Commentary

Gender Equality and Indirect Discrimination: The Legality of Restricting Company Housing Scheme to Comprehensive-Track Workers

The *AGC Green-Tech Co.* Case
Tokyo District Court (May 13, 2024) 1314 *Rodo Hanrei* 5

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I. Facts

Company Y (defendant) operates a business selling fluorine film for agricultural greenhouses, used as covering materials for structures such as vinyl greenhouses. Sales representatives at Company Y engage in sales activities by visiting agricultural cooperatives, farmers, and agricultural greenhouse installation contractors nationwide. For sales activities targeting farmers, sales representatives, together with distributors, visit farms in various regions. Given the nature of the work of sales positions (comprehensive-track workers), which covers the entire country and is very high-pressure, there were virtually no female applicants, and the workforce consisted almost entirely of men. Company Y's headquarters in Tokyo comprises Business Management Division, Administration Division, and Overseas Sales Management Department. Domestic sales are handled by the East Japan Sales Office (Kazo City, Saitama Pref.), Central Japan Sales Office (Toyokawa City, Aichi Pref.), and West Japan Sales Office (Kurume City, Fukuoka Pref.). Each sales office is staffed with managerial, sales, and general positions.

X (plaintiff) is a woman, who began working at Company Y's Administration Division (former General Affairs Department) under a temporary-to-permanent contract after graduating from junior college in April 2008. Around July of that year, she was hired as a permanent worker by Company Y and has since been working in the Administration Division. In June 2018, she obtained a Level 3 bookkeeping certification. In Japan, there are generally two categories of permanent workers: '*sogo shoku*' and '*ippan shoku*.' Normally, workers in *sogo shoku* may be required to relocate for work, but this is not the case for those in *ippan shoku*. The plaintiff was hired as *ippan shoku*. According to the written specification of her working conditions dated May 19, 2008, her duties were outlined as general affairs, accounting, and human resources tasks (including payroll calculation and petty cash management), with her monthly salary set at JPY 200,750. The written notice of working conditions stated that the responsibilities of the position were head office administrative duties, and it detailed the JPY 200,750 monthly salary as follows: a base salary of JPY 197,750 and a housing allowance of JPY 3,000. This was significantly lower than the benefits derived from the company housing scheme (discussed below) for *sogo shoku*.

With regard to the classification between '*sogo shoku*' (comprehensive-track workers) and '*ippan shoku*' (clerical-track workers) positions at Company Y, Article 2 of the salary regulations enacted on August 1, 2000, stipulated as follows: "As defined in the present regulations, *sogo shoku* refers to a worker who can accept assignment to any location at the company's direction and is recognized as having the ability to smoothly perform duties at the assigned work location" (Paragraph 1 of the same Article). "The term *ippan shoku* in the present regulations refers to job performance capabilities other than

those specified in the preceding paragraph" (Paragraph 2 of the same Article). Similar definitions were also set forth in the wage regulations.

Following the revision of the work rules on April 1, 2015, a classification between *sogo shoku* and *ippan shoku* positions was introduced in the work rules for indefinite-term workers (Article 2, Paragraph 2 (1)). *Sogo shoku* refers to a worker who can accept assignment to any location at Company Y's direction and make appropriate decisions based on expertise that meets the requirements of the ability-based grade system, and who is recognized as having ability to perform a wide range of non-routine tasks smoothly. *Ippan shoku* refers to positions engaged in routine, supporting tasks such as general clerical work, and workers in these positions are not subject to transfer to other workplaces. *Sogo shoku*'s workforce is predominantly sales representatives operating from various sales offices, with a limited number of managerial staff situated at headquarters. Most of *sogo shoku* were men, whilst most of *ippan shoku* were women.

In accordance with the management regulations of the company housing scheme, Company Y's company housing scheme is a program in which Company Y acts as the tenant for rental housing for its workers, covering the full amount of rent and other expenses. A portion of the rent is subject to deduction from the workers' wages, and the remainder is covered by Company Y. Initially, the provisions of the management regulations were eligible for *sogo shoku* who were considered to have difficulty commuting to the assigned work location and who consequently relocated. Since July 2011, the scope of application has expanded to include cases with no relation to *tenkin*, or job transfer requiring a change of residence. On March 16, 2018, the management regulations were revised to explicitly state that the company housing scheme could be applied to *sogo shoku* under 60 years of age who do not own a residence within the commuting area, if Company Y deemed it necessary. There has been no instance of Company Y rejecting an application from *sogo shoku* to grant the company housing scheme.

