workers and fixed-term contract workers. According to the interpretive guidelines for the Article 8 provided by the Minister of Health, Labour and Welfare (MHLW Notice No. 430 of Dec. 28, 2018), the nature and the purpose of each base salary should also be determined first.

In this judgment, the Supreme Court pointed out the possibility that the base salary for regular workers may have the nature of job-based pay or ability-based pay in addition to the nature of seniority pay (pay for length of service), and stated that the base salary for entrusted workers “has the nature and the purpose of payment that are different from those of the base salary for regular workers.” (omitted in II. Judgment above). In this respect, it is not necessarily clear why it can be assertively said that the nature and the purpose of the base salary for entrusted workers are different from those of the base salary for regular workers even though the nature and the purpose of the base salary for regular workers cannot be determined. In any case, however, while the court of first instance and the lower court made a somewhat abstract finding regarding the nature and the purpose of the base salary by describing the base salary as the “core of the compensation under a labor contract,” the Supreme Court demanded that these matters be inquired into more specifically and therefore did not choose to make its own decision after quashing the judgment in the lower court.

Thus, the inquiry into these matters will be the issue to be addressed by the lower court in the remanded case. In this case, however, it seems that there was no clear standard for determining the base salary for both regular workers and entrusted workers (Company Y itself stated in its statement of reasons for a petition for acceptance of final appeal that the base salary is a wage to be determined by comprehensively taking multiple factors into consideration, without any clear purpose). In light of what is indicated in Point (ii) of the judgment concerning the fact that the lower court found that the base salary for regular workers has the nature of seniority pay in view of the changes in the amounts paid to some regular workers (mentioned in (3) above), the parties will be required to make allegations and proof and the court will be required to make a finding regarding the nature and the purpose of the base salary based on objective facts, including the distribution and changes in the amount of base salary for all regular workers and entrusted workers.

4. Circumstances of labor-management negotiations

Furthermore, the Supreme Court criticized the lower court for focusing only on the results of labor-management negotiations (mentioned in (5) above) (the fact that the results were not reflected in the base salary for entrusted workers), and demanded that in the remanded case, the lower court examine specific circumstances of negotiations. “Labor-management negotiations” mentioned here include negotiations between Union A and Company Y. In lower court decisions, not only whether or not any agreement has been reached with the labor union (whether working conditions have been improved) and the content of such agreement, but also the processes of collective negotiations and labor-management consultation, had been considered in determining unreasonableness (the *Kitanihon Broadcasting* case, Toyama District Court (Dec. 19, 2018) 2374 *Rokeisoku* 18). Point (iii) of the judgment can be evaluated as showing that the Supreme Court supported such trends in lower court decisions.

It is noteworthy that in Point (iv) of the judgment,

communications in writing between X1 and Company Y were included in “labor-management negotiations.” It is suggested that the circumstances in which the employer has held consultation and negotiations with a fixed-term contract worker individually with regard to the worker’s working conditions can be considered as facts serving as a bar to an evaluation of unreasonableness. How much importance should be placed on such individual negotiations may be open to debate.

5. Public benefits and livelihood security theory

By contrast, the Supreme Court did not make a ruling, at least directly, with regard to the relationship between the receipt of public benefits (employees’ old-age pension and basic continuous employment benefits for the elderly after re-employment) and determination of unreasonableness, or the relationship between the livelihood security theory and the determination of unreasonableness. Therefore, these points will be considered again in the determination of unreasonableness at the court in the remanded case. The existence of public benefits had been regarded as a fact serving as a bar to an evaluation of unreasonableness in the precedents such as the Supreme Court judgment on the *Nagasawa Un-yu* case. Regarding the livelihood security theory, scholars are divided into those supporting this theory⁴ and others negating it.⁵

1. The former Article 20 of the Labor Contracts Act

If a labor condition of a fixed-term labor contract for a Worker is different from the counterpart labor condition of another labor contract without a fixed term for another Worker with the same Employer due to the existence of a fixed term, it is not to be found unreasonable, considering the content of the duties of the Workers and the extent of responsibility accompanying the said duties (hereinafter referred to as the “content of duties” in this Article), the extent of changes in the content of duties and work locations, and other circumstances.

2. Ryo Hosokawa, “Are Wage Disparities Unreasonable and Illegal? Between Fixed-term Contract Employees Rehired After Retirement and Regular Employees,” *The Nagasawa Un-yu Case*, The Supreme Court (June 1, 2018) 1179 *Rohan* 34, *Japan Labor Issues* 2, no.11 (December 2018): 13–16. <https://www.jil.go.jp/english/jli/documents/2018/011-03.pdf>.

3. The Article 8 of the Act on Improvement of Personnel Management and Conversion of Employment Status for Part-Time Workers and Fixed-Term Workers

An employer must not create differences between the base pay, bonuses, and other treatment of the part-time/fixed term workers it employs and its corresponding treatment of its workers with standard employment statuses that are found to be unreasonable in consideration of the circumstances, including the substance of the duties of those part-time/fixed term workers and workers with standard employment statuses and the level of responsibility associated with those duties (hereinafter referred to as the “job description”) and the scope of changes in their job descriptions and assignment, that are found to be appropriate in light of the nature of the treatment and the purpose of treating workers in that way.

4. For details, see Makoto Ishida, “Teinen-go sai koyō-sha no shōgū kakusa zesei to rōdō-sha no seikatsu hoshō no kanten: Nagoya jidōsha gakkō jiken Nagoya chisai hanketsu o keiki ni kangaeru” [Rectifying the treatment disparity for reemployed people after retirement and the perspective of “securing workers’ livelihood”: Thinking about the *Nagoya Driving School* case and the Nagoya District Court judgment], *Rōdō Hōritsu Junpō*, no. 1980 (2021): 15–17. See also, Keiko Ogata, “Teinen taishoku-go no yūki shokutaku shokuin no rōdō jōken to rōkeihō kyū 20-jō no fugōri-sei” [Working conditions for fixed-term contract workers after retirement and the unreasonableness of the former Article 20 of the labor Contracts Act], *Shin Hanrei Kaisetsu Watch*, no. 31 (2022): 310.

5. For details, see Michio Tsuchida. “Teinen-go sai koyō shain no rōdō jōken o meguru hōteki kōsatsu: Rō keihō 20-jō pāto yūki-hō kōrei sha koyō antei-hō no kiritsu” [Legal consideration on the working conditions for rehired employees after retirement], *Doshisha Hogaku* 73, no. 6 (December 2021): 695, and Yota Yamamoto, “Teinen-go shokutaku shokuin to sei shokuin-kan de no rōdō jōken no sōi to kyū rōdō keiyaku-hō 20-jō: Nagoya jidōsha gakkō jiken (Nagoya-chi hanrei 2. 10/ 28 (Wa) dai 4165-gō)” [Differences in working conditions between re-employed entrusted worker and regular workers and the former Article 20 of the Labor Contracts Act: The *Nagoya Driving School* Case (Nagoya District Court Case No. 4165, 2.10/28 (Wa))], *Rōdō Hōritsu Junpō*, no. 1980 (2021): 23–24.

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