views have also been calling for such a conclusion.

By Prof. TAKAYASU OKUSHIMA
YASUHIKO NOSE

7. Labor Law

Listed here are some of the outstanding cases indicative of the social and economic situation in recent years. Firstly, there was a case involving the relation between the actual social situation, that is, the extensive existence of enterprises aided by the dispatch of workers, and the prohibition of labor supply projects by the Employment Security Act. Secondly, there was a case in which a decision concerning the discrimination of both sexes (on the age limit system, pay raises and promotion) was made in favor of "equalization." Another case concerned the working conditions of public officials including the propriety of the age limit system. There were also many cases involving dismissal, the relocation of office posts, transfers, and punitive measures. Some of the major decisions in those instances are introduced here.

1. A case involving the Yamaguchi Broadcasting System in which a lockout set up against a strike for a limit number of hours was judged unlawful and the claim for wages was allowed.

Decision by the Second Petty Bench, the Supreme Court, on Apr. 11, 1980. (Case No. [*o*] 541 of 1976. *Jokoku* appeal dismissed. Claim for wages allowed. 34 *Minshū* 330.)

[Fact]

X et al. (*Jokoku* appellees) were employees of the company Y (*Jokoku* appellant) and had organized a labor union in Y. They resorted to limited strikes and other strikes by designated union members several times from Mar. 15, 1967, through May 5, in pro-

test against Y's personnel plan while, at the same time, demanding a wage hike.

Y carried out a lockout by erecting a barricade which included barbed wire from May 6, 1967 through July 4. In the meantime, X et al., whose demand to work was rejected, brought an action to the court demanding that Y pay their wages during this period.

In the first instance court, the lockout was ruled lawful (in part, unlawful), but in the second instance it was judged unlawful. Dissatisfied with the decision, Y filed a *Jokoku* appeal.

[Opinions of the Court]

"In cases where an employer is very disadvantegeously placed under heavy pressure due to acts of dispute by workers in certain respective labor dispute, acts of dispute by the employer can be interpreted as lawful in the light of the principle of equity so long as the defensive countermeasures designed to restore a balance of power between labor and management is considered proper." In this light, it cannot be said in the current case that the balance of power between labor and management had been lost in all departments of the company and that the employers were placed at a great disadvantage.

In this sense, the complete lockout as a defensive countermeasure against the strike was not proper and was therefore unlawful. Thus, the court supported the decision in the court below.

[Comment]

The current decision just followed the existing concept of the Supreme Court on lockouts, but it provides adequate material to learn about such theories in this context in Japan.

[Reference: Constitution § 28]

2. A Case in which damages were allowed for mental suffering by teachers of a public school due to excessive pressure to retire. The Shimonoseki Commercial High School Case.

Decision by the First Petty Bench, the Supreme Court, on July 10, 1980. (Case No. [*o*] 405 of 1977. *Jokoku* appeal dismissed.

Claim for damages allowed. 345 *Rōhan* 20).

[Fact]

The age limit system for teachers of public schools (as local public officials) is not recognized in the Public Officials Act. The two defendants X et al. had reached an age subject to pressure to retire, that is, 57 years of age, fixed by prefectural and municipal ordinances, the education board of Y city (hereinafter called Y') and the headmaster of the school pressured them to retire two to three times each year during a period of several years.

As X et al. refused to comply, the person in charge in the education board Y' continued to try to persuade X et al. to retire 11 to 13 times during a period of three to four months in 1980. During this period, X et al. were informally told of their decruitment and instructed to submit reports and material of their studies. Moreover, Y' adopted the attitude toward the union to which X et al. belonged that it would not respond to other demands of the union so long as the retirement issue in the current case remained unsettled.

Thereupon, X et al. filed a claim against Y city and Y' official in charge for ¥500,000 damages each for their mental suffering due to the pressure to retire, based on the State Liability Act. The first instance court admitted their claims with a reduction (¥40,000 and ¥50,000). An appeal was dismissed. Then, Y city and the official of Y' in charge filed a *Jokoku* appeal.