While a certain number of sales representatives at Company Y have experienced a job transfer, a considerable number of workers at Company Y have never experienced a transfer (at least six *sogo shoku* have not experienced a transfer, and beyond these, a considerable number of workers who relocated upon hiring have never experienced a transfer itself). Among sales representatives who have never experienced a transfer, some are granted eligibility for the company housing scheme. None of those in *sogo shoku* in Company Y's Management Office (i.e., the Head, and the Deputy Head of the Administration Division) have ever experienced a transfer in the past, yet they are also given eligibility for the system.

X filed a lawsuit against Company Y, alleging that restricting the use of the company housing scheme exclusively to *sogo shoku* violates Article 6, Item 2 of the Act on Equal Opportunity and Treatment between Men and Women in Employment (hereinafter, "EEOA" [Equal Employment Opportunity Act]), Article 7 of the same Act, and Article 90 of the Civil Code. Article 6 of the EEOA prohibits direct discrimination, whilst Article 7 of the EEOA prohibits indirect discrimination. Article 90 of the Civil Code provides that any act contrary to public policy and good morals shall be invalid. In Japan, even before the enactment of the EEOA, a legal doctrine had been established regarding regulations on gender discrimination in the labour sector, based on Article 90 of the Civil Code.

The point at issue in this case is whether Company Y's refusal to grant *ippan shoku* access to its company housing scheme can be considered unlawful direct or indirect discrimination. (This article addresses only this point in dispute.)

II. Judgment

1. Direct discrimination

X argues that Company Y's restriction on the use of the company housing scheme to *sogo shoku*, while not permitting its use for *ippan shoku*, creates a significant disparity in treatment between men and women, and that such disparity should be inferred as gender-based and constitutes a violation of Article 6,

Item 2 of the EEOA, as well as Article 1, Item 4 of the Enforcement Regulations of the EEOA. This will be examined below. From its establishment through April 2020, Company Y had a total of 34 *sogo shoku*. Of these, only one was a woman (D), while the remaining 33 were all men. There were a total of seven *ippan shoku*, of whom only one was a man (A), while the rest were all women. Limiting the eligibility of the company housing scheme to *sogo shoku* exclusively, it is recognized that a certain degree of disparity in treatment exists between *sogo shoku* who utilize this system and *ippan shoku*.

It can be recognized that the fact that all beneficiaries of the company housing scheme have been men, with the exception of D, is due to the circumstance that the majority of those eligible for the system consists of sales representatives, a job type for which there have been a low number of female applicants. Therefore, it cannot be concluded that the aforementioned disparity in treatment associated with the company housing scheme is attributable to gender.

A review of the period from the time of Company Y's establishment reveals no circumstances sufficient to infer that the purpose behind the design of the program—which permitted only *sogo shoku* to use the company housing scheme—was to create disparities in treatment based on gender. Given that D, who was formerly employed by Company Y, utilized the company housing scheme, while A was not permitted to do so, it cannot be said that the application of the system was being distorted based on gender.

Therefore, it cannot be considered that the disparity in treatment under the company housing scheme was directly attributable to gender, and given the objective fact that all beneficiaries of the system, with the exception of D, were men, it cannot be inferred that there was direct discrimination based on gender.

2. Indirect discrimination

As outlined in Article 2, Item 2 of the Enforcement Regulations of the EEOA, which is based on Article 7 of the Act, while the provision on lending of housing is not mentioned (in Article 6, Item 2 of the Act or Article 1, Item 4 of the Enforcement Regulations), [1] it is a measure based on grounds other than gender [2] that imposes a substantial disadvantage on members of one gender compared to those of the other gender, and therefore [3] implementation of such measures without reasonable grounds (which constitutes indirect discrimination) may exist other than those stipulated in the Enforcement Regulations of the EEOA. While such indirect discrimination may not be considered a violation of Article 7 of the EEOA, it could potentially be classified as unlawful under general principles of law, such as those stipulated in the Civil Code. (See the "Supplementary resolution concerning a bill to partially amend the Act on Securing of Equal Opportunity and Treatment between Men and Women in Employment (EEOA), as well as the Labor Standards Act (LSA)" by the Committee on Health, Labour and Welfare in the House of Representatives on June 14, 2006; *Kokinhatsu*, Administrative Notification No. 0210-02, issued by the Director of the Employment Environment and Equal Employment Bureau of the Ministry of Health, Labour and Welfare (MHLW), "Concerning the Partial Amendment to the 'Enforcement of the Revised Act on Securing Equal Opportunity and Treatment between Men and Women in Employment.'")

