Judgments and Orders

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Vol.1, No.1, September 2017–Vol.8, No.46, Winter 2024

The Japan Institute for Labour Policy and Training

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Editorial Office
The Japan Institute for Labour Policy and Training
International Research Exchange Section
8-23, Kamishakujii 4-chome, Nerima-ku, Tokyo 177-8502, Japan
https://www.jil.go.jp/english/

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

Ryo Hosokawa

Facts

Worker X and his colleagues signed open-ended (non-fixed term) labor contracts with transportation company Y, and from 1980 to 1993 each worked as a driver of a tanker truck as a regular employee. X et al. retired from Y in 2014 at the age of 60. However, on the same day that X et al. retired, they signed fixed-term labor contracts with Y and continued to work as tanker truck drivers. Under the fixed-term contract concluded at the time of retirement, the work duties and operations and associated responsibilities of X et al. were not different from those of regular employees.

The wages of Y's regular-employee drivers consist of a basic wage mainly based on years of service and age, plus efficiency wages, performance-based wages, and various allowances, bonuses, and so forth. Meanwhile, fixed-term contract employees rehired at Y after retirement, including Worker X et al., are paid higher basic wages than regular employees, but do not receive additional efficiency wages, performance-based wages, and so forth. In the course of determining the working conditions of retirees rehired under fixed-term contracts, labor union Z to which X belongs requested that rehired persons receive the same amount of wages as before retirement. Y refused this request, but on the other hand, decided to raise the basic wages of the retirees rehired under fixed-term contracts, including X and others, and offered separate adjustment payment—allowance to make up for the remuneration-based portion of benefit during the blank period of old age employee pension, although these terms have not been determined through a collective bargaining agreement).

X et al. argued that Y's non-payment of (1) efficiency wages and performance-based wages, and (2) perfect attendance allowance and various other allowances and bonuses to non-regular employees rehired after retirement constitutes an unreasonable disparity in working conditions compared to regular employees, i.e. the disparity between working conditions of open-ended contract employees (regular employee) and fixed-term contract employees is irrational and violated Article 20 of the Labor Contracts Act, and filed an action seeking payment equivalent to the difference in wages under the system applied to regular employees and the wages they were actually paid.

At the first instance (Judgment of the Tokyo District Court [May 13, 2016] 1135 *Rohan* 11), the claim of X et al. was approved. However, this judgment was reversed at the second instance (Judgment of the Tokyo High Court [Nov. 2, 2016] 1144 *Rohan* 16) and the claim was dismissed. X et al. appealed.

Judgment

The judgment of the court below was partially dismissed and partially remanded to the court below. The Supreme Court decision is summarized as follows:

(1)

The Labor Contracts Act, Article 20 recognizes that differences may exist between the treatment

of fixed-term contract employees and open-ended contract employees, but stipulates that these differences should not be unreasonable taking the content of work duties, scope of reassignment of work and work place and other related matters into consideration, and that workers should be treated in a fair and balanced manner in accordance with differences in the content of duties and responsibilities, etc. (see the *Hamakyorex* case, the Judgment of the Supreme Court [Jun. 1, 2018]) .

(2)

(a) At Y there is no difference between the work duties and accompanying responsibilities of fixed-term contract drivers rehired after retirement and regular employees, nor is there a difference between them in personnel management policies such as reassignment of work and work place.

(b) However, workers' wages are not automatically set in accordance with content of work duties and scope of change thereof. Employers determine workers' wages from the standpoint of business considerations, taking into account various circumstances besides their work duties and scope of their change. Also, it can be considered that workers' terms of conditions on wages ought to be largely entrusted to the autonomy between labor and management through collective bargaining, etc. Given the fact that Article 20 of the Labor Contracts Act explicitly mentions "other related matters" when judging whether disparities in working conditions of fixed-term contract and open-ended contract employees are unreasonable or not, it does not place restrictions on the circumstances taken into account other than content of work duties and scope of change thereof.

(c) X et al. retired from Y and were then rehired under fixed-term labor contracts.

(d) In general, companies with retirement systems have wage structures premised on long-term employment. On the other hand, when employers rehire retirees under fixed-term labor contracts, they do not generally intend to employ them over the long term. Also, retirees rehired under fixed-term contracts have enjoyed the benefits of a wage system premised on long-term employment up until their retirement. Also, they are scheduled to receive old-age employee pensions. When judging violations of Article 20 of the Labor Contracts Act, it is necessary to take into account the status of fixed-term contract employees rehired after retirement as "other related matters."

(3)

When judging whether disparities in the wages of fixed-term and open-ended contract employees are unreasonable, it is necessary not only to compare their total wages, but also to consider the determinant factors of the wages respectively. However, when some wages are determined considering other wages, such circumstances should also be taken into consideration.

(4)

(a) Though X et al. were not paid efficiency wages and performance-based wages which are paid to regular employees, taking into account the fact that their basic wages were higher than those prior to retirement, that the coefficient used to calculate their percentage pay was higher than the coefficient used to calculate regular employees' efficiency wages, and that the total basic wages of X et al. were raised through collective bargaining between Y and the labor union, the comparison should be made between the total of regular employees' basic wages, efficiency wages, and performance-based wages and the total of X and colleagues' basic wages and percentage pay when determining whether the disparity is unreasonable or not. The disparity between them amounts to 2% to 12%.

(b) In addition, taking into account the fact that X et al. are eligible to receive old-age employee pension, and that Y determines to provide adjustment pay after collective bargaining with the labor union, it is not unreasonable for the company to pay percentage pay and not to pay efficiency wages and performance-based wages.

(5)

Y pays a perfect attendance allowance to encourage its employees to come to work every day except holidays. If the content of work duties of X et al. and regular employees is the same, there is no discrepancy in the need to encourage and reward full

attendance. For this reason, failure to pay X et al. an attendance allowance is unreasonable and a violation of Article 20 of the Labor Contracts Act.

Commentary

The Article 20 of the Labor Contracts Act stipulates that there must not be unreasonable disparities between the working conditions of open-ended contract employees (regular employees) and fixed-term contract employees. The Supreme Court handed down on two verdicts involving interpretation of Article 20 on June 1, 2018. This *Nagasawa Un-yu* case is one of them, following the *Hamakyorex* case (the Supreme Court, Second Petty Bench, June 1, 2018, 1179 *Rohan* 20)

In Japan, mandatory retirement age systems requiring workers to resign when they reach a certain age are legally recognized and in widespread use. At the same time, in order to ensure employment until the age of 65 when people can generally begin receiving pensions, the Act on Stabilization of Employment of Elderly Persons requires employers to take one of three measures: (i) raise the retirement age to 65 or over, (ii) rehire workers that have retired so that they can continue working until age 65, or (iii) abolish mandatory retirement ages.[1] Many companies take approach (ii), and rehire the retired workers under fixed-term labor contracts. In these cases their wages are often lower than when they were regular employees, and wage disparities among employees result. The case under discussion here questioned whether such wage gaps between retired workers rehired under fixed-term labor contracts and regular employees are a violation of Article 20 of the Labor Contracts Act.

Below is commentary on (1) general judgments the Supreme Court has handed down with regard to application of Article 20 of the Labor Contracts Act (including the *Hamakyorex* case), and (2) application of said Article to fixed-term contract employees rehired after retirement.

(1) Objective and application of Article 20 of the Labor Contracts Act[2]

(a) There are many existing interpretations of the rules laid down by Article 20 of the Labor Contracts Act. These primarily revolve around three points, namely (i) that fixed-term contract employees and open-ended contract employees with similar duties and responsibilities must be subject to the same working conditions (equal pay for equal work, equal treatment), (ii) that even when differences between the work duties and responsibilities of fixed-term and open-ended contract employees exist, they must be treated in a fair and balanced manner (balanced treatment, and (iii) disparities between the working conditions of these two categories of employees must not be too large (while taking into account the general Japanese employment practice of implementing wage systems where wages do not necessarily correspond to work duties.)

The Supreme Court uses the term "balanced" in its judgments, and its viewpoint seems closest to point (2) above. However, in delivering judgments, it states that employers' business decisions and negotiations with labor unions would be taken into account. This means that the court does not disregard point (3) above, which relates to the unique nature of Japanese companies' wage systems.

(b) When wages are composed of multiple elements, there is a debate over whether (i) judgment should be made on whether disparities between each element of the wages are unreasonable or not, or (ii) judgment should only be made on whether disparities between the entirety of wages are unreasonable or not. On this point, the Supreme Court has adopted the first position. On the other hand, in this judgment, the court asserted that in cases like this one where multiple elements interrelate, it is possible for judges to examine them in their entirety and decide whether disparities are unreasonable. However, there is no

1. With regard to issues surrounding working conditions of employees rehired after retirement, ref. Keiichiro Hamaguchi, "Job Changes for Re-employed Retirees: The *Toyota Motor* case," *Japan Labor Issues* 1, no.1: 20.
2. With regard to the background behind establishment of Article 20 of the Labor Contracts Act and related judicial precedents, see Ryo Hosokawa, "The Illegality of Differences in Labor Conditions Between Regular Workers and Non-Regular (Fixed-term Contract) Workers: The *Japan Post* case," *Japan Labor Issues* 2, no. 7: 20.

clear standard for determining in which cases this sort of approach is acceptable. Further debate would be needed.

(c) In judging whether disparities are unreasonable, this judgment takes into account the fact that the employer raised wages based on requests from the labor union in the course of determining wages. Another likely point for future debate is whether disparities arising as a result of labor-management negotiations can be viewed as legitimate (in this case, however, no collective agreement on wage increases was concluded.)

(2) Workers rehired after retirement

In this case, the fact that X et al. were workers rehired after retirement had an impact on the Supreme Court judgment.

(a) This judgment interpreted the application of a wage system to fixed-term contract employees differing from that of regular employees as legitimate. It also views as acceptable a resulting drop in wages after reaching retirement age. As grounds for this, it cites for management decisions and the fact that X et al. had enjoyed the benefits of the wage system for regular employees until retirement. This appears to take into account the fact that at many Japanese companies, the wages of regular employees are determined not by the content of job duties but rather by age, years of service, experience, and general job competence. However, various different wage systems are in place at different Japanese companies, and at some, wages are determined on the basis of content of work duties. For this reason, there is a need for future debate on what kind of cases the above judgment will be applied.

(b) This judgment took into account the fact that X et al. were eligible to receive old-age employee pension payments, and decided that a 2% to 12% disparity in monthly wages with a lack of bonuses and allowances resulting in a total wage equivalent to 79% that of regular employees did not constitute an unreasonable wage gap. The Japanese legal policy of elderly employment presupposes that rehired workers would earn lower wages than before they retired. However, this also assumes that content of work duties and degree of responsibility would be lessened. This case is characterized by the fact that there was a wage gap even though the scope of work duties, responsibilities, and assignments had not changed compared to those prior to retirement. This judgment found, as described above, that the drop in X and colleagues' wages was acceptable. However, there are also precedents in which working conditions of employees rehired after retirement were judged to be too inferior and illegal in that the contradict the spirit of the Act on Stabilization of Employment of Elderly Persons (the *Kyushu Sozai* case (Fukuoka High Court [May 25, 2017] 1167 *Rohan* 49) There is an evident need for further discussion and debate on the specifics of how workers rehired after retirement should be treated.

AUTHOR

Ryo Hosokawa Vice Senior Researcher, The Japan Institute for Labour Policy and Training (JILPT). Research interest: Labor Law. Profile: https://www.jil.go.jp/english/profile/hosokawa.html

Binding Effect of Unilaterally Modified Rules of Employment Introducing a Performance-based and Ability-based Wage System

The *Trygroup* Case
Tokyo District Court (Feb.22, 2018) 2349 *Rokeisoku* 24

Zhong Qi

I. Facts

1

X was hired in August 2012 to engage in general affairs, finance and accounting, etc. at Y Co., Ltd., which operates home tutoring and cram schools. On October 1 of the same year, X and Y concluded an open-ended employment contract with basic salary of 429,000 yen. On March 1, 2013, Y proposed to X a change in working conditions with a contract term of 6 months and a basic salary of 310,000 yen, but X did not agree to this. After that, Y made several proposals for changing working conditions to X, but X did not agree to them.

Y paid a basic salary of 343,000 yen to X from the payment on June 25, 2013, and ordered X to be seconded to affiliate Y1 on July 22, 2013. On November 7, 2013, X filed a claim to the Labor Tribunal for invalidation of secondment against Y. In the Labor Tribunal process, mediation was established which included payment for reduced wages and confirmation that renewal of secondment would not be made.

Along with the end of the secondment, Y ordered X to work with AC affairs (receivable collection work by phone) in the general affairs and personnel department on August 11, 2014. On February 20, 2015, X was transferred to the teacher management division, and on October 17, 2017, X was transferred to the AC collection division again.

2

Y revised its rules of employment and salary regulations (which formed part of the rules of employment), etc. on March 29, 2014 and April 1, 2014, and made major modifications regarding the salary system, payment criteria, etc.

In the former salary regulations, salaries were abstractly determined in consideration of the quality of work assigned to employees and their age, experience, working results, working conditions, etc. In the new salary regulations, by contrast, salaries were determined based on assessment and evaluation by class rank scale tables classifying the quality of work assigned to employees, their age, experience, working results, working conditions, etc.

With regard to the salary system, while the standard wage in the former salary regulations was divided into the basic salary and a position allowance, in the new salary regulations, a functional allowance was added, and the names, contents, etc. of non-standard wages (such as allowances) were adjusted.

Furthermore, while the former salary regulations did not have an explicit provision for pay reduction, the new salary regulations stated that, "Pay raises and reductions concerning the functional allowance and the position allowance for staff below a manager position are determined based on a personnel evaluation conducted in May and November every year." With regard to promotions and demotions, it was stipulated that as a result of the personnel evaluation in the previous article, with the promotion

or demotion of classes, the functional allowance and the position allowance would also be raised or reduced. Under the new salary regulations, raising and reducing of the allowances and promotions and demotions of employees' position are clearly associated with personnel evaluations.

3

Y paid wages to employees including X based on the new salary regulations from November 2014. X was positioned at rank 47 in class J3 for the functional allowance, and the new salary was set at a basic salary of 200,000 yen, a functional allowance of 228,000 yen, and an adjusted salary of 1,000 yen (for a total amount of 429,000 yen, and the total amount was the same as the previous month).

Y performed a personnel evaluation based on the new salary regulations and personnel evaluation regulations in November 2014, and the evaluation result of X was the lowest F rank. As a result, X's functional allowance decreased by 15,000 yen to 213,000 yen. In all subsequent personnel evaluations, X received the lowest evaluation, and the functional allowance was reduced by 15,000 yen each time.

II. Judgment

Dismissal with prejudice on the merits.

1. Effectiveness of the Modification in the Rules of Employment

In the new salary regulations implemented by the modification in rules of employment, the basic salary that accounted for most of the wages in the former salary regulations was divided into the basic salary and the functional allowance. For general employees who work in Tokyo, like X, the basic salary would be 200,000 yen. As for the functional allowance, it has become possible to have a reduction in pay up to 10,000 yen to 15,000 yen depending on the class, once every half year, according to the result of the personnel evaluation. The new salary regulations changed the old seniority-based sequential wage system into a performance-based and ability-based wage system based on personnel evaluations. Under the new salary regulations, depending on the result of the personnel evaluation, the amount of wages may be reduced. Because such a possibility exists, it should be said that the change from the former salary regulations to the new salary regulations correspond to a disadvantageous modification of the rules of employment.

With regard to disadvantageous modifications in rules of employment, the working conditions shall be as specified in the modified rules of employment only when it is reasonable considering the degree of disadvantage received by workers, the necessity of changing working conditions, the appropriateness of the contents of the rules of employment after the modification, negotiations with labor unions, etc., and other circumstances related to modifications in the rules of employment, and when the modified rules of employment are known to the workers.

When changing a seniority-based wage system to a performance-based and ability-based wage system based on personnel evaluations according to the rules of employment, it should be said that the framework for judging the reasonableness of the modification in the rules of employment is different in a case on the one hand, in which the total amount of funds for wages decreases, and in a case on the other hand, that is, the total amount of funds does not decrease, and it is not disadvantageous for workers as a whole compared to the past, and preferably increases and decreases in the wages of individual workers occur as a result of personnel evaluations. That is, except when the total amount of wages decreases, if it does not decrease, it is the result of personnel evaluations of the relevant workers that directly and practically reduces the wages of the individual workers, rather than the result of the wage system change itself. Therefore, in determining the degree of disadvantage to workers and the reasonableness of the contents of the modified rules of employment, whether the equality of the results of pay raises, promotions, pay reductions, and demotions based on personnel evaluation criteria and evaluation results is ensured, considering the evaluation subject, method and criteria of evaluation, disclosure of evaluation, etc., whether there is a certain institutional security to prevent misuse by

the employer in personnel evaluation, the necessity of the modification in the rules of employment, and the circumstances concerning the change shall be considered comprehensively.

(1) Necessity of change

After integrating the business of group company Y1 and transferring the company's employees to Y, important working conditions were different between Y1 and Y, so it was necessary to unify working conditions among workers from Y1 and from Y.

Given the situation of intensifying competition, there was a need to acquire experienced personnel, motivate them to perform their duties, and increase their retention.

(2) Ensuring equality of pay raises and promotions

The change in the wage system did not reduce the total amount of funds for wages of employees, but it changed the method of determining wage amounts and the distribution method of wage resources to a more rational one. The amount of wages for each employee under the new wage system was determined based on personnel evaluations of the employee, and there may be pay raises, promotions, reductions, or demotions depending on the results of the personnel evaluations for each employee. Equality is secured in this sense.

Since the total wages did not decrease as a result of the modification in the rules of employment, whether a certain institutional security to prevent deviation and misuse of the employers' discretion in personnel evaluations is provided will be important in determining the effectiveness of the modification.

(3) Reasonableness of personnel evaluation system

In the case of personnel evaluations, how to configure evaluation items and how much importance to assign to which items reflects business management perspectives, such as what kind of performance is expected of the employee in current and future business operations, and what kind of ability development and human resource development are planned for that purpose. Because of this, it should be said that it is up to the discretion of the employer as a rule to decide the evaluation items, which items are to be emphasized and their reflection in the salary.

When looking at each evaluation item of the accreditation from this point of view, there are no evaluation items that should be regarded as instances of Y having misappropriated discretion. The personnel evaluation system in Y is conducted by a plurality of evaluators in accordance with evaluation items determined in advance, whereby it is secured to a certain extent that the personnel evaluation is performed objectively, and the evaluation results are to be returned to the person undergoing evaluation. It can be said that a certain institutional security is provided to prevent arbitrary personnel evaluations for illegal and unfair purposes. Also, because it is intended to be utilized for human resource development through the improvement of work ability, it can be said that there is reasonableness as a system, that is, reasonableness of contents of new rules of employment, etc.

As for the procedure for changing the rules of employment, although there seems to be no labor union in Y, after completing the proposal of the new rules of employment, there was a brief period in which interviews were conducted through employee representatives. An opinion from the employee representatives that there were no particular problems was obtained, and it can be considered that the interviews gave the employees at least an opportunity for negotiations with their employer.

To summarize the above facts, this modification in the rules of employment introduces a performance-based and ability-based wage system that meets management needs, and does not reduce the total amount of funding for wages. It should be said that it is effective because the system will be changed to a new rational system, in which pay raises and reductions are based on a personnel evaluation system with certain institutional collateral to prevent deviation.

2. Applicability of Proviso to Article 10 of the Labor Contracts Act

For the proviso to Article 10 of the Labor Contracts Act to be applied, it is not necessary to expressly agree that there will not be a modification depending on the rules of employment. It is necessary to have sufficient circumstances to interpret and evaluate that the parties have reached an agreement that the working conditions will not be changed by the rules of employment.

(i) The reason why the monthly salary of X was decided to be 429,000 yen in the employment contract is as follows. In the hiring interview with Y, X said that the annual salary of X's previous job was 7.2 million yen and at least 6 million yen would be necessary. It was decided to make 429,000 yen per month by rounding up 428,571 yen, which was 6 million yen divided by 14 months. (ii) In the wage column of the employment contract, there is a provision for pay raises and reductions (demotions) according to the rules of employment. In addition, it is recognized that there is no provision to exclude any method of modification other than an agreement with X for the wage amount.

The amount of the wage for X was determined by negotiation during the hiring interview, and was not calculated by formally applying the former rules of employment and the former salary regulations.

However, on the other hand, the employment contract provides that pay raises and reductions (demotions) are based on the rules of employment, and the wage amount varies according to the mechanism defined in the rules of employment and salary regulations. In the case of X, it is understood that it is not based on the premise that an individual agreement is necessary when raising the salary. X is just an ordinary employee, and the employment contract is not considered to be based on specific working conditions that are different from those of other employees, and it is not an annual salary system in which wage amounts are scheduled to be changed by annual agreement. Considering the circumstances described above, for X and Y, it cannot be accepted that the wage amount of X has been agreed as a working condition that will not be changed by changing the rules of employment. Moreover, if Y's wage system has undergone a major change that changes the wage determination mechanism itself, it cannot be accepted as an agreement to treat the wage amount set at the time of entering into an employment contract as a specific contract.

In contrast, X argues that the former rules of employment have a provision for demotions, but that there is no provision for a wage reduction, so it cannot be said that a wage reduction was scheduled for the employment contract. However, the issue here is whether it can be evaluated that the agreement on the wage amount in the employment contract is established as a working condition that will not be changed by the rules of employment. In light of the above mentioned circumstances such as the assumption that wage amounts fluctuate according to a prescribed mechanism such as rules of employment, it should not be evaluated that such an agreement has been established.

In addition, if there is no provision for wage reduction, whether or not it can be newly established by the method of changing the rules of employment has already been examined as a matter of reasonableness for changing the rules of employment.

III. Commentary

1. Significance and features of this judgment

In this case, when a wage system based on seniority is changed to a performance-based and ability-based wage system based on personnel evaluation by unilaterally modifying the rules of employment, it is the first judgment that clearly states that the framework for determining the reasonableness of modifications in the rules of employment differs depending on whether the total amount of funds for wages decreases or not. In particular, if the total amount of funds does not decrease, the court said that the wage decreases of individual workers were not the result of the wage system change itself, but the result of personnel evaluations of the specific workers. Instead of considering *the degree of disadvantage that the individual worker suffers*, a distinctive judgment

framework was presented to examine in detail the *appropriateness of the contents of the changed rules of employment.* As a result, X as an individual suffered a major disadvantage of a reduction in pay of 15,000 yen once every six months depending on the results of the personnel evaluation, but this point was not taken into consideration in the judgement.

2. Case law on disadvantageous modification of the rules of employment and Article 10 of the Labor Contracts Act

In order to perform efficient and rational business management using a large number of workers, it is necessary to uniformly set working conditions and workplace regulations. Rules concerning working conditions and workplace regulations that are uniformly applied to all workers in the workplace, established by employers for such business management needs, are called "rules of employment."

Regarding modifications in the rules of employment, the employer must listen to the opinions of a representative of a majority of employees at the workplace (a union that organizes a majority of workers at the workplace, or a worker selected by a majority of workers if such a union does not exist) (Labor Standards Act, Article 90, Paragraph 1). When submitting the rules of employment to the administrative agency, a document stating the above-mentioned opinion must be attached (Labor Standards Act, Article 90, Paragraph 2). However, in the sense that the consent with a majority of employees is not a legal requirement, the rules of employment can be unilaterally established or modified by the employer. Therefore, when the employment rules are modified unilaterally by the employer, on what basis this is binding on workers who oppose it became a critical legal issue.

Theories and judicial precedents developed various arguments over the issue, but a 1968 Supreme Court Grand Bench decision introduced a unique doctrine that, if the modification of the rules of employment is regarded as a reasonable one, workers who opposed it would also be bound by it. This was supported by the Supreme Court for about 40 years, and was incorporated in the Labor Contracts Act as Article 10 in 2007. That is, "When an Employer changes the working conditions by changing the rules of employment, if the Employer informs the Worker of the changed rules of employment, and if the change to the rules of employment is reasonable in light of the extent of the disadvantage to be incurred by the Worker, the need for changing the working conditions, the appropriateness of the contents of the changed rules of employment, the status of negotiations with a labor union or the like, or any other circumstances pertaining to the change to the rules of employment, the working conditions that constitute the contents of a labor contract are to be in accordance with such changed rules of employment; provided, however, that this does not apply to any portion of the labor contract which the Worker and the Employer have agreed on as being working conditions that are not to be changed by any change to the rules of employment.…"

"Underlying this ruling is a consideration for employment security and the need for flexible adjustment of working conditions. Traditional contract theory dictates that a worker who opposes any modifications made to the future terms of employment be discharged. However, according to the strict restriction on dismissals by the prohibition of abusive dismissals in Japan, such a dismissal may well be regarded as an abuse of the right to dismiss, and thus, rendered null and void. However, since the employment relationship is a continuous contractual relationship, modification and adjustment of the working conditions is inevitable."[1] Therefore, a unique rule that admits the binding effect of unilaterally modified rules of employment without workers' consent on the condition that the modification can be deemed reasonable was formed by case law and incorporated in the Labor Contracts Act in 2007.

According to Article 10 of the Labor Contracts Act, if an employer intends to change the working conditions disadvantageously by changing the rules of employment, and the two requirements are satisfied—namely, (i) inform the workers of the

changed rules of employment, and (ii) the changes to the rules of employment are reasonable—the working conditions will be changed to the contents stipulated in the changed rules of employment. Depending on the results of the personnel evaluation, the wage may be reduced for individual workers. Therefore, the judgement is that the change from the former salary regulations to the new ones is a disadvantageous change in the rules of employment. It follows the judicial precedents and is reasonable.

3. The framework for determining the reasonableness of disadvantageous modifications in rules of employment in this case

The judgement said that the framework for determining the reasonableness of modifications in rules of employment should be different depending on whether the total amount of wage funding is reduced, because it is the result of personnel evaluation of the workers in question which is the reason for reducing the wages of individual workers directly and practically. As mentioned above, in order for a disadvantageous modification in rules of employment to bind workers who do not agree with it, the modification in them must be reasonable. When judging whether there is reasonableness, "degree of disadvantage to workers" is listed as one of the factors to consider in Article 10 of the Labor Contracts Act. Also, "the degree of disadvantage that a specific worker receives" and "the degree of disadvantage that all workers receive" do not necessarily coincide. For example, in this case, the change to a performance-based and ability-based wage system is mainly aimed at the redistribution of wage resources among workers, so even if the total wage resources are not reduced, there are always workers at the individual level who lose their share and suffer disadvantages. In particular, in the case of X, it is true that the wages were reduced by 15,000 yen every six months, resulting in a large disadvantage. From the viewpoint of all workers, even if the total wage fund does not decrease, it does not mean that the degree of disadvantage actually suffered by certain workers at the individual level does not have to be a problem.

In addition, the "degree of disadvantage received by workers" and "appropriateness of the contents of the modified rules of employment" listed in Article 10 of the Labor Contracts Act are both independent judgment factors for determining the reasonableness of changing the rules of employment. The judgment as to whether the contents of the modified rules are appropriate is not directly related to the judgment of the degree of disadvantage received by (individual) workers.

As a result, neither "no reduction in the total amount of wage resources" nor "the reasonableness of the contents of the new rules of employment, etc." is a reason for not judging "the degree of disadvantage that an individual worker receives." In this case, in order to determine the reasonableness of the disadvantageous modification in the rules of employment, in accordance with the judgment framework of Article 10 of the Labor Contracts Act, it was necessary to comprehensively examine the degree of disadvantage received by workers (viewed from the two viewpoints of individual workers and all workers), the necessity of the change of working conditions, the appropriateness of the contents of the modified rules of employment, negotiations with trade unions, etc., and other circumstances.

4. The "individual specific agreements" in the proviso to Article 10 of the Labor Contracts Act

Flexicurity, a social policy balancing flexibility and security, in Japan is realized by giving employers the right to flexibly adjust working conditions under the case law on disadvantageous modification of the rules of employment while ensuring the stability of employment. While the rule on disadvantageous modification of the rules of employment is for the uniform and collective change of working conditions, it is necessary to secure the area of individual contract autonomy and respect workers' self-determination. The proviso to Article 10 of the Labor Contracts Act is created to meet the need for such individual autonomy. Where the "individual specific agreements" in the sense of Proviso to Article 10 exist, the agreements take precedent over the rule on disadvantageous modification of the rule

of employment.

However, if such individual specific agreements could be largely admitted, that would potentially undermine the function of the case law for uniform and collective modification of working conditions, which would lead the rigid employment system lacking flexibility to respond to constantly changing market demands. Therefore, in order to establish an individual specific agreement, it is necessary for there to be sufficient circumstances to recognize that an agreement has been reached as certain working conditions will not be changed by the rules of employment.

In this case, the wage amount of X was determined by negotiation during the hiring interview. However, in order to recognize the establishment of an individual specific agreement, it is necessary to have enough circumstances to recognize that a change in the wage amount of X excludes any method other than agreement with X. In this case, since such facts are not recognized, the establishment of individual specific agreements is not permitted.

1. Takashi Araki, "The Relationship between State Law, Collective Agreement and Individual Contract: Japan's Decentralized Industrial Relations with Internal Market Oriented Flexicurity," *University of Tokyo Journal of Law and Politics* 10 (Spring 2013): 15.

The *Trygroup* case, *Rodo Keizai Hanrei Sokuho* (*Rokeisoku*, Keidanren Jigyo Service) 2349, pp.24–45. See also *Journal of labor cases* (Rodo Kaihatsu Kenkyukai) no.75, June 2018, pp.34–35.

Zhong Qi

Researcher, The Japan Institute for Labour Policy and Training. Research interest: Labor Law.
https://www.jil.go.jp/english/profile/zhong.html

Commentary

Can a Client Be Held Liable for a Breach of Obligation to Care for Employee Safety and Health Due to Harassment against a Freelancer?

The *Amour (Aesthetic Salon) and Other Defendant* Case Tokyo District Court (May 25, 2022) 1269 *Rodo Hanrei* 15

TAKIHARA Hiromitsu

I. Facts

Plaintiff X, a woman born in 1995, has operated her own website (hereinafter referred to as "X's website") in March 2019, calling herself a beauty writer or cosmetic concierge. After her graduation from university and until the end of July 2019, X engaged in part-time work (*arubaito*, a term originally used for student part-time work, but now used to cover any work on a casual basis that does not fit into any other categories) to write articles that were supposed to be posted on websites of beauty-related businesses, such as aesthetic salons. Although X thought of making her living as a freelance beauty writer in the future, she has not had a job from which she would earn a fixed amount of monthly income as a beauty writer.

Company Y (hereinafter, Y1) engages in operating an aesthetic salon and other businesses, and it operates a salon named *Kintore Esthe* (hereinafter, the "Salon"). The aesthetic salon offers hand and machine treatments exclusively for female customers. At the Salon, the man who founded Y1 and served as its representative (hereinafter, Y2) provided treatments to all customers.

On March 9, 2021, using an inquiry form available on X's website, Y2 sent an email to X, asking her to receive treatment at the Salon and write an article about her experience to be posted on Y1's website (hereinafter, "Y1's website"). Through negotiation on particulars such as the unit price per character and the number of characters in the article, Y2 reached an agreement with X that: X would write an article on her experience at the Salon and post it on Y1's website; X would post the same article on X's website; and X and Y2 would have a meeting at the Salon on March 20 to discuss the content of the article. On that day, X and Y2 met each other for the first time at the Salon, discussed the content of the article to be written by X, and agreed that she would write an article by comparing her experience at the Salon with her experience at other salons (hereinafter, the "Article"). On this occasion, Y2 asked X questions about her past sexual experience and masturbation.

Several times on March 28 and other days, X received treatment by Y2 at the Salon, without paying a fee to Y2. When providing treatment, Y2 requested X to show her breasts to him; touched her private parts several times and had her touch them herself as he requested; and further requested her to touch his genitals. In addition, at the time of the meetings, held several times, Y2 demanded that X kiss him, saying that he would take her dinner if she allowed him to have sex with her; ordered her and another woman to take off their tops and touch each other's breasts; and made her stand up and pressed his crotch against her buttocks, saying that this was necessary for training her pelvic floor muscles, even though X was crying.

On April 23, 2019, X posted the Article on X's website. On April 28, Y2 made a proposal to X to have her write articles for the purpose of SEO (search

engine optimization; measures to ensure that Y1's website would come up on the top page of the search results when internet users search certain keywords on a search engine) every day as Y1's exclusive writer and post these articles on Y1's website. After that, X and Y2 continued communication to discuss terms and conditions. Y2 explained to X that a service contract would be signed for a period of up to six months, although it may be terminated immediately if the proposed scheme failed to be successful, and that there was also a possibility that X would be appointed as an executive officer or regular employee of Y1.

From August 1 to 31, while receiving instructions from Y2 on the content of articles, X created a column article by taking SEO measures and posted it on Y1's website once every day. In addition, X refined Y1's website by analyzing websites of competing aesthetic salons and advertised Y1's website on twitter and other social media.

On August 31 and onwards, while communicating with X, Y2 told her that he would terminate the contact with her because the quality of the articles she had written were low.

In late October 2019, X consulted with the *Shuppan Nets* (a union of publishers network affiliated with Japan Federation of Publishing Workers' Unions) about the damage she had suffered, such as Y1 having not paid her fees for her services and Y2 having touched her private parts, and she joined the *Shuppan Nets*. On November 14, 2019, the *Shuppan Nets* requested for collective bargaining with Y1. At the first session of collective bargaining held on December 16, 2019, Y2 denied the conclusion of the service contract and refused to pay fees to X, and after that, deleted a large part of the column articles posted by X on Y1's website.

On January 16, 2020, X visited a mental health clinic and complained that she had continued to have insomnia and other symptoms since around October 2019. On February 8, 2020, she was found to have symptoms such as insomnia, depressive mood, a lack of concentration, palpitations and shivering when thinking about her job for Y1, and was diagnosed as needing outpatient treatment for the time being.

In the second session of collective bargaining held on February 21, 2020, Y2 stated that no column article written by X had been posted on Y1's website, but after that, he stated that X had posted her column articles on Y1's website without permission, so he deleted these articles. Y2 also stated that X had created accounts for Y1 on Twitter, etc. and posted updates on these accounts although Y1 had not asked her to do so. In addition, Y2 demanded X to pay 350,000 yen as a fee for the treatment she had received at the Salon.

On March 9, 2020, the process attorneys for X filed claims against Y1 to seek consolation money due to sexual harassment by Y2 against X, and the unpaid amount of fees owed to X for her work.

II. Judgment

1. Whether X has a claim to seek fees for her services under the Service Contract

Since June 2019, X and Y2 repeatedly held specific discussions on the content of the services that Y1 would entrust X to perform and the amount of fees to be paid to her. On July 1, 2019, they prepared a draft contract based on what they had discussed until then, and from August 1, 2019, X actually performed the services while confirming the intention of Y2. In light of these facts, it is appropriate to find that by around July 1, 2019, a service contract (hereinafter, the "Service Contract") had been formed between X and Y1 to the effect that X would begin the services from August 2019 and that Y1 would pay her 150,000 yen as a monthly fee.

It is appropriate to find that the Service Contract has the nature of a quasi-mandate contract mainly for providing services.

According to the above, X has a claim against Y1 to seek 382,258 yen in total as the fees based on the Service Contact, which consists of 150,000 yen as the fee for August 2019, 150,000 yen as the fee for September 2019, and 82,258 as the fee for the period from October 1 to 17, 2018 (150,000 yen / 31 days ×17 days).

2. Whether there was harassment against X, committed by Y2 and whether it constitutes a tort

In this case, it is found that Y2 behaved as follows: (i) on March 20, 2019, when Y2 had a meeting with X at the Salon, he asked her questions about her sexual experience and masturbation; (ii) on March 28, on the occasion of the first treatment at the Salon, Y2 requested X to show her breasts to him, saying such things as that the treatment would tickle less if she was naked even against her will; (iii) on June 3, 2019, after X received the sixth treatment at the Salon, Y2 instructed her to take off the paper underwear used for treatment, touched her private parts three times, and then had her touch them herself as he requested, and he further requested her to touch his genitals; (iv) on June 17, when Y2 had a meeting with X at the Salon, he demanded that she kiss him, saying that he would take her dinner if she allowed him to have sex with her, and he touched her waist and pressed his crotch against her buttocks; (v) on August 31, 2019, Y2 told X that he would terminate the contact with her because the quality of the articles she had written were low, and sent her messages that he was disappointed to learn that she had not worked exclusively for Y1; (vi) on September 1, 2019, Y2 sent messages to X stating that the way she works was not professional and that her articles were pointless unless they came up on the top page of the search results; (vii) on September 4, Y2 expressed displeasure with X about the low quality of her services and her status of having another job; (viii) and he hugged her and tried to kiss her, and pressed his crotch against her buttocks; (ix) on October 7, 2019, when Y2 had a meeting with X, he hugged her and tried to kiss her, and then ordered her and another woman A, to take off their tops and touch each other's breasts; (x) on October 21, when X requested Y2 to have a meeting to discuss how to verify or assess her services, Y2 sent her messages stating that she should not demand fees if she was unable to understand these things unless she was taught them, that Y1 had not signed any contract with her and could not sign any contract with her because her skills were poor, and that she should not demand fees if she wished to be taught and trained by Y2.

It is appropriate to conclude that the series of behavior of Y2 described in (i) to (x) above constitutes sexual harassment that violates X's sexual freedom, and it also constitutes power harassment (explained below) in that Y2 had X engage in various services under his instructions based on the Service Contract, and yet, he refused to pay fees to X without legitimate grounds and, thereby, caused economic disadvantage to her.

3. Whether Y1 is liable for default on obligations due to the company's breach of the obligation to care for employee safety and health

X was entrusted by Y1 to engage in services such as writing articles that would be posted on Y1's website and create and operate Y1's website as the company's exclusive website manager, and performed these services while receiving instructions from Y2, and thus, it is found that X was in effect in the position to provide services to Y1 under its direction and supervision. Therefore, Y1 had an obligation under the principle of good faith and fair dealing to give the necessary consideration to enable X to provide services while ensuring her life and physical safety.

Y1 is found to have violated X's sexual freedom by way of the behavior of Y2 that constitutes sexual harassment or power harassment and, thereby, breached this obligation. Consequently, Y1 is liable for default on obligations due to the breach of this obligation.

4. Amount of damage suffered by X due to the tort by Y2 and the default on obligations by Y1

(1) Consolation money

It is appropriate to find that an amount sufficient to compensate X for the mental distress she suffered because of the tort by Y2 and the default on obligations by Y1 is 1.4 million yen.

(2) Lawyer's fee

100,000 yen

III. Commentary

The issue of this case is sexual harassment or

power harassment against a freelancer. "Power harassment" is a term that was originally coined in Japanese, with each of the two words borrowed from English (the same expression does not exist in English), and first came into use in the early 2000s, generally to refer to harassment by a person in a superior position. In the judgment on this case, the court determined that the service contract concluded between the plaintiff freelancer and the defendant company has the nature of a quasi-mandate contract, and found the company's breach of the obligation to care for employee safety and health, which is an accessory obligation attached to the service contract. This case is significant in that it found a breach of the obligation to care for employee safety and health in the context of purely bilateral entrustment of services, and it can be evaluated as a case the consequence of which can lead to the protection of freelancers, the number of whom is increasing.

1. Relationship between the parties that serves as the prerequisite of the obligation to care for employee safety and health

In the third point of this judgment, the court examined whether Y1 is liable for default on obligations due to the breach of the obligation to care for employee safety and health, and it found the company to be liable. This determination has a certain degree of significance in that it held Y1 to be liable for default on obligations (due to the breach of the obligation to care for employee safety and health) in the case in which the tort committed against X by Y2 was disputed.

The precedent case that cannot be ignored when discussing the obligation to care for employee safety and health is the *Ground Self-Defense Force (SDF) Hachinohe Maintenance Facility* case.[1] This is the case in which the court established the concept of the obligation to care for employee safety and health for the first time in case law. That case is about the accident in which an SDF member who was engaged in vehicle maintenance was run over and killed by a heavy vehicle driven by another SDF member. In this case, the Supreme Court defined the obligation to care for employee safety and health as the "obligation assumed by one party to the other party or by both parties to each other under the principle of good faith and fair dealing as an accessory obligation attached to the legal relationship based on which the parties have entered into a relationship of special social contact."

The obligation to care for employee safety and health that is based on such relationship of special social contact is applicable to various types of contracts for providing services. It is pointed out that the obligation to care for employee safety and health has been established as a contractual obligation (or an obligation based on a relationship similar to a contract) that is applicable to a wide area including school accidents.[2]

Currently, the obligation to care for employee safety and health under a labor contract is prescribed in Article 5 of the Labor Contracts Act. However, this judgment is significant because it specifically affirmed that the obligation to care for employee safety and health exists with regard to freelancers, who does not have "worker status." It can be evaluated as meaningful at the present time when attention is being paid to the protection of freelancers.

Before this judgment, there was a precedent, the *Waka no Umi Unso* case,[3] in which the court determined that the plaintiff (freelance truck driver) was not "worker" but affirmed that there was a "relationship of employment and subordination that is equivalent to an employment contract" between the plaintiff and the defendant (transport company), by stating that "although there is no employment contract between them, there is a relationship in which the plaintiff provides services under the direction and supervision of the defendant." It is not certain, but the Tokyo District Court may have made reference to this precedent judgment when handing down the judgment of the present case.

2. Scope covered by the obligation to care for employee safety and health

In the third point of this judgment, the court stated that "Y1 is found to have breached the abovementioned obligation by way of the behavior of Y2, who violated X's sexual freedom by

committing sexual harassment or power harassment against her." However, the court should have demonstrated certain reasoning as to whether the obligation to care for employee safety and health covers a person's "sexual freedom."

Originally, employer's obligation to care for employee safety and health has been generated and has developed as an obligation to protect people's lives and bodies as their legal interest from personal damage, that is, death and injury, and it can be said that the core area of concern of this concept is interest that is physically violated. If "sexual freedom" is considered to be freedom to sexual self-determination or freedom as to sexual feelings, it is somewhat surprising that it is covered by the obligation to care for employee safety and health (having said that, it may not be surprising if "sexual freedom" also means freedom from sexual violation (freedom from sexual violence); it should be noted that there can be various views on this point).

Obviously, it is clear that the doctrine of the obligation to care for employee safety and health actually exists and it has developed to a certain degree from the level where it was generated. However, in past cases in which the violation of the victim's sexual freedom was disputed, such as the *Mie Sexual Harassment* case[4] (a case in which the plaintiffs were subject to indecent words and were touched on their buttocks and other body parts several times by the defendant, who was their superior, at a hospital established by the defendant corporation), the obligation to consider the work environment (described in the judgment on the *Mie Sexual Harassment* case as the "obligation to take care to maintain a comfortable work environment for employees") basically applied. In short, it can be pointed out that "sexual freedom" may be more directly protected by the obligation to consider the working environment, rather than the obligation to care for employee safety and health.

Therefore, in light of the history of the concept of the obligation to care for employee safety and health and its relationship with theories of other types of obligations, the view adopted by this judgment that the obligation to care for employee safety and health covers "sexual freedom" may sound odd (but there is no such oddness if "sexual freedom" is considered to mean freedom from sexual violation (freedom from sexual violence) as well). In the present case, due to the violation of X's sexual freedom by Y2, X was diagnosed as having depression at a mental health clinic and was found to have symptoms such insomnia, depressive mood, a lack of concentration, palpitations and shivering. Such a consequence can be identified as personal damage. Therefore, there would be no objection to the view that the obligation to care for employee safety and health ultimately applies to the consequence mentioned above. However, it may be a leap of logic to consider that the obligation to care for employee safety and health directly covers "sexual freedom."

In this judgment, the court determined that Y1's refusal to pay fees to X without legitimate grounds constitutes "power harassment that causes economic disadvantage to her." Although this point is not particularly discussed in this commentary, it has a significant meaning for freelancers, who could face the same problem as X. Given that it is highly likely that similar lawsuits will be brought to court along with the increase in the number of freelancers, this judgment can be an important precedent in that it raised a question regarding the argument on an accessory obligation attached to a quasi-mandate contract.

1. The *Ground Self-Defense Force (SDF) Hachinohe Maintenance Facility*, Supreme Court (Feb. 25, 1975) 29-2 *Minshu* 143.
2. Takashi Uchida, *Minpō III, Saiken sōron, tanpo bukken (dai 4 han)* [Civil Law III, generalities on claims, security interest (4th edition)] (University of Tokyo Press, 2020), 152.
3. The *Waka no umi unso* case, Wakayama District Court (Feb. 9, 2004) 874 *Rohan* 64.
4. The *Mie Sexual Harassment* case, Tsu District Court (Nov. 5, 1997) 729 *Rohan* 54.

TAKIHARA Hiromitsu

Ph.D. in Law. Associate Professor, Daito Bunka University. Research interest: Labour and Employment Law, especially contract of employment, unfair labour practices, workplace bullying/harassment, restorative justice, and comparative labour and employment law.

Claim for Unpaid Overtime by a Public School Teacher

The *Saitama Prefecture* Case
Saitama District Court (Oct. 1, 2021) 1255 *Rodo Hanrei* 5

HAMAGUCHI Keiichiro

I. Facts

X has been a public elementary school teacher employed by Y (Saitama Prefecture) since 1981. Under the provisions of a special measures law governing public school teachers' salaries (the Act on Special Measures concerning Salaries and Other Conditions for Education Personnel of Public Compulsory Education Schools, etc., referred to here as the "Education Personnel Salaries Act," EPSA, enacted in 1971) addressed further below, public school teachers are exempted from the application of provisions on premium wages for overtime work and work on days off set out in Article 37[1] of the Labor Standards Act (LSA), and instead receive a salary top-up equal to 4% of their monthly salary (*kyōshoku-chōseigaku*, literally "teachers' adjustment payment"). At the same time, the EPSA prescribes that overtime should be limited for work that falls under one of the following four categories: (1) practical courses for junior high and high school students, (2) school events, (3) staff meetings, and (4) disasters or emergencies in which it is necessary to take urgent measures to direct students (elementary, junior high and high school students, hereinafter "students"). X filed a suit in December 2018, seeking the payment of the premium wages (or compensation under the State Redress Act) for his overtime work between September 2017 and July 2018, on the grounds that said work did not fall under the above-mentioned four categories and the provisions of Article 37 (LSA) should therefore be applied according to the general rule.

II. Judgment

In its judgment on October 1, 2021, the Saitama District Court dismissed X's claims. Namely, it firstly recognized Y's claims, which were based on the premise that "unlike typical workers who work under the overall directions and orders of their employer, teachers' work is unique in the sense that they are expected to voluntarily and proactively engage in duties at their own discretion as suited to the education of students. The ways in which they engage in said work are also similarly unique due to the summer holidays and other such long school holidays during which they rarely engage in their primary task of teaching classes. Given these specific characteristics of teachers' work, it is unsuitable to closely manage actual working hours as applied in the case for typical workers," and that "as such work clearly differs in character to work conducted under the directions and orders of a supervisor, teachers who engage in such work outside of official working hours cannot immediately be determined to have engaged in work under the directions and orders of a supervisor." The District Court also recognized the claim that "due to the fact that the work of teachers is typically an inextricable combination of work that the teacher conducts proactively at their own discretion and the work that they engage in under the directions and orders of the

school principal, rendering it difficult to accurately distinguish between these two types, the current system does not in practice allow the principal, as the manager, to closely manage working hours to identify exclusively what amount of time was spent on work under directions and orders and pay salaries accordingly."

The judgment went on to address the purport of the provisions set out in the EPSA, noting that "having excluded public school teachers from the application of Article 37 (LSA) on the basis that the unique nature of teachers' work precludes it from the quantitative management of working hours applied to typical workers, the Act prescribes the payment of a salary top-up as a result of comprehensive evaluation of work performed out of hours, and limits the occasion in which teachers can be ordered to work overtime to four categories as a means of preventing the exemption from Article 37 (LSA) from resulting in longer working hours for teachers." On those grounds, the judgment concludes that teachers are "exempt from the application of Article 37 (LSA) with regard to not only the four overtime categories but also all forms of teachers' duties conducted outside of working hours." The District Court thereby rejected X's claim, stating that as the 4% salary top-up is "paid as a result of comprehensive evaluation of work conducted by teachers outside of working hours, and paid in lieu of an overtime work allowance for not only the work listed in the four overtime categories but also work outside of working hours to perform any other type of duty; therefore, it cannot be interpreted that the EPSA accounts for the possibility of duties other than those specified in the four overtime categories being compensated with the overtime premium wages prescribed in Article 37 of the LSA in addition to the salary top-up."

X's claim that having a teacher work overtime beyond the regulations set out in Article 32 of the LSA was in violation of the State Redress Act was also dismissed on the grounds that the overtime work did not directly pose a risk of damage to the teacher's health or welfare.

