prove all the processes of the transfer which led to his possession of such rights. The majority view, however, interprets that the holder can exercise his rights only if he can substantially prove the transfer of rights as to the discontinued part of the endorsement. Precedents have usually followed such a view.

Although the current decision has also followed the standpoint of the majority view as well as precedents, it is significant in that it has for the first time admitted that the holder of a note which lacks a continuation of endorsement can suspend the limitation if he proves his substantial rights.

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7. Labor Law

Taken up here are three decisions by the petty benches of the Supreme Court as representative cases involving labor matters in 1982, namely, (1) the case involving Konohama station of the Nippon Telegraph & Telephone Public Corporation (NTT) over restrictions on the right to designate the period in which annual vacation with pay can be taken, (2) the Hotel Okura case over the validity of disciplinary action taken by the employer against the so-called "ribbon" struggle tactics whereby members of the union wear a small ribbon bearing their demands and slogans, and (3) the case involving the Tokyo Metropolitan Government's Construction Bureau over the validity of cancelling the decision to employ a local public servant.

1. NTT Konahama station case.

Decision by the First Petty Bench of the Supreme Court. Case No. (*o*) 53 of 1983. A demand for payment of wages during the annual vacation. *Jokoku* appeal dismissed. (The workers, *Jokoku*

appellant, defeated). 36 *Minshū* 366. The first instance, decision by the Osaka District Court on Mar. 24, 1976. 250 *Rōhan.* Second instance, decision by the Osaka High Court, on Jan. 31, 1978. 219 *Rohan.*

[Facts]

The two *Johoku* appellants, X and another (plaintiffs in the first instance) are employees of the Nippon Telephone and Telegraph Public Corporation (NTT) (*Jokoku* appellee, hereinafter called Y). According to the Work Rules affecting Y and the provisions in the written agreement concluded between Y and the All Japan Tele-Communications Workers Union (*Zendentsū*), employees working on a shift must tender their request for an annual vacation with pay by the time they finish their work two days before the scheduled vacation.

X et al. asked for paid leave of a day or two hours in the morning four times in August, 1968, but their requests were submitted on the mornings of their scheduled vacations. Although their procedure of request ran counter to the Work Rules and the labor-management agreement, the section chief of Y tried to ask for an explanation intending to grant the vacation, depending upon the circumstances, but X et al. refused to tell him their reason.

Thereupon, Y rejected their request and cut their wages for the days concerned. X et al. then filed a suit demanding payment of the wage cut on the ground that their request for a vacation was a legitimate exercise of their rights and that the wage cut was unlawful.

In the first instance, the court judged that "it is an employee's right to designate their annual vacation and that the regulation concerning the timing as stipulated by the Work Rules, etc. has no legal binding power." Stating that in the light of the actual work performed the requests for the annual vacation did not "prevent the normal operation of the enterprise," and the court did not recognize the exercise of Y's "right to change the vacation period." The plaintiff succeeded in this instance.

Y then filed an intermediate appeal.

In the second instance, the court ruled that the designation of an annual vacation two days before, according to the Work Rules, etc., was effective and that it did not violate Article 39 of the Labor Standards Act. Moreover, noting that the request for an annual vacation in the current case ran counter to the Work Rules mentioned above, and that they failed to give Y enough time to find someone else to work in their place, the court held that it was lawful for Y to change the annual vacation period requested by X et al. after the beginning of the scheduled vacation. Y's appeal allowed. X et al. defeated.

[Opinions of the Court]

(1) "The agreement on annual paid vacations as provided for in the Work Rules is reasonable in restricting, as a matter of principle, the timing to designate the period for annual vacation with pay." Hence, it does not violate Article 39 of the Labor Standards Act.

(2) Even if the employer exercised its right to change the period "after the vacation began or sometime after the vacation was over," and when "the employer has no time to judge in advance whether or not to exercise its right to change the period," and if "there is ample reason for exercising such right to change the period objectively," demonstration of the intention to exercise the right to change the period is considered effective. (In this case, it was the disapproval of Y.)

(3) In the current case, "there was not time enough to exercise the right to change the period in advance . . ." "Because the requests of the *Jokoku* appellants for paid vacation were not filed before their work ended two days before, as provided for in the Work Rules, there was the danger of hindering the normal operation of Y's enterprise."

(4) (Conclusion) In this regard, the current case corresponds to "hindering the normal operation of the enterprise," and exercising the right to change the period by Y was just. The decision of the lower court shall be supported.

[Reference: Labor Standards Act §39 (3). "The employer shall grant a vacation provided for in the preceding two paragraphs

in the period the workers require, provided that, when it hinders the normal operation of the enterprise the employer is authorized to change the period."]

[Comment]

In the current decision, the Supreme Court adopted the positions taken by past decisions (the JNR case involving the Koriyama factory, decision by the Second Petty Bench of the Supreme Court, 27 *Minshū* 210) and generally accepted theories, and ruled that there was no room for allowing the concept of approval by the employer as requirement for a paid vacation. (Accordingly, there is no need for submitting the reason for request or expression of intention of "approval" of the employer.)