In light of the EEOA's objective to ensure equal treatment between men and women in employment, following the enforcement of Article 7 of the same Act (on April 1, 2007), when it comes to lending of housing, in cases where setting a requirement that an worker must be able to respond to a job transfer requiring a change of residence could fall under an indirect discrimination, such measures may be held to violate Article 90 of the Civil Code or the existence of a tort. Therefore, the measures related to Company Y's company housing scheme should be given similar consideration.

When examining the ratio of men and women who meet the requirements for the measure, the specific content of the measure, the necessity for performing duties, the necessity for employment

management, and all other relevant circumstances, whether it imposes substantial disadvantage on female workers compared to male workers, and whether there are reasonable grounds for taking such a measure, whether the measures concerning Company Y's company housing scheme falls under indirect discrimination should be examined in light of the intention of the EEOA. If they constitute indirect discrimination, it should be considered whether the management regulations of the company housing scheme violate Article 90 of the Civil Code, and whether Company Y's measures constitute a tort (see "Guidelines on ways for employers to take appropriate measures with regard to matters provided for under the provisions concerning the prohibition, etc. of discrimination against workers on the basis of gender" (Ministerial Notification No. 614 of MHLW, 2006); last amended: Ministerial Notification No. 458 of MHLW, 2015), Section 3-1 (1), (3) (b)).

Given the comprehensive consideration of the various factors of this case in light of the points mentioned above, the following conclusions can be drawn. First, since at least July 2011, the ratio of male to female workers benefiting from the company housing scheme as part of fringe benefit measures has shown a significantly higher proportion of men compared to an extremely low proportion of women. Regarding the measure's specifics, there was a significant disparity in economic benefits received by workers eligible for the company housing scheme and those who were ineligible. Nevertheless, with respect to the practice of permitting application to the company housing scheme, it is difficult to prove the necessity or rationality of restricting its use to *sogo shoku* based on the necessity or usefulness within the in-house career system for sales representatives, or from the perspective of securing an advantage in the recruitment competition for sales positions, regardless of the existence of actual transfers or any realistic possibility thereof.

Consequently, since July 2011, Company Y, in accordance with its management regulations of the company housing scheme, has restricted eligibility for the system to workers who are capable of responding to a job transfer requiring a change of residence—that is, *sogo shoku*—while not permitting it to *ippan shoku*. Regarding the ongoing practice of applying this system as a welfare benefit measure, which is effectively applicable only to male workers and imposes a substantial disadvantage for female workers, the Court found no reasonable justification for the disparity. Consequently, it held that the implementation of the housing scheme constituted indirect discrimination, finding it inconsistent with the EEOA's objective of ensuring equal treatment between men and women in the workplace.

III. Commentary

This judgment marks the first ruling to recognize indirect discrimination since the 2006 Amendment of the EEOA.

1. Direct discrimination

The court rejected the claim of direct discrimination. As outlined in Article 6 of the EEOA, "Employers must not discriminate against workers based on their sex regarding the following matters," and the mentioned items consist of: "assignment (including allocation of duties and granting of authority), promotion, demotion, and training of workers" (Item 1), "loans for housing and other similar fringe benefits as specified by Order of the MHLW" (Item 2), "changes in job type and employment status of workers" (Item 3), and "encouragement of retirement, mandatory retirement age, dismissal, and renewal of labor contracts" (Item 4). According to Article 1 of the Enforcement Regulations of the EEOA, the measures are mentioned as "measures of fringe benefits provided by Order of the MHLW" under Article 6, item 2 of the EEOA as follows: "the lending of funds for living expenses, funds for education expenses and other funds for the purpose of promoting workers' welfare" (Item 1), "regular payment of moneys for the purpose of promoting workers' welfare" (Item 2), "payment of moneys for the purpose of asset formation by the workers" (Item 3), and "the lending of housing" (Item 4).

The basic principles of the EEOA are set forth in

Article 2, Paragraph 1, which states, "The basic principles of this Act are to enable workers to lead fulfilling professional lives free from sexual discrimination, and in the case of female workers, with respect for motherhood." Additionally, Article 5 stipulates that "With regard to the recruitment and employment of workers, employers must provide equal opportunities for all persons regardless of their sex." As outlined in Article 4 of the LSA, "An employer must not use the fact that a worker is female as a basis for discriminatory treatment in comparison to men regarding wages." All of the aforementioned provisions serve as prohibitions against direct discrimination based on gender in Japan.