[Opinions of the Court]

"The findings and judgment in the court below cannot be unrecognizable in the light of the evidence exhibited in the original decision, and the contention in its course is not unlawful." Thus, this court hereby supports the decision of the court below. The holdings of the court below were as follows: Firstly, the number of times they were pressured and the period should be within the limit ordinarily considered necessary to explain the relevant circumstances and negotiations on terms of retirement such as special retirement steps. Secondly, consideration should be paid not to hurt the sense of honor of the persons persuaded to retire. Thirdly,

the persons pressured should not be disturbed but be allowed to make up their own minds. With these as standards of evaluation, it must be noted that the act of persuasion in the current case was too persistent and forcible and should be termed unlawful. The claims for damages shall be admitted. (The standards of evaluation in the first instance were a little different but in the main the same.

[Comment]

The dissenting opinion in the current decision of the Supreme Court says as follows: "Persuasion to retire for public officials who are not subject to the age-limit system is reasonable as a means to avoid an increase in personnel cost, a decline in efficiency in public duties and a stagnation of personnel affairs due to the aging of staff employees. For these purposes, it is natural to repeatedly try to persuade those who have clearly expressed their intention not to retire."

The majority of public officials in this country are not subject to the age limit system. However, the propriety of introducing the system for them has come into spotlight because of the fiscal difficulty resulting from the aggravated economic situation in recent years and the changing awareness of the nation about the working conditions of public officials, including the growing criticism about their allegedly light work and better working conditions. Under such circumstances, the current decision called for special attention.

[Reference: Government Officials Act § § 75 (1), 38, 76, and 78; Local Public Officials Act § § 27 (2), 16, and 28 (1), (4)]

3. A case in which disciplinary action (a reprimand) against active public officials in non-managerial posts, engaging in outdoor postal work and parading with a "banner slung across a street" calling for the general resignation of the cabinet, was judged effective. –The Honjo Postal Office Case –

Decision by the Third Petty Bench, the Supreme Court on Dec. 23, 1980. (Case No. [*gyō tsu*] 4 of 1974. Reversed and decided. Demand for revoking the disciplinary action dismissed. 353 *Rōhan*

2.)

[Fact]

X was an active public official in a non-managerial post engaging in outdoor postal work. Following the 37th Central May Day Rally, X participated in a demonstration and paraded carrying a banner which read "Down with the Sato Cabinet for Taking Part in the U.S. Vietnam Aggression! Absolute Opposition Against Discharge for the Sake of Rationalization –Honjo Chapter of the Japan Postal Workers' Union."

As deputy leader of the youth department of the Honjo Chapter of the Postal Workers' Union, X played an active role in the selection of the wording on the banner. The director of the Tokyo Postal Services Bureau (hereinafter called Y) ruled that the behavior of X corresponded to the Personnel Authority Rules 14–7 Para. 5 item 4 and Para. 6 Item 13 thus violating Article 102 Para. 1 of the Government Officials Act. Contending that X had thus violated the Government Officials Act Article 82 Paras. 1 and 3, Y served X with a notice of disciplinary action.

In the first and second instance courts, the disciplinary action in the current case was judged invalid because it violated Constitution Article 21 insofar as the Government Officials Act Article 102 Para. 1 and the Personnel Authority Rules 14–7 Para. 5 Item 4 and Para. 6 Item 13 are applied. Thereupon, Y filed a *Jokoku* appeal.

[Opinions of the Court]

"The disciplinary action based on Article 82 of the Act on the ground that X violated Article 102 Para. 1 of the Act and Para. 5 Item 4 and Para. 6 Item 13 of the Rules does not run counter to Article 21 of the Constitution in the light of the tenor of the decision of this Court. (Decision by the Grand Bench, the Supreme Court, on Nov. 6, 1974. Case No. [*a*] 1501 of 1969. 28–9 *Keishū* 293.) Hence, the court below committed errors in interpreting and applying Article 21 of the Constitution."