The central points of the current case are the effectiveness of the Work Rules restricting the timing for employees to exercise their right to designate the period, and whether or not the normal operation of the enterprise will be hindered as a result.

In the case of the former, the question is whether or not the restrictions on the timing of exercising the right can be permitted within the generally conceivable scope and degree for the maintenance of the "normal operation of the enterprise" in connection with the relations between the management of the said enterprise and the duties and works of the said workers. On this score, the decision has shed new light.

In the case of the latter, even if violation of the Work Rules hinders "the normal operation of the enterprise" as a matter of general principle, it may be necessary to study if it hinders in concrete terms. The Supreme Court in its decision has considered this to a certain extent.

In conclusion, it can be said that restriction in the former case is proper regarding the request for a vacation of considerably longer period or at the time when many requests are made, but it is highly doubtful if it is proper in the case of a paid vacation of shorter duration (a day or two hours, etc.).

Moreover, even in the case of the latter, it is doubtful if it hindered the work of the "enterprise" on an extensive level rather

than that of the "works."

Lastly, the actual practice of the paid vacation system, unique in Japan, must be pointed out. For one thing, the system of taking a vacation of a "piecemeal" scale, such as by the hour or even by the minute has been adopted at many working places.

In addition, the system of allowing leave for reasons of sickness, nursing or social etiquette is rather poor in Japan and as a result the annual paid vacation is often used in substitute for these occasions. The current case falls under this category, and without taking up this customary situation one cannot discuss this case.

2. The Taisei Kanko (Hotel Okura) Case.

Decision by the Third Petty Bench of the Supreme Court on Apr. 13, 1980. Case No. (*gyo tsu*) 122 of 1977, 36 *Minshū* 659. The first instance, decision by the Tokyo District Court on Mar. 11, 1975 (221 *Rōhan*). The second instance, decision by the Tokyo High Court on Aug. 9, 1977.

[Facts]

An intervener, the trade union of the Hotel Okura (hereinafter called A), as part of campaign for demanding a wage hike, and upon notifying the *Jokoku* appellee, Taisei Kanko K.K. (hereinafter called Y) had its union members engage in work for two days wearing a ribbon with the slogan "Push Through Our Demand."

On the basis of the work rules, Y imposed a wage cut on the three executives of the hotel union A, tantamount to half-a-day pay. In protest, the union, A, staged another three-day ribbon-wearing tactic again, and Y imposed a disciplinary sanction (reprimand) on the three union executives for the second time.

A then filed a request for remedy with the Tokyo Metropolitan Labor Relations Commission (hereinafter called X) on the grounds of unfair labor practice. X issued a remedy order for cancellation of the disciplinary sanction on the ground that the ribbon "tactic" in the current case was a justifiable dispute action.

Dissatisfied Y brought an administrative action calling for annulment of the remedy order.

In the first instance, the court stated that the ribbon wearing tactic was unlawful union activity running counter to the obligation to engage in work faithfully, and that it was also unlawful as an act of dispute for lack of effective counter measures, thus running counter to equality between labor and management.

In addition, it said, the behavior of A, especially in the hotel business as in the case of Y, was highly unlawful, threatening to damage severely the hotel's reputation and trust. Y's request for annulment of the X's remedy order was allowed.

In the second instance, the court supported the decision of the first instance.

[Opinions of the Court]

"The ribbon tactic in the current case was staged mainly for the purpose of strengthening the structural buildup of the union itself, with emphasis placed on the effect of encouraging unity and promoting a sense of solidarity or fellowship among the members within the intervening trade union which was organized only three months ago.

"Accordingly, the judgment of the original court that the ribbon tactic being a union activity staged during the working hours, cannot be considered justifiable, is correct in conclusion."

[Comment]

The ribbon tactic, that is, working with a ribbon on, has often been used in Japan as a strategy without loss of wages while exercising pressure on the employer as a substitute for an act of dispute. Such a tactic is often staged by a trade union whose power of unity is not yet strong or in industries such as the service industry where the use of pressure on third parties such as guests is considered effective.

The current case is one such example, and some of the legal problems involved in the current judgment are presented here.

In the first place, the question is whether or not the ribbon tactic in the current case had the nature of a dispute tactic. Firstly, viewed from the standpoint that the wearing of a ribbon in the

current case was aimed at demonstration and a strengthening of unity in confrontation with the employer in the wage hike struggle, the attitude of the current decision is rather questionable as it put aside its aspect as an act of dispute, while evaluating only the aspect of strengthening unity within the organization.

Secondly, the recognition of the struggle as a union activity during working hours does not immediately account for its being illegal. In this regard, the Supreme Court ought to have given ample explanation about its illegality, especially in the light that the wearing of a ribbon does in no way hamper the offering of services physically.

Thirdly, a further study about what dress means in such special industries as the hotel business should have been made. In other words, the question is if the employer can refuse to accept the offer of labor as being incomplete. Even then, it is another question whether it can be subjected to disciplinary sanction as an illegal act.

