

Commentary

Application of the Deemed Working Time System for Work Outside of the Workplace

The *Globe Cooperative Association* Case

Supreme Court (April 16, 2024) 1309 *Rodo Hanrei* 5

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I. Facts

In September 2016, Appellee X was employed by Appellant Y, a licensed supervising organization for foreign technical intern trainees, serving as a technical intern training coordinator until his resignation on October 31, 2018.

In this case, X has filed claims against Y for the payment of wages pertaining to overtime, statutory days off, and late-night work. Y argues that certain work performed by X outside of the workplace (hereinafter referred to as the “Work”) fall under the category of work for which “it is difficult to calculate those working hours” as provided in Article 38-2, paragraph (1) of the Labor Standards Act (hereinafter referred to as the “LSA Provision”). Accordingly, Y argued that the hours worked by X should be deemed to be prescribed working hours.¹

During the period of X’s employment with Y, X was responsible for conducting on-site guidance visits to the technical intern training implementing organizations located in the Kyushu region, more than twice a month, and also engaged in work for foreign trainees, such as picking-up and seeing-off at the time of their arrival in, and departure from Japan, providing them with guidance on daily living, and serving as an interpreter for them when they got into unexpected trouble. With regard to the Work, X managed the scheduling process directly, including making appointments to visit the implementing organizations. Furthermore, although Y provided X with a mobile phone, X neither received specific

instructions from Y nor submitted reports on an as-needed basis via the device.

Notwithstanding X’s contractual working hours were stipulated as 9:00 a.m. to 6:00 p.m. with a one-hour break from noon, in reality, X took breaks at his own discretion depending on workdays. Furthermore, X was exempt from Y’s time card-based management of working hours and could travel directly to and from client sites based on his own judgment. Nevertheless, at the end of each month, X submitted daily work reports to Y, detailing the start and end times of his work, break times, visit locations and times, and general work content for each working day, all of which were subject to Y’s review and verification.

Given these facts, the court of prior instance (Fukuoka High Court [November 10, 2022]) partially granted X’s claim for payment of wages among the claims filed in this case, holding that the accuracy of X’s daily work reports was assured to a certain extent.

II. Judgment

According to the facts mentioned above, the Work covered a wide range of duties, including not only conducting on-site guidance visits to the implementing organizations, but also picking up and seeing off foreign trainees, providing guidance on daily living, and serving as an interpreter on the occasion of unexpected trouble. Furthermore, with regard to the Work, X managed the scheduling process directly, including making appointments to

visit the training implementing organizations, and hence, X was allowed to take a break at times different from the prescribed break time and could choose to go directly to and from client sites based on his own judgment, and X did not receive specific instructions from Y or make reports to Y on an as needed basis.

Under such circumstances, in consideration of matters such as the nature, content, manner, and situation of performance of the work, and the method, content, manner, and situation of communication of instructions and reports on the work, it is difficult to immediately say that it was easy for Y to specifically understand the situation of Appellee X's work outside of the workplace, even though the implementing organizations at which X was assigned to conduct training as well as the frequency of visiting these organizations on a monthly basis were designated.

Nevertheless, with regard to the daily work reports submitted by X to Y, the court of prior instance evaluated that their accuracy was assured, pointing out that [i] it was possible for Y to confirm with the implementing organizations concerning the content of the daily work reports, and [ii] in some cases, Y paid allowances for overtime work by calculating the hours worked overtime on condition that the daily work reports were accurate, and in conclusion, the court of prior instance denied the applicability of the LSA Provision to the Work.

However, the point mentioned in [i] above demonstrates merely in general terms that Y could take such measures as making inquiries to the other party involved in X's work, and it is uncertain in specific terms whether the approach of conducting confirmation with the implementing organizations is actually possible and effective. Regarding the point mentioned in [ii] above, Y argues that it paid allowances for overtime work to X without applying the LSA Provision only when Y was able to ascertain X's working hours based on evidence available other than the content of X's daily work reports. Unless the acceptability of this argument is examined, it cannot be said that Y regarded the accuracy of the daily work reports as a precondition, nor can it be evaluated that the accuracy of the daily work reports was

objectively assured only based on the fact that Y paid allowances for overtime work in certain cases.