"It should be interpreted that the action of X corresponding to

Para. 5 Item 4 and Para. 6 Item 13 of the Rules for exhibiting a document for political purposes to oppose a specific cabinet violated Article 102 Para. 1 of the Act." The current action is valid since it cannot be considered an abuse of disciplinary rights.

Majority and dissenting opinions were divided two to one. The dissenting opinion maintains as follows: In the light that the prohibition of political activities of public officials is rationally a minimum possible restriction, the prohibition should be interpreted with limitations. Hence, the disciplinary action should be revoked because the behavior of X in the current case was a simple participation in a demonstration for political purposes as described in Para. 6 Item 10 of the Rules.

[Comment]

There are influential opposing views in both academic theories and legal precedents, especially those of the lower courts. Their appraisal is that the legal system endorsed by the Government Officials Act Article 102 and the Personnel Authority Rules 14–7 which uniformly prohibit nearly all political activities by all public officials constitutes a restriction on fundamental human rights deviating from the necessary minimum scope for the maintenance of fairness and neutrality of the work of public officials.

[Reference: Constitution § 21; Government Officials Act §§ 102 and 110; Personnel Authority Rules 14–7]

4. A case in which a claim for damages arising from discrimination of both sexes concerning promotion was allowed. The Suzuka City Office Case.

Decision by the Tsu District Court on Feb. 21, 1980. (Case No. [*wa*] 83 of 1972. Claim for damages allowed. 31–1 *Rōminshū* 222.)

[Fact]

Ms. X has been a staff employee of the Y City Office since 1948. In the meantime, she was promoted to Rank 5 in 1964, receiving the 19th class salary of Rank 5 in April, 1970, the 20th class salary

of Rank 5 in July the same year, and the 21st class salary of Rank 5 on July 1, 1971.

According to the Y Municipal Pay Ordinance, etc., the one-rank-for-one-office-work system was adopted as matter of principle. But, in the actual operation of these ordinances, it was not uncommon for staff employees to be promoted from Rank 5 to Rank 4 without any accompanying change in the type of work. Actually, male employees, unless they had been subject to disciplinary action or had been long-term suspended workers, had been promoted to Rank 4 after going through a given number of service years in the same rank and work experience.

In this regard, X contended that the failure of Y City to promote her in 1970 and 1971, notwithstanding her having reached the promotion standards both in service years in the same rank and years of work experience, was based on sex discrimination. The step taken by Y City, she claimed, constituted a tort in violation of Article 14 of the Constitution, Article 4 of the Labor Standards Act, ILO Treaty No. 100, and Article 13 of the Local Public Officials Act.

X then brought an action before the court demanding, on the basis of the Act concerning state liability for compensation, that she be paid damages for the balance between her present wages and those she would have received if the city has properly promoted her in 1970 and 1971, and also consolation for her mental suffering due to sex discrimination.

[Opinions of the Court]

The claim in this case does not infringe upon the personnel management rights of the person who has appointing power since promotion is not sought directly. With regard to the promotional discrimination on Apr. 1, 1971, it can be presumed that male employees who met the requirements of serving a given number of years in the same rank and years of experience have been promoted automatically unless they were deemed otherwise unsuitable. True to the spirit of Article 13 of the Local Public Officials Act, female employees should have been dealt with fairly and equally. X ought

to have been regarded as qualified for promotion and to have been promoted at least to the 10th class salary of Rank 4, next to the 20th salary of Rank 5. Hence, Y City should pay damages resulting from promotional discrimination in the current case and the relevant cause-and-effect relationship as well as solatium for her mental suffering.

With regard to the promotion on Apr. 1, 1970, the existence of promotional discrimination cannot be recognized for lack of concrete evidence.

[Comment]

In the case of local public officials, there are many local autonomies which practice a so-called "jump" system in their pay rank tables, promoting employees to an upper rank without changing their work (for instance, to a managerial post). This is a contradictory practice arising from the fact that the work and ability pay system strictly linked with both the work system and pay system is in force in consideration of the Japanese seniority system. The current case concerned the discrimination of sexes that occurred in the course of practicing the "jump" system.