In concluding, the judgment also included an *obiter dictum* as follows: "The actual day-to-day conditions of teaching in Japan at present are such that many teachers have little choice but to conduct a certain amount of overtime work under the order to perform the duties or other such directions by the school principal. It must therefore be concluded that the EPSA, with its prescription of a salary top-up set at 4% of the monthly salary, no longer adequately reflects the actual conditions of teaching. It is a meaningful development that this issue has been highlighted for the public by the plaintiff's suit. In order to further enrich the education provided to students, who are Japan's future, it is the court's sincere hope that efforts will be made toward improving the actual working environments for teachers by promptly taking steps such as listening earnestly to the opinions of teachers, reducing the duties of teachers through work-style reforms, and seeking to develop a system for managing working hours and to review EPSA and other such salary structures in order to ensure that salaries are appropriately suited to the actual conditions of the work." It should, however, be noted that these observations have no impact on the content of the judgment.

III. Commentary

While this case has also attracted public attention, it must be said that the judgment itself is extremely poor. Firstly, the part in which Y's claims regarding the unique character of teachers' work are directly accepted does not stand up to logical analysis. It is certainly true that teachers' work is unique in comparison with the work of typical workers, in the sense that teachers may receive relatively little directions and orders and be allowed scope for independent decisions. Given such unique aspects, it can be suggested that the approach of establishing a special exemption for regulating teachers' working hours is to some extent rational. However, the unique characteristics of teachers' work that are referred to are the unique aspects of teachers as an occupation, which are entirely consistent across all types of schools, whether they be national, public, or private schools. At present, it is only public

school teachers who are exempt from the application of Article 37 of the LSA and to whom the EPSA is applied. In the case of both national school teachers and private school teachers, the provisions of the LSA are applied in full. Is this to suggest that such teachers' work does not involve the scope for independence and individual discretion that public school teachers are allowed?

Yet more incongruous is the fact that although at the time of its enactment in 1971 the EPSA was applied to both national schools and public schools, once national schools changed status in 2004 to become incorporated administrative agencies (the staff of which are not government employees), national school teachers were excluded from the exemption set out in the EPSA and came under application of the provisions of the LSA in full. Does this mean that 2004 saw national school teachers lose the independence and individual discretion that they had previously held? That is what is claimed by the Japanese Ministry of Education, Culture, Sports, Science and Technology (MEXT), but it is an implausible argument following a logic that quickly contradicts itself.

This judgment incidentally also traces in detail the developments leading up to the enactment of the EPSA, starting with a recommendation issued by the National Personnel Authority, but fails to touch on the key issue of why said act needed to be enacted in the first place. Prior to the EPSA, it was determined that teachers should not be ordered to work overtime in line with an administrative notification issued by the Ministry of Education, Science and Culture (currently MEXT), but as the reality was that teachers were often working overtime, a significant number of suits were filed by a teachers' labor union called the Japan Teachers' Union, leading to a succession of judgments recognizing payments of overtime allowances, which were ultimately confirmed by the Supreme Court in 1972. The EPSA was legislated in response to such developments and reflects such a background in the fact that it includes both exemption from the application of Article 37 (LSA) and a provision limiting overtime work to four categories as a general rule. This judgment does not give any consideration to the developments leading up to such legislation. The theoretical portion of this judgment can only be described as extremely low standard because it aimlessly accepts Y's claims, which are full of the kinds of contradictions noted above.

On the other hand, X's claims are also difficult to recognize when careful consideration is given to the application of the existing laws to this case (without addressing the laws' purports and objectives). X's claim is that the two provisions of the EPSA—namely, the payment of a 4% salary top-up in lieu of the application of Article 37 (LSA) and the limitation of overtime work to the four overtime categories—are closely interconnected (not only in their purport and objectives but also the scenarios to which they are applied), and therefore cases of overtime work other than that specified in the four overtime categories revert to the original provision —namely, Article 37 of the LSA applies—and yet, the nature of the provisions of the EPSA does not necessarily allow for such an interpretation.

Firstly, Article 6 of the EPSA merely orders employers to limit overtime work to "cases determined in municipal ordinances in accordance with the criteria set out in the Cabinet Order," such that any other overtime work simply constitutes a violation of said article by the employer, and the fact remains that it is overtime which is exempt from the application of Article 37 (LSA) in accordance with Article 5 (EPSA). X claims that the overtime work of a public school teacher can be divided into overtime work as categorized under Article 6 (EPSA) and all other overtime work, and that the latter does not fall under the application of the provision of Article 5 (EPSA) exempting the application of Article 37 of the LSA, but such an interpretation is not possible according to the provisions of the law.

Considering the aforementioned developments that prompted the enactment of the EPSA, it appears that the four overtime categories were introduced as an declaratory provision that sought to partially maintain the MEXT's façade (an official stance

divorced from reality) that teachers did not work overtime as a general rule, and it is not a provision that envisages cases of overtime to which LSA Article 37 is applied other than the overtime in the four overtime categories. The very EPSA itself merely states that overtime is restricted to "cases determined in municipal ordinances in accordance with the criteria set out in the Cabinet Order," such that the first appearance of the four categories is in a Cabinet Order, allowing limitless possibilities for expanding those categories depending on the way in which the Cabinet Order is determined, and, while there are outstanding theoretical issues, it is also impossible to suggest that these expansions are invalid when determined by municipal ordinances that go beyond the criteria of the Cabinet Order.

While the explanations by Y and MEXT regarding the purport of the EPSA are fundamentally flawed as discussed above, according to a literal interpretation of the provisions of the EPSA as a form of *ius positivum* (positive law— statutory man-made law), the only possible interpretation is that for public school teachers—and public school teachers *only*—overtime work is entirely exempted from the application of Article 37 of the LSA. Therefore, in this judgment, the conclusion—namely, that X's suit has no grounds and should be dismissed—alone is acceptable. All points regarding the reasons for reaching said conclusion can be refuted.

This conclusion is what could be described as *dura lex sed lex*—"the law is hard, but it is the law." The judgment would have been logically coherent if it had consisted of that conclusion with an *obiter dictum* such as the one provided in this case as final remarks. It is unfortunate that this judgment recognizes all of Y's explanations and even concludes with observations that contradict them, thereby adding a further layer of contradiction.

1. If an employer extends the working hours or has a worker work on a day off pursuant to the provisions of Article 33 or paragraph (1) of the preceding Article, it must pay premium wages for work during those hours or on those days at a rate of at least the rate prescribed by Cabinet Order within the range of not less than 25 percent and not more than 50 percent over the normal wage per working hour or working day; provided, however, that if the number of hours by which employer has extended the working hours it has an employee work exceeds 60 hours in one month, the employer must pay premium wages for work during hours in excess of those 60 hours at a rate not less than 50 percent over the normal wage per working hour. (LSA Art. 37 Para.1)

The *Saitama Prefecture* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1255, pp. 5–38.

HAMAGUCHI Keiichiro
Research Director General, The Japan Institute for Labour Policy and Training. Research interest: Labor policy.
https://www.jil.go.jp/english/profile/hamaguchi.html

Course-Based Employment Systems and Gender Discrimination

The Towa Kogyo Case

Nagoya High Court (Apr. 27, 2016)

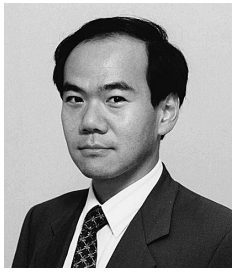
Keiichiro Hamaguchi

Facts

X was hired at Y in 1987 and was initially a clerical worker, but from 1990 onward worked as a designer and was engaged in designing plants and industrial machinery. In 2001 X acquired second-class architect certification. Y introduced a "track" system, in place of separate wage systems for men and women, in 2002, but all men were designated as *sogo shoku* (employees on the career track) and all women as *ippan shoku* (employees on the clerical track). In the design department, only X, the only female employee out of seven members, was designated as *ippan shoku*, and her wages were lower than those of men who were her juniors. X repeatedly asked Y to reclassify her as *sogo shoku*, but was refused, and filed a lawsuit. The District Court of Kanazawa ordered Y to pay the difference between *sogo shoku* and *ippan shoku* wages in seniority-based payment and retirement allowance, as well as consolation money, for violating Article 4 of the Labor Standards Act (LSA), stating that "an employer shall not engage in discriminatory treatment of a woman as compared with a man with respect to wages by reason of the worker being a woman," on March 26, 2015. However, the court did not recognize a violation in terms of gap in wages based on ability evaluations. Both X and Y appealed.

Judgment

The April 27, 2016 judgment from the Kanazawa branch of the Nagoya High Court was almost identical to the original judgment. It stated that "When Y's track system was introduced, employees were not actually classified according to their *sogo shoku* and *ippan shoku* roles, but rather all male employees were simply designated *sogo shoku* and all female employees *ippan shoku*…strongly indicating de facto gender-based discrimination. At Y, in effect, different wage tables were applied depending on gender, in violation of Article 4 of the Labor Standards Act." As in the earlier ruling, Y was ordered to pay the difference between *sogo shoku* and *ippan shoku* wages in seniority-based payment and retirement allowance, as well as consolation money, but the court did not recognize a violation in terms of wages based on evaluation of "professional ability." The judgment in the appeal went into somewhat more detail on this point than the original ruling, rejecting the call for compensation equivalent to the gap in ability-based pay on the grounds that "Employees' promotion is based on personnel evaluations, and whether or not an employee satisfies the conditions for promotion is a matter of Y's discretion."



X appealed, but on May 17, 2017 the Supreme Court decided not to hear the case.

Commentary

It is a good illustration of typical Japanese labor management before passage of the Equal Employment Opportunity Law (EEOL) of 1985, although such a clear-cut case of old-fashioned discrimination against women is somewhat unusual today. In the traditional Japanese-style employment system, male workers were generally expected to work for the same employer over the long term from

recruitment to retirement, their wages increasing with seniority, and to handle core business duties, while female workers handled supplementary duties, on the premise of short-term service from recruitment until resignation due to marriage, child-birth, or child-care. Influenced by the United Nations Convention on the Elimination of All Forms of Discrimination against Women in 1981, EEOL in 1985 called for employers' "duty-to-endeavor" to treat men and women equally in recruitment, hiring, assignment and promotion. It was not until the 1997 revision of the EEOL drastically modified the 1985 that discriminatory treatment in recruitment, hiring, assignment and promotion against women was prohibited. To comply with this, companies introduced track-based employment systems, with the former male track replaced by *sogo shoku* and the women's by *ippan shoku*, with workers to be classified regardless of gender. Until the 1997 revision, however, in many workplaces there was de facto continuation of the previous system, with all men classified as *sogo shoku*, and the vast majority of women as *ippan shoku*.

In this case, X, graduated from university with a science degree, had second-class architect certification, and was engaged in the design work, but was classified as *ippan shoku*, while male employee F, also in the design department, had a vocational-technical high school degree, and not only lacked second-class architect certification but could not even make a simple design drawing on his own, yet was classified as *sogo shoku*. This illustrates that the concept of "track" (*sogo shoku* vs. *ippan shoku*) in Japan differs from that of "job title" common in Western countries.

In this case the court found that "track" was simply slapping new labels onto the male and female categories, and that judgment is certainly applicable. Indeed, after X resigned in January 2012, Y introduced a new system in June 2012, and the first female *sogo shoku* employee was hired in April 2013.

Under the new system of *sogo shoku* and *ippan shoku*, classifications are to be applied to all workers regardless of gender. The concepts, however, are different from those of job title or position common in Western countries, with *sogo shoku* referring to positions where employer could assign different duties or relocate to other regions, and *ippan shoku* to those who as a basic rule have limited scope of duties and whom employer cannot order for relocation.

Now, it is very confusing that Japan's EEOL and the guidelines based thereon employ the term *shokushu* (generally translated as "job type," "position," or "occupation") to describe this distinction between *sogo shoku* and *ippan shoku*, rather than to the Western-style concept of "occupation" such as sales, design, or clerical work. In the Japanese-style employment system, the concept of "job title" in the Western sense either does not exist or is of little importance. The important aspect of employment classification is whether job content and geographical location are limited or can be freely assigned at the employer's discretion. There is scarcely any literature that draws attention to these points. Many non-Japanese researchers may misunderstand the significance of references to *shoku-shu* in EEOL.

The call for the amount equivalent to gap in wages based on ability evaluation, which was rejected in this case, also relates to a unique aspect of Japanese wage system. Under this ability-based wage system, job grades and gradational salaries are determined based on evaluations of workers' ability to perform job duties. In practice, it takes widely varied, from strictly regulated reviews resulting in major disparities in wages and position, to something virtually indistinguishable from a seniority-based system, depending on the companies.

While this particular case is not clear-cut, X claimed that there was no difference in promotion or wage increase criteria depending on whether she was *sogo shoku* or *ippan shoku*, thus she could expect a similar rise in wages over time as *sogo shoku*, but Y denied this and rejected. The court went along with the strictly defined basic principle of ability evaluation-based treatment. With little or no concept of "job title" per se, it is extremely difficult to prove discrimination in individual evaluations of professional ability unless these evaluations are

in practice extremely seniority-based. This is an obstacle not only in gender discrimination cases, but also in cases of discrimination based on other factors, such as labor union membership.

AUTHOR

Keiichiro Hamaguchi Research Director General, The Japan Institute for Labour Policy and Training (JILPT). Research interest: Labor policy. Profile: http://www.jil.go.jp/english/profile/hamaguchi.html

Commentary

Disguised Contracting and the Deemed Labor Contract Application by the Client under Item 5 of Paragraph 1 of Article 40-6 of the Worker Dispatching Act

The *Tori* Case
Osaka High Court (Nov.4, 2021) 1253 *Rohan* 60

ZHONG Qi

I. Facts

Y is a joint-stock company engaged in the manufacture and sale business of various floor coverings and carpets. There are many manufacturing works at Y's Factory D, among which X et al. were in charge of the baseboard and chemical product manufacturing processes.

Company A is a special limited liability company whose purpose is to provide contracting services for the manufacture of baseboards and flooring materials, etc. There is no capital relationship or personnel relationship, such as a concurrent directorship, between Company A and Y.

Since March 30, 1999, Company Y has concluded and revised a basic service contract agreement with Company A concerning the manufacturing and processing of baseboards. The latest basic contracts include one for the manufacture and processing of baseboards (hereinafter referred to as "Service Contract 1") and another for the manufacture and processing of adhesives ("Service Contract 2"). Each contract and memorandum of understanding stipulates the content, duration, amount, quantity, and place of work to be performed, etc.

X et al. were employed by Company A and were engaged in the baseboard or chemical product manufacturing processes at Company Y's Factory D.

Company A decided to terminate Service Contract 1 on February 28, 2017, and on March 1 of the same year, it concluded an individual worker dispatch contract with Y, specifying the dispatch destination as Factory D, the work as baseboard manufacturing work, the dispatch period as March 1 to 30, 2017, and dispatched 12 workers including 4 from X et al. to the baseboard manufacturing process. Meanwhile, Service Contract 2 continued until March 31, and was terminated on the same day. In accordance with this, X et al. were dismissed from Company A along with other workers on the 30th of the same month. Thereafter, Company Q took over Company A's business using dispatched workers, while X et al. were not hired by Company Q.

X et al. claimed that after March 21, 2017, Y was deemed to have made an offer of direct employment to X et al. on the grounds that Service Contract 1 and 2 fell under item 5 of paragraph 1 of Article 40-6 of the Worker Dispatching Act (Concluding any contract for work or other contract under any title other than worker dispatch for the purpose of evading the application of the provisions of this Act or any law that is applicable = so-called disguised contracting), and that X et al. expressed their acceptance of Y's offer, and that a labor contract was established between them and Y. However, since Y denied the existence of a labor contract with X et al., X et al. filed a suit seeking confirmation of their status under the labor contract and payment of wages.

The judgment in the first instance (Kobe District Court (Mar. 13, 2020) 1223 *Rohan* 27) dismissed X et al.'s claim on the grounds that their work relationship did not constitute disguised contracting, and X et al. appealed.

The contentious issues are (1) whether working in the baseboard and chemical product manufacturing processes were conducted in a state of disguised contracting, etc., at around March 2017 at the latest, (2) whether Y had the intent to engage in disguised contracting, etc., (3) the working conditions of X et al. and (4) when X5 expressed his intention to accept. In this paper, (3) and (4) will be omitted.

II. Judgment

Reversal of the original judgment (confirming that X et al. have labor contract status at Y).

1. Whether workers were engaging in the baseboard and chemical product manufacturing processes in a state of disguised contracting, etc., at around March 2017 at the latest.

"If the contractor does not give the workers any orders, and the client gives direct orders to the workers to perform the work in the same place, this cannot be considered to be a contract agreement, even if the legal form of the service contract is adopted between the contractor and the client."

"With regard to the distinction between worker dispatching and contracting, the 'Notice of the Standards for the Classification of Worker Dispatching Undertakings and Subcontracting Undertakings' (hereinafter referred to as the "Classification Standards") is an administrative interpretation of the Worker Dispatching Act from the perspective that, in order to ensure proper implementation of the Act, it is necessary to accurately determine whether or not an undertaking falls under the classification of worker dispatching. Since its content is regarded as reasonable, it is appropriate to refer to it in this case."

(1) Whether or not Company A directly utilizes the labor force of workers employed by itself

"The fact that Y did not communicate directly with Company A's workers does not mean that Y did not give instructions to Company A's workers. Rather, looking at the content of the information that was communicated, it is recognized that the content of the communication prepared by Y's technical staff was specific instructions on work procedures."

"While there is no evidence to suggest that Company A requested changes to Y's manufacturing requests or negotiated the content of such requests, the weekly manufacturing schedule prepared by Company A and confirmed by Y's technical staff was a detailed one that described the model numbers and quantities of products to be manufactured daily on site, and was subject to revision by Y's technical staff." Therefore, it cannot be recognized that Company A was able to freely determine the speed of work execution, the allocation and the order of work at its own discretion when preparing the weekly manufacturing schedule. Furthermore, there is insufficient evidence to support that Company A conducted its own quality inspections of the products manufactured in each process before delivering them to Y. Therefore, it is difficult to evaluate the delivery of the manufacturing request form and the preparation of the weekly manufacturing schedule as the process of receiving and placing an order for a service contract (from Y to Company A). "Rather, the preparation of the weekly manufacturing schedule indicates that Y had direct control over the on-site labor force in the baseboard and chemical product manufacturing processes, as well as in other processes."

"Company A cannot be found to have provided instructions or other management regarding the method of execution of the work in the baseboard and chemical product manufacturing processes, and thus the requirements for contracting as stipulated in Article 2 (1) (a) of the Classification Standards 'The party shall give instructions and other management regarding the performance of the work by falling under any of the following conditions: (1) To give instructions and other management concerning the method by which work should be performed to workers by itself. (2) To give instructions and other management related to the evaluation, etc. of the

workers' performance of work itself.' have not been met."

"Since Company A merely formally kept track of the workers' working hours and cannot be found to have managed the working hours, the requirements for contracting as stipulated in Article 2 (1) (b) of the Classification Standards 'The party shall give instructions and other management regarding working hours, etc. by itself by falling under any of the following conditions: (1) To give instructions and other management regarding the times that workers start and end work, their rest periods, days off, leave, etc., (excluding mere ascertainment of these) by themselves. (2) To give instructions and other management when extending the working hours of workers, or having them work on days off (excluding mere ascertainment of working hours, etc. in these cases.) by itself.'" have also not been met."

"It is recognized that when a worker from Company A caused an accident, the full-time chief manager or the chief manager of Company A reported the accident to Y and instructed the worker concerned, but there is insufficient evidence to support that this was reported to President C (the president of Company A) or that, based on this, Company A gave instructions on worker discipline. In addition, ...when X5 took paid leave, the arrangement for a support person was made by contacting the Section Chief I, an employee of Y, and there is no evidence that President C was involved in this arrangement. In light of these points, the requirements for contracting, as stipulated in Article 2 (1) (c) of the Classification Standards 'The party shall give instructions and other management to maintain and ensure order in the company by itself by falling under any of the following conditions: (1) To give instructions and other management relating to the discipline of workers by itself. (2) To make decisions and changes in worker assignments, etc., by itself.' cannot be said to have been met."

(2) Whether or not Company A independently handles the work undertaken under the service contract as its own business.

"Although Company A made reports, etc. to Y when defects occurred in its products, there is no evidence that Company A was ever requested by Y to fulfill its legal responsibilities as a contractor under Service Contract 1 and 2, so it is not recognized that Company A was, in fact, legally responsible as a contractor under the service contract."

"Company A cannot be considered to have prepared and procured raw materials and manufacturing machines at its own responsibility or expense."

"It is not recognized that Company A had the ability or know-how to independently provide the worker training necessary for the baseboard and chemical product manufacturing processes. In the first place, the knowledge and skill required for X et al. to operate in the baseboard manufacturing process were acquired through on-the-job instruction by R, who was an employee of Y, and not through education or training received from Company A."

"Considering these circumstances, it cannot be said that Company A handled the work contracted by Y as its own business independently from Y. Therefore, the following requirements for contracting, as stipulated in Article 2 (2) of the Classification Standards, are not satisfied: 'The party shall handle the work undertaken under the contract independently from the counterparty of the contract as its own work by falling under (a), (b), and (c). (1) To handle the work by means of machinery, equipment or tools (excluding simple tools necessary for work), or materials or supplies to be prepared and procured at its own responsibility and expense. (2) To handle the work based on its own planning or its own specialized techniques or experience'"

"It is recognized that Company A's workers have been working in the baseboard manufacturing process at Factory D based on a service contract between Company A and Y since around 1999, and that Company A's workers and Y's workers were mixed in the baseboard manufacturing process at that time, both providing labor under the direction and supervision of Y. It is clear that the said service contract was not an actual service contract, but an evasive act to escape the prohibition of worker dispatch in the manufacturing industry. Even after

the 2004 revision permitted worker dispatch in the manufacturing industry, there was a mixing of Company A's workers and Y's workers in the baseboard and chemical product manufacturing processes until around 2010, and even after the mixing was eliminated, workers like X et al., who worked in other processes at Y, received instructions from Y regarding detailed manufacturing procedures and methods, and manufactured products according to Y's manufacturing plants. It is also recognized that Y was the one who practically managed the working hours of the workers. Therefore, there was no actual status of Service Contract 1 and 2 as independent service contracts. …Therefore, the baseboard and chemical product manufacturing processes have been conducted in a state of disguised contracting, etc. since April 1, 2016, the conclusion date of Service Contract 1 and 2."

2. Whether Y had the intent to engage in disguised contracting, etc.

"In the case of item 5 of paragraph 1 of Article 40-6 of the Worker Dispatching Act (disguised contracting), the requirement is that the person receiving the provision of worker dispatch services has the intent to engage in disguised contracting, etc. This is because, while the fact of violation is relatively clear in the case of items 1 through 4 of the same paragraph, in the case of Item 5 of the same paragraph, the distinction between the order in worker dispatching and the instruction, etc. by the contracting client may be subtle, and it is not reasonable to immediately impose the aforementioned civil sanction merely because the person who concluded the service contract gave the order as in worker dispatching. It is understood that a subjective requirement of the intent to engage in disguised contracting, etc., in particular, is added. Such a subjective requirement is usually inferred from objective facts, except in cases where the recipient of the worker dispatch services admits this itself. However, in light of the purpose for which the subjective requirement of the intent to engage in disguised contracting, etc. was specifically added, it is not reasonable to infer that the intent to engage in disguised contracting, etc. exists immediately upon the occurrence of the state of disguised contracting, etc. However, in cases where it is recognized that the contractor has routinely and continuously engaged in disguised contracting, etc., unless there are special circumstances, it is reasonable to infer that a representative of a juridical person receiving worker dispatching services, or a person who has the authority to conclude a contract concerning worker dispatching services, while being aware of the state of disguised contracting, etc., has been systematically receiving services for the purpose of disguised contracting, etc."

"It is clear that Company A's provision of services to Y around 1999, when Company A entered into a service contract with Y and began to be involved in the baseboard manufacturing process, was a disguised contract, and it is conceded that Y was also aware of this fact. Even after the manufacturing industry was recognized as a target industry for worker dispatching under the 2004 amendment of the Worker Dispatching Act, there was no immediate change in the way Company A's workers provided labor in the baseboard manufacturing process at Factory D. Until around 2010, it is recognized that Y's worker R was working together with Company A's workers in the baseboard manufacturing process, and that Company A's workers were mixed with Y's workers in the chemical product manufacturing process. It is recognized that around 2014, Y moved R from the baseboard manufacturing process because it was considered that R's instruction to Company A's workers in the baseboard manufacturing process was problematic from the perspective of the right of order in the service contract, but this, conversely, indicates that Y was aware of the possibility that Service Contract 1 and 2 could be regarded as disguised contracting. And since Y continued to give specific instructions to Company A's workers in the baseboard and chemical product manufacturing processes regarding the performance of their work, even after the mixing of workers had ceased, and the state of disguised contracting etc. continued on a daily and continuous basis without its dissolution, it can be inferred that Y had the intent to engage in disguised contracting, etc.

until the dissolution of Service Contract 1 and 2."

"Y has alleged that (1) at the time of 2016, there were some processes at Factory D for which worker dispatch contracts were concluded, and there was no need to use disguised contracting, (2) the processes for which service contract agreements were concluded were suitable for contracting, and (3) Y concluded a worker dispatch contract on March 1, 2017 for the baseboard manufacturing process at the request of Company A and Company Q. In light of the aforementioned, etc., it is clear that the Factory Manager B, who was the party entitled to conclude the service contract between Y and Company A, had no intention to avoid the restrictions of the Worker Dispatching Act."

"However, points (1) and (2), which are asserted by Y, are not sufficient to overturn the aforementioned inference as to the intent to engage in disguised contracting, etc. As for point (3), the fact that Y agreed to switch the baseboard manufacturing process from a service contract to a worker dispatch contract on March 1, 2009, and was able to continue manufacturing in the same manner as before, infers that Y was aware of the state of disguised contracting, etc., before the switching, but systematically continued to engage in disguised contracting, etc., without improving this situation. Therefore, none of Y's arguments can be adopted. And there is no room for Y to be found to be negligent in good faith under the proviso of paragraph 1 of Article 40-6 of the Worker Dispatching Act."

III. Commentary

1. The Overall Picture of Japanese Worker Dispatching Regulations and the Significance of this Judgment

In Japan, until the enactment of the Worker Dispatching Act in 1985, worker dispatching was totally prohibited by Article 44 of the Employment Security Act as a form of worker supply services. However, from the late 1970s to the 1980s, while companies needed to reduce labor costs by using external labor, there was a need among job seekers, especially among highly educated women, to utilize their own advanced skills and develop a proactive professional life with a good work-life balance, and worker dispatching, which should have been prohibited, expanded in practice. Therefore, the Worker Dispatching Act of 1985 was enacted to legalize worker dispatching while regulating it as a new supply-demand adjustment system that fulfills the matching function between job seekers and job offers. However, because of the fear of eroding the employment of workers at the client, the 1985 Worker Dispatching Act adopted the so-called positive list system, which enumerated a limited number of target works for which dispatching was permitted. Subsequently, the ILO revised Convention No.96, recognizing "private employment agencies," including worker dispatching services, as labor supply and demand adjustment agencies alongside state-run public employment security offices, and required countries ratifying the Convention to set basic rules for these employment-related services. This international situation encouraged Japan to deregulate the labor market. In 1999, the Worker Dispatching Act was revised to, in principle, lift the ban on dispatching work in all types of work and to list only prohibited works as exceptions, making worker dispatching, which had been limited to specialized work, a general labor supply and demand adjustment system. Despite this deregulation, dispatched workers still account for only 2.4% of the total Japan's labor force as of 2018.

Until 2003, the Worker Dispatching Act had been deregulated, but after the global financial crisis of 2008, the need to protect dispatched workers was recognized, and the 2012 amendment to the Worker Dispatching Act put forth measures to strengthen the protection of dispatched workers. A typical provision is the establishment of Article 40-6 of the Worker Dispatching Act, which stipulates that, in the event of certain violations of the Worker Dispatching Act, the client shall be deemed to have made an offer of direct employment to the dispatched worker. This is the first lawsuit in which the effect of item 5 of paragraph 1 of Article 40-6 of the Worker Dispatching Act has been disputed since its establishment by the 2012 amendment, and is expected to have a significant impact on court practice in the future.

2. Development of laws and regulations governing indirect employment, including worker dispatching

In Japan, until the enactment of the Worker Dispatching Act in 1985, worker dispatching was comprehensively prohibited as a worker supply service under the objective of eliminating the harmful effects of labor coercion, kickback, etc. under parent-subsidiary control relationships and to break away from feudal labor practices. Prior to the enactment of the Worker Dispatching Act in 1985, worker supply was defined as "having a worker work under the direction and orders of another person based upon a supply contract" (Employment Security Act, Para. 6 (now Para. 8), Art. 4) and was prohibited under Article 44 of the Employment Security Act. If a worker supply service was conducted, the worker supply service owner was punished with imprisonment or a fine (Employment Security Act, Para. 10, Art. 64).

When the Worker Dispatching Act was enacted in 1985, worker dispatching, originally a form of worker supply, was excluded[1] from the definition of worker supply and excluded from the prohibition on it. Worker dispatching is defined as (1) having a worker employed by one person (2) so as to be engaged in work for another person under the instructions of the latter, while maintaining the worker's employment relationship with the former, (3) excluding cases where the former agrees with the latter that such worker is to be employed by the latter (Worker Dispatching Act, Item 1, Art. 2). Insofar as it meets the aforementioned definition, worker dispatching is excluded from the definition of worker supply. In addition, worker dispatching is distinguished from an outsourcing service contract, in which a worker is directly employed by an employer as a contractor and engages in work under its direction and orders, in that the worker is engaged in work for another person other than the contractual employer.[2]

When the Worker Dispatching Act was enacted in 1985, it was based on the so-called "positive list" system, which enumerated the jobs that could be dispatched and limited the number of dispatched workers to 16 jobs: specialized jobs (software development, interpretation, etc.) and jobs requiring special employment management (parking lot management, building cleaning, etc.). The 1996 amendment expanded the number of types of work covered to 26 (26 types of specialized work), and the 1999 amendment reversed the principle and exception to the regulation and adopted the so-called negative list system, in which only prohibited work that cannot be dispatched is enumerated. The dispatch work for which the ban was lifted is called "liberalized work," and while there are no restrictions on the dispatch period for the 26 types of specialized work, there have been restrictions on the dispatch period for liberalized work. In addition, the ban on dispatch work in the manufacturing industry, which had been prohibited under the 1999 amendment, was lifted in 2003.

3. Development of provisions for deemed application for direct employment by the client

When the 1999 revision lifted the ban on the dispatching of liberalized work, it was stipulated that when a client hires a worker for work after the dispatch has ended, it must make an effort to hire the dispatched worker who was engaged in the work, which is also inherited in the current law (Worker Dispatching Act, Art. 40-4). In addition to this obligation of effort, the 2003 amendment further stipulates the obligation of the client to offer direct employment to the dispatched worker when exceeding the dispatchable period for liberalized work (Worker Dispatching Act, Former Art. 40-4) and when accepting a dispatched worker for the same work for more than three years for 26 types of specialized work (Worker Dispatching Act, Former Art. 40-5).

However, even if the obligation to offer direct employment had arisen, if the client violated that obligation and did not in fact offer direct employment, it was not possible to establish a labor contract relationship between the dispatched worker and the client, although sanctions, etc., under public law were in place. In response to a question about whether it is necessary in the legislative process to make

employment itself mandatory, rather than merely requiring the client to apply for employment, the government took a negative attitude toward making employment itself mandatory, because a "deemed employment system" that establishes an employment relationship regardless of the intent of the parties involved is not necessary or appropriate in relation to the freedom of companies to hire, and because there are also issues about how working conditions should be determined.[3]

Under the aforementioned legal circumstances, if "disguised contracting" in which dispatched workers are accepted under a name other than worker dispatch, such as contracting, is performed for the purpose of evading the application of the provisions of the Act, the question arises whether disguised contracting that constitutes illegal dispatching constitutes labor supply and violates the prohibition of worker supply under Article 44 of the Employment Security Act or whether it should be treated as worker dispatching and thus within the framework of the Worker Dispatching Act. In this regard, the High Court decision in the *Panasonic Plasma Display (Pasco)* case (Osaka High Court (Apr. 25, 2008) 960 *Rohan* 5) held that disguised contracting is worker supply in violation of the Employment Security Act, and that the contractual relationship between the subcontracting business operator (dispatching agency) and the worker is invalid because it violates public order, and also the court recognized the establishment of an implied labor contract between the worker and the client company. However, the Supreme Court decision (Supreme Court of Japan, Japan (Dec. 18, 2009) 993 *Rohan* 5) reversed the judgment of the court below and held that, in the absence of special circumstances, the labor contract between a dispatched worker and the dispatching agency is not invalid merely because the dispatch of a worker in violation of the Worker Dispatching Act has been carried out. The court also denied the establishment of an implied labor contract between the client company and the dispatched worker.

Therefore, the issue of employment liability of the client in the case of illegal worker dispatching was left to the legislative decision. Under the 2012 amendment to the Worker Dispatching Act, in the case of (1) acceptance of dispatching for prohibited work (violation of paragraph 3 of Article 4), (2) acceptance of dispatching from an unlicensed or unreported dispatching business operator (violation of Article 24-2), (3) acceptance of dispatching beyond the limit of the period allowed for dispatching (violation of paragraph 1 of Article 40-2, and Article 40-3), and (4) disguised contracting (acceptance of dispatched workers under a name other than worker dispatching for the purpose of evading the application of the provisions of the Act), the client is "deemed" to have made an offer directly to the dispatched worker to conclude a labor contract with the same working conditions as those of the dispatched worker concerned at the time of the offer (Worker Dispatching Act, Para.1, Art. 40-6).

Such regulations do not apply in cases where the client did not know that the dispatch was illegal and was not negligent in not knowing, i.e., in cases of good faith and without negligence. On the other hand, if a client accepts a dispatched worker with knowledge of illegal dispatching or without knowledge due to negligence, the client is considered to have directly offered a labor contract to the dispatched worker at the time the illegal situation occurred. This application may not be withdrawn during the period until the day on which one year has elapsed from the day on which the aforementioned act ((1)-(4)) pertaining to the application ends (Worker Dispatching Act, Para.2, Art. 40-6). Therefore, if the dispatched worker accepts said application during this period, they become directly employed by the client.

These regulations have completed the legal basis for the conversion of dispatched workers from indirect employment to direct employment with a client in Japan.

4. Criteria for Deemed Application for Labor Contract

The court presented a framework for judging that in order to fall under item 5 of paragraph 1 of Article 40-6 of the Worker Dispatching Act and to be deemed to have applied for a labor contract, it is necessary to

find that the relationship between the parties was a disguised contract and that the client had the intent to engage in disguised contracting. With regard to the judgment on the state of disguised contracting, the court held that the "Classification Standards," which is an administrative interpretation of the Worker Dispatching Act, should be referred to, and held that (1) whether the contracting business operator gave the workers instructions on how to perform their work and managed the workers' work, (2) whether the contracting business operator managed the workers' working hours, (3) whether the contracting business operator gave the workers instructions on paid leave, etc., and (4) whether the contracting business operator treated the work contracted by the client as its own work, independently from the client. Regarding the determination of the intent to engage in disguised contracting, the court held that it should not be immediately inferred that there was intent to engage in disguised contracting, merely because a state of disguised contracting, etc. has occurred. However, when it is recognized that the client or ordered has continued to engage in disguised contracting on a daily and continuous basis, it is inferred that the client or ordered has the intent to engage in disguised contracting, etc., unless there are special circumstances. In this case, it was found that Y was aware that it was in a state of disguised contracting from around 1999, when it entered into a service contract with Company A and began to be involved in the baseboard process. Since it was found that Y continued in a state of disguised contracting for many years without resolving it, it was inferred that Y had the intent to engage in disguised contracting.

There are two opposing theories on the interpretation of "the purpose of evading the application of the provisions of the Act." One is the view that the existence of a purpose to evade the Act should be presumed by the continuation of the state of disguised contracting, and that it is not necessary to independently establish that purpose.[4] The other holds that it is necessary to independently establish the purpose of illegal evasion.[5] The former emphasizes the importance that direct employment should be the principle, while the latter seems to be rooted in the idea that the employer's freedom to hire should not be excessively restricted. In the case of items 1-4 of paragraph 1 of Article 40-6 of the Worker Dispatching Act, the requirement for the legal effect of deeming a direct application is simply that the receiving company or client has committed an act in violation of the Worker Dispatching Act. In contrast, in the case of the disguised contracting type (Item 5, Para. 1, Art. 40-6), a more stringent requirement of "the purpose of evading the application of the provisions of this Act" is added for the deemed effect to occur. It is understood that this stricter requirement is imposed in consideration of the fact that the distinction between a direction as an employer and an instruction by the client in a contract agreement may be subtle in some cases. The judgement, faithful to such legal text, takes the latter position in principle. Notwithstanding that, in the absence of special circumstances, the existence of a purpose to evade the Act is inferred in cases where disguised contracting has been routinely and continuously continued. In effect, the former argument is partially adopted, and the disguised contracting purpose requirement is interpreted more loosely than the latter. This judgement adopted the ideas of opposing theories, and thus lacks logical consistency in some parts. Therefore, there will be differences of opinion as to how to evaluate this judgement.

The *Tori* case, *Rodo Hanrei* (*Rohan*, Sanno Research Institute) 1253, pp.60–83. See also, *Rodo horitsu junpo* (*Rojun*, Junposha) 2003, pp.6–12 and pp.13–24; *Monthly jurist* (*Jurist*, Yuhikaku) 1566, pp.4–5; *Hogaku Seminar* (Nippon Hyoron Sha) 67(9), pp.132–133; *Journal of Management Lawyers Council* (Keiei hoso kaigi) 214, pp.145–158 and pp.267–322.

1. The term "worker supply" as used in this Act means having a worker work under the direction and orders of another person based upon a supply contract, and does not include anything that constitutes worker dispatch as provided in Article 2, Item (i) of the Act on Securing the Proper Operation of Worker Dispatching Services and Protecting Dispatched Worker (Act No. 88 of 1985; hereinafter referred to as the "Worker Dispatching Act"). (Employment Security Act, Para. 8, Art. 4)
2. Under the 1999 revision to the Worker Dispatching Act, the maximum period of dispatch was limited to one year, and the 2003 revision extended the dispatch period limit from one year to

three years.

3. Ichiro Kamoshita, Vice Minister of Health, Labour and Welfare, in responding to questions in the Diet, May 14, 2003, 156th Diet Session, House of Representatives, Committee on Health, Labour and Welfare, Minutes no. 14: 34.

4. For details, see Takuya Shiomi, "2015 nen Rodosha haken ho 40 jo no 6 o meguru ronten" [Issues concerning Article 40-6 of the Worker Dispatching Act of 2015], *Rojun*, no. 1887 (May 2017): 23.

5. For the consideration on this theory, see Ryuichi Yamakawa, "Dai 10 hen, Dai 3 sho, Iho haken no baai no rodo keiyaku no moshikomi minashi seido"[Part 10, Chapter 3, Deemed application of labor contract in the case of illegal dispatching] in *Rodosha haken ho, Dai 2 han* [Worker Dispatching Act, 2nd ed.] eds, Koichi Kamata and Yasuo Suwa, (Tokyo: Sanseido, 2022), 340.

ZHONG Qi

Vice Senior Researcher, The Japan Institute for Labour Policy and Training. Research interest: Labor Law.

https://www.jil.go.jp/english/profile/zhong.html

Do Educational Loan Programs Exempting Repayment of School Expense Lent by Hospitals on Condition of Working for Certain Periods Violate Article 16 of the Labor Standards Act?

The *Kyoyukai Misumi Hospital* Case
Hiroshima High Court (Sept. 6, 2017) 1202 *Rodo Hanrei* 163

HOSOKAWA Ryo

I. Facts

X_1 passed the entrance examination for School of Assistant Nursing A in March 2005, and was hired by Y, a medical corporation that manages hospitals, to work as a nursing aide starting on April 1 that year while attending school. In February 2007, X_1 passed the Assistant Nursing Examination, and in March that year graduated from School of Assistant Nursing A. Y suffered from a chronic shortage of nurses, and encouraged staff who were working while attending School of Assistant Nursing A to obtain nurse certification. Thus, starting in April, X_1 attended Nursing School B while working as an assistant nurse in Y. Afterward X_1 passed the nurse examination, graduated from B in March 2010, and has been working at Y as a nurse since April 1, 2010.

Y had a program offering interest-free educational loans for those who wanted to work for Y. Its main contents were as follows:

—Educational Loan period is from the day the loan is decided upon until the month the borrower graduates from school (Article 2 of the loan agreement).

—Borrowers who have graduated from school and worked at Y for certain years (4 years after graduation for assistant nurses, or 6 years for nurses) are fully exempt from repayment (Article 5 of the loan agreement).

—Educational loans must be repaid in full under the following circumstances, although repayment may be reduced in amount, waived, or delayed when students withdraw from school or resign from their jobs due to unavoidable reasons such as illness (Article 6 of the loan agreement).

(1) If a student withdraws from school

(2) After obtaining certification, if a student does not work for Y, or resigns from Y before the prescribed period has elapsed

When enrolling at schools A and B, X_1 submitted an educational loan application to Y and received the loan, with X_2, the father of X_1, as the guarantor. X_1 decided to resign from Y in or around May 2014. On asking Y's medical office manager C and section chief D about potential contract issues that would be raised by resignation, X_1 was not told that educational loan repayment would be required. Under these circumstances X_1 resigned on August 20, 2014.

Y filed a lawsuit against X_1 and guarantor X_2, seeking full repayment of the educational loan to X_1 on the grounds that X_1 resigned before working for the prescribed number of years. The first instance (Yamaguchi District Court, Hagi Branch [Mar. 24, 2017] 1202 *Rohan* 169) dismissed Y's claim, and Y appealed.

II. Judgment

The Hiroshima High Court dismissed Y's appeal (Y's demand for payment). The following is an

overview of the court's judgment.

(1) X_1 and X_2 claim that repayment is not required, and that a requirement for the educational loan to be repaid was not explained to them. However, it is clear that the document submitted by X_1 is a loan application. Also, a guarantor was required for this educational loan. Therefore, it cannot be said that there was no agreement to repay the loan.

(2) However, of the funds loaned by Y to X_1, the portion loaned to X_1 when the latter was attending School of Assistant Nursing A is exempted from repayment because, as stipulated by the regulations, X_1 worked for Y for 4 years or more after graduating from School A.

(3) Article 16 of the Labor Standards Act (LSA) stipulates that "Employers shall not make a labor contract which predetermines either a sum payable to the Employer for breach of contract or an amount of compensation payable for damages," and this could also be applied to loan agreements (formally signed independently of labor contracts).

Therefore, in the light of the purpose and content of this educational loan, the loan can be judged as violating Article 16 of the LSA if the obligation to repay the loan is deemed to unduly restrict X_1's freedom to resign from a job.

Article 14 of the LSA stipulates that the period of a fixed-term labor contract is, as a basic rule, limited to 3 years. Therefore, whether this case can be judged as "unduly restricting freedom to resign from a job," and whether the period for which the employee is effectively prohibited from resigning is longer than 3 years, should be considered important criteria here.

(4) Y recommended that X_1 attend nursing school due to Y's need to secure nurses. Thus, the fact that X_1 acquired a nurse certification is directly related to X_1's working for Y.

There was an agreement between Y, and X_1 and X_2 stipulating the latter's repayment of the educational loan (see [1]). On the other hand, explanation of the agreement's contents was insufficient, and at the time X_1 submitted a letter of resignation, X_1 was unable to recognize these contents clearly.

The period of nurses' full exemption from repayment is 6 years, far longer than the maximum length of a fixed-term labor contract stipulated by the LSA. Y asked for full repayment, ignoring the fact that X_1 worked at Y for 4 years and 4 months after obtaining a nurse certification. The amount Y sought to have X_1 and X_2 repay was 10 times X_1's base salary. Thus, the actual effect of the obligation to repay it was to seriously restrict X_1's freedom to resign.

(5) Based on the above, the agreement drawn up by Y stating that X_1 is to repay educational loan for Nursing School B, containing provisions regarding the period of exemption from repayment obligation and obligations to repay in the case stipulated in Article 6, constitutes an economic obstacle that unduly restricts X_1's freedom to resign and as such violates Article 16 of the LSA. Therefore, the contract between Y and X_1 relates to financial aid as a benefit and does not contain an agreement to repay. As a result, Y's demand for repayment is invalid.

III. Commentary

The matter disputed in this case is the legality of a system in which staff working at a hospital who have made a loan for the school expense of nursing school to obtain a nurse certification, and are expected to be exempted from repayment on condition of working for the hospital for a certain period after obtaining the certification (if they leave the job during this period, they are required to repay the loan).

Article 16 of the LSA prohibits employers from "making a labor contract which predetermines either a sum payable to the Employer for breach of contract or an amount of compensation payable for damages." In pre-World War II Japan, many employers had an unethical practice of imposing penalties for leaving jobs or returning to hometowns in the middle of a contract period, in effect, restricting workers' freedom and rendering them subservient. Article 16 of the LSA was established to prevent such undue restrictions by employers.

Today, employers sometimes bear the cost of workers' training or study abroad in order to have workers enhance abilities and vocational skills, or obtain certifications. If workers then immediately

resign after they have obtained certifications, etc., it becomes a total loss for employers. For this reason, it is a common practice for employers to "make a loan plan" covering the cost of the study to workers, and exempt them from repayment of the loan if they work for the employer for a certain period after the completion of study (if they resign during this period, they will be liable for repayment.) Contracts of this nature appear to stipulate "a sum payable to the Employer for breach of contract if a worker does not work for a certain period." Thus, whether this violates Article 16 of the LSA is an issue for debate.

Court decisions on such cases are divided. Some have found that workers by rights ought to be liable for voluntary educational expenses (without immediate relation to work), and a system in which they are exempted from repaying loans for such expenses on the condition of working for a stipulated period does not violate Article 16 of the LSA. On the other hand, requiring payment if employees do not work for a certain period when education constitutes vocational training (and/or is ordered by the employer) is in violation of said Article. However, it is difficult to distinguish between these two types of cases. More specifically, courts take the following factors into consideration: (i) Whether study, etc. is voluntary or involuntary—whether it is workers' option or order by the employer, (ii) Relevance between the content of study, etc. and work—if it is barely relevant, a loan, etc. is considered support for voluntary study, whereas if it is highly relevant, it is considered an expense that ought to be borne by employers, (iii) Reasonableness of conditions for exemption from repayment—if the amount to be repaid is too large or the period to be worked in order to be exempted from repayment is too long, it is deemed to "unduly restrain" the employee, (iv) Reasonableness of repayment procedures—if payment in installments is accepted, or amount to be repaid is reduced according to years of service after completing the education the procedure is deemed not to be unreasonable as the restricting effect on employees is small. These factors are comprehensively considered, and a judgment is made on whether conditions constitute "unduly restricting freedom of resignation."

In this case, the issue is a loan of school expense to obtain nurse certification (national license), thus the relation between the certification acquired through study and the work performed for the employer is very strong. Underlying the conditions imposed is a shortage of nurses at Y. Therefore, it can be judged that demanding repayment of an educational loan when an employee resigns within a certain period prevents the employee from resigning by imposing the cost which should be borne by employers as their business cost. The court's judgment of violating Article 16 of the LSA is considered valid.

However, the following key feature of this decision should be noted. There was an emphasis on the period of service required before exemption from repayment, with the maximum length of a fixed-term labor contract stipulated by the LSA as the standard. Article 14 of the LSA states that the period of a fixed-term labor contract is, as a basic rule, limited to 3 years. The purport of Article 14 of the LSA is that an overly long contract period prevents workers from resigning and unduly restricts their freedom. However, some questions can be raised with regard to this reasoning.

First, regarding the maximum length of a fixed-term labor contract under Article 14 of the LSA, a supplementary provision states that a worker can resign freely once one year has passed after conclusion of a labor contract (Supplementary Article 137 of the LSA). This supplementary provision was added out of concern that a 3-year fixed-term labor contract could have the effect of unduly restricting personal freedom to leave jobs. Thus, when the court decision refers to the maximum length of fixed-term contracts that limits freedom of resignation, the provision to be referenced should not be Article 14, but Supplementary Article 137 of LSA, which stipulates that workers are free to resign after 1 year. However, this court decision overlooks Supplementary Article 137.

Second, the scope of cases that reference the limit on length of fixed-term labor contracts as defined by Article 14 of the LSA is not clear. One precedent was a case regarding voluntary study-abroad expenses

that had a low degree of relevance to work, and a system of exempting repayment on the condition of 5 years of service was judged to be legally valid (the *Nomura Securities Co.* Case, Tokyo District Court [Apr. 16, 2002] 827 *Rohan* 40). Another provision, although it relates to public officers, which sets the period of service required for exemption from repayment of expenses at 5 years, in cases where officers resign of their own accord after studying abroad (Act on Reimbursement of National Public Officers' Expenses for Studying Abroad Article 3, paragraph 1, item 2).