According to the above, it must be said that the court of prior instance determined that the Work does not fall under the case where "it is difficult to calculate those working hours" as referred to in the LSA Provision, without fully examining the specific circumstances concerning whether the accuracy of X's daily work reports was assured, but solely by placing emphasis on X's reporting by means of the daily work reports, and that such determination by the court of prior instance is unlawful due to the erroneous interpretation and application of the LSA Provision.

As such, the above-mentioned determination by the court of prior instance contains a violation of law or regulation that has clearly influenced the judgment, and the part of the judgment in prior instance concerning X's claims, which is against Y, should inevitably be reversed. For the reversed part of the judgment in prior instance, the case is remanded to the court of prior instance to have it further examine matters including whether the Work falls under the case where "it is difficult to calculate those working hours" as referred to in the LSA Provision.

III. Commentary

(1) Significance of this judgment

This is a case in which the Supreme Court made a fact-specific determination and reversed the judgment in prior instance to remand the case to the High Court. It is noteworthy as the second judgment of the Supreme Court that addressed the applicability of the deemed working time system for work outside of the workplace. In particular, while the precedent judgment on the *Hankyu Travel Support* (Temporary Tour Conductors No. 2) case, Supreme Court, Second Petty Bench [Jan. 24, 2014] 1088 *Rodo Hanrei* 5) dismissed the final appeal, the judgment in the present case is significant in that it discussed what situation should be demonstrated to prove the difficulty in calculating deemed working time when an employee engaged in work outside of the workplace.

In addition, it has been a considerable period of time since the diversity of employment forms began to be argued in practical and labor policy terms. The Supreme Court's decision in the present case regarding the applicability of the LSA Provision to employees who engage in work away from the workplace (such as sales personnel who always or frequently work outside of the office) will provide valuable input for considering the optimal application of the deemed working time system for labor by those who work from home, which has become a more common working styles since the onset of the COVID-19 pandemic, and for developing a legal system for deemed working time in line with changes in working styles.²

(2) Difficulty in calculating working hours

What situation specifically constitutes the case where “it is difficult to calculate those working hours” as provided in Article 38-2, paragraph (1) of the LSA, which was disputed in this litigation?

The administrative authorities interpret that because this Provision concerns work outside of the workplace, it refers to the “case where it is difficult to calculate a employee's working hours due to the employer's insufficient direction and supervision. Legal scholars further elaborate on this, such as the “case where the employer is unable to exercise the sufficient direction and supervision of the employee to the level that can adequately grasp working hours due to the nature of the employee's work,” or the “case where it is objectively difficult for the employer, despite its reasonable effort, to ascertain the employee's working status to a degree that can be calculated.” These perspectives suggest that the determination hinges on the concrete extent of the employer's actual direction and supervision over the employees working outside of the workplace.

In the *Hankyu Travel Support Case*, the Supreme Court examined the facts found in the case in light of the “nature, content, manner, and situation of performance of the work, and the method, content, manner, and situation of communication of instructions and reports on the work between the employer and the employee,” and thereby derived a

conclusion. The Supreme Court followed this approach in the present case. It seems that the Supreme Court, while bearing in mind the qualitative nature of the work, presumed from the facts the dynamic aspects of the work, that is, how the work was performed and the communication and reporting were conducted, with a view to identifying whether the employer is found to have exercised the direction and supervision of the employee, or in other words, whether the situation falls under the case where “it is difficult to calculate those working hours.” Therefore, the determination on this issue should inevitably be made on a case-by-case basis, relying on the facts found in terms of the manner of performance and other dynamic aspects of the work.