The LSA was enacted in 1947, as was the EEOA in 1985. The 1985 EEOA was a law that clearly prohibited discrimination against women. Following the amendments in 1997 and 2006, it has become the current employment equality law, which prohibits discrimination against both men and women. The 2006 EEOA expanded the scope of prohibited discrimination in addition to the previous prohibitions on assignment, promotion, training, retirement, and dismissal to include the aforementioned demotion, changes in job type and employment status of workers, and encouragement of retirement or renewal of employment contracts (and, as discussed later, provisions regarding indirect discrimination were incorporated in the 2006 Amendment).

In Japan, the following are well-known cases of gender discrimination.

(1) The practice of women resigning from their jobs upon marriage became a point at issue in the *Sumitomo Cement* case (Tokyo District Court, December 20, 1966, 17 *Rominshu* 1407, Judgement: Treating marriage as grounds for dismissal solely for female workers by an employer constitutes gender discrimination, and limits an individual's freedom to marry. Given the absence of reasonable grounds for this practice, it violates public order, and is therefore invalid.)

(2) The mandatory retirement age of 30 for women (compared to age 55 for men) became a point at issue in the *Tokyu Kikan Kogyo* case (Tokyo District Court, July 1, 1969, 20 *Rominshu* 715, Judgement: None of the employer's assertions regarding the mandatory retirement age of 30 for female workers are reasonably justified, and there are no other special circumstances sufficient to constitute grounds for this mandatory retirement system. Therefore, this retirement policy, which discriminates against female workers by setting their retirement age at 30 while that of male workers is at 55, thereby placing female workers at a significant disadvantage, is deemed considerably unreasonable, contrary to public policy and good morals, and therefore invalid.)

(3) The gender-based wage table became a point at issue in the *Akita Sogo Bank* case (Akita District Court, Apr. 10, 1975, 26 *Rominshu* 388, Judgement: If an employer discriminates against a female worker in terms of wages in an employment contract solely on the basis of her gender, that particular provision of the contract is invalid as it violates Article 4 of the LSA. Consequently, the female worker may claim the difference between the amount paid to her and the amount paid to male workers.)

(4) The mandatory retirement age of 55 for solely female workers (compared to age 60 for male workers) became a point at issue in the *Nissan Motor Co*. case (Supreme Court, Mar. 24, 1981, 35 *Minshu* 300, Judgement: The company's work rules, which set a mandatory retirement age for women that is lower than that for men, amount to discrimination based exclusively on the fact that they are women. This practice constitutes unreasonable discrimination based solely on gender and is therefore invalid under Article 90 of the Civil Code.)

(5) The payment of various allowances exclusively to male workers became a point at issue in the *Iwate Bank* case (Sendai High Court, Jan. 10, 1992, 43 *Rominshu* 1, Judgement: In general, work rules that violate Article 4 of the LSA, as well as wage provisions in employment contracts based on such rules, are invalid under Article 90 of the Civil Code.) In this case, the employer (appellant) provided family allowances and other benefits to male workers, even if their wives had an income, based on certain salary regulations, while not extending these benefits to female workers in dual-income households,

regardless of whether they were the household's main income provider or if they were financially supporting their children, in instances where their husbands had an income (exceeding a certain amount). There are no exceptional circumstances that would rationalize these provisions or the gender-based discrimination in the treatment of the relevant allowances under said provisions. Therefore, these provisions, as well as the provisions regarding the payment of family allowances in the employment contract between the employer and the female worker (appellee), violate Article 4 of the LSA (mandatory provisions) and are invalid under Article 90 of the Civil Code.

(6) The discriminatory wage treatment between men and women performing the same job duties (with equivalent years of service and age) became a point at issue in the *Nisso-Tosho* case (Tokyo District Court, Aug. 27, 1992, 611 *Rohan* 10, Judgement: The employer (defendant) failed to take appropriate corrective measures to adjust the plaintiff's (a female worker) base salary to the average base salary of four male workers, even though it should have been done so by January 1972 at the latest. As a result, it is acknowledged that a disparity has emerged between the plaintiff's base salary and that of the four male workers. The wage disparity claimed by the plaintiff from fiscal year 1982 onward is based solely on the fact that the plaintiff is a woman, or on the fact that the plaintiff is a dual-income earner and not the household's main income provider. Given the amount of the monthly wage disparity is by no means insignificant, it must be concluded that this constitutes unlawful wage discrimination, in violation of Article 4 of the LSA. Furthermore, since the defendant cannot avoid liability for negligence in failing to take appropriate corrective measures, it is reasonable to interpret this as constituting a tort).

2. Legal provisions of indirect discrimination and this judgment

The legal principle that, even if an employer establishes gender-neutral criteria regarding the treatment of workers—such as recruitment, promotion, or wages—when they actually create a disadvantage for a specific gender group, yet the employer fails to prove the rationality of those criteria, such treatment is deemed unlawful discrimination, is known as the legal theory of indirect discrimination. While there is ongoing debate regarding this issue in various countries, including those in Europe and the US, the substance of the discussions does not always align.