In addition, generally in such cases regarding educational loan program and repayment of school expense, if it is judged that Article 16 of the LSA is being violated, then repayment of the full amount of expenses is exempted, but if Article 16 is not violated, then employers can seek repayment of the full amount of expenses (within the scope of the system established by employers), and it has been pointed out that it is not appropriate to come to an "all or nothing" conclusion in such cases (Takashi Araki, *Rodoho* [Labor and employment law], 3rd ed. [Tokyo: Yuhikaku, 2016] 77). The above-mentioned Act on Reimbursement of National Public Officers' Expenses for Studying Abroad states that if an officer resigns within 5 years after studying abroad, the amount to be repaid is not the full amount, but rather is proportionally reduced according to the length of service after studying abroad.

The *Kyoyukai Misumi Hospital* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1202, pp.163–168. See also *Rodokeizai Hanrei Sokuho* (*Rokeisoku*, Japan Federation of Employers' Associations) 2019, pp. 3–16.

HOSOKAWA Ryo

Professor, Aoyama Gakuin University. Research interest: Labor Law.

Does the Conclusion of a Fixed-term Part-time Contract when Returning to Work after Childcare Leave Constitute the Cancellation of the Regular Employment Contract?

The *Japan Business Lab* Case
Tokyo High Court (Nov. 28, 2019) 1215 *Rodo Hanrei* 5

TAKIHARA Hiromitsu

I. Facts

Y is a stock company with around 22 employees. Its main lines of business are the operations and other tasks related to B, a school providing career development courses, and C, a school providing coaching for the improvement in English language skills and other languages. On July 9, 2008, X signed a regular employment contract (the regular employment contract) with Company Y and subsequently worked as a coach at C. As of November 2012, X's main terms and conditions of employment under the regular employment contract included scheduled working hours of seven hours a day and salary and related payments of 480,000 yen per month.

In January 2013, X took prenatal maternity leave because she was expecting a child. She gave birth to her first daughter in March that year, after which she took postnatal maternity leave and childcare leave (until March 1, 2014). On February 26, 2014, X informed Company Y of her wish to extend her childcare leave by six months because she was unable to find a childcare facility, upon which her childcare leave was extended.

On September 1, 2014, following a consultation with the Company Y president, the manager responsible for her job (the male supervisor D), and labor and social security attorney as an advisor, X signed and exchanged with Company Y a document entitled "employment contract" (the fixed-term part-time contract), under which her form of employment was cited as contract employee and her other terms and conditions of employment included a contract term of one year, working times and hours of "generally Wednesdays, Saturdays and Sundays; four hours a day," and a monthly salary of 106,000 yen (the agreement).

X officially returned to work on September 2, 2014, and the following day began her role as a contract employee working three days a week. X claimed to have found a childcare facility to look after her daughter and for this and other reasons requested Company Y to reinstate her as a regular employee working five days a week. Although X made several attempts at negotiation, her request was rejected by Company Y. Company Y ordered X to stand by at home from July 12, 2015 onward, on such grounds as the fact that X had recorded conversations in the office without consent and had used the email address and computer assigned to her for work to send personal emails. In a document dispatched via registered mail with certification of contents on July 31, 2015, Company Y then informed X that the fixed-term part-time contract would expire at the end of its term on September 1 that year (the non-renewal of the fixed-term part-time contract). On August 3, 2015, Company Y filed a suit with the Tokyo District Court seeking confirmation that X was no longer

entitled to the rights assigned under an employment contract (case *β*).

On October 22, 2015, X filed a suit with the Tokyo District Court against Company Y ("case *α* original action"). Her principal claim was for (i) the confirmation of her entitlement to the rights set out in the regular employment contract and the payment of unpaid salary and other payments. As a secondary claim for the event that said claim was dismissed, she sought (ii) confirmation of her entitlement to the rights set out in the fixed-term part-time contract and the payment of unpaid salary and other payments. She also demanded (iii) solatium (*isharyō*) and other such payments on the grounds that Company Y had committed torts, namely, refusing to reinstate her as a regular employee after making her a contract employee and a series of other related acts. Company Y, on the other hand, demanded solatium and other such payments from X (case *α* counterclaim), on the grounds that X had committed a tort in making false statements at a October 2015 press conference (detailed below) and thereby defaming the good reputation of Company Y.

On the day that she filed the case α original action (October 22, 2015), X and her legal counsel held a press conference at the reporters' club room (*kisha kurabu*) in the Ministry of Health, Labour and Welfare, where copies of the complaint were distributed as reference material; Company Y's name was made public, and an explanation was provided, detailing the fact that the case *α* original action had been filed and setting out the particulars of the complaint. As part of this explanation, X made the following statements ("Statements"): that when finishing childcare leave in September 2014 she had applied for leave of absence because she had been unable to find a childcare facility for her daughter, but her request had been denied, upon which Company Y had forced her to choose between becoming a contract employee working three days a week or voluntary resignation (Statement (1)); that after she had reluctantly signed an employment contract as a contract employee the contract had not been renewed after the initial one year term (Statement (2)); that when she had returned to work after giving birth, she had faced fundamental criticism of her character (Statement (3)); that a male supervisor D had said " I would make sure that I'm prepared to earn enough to support the whole family, and then, I would make my wife pregnant" (Statement (4)), and that when she had joined a labor union the Company Y president had referred to her as a "loose cannon" (Statement (5)).

On the day of said press conference, the case was covered in newspapers (online) and on a news program (of three reports, two clearly stated Company Y's name). The following day, October 23, 2015, Company Y received some criticism in the form of two emails. On the same day, Company Y posted an article on its official website denying the claims that X had made at the press conference.

The Tokyo District Court dismissed case *β*. In response to X's demands in the case *α* original action, the court concluded that the regular employment contract had been canceled as a result of the agreement, but declared the non-renewal of the fixed-term part-time contract null and void and accepted the claim for confirmation of X's entitlement to the rights set out in the fixed-term part-time contract, as well as partially recognizing her demands regarding the torts committed by Company Y. The Tokyo District Court also dismissed the demands put forward by Company Y in the case *α* counterclaim. Company Y responded to the District Court decision by posting an article on its official website denying claims from certain media outlets regarding the decision.

On the grounds of objections and other issues regarding the District Court rulings against them, both X and Company Y respectively filed appeals to the High Court. The four main points in dispute were: (1) the interpretation and validity of the agreement, (2) whether the fixed-term part-time contract should have been renewed, (3) whether Company Y had committed torts, and (4) whether X had committed a tort.

II. Judgment

(1) The interpretation and validity of the agreement

(a) Whether the agreement included an agreement that the regular employment contract had been canceled

"As X selected contract employment rather than regular employment from the forms of employment offered to her, signed the document entitled "employment contract" with Company Y, and entered, as a contract employee, into a fixed-term employment contract to be renewed annually (the agreement), it is reasonable to conclude that the regular employment contract had been canceled."

(b) Whether the agreement was in violation of the Equal Employment Opportunity Act (EEOA) and the Child Care and Family Care Leave Act (CFCLA) prior to its amendment in 2016

A comparison of the terms and conditions of employment set out in the contracts for regular employment and contract employment reveals undeniable disadvantages to contract employment, such as no fixed premium wages for overtime included in the salary, a specified term of employment, and periods of work as a contract employee not counting toward the calculation of severance pay. At the same time, for these to be deemed as disadvantages for X, she needs to have been able to work five days a week.

"At the time of the agreement, X was only able to work four hours a day, three days a week, rather than a five-day week, because she was unable to find a childcare facility for her daughter and did not receive sufficient assistance from her family. Therefore, if X had returned to work as a regularly-employed coach with a five-day working week despite still having no prospect of securing a childcare facility for her daughter, even with the support of measures to shorten working hours, she would have struggled to fulfil her role as a coach responsible for a class. Moreover, even if she had been able to take responsibility for a class, she would have been considerably hindered in her capacity to run said class, or would have been repeatedly absent, such that she would have faced such risks as being forced to resign due to personal circumstances, being dismissed on the grounds that she was unsuitable for employment due to poor work performance (Article 34, Paragraph 1, Item 2, of the work rules), or being subject to disciplinary discharge on the grounds that she was not regularly attending work and showed no prospect of improvement (Article 31, Item 2, of the work rules)."

"Company Y has established various forms of employment to accommodate employees returning from childcare leave and their capacity to work in relation to their childcare commitments and other such obligations. The company revised its work rules and other such provisions and introduced a contract employee system to allow such employees to choose between the options of "regular employee (five days a week)," "regular employee (five days a week with reduced working hours)" or "contract employee (four or three days a week)." X, who was on childcare leave at the time, had these changes explained to her individually, and had sufficient opportunity, within the around six months that remained of her childcare leave, to consider which employment type would be best suited to her when she returned to work. On the day before the end of her childcare leave, X received an explanation of aspects such as the particulars of the contract, the working styles of contract employees, and the method used to calculate salary. She signed the fixed-term part-time contract after going through such details."

"Given the explanations provided by Company Y regarding the forms of employment and the content of the explanations provided and circumstances at the time the fixed-term part-time contract was signed, X's situation at the time her childcare leave ended, and the fact that X had changed her mind and requested to return to work as a contract employee despite having declared her intention to resign, there are objectively reasonable grounds to deem the agreement to have been concluded on the basis of X's free will (see Supreme Court (October 23, 2014) 68–8 *Minshu* 1270)."

"The agreement does therefore *not* constitute

"unfavorable treatment" as prohibited under Article 9, Paragraph 3, of the EEOA, and Article 10 of the CFCLA."

(c) Other points regarding the agreement

The agreement was concluded on the free will of the parties involved, and did not involve any mistake, the conclusion of an open-ended employment contract subject to a condition precedent, or an agreement that X would return to work as a regular employee.

(2) Whether the fixed-term part-time contract should have been renewed or not

The fixed-term part-time contract constitutes "a fixed-term contract for which there are deemed to have been reasonable grounds for the worker to expect the contract period to be renewed when the contract expired." However, X, "in violation of orders from the Company Y president and her own pledge, repeatedly made recordings in the office. Furthermore, in violation of her obligation to give undivided attention to duty, she also used the email address assigned to her for work to exchange personal emails on multiple occasions during her working hours. She also knowingly provided false information to news reporters and other persons outside of the company with the aim of creating the impression that Company Y had a culture of "maternity harassment," and consistently engaged in behavior that risked damaging the reputation of and public confidence in Company Y and behavior that damaged her trust relationship with Company Y, and, given that she also shows no sign of remorse, it can be concluded that there are sufficient grounds for her not to expect her employment to be continued."

"The non-renewal of the fixed-term part-time contract is therefore based on objectively reasonable grounds and is appropriate according to social norm."

(3) Whether Company Y committed torts

The fact that Company Y sent an email to a third party outside of the company stating that X had been put on standby at home because she had violated the work rules and leaked information was a violation of X's privacy, and therefore constitutes a tort. However, the other actions by members of Company Y—including D's words and behavior as described by X in Statement (4)—do not constitute torts.

(4) Whether X committed a tort

"Unlike a civil suit, where a judgment must be based on facts asserted and evidence submitted by parties to the litigation (the principle known as *benron shugi*), a press conference is a one-sided provision of information to news media representatives and guarantees no opportunity for the other party to offer a counterargument. Therefore, where the facts alleged in statements at a press conference diminish the reputation of the other party to the suit, these may be deemed to constitute the torts of defamation and damage to credibility. Furthermore, "judging on the basis of how the public would typically take note of and interpret" Statements (1), (3), (4) and (5), said Statements create a negative impression of Company Y and "can be deemed to diminish reputation of Company Y."

"In the case of defamation where facts are alleged, where the alleged facts are matters of public interest and the objective of alleging those facts is solely to ensure public welfare, if there is proof that the key parts of the alleged facts are true, said act is not unlawful. Moreover, even if there is no such proof, if there are sufficient grounds for the person who committed the act to have believed the key parts of said facts to be true, that person will not be found to have intentionally or negligently committed defamation." While the facts alleged in Statement (4) can be deemed to be true, the facts alleged in Statements (1), (3) and (5) can neither be deemed true nor be recognized to have been proved as such, and there cannot be deemed to have been sufficient grounds for X to have believed them to be true.

Statements (1), (3) and (5) therefore constitute torts.

III. Commentary

(1) Differences, etc. between the Tokyo District Court judgment and this Tokyo High Court judgment

The District Court judgment has already been the subject of an article in Japan Labor Issues Volume 3, Number 15 (Hosokawa 2019),[1] but we revisit it again here given the major changes made to it by this High Court judgment. The District Court judgment (i) did not recognize the confirmation of X's status as a regular employee, but (ii) declared the non-renewal of X's employment null and void, (iii) recognized that Company Y had committed a tort by violating its obligation of good faith in the process of preparing to revert X to regular employment (insincere attitude to negotiations) and (iv) rejected the claim that X's statements at the press conference constituted a tort. While reaching the same conclusion as the District Court on point (i), the High Court passed different judgments on the other points. Namely, the High Court declared (ii) the non-renewal of X's employment to be valid, (iii) recognized only the violation of X's privacy as a tort by Company Y, and (4) concluded that X's statements at the press conference constituted a tort (Statements (1), (3), and (5)).

Starting from the points upon which the judgments differed, let us firstly make an overview of the issue of (ii) whether the non-renewal of X's employment contract was declared null and void (District Court judgment) or valid (High Court judgment). In addressing whether the non-renewal of the contract is invalid or valid, considerable weight was placed on two points: the fact that X made recordings without consent and the fact that X used her work email address for sending and receiving personal emails (these two points were clearly specified on the written order issued to X by Company Y instructing X to remain at home on standby from July 12, 2015 onward). With regard to the recordings, the District Court judgment states that "it was clearly necessary for X to record the conversations in order to be able to use them as evidence at a later date, given that it is obviously social norm that recordings of such conversations between labor and management regarding points of contention typically serve as important evidence in a labor-management dispute." The District Court also acknowledged the fact that X's recording of the conversations without consent did not in fact result in any damages for Company Y, such as the leaking of information to a third party. With regard to the receiving and sending of personal emails, the District Court judgment declared that while "the sending and receiving of non-work-related emails during working hours using a computer assigned for work purposes may be in violation of the obligation to give undivided attention to duty as set out in the employment contract," there is no evidence that sending and receiving private emails is prohibited at Company Y, and, even if X had been sending and receiving private emails, it is unclear to what extent this would have impeded her performance of duties, such that it is not possible "to suggest that X's said actions destroyed her trust relationship with Company Y." As a result, the District Court declared the non-renewal of X's fixed-term part-time contract null and void on the grounds that "the non-renewal of the fixed-term part-time contract lacks objectively reasonable grounds and cannot be deemed appropriate according to social norm" This judgment contrasts with that of the High Court (Judgment (2)).

Secondly, let us now look at the question of (iii) whether the claims that Company Y committed torts were upheld (Tokyo District Court judgment) or mostly rejected (Tokyo High Court judgment). The District Court judgment stated that "in response to X's request to revert to regular employment from contract employment on the basis of Company Y's stance that it was 'assumed' that X would change contract again to return to regular employment, Company Y consistently responded insincerely in the negotiations regarding the conclusion of an employment contract to return X to regular employment, and did not provide any concrete or reasonable explanation regarding matters such as the timing or terms for X's return to regular employment, such that it can be concluded that Company Y was in

violation of the duty of good faith of parties involved in negotiating in the process of preparing a contract" and that "Company Y is obliged to compensate X for the damage suffered as a result of the torts against X." Here, we see another contrast, as, unlike the District Court's comprehensive judgment, the High Court decision (Judgment (3)) recognized only the invasion of privacy as a tort on Company Y's part.

Thirdly, let us summarize the issue of (iv) whether the claim that the press conference by X constituted defamation was rejected (Tokyo District Court judgment) or upheld (High Court judgment). The District Court judgment stated that it "can be deemed that X and X's legal counsel held the press conference in order to widely inform the media that X had filed the case α original action," and that "other than the Statements specified in the case, it is not deemed that concrete statements were made that deliberately sought to criticize Company Y, nor that it was stated that behavior amounting to what is known as maternity harassment occurred at Company Y, nor that statements were made that gave such an impression." With regard to Statement (3), the District Court judgment declared that "it can be deemed that X described the impressions that she had received from the course of events and cannot be concluded that she alleged any facts." And, with regard to Statements (1), (2), (4) and (5), the District Court stated that "given the actual content of the Statements and context in which they were made, these statements would typically be understood as X's descriptions of the claims she was making in the case α original action, and not the alleging that the Company Y president and others committed the aforementioned acts." In contrast, the High Court decision, Judgment (4), declared that Statements (1), (3) and (5) constitute torts.

While the District Court and High Court judgments differed on such points, they are consistent in that (i) neither confirmed X's status as a regular employee. On this point, the District Court judgment stated that firstly, "the regular employment contract and the fixed-term part-time contract differ on all of the following aspects: the defining of a contract period, the number of working days, the scheduled working hours, and the wage structure" and that "regular employment and contract employment at Company Y differ in terms of how the work rules are applied with regard to the scheduled working hours, and, in terms of work content, there are considerable differences in the duties covered by each form of employment; regular employees have a defined minimum number of classes that they need to cover in their role as a coach and take on leader roles in each project, while contract employees have no such defined number of classes and do not take on such leader roles." Thus, "it is difficult to interpret the regular employment contract and the fixed-term part-time contract as the same employment contract." The Tokyo District Court judgment then goes on to note that "when making the agreement, X and Company Y created a document entitled 'employment contract,' despite the fact that, according to social norm, it is not common for cases in which a contract is being extended and changes are merely being made to the employment terms and conditions to also involve creating and exchanging a document entitled 'contract' between labor and management." On this basis, the District Court determined that "it is reasonable to interpret the agreement as the consent that the regular employment contract would be canceled and a separate contract—namely, a fixed-term part-time contract—would be concluded" such that "it can be recognized that under the agreement the regular employment contract was canceled on the mutual consent of X and Company Y." The High Court reached a similar conclusion, as set out in Judgment (1) (a) above. The District Court and High Court (Judgment (1) (b)) likewise both determined that the agreement was not in violation of the EEOA or the CFCLA. The District Court and the High Court (Judgment (1) (c)) also shared the judgment that the agreement was concluded at her own free will of the parties involved, and did not involve a mistake or the conclusion of an open-ended employment contract subject to a condition precedent. (Note, the claims regarding the agreement to return to regular employment were put forward as additional claims at these High Court proceedings.)

(2) The cancellation of the regular employment contract

As explained above, the Tokyo High Court and the Tokyo District Court judgments were consistent with each other in that neither recognized the confirmation of X's status as a regular employee. That is, both courts determined that the regular employment contract and the fixed-term part-time contract are discrete, and the agreement resulted in the cancellation of the regular employment contract and the new establishment of the fixed-term part-time contract. At the same time, there is a commentary on the District Court precedent that casts doubt on such a judgment. Namely, it suggests that based on the logic of the judgment alone the regular employment contract cannot be said to have been terminated in the first place, and there is an undeniable possibility that the two contracts between X and Company Y —the regular employment contract and the fixed-term part-time contract—exist concurrently.[2] Such a suggestion has received support in other judicial precedent commentaries and similar criticism may apply to the High Court judgment, which reached almost the same decision as the District Court.

(3) Violations of the EEOA and CFCLA

The Tokyo High Court judgment on X's claims based on the EEOA and CFCLA is as summarized in Judgment (1) (b). Before investigating this point, let us look at the provisions of the EEOA and CFCLA that are relevant to this case, and, in particular, a Supreme Court judgment related to the EEOA.

Firstly, Article 9, Paragraph 3, of the EEOA prohibits the dismissal and unfavorable treatment of women workers on the grounds of pregnancy, childbirth, or other such factors,[3] and Article 10 of the CFCLA prohibits dismissal or unfavorable treatment of workers on the grounds of their application for or use of childcare leave.[4] The High Court responded to X's claim that the conduct of Company Y fell under these provisions with the decision noted in Judgment (1) (b).

Precedents of cases disputing violations of Article 9, Paragraph 3, of the EEOA include the *Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai* case (the *Hiroshima Central Health Care Cooperative* case) Supreme Court, (Oct. 23, 2014) 1100 *Rohan* 5. In said case, the plaintiff, a physical therapist employed in the role of deputy chief (*fuku-shunin*) by the defendant, a consumer cooperative operating multiple medical facilities, was relieved of her post as deputy chief when reassigned to light activities during pregnancy on the basis of Article 65, Paragraph 3, of the Labor Standards Act ("LSA"), and was not appointed deputy chief after the end of her childcare leave. She therefore sought the payment of the managerial (deputy chief) allowance and damages from the defendant on the basis of default or tort, claiming that relieving her of her position as deputy chief as described was in violation of Article 9, Paragraph 3 of the EEOA and therefore null and void. The Supreme Court declared that firstly, Article 9, Paragraph 3, of the EEOA is a mandatory provision, and, the "dismissal or other unfavorable treatment of a woman worker on the grounds of pregnancy, childbirth, application for prenatal leave, use of pre- or postnatal leave, or reassignment to light activities, is a violation of said paragraph and therefore unlawful and null and void," and, on that basis, "that the employer's use of a woman worker's reassignment to light activities during pregnancy as an opportunity to demote said worker can generally be deemed to fall under the treatment prohibited under said paragraph," while at the same time noting that in exceptional cases—such as where "there are objectively reasonable grounds to deem that the worker in question consented to the demotion at her free will," or, where there are special circumstances based on operational necessity—the demotion is not deemed to be in violation of Article 9, Paragraph 3, of the EEOA. The Supreme Court reversed the lower court decision and remanded the case for the court to determine whether such exceptional circumstances existed. In the remanded case, (Hiroshima High Court (Nov. 17, 2015) 1127 *Rohan* 5) the Hiroshima High Court did not acknowledge such circumstances, and largely upheld the plaintiff's claims.

The aforementioned Supreme Court judgment in the *Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai*

case was cited in this Tokyo High Court decision, Judgment (1) (b). However, it is not entirely clear whether the scope of the judgment in the *Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai* case, which was concerned with a demotion, could be extended to cases such as this one involving a change of status from regular employee to contract employee. This is due to the differing nature of the two issues (cases)—namely, the *Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai* case involved the exercising of authority over personnel matters (demotion under the same contract) while this case addresses the issue of the change from a regular employment contract to a non-regular employment contract (cancellation of the regular employment contract and conclusion of a fixed-term part-time contract). Moreover, even if the scope of the *Hiroshima Chuo Hoken Seikatsu Kyodo Kumiai* precedent can be extended to this case, there are further questions to be addressed, such as the matter that it is difficult to conclude that X was acting on her own free will.[5] The government guidelines[6] also provide examples of "dismissal and other unfavorable treatment" as defined in Article 9, Paragraph 3, of the EEOA and Article 10 of the CFCLA, and while these include the example of employees being forced to accept changes to the content of their employment contract, such as being forced to switch from regular to contract employment, there are inevitably questions regarding how consistent this case is with such an example.[7] It is, however, also important to note that government guidelines are not legally binding.

(4) Defamation

In Japan, there are cases in which workers who have filed suits against their employer hold press conferences with their legal counsel. This case also involved the issue of a press conference by X and her legal counsel and whether it constituted defamation of Company Y. However, there appears to be few other precedents for cases in which an employer suffered defamation due to a press conference by a worker and their representatives.

The standard used by the High Court for judging the statements in this case—namely "judging on the basis of how the public would typically interpret and respond to" the statements—is based on a Supreme Court precedent.[8] Company Y did not file a libel suit against the newspaper publishers and a television station that actually reported the incident. Given that the process of creating articles and other such reports using the materials provided at X's press conference involves the intervention of reporters and others editing said information ("exercising editorial rights"), simple logic should lead us to question Company Y's choice to pursue a suit that seeks to place the ultimate responsibility for the articles and other such reports solely upon X. Moreover, as noted in the Tokyo District Court judgment, it is quite possible to conclude that the Statements are X's "impressions" and "would typically be understood as X's descriptions of the claims she was making in the case α original action." And yet, as noted in Judgment (4), the High Court judgment deemed Statements (1), (3) and (5) to constitute torts. This High Court judgment may to some extent indirectly restrain workers in their approach to publishing information.

Supreme Court issued a ruling on this case on December 8, 2020.

1. Ryo Hosokawa, "Employers' Obligation to Consider the Needs of Employees Returning from Childcare Leave: The *Japan Business Lab* Case," *Japan Labor Issues* 3, no. 15 (June 2019): 13, https://www.jil.go.jp/english/jli/documents/2019/015-03.pdf.

2. Yukiko Ishizaki, "*Ikuji shūryō go ni teiketsu shita keiyakushain keiyaku no yatoidome: Japan Bijinesu Rabo jiken*" [The non-renewal of a fixed-term part-time contract concluded at the end of childcare leave: The *Japan Business Lab* case], *Monthly Jurist*, no. 1532 (May 2019): 107.

3. Women who are pregnant or have recently given birth ("expectant or nursing mothers") may not be able to deliver their typical standards of work due to certain changes in their physical condition or other such symptoms, such as morning sickness during pregnancy, decreased physical strength after birth, or postnatal depression. Such issues are addressed in laws or by certain regulations that have been prescribed by law to address expectant or nursing mothers' medical or physical need for protection, such as the provision of prenatal or postnatal leave under the Labor Standards Act (LSA), and the prohibition of unfavorable treatment on the grounds of a worker having used such leave or other measures. More specifically, there are provisions for leave before and after childbirth (LSA, Article 65, Items 1 and 2), for prohibiting dismissal during said leave or within the 30 days thereafter (LSA, Article 19, Paragraph 1), for limitations on belowground work and dangerous and

injurious work for expectant or nursing mothers (LSA, Article 64-2, Item 1 and Article 64-3, Paragraph 1), for reassignment of pregnant women to light activities (LSA, Article 65, Item 3), for limitations on overtime work, etc. (LSA, Article 66), for health care measures (EEOA, Articles 12 and 13), which specifically include measures to alleviate commuting and to provide breaks, etc. (EEOA, Article 13, Paragraph 2 Guidelines), and for time for nursing mothers to care for their children (LSA, Article 67). Moreover, as also noted in this article, Article 9, Paragraph 3, of the EEOA prohibits dismissals or other such unfavorable treatment on the grounds of pregnancy, childbirth, a worker requesting or taking prenatal or postnatal leave or using other measures or restrictions such as the above example of reassignment to light activities, or decline in working ability, etc. Seemingly emphasizing the point, Article 9, Item 4, of the EEOA prohibits the dismissal of expectant and nursing mothers as a general rule and also shifts the burden of proof to the employer. This could be deemed to constitute a legal framework that could be described as "a legal system for the protection of expectant and nursing mothers." It can be seen as a legal system that not only seeks to maintain the health of expectant and nursing mothers and thereby support childbirth, but also to strongly protect the employment of such women in a period where working ability and other such aspects of professional performance tends to decline. The legal provisions on harassment related to pregnancy and childbirth, etc., which were enforced on January 1, 2017 (EEOA, Article 11-3), are also included in this legal system.

4. Legal provisions regarding harassment concerning childcare leave, etc. (CFCLA, Article 25) were enforced at the same time as the provisions on harassment related to pregnancy and childbirth, etc. touched on in note 3.

5. The *Yamanashi-kenmin Shinyō Kumiai* case (*Yamanashi Prefectural Credit Association* case), Supreme Court (Feb. 19, 2016), 70–2 *Minshu* 123 demonstrates strict judgment criteria regarding a worker's consent to unfavorable changes to employment terms.

6. The guidelines related to the EEOA which are relevant to this case are the "Guidelines for appropriate measures for employers regarding items determined in provisions concerning the prohibition of discrimination on the grounds of a worker's sex, etc." (Ministry of Health, Labour and Welfare Notification 614, 2006). The guidelines related to the CFCLA are the "Guidelines regarding measures that employers need to implement to support workers who take or will take care of children or other family members to combine their professional lives with their family lives" (Ministry of Health, Labour and Welfare Notification 509, 2009). The applicable clauses are Article 4-3 (2) (iv) for the EEOA guidelines and Article 2-11 (2) (iv) for the CFCLA guidelines.

7. Shozo Yamada, "*Japan Bijinesu Rabo jiken ni okeru ikuji kaigo kyūgyōhō 10 jō tou ihan ni tsuite*" [The violation of Article 10, etc. of the Child Care and Family Care Leave Act in the *Japan Business Lab* case], (2019) 1942 *Rodo Horitsu Junpo* 27 draws on the text of each law and each guideline to elucidate the nature of the agreement as a violation of the mandatory provision.

8. Case seeking compensatory award and restoration of good reputation. Supreme Court (July 20, 1956), 10–8 *Minshu* 1059). https://www.courts.go.jp/app/hanrei_jp/detail2?id=57514 (in Japanese), accessed 1 October, 2020.

The *Japan Business Lab* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1215, pp. 5–45. See also *Jurist* (Yuhikaku) 1550, pp. 128–131 and *Journal of Labor Cases* (Rodo Kaihatsu Kenkyukai) 94, pp. 1–50.

TAKIHARA Hiromitsu

Ph.D. in Law. Researcher, The Japan Institute for Labour Policy and Training. Research interest: Labour and Employment Law, especially contract of employment, unfair labour practices, workplace bullying / harassment, restorative justice, and comparative labour and employment law.

https://www.jil.go.jp/english/profile/takihara.html

Does the Unilateral Discontinuance of Dues Check-off by a Local Public Entity Constitute Unfair Labor Practices?

The *National Government and Central Labor Relations Commission vs. Osaka City (Dues Check-off)* Case
Tokyo High Court (Aug. 30, 2018) 1187 *Rodo Hanrei* 5

Yota Yamamoto

I. Facts

City Y is an ordinary local public entity pursuant to the provisions of the Local Autonomy Act. Union X_1, Union X_2, Union X_3, and Union X_4 are all labor unions consisting of those City Y employees to whom the Local Public Enterprise Labor Relationships Act applies.[1] Unions X_1–X_4 each entered into a checkoff agreement with City Y, the earliest of which was concluded in 1957 and the latest in 1980. As these checkoff agreements were automatically renewed each year until 2011, the City Y employees who were members of Unions X_1–X_4 had their union dues deducted from their salary (checked off) for a number of years.

For City Y employees prescribed in the Local Public Service Act there is an employee organization in place, and the employees who belong to said employee organization had always had their dues checked off in accordance with the "Ordinance regarding Employee Salaries." From around 2004, employees' misconduct was a frequent issue in City Y. It was suggested that these problems could be attributed to the collusive relationships between City Y and the employee organization or labor unions, which are symbolized by the favorable treatment and the grant of convenience that City Y had traditionally provided to the employee organization or labor unions (including the checkoff arrangements). In March 2008, the Y City council therefore approved the "Ordinance for the Discontinuation of Dues Checkoff," which saw the discontinuation of checkoff for those employees belonging to the employee organization. In response to this, Union A, the employee organization of City Y, brought an action calling for the declaration of the invalidity of the "Ordinance for the Discontinuation of Dues Checkoff," but the Osaka District Court passed a judgment dismissing the action in February 2011.

Between February and March the following year, City Y also issued a notification (hereafter referred to as "this notification") to Unions X_1–X_4, informing them that their checkoff agreements would no longer be renewed as of April 1, 2013, thereby discontinuing the checkoff. In response, Unions X_1–X_4 engaged in collective bargaining with City Y from March to July 2012. During this process of collective bargaining, the explanations given by City Y included the fact that they needed to readdress their provision of the grant of convenience because it was a symbol of labor-management collusion; that the checkoff for the employee organization had been discontinued; that its (City Y's) claims in the aforementioned action regarding the "Ordinance for the Discontinuation of Dues Checkoff" had been upheld; and that it would be difficult to justify the continuation of the checkoff only for Unions X_1–X_4 to City Y citizens.

The course of events is shown in the next page (Process of this case). The Tokyo High Court case largely focused on whether this notification constituted "domination and interference" with a labor union, which would make it an unfair labor practice (Labor Union Act, Article 7, No. 3).[2]

Process of this case (Course of events leading up to the Tokyo High Court)

April/August 2012	Unions X_1–X_4 seek remedy from the Osaka Prefecture Labor Relations Commission on the grounds that the notification to discontinue the checkoff ("this notification") is an unfair labor practice as it constitutes "domination and interference" with a labor union (Labor Union Act, Article 7, No. 3).
February 2014	The Osaka Prefecture Labor Relations Commission issues an order-for-relief on the grounds that this notification is an unfair labor practice as it constitutes "domination and interference" with a labor union.
March 2014	City Y petitions the Central Labor Relations Commission to reexamine the case, as it objects to the order issued by the Osaka Prefecture Labor Relations Commission.
November 2015	The Central Labor Relations Communication issues an order-for-relief on the grounds that this notification is an unfair labor practice as it constitutes "domination and interference" with a labor union.
	City Y then brought an action with the Tokyo District Court to revoke the order issued by the Central LRC as it objects to said order.
February 2018	The Tokyo District Court quashed City Y's claims on the grounds that the notification is an unfair labor practice as it constitutes "domination and interference" with a labor union.
	City Y then appeals to the Tokyo High Court as it objects to the judgment of the Tokyo District Court.

II. Judgment

The Tokyo High Court concluded that City Y's notification was an unfair labor practice as it constituted "domination and interference" with a labor union (Labor Union Act, Article 7, No. 3). The judgment is summarized below.

(1) "In the event that union dues are checked off in accordance with an agreement between the employer and a labor union, it is on this assumption that the labor union pursues its activities and management and industrial relations are formed. Given that the checkoff system is in fact adopted by the great majority of private-sector business establishments across Japan, and discontinuation of such arrangements could be expected to have an impact on labor union activities and management and industrial relations; if an employer wishes to discontinue a checkoff, said employer is required to demonstrate reasonable grounds for doing so despite its inflicting a disadvantage. In addition, when discontinuing the checkoff, the employer must also give due consideration to the procedures that need to be followed for the labor union, such as providing an explanation of the grounds for discontinuing the checkoff, engaging in discussion on remedial measures and other such steps, and allowing a sufficient grace period. Moreover, where a discontinuation of checkoff fails to meet these requirements, the situation shall be assessed such that all elements are considered—including the purpose of, motivation behind, timing and conditions of discontinuation, and the disadvantages, impact and other such consequences that the discontinuation could have for the labor union's management or activities—and, where it can be said that the discontinuation may weaken the labor union, or disrupt its management or activities, the discontinuation shall be classed as "domination or interference" with the labor union."

(2) As its grounds for discontinuing the checkoff, City Y claimed that it needed to discontinue the provision of the grant of convenience in order to eradicate inappropriate industrial relations. However, "it is not clear what specific relationship exists, between their objective—that is, ensuring appropriate industrial relations—and the means that they took—discontinuing the checkoff—and there does not appear to be concrete grounds for it to be necessary for City Y to discontinue the checkoff with Unions X_1–X_4 in order to ensure appropriate industrial relations with Unions X_1–X_4 …. There is nothing to suggest that there would be reasonable grounds for City Y to discontinue the checkoff with Unions X_1–X_4 despite the fact that it creates a disadvantage for Unions X_1–X_4."

(3) Furthermore, "this notification was not only suddenly issued without any prior explanation or coordination, administrative-level negotiations, provision of information, or other such exchange

between City Y and Unions X_1–X_4," and it seeks the discontinuation of "a union dues checkoff arrangement that has consistently been in place for around a quarter to half a century, without any consideration of the individual circumstances of each of the labor unions (Unions X_1–X_4)." What is more, "in the collective bargaining conducted following this notification, City Y did not provide any of the unions (Unions X_1–X_4) with anything more than a general, abstract explanation of the need to discontinue the checkoff; City Y also merely spoke of the need to eradicate the mutual dependence between labor and management and develop industrial relations that are appropriate in the eyes of the citizens. City Y also failed to make any proposals for investigating the specific kinds of impacts the discontinuation of the checkoff could have on each of the unions (Unions X_1–X_4), or factors such as the necessity of and potential for tackling such individual circumstances." This suggests that City Y did not provide specific explanations of the grounds for or necessity of discontinuing the checkoff, did not engage in sufficient deliberation of remedial measures and other such responses, and did not allow for a sufficient grace period. Therefore, city Y cannot be said to have sufficiently fulfilled its duty to consider the procedures that need to be followed.

(4) "As the issuing of this notification indeed force Unions X_1–X_4 to take particular action and thereby coercibly placed them under considerable strain, it is recognized that there was a certain extent of hindrance to union activities." It is therefore possible to reach the conclusion that this notification had the effect of weakening Unions X_1–X_4, or disrupting their activities.

(5) "Therefore, it cannot be said that there were reasonable grounds for discontinuing the checkoff, or that sufficient care was taken when issuing the notification to take the necessary procedures into consideration. As the notification thus appears to have had the effect of weakening Unions X_1–X_4 or disrupting their activities, it is recognized to constitute "domination and interference" with Unions X_1–X_4."

III. Commentary

According to the "Actual Situation Survey on Labour Unions" conducted by the Ministry of Health, Labour and Welfare (MHLW) in 2008, most Japanese labor unions determine union dues by a fixed-rate method—that is, multiplying each union member's (worker's) basic salary by a set percentage (for instance, 1%). For the labor unions that apply this method, it is important to ensure that the exact salary of each union member is used when calculating and collecting dues. The practice of checking-off—by which an employer deducts union dues from each union member's (worker's) salary at the time of payment each month according to a predetermined rate, and pays those dues to the union as a lump sum—is therefore widely pursued in Japan. Results of the MHLW's "Survey on Collective Agreements," which is conducted in 2011, showed that 91% of Japan's labor unions collected their dues using checkoff. In the case we are addressing here, the labor unions (Unions X_1–X_4) also collected their dues using checkoff conducted according to a fixed-rate method.

It also should be noted that such checkoff is a form of the grant of convenience provided by an employer to a labor union, and employers are not legally obliged to implement a checkoff. The checkoff is therefore implemented on the basis of an checkoff agreement between a labor union and the employer (a labor-management agreement; where, according to the Supreme Court's interpretation, a labor union may only enter into such an agreement when said labor union is organized by a majority of the workers at the workplace, in accordance with Article 24 of the Labor Standards Act and the fundamental principles it prescribes on the payment of wages [The *Saisei-kai Chuo Byoin* case, Supreme Court (Dec.11, 1989) 43 *Minshu* 1786]). In that sense, it can be said that employers in Japan have, at the least, the freedom to decide whether to start a checkoff arrangement.

However, this does not automatically mean that an employer is entitled to unilaterally discontinue a checkoff arrangement that has already been started,

by such means as later refusing to renew the labor-management agreement. Court precedents and Labor Relations Commission orders have traditionally established interpretation that in order for a checkoff to be discontinued, (i) there needs to be reasonable grounds, and (ii) even if there are reasonable grounds, the employer must give consideration to the procedures that need to be followed beforehand, such as engaging in deliberations with the labor union on remedial measures and other such steps, and allowing a sufficient grace period. If either of these two conditions—(i) or (ii)—has not been met, the discontinuation of the checkoff has typically been classed as an unfair labor practice (Labor Union Act, Article 7, No. 3) on the grounds that it constitutes "domination and interference" with a labor union.

Amid such a trend, the Tokyo District Court case on this matter (Tokyo District Court [Feb. 21, 2018] 1187 *Rohan* 14) is notable for the fact that the court followed different judgment criteria to those typically adopted. That is, the Tokyo District Court held that "in the event that an employer discontinues (a checkoff) without giving sufficient consideration to the procedures that need to be followed, despite being aware that the discontinuation having the effect of…weakening the labor union, the discontinuation constitutes 'domination and interference' with a labor union." According to such judgment criteria, even if an employer has no reasonable grounds for discontinuing the checkoff—condition (i) above—as long as said employer has given consideration to the procedures that need to be pursued with the labor union, the discontinuation could avoid being classed as domination and interference with a labor union.

In contrast, the Tokyo High Court judgment that in addition to sufficient consideration of the necessary procedures, there also needs to be "reasonable grounds for discontinuing the checkoff despite its inflicting a disadvantage on the labor union" for the checkoff to be discontinued (as reflected in II (1) and (2)). That is, the Tokyo High Court reverted to the judgment criteria adopted in prior cases and Labor Relations Commission orders.

This difference in the judgment criteria adopted by the Tokyo High Court and the Tokyo District Court on this matter is thought to be attributable to divergence in their interpretations of checkoff itself. The Tokyo High Court judgment placed emphasis on the impact (disadvantage) that discontinuing the checkoff could have for the activities or management of the labor union, and therefore adopted the interpretation that it was needed for the employer to not only give consideration to the necessary procedures—(ii) above—but also have reasonable grounds—(i) above—in order to discontinue the checkoff.

In contrast, the Tokyo District Court adopted the interpretation that a checkoff is nothing more than the employer providing a grant of convenience to the labor union, and because "there are no legal grounds for the employer to have to automatically continue the arrangement," "it cannot be said that reasonable grounds are also required" in order to discontinue the checkoff. Thus, in this case the Tokyo High Court and the Tokyo District Court are divided on the question of whether the emphasis should be placed on the usefulness of checkoff as a means for collecting union dues, or on the employer's freedom with regard to starting and continuing the checkoff.

In addition to this divide, there is also another point on which the theories adopted in the Tokyo High Court and the Tokyo District Court's judgments are in conflict. There is a question whether the employer's intent of "domination and interference" (as prohibited under Article 7, No. 3 of the LUA) is necessary for the determination of unfair labor practice. The majority of legal theories argue that for an act to constitute the unfair labor practice of "domination and interference," the employer needs to have intent of dominating and interfering, in the sense that they are aware that their action will weaken or risk weakening the labor union (the theory that intent is required). There are also examples of court precedents that have adopted such an interpretation (The *IBM Japan* case, Tokyo High Court [Feb. 24, 2005] 892 *Rohan* 29). However, there are also theories that strongly argue that it is not necessary to demonstrate subjective factors regarding the employer, such as said employer's intent to "dominate and interfere," in order for an act to constitute "domination and interference." That is,

if the act can be objectively seen to weaken the labor union or entail the risk of doing so, it is classed as "domination and interference" (the theory that intent is *not* required).

Looking at this case in light of the above, the Tokyo District Court judgment, as we have seen, addressed as part of its judgment criteria the subjective factors regarding the employer—namely, the employer's awareness that discontinuing checkoff would weaken the labor union—and thereby took an interpretation that echoes the theory that intent is required. On the other hand, the Tokyo High Court focused on the ways in which in this notification to discontinue the checkoff weakened Unions X_1–X_4 (as shown in II (4)), an evaluation that seems to follow an interpretation that echoes the theory that intent is *not* required.

In this case, the notification of the unilateral discontinuance of the dues checkoff had been issued to all of the unions (Unions X_1–X_4) without any discussion being pursued regarding remedial measures and other such steps suited to the individual circumstances of each union and without a grace period being put in place. This was done on the grounds that discontinuing the dues checkoff system was necessary in order to ensure consistency with the treatment of the employee organization (Union A), to which the Labor Union Act did not apply in the first place. The Tokyo District Court—and of course the Tokyo High Court (see II (3) and (5))—also concluded that this notification to discontinue the checkoff constituted "domination and interference" with a labor union, on the basis that City Y had failed to give consideration to the necessary procedures. (Moreover, the Tokyo High Court also determined that the notification to discontinue the checkoff was not based on "reasonable grounds" as specified above—II (2). As we have seen in this case, there is a marked contrast between the respective theories that the Tokyo High Court and the Tokyo District Court followed in the process of reaching these judgments.

1. In Japan, employees who work for local public entities fall under the Labor Union Act depending on their job type. In this case, among the employees working for City Y, those employees to whom the Local Public Enterprise Labor Relationships Act applies, such as the members of Unions X_1–X_4, fall under the Labor Union Act as a general rule, as prescribed in Article 4 of the Local Public Enterprise Labor Relationships Act. It is therefore possible for such employees to form or join a labor union and also to use the system of unfair labor practices (Labor Union Act, Article 7). On the other hand, for workers who are regular service employees engaged in clerical work in City Y, like the employees who are members of Union A in this case, the Local Public Service Act applies. Therefore, as these employees do not fall under the Labor Union Act due to the specifications of Article 58, Paragraph 1, of the Local Public Service Act, they are not able to form or join labor unions. These employees are able to form or join employee organizations, but as they do not fall under the Labor Union Act, they are not able to utilize the system for unfair labor practices.

2. Labor Union Act, Article 7 (Unfair Labor Practices), No. 3
The employer shall not commit the acts listed in any of the following No. 3:
(iii) to dominate and interfere with the formation or management of a labor union by workers or to give financial assistance in paying the labor union's operational expenditures, provided, however, that this shall not preclude the employer from permitting workers to confer or negotiate with the employer during working hours without loss of time or wage, and this shall not apply to the employer's contributions for public welfare funds or welfare and other funds which are actually used for payments to prevent or relieve economic adversity or misfortunes, nor to the giving of office of minimum space.

The *National Government and Central Labor Relations Commission vs. Osaka City (Dues Check-off)* case (Tokyo High Court, Aug. 30, 2018), *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1187, pp.5–38. See also *Hanrei Jiho* (*Hanji*, Hanreijihosha) 2403, pp.93–122, and *Rodo Horitsu Junpo* (*Rojun*, Junposha) 1924, pp. 67–73. For the summary of the case by the Labor Relations Commission, see https://www.mhlw.go.jp/churoi/meirei_db/han/h10670.html (in Japanese).

Yota Yamamoto
Doctor of Law. Vice Senior Researcher, The Japan Institute for Labour Policy and Training. Research interest: Labor law.
https://www.jil.go.jp/english/profile/yamamoto.html

Commentary

Employers' Duty for Safety of Multiple Job Holder Who Worked Excessively Long Hours

The *Daiki Career-Casting and One Other Defendant Company* Case Osaka District Court (Oct. 28, 2021) 1257 *Rodo Hanrei* 17

IKEZOE Hirokuni

I. Facts

The plaintiff, X, worked the late night to early morning shift at a 24-hour gas station under a labor contract concluded with Y1, one of the defendants. Y1 was responsible for the day-to-day running of the gas station, which had been contracted out by A (the gas station's operating enterprise, which was not a party to this case) to B (understood to be the parent company of Y1 and also not a party to the case), and in turn subcontracted to Y1. X requested a colleague to give up shifts to X, and consulted with the colleague and their supervisor, which resulted in the colleague partially accepting X's request (and thereby led to an increase in X's shifts). Directly after, X concluded a labor contract with A as well, such that X worked shifts other than the late night to early morning shift once or twice a week at the gas station for A, in addition to the shifts worked for Y1. As a result, the number of hours worked by X—who subsequently ceased to attend work—for Y1 and A totaled 303 hours and 45 minutes in the month prior to becoming absent, 270 hours and 15 minutes in the second month prior, 271 hours in the third month prior, 268 hours and 30 minutes in the fourth month prior, 256 hours and 45 minutes in the fifth month prior, and 244 hours in the sixth month prior. It should also be noted that in a subsequent merger by absorption, Y1 and A were absorbed into the enterprise Y2, the other defendant in this case.

In this case, X claimed damages from Y1 and Y2 on the grounds that Y1 and Y2 had, among other acts, neglected their duty to reduce X's working hours after having ascertained or being able to ascertain X's working hours, and thereby breached their duty of care (*chūi gimu*) under tort law, and breached their duty to consider to ensure a worker's safety (*anzen hairyo gimu*; "duty for safety") under the labor contract.

II. Judgment

X's claim was dismissed.

1. For several months, X, under the employment of Y1 and A, worked long hours totaling around 270 hours or more per month. This state of affairs was problematic in light of the purpose of Article 32 of the Labor Standards Act (LSA), which prescribes upper limits on working hours (author's note: namely, a weekly limit of 40 hours and a daily limit of 8 hours), to prevent the impairment of workers' health due to long working hours. However, said state of affairs was the result of X making efforts to secure more work opportunities with long working hours and thereby successfully increasing X's own working hours, because X had actively requested a colleague, K, to give up K's scheduled work shift to X and secured K's partial concession.

2. Moreover, X, on X's own request, concluded a labor contract with A to increase X's working

hours by working for days in succession with no days off. X was working for A on days prescribed as days off under X's labor contract with Y1, as X had intentionally continued to work on successive days by arranging to work on said days on X's own active request. The fact that X came to be working for days in succession and for long hours was therefore the result of an active choice by X. Furthermore, Y1's status did not allow it to directly intervene in the labor contract-based relationship between X and A to reduce X's working days.

3. It cannot be recognized that Y1 breached Y1's duty of care toward X under tort law or breached Y1's duty for X's safety under the labor contract. This is based on several factors, including the fact that the tasks assigned to X entailed a considerably low intensity of labor, the fact that Y1 had, under its labor contract with X, allocated Sunday as a day off, and the fact that X's supervisor had pointed out to X that X's way of working presented an issue in light of the laws regarding labor and informed X that X should take time off in consideration of X's own physical health.