Having said that, the value of the *Hankyu Travel Support Case* as a precedent is reflected in the Supreme Court judgment in the present case. In its ruling, the Supreme Court stated that “the court of prior instance determined that the Work does not fall under the case where ‘it is difficult to calculate those working hours,’ without sufficiently examining the specific circumstances concerning whether the accuracy of X's daily work reports was assured, but only by placing emphasis on X's reporting by means of the daily work reports.” Consequently, the actual nature of an employee's engagement in work—rather than the presumptive expectations of their role—is the determinative factor in assessing the extent of an employer's direction and supervision. This assessment, in turn, dictates whether the circumstances satisfy the legal criteria for being “difficult to calculate working hours.”

Focusing on the nature of the work performed, a clear distinction arises when comparing this case with the *Hankyu Travel Support Case*. In that precedent, the employee, a tour conductor, was ordered to follow the pre-established tour itinerary and other details of work predetermined by the employer, exercising discretion only when addressing unforeseen contingencies during the tour. In contrast, the Appellee X in the present case, a technical intern training coordinator for foreign trainees, engaged in a far broader scope of duties—ranging from periodical on-site guidance to daily life counseling,

trouble shooting and interpreting for foreign trainees—while maintaining direct control over their own work schedule. These substantive differences in the prescribed work may have influenced the court’s legal decision regarding the degree of the employer’s direction and supervision, particularly concerning the challenges of calculating actual working hours.

Meanwhile, with the current development of Information and Communication Technologies (ICT) equipment, how the employee actually uses such equipment in performing his/her work may possibly influence the court’s legal decision regarding the difficulty in calculating working hours (for the case in which the court partially determined that the situation in dispute does not fall under the case where “it is difficult to calculate those working hours” due to the manner of using ICT equipment in performing work, see the *Celltrion Healthcare Japan Case*, Tokyo High Court [November 16, 2022] 1288 *Rodo Hanrei* 81).

Notes

1. Article 38-2 of the Labor Standards Act:

(1) If a worker engages in work outside of the workplace during all or part of their working hours and it is difficult to calculate those working hours, the number of hours worked is deemed to be the prescribed working hours; provided, however, that if it would normally be necessary to work in excess of the prescribed working hours in order to carry out that work, the worker is deemed to have worked for the number of hours that would normally be necessary to carry out that work, pursuant to the provisions of Order of the Ministry of Health, Labour and Welfare.

(2) In a case referred to in the proviso of the preceding paragraph, if the employer has concluded a written agreement concerning the work in question with the labor union that is organized by a majority of the workers at that workplace, if there is one, or with a person representing a majority of the workers at that workplace, if there is no such union, the number of hours specified in that agreement is used as the number of hours that would normally be necessary to carry out the work referred to in the proviso to that paragraph.

(3) An employer must file the agreement referred to in the preceding paragraph with the relevant government agency pursuant to the provisions of Order of the Ministry of Health, Labour and Welfare.*

*Please note that the English translations of paragraphs (1) through (3) above are quotations from the Japanese Law Translation Database System, which is operated by the Ministry of Justice (<https://www.japaneselawtranslation.go.jp/en/>).

Note by the author: If the number of deemed working hours prescribed by the employer exceeds the number of statutory working hours per day (eight hours) or if work on a statutory day off per week is expected, the employer is required to conclude a labor-management agreement with the person representing a majority of the employees at the workplace regarding work in excess of statutory working hours (overtime work) and work on statutory days off, and notify the Director of the Labor Standards Inspection Office of this agreement. If such agreement exists, the employer must pay premium wages for overtime work and work on days off. Even if such overtime work and work on days off is not expected, the employer has the obligation to pay premium wages to employees who have actually engaged in work overtime or on days off. The employer must also pay premium wages to employees who have engaged in work during the period between 10:00 p.m. and 5:00 a.m. (late-night work).

2. According to the Summary Report of the “General Survey on Working Conditions” 2024 (released on December 25, 2024), the proportion of companies that adopt the deemed working hours system for work outside of the workplace under Article 38-2 of the LSA is 13.3%, and the employees covered by this system account for 7.6%.

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