3. Case of the Tokyo Metropolitan Construction Bureau.

Decision by the First Petty Bench of the Supreme Court, May 27, 1982. Case No. (*gyo tsu*) 114 of 1976. A *Jokoku* case requesting the cancellation of the action to cancel an informal decision to employ a staff member. *Jokoku* appeal dismissed (plaintiff defeated), 36 *Minshū* 777. The first instance, decision by the Tokyo District Court on Oct. 30, 1974, 214 *Rōhan*. The second instance, decision by the Tokyo High Court on Sept. 30, 1976. 265 *Rōhan*.

[Facts]

Jokoku appellant X (plaintiff) filed an application in August, 1970, and passed the employment test and was registered on the list of candidates for employment in December the same year. He received an informal notice on Jan. 27, 1971, to the effect that he would be employed as a staff member of the Tokyo Metropolitan Office Construction Bureau starting April 1 the same year.

Later, X participated in an anti-service-training gathering, and was arrested on the spot on a charge of committing the crime of disobeying an expulsion order and the crime of interference in the execution of official duties.

The Tokyo Metropolitan Office (hereinafter called Y_1) revoked its informal decision to employ on Mar. 27 stating as the reason his lack of eligibility as a metropolitan office employee.

X then filed an action demanding that the metropolitan governor (hereinafter called Y_2) revoked the cancellation of its informal decision to employ and calling on the metropolitan government to confirm his status as an employee at the Construction Bureau.

In the first instance, the court held that the notice, the informal decision to employ, was an administrative action as an employment action with its effect beginning Apr. 1, 1971. The cancellation of the informal decision to employ was another administrative action to revoke the administrative action to employ on an effective date prior to the advent of such an effective date.

In this sense, the cancellation in the current case can well be an action subject to the action of a complaint, the court stated, but there is a justifiable reason for the defendant Y_1 to judge that X lacked eligibility as a public servant for the latter's behavior of interference at the gathering. Revocation of the cancellation of the status as an employee dismissed.

In the second instance, the court held that the informal decision to employ was just a preparatory action aimed at carrying out the procedure to announce acceptance without a hitch. It also held that although there may be cases in which compensation must be made against unreasonable infringements on the expectation of being accepted for employment, it does not mean that with the notice of informal decision to employ X (appellant) can obtain the status as an employee of Y_1 (appellee).

In this regard, the cancellation of the informal decision to employ does not bring about any change in the legal status of X and hence it cannot be termed as an administrative action.

Thus viewed, the court held, X has no legal interest in seeking

revocation of the cancellation of the informal decision to employ. Demand for the revocation of the cancellation of the informal decision to employ rejected and the request for confirmation of his status as an employee dismissed.

Dissatisfied with the decision, X then filed a *Jokoku* appeal requesting a total reversal of the decision in the second instance.

[Opinions of the Court]

(1) "The notice of the informal decision to employ is no more than a *de facto* act to be conducted as a preparatory procedure aimed at carrying out the procedure to announce acceptance without a hitch." This notice of informal decision to employ does not assure the acquisition of the status as an employee, and the *Jokoku* appellee Y_2 is under no legal obligation to employ him as its employee.

(2) "It is a special case in that if the informal decision to employ were cancelled without justification, Y_1 would be obligated to pay compensation to the person who made preparations for employment in Y_1, but the cancellation itself of the informal decision to employ as above does not affect the legal status or the rights of the person who received the notice of the informal decision to employ."

Accordingly, it does not correspond to what is provided for in Article 3 (2) of the Administrative Litigation Act, that is, "the measure of administrative offices and other acts tantamount to the exercise of public power." X cannot demand revocation of the cancellation of the informal decision to employ.

[Comment]

This is a case in which the validity of the cancellation "action" of the informal decision to employ a local public servant.

With regard to the cancellation of an informal decision to employ new graduates, there were the Dai Nippon Printing Co. case (decision by the Second Petty Bench of the Supreme Court on July 20, 1979; 323 *Rōhan*) and the case of the NTT Kinki District Telecommunications Bureau (decision by the Second

Petty Bench of the Supreme Court on May 30, 1980; 342 *Rōhan*). The former case involved an enterprise in the private sector and the latter a public corporation, but the current Supreme Court decision was the first of its kind involving the status of a local public servant.

The decision in the current case as well as the two cases above were related to the employment system for new graduates from school which has almost the same process; a three to six-month procedure covering interviews, examinations, checking results of tests, selection, notice of informal decision to employ, presentation of applications and other papers, and announcement of employment.

In the two cases above, the court recognized that, by a notification of the informal decision to employ, a conditional labor contract (obligation to employ) was completed, but in the current decision it was ruled that the informal decision was just a *de facto* act of convenience and that it was not an act of employment legally.

Although the court failed to offer precise reasons, it seems to have regarded a certain special act of employment other than the notice of the informal decision to employ as a requirement, merely on the basis of the differences in the status of local public servants.

Judging from the actual situation in Japan, however, there is little rationality in requiring special declaration of employment in the case of local public servants. In other words, there is little need, depending upon the employer, to grant a larger opportunity for consideration.

Supposing we recognize the special nature of public servants, it must be said that they differ, sometimes largely, from private enterprises and public corporations concerning employment standards and the circumstances leading to the cancellation of the action of employment after it is made.

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