4. Given that, as stated above, it was determined that Y1 had not breached their duty of care under tort law or their duty for safety under the labor contract, the court did not recognize the claim that A, by cooperating with the tort of Y1, was liable for a tort. Therefore, as A was not liable for a tort, Y2, the enterprise which inherited A's business, was not subject to such liability and therefore not subject to liability for damages. Having formed no contract with Y1, A also held no authority to directly intervene in the labor contract-based relationship between X and Y1 to allocate days off to X. Therefore, the court did not recognize that A had breached their duty of care toward X under tort law or breached their duty for X's safety under the labor contract and, in turn, Y2, which had inherited A's business, did not inherit the liability for damages.

III. Commentary

1. Work Style Reform and working hours of multiple job holders

Deliberations aimed at developing policy to support new and diverse work styles—known as Work Style Reform (*hatarakikata kaikaku*)—commenced in 2016 and culminated in the revision of key laws and regulations such as the LSA and the Industrial Safety and Health Act, which resulted in the introduction of an upper legal limit on overtime working hours and various measures aimed at protecting workers' health. While such steps meant the introduction of stricter provisions, the government's Work Style Reform, as measures to facilitate diverse working styles, sought to provide policy to foster the practices of teleworking (working from home or remotely) and of pursuing multiple jobs.[1]

One of the contentious aspects of this case was whether the employer should bear the legal liability for long working hours arising from working multiple jobs. Concerning this point, the provisions of Article 38 of the LSA address the calculation of hours worked. Paragraph 1 of said Article prescribes that "[t]o apply the provisions on working hours, hours worked are aggregated, even if the hours worked were at different workplaces." "At different workplaces" has typically been interpreted as covering not only work conducted at different workplaces under the same employer, but also work conducted at different workplaces under multiple different employers (May 14, 1948, *Kihatsu* [administrative notification related to labor standards] No.769). (Moreover, this case can be interpreted as a precedent involving multiple jobs, given that while working at the same workplace, X was working under labor contracts concluded with two different employers.)

The Ministry of Health, Labour and Welfare has recently issued a set of guidelines aimed at fostering the practice of workers pursuing multiple jobs, entitled "Guidelines for Multiple Jobs" (revised in July 2022). A key point of the Guidelines is that employers are responsible for controlling the

aggregate total of hours worked by a worker (the hours worked under their employment and that of other employers) based on self-reported information and other such input from the worker. On the other hand, it also states the necessity for workers to check the working hours and other such employment conditions at the different workplaces and manage one's own working hours and health when working multiple jobs.

2. Significance

Amid such developments in policy, this case was the first judicial precedent in which a judgment was passed on the employer's legal liability concerning long working hours in multiple jobs (it should, however, be noted that the suit was filed in 2017). This case is also distinctive because it entailed a judgment on multiple employers' respective duties of care under tort law and duties for safety under the labor contracts, as opposed to being an issue of an employer or business operator's nonperformance of duty under the LSA or Industrial Safety and Health Act.

It should be noted that the Guidelines also address the employer's duty for safety, listing as one of the examples of breach of duty: "the event that an employer, despite ascertaining that a worker's overall workload and working hours are excessive, takes no consideration of that in any way, to such an extent that the worker's health becomes impeded." According to the facts found, this case is a precedent that does not involve damage to health due to long working hours and working for days in succession and therefore may be significant as a precedent that does not fall under a breach of duty as described in the Guidelines.

3. Legal theory, scope and pending issues

It is important to note here that both duty of care under tort law and duty for safety under the labor contract are obligations of conduct (*nasu saimu*) rather than obligations to achieve a result (*kekka saimu*), and therefore by taking care, or by giving consideration, the employer can be seen to have performed their duty. The specific conduct required to do so also differs from case to case. With regard to cases of long working hours such as this one, the specific conduct required to be recognized to have taken care or given consideration may include measures such as reducing working hours by not allowing the worker to work overtime, ensuring the worker has days off, ensuring that the worker takes their annual paid leave, or reassigning or sending the worker on leave of absence (*kyūshoku*) in the event that said worker is recognized to be experiencing physical or mental health difficulties.

According to the facts found in this case, X requested a colleague to give up shifts to X, and actively sought opportunities to work by forming a labor contract with A in addition to Y1, and therefore consecutive days of long working hours were brought about by X's own choice and on X's own decision. X's supervisor, on the other hand, informed X that a large number of hours worked by X conflicted with the LSA, and also warned X that X should take time off in consideration of X's own health (the supervisor had also ordered X to cease working for A, and X had promised to do so but not fulfilled said promise). Thus, it can thereby be interpreted that Y1 did not breach its duty of care or duty for safety. Therefore, as determined by the court, Y1 cannot be said to have breached its duties. (Moreover, given that despite working long hours and successive days, X had not suffered health damage as a result, the case could not entail a breach of duty for safety or duty of care by Y1 or Y2 in the first place.)

On this basis, it can be surmised that while the government may be pursuing efforts to foster the practice of working multiple jobs, such workers are expected to be self-reliant and self-selecting and bear individual accountability behind the scenes, while employers' legal liability is limited. This corresponds with the stance set out in the Guidelines, which establish that working hours and other such employment conditions should be ascertained on the basis of self-reporting by the worker to the employer, and that workers should be self-organized with regard to working hours and health.

At the same time, as stated in the Guidelines, an employer is theoretically unable to avoid the duty for

safety under the labor contract (or duty of care under tort law) that they bear toward the worker. If a worker working multiple jobs has been self-reporting their state of work to their employer, such as their own working hours and days off, and the employer has recognized the worker's excessive burdens and fulfilled their duty of care and duty for safety, the employer cannot be regarded to have breached their duty (the specific ways in which they fulfilled that duty, however, could be called into question). However, the way in which the employer, upon receiving the worker's self-report, recognized the excessive burden on the worker and the kinds of measures that the employer took, upon having recognized the burden, may become the points of contention in judicial precedents in the future. In that sense, this case implies the issues of future deliberation regarding legal judgments on cases that fall in a grey zone. This is also a precedent in which it was determined that there had been no breach of duty for safety under the labor contract or duty of care under tort law and that, despite working long hours and successive days, the worker had not damaged their health as a result. It therefore has little significance as a precedent for cases recognizing the legal liability of each employer of a worker working multiple jobs.

As one of the points for contention in this case was the duty of care under tort law and duty for safety under the labor contract, the case was not judged to be a precedent of a violation of the upper legal limit on overtime working hours as prescribed under the LSA (100 or more hours of legally prescribed overtime working hours per month, or a monthly average of more than 80 hours of legally prescribed overtime working hours for six months), where, in anticipation of applying penal provisions, work at multiple workplaces (under multiple employers) must be aggregated. Therefore if a judgment on such a case was passed in the court, it would not also entail a judgment as to how the legal liability would be shared between the multiple employers. This is another issue and remains to be addressed.

1. Furthermore, as part of the Work Style Reform, the Industrial Safety and Health Act prescribes that an employer must assess the situation of working hours of workers (Industrial Safety and Health Act, Article 66-8-3). The eligibility criteria for receiving insurance benefits (for cerebrovascular disease or heart disease and mental disorders) under the Industrial Accident Compensation Insurance Act also prescribe that in the event of work at multiple workplaces, the decision on eligibility should take into consideration the aggregate working hours (Sept. 14, 2021, *Kihatsu* No.1, and Aug. 21, 2020, *Kihatsu* No.0821). Therefore, in accordance with laws and regulations regarding workers' health, legal violations are generally assessed on the basis of the aggregate hours worked.

The *Daiki Career-Casting and One Other Defendant Company* case, *Rodo Hanrei* (*Rohan*, Sanno Research Institute) 1257, pp.17–51. *Rodo Keizai Hanrei Sokuho* (*Rokeisoku*, Keidanren Business Services) 2471, pp.3–34.

IKEZOE Hirokuni

Assistant Research Director, The Japan Institute for Labour Policy and Training. Research interests: Various issues relating to labor contract, legal concept of workers, labor dispute settlement, employment and labor law in the USA.

https://www.jil.go.jp/english/profile/ikezoe.html

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

Ryo Hosokawa

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).

AUTHOR

Ryo Hosokawa Professor, Aoyama Gakuin University. Former Vice Senior Researcher, The Japan Institute for Labour Policy and Training (JILPT) (at the time of writing). Research interest: Labor Law.

Illegality of the Disparity in Working Conditions between Hourly Paid Fixed-term Contract Employees and Monthly Paid Regular Employees

The *Osaka Medical and Pharmaceutical University (former Osaka Medical University)* Case
The Supreme Court (Oct. 13, 2020) 1229 *Rodo Hanrei* 77

ZHONG Qi

I. Facts

On January 29, 2013, X signed a fixed-term labor contract with Y for a contract period until March 31 of the same year, and worked as an *arubaito* employee.[1] Thereafter, X renewed the contract for a period of one year three times, and resigned on March 31, 2016. X was diagnosed with adjustment disorder in March 2015 and did not come to work from the 9th of the same month until the above resignation date, and was treated as having taken annual paid leave for about one month from April to May of the same year, after which she was treated as being absent from work.

At the time of X's employment, Y had regular, contract, *arubaito*, and entrusted (*shokutaku*)[2] employees for clerical tasks, but only regular employees had indefinite-term labor contracts. Regular employees and contract employees were paid on a monthly basis, and entrusted employees were paid on a monthly or annual basis. In contrast, *arubaito* employees were paid on an hourly basis. While about 40% of them had the same scheduled working hours as regular employees, working hours of the rest were shorter than those of regular employees.

At the time of X's employment, in accordance with the rules of employment, etc., regular employees were entitled to basic pay, bonus, wages during the year-end and New Year holidays and the anniversary of the founding of the university, annual paid leave, special paid leave during the summer, wages during absences due to personal injury or illness, and grants for medical expenses at the affiliated hospital. According to the salary regulations for regular employees, the basic pay is determined by taking into consideration the kind of job, age, educational background, and work history of the regular employees at the time the regular employee is hired, and the salary is to be increased according to years of service taking their work performance into consideration. Regarding bonuses, it was only stipulated that temporary or regular wages would be paid when Y deemed it necessary.

On the other hand, based on the bylaws for *arubaito* employees, *arubaito* employees were paid hourly wages and granted annual paid leave as prescribed by the Labor Standards Act, but bonuses, wages during the year-end and New Year holidays and the anniversary of the founding of the university, other annual paid leave, special paid leave during the summer, wages during absences due to personal injury or illness, and grants for medical expenses at the affiliated hospital were not paid or granted. Under the bylaws for *arubaito* employees, the hourly wage rate was to be changed when there was a change in the kind of job, etc. There was no provision for wage increases.

Regular employees were engaged in all kinds of work at the university and the affiliated hospital, and their duties varied depending on where they were assigned, including general affairs, academic

affairs, and hospital administration. In the departments where regular employees were assigned, most of the tasks were not routine or simple, and some of the tasks included crucial measures that affected the entire corporation, and the responsibilities associated with the work were considerable. In addition, the rules of employment for regular employees stipulate that regular employees may be ordered transfers within or beyond the boundary of the university, and personnel transfers are conducted for the purpose of developing and utilizing human resources.

On the other hand, under the bylaws for *arubaito* employees, the employment period for *arubaito* employees is limited to one year. Although their contract may be renewed, the upper limit is set at five years, and their duties are mainly routine and simple. The bylaws for *arubaito* employees stipulate that *arubaito* employees may be ordered transfers to other departments, but since they are hired with a clear description of their jobs, in principle they are not reassigned to other departments by job-related orders, and personnel transfers are limited to exceptional and individual circumstances.

At Y, there was a system of promotion by examination from *arubaito* employees to contract employees and from contract employees to regular employees.

The university in question has a total of eight laboratories for basic courses that do not have medical departments, each with one or two laboratory clerks, and in 1999, there were nine laboratory clerks as regular employees. Regarding the laboratory clerks, since more than half of their work was routine and simple, Y started to replace them with *arubaito* employees since around 2001 by transferring out regular employees, and from April 2013 to March 2015, there were left only four regular employees. Three of these regular employees had never engaged in any work other than laboratory clerical work. In the laboratories where regular employees remained, there were duties such as editing of the university's English-language journals, public relations work, dealing with bereaved families regarding pathological autopsies and other matters requiring inter-departmental cooperation, and management of reagents such as poisonous and deleterious substances, etc., for which Y judged that it was necessary to assign regular employees instead of *arubaito* employees.

In the fixed-term labor contract that X concluded in January 2013, the place of work was the pharmacology laboratory at the university, the main duties were secretarial work in the pharmacology laboratory, and the wage was 950 yen per hour. The contract was renewed three times from April of each year, and the hourly wage rate was sometimes slightly increased. However, there was no particular change in her job content, which included schedule management and adjustment for professors, teaching staff and research assistants, handling of telephone calls and visitors, preparation of materials for professors' research presentations, accompanying professors when they went out, various office work in the laboratory, laboratory accounting, equipment management, cleaning and waste disposal, and management of receipts and payments. In addition, X's scheduled working hours were full-time.

The average monthly wage of X from April 2013 to March 2014 was 149,170 yen, and assuming that she worked full-time for the entire period, her monthly wage would have been approximately 150,000 to 160,000 yen. On the other hand, the starting salary of a regular employee newly hired in April 2013 was 192,570 yen, and there was a difference of about 20% in wages (basic pay) between X and the regular employee.

At Y, bonuses were paid to regular employees twice a year. In fiscal year 2014, the bonus was equivalent to 2.1 months of basic pay plus 23,000 yen in the summer, 2.5 months of basic pay plus 24,000 yen in the winter, and in fiscal years 2010, 2011, and 2013, the bonus was equivalent to 4.6 months of basic pay for the entire year, so the standard amount was equivalent to 4.6 months of basic pay for the entire year. Additionally, contract employees were paid a bonus that was approximately 80% of the bonus paid to regular employees. In contrast, bonuses were not paid to *arubaito* employees. The annual amount of wages paid to X

was about 55% of the total amount of basic pay and bonus paid to the regular employee who was newly hired in April 2013.

At Y, when a regular employee was absent from work due to personal injury or illness, the full monthly salary was paid for six months, after which the employee was ordered to take a leave of absence and 20% of the standard salary was paid as leave pay. In contrast, there was no compensation or leave system for *arubaito* employees during absences.

X filed a lawsuit on the grounds that the difference in bonuses, wages during absences due to personal injury or illness, etc. between X and regular employees with indefinite-term labor contracts violated Article 20 of the Labor Contracts Act. The main issue in this case is whether or not the difference in working conditions between regular and *arubaito* employees at Y can be deemed unreasonable.

II. Judgment

High court judgment was partially reversed and partially modified.

(1) Regarding bonuses

In light of the fact that the disparity in working conditions between employees with fixed-term labor contracts and those with indefinite-term labor contracts has been a problem, Article 20 of the Labor Contracts Act prohibits making working conditions unreasonable due to the existence of a fixed term in order to ensure fair treatment of employees with fixed-term labor contracts. Even if the difference in working conditions relates to the payment of bonuses, it may be considered unreasonable under the Article. However, in making such judgements, as with any other differences in working conditions, it should be examined whether or not the difference in working conditions can be evaluated as unreasonable by taking into account the various circumstances prescribed in the Article, considering the nature of the bonus and the purpose for which it is paid by the employer.

Y's bonus for regular employees is only stipulated in the salary regulations for regular employees to be paid when deemed necessary, and as a lump-sum payment to be paid separately from the basic pay, whether it is paid or not and the criteria for payment are determined by Y on a case-by-case basis, taking into account the financial situation during the calculation period. In addition, the said bonus is based on 4.6 months of basic pay for the whole year, and in light of the actual payment, it is not linked to Y's business performance, but is recognized to include the purposes of deferred payment of compensation for labor during the calculation period, uniform reward for meritorious service, and improvement of future work motivation. It can be said that the basic pay of regular employees is raised in accordance with the number of years of service taking their work performance into account, and has the character of an ability-based wage corresponding to the improvement of their ability to perform their job duties in accordance with the number of years of service; in general, the level of difficulty and responsibility of the work is high, and personnel transfers are conducted for the purpose of developing and utilizing human resources. In light of the salary system of regular employees and the required level of ability to perform their duties and their responsibilities, etc., it can be said that Y decided to pay bonuses to regular employees for the purpose of securing and retaining personnel who can perform their duties as regular employees.

When we look at "the substance of the duties and the level of responsibility associated with those duties (hereinafter referred to as the "content of duties")" prescribed in Article 20 concerning X and the regular employee as a laboratory clerk who has been designated the subject of comparison by X, there were some similarities in the substance of the duties between the both employees. However, while X's duties were considered to be fairly light, the regular employee as a laboratory clerk had to engage in other duties such as editing the university's English-language academic journals, dealing with bereaved families regarding pathological autopsies, and other duties requiring inter-departmental cooperation, as well as managing reagents such as poisonous and deleterious substances. It cannot be

denied that there were certain differences in the content of duties of the two. In addition, while the regular-employee laboratory clerks could be ordered to change their assignments under the rules of employment, the *arubaito* employees were not, in principle, reassigned by job-related orders, and personnel transfers were made on an exceptional and individual basis. It cannot be denied that there was a certain difference in the scope of changes in the content of duties and assignment (hereinafter referred to as the "scope of changes") between the two.

Furthermore, at Y, all regular employees are subject to the same employment management category and are subject to the same rule of employment, etc., and their working conditions are set based on their content of duties and the scope of changes, etc. Y has been replacing laboratory clerks with *arubaito* employees since around 2001, except for laboratories with certain duties, etc., because more than half of the laboratory clerks' substance of the duties was routine and simple. As a result, at the time when X was working, the number of regular employees as laboratory clerks had been reduced to only four, which was a very small number compared to the majority of other regular employees whose work was more difficult and had a higher level of responsibility, and who were also subject to personnel transfers. Thus, it can be said that the fact that the regular employees who are laboratory clerks differed from the majority of other regular employees in terms of their content of duties and the scope of changes was related to the circumstances concerning the substance of duties of laboratory clerks and the review of staffing that Y had conducted. For *arubaito* employees, there was a system of step-by-step promotion through examination in order to be contract and regular employees. It is appropriate to consider these circumstances as "other circumstances" prescribed in Article 20 of the Labor Contracts Act in determining whether the difference in working conditions between the regular-employee laboratory clerk and X is deemed unreasonable.

Based on the nature of Y's bonus for regular employees and the purposes of providing the bonuses, and considering the content of duties and the scope of changes of regular laboratory clerks and those of *arubaito* employees, therefore, it cannot be said that the difference in working conditions regarding bonuses between regular employees as laboratory clerks and X can be evaluated as unreasonable.

(2) Wages during absence due to personal injury or illness

It is understood that the reason why Y decided to pay salaries and leave pay to regular employees who are unable to provide services due to personal injury or illness is to ensure the livelihood of regular employees and to maintain and secure their employment, in light of the fact that regular employees are expected to work continuously for a long period of time or to work continuously in the future. Given the nature of such wages during absence due to personal injury or illness and the purpose of providing such wages at Y, it can be said that the said wage system is based on the premise of maintaining and securing the employment of such employees.

Looking at the content of duties and the scope of changes of the regular employee as laboratory clerks and the *arubaito* employees, it cannot be denied that there were certain differences between them in terms of their content of duties and the scope of changes. In addition, the fact that only a very small number of regular employees remained as laboratory clerks and that their content of duties and scope of changes differed from those of the majority of regular employees was related to the circumstances concerning the substance of duties of laboratory clerks and the review of staffing, etc., as well as the fact that there was a system of promotion through examination for changing job titles.

In addition to the circumstances related to the content of duties and the scope of changes, the contract period of *arubaito* employees is limited to one year, though it may be renewed, and it is difficult to say that they are scheduled to work on the premise of long-term employment. Given these

facts, the purposes of the system to maintain and secure employment as described above cannot be said to apply immediately to *arubaito* employees. Furthermore, X was treated as being absent from work after more than two years of service, and her period of employment, including the period of absence, was only more than three years, and it is difficult to say that her period of service was for a considerable length of time. There are no circumstances that suggest that X's fixed-term labor contract would be naturally renewed and the contract period continued. Therefore, the difference in working conditions regarding wages during absence due to personal injury or illness between X and regular employees as laboratory clerks cannot be evaluated as unreasonable.

III. Commentary

(1) Significance of this judgment

Article 20 of the Labor Contracts Act stipulates that in the event that the working conditions of an employee under a fixed-term contract differ from those of an employee under an indefinite-term contract, such difference "shall not be deemed unreasonable in light of the substance of the employee's duties and the level of responsibility associated with those duties (hereinafter referred to as the "content of duties" in this Article), the scope of changes in the content of duties and assignment, and other circumstances." This provision prohibits unreasonable differences in working conditions due to the existence of a fixed term. It should be noted that this provision does not uniformly prohibit differences in working conditions due to the existence of a fixed term, but only prohibits "unreasonable differences." It should be also emphasized that the provision does not require that indefinite-term contract employees and fixed-term contract employees be engaged in equal job.

With regard to Article 20 of the Labor Contracts Act introduced in 2012, the Japanese Supreme Court clarified its interpretation of some issues in the 2018 judgments in the *Hamakyorex* case (Supreme Court (Jun. 1, 2018) 72–2 *Minshu* 88) and the *Nagasawa Un-yu* case (Supreme Court (Jun. 1, 2018) 72–2 *Minshu* 202), but there has been no judgment on bonuses. Bonuses account for a large portion of the annual income of regular employees in Japan. In this case, the amount of bonus was equivalent to 4.6 months of monthly salary per year (amounting to about 28% of annual income). This judgment is important because it is the first time that the Supreme Court has ruled on whether or not the difference between bonuses paid to indefinite-term contract employees (regular employees) and not paid to fixed-term contract employees is considered unreasonable. The Labor Contracts Act was amended by the Laws on Work Style Reform passed on June 29, 2018, and Article 20 was deleted and incorporated into Article 8 of the Part-Time and Fixed-term Workers Act. Although this judgment was made in a case before the 2018 amendments were made, it is generally understood that the Supreme Court's interpretation of Article 20 of the Labor Contracts Act should, in principle, also be referred to when interpreting the amended law.

(2) The nature of the ability-based grade system and Article 20 of the Labor Contracts Act as "regulation of balanced treatment"

In the case of "job-based wage," where a person is hired for a specific job and the wage is determined by the difficulty and value of the job, the employee should be paid the equal amount of wage for equal job, regardless of whether or not the labor contract has a fixed term. Under such a job-based wage system commonly found in European countries, when determining whether a fixed-term contract employee is being treated disadvantageously, it is necessary to select an indefinite-term contract employee engaged in the same job as a comparator (if such a comparator does not exist, wage tables applicable to indefinite-term contract employees, etc., are referenced). In contrast, many Japanese companies have adopted a personnel management system called the "ability-based grade system" (ability-based wage system). Under this system, the job grades of employees are first rated according to their ability or potential to perform their job duties, and then their basic pay is determined according to

the rating. In other words, in the case of indefinite-term contract employees in Japan, their wages are not determined by the value of the job they are actually engaged in, but by the "value as a human resource" or their potential to perform their duties.

On the other hand, for fixed-term contract employees, the job-based wage system is also applied in Japan, and wages are often determined according to the difficulty of the job and the level of responsibility. While indefinite-term contract employees are paid on a monthly or annual salary basis, fixed-term contract employees are often paid on an hourly basis. In other words, in Japan, indefinite-term contract employees and fixed-term contract employees are employed under different wage determination systems, and thus even if they are engaged in the same job, their wages differ due to differences in the wage determinants in the respective wage systems, namely the potential to perform their duties or the job values.

Thus, in the case of Japan, since the method of determining wages differs between fixed-term contract employees and indefinite-term contract employees, Article 20 of the Labor Contracts Act have not adopted such regulatory method that prohibits different treatment of employees engaged in the same job as illegal discrimination as in the case of Europe, where fixed-term contract employees and indefinite-term contract employees work under the same job-based wage system. Initially, in order to improve the working conditions of part-time employees, Article 8 of the revised Part-Time Workers Act of 2007 prohibited the discriminatory treatment of part-time employees whose (1) content of duties, (2) scope of changes in the content of duties and assignment, and (3) contract periods are all the same as those of full-time employees. However, only 1.3% of all part-time employees[3] met all these three requirements and could be considered the same as regular employees. Since the number of part-timers protected by such regulations was extremely limited, it was ineffective in correcting the disparity between non-regular and regular employees. The major complaints of non-regular employees in Japan were that, even if the content of duties and the scope of changes were not identical between regular and non-regular employees, the disparity in treatment and remuneration between them was unreasonably too large compared to those differences. Therefore, Article 20 of the Labor Contracts Act of 2012, which regulates fixed-term contract employees, has changed its regulatory approach. It does not require that fixed-term contract employees and regular employees be the same in matters (1) and (2) ((3) contract period is naturally different, since Article 20 deals with disparity between fixed-term and indefinite-term contract employees). Under Article 20, (1) and (2) are only factors for judging the unreasonableness of the difference, and if the difference is deemed unreasonable, it is illegal (later, the Part-Time Workers Act was amended in 2014 to adopt the same regulation). Thus, Japan has adopted a unique regulation of "balanced treatment" that does not presuppose equal work, but makes it illegal if there is an *unreasonable* disparity in the treatment of employees, even if they are engaged in different work. Under such a regulation, there is no need for the court to identify comparators engaged in the same work as non-regular employees. It is up to the plaintiff employee to choose which regular employee to compare with to claim that the disparity in working conditions is unreasonable. The greater the disparity in working conditions between the plaintiff employee and the plaintiff's own chosen comparator, the easier it is to prove unreasonableness, but the greater the difference in the content of duties and the scope of changes, the more difficult it is to prove unreasonableness. This is a matter of the plaintiff's litigation strategy.

Given the difference between the above-mentioned regulation under Article 20 of the Labor Contracts Act and the general anti-discrimination regulations that presuppose the existence of employees engaged in the same work, it is understandable that the Supreme Court has endorsed the position of leaving the selection of comparators to the plaintiff's choice. As for the choice of the comparator, the lower courts were divided into two positions. One is the position that the comparator is

objectively determined. For example, the judgment of the High Court in this case (Osaka High Court (Feb. 15, 2019) 1199 *Rohan* 5) rejected X's argument that person A, an indefinite-term contract employee who is also assigned as a laboratory clerk, should be a comparator. The court ruled that the comparator should be objectively determined, and is not something that can be chosen by a plaintiff. The other position is that the comparator is determined by the plaintiff's designation. For example, the Tokyo High Court judgment in the *Metro Commerce* case (Tokyo High Court (February 20, 2019) 1198 *Rohan* 5) rejected the employer's argument that the entire employees with indefinite-term contracts should be the comparator, and made the regular employee engaged in the station stall work designated by the plaintiff employee the comparator. In the midst of such conflicts among the lower courts, the Supreme Court endorsed the latter position and settled the issue. This is a major feature of the Japanese unique regulation that makes it illegal if the disparity in treatment between regular and non-regular employees is unreasonable even if their engaged works are different, whereas under the European regulations, the inferior working conditions of non-regular employees cannot be redressed unless a comparator engaged in the same work can be identified.

(3) The nature and purpose of the working conditions being compared

According to the judgment, when examining whether the difference in the treatment of bonuses between X and the comparator is unreasonable, the unreasonableness of the difference is evaluated based on the nature of the bonus and the purpose of its payment. In addition, the "intent" of paying the bonus is also taken into consideration in the specific examination. The Supreme Court judgment in the *Metro Commerce* case, as well as three Supreme Court judgments in the *Japan Post* case, which were handed down at about the same time as this judgment, also examined the "nature," "purpose," and "intent" of the working conditions that are subject to the judgement of unreasonable differences. With regard to these three terms, one commentator argues that they are used differently, saying that "nature" should be objectively clarified by the court through a comprehensive judgement of the requirements for payment, calculation method, etc., while "purpose" is determined by the subjective will of the employer.[4] However, a straightforward reading of the judgment in this case does not necessarily mean that the two are used separately under a different standard. Article 8 of the Part-time and Fixed-term Workers Act,[5] which incorporated Article 20 of the Labor Contracts Act, added the phrase " that are found to be appropriate in light of the nature of the treatment and the purpose of treating workers in that way" in determining the unreasonableness of differences in working conditions. The five Supreme Court judgments handed down in October 2020, including this case, are presumed to have used the aforementioned terminology in order to make judgments applicable under Article 8 of the revised Act.

(4) "Securing capable human resources" and judgment on unreasonableness of non-payment of bonus to *arubaito* employees

Before this judgment was issued, there were a number of lower court judgments that denied the unreasonableness of differences in working conditions, such as bonuses, on the ground that the purpose of such differences was to "provide incentives for long-term employment and to secure and retain capable human resources" of indefinite-term contract employees, which became a topic of discussion as the "securing capable human resources" argument. Based on such a logic, the mere fact that an indefinite-term contract does not have a fixed-term, and thus, long-term employment is expected, may lead to allow preferential treatment for indefinite-term contract employees,[6] which may become "a universal justification for the disparity in working conditions between regular and non-regular employees," and the purpose of Article 20 of the Labor Contracts Act may be subverted.

This judgment stated that "bonuses are paid to regular employees for the purpose of securing and

retaining personnel who can perform their duties as regular employees," so at first glance, it could be read as a judgment in line with the argument of "securing capable human resources." However, if we analyze the logical structure of the Supreme Court's judgment, we can see that it does not recognize the reasonableness of the difference in working conditions only because "there is no fixed-term."

First of all, it is recognized that the bonus in question is calculated based on the basic pay of the indefinite-term contract employees. It is also emphasized that the basic pay of indefinite-term contract employees is supposed to be raised in accordance with the number of years of service, and has the character of ability-based wage in accordance with the improvement in ability to perform their duties accompanying years of service. Therefore, the bonus, which is calculated based on the basic pay, also has the character of ability-based wage. In contrast, since X and other *arubaito* employees are not employed under the ability-based wage system, the non-payment of bonuses, which is characterized as ability-based wage, was not deemed unreasonable.

Some may criticize that even if bonuses can be characterized as part of the ability-based wage, what is justified by this is that bonuses are increased in accordance with years of service, but this does not immediately justify not paying bonuses to *arubaito* employees such as X. Looking at the overall structure of the court's judgment, what justifies the non-payment of bonus to X is the differences in the personnel management between *arubaito* employees and regular employees, namely, regular employees' duties are "of a higher level of difficulty and responsibility" and they are subject to "personnel transfers conducted for the purpose of developing and utilizing human resources." All the following facts are also factors to be considered to justify not paying bonuses to X and other *arubaito* employees: the fact that, compared to the comparator, there were certain differences in the content of duties, and in the scope of changes in the content of duties and assignment, as well as facts mentioned in "other circumstances," including the fact that regular-employees laboratory clerks designated as comparator have difference from other regular employees in the content of duties and the scope of changes, and that there is a system to promote *arubaito* employees to regular employees. Therefore, it can be said that the court in this case came to the conclusion that the non-payment of bonuses to X was not unreasonable after considering all the factors stipulated in Article 20 of the Labor Contracts Act.

(5) Existence of a promotion system to regular employees and its impact on determination of unreasonable differences in working conditions

In this case, the fact that there is a system to promote fixed-term contract employees to regular employees was considered as a factor to deny the unreasonableness of the difference in working conditions between fixed-term contract employees and regular employees. If such a judgment is made from the perspective of labor policy, with the aim of encouraging employers to introduce such a promotion system as one of the measures to convert non-regular employees into regular ones, it cannot be said to be inappropriate. However, Article 20 of the Labor Contracts Act is a regulation to redress unreasonable disparities in working conditions between fixed-term and indefinite-term contract employees while fixed-term contract employees are still fixed-term contract employees, rather than to convert them into indefinite-term contract employees. It is one thing for fixed-term contract employees to be able to improve their working conditions through the promotion system for regular employees, and for fixed-term contract employees to have their unreasonable disparity in working conditions corrected through Article 20 of the Labor Contracts Act rather than through promotion to regular employees is another. Therefore, the promotion system should not be regarded as a factor that affects the judgment of unreasonableness of the difference in working conditions between fixed-term contract employees and regular employees.

1. The term "*arubaito*" is commonly used in Japan when

students or other casual workers are employed in casual work as non-regular employees, and does not necessarily refer to part-time work. This word originally comes from the German word *Arbeit*, which was used in Japan by college students engaging in paid work while pursuing their studies.

2. *Shokutaku* usually refers to former employees who are rehired under fixed-term or part-time contracts after reaching their mandatory retirement age.

3. https://www.mhlw.go.jp/stf/shingi/2r985200000204n5-att/2r985200000204ql.pdf.

4. See Yuichiro Mizumachi, "Fugori-sei o dou handan suruka ? *Osaka ika yakka daigaku* jiken, *Metoro komasu* jiken, *Nippon yubin* (Tokyo, Osaka, Saga) jiken, Saiko sai 5 hanketsu kaisetsu" [How to judge unreasonableness? Commentary on the Supreme Court's 5 Judgments in the *Osaka Medical and Pharmaceutical University* case, the *Metro Commerce* case, and the *Japan Post (Tokyo, Osaka, Saga)* case] *Rodo Hanrei*, no.1228, (November 2020): 5–32.

5. Article 8. An employer must not create differences between the basic pay, bonuses, and other treatment of the part-time/fixed-term employees it employs and its corresponding treatment of its employees with standard employment statuses that are found to be unreasonable in consideration of the substance of the duties of those part-time/fixed-term employees and employees with standard employment statuses and the level of responsibility associated with those duties (hereinafter referred to as the "content of duties"), the scope of changes in the content of duties and assignment, and other circumstances, that are found to be appropriate in light of the nature of the treatment and the purpose of treating employees in that way.

6. See Takahito Ohtake, "Metoro comasu jiken saikosai hanketsu no kaisetsu" [Commentary on the Supreme Court judgment in the *Metro Commerce* case], *Monthly Jurist,* no. 1555 (March 2021): 57.

The *Osaka Medical and Pharmaceutical University (former Osaka Medical University)* case, Judgements of the Supreme Court of Japan, https://www.courts.go.jp/app/hanrei_jp/detail2?id=89767. See also *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1229, pp. 77–89, and *Journal of Labor Cases* (Rodo Kaihatsu Kenkyukai) no.104, November 2020, pp. 6–7 and pp. 21–26. (only available in Japansese).

ZHONG Qi

Vice Senior Researcher, The Japan Institute for Labour Policy and Training. Research interest: Labor Law.

https://www.jil.go.jp/english/profile/zhong.html

Interpretation of Work Rules on Conversion from Fixed-Term to Open-Ended Contract for a College Lecturer

The Fukuhara Gakuen (Kyushu Women's Junior College) Case

Supreme Court (Dec. 1, 2016) 1156 *Rohan* 5

Yota Yamamoto

Facts

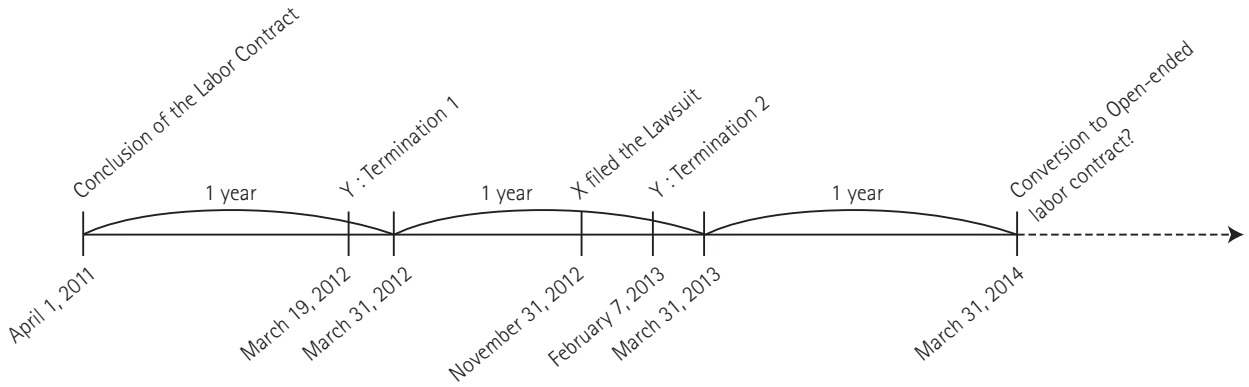
On April 1, 2011, X entered a one-year fixed-term labor contract until March 31, 2012 (the Labor Contract) with Y (Fukuoka Gakuen) and started working as a lecturer (contract employee) at a junior college operated by Y. Y's work rules on contract employees as applied to X (the Regulations) included provisions to the effect that the contract term of a contract employee could be renewed up to a maximum of three years, and that a contract employee could convert to an open-ended (non-fixed) labor contract upon expiration of the three-year maximum renewal period, on condition that Y deemed it necessary to do so in consideration of the employee's work performance. In the university operated by Y, there were ten contract employees who had worked for more than three years as of March 31, 2012, and eight of them had converted to open-ended labor contracts upon expiration of the three-year maximum renewal period.

On March 19, 2012, Y informed X that the Labor Contract would be terminated as of the 31st of that month (Termination[1] 1). Therefore, on November 6, 2012, X filed a lawsuit against Y seeking confirmation of X's status of entitlement under a labor contract (the Lawsuit). On February 7, 2013, while the Lawsuit was in progress, Y informed X that even if the Labor Contract had not been terminated upon Termination 1, it would terminate the Labor Contract as of March 31, 2013 (Termination 2).

The issue contested at the Supreme Court was whether the Labor Contract had been converted to an open-ended labor contract upon expiration of the three-year maximum renewal period on April 1, 2014.

Judgment

The Supreme Court Judgment of December 1, 2016 was as follows. "In that the Labor Contract was concluded as a fixed-term labor contract with



Process of this case

a term of one year, it was clearly specified in the Regulations that govern its content that the renewal limit of the contract term was three years and that the term of a labor contract could only be made open-ended on expiration thereof if Y had deemed it necessary in consideration of the work performance of the contract employee requesting it; X may be assumed to have concluded the Labor Contract in full awareness of this fact. In addition to the above stipulation in the Labor Contract, it must be said that whether or not the Labor Contract was to be made open-ended was entrusted to the judgment of Y in consideration of X's work performance, in view of the fact that X was employed by Y as a faculty member of the college and that there is generally assumed to be fluidity in the employment of faculty members, and moreover that in the three universities operated by Y, there were several other contract employees whose labor contracts did not become open-ended after expiration of the three-year maximum renewal period. It, therefore, cannot be construed that the content of the Labor Contract was such that it would automatically convert to an open-ended labor contract upon expiration of the three-year maximum renewal period."

Commentary

In Japanese labor law, there is no legal regulation requiring just cause when concluding a fixed-term labor contract. Therefore, when an employer hires a worker (particularly in a specialist occupation), the format sometimes adopted is to conclude (or renew) a fixed-term labor contract for trial purposes at first, and to ascertain the worker's aptitude during that time. In such cases, the relationship with the worker converts to an open-ended labor contract if the employer judges the worker to have an aptitude, but if the employer judges him/her to have no aptitude, the normal rule is for the relationship to end upon expiration of the fixed-term labor contract.

In this case, similarly, Y had adopted the hiring format of employing their faculty members first as contract employees for a maximum of three years by concluding and renewing one-year fixed-term labor contracts, and then judging whether or not to convert to open-ended labor contracts upon expiration of the three-year maximum renewal period, based on their work performance during that time. The direct cause of the dispute in this case was that Y originally informed X that it would not renew the Labor Contract before reaching the first renewal (Termination 1). However, the ruling by the Kokura Branch of the Fukuoka District Court on February 27, 2014 deemed this Termination 1 and the Termination 2 subsequently made during the Lawsuit, as unlawful under the "doctrine restricting termination of employment"[2] (Article 19 (ii) of the current Labor Contracts Act). It judged that the Labor Contract should have been renewed twice unless it was unlawfully terminated, giving rise to a situation in which the expiration of the three-year maximum renewal period was reached while the Lawsuit was in progress.

Based on this situation, the ruling by the Fukuoka High Court on December 12, 2014 deemed that the period of three years in this case was "a probation period, and in the absence of exceptional circumstances, it would be reasonable to expect conversion to an open-ended labor contract," thus supporting the conversion of the Labor Contract to an open-ended labor contract.

In the supplementary opinion of Judge Ryuko Sakurai added to the Supreme Court ruling, this judgment by the Fukuoka High Court was critically deemed as having "borrowed" the aforementioned doctrine restricting termination of employment (Article 19, (ii) of the Labor Contracts Act) to cover the conversion of fixed-term labor contracts to open-ended labor contracts.

Reversing the Fukuoka High Court, the Supreme Court judged that the decision whether or not X could have converted to open-ended contract status was "entrusted to the judgment of Y," in view of (i) the fact that, in the Regulations, the rule on conversion from a fixed-term to an open-ended labor contract was explicitly stipulated, (ii) the fact that there is generally fluidity in the employment of college faculty members, and (iii) the actual situation that several of the other contract employees did not convert to open-ended labor contracts. In conclusion, therefore, it denied the conversion.

In other words, based on the hiring format used in this case, the employer's discretion regarding the

conversion from fixed-term to open-ended contracts would be recognized if rules to this end have been clearly stipulated (i), if actual contract conversion has been made in line with these rules (iii), and if it could be considered to be the type of job for which it would be reasonable to adopt this kind of hiring format (ii). To put it differently, however, there is room to deny discretion on the employer's part in cases where actual contract conversion has not been made in line with conditions presented in advance, or when it is not deemed reasonable to adopt the hiring format used in this case for the type of occupation in question.

The Supreme Court ruling of June 5, 1990 on the *Kobe Koryo Gakuen Case* indicated that, when a period has been specified in a labor contract for the purpose of evaluating aptitude, in principle, the said labor contract should be construed not as a fixed-term labor contract but as an open-ended labor contract with a probation period. In contrast to this, because X did not make a claim based on that Supreme Court ruling in this case, the Kokura Branch of the Fukuoka District Court, the Fukuoka High Court and the Supreme Court all made their judgments on the premise that the Labor Contract was a fixed-term labor contract until expiration of the contract term renewal limit. Therefore, this case could be considered basically unrelated to the Supreme Court ruling on the *Kobe Koryo Gakuen Case* (Supreme Court (Jun. 5, 1990) 564 *Rohan* 7). Given the fact that just cause requirement for concluding fixed-term contracts was discussed but not introduced when the Labor Contracts Act was amended in 2012, the judgment in the Supreme Court ruling on the *Kobe Koryo Gakuen Case* will need to be studied anew.

1. Termination means refusal to renew a fixed-term contract.
2. The doctrine restricting termination of employment

This is the principle whereby, when an employer and a worker enter a fixed-term contract, the employment relationship terminates upon expiration of the specified term. In Japan, however, the employer must have just cause for terminating the employment relationship with the worker if the worker has a reasonable expectation that the employment relationship will continue when this term expires (whether this reasonable expectation exists is judged in consideration of aspects such as the worker's job content, the number of previous contract renewals, and the employer's indications in word or deed). This means that, if there is no just cause, the legal position on the matter is that the existing fixed-term contract has been renewed.

This rule (the doctrine of termination of employment) was previously based on case law precedents of the Supreme Court (for example, the *Panasonic Plasma Display Case* of December 18, 2009), but following the amendment to the Labor Contracts Act in 2012, it is now governed by Article 19 of the Labor Contracts Act.

AUTHOR

Yota Yamamoto, Researcher, The Japan Institute for Labour Policy and Training (JILPT). Research interest: Labor law. Profile: http://www.jil.go.jp/english/profile/yamamoto.html

Commentary

Is a Part-time Instructor Whose Role is Exclusively to Teach University Language Classes a "Researcher"?

The *Senshu University (Conversion of a Fixed-Term Labor Contract to an Indefinite-term Labor Contract)* Case
Tokyo High Court (Jul. 6, 2022) 1273 *Rodo Hanrei* 19

HOSOKAWA Ryo

I. Facts

X worked as a part-time instructor (*hijōkin kōshi*) teaching German language at the School of Business Administration of University Y, under an approximately one-year fixed-term labor contract with the university commencing in April 1989. After the initial one-year period, X continued to work for University Y under the fixed-term contract, which was renewed each year.

X's academic experience included conducting research and publishing papers on German literature while pursuing a master's degree and a PhD program at graduate school. These research achievements were the basis on which X was employed by University Y as a part-time instructor. However, while X's role as a part-time instructor at University Y entailed teaching classes and conducting examinations in German language, it did not include engaging in research. X was also neither allocated a research office nor provided with research funding by University Y.

On June 20, 2019, X applied to University Y to have her labor contract converted from a contract with a fixed-term to a labor contract without a fixed-term (indefinite-term contract), on the grounds of paragraph 1 of Article 18 of the Labor Contracts Act (LCA), which entitled her to said conversion to an indefinite-term contract because her total contract term with University Y had exceeded five years (the "five-year rule" for conversion to an indefinite-term contract). University Y in return claimed that X was a "researcher" as prescribed under item 1 of paragraph 1 of Article 15-2 of the Act on the Revitalization of Science, Technology and Innovation (Science, Technology and Innovation Act) and thereby refused to recognize the conversion to an indefinite-term contract on the grounds that said item prescribes that for those classed as researchers the total contract term must have exceeded 10 years, as opposed to five years, for conversion to an indefinite-term contract to be possible (10-year special provision). X responded by filing a lawsuit claiming that University Y's refusal of her application for conversion to an indefinite-term contract was in breach of the law and seeking confirmation of her status—namely, that she held the rights provided by an indefinite-term contract with University Y—as well as payment of solatium (*isharyō*) and other such damages on the basis that University Y had committed a tort. Of X's claims, the court of first instance (Tokyo District Court (Dec. 16, 2021) 1259 *Rohan* 41) recognized her demand for confirmation of her status as an employee with an indefinite-term contract. University Y therefore appealed to the Tokyo High Court.

II. Judgment

Tokyo High Court dismissed Y's appeal and upheld the judgment of the court of first instance which had approved X's demand for confirmation of X's status as an employee under an indefinite-term contract. The judgment is summarized below.

Item 1 of the paragraph 1 of Article 15-2 of the

Science, Technology and Innovation Act stipulates that the 10-year special provision applies to researchers and technical experts in the field of science and technology who have concluded a fixed-term labor contract with a university (humanities also fall under "science and technology"). The purpose of this provision is to avoid the following situations, according to statements made during the deliberations pursued in the process of establishing the Science, Technology and Innovation Act and the wording of Article 15-2 of the Act. Namely, research and development are often conducted as part of projects with a predetermined durations exceeding five years. Recognizing the five-year rule for the conversion of contracts—the conversion prescribed in Article 18 of the LCA—for fixed-term contract workers who participate in such projects and thereby engage in research and development and related tasks entails the risk that employers will terminate the contracts of such workers before exceeding a total contract period of five years in order to avoid the said conversion to an indefinite-term contract. This, in turn, may hinder the pursuit of the project and prevent said worker from producing research results.

The School Education Act stipulates that "instructors may engage in duties equivalent to those of professors or associate professors" (Para. 10, Art. 92). It also prescribes that the duties of professors and associate professors are to "possess outstanding knowledge, ability and accomplishments in teaching, research or the practical pursuit of their discipline, and to instruct students, provide guidance for students' research, and engage in research" (Para. 6 and 7, Art. 92). That is, in the duties of university professors, associate professors, and instructors, a distinction is drawn between teaching and research such that they may not be seen as an inseparable unit. It is assumed that there may be professors, associate professors, and instructors who exclusively engage in teaching and are not responsible for conducting research.

Moreover, stipulations for qualification as an instructor set out in the Standards for Establishment of Universities (SEU)—which require instructors to be "deemed to have the educational abilities suitable for taking charge of the education offered by a university in their special major" (2007 SEU, Item 2, Art.16 (2022 SEU, Art.15, item 2))—also reflect the assumption that university employees whose role is to draw on their educational ability to exclusively provide instruction as instructors. Instructors, who are exclusively responsible for teaching as assumed in paragraph 10 of Article 92 of the School Education Act and Article 16 of the SEU, cannot therefore be seen to be engaging in duties equivalent to those of a professor or associate professor engaging in teaching and research. It is not assumed that such instructors are subject to "the 10-year special provision" as "researchers."

To be classed as a "researcher" according to item 1 of paragraph 1 of Article 15-2of the Science, Technology and Innovation Act, a worker must have concluded a fixed-term labor contract to engage in research or development and related work and must be engaged in research or related work at the university with which said worker has concluded the fixed-term labor contract. Classing a part-time instructor who is not engaged in research or development at the university with which they have concluded the fixed-term contract as a "researcher" as prescribed in said item would not be consistent with the purpose of the legislating the Science, Technology and Innovation Act .