In Japan, provisions regarding indirect discrimination were incorporated into the EEOA through the 2006 Amendment to the Act. Article 7 of the EEOA, as amended in 2006, stipulates that "An employer must not take measures which concern the recruitment and employment of workers or any of the matters listed in the items of the preceding Article, and based on criteria other than the worker's sex, which are specified by Order of the MHLW as measures that may substantially cause discrimination on the grounds of the worker's sex in consideration of the ratio of men and women who satisfy the criteria and other circumstances, except in cases where there is a legitimate reason to take those measures, such as cases where those measures are specifically required for the purpose of performing the business in light of the nature of the business, or cases where those measures are specifically required for the purpose of employment management in light of the status of business operations."

According to Article 2 of the Enforcement Regulations of the EEOA, "measures which concern the recruitment or employment of workers and which require criteria concerning the worker's height, weight or physical strength" (Item 1), "measures which concern the recruitment, employment, promotion or change in job type of workers and which require criteria concerning the worker's ability to receive reassignment that results in the relocation of the worker's residence" (Item 2), and "measures which concern the promotion of workers and which require criteria concerning the worker's experience of having been reassigned to a workplace other than the workplace where the worker had formerly worked" (Item 3) are stated as "measures specified by Order of the MHLW" under Article 7 of the Act.

Under the EEOA, the scope of indirect

discrimination is strictly limited to the three aforementioned categories, making its legal application extremely restrictive. Nevertheless, this judgment transcends the narrow confines of Article 7, explicitly recognizing the validity of indirect discrimination in categories not previously enumerated under the Act. The judgment specifically held that while "lending of housing (Article 6, Item 2 of the EEOA; Article 1, Item 4 of the Enforcement Regulations of the EEOA) is not mentioned in Article 2, Item 2 of the aforementioned Enforcement Regulations, [1] it is a measure based on grounds other than gender [2] that imposes a substantial disadvantage on members of one gender compared to those of the other gender, and therefore [3] implementation of such measures without reasonable grounds may exist other than those stipulated in the Enforcement Regulations of the EEOA, and even if they do not violate Article 7 of the EEOA, there are cases where they should be deemed unlawful in light of general legal principles such as those of the Civil Code." The court rendered its decision as described above (see the "Regarding indirect discrimination" section of the judgment).

3. Significance of this judgment

This judgement breaks new ground by affirming that indirect discrimination can be established outside the specific criteria mandated by Article 7, making a pivotal shift in the interpretation of employment equality law in Japan.

It has been pointed out that, other than the three grounds limitedly mentioned in the Enforcement Regulations of the EEOA, there may be instances where it could be assessed as unlawful and invalid under private law. As this judgment also recognizes, this is evident from the supplementary resolutions or notifications issued at the time of the 2006 Amendment. Nevertheless, there has been no specific precedent recognizing illegality until now. While the judgment's recognition of the existence of a tort based on indirect discrimination is significant, the scope of the ruling is not necessarily clear.[1] In any case, it can be said that the judgment has expanded the potential for the de facto applicability and existence of prohibitions against indirect discrimination in the future by recognizing the application and existence of indirect discrimination in cases not covered by Article 7 of the EEOA.[2]

While the judgment employed a somewhat interpretative technique, this judgment would likely become one of the indispensable precedents in the ongoing discussion of indirect discrimination in Japan.

Notes

1. Kanki, Chikako, and Koichi Tominaga. 2024. "Deiarogu: Rodo hanrei kono 1-nen no soten" [DIALOGUE, Labor Law Precedents 2023–2024: The Issues Involved]. *Nihon Rodo Kenkyu Zasshi* [The Japanese Journal of Labour Studies]. Vol. 66 November 2024 No. 11: 2–63, 53. (remarks by Kanki).
2. Hasegawa, Satoshi. 2024. "Shataku seido tekiyo ni okeru tenkin kanosei no aru *sogo shoku* yoken no kansetsusei sabetsusei" [Indirect discriminatory factors in the eligibility of *sogo shoku* workers under the company housing scheme]. 1318 *Rodo Hanrei* 5, 14.

*Please note that the English translations of the provisions of Article 2, 5, 6, 7 of the EEOA, Article 1 of the Enforcement Regulations of the EEOA, and Article 4 of the LSA are quotations from the Japanese Law Translation Database System, which is operated by the Ministry of Justice (https://www.japaneselawtranslation.go.jp/en/).

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