It is a generally accepted legal interpretation that announcing a promotion is the personnel management right of the person who has such appointing power. In the current case, damages were claimed on the basis of the tort arising from illegal discrimination. However, it may be necessary to study claims for promotion in order to settle other related problems.

5. A case in which workers dispatched by a subcontractor on the basis of a work commission contract were recognized as having a labor contract relationship with the principal company. The Saga Television Co. Case.

Decision by the Saga District Court on Sept. 5, 1980. (Case No. [*yo*] 44 of 1975. Application for a provisional injunction for preservation of status. Allowed. 352 *Rōhan* 62.)

[Fact]

X et al. concluding a labor contract with the company A had been working at Saga Television Co. (hereinafter called Y) with whom A had concluded a work commission contract. X et al. had been engaged in spot CM film splicing and type printing for four years at the Saga Television Co. X et al. had been under the supervision of Y's staff employees at Y's worksite as part of its work operation.

Although they were paid by A, they had worked within the framework of Y's interests. In the meantime, trouble arose between X et al. and A over a pay raise. Out of consideration of the balance of income from the work commissioned with Y, A stopped the work with Y and cancelled the work commission contract in 1975 and discharged X et al. Thereupon, X et al. demanded that Y employ them. Y, however, rejected X et al. 's demand on the ground of its policy to commission such work in question with an outsider. X et al. then filed an application for a provisional injunction to confirm their status as Y's employees.

[Opinions of the Court]

In making a judgment on this case, "it is necessary yet sufficient to determine whether or not there on June 1, 1975 existed a labor contract relationship between X et al. and Y."

Judging from the recognizable facts, the matter of employment and wages was, in the main, within the scope of Y's interests and in the field of actual work X et al. had been completely under the orders and instructions of Y. Therefore, there had been a "virtual employ-depend relationship" between X et al. and Y. Thus, it can be judged that "there had been, in essence or content, more of a labor contract between X et al. and Y than between X et al. and A.

The work commission contract in this case revealed a deviation from Article 44 of the Employment Security Act, which states to the effect that except provided for in Article 45 of the Act, no person shall be allowed to conduct a labor supply project, or to use workers supplied by such a project, and attempted to carry out the work in question though prohibited from conducting a labor supply

project, thus running counter to public order and morals. Since Article 44 of the Act is aimed at the protection of workers and the democratization of labor, it is reasonable that Y should share any possible outcome arising from the cancelling of the work commission contract in the current case, despite the fact that Y had expressly refused to conclude a labor contract with X et al. Accordingly, it can be objectively surmised that "Y allowed and recognized the existence of a labor contract with X et al. on June 1, 1975." In this connection, since it is recognized that there exists the substantial employ-depend relationship between X et al. and Y and that their mutual contract intents are matched, this court declares the status of X et al. as employees of Y.

[Comment]

Whether or not "supply" projects conducted by labor supply enterprises in subcontract work, which has increased in recent years for such as the management of buildings, and data and office work processing, infringe upon certain provisions such as Article 44 of the Employment Security Act (prohibition of labor supply projects) and Article 6 of the Labor Standards Law (exclusion of intermediate exploitation), has posed a serious problem in connection with labor laws.

However, there are many unlawful firms which are not identifiable as independent work subcontractors and it will become a problem how such enterprises as in the current case should be dealt with.

In conclusion, we agree with the current decision, but how to settle the actual situation embracing similar work subcontractors on an extensive scale is a big problem in terms of labor administration and legislative theory. Basically, restrictions on the worksite to which the labor has been supplied as well as on the source of labor supply must be taken into consideration.

[Reference: Labor Security Act § 44, Enforcement Ordinance of Employment Security Act § 4, Labor Standard Law § 6]

By Prof. KAZUHISA NAKAYAMA
KUNIYUKI MATSUO