The judgment recognized that on June 20, 2019, when X applied to University Y for conversion to an indefinite contract, an indefinite-term contract between X and University Y commencing March 14, 2020, the day following the expiration of the term of the then fixed-term labor contract, was established on the grounds of paragraph 1 of Article 18 of the LCA.

III. Commentary

This case is the first precedent to have been brought to the court to determine whether the demand of a part-time instructor—who had teaching classes at a university over a number of years under a fixed-term labor contract renewed each year—to exercise

her right to the five-year rule (for contract conversion as prescribed under Article 18 of the LCA) could be dismissed on the grounds of applying the 10-year special provision prescribed in the Science, Technology and Innovation Act, given that the total contract period was less than 10 years. More specifically, it is the first to have contested whether a part-time university instructor falls under the category of "researcher" to which the Science, Technology and Innovation Act is applied.

In European countries, there is a tendency for legal systems applied to fixed-term labor contracts to operate on the assumption that such contracts will be used for temporary and therefore to place restrictions on the reasons for which such contracts can be used and limit the number of times that they may be renewed and the total contract period. In contrast, Japan's regulations on fixed-term contracts are limited to restrict the upper limit on contract periods. There are neither restrictions on the reasons for which fixed-term contracts can be used, nor restrictions on aspects such as the number of times such contracts can be renewed or the total period for which they can be used. There are consequently a considerable number of workers who work for the same employer for a number of years under a fixed-term labor contract that is repeatedly renewed. The part-time university instructor at the center of this issue in this case is one such worker.

Since the 2000s, Japan has seen a continuing rise in the number of workers working under fixed-term labor contracts—workers who are referred to as *hiseiki rōdōsha* (non-regular workers). This trend has also included growing numbers of not only those workers whose income is a supplement to the main source of income for their household (such as housewives or students working part time)—who formerly made up a significant portion of non-regular workers—but also non-regular workers (fixed-term contract workers) whose income from non-regular employment is the source with which they maintain their livelihoods. This prompted a 2012 amendment to the LCA aimed at protecting fixed-term contract workers (≈non-regular workers). One item covered in this amendment was granting the right to the five-year rule—namely, the right of a fixed-term contract worker whose fixed-term labor contract has been repeatedly renewed over a period exceeding five years to have their fixed-term labor contract converted to a labor contract without a fixed term (LCA Art. 18).[1]

An exception to the five-year rule is in place for researchers, technical experts, and other such employees in the fields of science and technology, including the humanities. Namely, the 10-year special provision for researchers, technical experts and other such employees in the field of science and technology, as prescribed in paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act. This exception to the LCA is said to have been established due to concerns that the five-year rule may prompt universities and other such employers to seek to avoid having to convert to contracts without fixed terms for young fixed-term contract researchers engaged in projects lasting over five years by ceasing to renew such researchers' fixed-term contracts before the five years have passed, which would in turn adversely affect the teaching, research and career development provided by and pursued by such researchers.[2] The point at issue in this case was whether said 10-year special provision applied. A significant number of universities responded to the 2012 amendment to the LCA from April 2018 onward (once five years had passed from the starting date in 2013) by converting to indefinite-term contracts for those part-time instructors who requested said conversion.[3] On the other hand, many universities refused said conversions to indefinite-term contracts for part-time instructors with a total contract period of less than ten years, on the understanding that part-time instructors fall under the aforementioned provision set out in paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act (or Article 7 of the Act on Term of Office of University Teachers, which is covered below). University Y also adopted the latter stance. That is, in response to X's assertion of the five-year rule in accordance with Article 18 of the LCA, University Y rejected said request on the grounds that X did not possess the right to conversion to an indefinite-term labor contract because she fell

under paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act.

As it states, the judgment in this case addressed this point by determining that paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act was created on the assumption that the rule for conversion to an indefinite-term contract after a period of five years may not be appropriate for researchers such as those engaged in long-term project research or other such work. Therefore, in order to fall under the category of "researcher" to which said article applies it is necessary to be engaged in research or development and other such related work at a university or other such institution. The judgment also drew on the provisions of the School Education Act to clearly indicate that it is possible for there to be university teachers at a university who are exclusively engaged in teaching, and thereby appears to consider X to be a "university teachers exclusively engaged in teaching" as opposed to a "researcher." This judgment's interpretation of the definition of "researchers" as prescribed in paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act seems appropriate in light of the purpose of the provisions of the Act, as they are noted in the judgment. Given that a considerable number of universities such as University Y have refused the majority of part-time instructors who are effectively engaged exclusively in teaching (classes) the opportunity to convert a fixed-term contract to an indefinite-term contract even after their total contract terms have exceeded five years, this judgment is anticipated to have a significant impact on this issue in practical terms.

The judgment determined that X does not fall under the category of "researchers" for whom paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act is applied. This prompts the question of what condition requires a person to be considered as a "researcher," other than giving university lectures? A worker who is engaged in research activities conducted by the research institution with which they have concluded a fixed-term labor contract will obviously fall under the category of "researcher." However, some of university faculty members who, although not participating in research projects conducted on an institutional level by their university or research facilities within their university, pursue research independently and publish their results through extramural academic journals or academic conferences. While X was neither allocated a research office nor provided with research funding by the university, would X, despite being part-time instructors, be considered a "researcher" if X were conducting extramural research activities, having been allocated a research office or provided research funding by the university? There is still room for debate as to what makes up the criteria for "researchers" to whom paragraph1 of Article 15-2 of the Science, Technology and Innovation Act applies.

In addition to the Science, Technology and Innovation Act, the Act on Term of Office of University Teachers, etc. ("University Teachers' Term of Office Act") likewise establishes a "10-year special provision." This provision can only be applied if one of the three following conditions are satisfied: a worker must (i) be employed at an education and research institution with a particular demand for diverse human resources given the pursuit of advanced, interdisciplinary, or comprehensive education and research and given the unique nature of the field or methods of the other education and research conducted at said education and research institution, (ii) be *jokyō* (an assistant professor), or (iii) have a role that entails providing teaching and pursuing research for a predetermined period in accordance with a particular plan that the university has set out or is participant in (University Teachers' Term of Office Act, Art. 4). The University Teachers' Term of Office Act involves more stringent regulations and procedural requirements in comparison with paragraph 1 of Article 15-2 of the Science, Technology and Innovation Act.

The application of the 10-year special provision under the University Teachers' Term of Office Act has been recognized by the court of first instance of the *Hagoromo University of International Studies* case (Osaka District Court, Jan. 31, 2022), and in the *Educational corporation Chaya Shirojiro Kinen*

Gakuen (*Tokyo University of Social Welfare*) case (Tokyo District Court, Jan. 27, 2022, 1268 *Rohan* 76), both cases in which the plaintiff workers were employed as full-time instructors (*sennin kōshi*).[4] Furthermore, the *Baiko Gakuin University* case (Hiroshima High Court (Apr. 18, 2019) 1204 *Rohan* 5), while not a case in which application of the 10-year special provision was disputed, addressed whether the fixed-term employment of a specially appointed associate professor (*tokunin junkyōju*) should be recognized under item 1 of paragraph 1 of Article 4 of the University Teachers' Term of Office Act (the plaintiff asserted that his employment did not fall under said item and was therefore under an indefinite-term contract). In this case, the judgment held that "given the demand for university autonomy, (the Act) clearly intends to allow universities that employ faculty members with a fixed term a certain amount of discretion." The judgment therefore found that the "particular demand for diverse human resources" specified in item 1 of paragraph 1 of Article 4of the University Teachers' Term of Office Act was applicable in this case, given one of the purposes for which said specially appointed associate professor was hired—namely, the fact that "his past successes in marketing activities to recruit students were also taken into consideration" when he was hired.

On the other hand, the appeal of the aforementioned *Hagoromo University of International Studies* case (Osaka High Court (Jan. 18, 2023) 2028 *Rojun* 67) found that item 1 of paragraph1 of Article 4 of the University Teachers' Term of Office Act did *not* apply. The judgment held that (1) regarding employment under item 1 of paragraph1 of Article 4 of the University Teachers' Term of Office Act, it is necessary, given the purpose with which the Act was enacted, for it to be "reasonable to determine a contract period," and (2) the position at issue needs to be an "advanced, interdisciplinary, or comprehensive education and research" position. It thereby determined that said article did not apply, given that the plaintiff, a full-time instructor on a fixed-term contract whose role was to provide teaching to prepare students for taking state examinations, (despite having accumulated professional experience before being hired) was engaged in work that "had little to do with" facilitating "practical education and research that draws on experience of the working world" or (advanced, interdisciplinary, or comprehensive) "research." As such precedents indicate, the application of the 10-year special provision under the University Teachers' Term of Office Act is also anticipated to prompt debate in the future.

The case was appealed to the Supreme Court and a petition for acceptance of appeal was filed, and the decision of the Supreme Court was the focus of much attention. On March 24, 2023, the Second Petty Bench of the Supreme Court (Koichi Kusano, Chief Justice) dismissed the appeal and the petition for acceptance of appeal, and therefore the High Court decision in this case became final.

1. For related survey results, see Yuko Watanabe, "New Rules of Conversion from Fixed-term to Open-ended Contracts: Companies' Approaches to Compliance and the Subsequent Policy Developments," *Japan Labor Issues* 2, no.7 (June-July 2018): 13–19. https://www.jil.go.jp/english/jli/documents/2018/007-03.pdf.
2. See Takashi Araki, *Rodoho* [Labor law], 4th ed. (Tokyo: Yuhikaku, 2020) 531; Statements by House of Representatives member Wataru Ito at the 7th Meeting of the Committee on Education, Culture, Sports, Science and Technology of the House of Representatives for the 185th Diet (November 29, 2013). https://www.shugiin.go.jp/internet/itdb_kaigirokua.nsf/html/kaigirokua/009618520131129007.htm.
3. For example, the university where I am employed converts labor contracts to indefinite-term labor contracts for those part-time instructors who demand such a conversion and whose contract has been repeatedly renewed such that the total contract period exceeds five years.
4. The first instance of the *Hagoromo University of International Studies* case, Osaka District Court (Jan. 31, 2022) 2476 *Rokeisoku* 3, was brought to the court to determine whether the 10-year special provision prescribed by the University Teachers' Term of Office Act should be applied to a full-time instructor employed under a fixed-term labor contract stipulating the contract term as three years and that the contract could be renewed once. The *Educational corporation Chaya Shirojiro Kinen Gakuen (Tokyo University of Social Welfare)* case, Tokyo District Court (Jan. 27, 2022) 1268 *Rohan* 76, was disputed whether the 10-year special provision prescribed by the University Teachers' Term of Office Act should be applied to a full-time instructor whose one year fixed-term labor contract had been repeatedly renewed for over five years. In both cases, it was recognized that the 10-year special provision prescribed by the University Teachers' Term of Office Act should be applied. The latter of the two cases also

involved a dispute over the termination (refusal to renew) of the plaintiff faculty member's contract, and on this point, the plaintiff's claims were recognized.

The *Senshu University (Conversion of a Fixed-Term Labor Contract to an Indefinite-term Labor Contract)* Case, *Rodo Hanrei* (*Rohan*, Sanno Research Institute) 1273, pp.19–24.

HOSOKAWA Ryo

Professor, Aoyama Gakuin University. Research interest: Labor Law.

Is an Owner-manager of a Convenience Store a "Worker" under the Labor Union Act?

The *Seven-Eleven Japan* Case
Order, the Central Labour Relations Commission
(Feb. 6, 2019) 1209 *Rodo Hanrei* 15

IKEZOE Hirokuni

I. Facts

X is a labor union with members consisting of owner-managers (hereinafter referred to as "franchisees") who operate convenience stores under member-store contracts with Company Y. Y operates a franchise chain of one of Japan's major convenience stores. X made a collective bargaining request to Y with agenda items including the establishment of rules for collective bargaining. Y, however, did not respond to the request, stating that the franchisees belonging to X were independent business operators and that they had no labor-management relationship with Y.

X asserted that Y's refusal to engage in collective bargaining constituted an unfair labor practice under Article 7 No. 2 of the Labor Union Act (LUA), and filed a complaint for remedy with Okayama Prefectural Labour Relations Commission (abbreviated below as "Okayama Pref. LRC"). Okayama Pref. LRC concluded that the franchisees as workers under the LUA and that Y's failure to respond to X's proposal for collective bargaining was an unfair labor practice, and issued a remedial order that Y must respond to X's request for collective bargaining (Okayama Pref. LRC Order 2014.3.13 *Bessatsu chuo rodo jiho*, June 2014, p. 1).

Y then appealed to the Central Labour Relations Commission (abbreviated below as the "Central LRC) for administrative review, seeking revocation of the order of Okayama Pref. LRC, and dismissal of X's complaint for remedy.[1]

II. Order

1. Worker status of franchisees under the Labor Union Act

(1) Framework for determining worker status under the Labor Union Act

A. The worker status under the Labor Union Act of those in labor-supply relationships is interpreted as follows.

a. Even if labor is supplied under contracts other than labor contracts, such as through outsourcing etc., the labor supplier should be considered a worker under the LUA[2] when it is deemed necessary and appropriate that collective bargaining protections should be given considering the following three criteria substantially: criteria ① to ③ substantially, defined in the LUA as "persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation."

① Whether the person providing the labor is integrated into the business organization of the other party, such as consistently supplying labor that is indispensable for the business activities of the other party.

② Whether all or important parts of the labor supply contract are determined in a unilateral and standardized manner by the other party.

③ Whether the payment for the labor supplier can be considered equivalent or similar to the remuneration for the labor supply.

b. Regarding the criteria a. ① above, the following supplementary factors (a) to (c) are also

considered for the judgment of "being integrated into the business organization."

(a) Whether the labor supplier is in a relationship where he/she is to respond to the other party's individual business requests.

(b) Whether the labor supplier is bound to a specific date, time and location of labor supply and engages in work in the manner directed or supervised by the other party in a broad sense.

(c) Whether the labor supplier provides labor exclusively to the other party.

c. On the other hand, if the labor supplier shows conspicuous characteristics to be qualified as business operator, such as having constant opportunities to gain profits by directing business operations based on their own independent management decisions, worker status under the LUA is denied.

B. Looking exclusively at the provisions of the franchise agreement, the relationship between Y and the franchisees is only a relationship between the franchise system provider and retailers who operate stores using it, and the latter cannot be said to be providing labor to Y. Therefore, in this case, a legal question arises that the focal point of dispute is whether the criteria for worker status under the LUA outlined in A above, which regulates those in labor-supply relationships, may not be applied.

However, in this case, it is recognized that (1) the provisions of the franchise agreement were determined in a unilateral and standardized manner by the other party Y, and there was no leeway for the franchisees to alter it by means of individual negotiation, (2) the franchisees have been bound by the unilateral and standardized contract while receiving advice and guidance from Y on managing the member stores, and in many cases, have been operating the stores themselves for a considerable amount of time, (3) based on the consistent appearance of store interiors and exteriors, signboards, uniforms and so forth adhering to design prescribed by Y, the franchise should appear to be a chain store with Y as its headquarters, and (4) Y, a franchise chain headquarters, conducted business activities and provided more than management support to the franchisees such as store opening plan and product development based on Y's own management strategies, and thus, Y is considered to increase its own profits through the business activities of the franchisees. Given these circumstances, it can be said that in the light of the relationship between Y and franchisees in reality, there is possibly scope for assessing franchisees themselves as providing labor for Y's business endeavors.

Therefore, in this case, it is still necessary to take criteria A above into account when making judgments, and to examine whether the relationship between Y and franchisees can be viewed as, in effect, a labor-supply relationship.

(2) Integration into the business organization (1 (1) Aa① above)

In this case the franchisees, as retailers, raise their own funds and bear the costs of their business, and take on both losses and profits, as well as hiring employees and managing personnel at their own discretion. They use the labor force of others to manage stores at the locations of their choice. There are certain restrictions on the management of funds, purchase of products, and business days and hours, but managers have the character of an independent retailer with considerable discretion. On the other hand, Y conducts training, evaluations, and so forth on the management of franchisees' stores, and requires to present consistent external appearance of their stores showing that they are part of the Y's chain. However, even though there are constraints on aspects of franchisees' business operations and store management, this does not provide grounds for franchisees to be considered as part of the labor force integrated into Y's business organization.

The next point is that franchisees cannot be said to be supplying labor under time and location constraints from Y, and while engaging in the management of store operations, following a manual and receiving advice and guidance from "operation field counselors" (Y's employees who visit stores and provide advice and guidance to franchisees), these practices are not governed by binding rules, with the exception of acts that violate the Franchise

Agreement. Even if there are practical constraints on business operations at stores, these should be regarded as restrictions on store management as a business activity of franchisees, and therefore franchisees are not actually supplying labor under the supervision of Y, even in a broad sense. Also, while franchisees are exclusively affiliated with Y as far as convenience store management is concerned, in this case for judgment, that point should not be emphasized in considering the issue of integration into the business organization. With all these points taken together, franchisees cannot be assessed as being integrated into Y's business organization as an indispensable labor force of Y's business activities.

(3) Unilateral and standardized determination of contents of contract (1 (1) Aa② above)

It is appropriate to state that the contents of this franchise agreement have been determined in a unilateral and standardized manner by Y. However, as mentioned above, considering that franchisees are independent retailers, it is appropriate to say that this franchise agreement does not regulate the labor supply and working conditions of franchisees, but rather stipulates the manner of the business activities of franchisees' store management. Though the fact that Y decides the contents of the contract unilaterally may indicate a disparity in bargaining power between Y and franchisees, it is not grounds for recognizing franchisees' worker status under the LUA.

(4) Payment as remuneration for labor supply (1 (1) Aa③ above)

It should be said that the money that franchisees receive from Y lack the precondition to be considered as characteristics that remuneration for franchisees' supply of labor should have, given the purpose of the franchise agreement and the actual situations regarding the relationship between franchisees and Y. In addition, when the character of the funds is examined, it is not possible to affirm their nature as remuneration corresponding to labor supplied. Therefore, it cannot be said that franchisees are being paid by Y for the labor they supply.

(5) Conspicuous business-operator status (1 (1) Ac above)

Given the franchisees' form and scale of business and store management in reality, franchisees are independent business operators, and they constantly have the opportunity to gain profits through independent management decisions with regard to the overall management of their own retail business operations. Franchisees can make judgments on business forms and the number of stores, plan for the proper daily stock, the payment of expenses, and operational direction and so forth. Also, by bearing the costs of their own retail business, having a responsibility to accrue losses and profits, and utilizing the labor force of others, franchisees take risks on their own initiative. They clearly have the status of business operators.

(6) Conclusion

The franchisees are independent retailers, and can be said neither to be integrated into Y's business organization as a labor force integral to carrying out Y's business, nor to supply labor through a contract similar to a labor contract. Furthermore, it cannot be said that franchisees supply labor to Y and receive payment from Y as remuneration for labor, and in addition, franchisees' character as business operators is conspicuous. In view of the above comprehensively, the franchisees in relation to Y cannot be considered workers under the LUA, under which it would be deemed necessary and appropriate to apply protections of the LUA to ensure equal footing in negotiation with the employer.

2. Whether unfair labor practices are recognized

It was concluded that, given the fact that franchisees do not have worker status under the LUA, Y's failure to respond to X's request for collective bargaining does not constitute an unfair labor practice under the Article 7, No. 2 of the LUA.

III. Commentary

In recent years, the rapid growth of new forms of work which cannot be defined as employment, including personal delivery of documents, food, and

other items via motorcycle or bicycle has seen in many countries. Are the people doing these "gigs" workers? Who has worker status? Problems have arisen regarding the scope of application of labor laws, which have drawn public attention.[3] In the same context the issue of owner-managers of convenience stores, like those in this case, involves worker status. Thus far the legal relationship between franchisee owner-managers and the franchise companies, and the regulation of the contents of their contract have been discussed from a judicial perspective.[4] Although this case is not a court decision but an administrative order issued by the CENTRAL LRC regarding a motion for review of the prefectural labour commission order in the first instance (therefore, this order is subject to a judicial review in the future),[5] we have focused on it here because of the widespread attention it drew.[6, 7]

In Japan, the concept of a "worker" under collective labor relations law (the Labor Union Act) is different from that under the individual labor relations laws (the Labor Standards Act, the Labor Contracts Act, abbreviated below as the"LSA," and the "LCA"). The issue in this case is the worker status under the LUA. Article 3 of the LUA stipulates that "the term 'Workers' as used in this Act shall mean those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation." On the other hand, the LSA and the LCA state as requirements for "workers" that they are "employed" and "receive wages."[8] In the area of individual labor relations laws, being "employed" based on a labor contract, in other words, the presence of control and supervision of an employer, is an important factor that determines worker status.[9] By contrast, as for collective labor relations law, worker status under the LUA does not require being "employed," as shown in the article quoted above. In other words, under the LUA, a labor contract relationship is not absolute, and rather worker status is broadly defined, and one can have the status of a "worker" if they receive remuneration by supplying labor. In addition, Japan's collective labor relations legislation is interpreted as focusing on the voluntary and autonomous setting of working conditions between labor and management, by promoting collective bargaining. The scope of "workers" is defined in terms of "who should reasonably be included in collective bargaining relationships." Thus, regarding "workers" under the LUA, the normative values for "workers to be included in collective bargaining" have greatly differed depending on the scholar, and there has been heated controversy regarding various legal judgments and theories.[10]

Under these circumstances, the Supreme Court of Japan issued three decisions in recent years (2011–2012)[11] on worker status under the LUA, making judgments comprehensively based on the factors summerized in 1. (1) A of II above. Later, Study Group on the Labor-Management Relations Law composed of labor law scholars, set in the Ministry of Health, Labour and Welfare (MHLW), organized the factors for consideration indicated in the Supreme Court's three decisions, and issued a report on criteria for worker status under the LUA (July 2011, hereafter the LMRL Study Group Report).[12] It can be said that the interpretation of this issue has almost established with this report.

To describe the factors for consideration specifically, in accordance with the summary of the decision and order in this case, the LUA concept of "workers," in comparison with the concept of "workers" under the individual labor relations laws of the LSA and LCA, is characterized by judgment based on considerations of "integrated in the business organization" (as described in 1 (1) Aa①, for details see 1 (2) of II above), and "unilateral and standardized determination of contracts contents" (as described in 1 (1) Aa②, for details see in 1 (3) of II above). These factors are not seen in the criteria defining "workers" under the individual labor relations laws. From the viewpoint of the labor-management relations law, facts that can be grasped through these factors should be appropriately dealt with by means of collective bargaining. This illustrates the uniqueness of the concept of "workers" under the LUA.

Still, the factors for the concept of "workers" under individual labor relations laws have not completely been neglected. In the supplementary factors for the judgment of the criteria "integration

into the business organization (1 (1) Ab above), reference is made to whether the labor supplier can refuse the orders of the client, and whether there are constraints on the time and place business operations are performed. These are factors considered upon the determination of worker status under the individual labor relations laws, the LSA and the LCA. However, in determining worker status under the collective labor relations law as well, these are considered "positive supplementary factors" that allow worker status (in two of the supplementary factors (a) and (b) of the above 1 (1) Ab). Similarly, business operator status (1 (1) Ac above) is also a factor that can be considered not only with regard to worker status under individual labor relations laws, but also worker status under the collective labor relations law, where business operator status is interpreted as a factor denying worker status.

The judgment procedures comprising these factors are comprehensive judgments. At the same time, in accordance with the worker-status judgment under the collective labor relations law of Japan, it is an interpretative approach in which "those who obtain wages under labor relationship similar to those of a labor contract ought to be recognized as 'workers' under the LUA, if it is deemed necessary and appropriate to provide collective bargaining protection."[13]

In this case, the CENTRAL LRC denied the worker status of an owner-manager of a convenience store. In this regard, this order seems to be characterized by the logical construction and the use of factors for consideration for the judgment.

The three Supreme Court decisions and the LMRL Study Group Report as well as the Okayama Pref. LRC order in the first instance of this case all appeared to interpret three factors for determining worker status to be considered based on (1) integration into a business organization, (2) unilateral and standardized determination of contents of contract, and (3) compensation as remuneration for labor supplied (1 (1) Aa①–③ of II above), and as supplementary factors, (4) relationship necessitating response to business requests and (5) supplying of labor under control and supervision in a broad sense and the imposition of certain spatial and temporal constraints (1 (1)Ab (a) and (b) above) to be considered respectively. Furthermore, (6) conspicuous business-operator status (1 (1) Ac above) was classified as a factor that could cancel out factors (1) to (5) above after consideration of these factors. It seems that a logical construction used above led to a comprehensive judgment as a result of the consideration.

On the other hand, in light of 1 (1) B above regarding the provisions of the franchisees agreement, the order in this case seems to have assumed the business-operator status of franchisees since the beginning of the review. Nonetheless, considerations were made using criteria that have been widely recognized until now, namely "it can be said that there is possibly scope for assessing franchisees themselves as providing labor for Y's business endeavors." In addition, as shown in 1 (1) Ab, when considering integration into a business organization, considerations included the supplementary factors listed above, (4) relationship necessitating response to business requests and (5) supplying of labor under control and supervision in a broad sense and the imposition of certain spatial and temporal constraints.

One could presume that there could be two reasons behind the fact—that criteria which have been used so far were restructured to give a new framework, while it premised on the business operator status of franchisees. First, the CENTRAL LRC would probably have had strong hesitation about a drastic alteration in the judgment framework (or factors) of worker status under the LUA in this case that may shake the judicial stability. Second, while X claims that under actual working conditions franchisees are supplying labor to Y, (it seems that) it is recognized as a premise that franchisees are business operators under a franchise agreement. Under these circumstances, the CENTRAL LRC recognized essential differences between franchisees and individual contractors[14] which had been set in precedents and orders thus far in the relationship with the company, contract forms, and the nature of work form. For these two reasons, it can be surmised

that in this case, the franchisees' worker status was denied from the start, that is, the underlying logical construction was based on the affirmation of their status as business operators. This is because without such a construction, as the Okayama Pref. LRC order in the first instance and some experts point out,[15] membership under a franchise agreement and execution of business operations would have to be recognized as the integration of franchisee into the business organization of Y.

Also, because it cannot be denied that the franchise owner-managers in this case have the status of business operators, which contradicts worker status, a new judgment approach differing from precedents was presented, or perhaps the interpretation may be limited to franchisees with business-operator status.[16] Such implications are not stated in the order, and remain inferred. However, even on the presumption of this understanding, the order's unconventional interpretation seems to add ambiguity to the existing judgment framework (or the construction of the factors for consideration).[17] Specifically, it would seem that the "unilateral and standardized determination of contract contents" and "compensation as remuneration for labor supplied," which ought to be the main factors for consideration, have been relativized and belittled and their significance as factors greatly diminished. On the other hand, supplementary factors such as "a relationship necessitating a response to other party's business requests" and "supplying of labor under control and supervision in a broad sense, and the imposition of certain spatial and temporal constraints" are included in consideration of "integration into the business organization," and as a result, it occupies an important position in the overall judgment on the value or meaning of the relationship between franchisor company and franchisees, beyond its intrinsic supplemental significance. This point will be clarified through an examination of the judicial approach in similar cases in the future.

Furthermore, the CENTRAL LRC might have denied franchisees' worker status in relation to the conclusion of collective bargaining agreements and the guaranteed right to engage in labor disputes. Franchise agreements are contracts between businesses, this objective fact cannot be altered. Once a collective agreement is concluded, however, the question arises of how to interpret the collective agreement's normative effect (legal effect of the part of the agreement that determines working conditions) in a franchise contract, or of whether a franchise contract will be accepted as a (relative) labor contract. In addition, there may be a question of whether a franchise agreement can provide civil immunity in the event of a dispute.[18] Because the issue of worker status in this case was closely related to such interconnected issues in collective labor relations law, the CENTRAL LRC seems to have made a judgment in this case focusing on the business-operator status of the franchise owner-managers, and came to the conclusion that they were not eligible for worker status.

Considering the working conditions of franchise owner-managers, who work extraordinarily long hours due to operating businesses open 24 hours a day without being able to secure sufficient staff, contemplating the problems they face as a labor law issue is essential. Postulating franchise agreements between businesses which are the basis of relationships between the franchisor company and the franchisees as the unignorable, in the field of economic law as well, it would be necessary to consider institutional and policy measures to render more appropriate the business operations of franchise stores and the working conditions of owner-managers.[19] The CENTRAL LRC order in this case indicates the limitations of labor law, and also suggests a need for greater connection and coordination with adjacent legal domains.

1. Unfair labor practice remedial procedure in the labor relations commission and its relationship with judicial procedure, see https://www.mhlw.go.jp/english/org/policy/dl/08.pdf.
2. Article 3, LUA, defines "workers" as "persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation."
3. In Japan, unlike other countries, ridesharing services such as Uber and Lyft are not legally permitted. Thus, no legal judgments so far have been made on the worker status of those services' drivers.
4. See Yoko Hashimoto, "Can Owners of Convenience Stores

Be "Workers" under the Japanese LUA?" *Japan Labor Issues* 3, no. 12 (January–February 2019): 19.

5. According to newspaper reports, X has appealed to the CENTRAL LRC order and filed a suit in the Tokyo District Court for revocation of the administrative decision and order.

6. On the same day as this CENTRAL LRC order, an order was issued for a similar case. See *FamilyMart* case, Central Labour Relations Commission (Feb. 6, 2019). Ministry of Health, Labour and Welfare website: https://www.mhlw.go.jp/churoi/houdou/futou/dl/shiryou-31-0315-2z.pdf. Because the basic contents of that order are the same as the order in this case, this article deals only with the latter.

7. Commentary on this order includes Yoko Hashimoto "Konbini-ouna no rosoho jo no rodosha-sei" [Can Owners of Convenience Stores Be "Workers" under the Japanese LUA?] *Jurist*, no. 1533 (2019): 4; Yoichi Motohisa "Konbini-ouna no rosoho jo no rodosha-sei" [Worker Status of Convenience Store Owners under the LUA] *Rodo-Horitsu-Junpo*, no. 1943 (2019): 6; Yoichi Shimada, "Konbini chen kameitenshu no rosoho jo no rodosha-sei" [Worker Status of Convenience Store Chain Franchisees] *Rodo Hanrei*, no. 1209 (2019): 5; Susumu Noda, Kaoko Okuda, "Daiarogu: Rodo hanrei kono 1-nen no soten" [Dialogue: Labor law precedents 2018–19: The issues involved] *The Japanese Journal of Labour Studies* 61, no. 11 (2019): 2 (all commentary is only available in Japanese).

8. "In this Act, 'Worker' means one who is employed at a business or office and receives Wages therefrom, regardless of the type of occupation." (Labor Standards Act Art. 9); "The term 'Worker' as used in this Act means a person who works by being employed by an employer and to whom wages are paid." (Labor Contracts Act Art. 2 (1)).

9. In a lawsuit in which the worker status of a convenience store owner-manager under the LSA and LCA was disputed, the court denied worker status. The *Seven-Eleven Japan (franchisees)* case, Tokyo District Court (Nov. 21, 2018) 1204 *Rohan* 83.

10. For the history of legal decisions and debates on theories, see Takashi Araki, *Rodoho* [Labor and Employment Law], 3rd ed. (Tokyo: Yuhikaku, 2016) 573–576.

11. *Central Labour Relations Commission* v. *Shin-Kokuritsu Gekijo Un'ei Zaidan* case, Supreme Court (Apr. 12, 2011) 65-3 *Minshu** 943; *Central Labour Relations Commission v. INAX Maintenance* case, Supreme Court (Apr. 12, 2011) 1026 *Rohan* 27; *Central Labour Relations Commission* v. *Victor Service & Engineering* case, Supreme Court (Feb. 21, 2012) 66-3 *Minshu* 955. All of these decisions determine only whether the union members in the cases have worker status under the LUA, and do not provide a general definition of the concept of a worker.

**Minshu*: Saikosaibansho Minji Hanreishu (Supreme Court Reporter)

12. Labor-Management Relations Law Study Group, "Report of the Labor-Management Relations Law Study Group: Criteria for Worker Status under the LUA (July 2011, only available in Japanese) (Chair: Takashi Araki, Professor of The University of Tokyo). This report identified criteria based on the Supreme Court decisions cited in the note 9, and classified (1) integration into a business organization, (2) unilateral and standardized determination of contract contents, and (3) compensation as remuneration for labor provided [(1) to (3) are defined as "basic criteria" by the Report], (4) relationship where the labor supplier is to respond to the other party's business requests and (5) supplying of labor under the other party's control and supervision in a broad sense and the imposition of certain spatial and temporal constraints [(4) and (5) are defined as "supplementary criteria"], and (6) conspicuous business-operator characteristics [defined as a negative criterion that could cancel out factors (1) to (5) above].

13. Kazuo Sugeno, *Rodo ho* [Labor law]. 12th ed. (Tokyo: Kobundo, 2019), 830 (only in Japanese).

14. In addition to the three cases cited in note 11, there is also a decision and order in the *Sokuhai* case, Central Labour Relations Commission (July 7, 2010)1395 *Bessatsu chuo rodo jiho* 11.

15. Hashimoto, *supra* note 7, 5.

16. Noda and Okuda, *supra* note 7, 9, 11 (Comments by Professor Noda and Professor Okuda); Shimada, *supra* note 7, 12–13.

17. Hashimoto, *supra* note 7, 5; Shimada, *supra* note 7, 12–13.

18. Noda and Okuda, *supra* note 7, 9–10 (Comments by Professor Noda).

19. Shimada, *supra* note 7, footnote 17 at 13. Japan Fair Trade Commission, which has jurisdiction over the Antimonopoly Act, has published implementation standards for the act, entitled "Guidelines concerning the Franchise System under the Antimonopoly Act" (April 24, 2002, revised June 23, 2011) (only available in Japanese). However, this is merely an approach to implementation of laws and regulations regarding relationships between business operators, and does not provide views on how franchisees supply labor.

The *Seven Eleven Japan* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1209, pp. 5–63. See also *Labor Law Studies Bulletin* 2708.

IKEZOE Hirokuni

Senior Researcher specialized in Labor and Employment Law, The Japan Institute for Labour Policy and Training. Research interests: Working time, Work-life balance/conflict, Diversification of labor market, Legal concept of employee, and Labor/employment dispute resolution.

https://www.jil.go.jp/english/profile/ikezoe.html

Job Changes for Re-employed Retirees

The Toyota Motor Case

Nagoya High Court (Sept. 28, 2016) 1146 *Rohan* 22

Keiichiro Hamaguchi

Facts

Under Japanese law, if an employer fixes the mandatory retirement age of workers, it must not be below 60 years of age. If they set the retirement age under 65, they are required to provide continued employment (re-employment) up to age 65. Until March 2013, these re-employed workers could be restricted based on certain standards of eligibility under labor-management agreements. However, a legal amendment in 2012, with effect from April 2013, obliges companies to retain all employees until age 65 if they wish to continue working. To be precise, the age of mandatory re-employment has been raised by one year of age, in line with the starting age of employee pension payments. When this case occurred, mandatory re-employment applied to all employees up to age 61, beyond which certain restrictions are allowed for continued employment.

Worker X employed by Company Y retired on reaching the mandatory retirement age of 60 in July 2013. Y's work rule was to re-employ workers in their original jobs (known as "skilled partners") up to a maximum age of 65, but only if they met certain standards specified in their labor-management agreement. Workers who did not meet those standards were re-employed until age 61 as part-time workers on hourly wages. X had been employed in a clerical post, but the company proposed to re-employ him in cleaning work for four hours a day. X rejected this and filed a lawsuit in which he sought to have his status as a "skilled partner" confirmed. The Okazaki Branch of the Nagoya District Court dismissed X's suit on January 7th, 2016, whereupon X appealed.

Judgment

Nagoya High Court ordered the company to pay damages on September 28th, 2016, not recognizing X's status as a "skilled partner," but ruled that the company had contravened the law in proposing cleaning work that was completely different from X's job before retirement. The judgment stated that "though an employer has some discretion in deciding which working conditions to propose when re-employing workers after mandatory retirement, if the proposed conditions cannot be deemed to offer a substantial opportunity for re-employment, for example, providing for an unacceptably low level of wages in light of preventing periods of no pension and no income, or a job content that is utterly unacceptable to the worker in light of social norms, the action by the said employer is clearly against the gist of the Revised Act on Stabilization of Employment of Elderly Persons." Y did not contest the judgment, which therefore became final.

Commentary

Japan's legal policy concerning the employment of older persons has gradually tightened the obligation on companies to continue employing workers up to age 65 as long as the workers wish continued employment. This obligation used to be non-binding as a duty to endeavor, and from April 2006 it basically became legally binding with exceptions only permitted when they were based on labor management agreements. From April 2013 even those exceptions were removed. This case occurred immediately after the 2013 amendment. The key issue in the argument is that the company was still practicing the old system of selecting workers for re-employment based on a labor-management

agreement, but proposed re-employment in part-time cleaning work for a worker who would not have been re-employed under that system.

This case brings about two different arguments. The first is that the form of employment proposed to X was not a "skilled partner," provided in the company's work rule, but an hourly-paid part-time worker. The second is that the proposed job involved cleaning work, completely different from the previous clerical work. The judgment did not deem the former to be illegal. X's expected annual income as a part-time worker would have been about 1.27 million yen, equivalent to about 85% of the earnings-related component of employees' pension benefit. For this reason, the court ruled that "this cannot be deemed an unacceptably low level of wages." What the judgment deemed illegal was the change of job from clerical work to cleaning. However, this assertion is dubious on two counts.

On the assessment of expected wages in this case, X's annual income before retirement was around 9.7 million yen, and X claimed that his annual income would have been around 5.7 million yen if he had been re-employed as a skilled partner. The difference between the two amounts of estimated wage (5.7 million yen and 1.27 million yen) is too large, and any judgment deeming this difference as appropriate would need to have been accompanied by a justifying explanation (the need for a change of job to cleaning could have been used as justifying evidence, but the judgment refuted that).

On the job change from clerical to cleaning work, the judgment ruled that "if two job types belong to completely different job categories, they would already lack substance as continued employment, and would be regarded as a combination of regular dismissal and new hiring." For this reason, the court ruling severely criticizes the job change, stating that "unless there has been a situation warranting regular dismissal, proposing work with this content is not acceptable."

However, if the range of a job change is possible in the middle of an employment contract without any general agreement on restricting job types, a change of job should be even more possible in cases of re-employment. In the past, Japan's doctrine of judicial precedence has accepted a wide range of job changes on the premise of the Japanese-style employment practice and system. The possibilities are endless: examples might include a TV announcer being transferred to an information center, a nurse changing to a clerk, a taxi driver to a sales assistant, an editor to welfare office work, a child-care worker to kitchen staff, or a bartender to a room clerk. At least, rejecting this case of job change on the grounds that it "belongs to a completely different job type" runs counter to the trend set by these judicial precedents.

Some exceptional precedents that have deemed a job change illegal have been made in cases accompanied by a decrease in wages or transfer involving harassment. As mentioned above, however, this judgment did not deem low wages to be a problem. On the subject of harassment, the judgment suggests that "the doubt even arises that the intention was to deliberately propose the work that would cause a feeling of humiliation (i.e. cleaning), giving X no option but to take retirement." If the judgment had been composed with this as its main argument, it might have assumed a degree of persuasiveness.

AUTHOR

Keiichiro Hamaguchi, Research Director General, The Japan Institute for Labour Policy and Training (JILPT). Research interest: Labor policy. Profile: http://www.jil.go.jp/english/profile/hamaguchi.html

Judgment Declaring Fixed Overtime Pay Illegal and Upholding a Worker's Claim for a Solatium for Excessive Overtime Work despite No Resulting Health Damage

The *Karino Japan* Case
Nagasaki District Court, Omura branch (Sept. 26, 2019) 1217 *Rodo Hanrei* 56

HOSOKAWA Ryo

I. Facts

X signed an employment contract in 2012 with Company Y, a company that manufactures and sells noodles, and was engaged in manufacturing noodles and other such duties.

In addition to the basic salary, X received an allowance related to X's specific job duties, namely, "job-based allowance" (*shokumu teate*), of 30,000 yen per month, a "meal allowance" (*shokuji teate*) of 1,500 yen per month, and in some months, received a "good attendance allowance" (*seikin teate*). The notice of working conditions issued by Y when hiring X stated that "a portion of the job-based allowance constitutes overtime pay," but did not specify what amount of the job-based allowance would constitute overtime pay. Y's wage regulations (Article 13) similarly prescribe that "fixed overtime pay is paid as part of the job-based allowance," but do not explicitly indicate how many hours of the premium wages paid for overtime work (*jikangai rōdō*, namely, overtime exceeding the maximum working hours prescribed in the Labor Standard Act (LSA)) are covered in the job-based allowance. As described below, X engaged in large amounts of overtime work every month but was not paid premium wages for overtime work in addition to the basic salary, job-based allowance, and other such payments listed above.

Every month between June 1, 2015, and June 30, 2017 when leaving Y, X worked at least 90 hours of overtime a month. Moreover, in seven of those months, X's overtime work was no less than 150 hours. For the majority of this period, Y had not yet concluded a labor-management agreement on overtime work as stipulated in Art. 36, LSA (Art. 36 agreement) which Y had been obliged to enter into in the event that workers were to work overtime. An Art. 36 agreement was subsequently concluded on February 1, 2017. The Ordinance for Enforcement of the LSA (Art. 6–2 (1)) requires that the "person representing a majority of the workers" who concludes the Art. 36 agreement with the employer be elected by the workers by ballot, show of hands, or other such means. However, A, the worker representative who concluded the Art. 36 agreement with Y, was chosen as representative of the majority of workers on recommendation. Furthermore, Y did not take any measures to respond to the fact that, as described above, X was engaging in large amounts of overtime work, such as exercising special care, checking the content of X's work, or reducing the large amounts of overtime work. X was diagnosed with partial decline in lung function, although the diagnosis did not identify X's work at Y as the cause.

X demanded the payment of premium wages

and other such allowances for overtime work, work on days off, night work and other work, along with what is known as the "additional monies prescribed in Article 114, LSA"[1] owed for X's work in the period from June 1, 2015 to June 30, 2017, as well as the payment of a solatium and other such compensation for mental distress, on the basis of consistently having been subjected by Y to harsh long working hours over a long period of time.

Y responded by claiming that the job-based allowance paid by Y to X each month was paid as a fixed amount covering premium wages for the monthly sum of the one hour and a half of overtime worked each working day (fixed overtime pay) and should be excluded from the calculation of the premium wages demanded by X as unpaid wages. Y also claimed that merely allowing a worker to work long hours does not constitute a tort.

II. Judgment

The Nagasaki District Court partially upheld and partially quashed X's claims (*a settlement was reached after an appeal was filed with the higher court). The judgment can be summarized as follows:

(1) The job-based allowances at Y include the payment for ability-based remuneration in addition to that for fixed overtime pay. Therefore, in order to recognize that Y had paid the overtime pay required under Art. 37, LSA by paying the job-based allowance, it is necessary to clarify the portion of the job-based allowance paid for fixed overtime pay and that paid for ability-based remuneration.

However, there is no explicit indication of exactly what amount of X's job-based allowance represented fixed overtime pay. Moreover, Y's wage regulations also fail to explicitly indicate how many hours' worth of premium wages were accounted for the portion of the job-based allowances paid as a part of fixed overtime pay.

Given the above, the job-based allowances at Y cannot be regarded as being clearly divided into a fixed overtime pay portion and an ability-based remuneration portion. It is therefore not possible to recognize that paying the job-based allowances constituted the payment of premium wages for overtime work as stipulated in Article 37 of the LSA. As a result, the amount of job-based allowances cannot be excluded from the calculation of the premium wages for overtime work that should be paid to X.

(2) As is common knowledge, consistently working long hours for extended periods of time can lead to an excessively accumulated fatigue and mental stress that may damage a worker's mental and physical health. Y was therefore obliged to exercise care when determining and overseeing the work it assigned X to ensure that there would be no damage to X's mental or physical health as a result of an excessively accumulated fatigue, mental stress, or other such strains from the pursuit of said work.

X engaged in overtime work as described in Section I above. Initially, Y had not yet entered into an Art. 36 agreement, and the Art. 36 agreement it concluded in February 2017 was invalid, as it did not fulfil the conditions stipulated in Art. 6–2 (1) (ii) of the Ordinance for Enforcement of the LSA. In addition to this, Y also failed to exercise care regarding X's working hours, which could be ascertained from the clock-in and clock-out times recorded on X's time card, to check the content of X's work, or to take measures such as providing guidance aimed at improving the X's work situation.

Y's actions as described above were in violation of its contractual obligation to give due consideration to a worker's safety (*anzen hairyo gimu*). This violation constitutes a tort and Y is obliged to compensate X for any damages that arose as result of its failure to fulfil that contractual obligation to consider safety.

(3) There is no medical evidence that X experienced mental or physical health difficulties as a result of working long hours. However, even if the long working hours did not ultimately result in X developing a specific illness, Y neglected its contractual obligation to consider safety, and, for more than two years, allowed X to work long hours such that there was a risk of causing X to develop mental or physical difficulties. It can therefore be judged that Y infringed upon X's personal interests.

It can easily be inferred that Y's violation of its contractual obligation to consider safety and in turn its infringement upon X's interests as an individual resulted in X suffering mental distress. Thus, Y is obliged to pay X compensation and other such payments for damages that arose as a result of its tortious act.

III. Commentary

This is a case that a worker having been compelled to engage in large amounts of overtime work sought the payment of premium wages for overtime work and, at the same time, claimed damages on the grounds that in compelling the worker to work long hours, the employer violated its contractual obligation to consider safety.

The first key point of discussion is what is known as "fixed overtime pay" (*kotei zangyōdai*). In some cases in general it may be recognized that an employer has paid the worker wages for monthly overtime work by paying nominally, in addition to the basic salary, a set amount of monthly allowance, which, as with the job-based allowance paid in this case, is often not explicitly indicated as premium wages for overtime work. At the same time, in many cases there is a lack of clarity regarding the role of the allowances that are treated as fixed overtime pay and the ways in which they are calculated. Furthermore, as these allowances are fixed amounts—regardless of the amount of overtime work— there is a growing number of cases of workers seeking the payment of unpaid premium wages on the grounds that the fixed overtime pay they have received does not sufficiently cover the amount that should be paid for their actual overtime work or demanding that the allowances treated as fixed overtime pay should not be seen as premium for overtime work.

The Supreme Court has ruled that in order for fixed overtime pay to be recognized as payment of premium wages in compliance with Art. 37, LSA, it needs to meet the following two requirements: (1) that it is possible to distinguish between the wages paid for standard working hours and the portion paid as premium wages, and (2) that the amount paid as premium wages is not less than the amount calculated on the basis of Art. 37, LSA (the *Kochi Prefecture Tourism* case, Supreme Court (Jun. 13, 1994) 653 *Rohan* 12).

In this case, the job-based allowance that Y claimed was fixed overtime pay constituting the payment of premium wages is, according to Y's system, intended to constitute not only premium wages for overtime work but also ability-based remuneration, and yet it is recognized that there is no explicit indication of the portions (amounts of money) assigned to each. It is also recognized that it is unclear how many hours of overtime work those premium wages should cover. On these grounds, the district court determined that the job-based allowances at Y cannot be recognized as the payment of premium wages for overtime work as prescribed in Art. 37, LSA. This decision, which follows the approach adopted in the Supreme Court judgment described above, appears to be the inevitable conclusion.

The second key point is the question of whether to recognize X's claim for damages in relation to the fact that Y compelled X to consistently engage in large amounts of overtime work for a long period of time exceeding two years. Of the points raised by this judgment, this second one has gathered particular interest in Japan.

The employer's contractual obligation to consider safety has been recognized in Supreme Court precedents for many years. Namely, judgments have determined that employers bear a "contractual obligation to give due consideration in order to protect workers' lives and physical safety, etc. from danger (the *Kawagi* case (Apr. 10, 1984) 38–6 *Minshu* 557). In addition to this, Art. 5, Labor Contracts Act currently prescribes that "in association with a labor contract, an Employer is to give the necessary consideration to allow a Worker to work while ensuring the employee's physical safety." Employers are also expected to protect workers from health damage resulting from overwork given their "contractual obligation to take care that workers do not suffer damage to their mental or physical health due to an excessively accumulated

fatigue or mental stress, etc. in the pursuit of their work" (the *Dentsu* case, Supreme Court (Mar. 24, 2000) 54–3 *Minshu* 1155).

It should, however, be noted that in cases regarding violations of an employer's contractual obligation to consider safety, it is typical that a specific incident or damage to the worker's health has arisen, thereby allowing the specifics of the contractual obligation that the employer was obliged to fulfil to be clearly identified. It has therefore been considered difficult for a worker to request their employer to fulfill their contractual obligation to consider safety before such an incident or health damage occurs. That is, while there are many precedents recognizing an employer's contractual obligation to consider safety with regard to employers compelling workers to engage in large amounts of overtime work, all of these cases involved a specific incident of a worker suffering health issues or losing or severely endangering their life due to cerebral or cardiac diseases or mental illness (depression, etc.).

In contrast, this judgment recognized X's claim for payment of damages (solatium) on the grounds of the employer's violation of its contractual obligation to consider safety, despite the fact that it was recognized that—given the lack of medical evidence that the disease affecting lung function claimed by X was a result of X's work—this case did not involve the worker developing a specific illness as a result of work duties. It is, as this judgment states, theoretically possible to recognize that long working hours may incur mental health damage, even if a specific illness has not developed. This point is the major feature of this judgment and can be seen as a valuable precedent.

On the other hand, this judgment addresses the fact that in addition to the over two years of consistent long working hours, Y violated the law concerning the conclusion of an Art. 36 agreement which is necessary when ordering workers to engage in overtime work, as well as the fact that Y failed to take measures to oversee or ameliorate X's working hours or work situation. It is problematic that there are unclarity as to the relationships between the circumstances addressed by the judgment and the theoretical framework and conclusion adopted in the judgment, such as whether those circumstances were addressed in order to identify the specific nature of the contractual obligation to consider safety borne (violated) by Y or whether those circumstances had to be addressed in order to recognize the claim for damages despite no specific health damage having arisen.

While this case was settled following the filing of an appeal and will therefore not be tried in a higher court, there is significant interest in future developments concerning judgments that may be passed by courts in similar cases.

1. When an employer has failed to make a payment that is prescribed in the LSA—namely, an allowance to account for lack of advance notice of dismissal (Art. 20), an allowance for absence from work for reasons attributable to the employer (Art. 26), premium wages (Art. 37), or allowance for annual paid leave (Art. 39 Para. 9)—the court, at a request from the worker, may order the employer to make additional monies equal to the amount of unpaid wages or allowances (which is paid *in addition* to the payment of unpaid wages or allowances) (LSA Art. 114). This system is thought to have been established due to the influence of the "double damages" system (doubling of the amount of back pay) adopted in US law (See Takashi Araki, *Labor and Employment Law*, 4th. 2020, at 70). It is at the discretion of the court whether the company should be ordered to make the additional monies and how much the additional monies should be. In recent years, the courts have tended to make decisions on the additional monies depending on the nature of the case and whether the employer has acted in bad faith.

The *Karino Japan* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1217, pp. 56–66. See also *Rodo Keizai Hanrei Sokuho* (*Rokeisoku*, Keidanren Jigyo Service) 2402, pp. 2–11 and *Jurist* (Yuhikaku) no.1539, December 2019, pp. 4–5.

HOSOKAWA Ryo
Professor, Aoyama Gakuin University. Research interest: Labor Law.

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

TAKIHARA Hiromitsu

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.

TAKIHARA Hiromitsu

Ph.D. in Law. Researcher, The Japan Institute for Labour Policy and Training. Research interest: Labour and Employment Law, especially contract of employment, unfair labour practices, workplace bullying/harassment, restorative justice, and Comparative labour and employment law.
https://www.jil.go.jp/english/profile/takihara.html

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

IKEZOE Hirokuni

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.

IKEZOE Hirokuni

Assistant Research Director, The Japan Institute for Labour Policy and Training. Research interest: Various issues on labor contract, Legal concept of workers, Labor dispute settlement, Employment and Labor Law in the USA.

https://www.jil.go.jp/english/profile/ikezoe.html

On Payment or Non-payment of Premium Wages When Incorporated Into Annual Salary

The Iryo Hojin Shadan Koshin Kai Case

Supreme Court (Jul. 7, 2018) 1168 *Rohan* 49

Hirokuni Ikezoe

Facts

In this case, X (plaintiff of the first instance, appellant of the court below) was employed as a medical doctor at incorporated medical institution Y (defendant of the first instance, appellee of the court below), and sued for premium wages for overtime and night work, etc. Below, only the points debated in the final appeal are described.

(1) According to the employment contract between X and Y, wages should consist of an annual salary totaling 17 million yen (approx. US$14,100) made up of a monthly base salary of 860,000 yen (approx. US$7,100) and a total of 341,000 yen (approx. US$2,800) in monthly fringe benefits (managerial position allowance, duty allowance, adjustment allowance), with a bonus based on the equivalent of three months' salary.

The employment contract specified a five-day work week, with working hours from 8:30 a.m. to 5:30 p.m. (with an hour's recess), and two days off per week, in principle, but stated that if needed the doctor could be called on to work at other times, in which case overtime wages would be based on Y's overtime compensation plan for doctors (hereinafter referred to as the "overtime plan").

In the overtime plan, work that qualifies for an overtime allowance is limited to (a) operations that directly contribute to hospital income or essential emergency services, (b) allowance payments are limited to the actual hours of emergency operations, and payment must be authorized by the manager in charge, (c) the time for which overtime allowances are paid shall be the time spent on emergency services occurring between 9:00 p.m. on a workday and 8:30 a.m. on the next day, or on days off, (d) overtime allowance is not paid for overtime work regarded as an extension of ordinary work, and (e) a separate duty allowance would be paid to doctors on duty or day duty.

In the employment contract, it was agreed that premium wages for overtime work, etc., other than those paid under the overtime plan, would be included in annual salary of 17 million yen (hereinafter referred to as "the agreement"), but what proportion of the annual salary consisted of premium wages for overtime work, etc. was not disclosed.

(2) Y calculated X's overtime work during the employment period (six months) as 27.5 hours (of which 7.5 hours was night work) for X, paid an overtime allowance of 155,300 yen for this, and paid a total of 420,000 yen as a duty allowance. In the calculation of overtime allowance, although night work was compensated at a premium rate, other overtime work was not.

(3) X filed a lawsuit against Y for payment of premium wages for overtime totaling 4,380,000 yen and damages for delayed payment, etc.

In both the first and the second trials, the judgments recognized part of X's claim, limited to 563,380 yen in premium wages, but dismissed the rest of the claim, and X appealed.

Judgment

The supreme court decided that in the high

court judgment the part of the claim related to premium wages was reversed, and the case was remanded to the Tokyo high court.

(1) Employers' obligation to pay premium wages for overtime work etc. under Article 37 of the Labor Standards Act (LSA) is intended to curtail overtime work etc. by making employers pay premium wages, and thus such obligation under the Act is understood to have the purpose of ensuring employers observe the Act's provision on working hours and compensate their employees…It is understood that employers are obligated only to pay premium wages to ensure that the amount paid is not less than that calculated by the method prescribed in said Article (author's note: related provisions on calculation of premium wages), and here the method itself, of paying premium wages by including them in advance in the base salary or other allowances, is not immediately against said Article.

(2) On the other hand, in order to determine whether an employer has paid an employee the premium wages mandated by Article 37 (LSA), it is necessary to consider whether the amount paid as premium wages is not less than the amount of premium wages calculated by the method prescribed in said Article, based on the wages for ordinary working hours. In line with said Article, in cases where premium wages are paid in advance as part of the base salary etc., as a prerequisite for this consideration, it is necessary to be able to distinguish between the ordinary wages and premium wages respectively in the employment contract's provisions on base salary. If the amount of the premium wages falls below the amount calculated by the method prescribed in said Article, etc., the employer is obligated to pay the difference to the employee.

(3) Although the agreement between X and Y states that premium wages for overtime work, other than those paid based on the overtime plan, are included in the annual salary of 17 million yen, it does not clarify which portion of wages corresponds to premium wages for overtime work etc. This means the agreement cannot be used to determine what amount of wages have been paid to X as premium wages for overtime work etc. Also, with regard to the annual salary paid to X, it is not possible to distinguish between the portion corresponding to wages for normal working hours and that corresponding to premium wages.

Therefore, it cannot be said with any certainty that Y has paid X premium wages for X's overtime work and night work.

(4) Being different from above-mentioned opinion, the judgment of the court below violates laws, which has obviously affected its decision. ..... We hereby remand this case to the court below and ask for further, careful consideration of whether Y has paid X all the premium wages calculated by the method prescribed by Article 37 (LSA) based on the amount of the portion equivalent to the wage of normal working hours.

Commentary

This decision is significant and distinctive in several ways.

First, regarding the form of wage payment, with premium wages included in wages normally paid, the court followed the precedents of Supreme Court decisions[1] in making a judgment on the suitability of this form of payment of premium wages for legally mandated overtime work and night work. It judged that in order to determine whether legally mandated premium wages have been paid, it is necessary to be able to distinguish between ordinary wages and premium wages, and furthermore that the amount of premium wages paid must not be less than the amount calculated by the legally prescribed method (see (2) in Judgment).

Second, while the court reiterated that the premium wage payment method of including premium wages in wages normally paid is not invalid per se,[2] as a precondition, there must be clear compliance with the purport of the premium wage provision under Article 37 of LSA. In particular, the purport of said Article is interpreted as being the curtailing of overtime work by mandating that employers pay premium wages (see (1) in Judgment).

The prior to Supreme Court rulings stated that the significance of the premium wage regulation was ensuring compliance with the working hours

principle (8 hours per day, 40 hours per week) and financial compensation for employees who do overtime work. The new judgment further emphasizes these and explicitly shows understanding of the intent to curtail overtime work. With the enactment of the Work Style Reform Bill (Jun. 29, 2018), while reducing excessively long work hours is being carried out on both the policy and practical fronts, this court judgment is in line with social trends in terms of its legal interpretation.

Third, the plaintiff in this case is a professional, medical doctor, who has discretion in performing work tasks and whose salary is considerably higher than those of average employees. According to this judgment, working hours regulations regarding premium wages are to be strictly applied not only to average employees such as shop-floor operators and office employees but also to specialized employees with high salaries and discretion in performing work tasks.

There were already lower court precedents with regard to premium wage for overtime work by such specialized employees with high salaries and discretion in performing work tasks.[3] In one of these cases, the *Morgan Stanley Japan* case, involving a foreign currency trader with a monthly salary of about 1,830,000 yen, interpreting premium wages as being included in wages ordinarily paid was not in violation of the LSA.

Also, regarding the *Tech Japan* case, the lower court ruled[4] that if fixed monthly salary of 410,000 yen is paid for total monthly working hours of between 140 hours to 180 hours, premium wages need not be paid even when exceeding the standard monthly working hours of 160 hours, and rejected the claim of the plaintiff, a programmer, whose salary was set significantly higher than those of other employees, as having voluntarily waived the right to premium wages if working in excess of 160 hours but less than 180 hours per month (however, the court mandated that for work exceeding 180 hours a month, the employer was to pay an hourly rate determined by dividing the prescribed monthly salary by the prescribed monthly working hours).

The initial and second decision in the *Koshin Kai* case adopted the same position as the lower court ruling for the Morgan Stanley Japan case, but the Supreme Court judgment in this case rejected its interpretation. In the decision for the Tech Japan case, the lower court judgment on normal wages and premium wages was overturned due to the impossibility of distinguishing between them at the Supreme Court. This can be seen as the Supreme Court reiterating the position that mandated premium wages regulations are to be strictly applied, regardless of the nature and mode of work and salary amount.

Given the Supreme Court ruling in this case in question, some readers may wonder whether Japanese law lacks provisions on exclusion from working-hours limits and premium wages for professional, discretionary, high-salaried employees.

In fact, such provisions exist in Japan. One is in Article 41(ii) of LSA (persons in positions of supervision or management), another in Article 38-3 and 38-4 of LSA (specialized work and discretionary management-related work, and the other in the bill that recently passed the Diet (The "highly professional" work system).

The system for persons in positions of supervision or management excludes said persons from the application of the provisions regarding working hours. As to whether or not someone is covered by this system, in administrative practice and judicial precedents thus far, people have been judged on whether they (i) participate in management decisions and have labor management authority, (ii) have discretion about working hours, such as what time they begin and end work, and (iii) their wages and treatment, etc. are in line with such status and authority. Those who meet these criteria are excluded from the application of the regulations pertaining to working hours, rest periods, and days off, including regulations governing overtime work and premium wages (those regarding premium wages for night work and annual leave still apply).

The discretionary work system is one that deems people to have worked for a certain period of time, and in some cases overtime work and premium

wage regulations do not apply to these employees. Execution of tasks is largely up to the discretion of employees because of the nature of the work, and it is difficult for employers to specify procedures and allocation of time for the jobs in question (19 specialized and 8 planning-oriented occupations). The system can be applied after certain procedures such as a majority labor-management agreement (specialized type) or a resolution by a labor-management committee and employee's consent (planning-oriented type). Since the discretionary work system deems employees to have worked the hours prescribed in these agreements or resolutions, regardless of the actual working time, unless the number of hours deemed worked exceeds the legal limit working hours, premium wages are not paid. This system has the same effect as the system for exclusion from overtime work and premium wages (regulations governing premium wages for night work, rest periods, days off, and annual paid leave still apply).

The highly professional work system was established as one of the work style reforms the current administration is pursuing, and excludes a wider range of application than the above two systems. Under this system, in cases where the scope of jobs is clear and employees with a specified annual income (at least 10 million yen) are engaged in work requiring highly specialized knowledge, they are excluded from premium wage regulations governing working hours, rest periods, days off, and night work (annual paid leave regulations still apply), on the condition that they are given, and actually take, 104 days off per year as a health protection measure, and that there is both a resolution by a labor-management committee and employee's consent. As a result, employees to whom this system applies are not covered by overtime work and premium wage regulations.

Those exclusionary systems or similar systems do not specify "medical doctor" as a job category to which they apply (note that the highly professional work system has not yet gone into effect), and cases like these regarding overtime work and premium wages for employees of this particular profession must be determined by court decisions such as this one. Thus, in practice, an employer adopting a system where total wages include premium wages (even if there is some form of agreement between the employer and employees about the wage payment system, as in this case) bears the duty to calculate the premium wages based on the purport of Article 37 (LSA) covering the wage form of all employees including high-salaried employees who perform specialized, discretionary work, unless the employer applies one of the above systems of exclusion from regulations governing overtime work and premium wages to the employees. Otherwise, the employer is required the thorough management of working hours and calculation of overtime and night work hours. And under a wage system where it is possible to distinguish between the portion constituting normal wages and that constituting premium wages, it is necessary to pay employees premium wages not less than the amount calculated by the method specified by law. Therefore, this judgment promises to have a highly significant impact on employers' wage and working-hours practices.

1. The *Kochi Kanko* case, Supreme Court (Jun. 13, 1994) 653 *Rohan* 12; The *Tech Japan* case, Supreme Court (Mar. 8, 2012) 1060 *Rohan* 5; The *Kokusai Motorcars* case, Supreme Court (Feb. 28, 2017) 1152 *Rohan* 5.
2. This point was also mentioned in the *Kokusai Motorcars* case (see note 1) reviewed in *Japan Labor Issues*, vol 2, no. 4 (January 2018).
3. The *Morgan Stanley Japan* (overtime allowance) case, Tokyo District Court (Oct. 19, 2005) 905, *Rohan* 5.
4. The *Tech Japan* case, Tokyo High Court (Mar. 25, 2009) 1060 *Rohan* 11. The *Tech Japan* case, Yokohama District Court case (Apr. 24, 2008) 1060 *Rohan* 17.

AUTHOR

Hirokuni Ikezoe Senior Researcher specialized in Labor and Employment Law, The Japan Institute for Labour Policy and Training (JILPT). Research interests: Working time, Work-life balance / conflict, Diversification of labor market, Legal concept of employee, and Labor / employment dispute resolution. Profile: https://www.jil.go.jp/english/profile/ikezoe.html

Reduction in the Shifts of a Non-standard Shift Worker

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

HAMAGUCHI Keiichiro

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).

HAMAGUCHI Keiichiro
Research Director General, The Japan Institute for Labour Policy and Training. Research interest: Labor policy.
https://www.jil.go.jp/english/profile/hamaguchi.html

Commentary

Regional Extension of Collective Agreements under Article 18 of the Labor Union Act

The Regional Extension Decision by the Minister of Health, Labour and Welfare on September 22, 2021

YAMAMOTO Yota

I. Facts and background

On September 22, 2021, the Minister of Health, Labour and Welfare (at the time, Tamura Norihisa) passed a decision [*Kettei*] recognizing the regional extension of a collective agreement (hereinafter, "the decision") in accordance with Article 18 of the Labor Union Act (LUA). Prior to the decision, there were in Japan as few as eight precedents of the recognition of requests for the extension of collective agreements under Article 18 (LUA). Moreover, as all of these precedents involved requests for extension within one prefecture, the recognition of these extensions took the form of a resolution by the relevant Prefectural Labor Relations Commission and a decision by the relevant prefectural governor (as prescribed in Article 15 of the Order for the Enforcement of the LUA). This case, in contrast, entailed a request for the extension of a collective agreement applied to a region covering several different prefectures, and it therefore became Japan's first precedent of extension under a resolution of the Central Labor Relations Commission (CLRC) and a decision of the Minister of Health, Labour and Welfare (as also prescribed in the Order for the Enforcement of the LUA, Article 15). This commentary addresses the basis for the decision, which consisted of the resolution [*Ketsugi*] by the CLRC on August 4, 2021 ("the resolution") and a report submitted to the CLRC by a sub-commission on July 13, 2021 ("the report").

II. Overview of the case

On April 22, 2020, the labor union of electronics superstore Yamada Denki Co., Ltd., and two other enterprise unions ("the unions party to the agreement"), which are members of the industrial union UA Zensen, formed a collective agreement regarding annual days off ("the collective agreement") with Yamada Denki Co., Ltd. and two other enterprises that also operate large-scale stores for the mass retail of consumer electronics across Japan ("the employers party to the agreement"). The collective agreement applied to a region encompassing all of Ibaraki Prefecture and certain municipalities in Chiba Prefecture, Tochigi Prefecture, and Fukushima Prefecture. It covered those workers who are full-time employees with an indefinite term of employment ("indefinite full-time employees") working at such electronics superstores in said regions, and stipulated a minimum of 111 annual days off.

On August 7, 2020, the unions party to the agreement submitted a request to the Minister of Health, Labour and Welfare to pass a decision to extend the collective agreement under Article 18 Paragraph 1 of LUA ("the request"). The Minister of Health, Labour and Welfare responded by requesting the CLRC to pass a resolution as prescribed in Paragraph 1 of Article 18 (LUA). The CLRC established a sub-commission to investigate and

deliberate the request.

Based on the Sub-commission's report, the CLRC passed the resolution at its general assembly meeting on August 4 that year. Given the CLRC's resolution, the Minister of Health, Labour and Welfare made the decision and issued a public notice (LUA Art.18 Para. 3) of the decision on September 22, 2021.

III. The purpose of Article 18 (LUA)

The CLRC's resolution and the report suggest that the purpose of Article 18 (LUA) is for "working conditions prescribed in a collective agreement (that fulfills the requirements prescribed in Article 18 of LUA) to be regarded as the fair working conditions for that region and to be also applied to workers and employers other than those parties to the collective agreement, thereby (i) preventing competitive reduction of working conditions and in turn assisting to maintain and improve working conditions, as well as (ii) securing fair competition between workers and between employers." Of these two, while (ii) is definite in meaning, it is not entirely evident how it differs from (i). It should, however, be noted that the report—in its judgment of the validity of regional extension, an aspect addressed in Section V below—stated that "regional extension of this collective agreement is consistent with the objectives of the regional extension system, because said extension enables the increase in the number of annual days off to the level prescribed in said collective agreement and consequently improves working conditions for the workers in the region whose employment conditions were not at that level." When such an interpretation is also considered, it could be inferred that (i) also encompasses the objective of protecting workers not enrolled in the labor unions party to the collective agreement (non-unionized workers). It can therefore be suggested that through the report and the resolution, the CLRC revealed that the Article 18 (LUA) is a combination of multiple objectives—namely, to protect non-unionized workers and to ensure fair competition between workers and between employers.

IV. Judging the fulfillment of the substantive requirements

For the extension of a collective agreement to be recognized, Article 18 Paragraph 1 of LUA stipulates that "a majority of the workers of the same kind in a particular locality come under application of a particular collective agreement." That is, the substantive requirements for extension are that a collective agreement applies to: (1) a particular locality, (2) workers of the same kind, and (3) a majority.

Looking first at requirement (1), we see that the resolution concluded that "while the region of application prescribed in the collective agreement is taken into consideration," for application to a particular locality to be recognized, "it is necessary to identify a region that can be objectively determined, is clearly definable, and is persuasive for the related workers and employers, in the light of the system's objectives." On this basis, as noted in Section II above, although the collective agreement applied not only to all of Ibaraki Prefecture but also to certain municipalities in the neighboring prefectures of Chiba, Tochigi, and Fukushima, the report and the resolution limited the particular locality in this case to all of Ibaraki Prefecture, based on two main reasons. Namely, that prefectures—given their nature as administrative districts—are a) what can be considered definable regions, as they can be demarcated objectively, without arbitrary gerrymandering, and are b) persuasive for the workers and employers who are not participants in the collective agreement as regions for the demarcation of minimum standards in working conditions, such as regional minimum wages. This judgment appears to have considered the unique nature of the case—that is, that both the employers party to the agreement and the employers to whom the extension of the agreement would apply operate electronics superstores across Japan, and those stores are not all concentrated in the region to which the collective agreement applies.

Turning to requirement (2), the report and the resolution ultimately consider the workers specified

in the collective agreement—namely, the "indefinite full-time employees employed by electronics superstores" to which the agreement applies—to be "workers of the same kind." However, it should be noted that this conclusion was reached by the judgment that "as the mass retail of consumer electronics entails a common business model, focused on purchasing and selling in large quantities, that is consistent from enterprise to enterprise, region to region, and store to store, the job content and other aspects of the roles of 'indefinite full-time employees' of electronics superstores share the common focus of serving customers and managing sales," and it was therefore certainly not the case that the workers prescribed in the collective agreement were automatically recognized as workers of the same kind.

The indefinite full-time employees of electronics superstores in Ibaraki Prefecture—which were thereby recognized as "workers of the same kind" (requirement (2)) in the "particular locality" (requirement (1))—constituted a total of 662 workers; of which 601 workers were under the application of the collective agreement because they were employed by the employers party to the agreement and members of the unions party to the agreement. The application rate of the collective agreement under Article 16 of the LUA is therefore as high as 90.8%. Furthermore, while the parties to the collective agreement consist of both multiple unions and multiple employers, the agreement itself was concluded as a single agreement with plural signers. Given these factors, the report and the resolution recognized that the "majority" (requirement (3)) of "the workers of the same kind" in the "particular locality" are "under the application of" the collective agreement. It can be suggested that this case fulfils requirement (3) without question, when it is considered that precedents include a case in which application to the "majority" was recognized for a collective agreement with a rate of application of 73% (The *Hakodate Lumber Workers' Labor Union* case, Hokkaido Labor Relations Commission (Oct. 26, 1951)).

V. Judging validity

Having addressed the fulfillment of the substantive requirements as described in Section IV above, the report and the resolution determine the validity of the extension coverage of the collective agreement—that is, whether the extension could be considered appropriate in light of the purpose of Article 18 (LUA). Unlike the substantive requirements discussed above, the judging of validity is not directly drawn from the wording of Article 18 (LUA). We must therefore first address the question of what grounds the CLRC had for including such a judgment of the validity. It can be suggested that the report and the resolution incorporated this additional requirement of validity in the sense described above as a means of allowing the CLRC to use its own discretion, on the basis of the premise that the judgment is up to the discretion of the CLRC even in cases in which all of the substantive requirements prescribed in Article 18 (LUA) are fulfilled.

The specific factors that the report and the resolution adopted as grounds for recognizing the validity of extending coverage of the collective agreement are: (A) that the extension of the collective agreement both improves the working conditions of workers in the relevant region (the entire Ibaraki Prefecture) who have less than 111 days of annual days off, and contributes to ensuring fair competition by correcting disparities between employers and preventing the reduction of days off to levels below the standard prescribed in the collective agreement, and (B) that the request does not involve special grounds that may be an attempt to abuse the extension system as a means of restricting competition such as eliminating the new market entry of other enterprises. Moreover, in addition to these points, the report also refer to the fact that (C) the regional extension system, given its objectives, naturally presupposes that employers that fall under the extension are restricted from imposing working conditions worse than those that apply under the extension, and (D) in this case, there are no issues about the infringement of the rights to collective bargaining of the labor unions formed by the workers employed by the

employers to whom the extension applies. For each of these points, it can be suggested that the issue is whether the extension is still valid in light of the purpose of Article 18 (LUA) (see Section III) even when considering the effects of the extension of the collective agreement on those who do not belong to a party to the agreement in the context of this specific case. While recognizing that extension under Article 18 (LUA) also applies to members of labor unions other than those party to the collective agreement ("other labor unions"), (D), in particular, appears to be based on the premise that the favorability principle (the recognition of the validity of the more favorable working conditions) applies about the relationship between the standards of the extended coverage of the collective agreement and the working conditions applied to the members of the other labor unions concerned.

VI. Concluding remarks

The report and the resolution are extremely valuable as precedents because they represent the views of the CRLC directly or indirectly on various interpretive issues concerning Article 18 (LUA), which had not necessarily been the subject of active discussion in the past.

It must be noted, however, that there is a view that the purpose of Article 18 (LUA) is to protect the existence of the current collective agreements and the right to organize, neither the resolution nor the report mention these points. In addition, there may be an academic objection to the fact that the report and resolution do not interpret "particular locality" and "workers of the same kind" prescribed in Article 18 (LUA) in the same way as the applicable area and applicable workers stipulated in the collective agreement (see Section IV). It is furthermore unclear exactly what kinds of circumstances are required for the recognition of "special grounds that may be an attempt to abuse the extension system as a means of restricting competition such as eliminating the new market entry of other enterprises" touched on by the report and the resolution in their judgment of validity (see Section V). Therefore, considerable number of issues remain to be addressed about the interpretation of Article 18 (LUA).

For a detailed analysis, see Yota Yamamoto, "*Rōdō kumiai hō 18 jo no kaishaku ni tsuite: Reiwa 3 nen 9 gatsu 22 nichi kōsei rōdō daijin kettei to no igi to kadai*" [The interpretation of Article 18 of the Labor Union Act: The significance and issues of the decision, etc. of the Minister of Health, Labour and Welfare on September 22, 2021], *Quarterly Labor Law* 227 (Summer 2022): 14–30.

YAMAMOTO Yota
Doctor of Law. Senior Researcher, The Japan Institute for Labour Policy and Training. Research interest: Labor law.
https://www.jil.go.jp/english/profile/yamamoto.html

The Illegality of Differences in Labor Conditions between Regular Workers and Non-regular (Fixed-term Contract) Workers

The Japan Post Case

Tokyo District Court (Sept.14, 2017) 1164 *Rohan* 5

Ryo Hosokawa

Facts

The plaintiffs, X et al., were employed by Y, a company currently known as Japan Post, as non-regular workers on hourly wages, under fixed-term labor contracts that were repeatedly renewed.

Non-regular workers on hourly wages engage only in specific routine tasks and are not given managerial duties. There are limitations on the scope of their assigned duties, potential personnel reassignments, and other such elements of their employment, meaning for instance that they are generally not transferred to different positions and are not scheduled for promotion to a higher position or rank. Based on the agreements concluded at the time each of them was hired, some may work part-time hours or only between certain times.

The personnel system changed and new work regulations applied to regular workers on April 1, 2014. Regular workers employed as non-career-track workers before the new system was introduced (hereafter "former non-career-track workers") were expected to engage in a wider range of duties and might have been transferred inside or outside of a certain post office. It was also assumed that they would have been promoted to managerial positions and be expected to take on greater roles or responsibilities.

The non-career-track workers employed under the new system ("new non-career-track workers") engage in general work duties such as counter service, and are not expected to be given managerial duties, but may be subject to personnel transfers within a scope that does not require them to relocate their place of residence. There are no prospects for them to be promoted to a higher position or rank within the same course of employment.

X asserted that the fact that non-regular workers on hourly wages were not granted (i) allowances for outside duty, (ii) allowances for work during the New Year's holiday period, (iii) early morning shift allowance, (iv) special pay for work on public holidays, (v) summer and year-end bonuses, (vi) housing allowances, (vii) summer and winter vacation leave, (viii) sick leave, (ix) special allowances for work conducted at night, and (x) performance-based allowance for external or internal postal service duties, was a violation of Article 20 of the Labor Contracts Act (LCA), which prohibits unreasonable differences in labor conditions between workers with contracts that do not specify a term of employment ("open-ended contract workers") and workers with contracts that do specify a term of employment ("fixed-term contract workers"). X therefore filed an action calling for confirmation that the work rules provisions being applied to regular workers also apply to them. As a primary claim, the action called for the payment of the equivalent amount of allowances based on the labor contract, and for the secondary claim, for the payment of damages in tort under Article 709 of the Civil Code.

Judgement

The plaintiffs' claims were partially accepted and partially rejected. The judgement is summarized

below.

(1)

(a) Differences in labor conditions between fixed-term contract workers and open-ended contract workers constitute a violation of Article 20 of LCA only when they result from factors relating to whether a term of employment is fixed.

(b) When it is not possible to clearly determine the differences in labor conditions to be unreasonable, said differences are not a violation of Article 20 of LCA.

(c) When assessing whether differences in labor conditions are unreasonable, decisions are made on the basis of consideration of the following three factors as a whole: (i) job content, (ii) the scope within which the job content and assigned position can be changed, and (iii) any other factors. Article 20 of LCA permits a certain extent of difference in wage systems between fixed-term contract workers and open-ended contract workers. While the defendant claims that it is inappropriate to consider each difference in labor conditions individually to determine whether the difference is unreasonable or not, this criticism is not justifiable.

(2)

(a) The regular workers whose labor conditions should be compared with those of X (fixed-term contract workers), are the new non-career-track workers under the new personnel system, and the former non-career-track workers under the former personnel system.

(b) Focusing on job content, there is a significant difference between the former non-career-track workers and the fixed-term contract workers on hourly wages in terms of the content of the work they engage in and the level of responsibility involved in said work. On the other hand, between the new non-career-track workers and fixed-term contract workers, there are some commonalities with regard to their possibilities for promotions to higher positions or ranks, and a certain level of difference in terms of factors such as their working hours and the content of the duties they are expected to take on.

(c) With regard to the scope of changes in job content and assigned position, there is a significant difference between former non-career-track workers and fixed-term contract workers on hourly wages, and also a certain level of difference between new non-career-track workers and fixed-term contract workers.

(3)

(a) The differences regarding the payment of allowances for outside duty, summer and year-end bonuses, and performance-based allowance for external or internal postal service duties are not unreasonable, given overall consideration of the following grounds: the fact that these differences originates from the differences in the wage structures between regular and fixed-term contract workers, the fact that there are significant or certain differences between the two types of workers in terms of their job content and other such factors, the fact that it is to some extent reasonable for companies to adopt the personnel measure of establishing a wage system for regular workers based on the assumption of long-term employment, and the fact that there are benefits for fixed-term contract workers on hourly wages that may serve as a substitute for such measures.

(b) With regard to early morning shift allowance, special pay for work on public holidays, and special allowances for work conducted at night, in the event that a regular worker is assigned a certain work shift, such allowances should be paid to ensure equitable treatment for the said regular worker when compared with another regular worker who was not assigned the shift. Given that fixed-term contract workers on hourly wages have their work times specified from the outset, and receive overtime pay and other such payments, it is not unreasonable for these allowances not to be paid.

(c) Allowances for work during the New Year's holiday period are fixed amounts paid in addition to base pay as compensation for work during the New Year's holiday period. There are no reasonable grounds for only regular workers who are employed on the assumption of long-term employment to be paid this special allowance while no allowance at all is paid to fixed-term contract workers on hourly wages, despite the fact that they also worked during the busiest period of the year.

(d) As the New Year's holiday period is the busiest of the year for both regular workers and fixed-term contract workers on hourly wages alike, there are no reasonable grounds for the fact that only fixed-term contract workers are not granted summer or winter vacation leave at all.

(e) Given that both new non-career-track workers and non-regular workers on hourly wages are not scheduled to be subject to personnel reassignments that require them to relocate their place of residence, there are no reasonable grounds for the fact that a housing allowance is paid only to the former, but not paid at all to the latter.

(f) Where fixed-term contract workers on hourly wages have had their contract renewed multiple times and therefore been in continuous employment with the employer for a lengthy period, there are no reasonable grounds for them not to be granted any paid sick leave.

(4)

(a) Labor conditions set out in violation of Article 20 of LCA are invalid, and cases that are judged to be a violation of said article constitute illegal conduct (Civil Code, Article 709). However, so-called supplementary effect is not admitted. In other words, it is not permitted to automatically replace the labor conditions of fixed-term contract workers with those of open-ended contract workers.

(b) While there is leeway to apply the work rules determining the labor conditions for open-ended contract workers to fixed-term contract workers through a reasonable interpretation of the work rules and other related regulations, given that company Y has set out separate work rules and other related regulations for regular workers and fixed-term contract workers respectively, it is not possible to apply the labor conditions of open-ended contract workers to fixed-term contract workers in this way.

(c) On the other hand, the differences with regard to the allowances for work during the New Year's holiday period, housing allowance, summer and winter vacation leave, and sick leave are violations of Article 20 of LCA, and the non-payment of these allowances to X constitutes illegal conduct.

(5)

(a) In the event that it is unreasonable for fixed-term contract workers to be subject to labor conditions that are not the same as those for open-ended contract workers, the employer should be expected to pay the total difference between the allowances and other such benefits as damages.

(b) In contrast, where fixed-term contract workers are granted no such allowances or other such benefits at all, or the difference in the quality or amount of the payments is unreasonable, it is extremely difficult to specifically determine the amount of allowances that should be paid. Therefore, for the allowances for work during the New Year's holiday period and housing allowance, a reasonable amount of damages shall be determined in line with Article 248 of the Code of Civil Procedure.*

*Article 248 of the Code of Civil Procedure stipulates that "If damage is found to have occurred, but, due to the nature of the damage, it is extremely difficult to prove the amount of damage that occurred, the court may reach a finding on the amount of damage that is reasonable, based on the entire import of oral arguments and the results of the examination of evidence."

Commentary

Under the typical employment system in Japan, employers provide regular workers (namely, workers hired directly by the employer on full-time, and open-ended contracts) with substantial employment security, and focus primarily on their internal labor markets by providing seniority-based wages and opportunities for personnel development within the organization. At the same time, unlike European countries, which have relatively strictly regulated the use of fixed-term contracts and other such atypical employment, Japan has not legally regulated the use of atypical employment. Atypical employment in Japan generally supported the long-term employment system as a buffer alleviating the impact of economic changes, largely through the employment of workers wishing to earn a wage to supplement existing household income, such as housewives or students in part-time jobs. However, from the late 1990s, there was an increase in both the number of workers in atypical employment and the proportion of workers in atypical employment whose

work is the sole source of household income. Since the 2000s, particularly following the onset of the 2008 financial crisis, atypical employment has come to be recognized as a key issue to be addressed when developing employment policy.

Prompted by the factors described above, amendments were made to LCA in 2012 to prescribe new rules regarding fixed-term labor contracts. One of those provisions is Article 20 of LCA, which was the point at issue in this case. Article 20 prohibits unreasonable differences in labor conditions due to the existence of a fixed-term. However, Article 20 does not strictly stipulate the principle known as "equal pay for equal work." That is, while it not necessary for the work of fixed-term contract workers to be the same as that of open-ended contract workers in order for Article 20 to be applied, on the other hand, even if both types of workers engage in the same work duties, there is no demand for them to immediately have the same labor conditions. It is simply the case that in the event that a difference in labor conditions between the two types of workers is judged to be unreasonable when reviewed in light of the factors for consideration listed in Article 20, said difference is illegal.

While there are no Supreme Court precedents regarding Article 20 of LCA, there has already been a succession of judgements in the lower courts. The main judicial precedents include:

A. The *Hamakyorex* case (Osaka High Court, July 26, 2016. Judgement: It was determined unreasonable that the employer was not paying fixed-term contract workers allowances such as commuting allowances, allowances for accident-free driving, and temporary leave allowances, which were paid to regular workers. In this case the fixed-term contract workers and regular workers both engaged in the same work as truck drivers, but were subject to different personnel management systems, covering elements such as the scope of potential job transfers and possibilities for promotion).

B. The *Nagasawa Unyu* case (Tokyo High Court, November 2, 2016. Judgement: While both regular workers and fixed-term contract workers reemployed after mandatory retirement age engaged in the same duties (transportation services), it was determined that it was not unreasonable for there to be a 20 percent difference in wages between the two types of workers).

C. The *Metro Commerce* case (Tokyo District Court, March 23, 2017. Judgement: The differences in labor conditions between typical regular workers and fixed-term contract workers working as kiosk sales staff in the subway were determined not to be unreasonable).

The key points of the Tokyo District Court's decision in the *Japan Post* case (September 14, 2017) are as follows.

(i) This judgement is significant in that it determined differences in labor conditions (namely, the allowances or leave granted) between regular workers and fixed-term contract workers (non-regular workers on hourly wages) who pursue different duties to be unreasonable. This differs from the aforementioned case A and case B, in which the actual job contents of the regular workers and the fixed-term contract workers were the same, and also differs from case C, in which it was ultimately concluded that the differences in labor conditions were not unreasonable.

(ii) This judgement is significant in that it determined that when comparing the differences in job content and labor conditions of fixed-term contract workers with regular workers, the comparison was only made with the job content and labor conditions of (new and former) non-career-track workers—that is, those regular workers employed by Y who are closer in position to non-regular workers (fixed-term contract workers)—as opposed to regular workers in general. This differs from case C, in which the labor conditions of fixed-term contract workers were compared with those of regular workers in general, consequently emphasizing the differences in job content and resulting in hardly any relief measures being approved at all. Regarding the type of workers that should be used as comparison, Article 20 of LCA does not stipulate any provisions. Since it is unclear on what grounds the court selected (new and former) non-career-track workers as the subject

for comparison, this will continue to be a point of contention in the future.

(iii) This judgement is in line with the overall trend in judicial precedents in regards to the following points. First, with regard to the differences in labor conditions, it was determined that when considering whether the differences in the labor conditions are unreasonable, the differences should each be addressed separately, rather than as a whole. Second, it determined that employers are not necessarily expected to provide proof that differences in labor conditions are reasonable, and in cases where it is not possible to determine differences to be unreasonable, said differences in labor conditions are not in violation of Article 20 of LCA (however, this is a point of contention in academic theories).

(iv) This judgement determined that it is to some extent permitted to establish differences in wage systems between regular workers employed on the assumption of long-term employment and fixed-term contract workers employed on the assumption of short-term employment, and for there to be differences in labor conditions as a result of such wage systems. This approach seems to have been adopted to account for the distinctive characteristics of the Japanese employment system.

(v) In this judgement, the decision is in line with previous judicial precedents and the general trend in academic theory, in that it is a violation of Article 20 of LCA for there to be significant differences in the payment of certain allowances and other such benefits where there are no significant differences in the job content or other such factors related to the purpose of those allowances.

(vi) In this judgement, it was determined that where there is a violation of Article 20 of LCA, the labor conditions of regular workers cannot automatically be substituted for the labor conditions of fixed-term contract workers. While there are some arguments against this, this is in line with many academic theories and previous judicial precedents. Moreover, it determined that when calculating the damages on the grounds of illegal conduct (Civil Code, Article 709), it is necessary to determine a reasonable amount of damages on the basis of Article 248 of the Code of Civil Procedure. As mentioned above, Article 20 of LCA prohibits unreasonable differences, rather than strictly prescribing the principle of equal pay for equal work. Namely, as Article 20 permits a certain level of difference, it is difficult to determine an amount of damages based on illegal conduct. This appears to be why it was decided that damages would be determined at the discretion of the court under Article 248 of the Code of Civil Procedure.

As of June 1, 2018, after completion of this article, the Supreme Court made a decision in the aforementioned *Nagasawa Unyu* case (Tokyo High Court, November 2, 2016). The detail of the case will be covered in October 2018 issue.

AUTHOR

Ryo Hosokawa Vice Senior Researcher, The Japan Institute for Labour Policy and Training (JILPT). Research interest: Labor Law. Profile: http://www.jil.go.jp/english/profile/hosokawa.html

The Leakage of Trade Secrets (Customer Data) by the Employees of Contractors

The *Benesse Corporation Customer Data Leakage* Case (Criminal Case)

Tokyo High Court (Mar. 21, 2017) 1180 *Rodo Hanrei* 123

Hirokuni Ikezoe

Facts

This was a criminal case in which the defendant was an employee of a subcontractor, Company K, the end company in a chain of contractors engaged to develop an information system for a project that had been outsourced to Company B by Company A (Benesse Corporation), which were both non-parties to the litigation. The defendant violated the Unfair Competition Prevention Act (UCPA) by downloading around 30 million pieces of customer information—namely, the trade secrets (*eigyō himitsu*) of Company A—and disclosing and selling around 10 million of those pieces to a list broker for the purpose of wrongful gain. The key points at issue were as follows: (i) *himitsu kanri sei*—whether the customer information in question was managed properly as secret, and (ii) whether the defendant was under *eigyō himitsu hoji gimu*—the obligation to maintain confidentiality of the trade secrets.

In the first instance (Tokyo District Court Tachikawa Branch [Mar. 29, 2016] 1180 *Rohan* 133), the court recognized the claims that said customer information was managed as secret and that the defendant was obliged to maintain the confidentiality of the trade secrets, and the defendant was sentenced to three and a half years' penal servitude and a fine of three million yen (approximately US$27,500). Here we will look at the High Court case that was brought by the defendant to appeal said judgment.

Judgment

The High Court reversed the judgment of the District Court and issued its own judgment. The defendant was sentenced to two and a half years' penal servitude and a fine of three million yen (namely, the High Court set a one-year shorter jail term than that set by the District Court).[1]

(1) Customer information and whether it is properly managed as secret

According to the essence of the requirements of UCPA Article 2, Paragraph 6[2] that requires proper management as secret, trade secrets to be protected must be distinct from other information. Without a clear distinction between them, it will be difficult for the people who come into contact with business owners' information to judge whether they are permitted to use said information, thereby potentially hindering the effective use of information. In order for such information to be classed as managed secret, it is not sufficient for the owner to have a subjective will to keep the information secret. It is important that it is sufficiently possible for the people who access said information to recognize that the information is a secret. The owner therefore needs to be taking the reasonable efforts to manage said information, such as placing restrictions upon who can access said information.

In the first instance, the judgment appears to have set the following factors for the information in question to be managed as secret: (i) that it is possible for people who access the information in question to objectively recognize that the information should be kept secret, and (ii) that the reasonable efforts required to protect the secrecy of said information are being taken, such as limiting who has access to the information or other such methods.

However, according to the essence of the UCPA, it is primarily the first of these two points—namely, (i) that the people who access the information objectively recognize it as secret—that is important, and, while the (ii) is a key for determining whether the information is "managed as secret," it is not acceptable to isolate it from (i). In this case, even though the restrictions on access to customer information and other such measures were unsatisfactory, such that the highly-advanced information management measures expected of a major company had not been established or implemented, the requirements for the information to be classed as managed secret were fulfilled on the whole, provided that the people who accessed said information were able to recognize it as a secret.

Company B, the contractor to which the work was directly entrusted, provides information security training for all employees each year. All employees are also required to confirm that they have attended the training by submitting a form, in which it is specified that it is prohibited to wrongfully disclose personal or classified information. They were also expected to submit a consent form in which they commit to maintain the secrecy of personal and secret information. Moreover, it could also be said that, based on the content and purpose of the system, the information within it, and others, it was easy to recognize that the relevant customer information, which was accumulated in the aforementioned database, was important for the sales and marketing strategies utilized in the business activities of Company A, the company that initially ordered the work, and that said information must remain classified. In this case, the requirements for the information to be classed as managed secret had been fulfilled.

(2) The obligation to maintain confidentiality of trade secrets

The defendant had submitted a written pledge to his employer, Company K, in which he pledged not to take classified information out of the company without the company's permission. He was also under the obligation to maintain the confidentiality of the classified information he acquired in the course of his work as prescribed for all employees under the work rules of Company K. Moreover, the outsourcing agreements exchanged between each company also included clauses regarding the confidentiality of classified information. It can therefore be suggested that the classified information that the defendant was handling as part of his work for the primary contractor Company B was also covered under the confidentiality obligations that he held to Company K. However, this does not mean that the defendant was therefore automatically a party to the contract such that he was under obligation to Company B to maintain the confidentiality of the relevant customer information.

At the same time, it must also be noted that in this case the chain of outsourcing consisted of four stages—that is, work was outsourced from Company A to Company B, from Company B to Company O, from Company O to Company Q, and from Company Q to Company K. The outsourcing agreements between Company B and Company O, Company O and Company Q, and Company Q and Company K each fall under what is known as "disguised contracting" (*gisō ukeoi*, where an employer directly supervises and instructs a worker as they would a dispatched worker, while treating them as a subcontractor, in order to avoid administrative responsibility for them). As the defendant was working under direction and orders from Company B, he is recognized as a dispatched worker under Article 2, Item 2, of the Worker Dispatching Act (WDA).[3] Under the application by analogy of Article 40-6, Paragraph 1, Item 1 of the WDA[4] (this clause was not yet in effect when this incident occurred, but its essence can be considered valid even at that time) a direct employment contract is considered to have been formed between the defendant and Company B, and it can be understood that, according to Article 24-4 of the WDA,[5] the defendant was under the obligation not to disclose to other people any classified information handled over the course of his work.

This therefore meant that as the defendant had submitted to Company B a consent form pledging not to wrongfully disclose to persons outside of the company any classified information acquired in his

work for Company B, the consent form is a valid confidentiality agreement with Company B and the defendant was under an obligation to Company B to protect the classified information acquired in the course of his work. Given that the customer information in this case was classed as classified information under Company B's internal regulations, and that people who came into contact with it were easily able to recognize it as classified information, the defendant is deemed to have had an obligation to Company B to maintain the confidentiality of the relevant customer information.

Commentary

(1) Significance and features of the judgment

This is a precedent of a criminal case that garnered public attention because the leakage involved such a massive data of trade secrets in the form of customer information. In this case, the penal provisions under the UCPA (the cumulative imposition of penal servitude and a fine) were also approved by the High Court, and it can be considered a significant precedent for similar cases (this is thought to be the first case in which the High Court recognized the application of criminal penalties under the UCPA). Moreover, it is surely socially significant as it may serve as a deterrent against similar behavior.

The High Court judgment is also distinctive in the way in which it adopted a slightly different approach to determining whether the information was managed as a secret—which is one of the UCPA's requirements prescribed as trade secret[6]—to that which is typically used in judgments.

From the perspective of labor law, this judgment is also significant in the way in which an interpretation and application of the WDA was adopted to present a legal construction to ensure that workers not under direct employment fulfil their contractual obligation to maintain trade secrets.

(2) The requirements for "trade secret": whether it is managed as secret to be confidential

According to the judgment, the important factor in determining whether the information is being managed as secret, is not only the subjective will of the trade secret owner to keep them secret, but also the possibility for the people who come into contact with the trade secrets to objectively recognize them as such. In addition, the high court regards the imposition of access restrictions and other such reasonable efforts for implementing the safeguards as not a requirement, but one of factors in determining whether information can be objectively recognized as secret.

In the conventional scholarly and administrative interpretations, it is understood that for information to be managed as trade secret, it needs to fulfil the two requirements—"the information in question is objectively recognized as being trade secret" and "steps are being taken to restrict access to it."[7] In this case, some part of the judgment in the first instance could have shared this interpretation. However, the high court judgment clearly rejects this understanding. That is the distinctive feature of this judgment.

Moreover, among the precedents up until now,[8] there have been cases in which the protection of trade secrets was denied due to the strict requirements applied in determining whether the information was being treated as secret. Such strict interpretation of managed secret was thought necessary to prevent disputes regarding trade secrets and to clarify the scope of criminal liability responding to the amendments to the UCPA.[9]

However, it has been questioned whether a strict requirements for being managed as secret is in accordance with the purpose of the UCPA, and such requirement could result in excessive burdens, particularly for small and medium-sized companies in practice.[10] There were therefore calls to include the relative standard of whether the people contacting with the trade secrets are able to objectively recognize it as such. Analysis also suggests that, as if in response to this opinion, courts have tended toward a lenient (flexible) judgment of whether information is being managed as secret around the last 12 years.[11] This judgment also appears to have entailed a more flexible framework for determining information being managed as secret. More specifically, in this

judgment, this can be seen from the way in which it explores whether the reasonable efforts were adopted to manage trade secret (the fact that it does not demand advanced and rigid management methods) and, while there are typically two factors—namely, that access to the information was restricted and that the information could be objectively recognized as information to be kept—it currently, emphasizes the latter and makes a judgment of the circumstances "as a whole." This judgment can be seen to have adopted the same mode of thinking as that of judicial precedents and theories in recent years. The current official interpretation is considered to tend toward that of the case described above and other such judicial precedents and theories of scholars.[12]

And yet, it remains controversial whether the kind of approach adopted in this ruling is suitable for the practical application of the law. Indeed, as stated in the judgment, restricting access to information is not so much a factor that can be treated independently, as it is one important factor for determining whether information is managed secret. However, it is not unquestionable that the issue may in practicality be difficult to determine whether information is managed "on the whole," as it was in this judgment. Trade secrets are extremely important information that forms the core of business administration. Therefore, while the possibility for the person who came into contact with the trade secrets to objectively recognize it as such is important in legally determining whether information is being managed as secret, efforts need to be made to understand how the extent to which the information is "on the whole" being managed as secret that depending on the characteristics and the scale (of the eventual disclosure or leak) of said secret information, and the business owner's financial power to whom the trade secrets belong, while also taking note of further judicial precedents in the future.

(3) The legal construction regarding the obligation to protect trade secrets

Under the provisions set out by labor laws, it is understood that the obligation to protect trade secrets is imposed on workers in accordance with the good faith and fair dealing principles that are incidental to the existing contractual relationship.[13] Previous labor lawsuits regarding violation of the obligation to maintain the confidentiality of trade secrets have focused on the company taking measures against the worker, such as requests for the payment of damages, injunctions, disciplinary action, dismissal, or restriction on the payment of retirement allowances.[14] On the other hand, the UCPA notes trade secrets as one of the interests protected by law, and prescribes remedies[15] for victims of infringements upon the confidentiality of their trade secrets and penal provisions[16] to be imposed upon the perpetrator. In violation of trade secrets under the UCPA, the civil remedies do not—unlike the typical concept adopted in labor law—focus on the obligation to maintain confidentiality as set out in the contractual relationship.[17] However, in criminal cases such as this one, in prescribing the penal provisions—the point which caused an issue here—it is necessary for the perpetrator to have been found to have "breached their duties of management."[18] These "duties of management" are interpreted as "the duties to protect confidentiality typically imposed in a contract, and the duties to protect confidentiality individually imposed through confidentiality agreements and other such contracts."[19] Thus, his duty to protect the confidentiality of trade secrets is itself not a concept that originated in the UCPA, but one that has its roots in the contractual relationship. Therefore, in criminal cases such as this, it is necessary to recognize and construct a contractual relationship between the defendant and Company B, which was contracted to conduct the work for Company A, under which the defendant is subject to the obligation to protect trade secrets.

According to the court's fact finding in this case, the multi-layered outsourcing over a chain of companies, and each outsourcing relationship should be deemed a worker dispatching relationship, as these were cases of disguised contracting. Therefore, by applying the provisions of the WDA, it is possible to construct a direct contractual relationship between Company B, the company to which A had initially outsourced the work, and the defendant, an

employee of the end subcontractor in the chain of the contractors to which the work was outsourced. Such a logical construction seems to be the unique feature of this case.

Work that entails handling trade secrets in the form of electronic information is, as in this case, often conducted as part of multi-layered outsourcing among the information and communications industry, rather than within a direct employment relationship. With this in mind, even in labor relations-focused civil cases that address dispatched labor (disguised contracting) and outsourcing relationships, it is possible that the kind of logical construction adopted in this judgment may be applied in order to recognize that the worker who ultimately engages in the work is under the obligation to maintain confidentiality. In this sense, this case alerts us to the existence of issues that stretch beyond the realms of conventional labor law and to the importance of collaboration and cooperation between the labor laws intended to respond to such circumstances and the related study of the law. In a broader perspective, focusing on the judgment in this case, we could learn measures need to be taken against the wrongful disclosure of companies' important trade secrets.[20]

1. The High Court reduced the sentence on the grounds (i) that in the outsourcing relationship referred to in this case confidential information was being managed extremely inappropriately, as indicated by the fact that the subcontractor's employees—namely, people whose backgrounds, etc. are unknown—were permitted access to said customer information (that is, important trade secrets that form a fundamental component of the business) and (ii) that it was partially due to the approach of Company B, the company to which the project was initially outsourced, that the database's alert system was not functioning at all, in turn allowing the defendant's behavior to go unchecked for around one year and the damage to grow.

2. UCPA, Article 2, Paragraph 6: "The term 'Trade Secret' as used in this Act means technical or business information useful for business activities, such as manufacturing or marketing methods, that are kept secret and that are not publicly known."

3. WDA, Article 2, Item 2: " 'Dispatched Worker' means a worker, employed by an employer, who becomes the object of Worker Dispatching."

4. WDA, Article 40-6, Paragraph 1, Item 1: "In the event that the person(s) receiving the provision of Worker Dispatching services undertake one of acts described in the following items, the person(s) receiving said provision of Worker Dispatching services are at that time deemed to have made the Dispatched Worker who engages in the dispatched work the offer of a labor contract with the same labor conditions as the labor conditions pertaining to said Dispatched Worker at that time, with the proviso that this does not apply when the person(s) receiving the provision of Worker Dispatching services are unaware, without negligence, that their behavior falls under any of the acts listed in the following items.

Items 2-4 (omitted)

Item 5: When a person receives the provision of Worker Dispatching services under the title of contracting or other such title other than worker dispatching and without prescribing the provisions set out in the items of Article 26, Paragraph 1 (Author's note: Provisions related to the content of the worker dispatching contract), with the intention of avoiding the application of this act or the provisions of the act applied under the provisions of the following clause."

5. WDA, Article 24-4: "A dispatching business operator, as well as his/her agent, employee or other worker, shall not disclose to another person a secret learned with regard to a matter he/she handled in the course of business, unless there are justifiable grounds. The same shall apply to any person who ceased to be a dispatching business operator or his/her agent, employee or other worker."

6. In addition to the requirement for information to be managed as secret (*himitsu kanri-sei*), the requirements that are to be fulfilled for information to be "trade secrets" are that the information is useful (*yūyō-sei*) and is not publicly known (*hikōchi-sei*). UCPA, *supra* note 2.

7. Yoshiyuki Tamura, "Eigyō himitsu no fusei kōi riyō wo meguru saibanrei no dōkō to hōteki na kadai" [Trends in court decisions and legal issues surrounding improper use of trade secrets], *Patent* 66, no.6 (April 2013): 82; Kazuko Takizawa, "Himitsu kanri sei to eigyo himitsu kanri" [Confidentiality requirements for a trade secret and its management], *Waseda Bulletin of International Management* no.46 (2015): 53.

8. For more on the analysis of judicial precedents, see Emi Tsubata, "Eigyō himitsu ni okeru himitsu kanrisei yōken" [Reasonable efforts to maintain secrecy in Trade Secret Law], *Intellectual property law and policy journal* 14 (2007): 191; Takeshi Kondo, "Himitsu kanrisei yōken ni kansuru saiban rei kenkyu" [Swinging back of court decisions about trade secrets], *Intellectual property law and policy journal* 25 (2009): 159; Wataru Sueyoshi, "Eigyo Himitsu" [Trade Secrets in Japan], *The University of Tokyo Law Review* 9 (Oct. 2014): 157.

9. Kondo, *supra* note 8, 201.

10. Tsubata, *supra* note 8, 213; Kondo, *supra* note 8, 201.

11. Takizawa, *supra* note 7, 53; Sueyoshi, *supra* note 8, 165.

12. "Eigyō himitsu kanri shishin" [Guidelines on the management of trade secrets], Ministry of Economy, Trade and Industry, last modified January 23, 2019, https://www.meti.go.jp/policy/economy/chizai/chiteki/guideline/h31ts.pdf.

13. Takashi Araki, *Rodo ho* [Labor and employment law] 3rd ed. (Tokyo: Yuhikaku, 2016), 279.

14. Araki, *supra* note 13.

15. UCPA Article 3, Paragraph 1 (Right to Claim for an Injunction): "A person whose business interests have been infringed on or are likely to be infringed on due to Unfair Competition may make a claim to suspend or prevent that infringement, against the person that infringed or is likely to

infringe on the business interests."

UCPA Article 4 (Damages): "A person who intentionally or negligently infringes on the business interests of another person through Unfair Competition is held liable to compensate damages resulting therefrom"

16. The penal provisions that were an issue in this case are those set out in Article 21, Paragraph 1, Items 3 and 4.

Article 21, Paragraph 1, main clause: "A person who falls under any of the following items will be punished by imprisonment with required labor for not more than ten years, a fine of not more than twenty million yen, or both."

Item 3: "[A] person to whom the Owner of Trade Secrets has disclosed a Trade Secret, and who, for the purpose of wrongful gain or causing damage to the Owner, obtains a Trade Secret by any of the following means (Author's note: omitted), in breach of the legal duties regarding the management of the Trade Secret"

Item 4: "[A] person to whom the Owner of Trade Secrets has disclosed the Trade Secret and who, for the purpose of wrongful gain or causing damage to the Owner, uses or discloses Trade Secrets obtained through the means set forth in the preceding item (Author's note: omitted), in breach of the legal duty regarding the management of the Trade Secret"

17. Protection, remedy, and sanctions regarding trade secrets that do not fall under the classification of trade secrets under the UCPA are therefore dealt with as a contractual issue. Moreover, as long as the information is classed as a trade secret under the UCPA, even after the worker has left their employment, he or she is prohibited from using or disclosing the trade secrets without forming a special contract with their employer for the purpose of wrongful gain, etc.

18. *See supra* note 16.

19. Hirokazu Aoyama, *Fusei kyoso boshi ho* [Unfair Competition Prevention Law] 5th ed. (Tokyo: Hougakushoin, 2008), 231.

20. This judgment is also covered in a commentary by Keiichiro Hamaguchi in "Gisō ukeoi deatta SE no kokyaku jōhō rōei to fusei kyōsō bōshi hō ihan no umu" [The leakage of customer information by a system engineer hired under a disguised contracting arrangement and whether it constituted a violation of the UCPA] *Jurist*, no. 1528 (2019):119. Hamaguchi explores the judgment from a different perspective from the author.

The *Benesse Corporation Customer Data Leakage* Case (Tokyo High Court, Mar. 21, 2017), 70-1 *judgments* 10. http://www.courts.go.jp/app/files/hanrei_jp/028/087028_hanrei.pdf. See also 1180 *Rodo Hanrei* pp. 123–147.

AUTHOR

Hirokuni Ikezoe Senior Researcher specialized in Labor and Employment Law, The Japan Institute for Labour Policy and Training (JILPT). Research interests: Working time, Work-life balance / conflict, Diversification of labor market, Legal concept of employee, and Labor / employment dispute resolution. Profile: https://www.jil.go.jp/english/profile/ikezoe.html

The Worker Status of a Theater Troupe Member

The *Air Studio* Case
Tokyo High Court (Sept. 3, 2020) 1236 *Rodo Hanrei* 35

HAMAGUCHI Keiichiro

I. Facts

Y is a stock corporation (*kabushiki gaisha*) that engages in theater production, audiovisual production, management of entertainers, studio management, and restaurant management. Y1, a theater troupe run by Y, has theaters at two locations in Tokyo, where it gives performances almost weekly, in addition to an annual performance at a theater not belonging to the troupe.

X joined Y1 in December 2008 on a provisional basis, and later became a troupe member upon signing a contract to join the company in August 2009. As a troupe member, X appeared in productions and participated in rehearsals for said productions, and, in addition, engaged in backstage work in areas such as stage setting, props, sound, and lighting. X initially received no salary at all, but from around 2013 onward, Y began to pay X and other troupe members 60,000 yen per month. Each troupe member also received a form of commission, determined according to the number of tickets sold, for each production in which they appeared (same amount for each performer; around 20,000 yen per production). X also received a wage for working at a café operated by Y.

X left Y1 in May 2016 and filed a suit in 2017 seeking payment of unpaid wages for duties such as backstage work and performance in productions and rehearsals, among other claims. On September 4, 2019, the Tokyo District Court passed a judgment partially in favor of X, whereby X's eligibility to be classed as a worker, or "worker status" (*rōdōshasei*), was recognized for the backstage work, but rejected for performance in productions, and Y was ordered to pay the unpaid wages for the backstage work only.

Both X and Y responded by filing an appeal to the Tokyo High Court. X asserted his worker status concerning performance in productions as well (that is, in addition to his worker status about the backstage work), while Y asserted that working backstage should not qualify for worker status either (namely, just as performance in productions had been determined ineligible for worker status).

II. Judgment

Unlike the Tokyo District Court judgment, the Tokyo High Court, on September 3, 2020, recognized worker status not only concerning the backstage work but also concerning the performance in productions and rehearsals.

The Tokyo District Court had determined that due to the fact that "appearing in productions is optional, and X was therefore able to refuse," "it cannot be said that X was providing labor in the form of appearing in productions under Y's direction," and "the payment of money as a ticket sales commission is a remuneration for the performer's ability to attract an audience and not a

compensation for the provision of labor in the form of performing."

In contrast, the Tokyo High Court recognized that while "X was able to refuse to appear in a Y1's production, and it cannot be inferred that any disadvantage would have been incurred as a result of refusing," "as troupe members become troupe members because they wish to appear in productions, they would typically be unlikely to refuse to perform, and, even if they were to refuse, it would be in order to allow them to engage in other duties for Y." As "such troupe members had to prioritize performing the work assigned to them by Y1 and Y, and were therefore effectively under the direction of Y, they are not considered to have been able to refuse." The judgment went on to state that "even if there were cases in which rehearsals were carried out at a location other than the theaters stated in this case, rehearsals themselves are, as a matter of course, conducted under Y1's direction, and therefore, even if the appearance in a production itself was optional, appearing and acting in the production falls under the direction of Y1." The court therefore concluded that "among X's duties at Y1, the work related to stage setting, props, sound and lighting (backstage work), appearing and acting in productions, and rehearsing, among other duties (excluding, however, participation in "end of run" parties and other such social events) can also be considered the provision of labor by X at specified times and locations under direction from Y1, namely, labor for which X was receiving a certain amount of wages. Therefore, it determined that X was employed by Y and thereby falls under the definition of a worker who is paid wages (as set out in Article 9 of the Labor Standards Act)."

III. Commentary

This judgment was a great shock to the Japanese theatrical world, which relies on the support of unpaid work by troupe members on the assumption that said members are not classed as workers. While the Tokyo District Court decision, and its recognition of worker status for the backstage activities, was itself a disquieting development for many theater companies utilizing troupe members as a source of unpaid labor, this Tokyo High Court judgment, and its recognition of worker status even for appearing in productions and attending rehearsals—the very fundaments of theatrical activity—delivered an extremely significant blow.

Looking first at the issue of the worker status for backstage work—which the Tokyo District Court had already recognized—stage and prop setting, sound, lighting, and other such work for entertainment activity of a certain scale would typically be the responsibility of a specialist worker, and the recognition of worker status would be no issue. In this case, in addition to appearing in productions, participating in rehearsals, and engaging in backstage work, X was working at Y's café, and, as Y recognized X's worker status for said work at the café, it is clear that the same person can engage in work for which they have worker status and work for which they do not have worker status at the same corporation.

It has, however, been noted that small theater troupes in Japan are barely capable of financially sustaining themselves as business operations and are just about keeping themselves afloat by troupe members' efforts to sell tickets to friends and family. Therefore, it is seemingly typical for the backstage work that would normally be conducted by specialist workers to be carried out by troupe members free of charge. A factor behind this is the lack of perception of theatrical performance (in contrast to other entertainment) as commercial enterprise, and there also appears to be a tendency to see theatrical performance as artistic endeavors where no thought is given to the pursuit of commercial success. For such theatrical productions by students or other non-professionals performing as a hobby, it is no doubt normal for troupe members to take care of the backstage work by themselves. However, an enterprise such as Y, a stock corporation operating various businesses, can hardly suggest that its theatrical activities are not commercial enterprise. If Y also employed and paid workers from external sources to engage in backstage work when said work was too much for

the troupe members alone, it stands to reason that when the troupe members carry out the same work, they should be recognized as workers.

This judgment, which addressed this issue by recognizing worker status for appearing in productions and participating in rehearsals, is expected to have extremely far-reaching consequences. It is particularly important to note that the logic behind this recognition of worker status is based on the conclusion that troupe members are effectively unable to do so, despite officially being able to refuse to appear in productions, because "troupe members become troupe members because they wish to appear in productions." The typically adopted logic is that even a person who is officially able to refuse orders does not have that freedom in practice if they are under some form of tangible or intangible pressure from the other party (the theater troupe). In addition to this typical logic, this judgment adopts the somewhat peculiar conclusion that the troupe member himself was unable to refuse due to his own psychological mechanism of "not wanting to refuse." This is, however, highly disputable, as it seems to render this criterion for worker status (the lack of freedom to refuse orders) an empty concept.

This judgment also states that the presumption that a performer will arrange his or her replacement when they cease to appear in productions is the distinguishing factor that such performing is work conducted under an employer's direction. However, this logic is reversed; in the first place, if the person could hire another person to conduct his or her work, this indicates that the person is not under a direction and supervision of an employer (*Labor Standards Act Study Group Report*, 1985[1]). On this basis, it is necessary to object to this judgment recognizing worker status—as such status is defined under the Labor Standards Act—for troupe members concerning productions and rehearsals.

This case deals with a claim for the payment of unpaid wages, which addresses the issue of worker status as defined in the Labor Standards Act. At the same time, there is another concept of worker status: worker status as defined under the Labor Union Act, which would appear to be more applicable for allowing recognition of worker status in this case. That is, it can be suggested that the troupe members were retained by Y1 as a necessary or essential labor force for carrying out the organization's work, and the particulars of their contract were unilaterally determined. It is also possible to class the 20,000-yen ticket sales commission for each production as remuneration for the provision of labor (even if it is difficult to recognize it as wages for hours worked). Therefore, if X were to form or join a labor union and apply for collective bargaining to seek payment of appropriate remunerations for productions and rehearsals, there would surely be scope for recognizing his worker status under the Labor Union Act.

1. The Study Group on the Labor Standards Act, *Rodo kijunho kenkyukai hokoku: Rodo kijunho no 'rodosha' no handan kijun ni tsuite* [Labor Standards Act Study Group Report: The criteria for 'worker' in the Labor Standards Act] (Tokyo: Ministry of Labour, December 19, 1985). https://www.mhlw.go.jp/stf/shingi/2r9852000000xgbw-att/2r9852000000xgi8.pdf (available only in Japanese).

The *Air studio* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1236, pp. 35–62. See also *Journal of Labor* Cases (Rodo Kaihatsu Kenkyukai) no.106, January 2021, pp. 38–39 and *Jurist* (Yuhikaku) no.1554, February 2021, pp. 4–5.

HAMAGUCHI Keiichiro
Research Director General, The Japan Institute for Labour Policy and Training. Research interest: Labor policy.
https://www.jil.go.jp/english/profile/hamaguchi.html

Validity of Wage Rules Deducting an Amount Corresponding to Premium Wages in Calculating Percentage Pay

The Kokusai Motorcars Case

The Third Petty Bench of the Supreme Court (Feb. 28, 2017) 1152 *Rohan* 5

Hirokuni Ikezoe

Facts

In this case, 14 appellees including Appellee X (plaintiffs in the district court trial, appellees in the high court trial) who were employed by Appellant Y (defendant in the district court trial, appellant in the high court trial) and were working as taxi drivers, claimed that the stipulation in Y's wage rules that an amount corresponding to premium wage for overtime and night work would be deducted when calculating percentage pay was invalid, and that Y bore an obligation to pay an amount corresponding to the deducted premium, and thus demanded payment from Y.

In Y's wage rules, premium wage and commuting expenses are treated as costs subject to deduction when calculating percentage pay, which constitutes a part of the normal wage. The gross amount from which these expenses are deducted is called the "base amount." It is calculated by subtracting a fixed basic deduction from sales per shift for each of weekdays, Saturdays, and Sundays or public holidays, and multiplying the amount thus calculated by a fixed coefficient. The overtime and night work premiums (etc.) calculated severally using calculation formulae stipulated in Y's wage rules are deducted from this. The use of this procedure to calculate percentage pay leads to a situation in which, although the premiums for overtime and night work are initially calculated, the amount paid to drivers is the same whether they work overtime and night work or not, as long as the sales turnover is the same as the sum of the premium and commuting expenses (as the initially calculated premium is deducted from the calculation of percentage pay, the premium is consequently offset even if it is paid). Therefore, the premium wage is, in effect, not paid.

Both the district court and the high court ruled that Y's wage rules are a circumvention of the gist of Article 37 of the Labor Standards Act, obliging employers to pay premium wage, and are invalid as a violation of public order and morals, and therefore upheld the claim for unpaid wages.

Judgment

Loss of suit by Appellant in high court's judgment was reversed and remanded. The judgment is summarized below.

(1)(a) Article 37 of the Labor Standards Act only obliges employers to pay premium wage in an amount not less than the amount calculated using the method stipulated in said Article.

(1)(b) To judge whether an employer has paid the premium wage stipulated in said Article, it should first be considered whether or not the portion corresponding to wages for normal working hours can be distinguished from the portion corresponding to the premium wage stipulated in said Article. If they can be distinguished, it should then be considered whether or not the amount paid as a premium is less than the amount calculated using the method stipulated in said Article, taking the amount of the portion corresponding to wages for normal working hours as a basis.

(1)(c) On the other hand, since Article 37 of the Labor Standards Act does not provide for a method of determining wages for normal working hours in an employment contract, a rule stipulating that wages for normal working hours shall be calculated by

deducting an amount corresponding to the premium wage stipulated in said Article from an amount corresponding to a fixed ratio of sales turnover, etc., in an employment contract naturally cannot be deemed a circumvention of the gist of said Article or invalid as a violation of public order and morals.

(1)(d) The high court only judged that deducting an amount corresponding to the premium when calculating percentage pay is a circumvention of the gist of Article 37 of the Labor Standards Act and invalid as a violation of public order and morals. It did not judge whether or not, in Y's stipulation of its wage rules, the portion corresponding to wages for normal working hours can be distinguished from the portion corresponding to the premium wage stipulated in said Article, or, if it can be distinguished, whether the amount paid as a premium wage based on Y's wage rules is less than the amount calculated using the method stipulated in said Article. As such, the assertion that the claims of X et al. should be upheld is thus unlawful, based on the principle of inexhaustive review.

(2) Of overtime work, the high court made no distinction between portions corresponding to overtime work within statutory working hours and non-statutory holiday work, and portions other than these. However, Article 37 of the Labor Standards Act does not oblige employers to pay premium wage for overtime work within statutory working hours or non-statutory holiday work, and whether or not employers should pay premium wage for this kind of labor is entrusted to the employment contract. Of the overtime work performed by X et al., therefore, a distinction needs to be made between portions corresponding to statutory overtime work and non-statutory holiday work, and portions other than these.

(3) In view of the above, the portion of the high court's judgment relating to the loss of suit by the Appellants shall be reversed and remanded to the high court.

Commentary

Article 37 of the Labor Standards Act obliges employers to pay a premium of 25% of the normal wage for labor exceeding the statutory working hours of 8 hours per day and 40 hours per week, as well as for night work (work between the hours of 10 p.m. and 5 a.m.), and a premium of 35% of the normal wage for labor on statutory holidays (basically one calendar day per week) (Cabinet Order No.309 of June 7, 2000). These premium wages are generally paid in accordance with the hours actually worked, but in some professions, overtime work, night work and holiday work are treated as part of the job and premium wages are included in the normal wage. A fixed premium wage may already be included on the assumption of certain labor outside statutory working hours, regardless of actual hours worked. Such practices are called "fixed overtime pay system" and "fixed amount payment system." In the case of wage systems that incorporate a premium wage, the premium is paid together with the normal wage. This is deemed a violation of Article 37, in that it is impossible to distinguish whether the premium prescribed by Article 37 has been paid. In the case of the fixed overtime pay system and the fixed amount payment system, meanwhile, although the premium prescribed by Article 37 is paid separately from the normal wage and can be calculated, it is in violation of Article 37 unless the missing portion corresponding to actual hours worked beyond statutory working hours and others actually worked at night is paid in addition. In cases involving Article 37, these two types of violation are also seen besides simple non-payment of premium wages, and workers often file suits claiming unpaid wages in such cases.

In interpreting Article 37 of the Labor Standards Act, the Supreme Court has until now tended first to consider whether or not the premium wage portion can be distinguished from the normal wage portion. This enables it to judge whether or not the statutory premium wage has been paid as part of the overall wage (possibility of distinguishing). If the two can be distinguished, the Supreme Court has then judged whether or not the amount paid in the premium wage portion is less than an amount calculated using the method stipulated by law (appropriateness of the amount paid). Like existing Supreme Court precedents, the present judgment by the Supreme Court also focuses on the above two points (Judgment (1)(b)).

The first characteristic of this case is the special nature of the work of taxi drivers. Taxi drivers often exceed statutory working hours in a single shift, and

night work is often assumed. These hours qualify for payment of statutory wage premiums. On top of that, percentage pay constitutes a significant proportion of the overall wage. For this reason, taxi companies are inclined to suppress total wages, and sometimes set up a system of fixed overtime pay or fixed amount payment, or, as in this case, a very complicated wage system that could enable them, in effect, to avoid paying premium wages. Thus, the second characteristic of this case is that the very complex problem of whether statutory premium wages were effectively being paid or not has become a point of contention, given that the legal validity of the rule for calculating percentage pay (the portion that constitutes the majority of the normal wage) is brought into question. On this point, the Supreme Court, in (1)(b)(d) of the Judgment, follows existing precedent in raising the question of whether the premium wage portion can be distinguished from the normal wage portion when calculated in accordance with Y's wage rules.

The calculation formula used in Y's wage rules, brought into question in this case, was generally (basic pay[1] + service allowances[2]) + percentage pay (1) [base amount[3] — (night work, overtime and holiday allowances + commuting expenses)[4]] + percentage pay (2)[5]. As stated above, statutory overtime and night work are assumed to be part of the job for taxi drivers. Even if overtime and night work allowances were calculated under these rules, therefore, the amount would be offset by deducting the overtime and night work allowance from the calculation of percentage pay that forms the majority of the normal wage. As a result, the statutory premium wage might effectively go unpaid (although the base amount would have been calculated as a negative figure if total deductions had exceeded the base amount, the treatment in this case was rather that the premium at last started to be added from this point). In their understanding of this point, the district court and the high court judged Y's wage rules to be a circumvention of the gist of Article 37 of the Labor Standards Act and invalid as a violation of public order and morals. By contrast, the Supreme Court, in its interpretation of Article 37 of the Labor Standards Act, stated that the very fact that appropriate premium wages are paid in accordance with the law is the point (Judgment (1)(b)(d)). On the other hand, it judged that Y's wage rules naturally cannot be deemed a circumvention of the gist of said Article or invalid as a violation of public order and morals (Judgment 1(c)), since Article 37 of the Labor Standards Act does not include a specific provision on the manner of prescribing wages for normal working hours in an employment contract (wages including percentage pay, in this reviewer's understanding).

In this case, there are aspects of the Judgment that are difficult to understand, in that it differs from other similar cases because there are concurrent problems on the validity of a single wage rule – namely, that of calculating the percentage pay that constitutes the normal wage, and how to treat premium wages in the process of this calculation. One possible understanding is that (i) it is not clear whether the premium wage portion can be distinguished from the normal wage portion as a result of calculating the wage amount according to Y's wage rules, and therefore, while strictly calculating actual hours worked beyond statutory working hours and statutory holidays, it would need to be ascertained whether the premium wage portion can be distinguished from the normal wage portion, in line with Judgment (2); if it can be distinguished,

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1. **basic pay**: 12,500 yen per shift of 15 hours and 30 minutes.
2. **service allowances**: Allowance if working without driving; 1,000-1,200 yen per hour.
3. **base amount**: (Contractual shift takings — contractual shift basic deduction) x 0.53 + (Non-contractual shift takings — Non-contractual shift basic deduction) x 0.62). The basic deduction differs depending on whether contractual or non-contractual, and whether on weekdays, Saturdays or Sundays and holidays (generally 8,000-30,000 yen).
4. **allowances for night, overtime and holiday work**: The formula for calculating night, overtime and holiday allowances is the total of {(basic pay + service allowance) ÷ (days worked x 15.5 hours)} x 1.25 (*night work = 0.25, holiday work = 0.25 to 0.35) x overtime and other non-contractual hours, plus (base amount ÷ total working hours) x 0.25 (*of allowances, statutory holidays = 0.35) x overtime and other hours.
5. **percentage pay (2)**: Wage paid in lieu of a bonus.

it could therefore have been construed that Y's wage rules cannot be deemed illegal, although whether the premium was appropriate or not is a separate problem. Another understanding is that (ii) it could have been construed that the legal evaluation of Y's wage rules in reference to Article 37 of the Labor Standards Act is that the rules cannot be deemed invalid because they are a question of calculating the normal wage, since the Article is not concerned with the calculation of the normal wage. The understanding is that this would hold true even if the possibility of distinguishing the normal wage portion from the premium wage portion, and the problem of calculating and paying an appropriate premium wage amount were separate problems. In other words, the understanding is that the high court is stated to have somewhat misunderstood the problem. Of course, these two interpretations are not mutually exclusive, and it is also possible that the understanding in (i) above was adopted on the assumption of (ii) above (that is to say, it was judged that Y's wage rules could not be deemed invalid in two senses).

Further study is needed on the assessment and impact of this judgment, but in any case, the remanded-trial will surely give further scrutiny to the possibility of distinguishing between the normal wage portion and the premium wage portion, and whether or not premium wages were paid in appropriate amounts, as a result of using Y's wage rules, based on Judgment (2). This means that judgment will probably be passed on the validity of Y's wage rules. One awaits with interest the remanded-judgment of the high court.

AUTHOR

Hirokuni Ikezoe Senior Researcher specialized in Labor and Employment Law, The Japan Institute for Labour Policy and Training (JILPT). Research interests: Working time, Work-life balance/conflict, Diversification of labor market, Legal concept of employee, and Labor/employment dispute resolution. Profile: http://www.jil.go.jp/english/profile/ikezoe.html

Whether a Staff Position in an Automobile Manufacturer Shall Be Deemed "Supervisory or Managerial Employee" Status under the Labor Standards Act

The *Nissan Motor Co. Ltd. ("Supervisory or Managerial Employee" Status)* Case
Yokohama District Court (Mar. 26, 2019) 1208 *Rodo Hanrei* 46

YAMAMOTO Yota

I. Facts

1. Company Y is a stock company whose main line of business is the manufacturing and sales of automobiles. **X** entered into an indefinite-period labor contract and began working for Company Y on October 1, 2004.

2. **X** became a section chief in Company Y in April 2011, and was assigned to the Datsun Corporate Planning Department in April 2013, and to the Japan LCV Marketing Department in February 2016. Of these, **X** served as a manager in the Datsun Corporate Planning Department. The job duties of a manager included planning of items that its Program Directors (PD—department head) propose at the Product Decision Meetings (PDMs—meetings that decide investment amounts and return on investment for Company Y's new vehicle models) and attending those meetings. **X** also served as a marketing manager in the Japan LCV Marketing Department. The job duties of the marketing manager included drafting new marketing plans upon the approval by the marketing director (department head), and proposing those plans together with the marketing director at the Marketing Headquarters meetings (meetings that decide marketing plans for Company Y in Japan).

3. Company Y managed the attendance of its employees with an attendance management system that employees could access from their personal computers. **X** entered his hours worked in this system and received approval from an authorizer.

4. **X**'s wages were comprised of a basic salary, vacation pay, late night work allowance, commutation allowance and incentives. **X**'s basic salary (calculated by dividing the annual salary by 12 and rounding up fractions under 100 yen) was 866,700 yen per month (from April 2014 until March 2015) and 883,400 yen per month (from April 2015 until March 2016). **X**'s annual income between January and December 2015 was 12,343,925 yen.

5. In March 2016, **X** collapsed while working in Company Y's head office and died of a brain stem hemorrhage. This case involved a demand by **Z** (**X**'s spouse), who inherited the right to claim **X**'s wages as a result of **X**'s death, for the payment of premium wages, etc., stipulated in the Labor Standards Act (LSA) for **X**'s overtime work between September 2014 and March 2016. Whether or not **X** fell under the category of a "supervisory or managerial employee" as stipulated in Article 41 No.2 of the LSA was contested in the case.

II. Judgment

The Yokohama District Court denied **X**'s

"supervisory or managerial employee" status. The judgment is summarized below.

(1) The purport of Article 41 No.2 of the LSA is this: A "supervisory or managerial employee" is a person who is, due to the nature of work and managerial necessity, given important job duties, responsibilities, and authority in a position that may demand activity beyond regulated limits on working hours, rest periods, rest days, etc., in a position integrated with management. Also, his/her actual work situation may not fit with regulations on working hours, etc. On the other hand, he/she receives preferential treatment appropriate for that position in terms of wages and others compared with other ordinary employees and is permitted to manage working hours at his/her discretion. Thus, there is no defectiveness in the protection of said "supervisory or managerial employees" even if regulations on working hours, etc., in the LSA are not satisfied. Given this, the question of whether an employee falls under the category of "supervisory or managerial employees" based on the LSA should be judged from the following viewpoints (i) Is the employee given important job duties, responsibilities, and authority which are sufficient to indicate that he/she is in a position that can be described as being, in effect, integrated with management?, (ii) Is the employee permitted to manage his/her working hours at his/her discretion?, and (iii) Does the employee receive treatment in the context of wage etc., that is appropriate for the position and responsibilities of a "supervisory or managerial employee"?

(2) Company Y claimed, based on an administrative interpretation (Mar.14, 1988, *Kihatsu* No.150 [administrative notification issued by the Director of the Labor Standards Inspection Office]), that classification as a "supervisory or managerial employee" should be recognized if the requirements of (iv) the employee is drawing up plans regarding important management matters, and (v) the employee is engaged in line occupations, that is, given a rank equal to or above line manager were satisfied. However, of these five, (v) is interpreted as having the same meaning as (iii) above, and therefore it is enough to see it as a factor for consideration in (i) to (iii) above, rather than as an individual requirement or viewpoint. On the other hand, regarding (iv), from the viewpoint of the above mentioned purport of Article 41 No.2 of the LSA, it should also be interpreted that it is not enough to say that the employee simply handles job duties such as drawing up plans regarding of important management matters, but rather that those job duties and responsibilities are essential as to be deemed to belong to a position integrated with management. Thus, ultimately, this (iv) is nothing more than a factor for consideration in the study undertaken from the viewpoint of the aforementioned (i).

(3) At the Datsun Corporate Planning Department, it is recognized that managers were in a position of attending the PDMs that decide investment amounts and return on investment for new vehicle models and of planning proposals for investment amounts and return on investment. However, the people who actually make proposals at the PDMs are the PDs. Given that the proposals that managers plan must be approved by the PDs, and the persons who exercise a direct influence on the formulation of management decisions are the PDs. Managers are no more than assistants to the PDs, and their influence on the formation of management decisions is indirect.

(4) At the Japan LCV Marketing Department, marketing managers were recognized to be in a position to draft marketing plans and propose them in the Marketing Headquarters meetings that adopt them. However, the marketing managers must receive prior approval for their marketing plans from the marketing director before making proposals to the Marketing Headquarters meetings. Moreover, the marketing director is also in a position to attend the meetings and propose marketing plans together with the marketing managers. In light of these circumstances, the marketing managers are no more than assistants to the marketing director and their influence on the formulation of management decisions should be deemed indirect.

(5) **X** entered his hours worked in the attendance management system on this case and received approval from an authorizer. However, despite the fact that the standard working hours in both the

Datsun Corporate Planning Department and the Japan LCV Marketing Department were 8:30 a.m. to 5:30 p.m. (with a one-hour break), **X** often came to work after 8:30 a.m. and left work before 5:30 p.m. Considering the fact that **X**'s wages were not deducted as a result of coming to work late or leaving work early, it can be recognized that **X** had discretion in his working hours.

(6) **X**'s basic wage was 866,700 yen or 883,400 yen per month, and **X**'s annual income reached 12,343,925 yen. This annual income was 2,440,492 yen higher than **X**'s subordinates and thus, in terms of treatment, is recognized as being appropriate for a "supervisory or managerial employee."

(7) From the above, **X** had discretion with regard to his working hours and received treatment appropriate for a "supervisory or managerial employee." However, it cannot be recognized that **X** was given important job duties, responsibilities, and authority which are sufficient to indicate that he was in a position that can be described as being, in effect, integrated with management. Therefore, considering all of these circumstances, **X** is not recognized as falling under the category of "supervisory or managerial employees."

III. Commentary

Japan's LSA regulates working hours from the purport of protecting employees' health. In particular, Article 32 of the Act establishes upper limits on working hours that employers can have employees work of eight hours per day and 40 hours per week. Additionally, Article 37 of the LSA imposes an obligation to pay premium wages on employers when they have employees work in excess of these limits (i.e., overtime work). However, some employees must be asked to work beyond the limits set by provisions on working hours established by the LSA in order to handle important job duties or responsibilities in their companies. Because of this, Article 41 No.2 of the LSA stipulates that the provisions on working hours shall not be applied to "one in a position of supervision or management" (a "supervisory or managerial employee"). Based on this, judicial precedents have judged whether an employee falls under the category of a "supervisory or managerial employee" or not, using as *merkmal* the employee's (i) being in a position integrated with management in terms of the determination of working conditions of the subordinates and other areas of labor management, (ii) having discretion in his or her working hours on, and (iii) receipt of treatment in terms of wages that is appropriate for a "supervisory or managerial employee."

Incidentally, personnel management that is based on an "ability-based grade system" is predominant in Japanese companies. Under this system, employees are classified into several grades depending on their ability to perform job duties, and their wages (particularly basic wages) are determined based on their grades. A system of corresponding management posts (e.g., department head, section chief, etc.) is established for employees who reach a certain level of grades. Employers select some employees from all personnel in the same grade and place them in management posts. The employees who are placed in management posts in this way have the authority to engage in labor management of other employees (subordinates) and can also discretionarily determine their own times for coming to and leaving work. They also receive a managerial-position allowance, etc. Consequently, there are many cases in which an employee is deemed to be the "supervisory or managerial employee" stipulated in Article 41 No.2 of the LSA after reference to the above *merkmal* (i) to (iii). This kind of supervisor is called a "line manager" in Japan.

On the other hand, there are "staff positions" in the Japanese management system. In general, employees in staff positions are different from line managers in that they engage in specialized job duties, such as business management-related planning and surveys, and do not have authority in the labor management of subordinates. Specifically, under Japan's ability-based grade system, it has often been the case that employees of the same grade who were not selected to be a line manager (or who completed serving as a line manager) are appointed to staff positions. In administrative notifications issued in 1977 (Feb. 28, 1977, *Kihatsu* No.104–2;

Feb. 28, 1977, *Kihatsu* No.105), the Ministry of Labor (currently the Ministry of Health, Labour and Welfare) presented an administrative interpretation recognizing employees in staff positions at financial institutions as the "supervisory or managerial employees" stipulated in Article 41 No.2 of the LSA when they are (iv) drawing up plans and other job duties regarding important management matters and (v) given a rank in the company that is equal to or above line managers. This is based on the idea that, when line managers and employees in staff positions are at the same grade in an ability-based grade system and the former are classified as having the status of "supervisory or managerial employees" but the latter are not, the fact that premium wages will be paid only to those in staff positions for work of more than eight hours a day, even when the wages and other treatment of both are the same, is unfair. The Ministry of Labor subsequently issued an administrative notification in 1988 (Mar. 14, 1988, *Kihatsu* No.150) that restated the ministry's interpretation that employees in staff positions in financial institutions fall under the category of "supervisory or managerial employees," if they meet the aforementioned (iv) and (v). Moreover, for employees in staff positions who are not in financial institutions, the administrative notification presented the administrative interpretation that "depending on the degree of treatment in the company, even if such employees are treated similarly to "supervisory or managerial employees" and exempt from applying the LSA, there is no particular risk of defectiveness in protection from the standpoint of their position" and that "handling that includes such employees within a certain scope among employees falling under Article 41 No.2 of the LSA is considered valid."

However, on the other hand, among the past judicial precedents in which the applicability of "supervisory or managerial employee" status for employees in staff positions has been contested, many are seen to present judgments that apply the above-examined (i) to (iii) as it is to employees in staff positions (The *Okabe Seisakusho* case, Tokyo District Court [May 26, 2006] 918 *Rohan* 5; The *HSBC Services Japan Limited* case [December 27, 2011] 1044 *Rohan* 5). Based on such judgments, "supervisory or managerial employee" status has been denied for the reason that it lacks (i), in particular, for an employee in a staff position who does not have authority in labor management concerning subordinates.

Against this backdrop, this case focused on the "supervisory or managerial employee" status of **X**, who was a section chief in Company Y, a leading Japanese automobile manufacturer. **X** served as a manager and marketing manager who drew up plans submitted to important managerial meetings in Company Y **(I. 2**) and can be described as an employee in a staff position. The significance of the case's judgment is that it recognized there is room for employees in staff positions to be deemed "supervisory or managerial employees" in certain cases (even though, in the end, **X**'s "supervisory or managerial employee" status was denied). That is to say, although the judgment used the conventional (i) to (iii) within the framework for judging "supervisory or managerial employee" status (**II. (1)**). However, for the specific decision concerning (i), it made its decision based on how much **X** had influence on the formulation of Company Y's management decisions (**II. (3)**, **(4)**). In other words, unlike past judicial precedents, the judgment determined that it did not matter whether or not an employee had labor management authority concerning subordinates in the decision for (i); indeed, if it were found in this case that **X** was capable of exercising a direct influence on the formation of Company Y's management decisions, it is possible that **X**'s "supervisory or managerial employee" status would have been affirmed. (It should be mentioned that, in this case, **X** had one subordinate when he belonged to the Datsun Corporate Planning Department and when he belonged to the Japan LCV Marketing Department. However, the fact that **X** had labor management authority concerning those subordinates was not recognized in the judgment).

It can be said that the difference between this judgment and past judicial precedents comes from the understanding of the administrative interpretations (and particularly the administrative

notification of 1988) that were examined above. Specifically, this judgment did not apply the administrative interpretation (= the interpretation recognizing employees in staff positions who satisfy the requirements of the aforementioned (iv) and (v) as "supervisory or managerial employees") as it is. However, it did position "the employee is in charge of drawing up plans regarding important management matters" of (iv) as a factor for consideration in the decision on (i) (**II. (2)**). This point appears to be linked to the judgment's principle of deciding (i) from the viewpoint of whether **X**'s work of drafting plans etc. could directly influence on Company Y's management decisions.

However, several questions can be raised with regard to this judgment. The first concern is the range of administrative interpretations. Specifically, as was mentioned above, it is understood that this judgment took administrative interpretations into account to a certain degree when deciding the case. However, the interpretations presented in the administrative notifications of 1977 and 1988 that recognize employees in staff positions who satisfy the aforementioned (iv) and (v) as "supervisory or managerial employees" were made with financial institutions in mind. It is unclear why the interpretations of those administrative notifications can be considered in this case, which involved an automobile manufacturer. As was mentioned previously, the administrative notification of 1988 does recognize the possibility that employees in staff positions not at financial institutions will be classified as "supervisory or managerial employees," and it can be understood that the same administrative notification presents the interpretation that such employees in staff positions shall be recognized as "supervisory or managerial employees" if they meet (iv) and (v). However, if that was the case, it seems there was a need to explain the reason for such a reading.

Secondly, if it is understood that the range of the administrative interpretations (administrative notification of 1988) extends to this case, doubts arise as to whether the recognizing decision concerning (iii) in the judgment is consistent with the administrative interpretations. Specifically, the judgment recognized that **X** was receiving treatment appropriate for a "supervisory or managerial employee" for the reason that **X**'s annual income was high in comparison with the annual income of his subordinates (**II. (6)**). However, as was mentioned above, a reason that the administrative interpretations reached so far as to recognize employees in staff positions who meet (iv) and (v) as "supervisory or managerial employees" is that, based on the ability-based grade system, unfairness could arise when line managers and employees in staff positions are at the same grade. Accordingly, when deciding on whether an employee in a staff position is receiving treatment appropriate for a "supervisory or managerial employee," the focus of comparison should be line managers who are at the same grade as **X**. Regarding this point, the judgment itself stated that (v) "the employee is given a rank in the company that is equal to or above line manager" presented in the administrative interpretations has the same meaning as (iii) (**II. (2**)). Nevertheless, as is shown above, this perspective is missing in the specific decision concerning the *merkmal* of (iii), and thus the judgment appears to have an inherent inconsistency here.

Regarding employees who engage in the planning or drafting matters concerning business operations, it should be noted that Article 38-4 of the LSA separately establishes a system permitting the leaving of decisions concerning the execution of those operations and working hours to the discretion of the employee (Discretionary-Work Systems for Planning Work). In this case, it could be said that, instead of treating **X** as a "supervisory or managerial employee," Company Y should have applied this Discretionary-Work Systems for Planning Work in order to allow **X** to work flexibly. However, it has been pointed out that there are strict requirements for introducing the Discretionary-Work Systems for Planning Work and that the system is cumbersome to establish. This may be leading corporate practices into handling employees in staff positions as "supervisory or managerial employees." Therefore, the kind of staff position handling seen in this case is a problem that should be discussed not only

from the perspective of "supervisory or managerial employee" status (Article 41 No. 2 of the LSA) but also within the whole legislative policy concerning working hour regulations.

The *Nissan Motor Co. Ltd.* (*"Supervisory or Managerial Employee" Status*) case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1208, pp.46–59. See also *Rosei Jiho* (Romu Gyosei) 3977, pp.12–13 and *Journal of Labor Cases* (Rodo Kaihatsu Kenkyukai) 88, pp.26–27.

YAMAMOTO Yota

Doctor of Law. Vice Senior Researcher, The Japan Institute for Labour Policy and Training. Research interest: Labor law.
https://www.jil.go.jp/english/profile/yamamoto.html

Commentary

Worker Status of Platform Workers under the Labor Union Act

The *Uber Japan and One Other Company* Case
Order, the Tokyo Labor Relations Commission (Oct. 4, 2022) 1280 *Rodo Hanrei* 19

ZHONG Qi

I. Facts

The respondent, Uber Japan, Inc. (hereinafter, "Uber J"), was established on November 30, 2012, and was engaged in the Uber Eats business commissioned by Uber Portier B.V. (hereinafter, "Uber P"), a company located in the Netherlands and incorporated under the laws of the Netherlands.

On October 3, 2019, 18 delivery persons (hereinafter, "delivery partners") who had concluded a contract with Uber P formed the claimant Uber Eats Union (hereinafter, the "Union"), and on October 8, the Union notified Uber J of the formation of the Union and requested to collectively bargain over compensation for the delivery partners involved in the accident (hereinafter, the "October 8 Collective Bargaining Request").

On October 18, 2019, Uber P responded to the Union that it was not able to bargain collectively because the delivery partners had a contract with Uber P, not with Uber J, and that the delivery partners were not workers under the Japanese Labor Union Act.

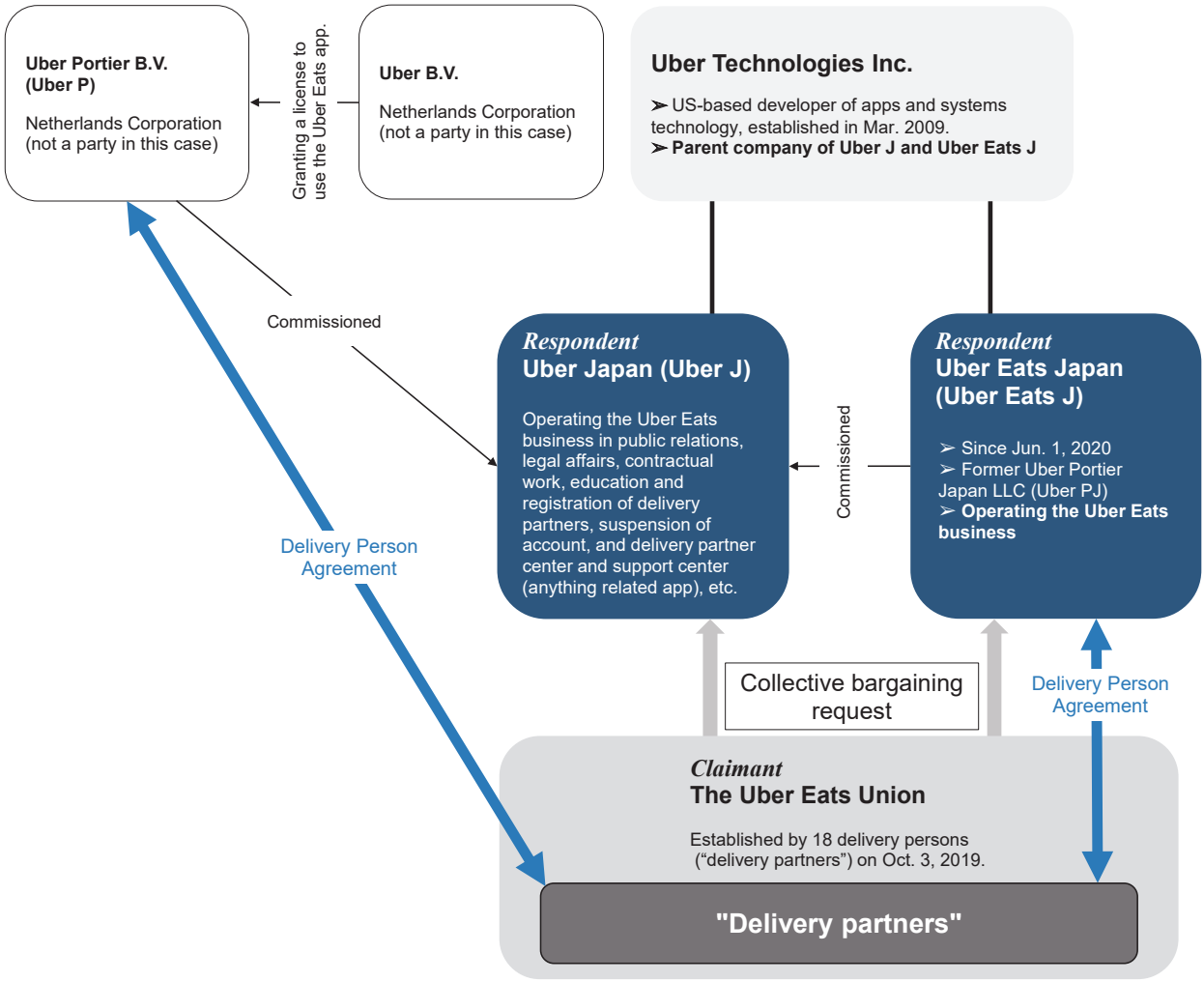
On October 29, 2019, one other respondent Uber Portier Japan LLC (hereinafter, "Uber PJ") was established as the operator of the Uber Eats business in Japan, and on June 1, 2020, Uber PJ changed its name to Uber Eats Japan (hereinafter, "Uber Eats J").

On November 20, 2019, Uber P notified delivery partners that, beginning December 1, Uber PJ would provide a platform for connecting delivery partners with restaurants and customers. Uber P, together with Uber PJ, entered into an agreement with delivery partners, Uber P granted the delivery partners the right to use the app, and Uber PJ conducted the matching between the users on the app. Uber J concluded an intercompany service agreement with Uber P on and after December 1, 2019, and performed services such as registration procedures, education, and support for delivery partners.

On November 25, 2019, the Union submitted a collective bargaining proposal to Uber PJ regarding compensation for the accident, reduction of fees, and other issues (hereinafter, the "November 25 Collective Bargaining Request").

On December 4, 2019, Uber PJ refused to bargain collectively with the Union, claiming that the delivery partners were not "employed workers" under the Labor Union Act.

The contract relationships of this case are shown in Figure 1. The case concerned from the perspectives of (1) whether delivery partners are workers under the Labor Union Act, (2) whether Uber J is an employer under the Labor Union Act in relation to union members who are delivery partners, and (3) whether Uber J's refusal to respond to the October 8 Collective Bargaining Request and Uber PJ's refusal to respond to the November 25 Collective Bargaining Request constitute refusal to bargain collectively without just cause, respectively. This commentary deals only with issues (1) and (2).



Source: Author created.

Figure 1. Contract relationships diagram

II. Order

Remedies for all unfair labor practices.

1. Whether delivery partners are workers under the Labor Union Act.

1-A. Framework for determining worker status

The Uber Eats business is a service that connects restaurants, customers who order food and beverages, and delivery partners via an app, and delivers food and beverages provided by the restaurants to the customers. Therefore, the business of delivering food and beverages is an integral part of the Uber Eats business.

Under the contract, Uber does not provide delivery services, etc., but provides a platform to users, and with respect to the sale of food and beverages, the transaction is made directly between the ordering customer and the restaurant, and if the sale of food and beverages involves delivery, a direct business relationship for delivery is created between the restaurant and the delivery partner, and the delivery partner is not in a relationship to provide labor to Uber P and Uber Eats J. One of the purposes of the Labor Union Act is "to elevate the status of

workers by promoting their being on equal standing with their employer in their negotiations with the employer" (Art. 1 LUA). Given the purpose and nature of the Act, it is necessary to determine objectively whether a worker is a "[person] who [lives] on their wages, salaries, or other equivalent income" (Art. 3 LUA) to whom the Act applies, in accordance with the reality of the situation, without being bound only by the formality of the contract such as its title.

Contractually, the delivery service is a direct business relationship between the restaurant and the delivery partner. In practice, Uber issues a Delivery Partner Guide to the delivery partner and suggests or warns that the account will be suspended if certain prohibited behaviors are violated, sometimes actually suspends the account, and even terminates the Uber Service Contract with the delivery partner if it is deemed difficult for the delivery partner to properly perform the delivery service, or if trouble occurs, the Uber support center operated by Uber J takes care of the problem. In light of these facts, it can be seen that Uber is involved in various ways in the performance of the delivery business so that the delivery partners can smoothly and stably perform the delivery business, which is an integral part of the Uber Eats business. Although delivery fees are contractually paid by the restaurant to the delivery partner, Uber Eats J actually receives them from the ordering party based on its agency authority and pays them to the delivery partner, minus a service fee that it earns itself. Therefore, it is difficult to view the delivery partner as merely a pure 'customer', and it is strongly inferred that it may be evaluated as supplying labor to Uber, which operates that business, within the overall Uber Eats business.

Even if the (Uber Eats) business provides a platform on the sharing economy, in some cases, users can be evaluated as supplying labor to the share provider. Therefore, in determining the worker status of delivery partners, the companies' argument that there is no room for the application of the criteria for determining worker status under the Labor Union Act because the companies are not using the labor of delivery partners cannot be adopted.

As to whether the delivery partner in this case is a worker under the Labor Union Act, in light of the purpose and nature of the Act, the relationship between the companies and the delivery partners should be examined, including whether there is an actual situation that can be evaluated as a labor supply relationship. The decision should be made by comprehensively considering various circumstances, such as integration into the business organization (see B. below for details), unilateral and routine determination of the content of the contract (C. below), whether the compensation is for labor (D. below), whether the delivery partner should respond to the request for business (E. below), the provision of labor under direction and supervision in a broad sense, and a certain time and place restraint (F below), and significant business ownership (G. below).

1-B. Integration into business organizations

(a) Purpose of the contract

The purpose of the agreements that delivery partners will enter into with Uber P and Uber Eats J is to provide Uber services to delivery partners on the platform provided by Uber P and Uber Eats J. The agreement also has the objective of securing a delivery partner to take care of most of the delivery work in order to ensure that the matching on the platform can be concluded quickly and reliably.

(b) Status of integration into organizations

In the Uber Eats business, delivery partners deliver food and beverages to the customer for 99 percent of all orders. And the number of delivery requests, at its highest, reaches 2.7 million per week. The percentage of delivery requests that are accepted by the delivery partner was approximately 70 percent at the time of the filing of the petition, and has generally remained at 40 percent since the response time was changed from 60 seconds to 30 seconds, but the percentage of delivery requests that are matched has generally been close to 100 percent throughout this period.

In order for Uber Eats to be successful as a

business, it is necessary to match many orders reliably and, due to the nature of the business of delivering food and beverages, it is also necessary to complete orders quickly. Uber Eats J pays its delivery partners money, which it calls an incentive, in addition to the basic delivery fee. Incentives can be said to direct and place delivery partners in locations, times, and periods of high demand for deliveries. When making a delivery request at the time of this filing, the delivery address was not indicated, suggesting that the delivery address was not indicated on purpose in order to match the request quickly.

(c) Evaluations and account suspensions

The companies seek to maintain and ensure a certain level of labor by controlling the behavior of delivery partners through an evaluation system for delivery partners and by eliminating labor that falls below the arbitrage evaluation average.

The account suspension means that the delivery partner will no longer be able to work, which has a considerably strong controlling effect. In the Delivery Partner Guide, the company stipulates a greater number of actions that are subject to account suspension for delivery partners than for other users, indicating that the companies are making efforts to strongly control the behavior of delivery partners and ensure that delivery partners are able to smoothly perform delivery operations.

(d) Representations to third parties

The companies do not require delivery partners to use Uber bags; it is up to the delivery partner to decide whether or not to use said bags. However, it is easy to infer that there are many delivery partners who use Uber Bags to take advantage of the name recognition of "Uber Eats," and these delivery partners can be considered to be treated as part of the Uber organization by third parties.

According to the Delivery Partner Guide, delivery partners are encouraged to address themselves as "Uber Eats" when visiting a restaurant or ordering customer. This can be seen as an indicator that they are being treated as part of the Uber organization.

(e) Exclusivity

Delivery partners only need to run the application when it is convenient for them, and they are not contractually prohibited from working for other companies, and in fact, some delivery partners are using multiple matching services simultaneously to perform similar delivery tasks. However, incentives such as "quests" can be said to encourage people to be virtually bound for a certain period of time in order to achieve their goals and earn rewards. Even though the percentage of delivery partners is not large, there are about 2,000 delivery partners who are working more than 40 hours per month on the app and are considered to be making a living by working exclusively for Uber Eats delivery services, and according to a survey conducted by Uber, a quarter of the respondents have delivery as their "main business." In this way, although delivery partners are not necessarily obligated to be exclusive to Uber, a system has been established to encourage them to engage exclusively in the Uber Eats delivery business, and in fact, there is a certain number of delivery partners who appear to be exclusive to this business.

(f) Summary

As described above, the Uber Eats business provides a service that connects users via an app and delivers food and beverages provided by restaurants to the customers who place orders. The delivery partners deliver food and beverages to customers, which account for 99% of all orders. In order to continue the business and generate profits, it is necessary to secure a large number of delivery partners, and it is believed that the companies control the behavior of delivery partners through evaluation systems and account suspension measures to maintain the smooth and stable performance of delivery operations. In addition, some delivery partners are treated by third parties as part of the Uber Eats organization, and a certain number of delivery partners are retained on a virtually exclusive basis with incentives.

In light of the above, the Uber Eats business could not function without the labor provided by the

delivery partners, and the delivery partners should have been secured and integrated into the business organization as an essential labor force for the execution of the companies' business.

1-C. Unilateral and routine determination of the contents of the contract

In both the determination and modification of the contents of the contract, there is no equal relationship, and it can be said that the companies are making unilateral and routine decisions.

1-D. Compensation for labor

The agreements that the delivery partners and the restaurants have with the companies provide that the companies are technical service providers, not delivery service providers, that a direct business relationship arises between the delivery partners and the restaurants with respect to delivery, and that the delivery partners charge the restaurants a delivery fee.

However, looking at the flow of money related to the delivery fee, Uber Eats J receives it from the ordering party and pays it to the delivery partner on behalf of the restaurant based on its agency authority, and the restaurant is not involved in the collection and payment of the delivery fee. The amount of the delivery fee is also determined by Uber Eats J, and the delivery fee is considered to be the recommended price. But, in practice, there is no negotiation between the delivery partner and the company, or between the delivery partner and the restaurant, and the delivery fee has never changed to an amount other than the recommended price. Uber Eats J also pays a certain amount of money to the restaurant or the ordering party depending on the circumstances, such as when the delivery of food and beverages is unsuccessful. Uber Eats J may also pay a predetermined delivery fee to the delivery partner even when the ordering party is not at the delivery location and the food and beverages are not delivered, or when the food and beverages are damaged due to the carelessness of the delivery partner. Therefore, even if the restaurant is supposed to pay the delivery fee under the contract, it is reasonable to assume that Uber Eats J pays the delivery fee to the delivery partner in reality.

When a delivery partner allows another person to use their account, it is considered grounds for suspension of the account, and the delivery service is to be performed by the delivery partner, supplying their own labor.

Regarding the delivery fee, the Delivery Partner Guide states that it is the basic delivery fee (base fee - service fee) plus an incentive (irregular additional compensation), and that the "base fee" consists of a receiving fee, a delivery fee, and a distance fee. The receiving fee is based on the number of food and beverages received at the restaurant, the delivery fee is based on the number of food and beverages given to the orderer, and the distance fee is based on the distance from the restaurant to the delivery destination, all of which are calculated based on the volume of business that the delivery partner delivers food and beverages to the orderer. Uber Eats J may pay a predetermined delivery fee to the delivery partner even if the delivery is not completed, for example, if the delivery cannot be completed for the convenience of the ordering party. This makes it difficult to say that the delivery fee is a reward for the completion of the job. Delivery fees are paid weekly, are due every Monday, and are transferred to the registered account within one week of the closing date.

The Delivery Partner Guide states that incentives are additional compensation added to the delivery fee. Among the incentives, boosts are increased by a certain multiplier at times and locations with high order volume, quests are paid when the target number of deliveries is met within a time period, and online time incentives are the difference between the fixed amount and the actual delivery fee if the delivery fee at a specified time is less than a certain amount. Boosts can be described as encouraging operation at times and locations with high order volumes, quests as encouraging increased deliveries, and online time incentives as encouraging apps to be online at specified times by guaranteeing a certain amount of money, all of which are similar in nature to busywork allowances, incentives, and the like.

In short, the delivery fee paid by Uber Eats J to

the delivery partners is a basic delivery fee and an additional remuneration called an incentive, both of which are in the nature of compensation for the labor performed by the delivery partners themselves.

1-E. Relationship to respond to requests for business

Delivery partners can receive delivery requests, which are requests for work, when the app is online. Whether or not to put the app online, at what time of day, and at what location the delivery service is to be performed is completely up to the delivery partner. While cancellation after responding to a delivery request could result in a loss of reputation or account suspension, there is no specific provision to the effect that simply not responding to a delivery request will result in a specific disadvantage. In fact, delivery partners had a certain degree of freedom to accept or reject delivery requests, as the percentage of acceptances by delivery partners was approximately 70 percent at the time of the filing of the petition and approximately 40 percent in recent times, after the response time was changed from 60 seconds to 30 seconds. However, the following circumstances are also recognized.

(a) Possibility of disadvantageous treatment

In many cases, the app is set to automatically go offline if the delivery request is not accepted three times in a row within a certain period of time. Although it is possible to log in again, if the delivery partner is unaware that they have been taken offline, they may miss the opportunity to accept the delivery request.

The union claims that if a delivery partner fails to respond to two or three delivery requests in a row, the partner may be "hung out to dry" for a while, meaning that no more delivery requests are received. Even if it is difficult to find that there was a fact of being "hung out to dry," it is undeniable that the delivery partners, who are members of the association, were aware that if they refused delivery requests, they might be disadvantaged, for example, by a decrease in the number of delivery requests sent.

(b) Possibility of rejecting the request for a contract

The circumstances suggest that Uber did not indicate the delivery destination when the delivery request was made. The delivery partner was in a difficult situation to reject the delivery request at the stage when the delivery destination was actually informed at the restaurant. Among the incentives set by the firms, quests are paid if the target for the number of deliveries is achieved within a certain period of time. Therefore, delivery partners who set a goal for a quest are less likely to refuse a request for work until the goal is achieved within that time period. Furthermore, since delivery partners are not guaranteed a certain amount of income and do not know how many delivery requests will be sent, they are likely to be inclined to comply if a delivery request comes in while the app is online. In particular, delivery partners who operate approximately 40 hours per week and are virtually exclusively engaged in the Uber Eats business essentially find it difficult to refuse delivery requests.

(c) Summary

Delivery partners were free to decide whether or not to put the application online, at what time of day, and at what location to perform delivery services, and there was no specific stipulation that they would suffer specific disadvantages if they refused delivery requests, and it cannot be said that they were in a relationship where they had to respond to business requests. However, in some cases, the delivery partner's perception is that it is difficult to refuse a delivery request.

1-F. Provision of labor under direction and supervision in the broad sense, and a certain time and place restraint

The delivery partner can put the app online at the time and location of their choice when they wish to perform the work, and they are completely free to choose at what time and location they wish to perform the work. After the delivery partner accepts the delivery request, the delivery partner is given instructions by the company in the delivery partner

guide, etc. on how to perform the delivery operation, and is forced to follow the instructions regarding time and place, but after the delivery operation is completed, the delivery partner is free to either leave the application online to wait for the next delivery request or to go offline to finish the operation. In light of this, it cannot be said that the delivery partners are bound by the companies, at least as to what time and where they perform their work.

Since delivery work is routine and work procedures are indicated by the delivery partner guide, the only discretion that delivery partners have in their work is the selection of delivery routes. However, it can be inferred that the delivery partners have little room for discretion in their work, as they are virtually forced to follow the recommended route.

In light of the above, although the delivery partners cannot be said to be bound by the companies with respect to the time and place of their work, they are, in a broad sense, under the direction and supervision of the companies in performing their delivery duties.

1-G. Significant business ownership

(a) Opportunity to profit from one's own talent

There is very little room for discretion for delivery partners in the delivery operations, and since community guidelines prohibit restaurants and customers from unnecessary contact with delivery partners and from acquiring their own unique customers, there is little opportunity for them to use their own talents.

(b) Burden of profit and loss in operations

The profits and losses in the delivery business are borne by Uber Eats J, and it cannot be said that the delivery partners bear any risk in their operations.

(c) Use of other persons' labor

Delivery services are to be provided by the individual who has registered in advance, and violations of this rule may result in account suspension. Therefore, delivery partners are not allowed to expand their business by hiring others, etc.

(d) Burden of equipment, etc. necessary for the work

Delivery partners carry out delivery operations by owning their own means of delivery, such as motorcycles and bicycles.

(e) Summary

Although delivery partners own their own means of delivery, such as motorcycles and bicycles, they cannot independently acquire unique customers or use the labor of others, and they have little opportunity to profit from their own talents or take on the risks of the delivery business, so it cannot be said that delivery partners have significant business ownership.

1-H. Conclusion

The delivery partners in this case are: secured as labor force indispensable for the execution of the companies' business and integrated into the business organization (as the order states in B. above); the companies have unilaterally and routinely determined the contents of the contract (C. above); and the delivery fees earned by the delivery partners are compensation for the provision of labor (D. above). On the other hand, the delivery partners have freedom as to whether or not to run the application, at what time of day, and at what location to perform delivery services, and it cannot be said that they were in a relationship where they had to respond to the companies' requests. However, it is recognized that in some cases, there were circumstances that made it difficult for them to reject delivery requests (E. above). In addition, although they are not bound to a certain time and place, in a broad sense, they are under the direction and supervision of the companies in carrying out their delivery work (F. above). And, the delivery partner cannot be found to have significant business ownership (G. above). Taking all of these circumstances into consideration, the delivery partners in this case are workers under the Labor Union Act in relation to the companies.

2. Whether Uber J is an employer under the Labor Union Act in relation to union members who are delivery partners.

With regard to the Uber Eats business, the division of roles among the affiliated companies involved in the business is not clearly differentiated, and it is reasonable to assume that the affiliated companies were, in effect, developing and operating the business as a single entity.

Uber J, which practically handles the Uber Eats business for delivery partners, from registration and contract procedures to explanation and support of operations and various inquiries, should be considered to be in a position to control and decide collective bargaining matters concerning working conditions, etc. of delivery partners in a realistic and concrete manner, together with Uber Eats J, a party to the contract with delivery partners, and to be an employer who should respond to collective bargaining.

III. Commentary

1. Significance and features of this order

This order of the Labor Relations Commission is the first case in Japan, in both administrative and judicial terms, to determine the worker's status under the Labor Union Act when matching labor supply and demand through digital platforms. With the development of platform work, as represented by the Uber Eats business, this order, together with the conclusion of the affirmation, is of great significance, as it indicates the way of determining the worker status of such workers under the Labor Union Act.

As a framework for determining worker status under the Labor Union Act, this order cites the factors listed in the Report of the Labor-Management Relations Law Study Group of the Ministry of Health, Labour and Welfare (MHLW) of July 25, 2011, and applies them to the facts found to make a decision, but does not give any weight to the factors and takes the form of a comprehensive judgment.

Contractually, the platform provider is not supposed to use the labor of the worker, and in many cases, the one who needs the labor is the ordering party and not the platform. This phenomenon is not limited to the Uber Eats business, but has become a common phenomenon for businesses that use the platform. In this case, it was found that even though the delivery partner does not contractually provide labor to UP and UEJ, actually, the delivery partner may be considered as supplying labor to the platform. And UJ, which is not a party to the contract, was deemed to be an employer under the Labor Union Act.

2. Japanese concept of worker and criteria for determining worker status

While some countries, such as Germany, maintain a unified concept of worker regardless of individual or collective laws, in the case of Japan, the concept of worker under collective laws, represented by the Labor Union Act, is a broader concept, separate from the concept of worker under individual laws, such as the Labor Standards Act and Labor Contracts Act.

The concept of worker in individual labor relations is often determined by reference to the definition in Article 9 of the Labor Standards Act.[1] The definition in Article 9 of the Act indicates that a worker is "a person who is (i) employed at a business or office" and (ii) receives wages therefrom. However, both the meaning of "employed" and the definition of "wages" are broad and abstract, so the scope of workers cannot be immediately clarified from this article. The criteria for determining worker status that is generally based and used in practice is the Labor Standards Act Study Group Report of December 19, 1985, "On the criteria for determining worker status under the Labor Standards Act."[2] The report stated that the determination of worker status should be based on actual and concrete relationship, regardless of the form of the contract, such as an employment contract or a subcontracting contract, and established a basic framework for determining worker status under the LSA: the existence of "subordinate relationship to an employer (personal dependence, namely, subordination to the control of the employer [*shiyo juzoku sei*])," that is, whether a person (i) works under the direction and supervision of an employer and (ii) receives compensation for his/her labor. On the other hand, it is generally

accepted that economic subordination is not a basis for worker status under the Act.[3]

(i) Whether or not the work can be considered as work under direction and supervision is judged in light of whether or not the worker has the freedom to accept or refuse work requests, direction in performing the work, etc., whether or not the work is restricted in terms of workplace and work hours, and whether or not the work is substitutable.

(ii) Regarding the remuneration as compensation for labor, if the remuneration is calculated on the basis of hourly rates, etc., and if there is little difference depending on the result of labor, and if it is judged as compensation for providing labor for a certain period of time, it is considered to reinforce the "subordinate relationship to an employer."

In cases where the determination cannot be made solely from the perspectives of (i) and (ii), (iii) the existence (or degree) of business ownership and the degree of exclusivity may be considered as factors to reinforce the determination of worker status. Specifically, the burden of machinery and equipment, the amount of remuneration, liability for damages, and whether or not a trade name is used.

On the other hand, the issue in this case was the concept of worker under the Labor Union Act. Article 3 of the Labor Union Act defines the concept of worker under the Labor Union Act as "[t]he term "workers" as used in this Act means those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation." There is almost no dispute that the concept of worker under the Labor Union Act is broader interpreted than that under the Labor Standards Act because, unlike the concept of worker under the Labor Standards Act, the worker is not required to be employed; but it was not always clear how much broader than that under the Labor Standards Act, or the criteria for defining its extension.

Therefore, in three decisions in 2011–2012,[4] the Supreme Court established the stance that economic subordination plus moderated employment subordination (personal subordination) is taken into account to determine workers' status under the Labor Union Act. According to the common theory, the basic factors of judgment presented by the three aforementioned Supreme Court decisions are (i) integration into the business organization, (ii) unilateral and routine determination of the content of the contract, and (iii) the remuneration for labor. The supplemental factors of judgment are (iv) a relationship to respond to requests for work, (v) provision of labor under direction and supervision in a broad sense, and a certain time and place restraint. Lastly, (vi) significant business ownership is interpreted to be a factor that negatively affects the status of a worker.[5]

With regard to (iv), the Labor Standards Act presumes that a worker is obligated under the labor contract to respond to requests for work, but the Labor Union Act only requires that the worker is obliged to respond to requests for work in the actual labor relationship, even if there is no such obligation under the labor contract. With regard to (v), this is exactly what is understood as "moderate subordinate relationship to an employer status." While (iv) and (v) are the basic factors of judgment when determining worker status under the Labor Standards Act, (iv) and (v) are merely supplemental elements of judgment when determining worker status under the Labor Union Act. The determining factors that delineate the boundaries of worker status under the Labor Union Act are (i) and (ii), which were not considered in the concept of worker under the Labor Standards Act.

The factor (i) held that when labor providers are involved within an organization as a labor force that is quantitatively and qualitatively indispensable for the performance of work, the terms and conditions of use of the labor force should be resolved through collective bargaining, and clarified the breadth of the concept of worker under the Labor Union Act, which is not based on the contractual form of the parties,[6] and at the same time, it delineated the boundaries of the concept of worker under the Labor Union Act. In addition, in the case of unilateral and routine determination of the content of the contract in (ii), the labor provider side has a disparity in bargaining power vis-à-vis the other party, which clearly requires protection under the collective bargaining legislation.

The factor (iii) corresponds to "wages, salaries, and other similar income" as specified in the definition of workers under the Labor Union Act.[7] The significant business ownership of (vi) is considered as a negative factor in determining worker status under the Labor Union Act. If a labor provider is viewed as a person who constantly has the opportunity to profit from his/her own talent and undertakes the risk of conducting business on his/her own, it may act negatively in considering worker status.

Thus, in the abovementioned Report of the Labor-Management Relations Law Study Group which is generally referred as the criteria for determining worker status under the Labor Union Act, the factors are divided into "basic" and "supplemental," etc., and from their perspective, there appears to be a difference in the level of importance. However, this order took the stance of "making a judgment based on a comprehensive consideration of various circumstances," and did not assign any strength or weakness as a factor in making a judgment.

Looking at the specific judgment, this order, in line with the judgment framework presented in the above mentioned Report breaks down each judgment factor into more detailed circumstances for consideration.[8] Bearing in mind that this is only a "judgment of degree," the order finds that even if the degree is not as strong as when recognizing worker status under the Labor Standards Act, there are circumstances of a degree appropriate for recognizing worker status under the Labor Union Act, and after comprehensive consideration, the order finds that the delivery partner is a worker under the Labor Union Act. In determining the relationship between the delivery partner and the company, the Tokyo Metropolitan Government's Labor Relations Commission emphasized, it has "recognized" that if the delivery partner did not respond to two or three delivery requests in a row, the delivery partner would be "hung out to dry" and would not receive delivery requests for a while, and that "there were circumstances that made it difficult to refuse the delivery request." Although there is no specific provision in the contract to the effect that a party will suffer specific disadvantages if it does not comply with a delivery request, the stance of this order, which emphasizes the perception of the parties rather than making judgments based solely on the content of the contract, is consistent with the criteria of judgment presented in the Report.[9]

3. Determination as to whether the platform provider is using the labor of the delivery partner

In the platform economy, not limited to the Uber Eats business, platform providers often claim that there is a direct business relationship between the party needing labor and the labor provider, and that they do not use the labor of the labor provider, and that the platform provider merely provides a platform for matching labor supply and demand. In Japan, however, in determining whether a franchisee who operates a convenience store under a franchise agreement is a worker under the Labor Union Act, the issue is whether the convenience store franchise owner is in a contractual relationship to provide labor to the head office.[10]

There are two patterns of logical construction in regards to this point. One is to first determine whether the platform provider is using the labor of the labor provider (delivery partner), and if that is denied, then there is no room to apply the criteria for determining the worker status under the Labor Union Act for labor provider's.[11] The other is to strongly infer the possibility that a labor provider may be supplying labor to the platform provider that operate the business within the overall Uber Eats business, thereby expanding the scope for applying the already established framework for determining worker status under the Labor Union Act, and drawing a conclusion about whether the platform provider is using the labor provided by the labor provider. Considering that the use of labor performed by labor providers is a subcomponent of the factor of the "integration into the business organization," that it is necessary to consider each factor comprehensively, and that, in determining worker status under the Labor Union Act, it should be determined as much as possible in accordance with the already established framework of judgment, the latter logical structure is more

appropriate.

4. Determination of Uber J as "employer"

Another characteristic of the platform economy is that there may be cases where there is no contractual employer, or where the platform provider, in order to escape employer liability, may create a subcontractor or other entity with jurisdiction over a particular area to act as the contractual employer. Again, the issue was the employer status of Uber J, which had no contractual relationship with the delivery partner.

In a case in which unionized workers of a subcontractor applied to the prime contractor for collective bargaining, the Supreme Court in the *Asahi Hoso* case[12] held that even a business owner other than the employer is recognized as an employer "if it is in a position to control and decide in a realistic and concrete manner to the extent that it can be considered, though partially, as an employer" (The *Asahi Hoso* case, Supreme Court decision). The judgment method of the Supreme Court decision in the *Asahi Hoso* case has become the established method for holding parties other than the contractual employer liable for employer liability under the Labor Union Act, which centers on the contractual employer and attempts to partially extend the employer concept to related parties in the surrounding area.

On the other hand, in this case, it was found that the division of roles among the affiliated companies involved in the Uber Eats business was not clearly differentiated, and that the affiliated companies, including Uber J, were effectively united in the development and operation of this business. In determining the worker status of delivery partners under the Labor Union Act, even when determining their integration in the business organization, the "business organization" referred to therein does not refer to a specific company, but to all of the affiliated companies engaged in the same business. In other words, this order held that all of the affiliated companies involved in the Uber Eats business, regardless of whether they were contractual employers or not, were subject to the labor provision of the delivery partners because the division of roles among the companies was not clearly distinguished, and any affiliated company had the status of an employer who should be subject to collective bargaining as long as it was responsible for a part of the Uber Eats business. In other words, rather than focusing on a particular company and partially extending the employer concept to other parties, this order adopts the logical structure that as long as multiple companies share the employer function, all companies have worker status under the Labor Union Act. This concept is similar to the American concept of "joint employer," and may develop as an important legal doctrine in the platform economy era to pursue employer liability against platform providers who try to distance themselves from labor providers by establishing a separate contractual employer.

1. The concept of worker under the Labor Contracts Act is commonly understood to be the same as that under the Labor Standards Act. See Takashi Araki, *Rodoho* [Labor Law], 5th ed. (Tokyo: Yuhikaku), 53.
2. https://www.mhlw.go.jp/stf/shingi/2r9852000000xgbw-att/2r9852000000xgi8.pdf.
3. Araki, *supra* note 1, 54.
4. The *National Government and Central Labor Relations Commission (Shin-Kokuritsu Gekijo Un'ei Zaidan [New National Theatre Management Foundation])* case, The 3rd Petty Bench, Supreme Court, (Apr. 12, 2011) 65–3 *Minshu* 943; *National Government and Central Labor Relations Commission (INAX Maintenance)* case, the 3rd Petty Bench, Supreme Court, (Apr. 12, 2011) 1026 *Rohan* 27; The *National Government and Central Labor Relations Commission (Victor Service Engineering)* case, The 3rd Petty Bench, Supreme Court, (Feb. 21, 2012) 66–3 *Minshu* 955.
5. The Study Group of the MHLW on Labor-Management Relations Law, Roshi kankei-ho kenkyukai hokokusho: Rodo kumiai ho jo no rodosha sei no handan kijun ni tsuite [Report of the Study Group on Labor-Management Relations Law: Criteria for determining worker status under the Labor Union Act] (Tokyo: Ministry of Health, Labour and Welfare, Jul. 25, 2011). https://www.mhlw.go.jp/stf/houdou/2r9852000001juuf-att/2r9852000001jx2l.pdf.
6. In the discussion at the time of the Trade Union Law in December 1945, it was apparent that the intention was to guarantee that those who live on remuneration for their own labor under contractual arrangements such as subcontracting may also organize a labor union and bargain collectively, etc. The Trade Union Law was completely revised into the current law in 1949, but the concept of "worker" was maintained as it was in the old Labor Union Legislation. See the Study Group of the MHLW on Labor-Management Relations Law, *supra* note 5, 1–6.
7. "The term "workers" as used in this Act means those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation." (Art.3 LUA)

8. The Study Group of the MHLW on Labor-Management Relations Law, *supra* note 5, 12 and the following for details of the circumstances considered.
9. The Study Group of the MHLW on Labor-Management Relations Law, *supra* note 5, 11, for details on the criteria.
10. The *National Government and Central Labor Relations Commission (Seven-Eleven Japan)* case, Central Labor Relations Commission (Feb. 6, 2022) 1209 *Rohan* 15; The *National Government and Central Labor Relations Commission (Seven-Eleven Japan)* case, Tokyo District Court (June 6, 2022) 1271 *Rohan* 5.
11. In this case, the company argues it.
12. The *Asahi Hoso* case, The 3rd Petty Bench, Supreme Court (Feb. 28, 1995) 49 *Minshu* 387.

The order of this case is available at https://www.metro.tokyo.lg.jp/tosei/hodohappyo/press/2022/11/25/documents/14_01.pdf [summary in Japanese]. For other related information, see *Rodo Hanrei* (*Rohan*, Sanno Research Institute) 1280, pp.5–17 and *Rodo Horitsu Junpo* (*Rojun*, Junposha) 2026, pp.6–27.

ZHONG Qi

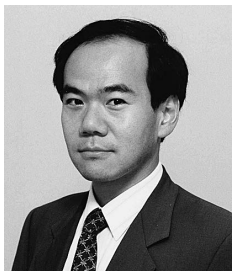
Vice Senior Researcher, The Japan Institute for Labour Policy and Training. Research interest: Labor Law.
https://www.jil.go.jp/english/profile/zhong.html

Worker Status of the Commercial Agent

The *Bellco* Case

Sapporo District Court (Sept. 28, 2018) 1188 *Rodo Hanrei* 5

Keiichiro Hamaguchi

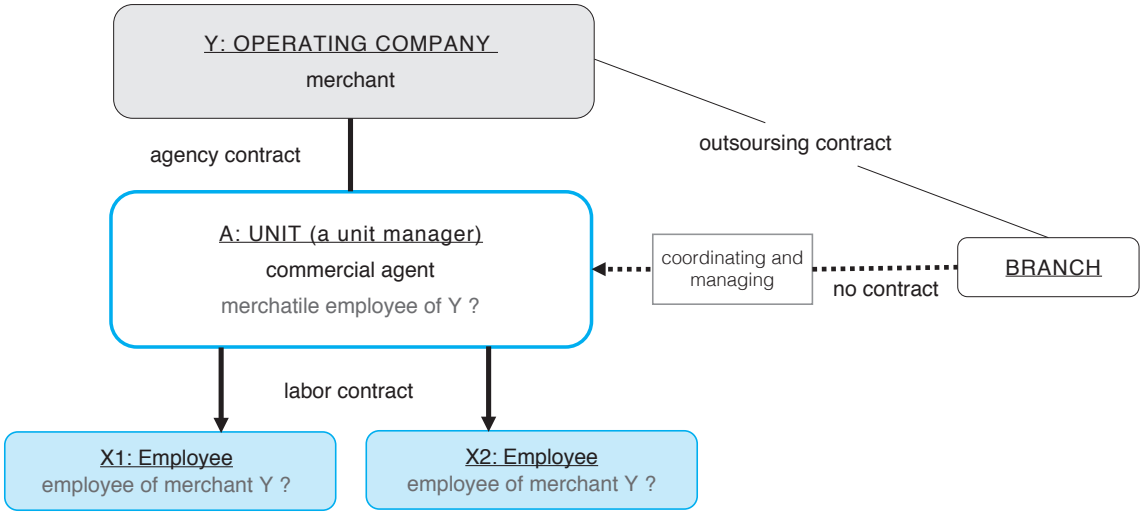


Facts

The defendant Y, the operating company of a ceremonial services, has concluded outsourcing contracts with independent proprietors or corporations nationwide to serve as agencies, and operations are carried out within areas known as "branches." A concluded an agency contract with Y and was in charge of sales activities in T district, with the title of "T unit manager." The plaintiffs X1 and X2 (hereinafter referred to as "X et al.") entered into one-year fixed-term labor contracts with A (subject to renewal every year), and were engaged in funerary services and sales activities. Y entrusted work such as coordinating and managing the agencies in each area to a third party with the title of "branch manager" (see the figure below).

On January 29, 2015, A requested the termination of the agency contract with Y, and the contract ended on the 31st of the same month. B, who had signed an agency contract with Y, took over operations in T district in place of A on February 1 of the same year, and concluded labor contracts with A's former employees other than X et al., but did not conclude similar contracts with X et al.

X et al. asserted that since Y delegated hiring of Y's employees to A, a mercantile employee, the labor contracts of X et al. should remain in effect under B which now occupied the former position of A with relation to Y. X et al. requested Y's confirmation of the employer status on labor contracts, payment of unpaid wages, etc. The Sapporo District Court rejected the request on September 28, 2018, and X et al. appealed to a higher court.



Overview of this case

Judgment

Whether persons qualify as employees of a merchant including a company should be determined by whether or not it can be said that they are substantively employed by the merchant and provide labor, regardless of the contract type. A received detailed instructions from Y on work policies and results, and was in a position where he would have considerable difficulty in refusing to carry them out, but on the other hand, A had a certain degree of discretion with regard to time, place, and specific procedures for performing labor. While there was little scope for substitution, he conducted his operation based on his own account, work and its results corresponding with remuneration. Therefore, A could not be interpreted as employee of Y.

The above judgment is not affected by the facts that Y payed wages to the employees of A through bank transfers, that remuneration for A was paid by Y in the form of "wage" that Y prepared the agency's bills required for the payment of the remuneration of A, that A's year-end tax returns and payments were carried out under Y's instructions, that Y referred to agents including A as "unit managers" of the operating company, and essentially treated them as a lower-level part of its own corporation in a manner demonstrating them as internal organizations to outside.

Commentary

In this case the plaintiffs did not assert their own status as formal employees of the operating company per se, but rather, based on their assertion that the agent acting as the plaintiffs' (contractual) employer was essentially employed by the operating company, claimed that the plaintiffs were regarded as workers of the operating company. As a matter of form, this is a question of employer status (i.e. who is the employer of X et al.?). However, the essential issue is the nature of worker status of commercial agents, raised in the disputed point (1). This article outlines the circumstances surrounding worker status in Japan, and perspective about this case.

The 1947 Labor Standards Act defines a worker as "one who is employed at an enterprise or place of business and receives wages therefrom, without regard to the kind of occupation" (Art. 9), and the 2007 Labor Contracts Act as "a person who works by being employed by an employer and to whom wages are paid" (Art. 2), but specific criteria are not given. Japanese labor administration set forth criteria for "a worker" in the Labor Standards Act Study Group Report 1985, with the major criteria of (i) whether the person in question can refuse the orders of the client, (ii) whether the person is bound to the client's directions in performing his/her work, (iii) whether the person is bound to a given working time and place, (iv) whether the person can hire another person to perform his/her work, and (v) whether the person remuneration is qualified as for his/her work, not for the product, and with the supplement criteria of (vi) whether the person can be qualified as a business trader, (vii) whether the person has only one client or many, and (viii) other circumstances, to be considered comprehensively. These criteria have been applied to many court cases including the Supreme Court rulings.

The judgment under discussion here was decided comprehensively based on these criteria. The criteria most emphasized are (ii) and (iii), which were conceived with traditional factory workers in mind and have little to do with white-collar workers in today's job market. Indeed, a discretionary work scheme was established under the 1987 amendment to the Labor Standards Act, and has been applied and expanded since then. Under the discretionary work scheme, there is no freedom to accept or reject work duties or targets, though it gives a high degree of discretion about specific procedures, time and place of performing work duties. Even more discretionary high-level professional work scheme was established in 2018. Telework and mobile work, which enable work at home or elsewhere via information technology devices, are also expanding. These workers are of course hired under labor contracts. In other words, insufficiently meeting criteria (ii) and (iii) are no longer sufficient to deny worker status.

In addition, the fact that amount of remuneration depends on performance is not grounds for a contract to be an outsourcing contract, and payment of wage under a piece work payment

system based on a labor contract is assumed in Article 27 of the Labor Standards Act. In recent years, there is an increasing tendency for wage systems to be performance-based, and interpreting criteria (v) too strictly is also not appropriate for contemporary white-collar workers. Thus, the judgment under discussion overly emphasizes worker status criteria assuming traditional factory workers, which are behind the times today, and reveals an inappropriate understanding of remuneration for labor, while underestimating criteria that are still relevant today, such as the freedom to accept or reject work duties or whether workers can be substituted.

These analyses not only reveal the inappropriateness of the judgement but also contains problems of the obsolete nature of the 1985 Report that has been cited for numerous judgments. While it may not be necessary to change the individual criteria themselves, the relative prioritization of their importance will need to be altered in response to changes in the times, such as discretionary work scheme and the growing prevalence of performance-based wages.

The Labor Union Act of 1945 defined workers somewhat broadly as "those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation" (Art. 3). The Supreme Court's decisions rely primarily on the basic criteria of the Act: (i) inclusion in a business organization, (ii) unilateral and standardized determination of the content of contracts, and (iii) remuneration for labor, as factors for judgments. (Details omitted.)

The *Belco* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1188, pp.5–22. See also *Journal of Labor Cases* (Rodo Kaihatsu Kenkyukai) no.82, January 2019, pp.1–23.

AUTHOR

Keiichiro Hamaguchi Research Director General, The Japan Institute for Labour Policy and Training (JILPT). Research interest: Labor policy. Profile: https://www.jil.go.jp/english/profile/hamaguchi.html

Worker Status of the Joint Enterprise Cooperative Members

The *Joint Enterprise Cooperative Workers' Collective Wadachi Higashimurayama* Case
Tokyo High Court (Jun. 4, 2019) 1207 *Rodo Hanrei* 38

HAMAGUCHI Keiichiro

I. Facts

X engaged in work delivering goods as a member[1] of Y, a joint enterprise cooperative that operates a general motor truck transportation business. As a joint enterprise cooperative established in accordance with the Small and Medium-Sized Enterprise Cooperatives Act, Y is a workers' collective, meaning that all 14 of its members—including the chief director—are financial contributors, attend management meetings, and work as truck drivers. The members are paid remunerations based on their allotted delivery routes and while surplus funds are distributed among them, members do not receive overtime pay.

Having left employment with Y in March 2015, X brought an action in September that year demanding the payment of premium wages for overtime work in accordance with the Labor Standards Act. The point in dispute was whether X could be qualified as a "worker" (*rōdōsha*) as defined under the Labor Standards Act. On September 25, 2018, the Tachikawa branch of Tokyo District Court rejected X's demand on the grounds that X lacked worker status (*rōdōsha sei*). X responded by appealing to the Tokyo High Court.

II. Judgment

The Tokyo High Court's judgment, passed on June 4, 2019, adhered mostly to that of the District Court, with slight additions. These can be summarized as follows:

(1) Regarding whether X was able to refuse work requests or instructions on the pursuit of work: The directors issued requests to the members to carry out delivery work, but the delivery routes themselves were determined on the basis of consultation at management meetings and were in fact amended as necessary in light of members' opinions. Members were obliged to inform the operations manager at least two weeks before taking leave, for this was to allow for arrangements and handovers with other members (substitutes). The sharing of detailed reports with the management meeting in the event of violations of meeting resolutions was also merely a measure aimed at preventing further such incidents. There was a case in which a member was demoted to part-time worker (*arubaito*) status without said member's consent, but this decision was made on the basis of consultation among all members, and was deemed necessary to ensure the quality of service that should be offered by a joint enterprise cooperative consisting of a small number of members. On this basis it would be wrong to suggest that X lacked the freedom to refuse work requests or instructions.

(2) Regarding whether X was bound to directions in performing his/her work: The members were obliged to notify the operations manager when taking a detour from their delivery route, but detours themselves were not prohibited, and not subject to disciplinary action. The members received instructions regarding their delivery routes and driving methods, but these were aimed at ensuring that the trucks were driven safely. The members also had the tasks of selling co-op products that were on promotion and encouraging co-op insurance enrollment, but there were no related penalties even if they were not successful, and it cannot be

suggested that they received direction or supervision.

(3) Regarding whether X was bound to a given working time and place: The members generally gathered at 8:00 a.m. to load goods on the truck, after which a morning meeting was held. They would also work for around one hour after returning their working place, to file delivery slips and carry out other such tasks. However, given the nature of the work, it is reasonable that goods should be loaded at a time of day that avoids delays in deliveries. Conducting a morning meeting with all members present was also undeniably necessary process to ensure that the delivery work was conducted properly. It would therefore be wrong to suggest that X was strongly bound to a given working time and place.

(4) Regarding whether the payment X received was paid as remuneration for his/her work, not for the product: The remunerations received by members may be classed as payments based on the work completed, as members were paid on the basis of a record of the particular delivery routes they had finished. As the specific amount of remunerations was determined on the basis of whether the delivery work for a particular delivery route had been conducted, and the amount of time required to complete the deliveries was essentially irrelevant, it would be wrong to suggest that remunerations were paid as the equivalent for a certain amount of time worked. In addition, the surplus funds were generally divided equally among the members.

(5) Regarding whether X could be qualified as a business operator: It is not possible to suggest that X could be qualified as a business operator simply on the basis of the fact that the legal entity in question was a workers' collective. The key issue in question is whether, in light of the nature of the joint enterprise cooperative contract, the members were actively involved in decisions on the basis of actual consultations across the business of the cooperative as a whole. Y operates on the basis of the contributions from all members including the chief director in terms of their financial investments and work as truck drivers. There was therefore no significant difference between the status of the chief director and other directors and that of X and the other members. All members had a practical role in the management of the cooperative, as management matters were determined by majority decisions in which all members had equal say. The members were operating the business together, actively contributing funds, engaging in management, and carrying out the work. Therefore, as a member of the cooperative, X can be classed as a business operator, and the work that X conducted cannot be seen as work carried out under the direction or supervision of another party.

Based on the above, it was determined that X cannot be qualified as a worker. The demand for overtime pay was therefore dismissed.

III. Commentary

Both the District Court and the High Court judgments as well as an overwhelming number of other cases in which worker status under the Labor Standards Act has been disputed, follow the criteria for "worker" set out in the Labor Standards Act Study Group Report published in 1985. The criteria have been used in many judicial decisions including judgments by the Supreme Court. The major criteria for determining worker status are: (i) whether the person in question can refuse the orders of the client, (ii) whether the person is bound to the client's directions in performing his/her work, (iii) whether the person is bound to a given working time and place, (iv) whether the person can hire another person to perform his/her work, and (v) whether the payment the person receives is paid as remuneration for his/her work, not for the product, with the supplementary criteria of (vi) whether the person can be qualified as a business operator, (vii) whether the person has only one client, and (viii) other circumstances, which are to be considered comprehensively.

As noted in the May 2019 issue of this journal, in my commentary on the judgment of the *Bellco* case, increasing numbers of people are engaging in working styles in which they have high levels of freedom to make decisions regarding working time and place, even if they are under labor contracts. With the current growing trend toward teleworking

and ICT based mobile work, people are able to work at home or elsewhere via information technology devices. The abovementioned 35-year-old Study Group Report criteria themselves are becoming somewhat outdated and in need of review. Aside from that, the case addressed here differs in that the very suitability of applying the judgment criteria to a type of organization like a workers' collective can be called into question.

Both the District Court and the High Court judgments appear to have given little concern to such a potential issue and simply judged X's worker status in reference to each point. However, (2) to (4) of the above judgment summaries entail a considerable amount of content that is specific to the employment type of a truck driver. If, conversely, said content is used as a basis to summarily reject worker status, this poses the risk that it will become impossible to eradicate malicious cases of truck drivers being qualified on paper as independent contractors.

The most important items addressed in the judgment of this case are ((5) of the judgment) whether X could be qualified as a business operator—the significance of which is slightly downplayed as one of the supplementary criteria in the aforementioned Study Group Report—and, in relation to that point, ((1) of the judgment) whether X could refuse orders of the client. However, in this case, the very interpreting of (5), and (1) only in relation to that point of (5), somewhat misses the mark. In other words, the question whether those members are business operators or not seems to be an inappropriate issue given the nature of an organization like a workers' collective. The defining characteristic of workers' collectives is that each member is a financial contributor, manager, and worker in one, and in that sense all members share the roles of investor, manager, and worker to a certain extent. Looking at each characteristic separately is therefore the wrong approach—namely, it is not suitable to try to determine to what extent the plaintiff has worker status, or to what extent they have business operator status. Instead, the judgment should address the extent to which the nature of the workers' collective and the principle of members playing three roles are being correctly applied in practice. In that sense, (5) of the judgment is suited to the nature of this case.

It is therefore fair to conclude that the judgment itself was merely a perfunctory application of a conventional framework. And yet, as this case causes us to readdress the very applicability of that framework itself, it has a significant role to play in discussion on worker status.

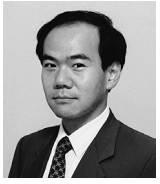
1. "Partner" defined in the Small and Medium-Sized Enterprise Cooperatives Act is described as "member" in this article.

The *Joint Enterprise Cooperative Workers' Collective Wadachi Higashimurayama* case, *Rodo Hanrei* (*Rohan*, Sanro Research Institute) 1207, pp.38–55.

HAMAGUCHI Keiichiro

Research Director General, The Japan Institute for Labour Policy and Training. Research interest: Labor policy.

https://www.jil.go.jp/english/profile/hamaguchi.html



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