7. Labor Law

1. Kansai Denryoku Case — A case in which the imposition of a disciplinary action upon an employee was disputed which had been imposed because the employee had disturbed the workplace discipline by criticizing the employer in handbills he had distributed.

Decision by the First Petty Bench of the Supreme Court on Sept. 8, 1983. Case No. (*o*) 1144 of 1978. *Jokoku* appeal dismissed. 1094 *Hanrei Jihō* 121; 415 Rōhan 29. The first instance, decision by the Amagasaki Branch of the Kobe District Court on Feb. 8, 1974. 739 *Hanrei Jihō* 25; 199 Rōhan 50. The second instance, decision by the Osaka High Court on June 29, 1978. 29 *Rominshū* 371; 302 Rōhan 58. Reference: Articles 21 and 28 of the Constitution.

[Facts]

X (*jokoku* appellant) was an employee (technician) of Y (*jokoku* appellee, an electric power company). X had previously been on the executive committee of A (a trade union composed of employees of Y), but was not at this time. X and some other employees were against the personnel management policy of Y. They were also critical of A, where the policy was to cooperate with the management.

On Dec. 31, 1968, X and others distributed some 350 handbills to the employees' collective houses late at night. The handbill contained the following allegations:

(i) "The next year, 1970, will be the revisional year of the Japan-U.S. Security Treaty. And Y and A are spreading anti-communist propaganda that 1970 will be the year of communist riots."

(ii) "In 1968, Y oppressed workers by way of discrimination, ostracism, etc. This was against common sense and law."

(iii) "Y has imposed lower wages than other companies."

(iv) "Y has deprived workers of various vested rights."

(v) "As a consequence of the above-mentioned facts, we know that the real nature of Y — one of the very big businesses in Japan — is very dirty and wicked."

(vi) "Y's methods will become more and more dirty in the future."

(vii) "We must reveal every evil design and maneuver of Y. This is the threat Y is most afraid of."

(viii) "Then, Y will receive proper punishment."

Though there was no identification in the handbill of the persons who had issued it, Y finally found out that X and others had been the distributors. Y then subjected X to disciplinary reprimand (the least serious available disciplinary action), as Y judged that X's distribution of the handbills fell within the category of "other outrageous behaviors." This gave Y power to take disciplinary actions under applicable work rules. X requested a judicial declaration that the reprimand was null and void, on the grounds that it had been issued illegally.

In the first instance, the court held that there had been a statement not based on truth, and indeed exaggeration or distortion of the truth in the handbill. Therefore the handbill as a whole unjustly abused Y, and so X's issuance and distribution of the handbills in the current case fell within the allowed category for disciplinary measures, i.e. "outrageous behavior". The court, however, considered that the handbills actually had had little bad influence and caused little damage, that the expressions used in the handbill should be evaluated in light of the educational background and status of X, and that Y's efforts to disprove or resolve the complaints or suspicions about Y that X and others had had not necessarily been sufficient. Then the court held that X's behavior had not been so wrongful nor so important to justify the disciplinary reprimand, though it fell within the general category for which disciplinary actions might be appropriate.

Y, dissatisfied with this decision, filed an appeal to the Osaka High Court.

In the second instance, the court held that the contents of the handbill were all untrue or were an exaggeration or distortion of the truth, and that the distribution of the handbills by X had been undertaken without the proper moderation or restraint expected of X as a worker engaged in an electric power enterprise of a public nature. Consequently, the distribution had made other employees of Y distrustful of Y, and had disturbed the workplace discipline or at least created the possibility of doing so. The court held that X's behavior had thus been wrongful despite various extenuating circumstances, and therefore that the disciplinary action taken by Y — on the ground that X's behavior fell within the cause for disciplinary actions — was legal and effective.

X, dissatisfied with this decision, filed a *jokoku* appeal, on the grounds (a) that the distribution of the handbills was a justifiable trade union activity, and (b) that it was a justifiable exercise of freedom of expression. X argued that the decisions had misconstrued these points.

[Opinions of the Court]

(1) When a worker becomes obliged to work for an employer and to obey workplace discipline upon entering into an employment contract, the employer is empowered to impose disciplinary measures on an employee who has disturbed the workplace discipline, in order to allow management to maintain the workplace discipline and to manage the enterprise smoothly.

For the purpose of maintaining the workplace discipline, the employer can impose disciplinary actions on an employee whose behavior threatens to disturb normal business operations, even if the behavior takes place outside working place and working hours and has nothing to do with the employee's work.

(2) The judgment of the original court was that the contents of the handbill were untrue or an exaggeration or distortion of the truth; that as a whole they wrongfully abused Y; and that the distribution of the handbills had made Y's other employees distrustful of Y and had disturbed the workplace discipline or at

least created the possibility of doing so. These conclusions of the original court are not unapprovable.

X's behavior in the current case falls within the permissible criteria for imposition of disciplinary actions. And the disciplinary reprimand to X did not deviate from the proper discretion of Y, who had authority to impose such disciplinary actions. Furthermore, though the distribution of handbills by X had some of the characteristics of a protected expression of ideas, the disciplinary action in the current case did not contravene the public policy; after all, such distribution was not a permissible trade union activity.

[Comment]

This is a case disputing the legal status of a disciplinary action against an employee. It was brought because the employee had made and distributed handbills outside both working hours and working place. A main reason for this action was the defamatory contents of the handbill. This was the first judgement of the Supreme Court involving such a case.

There have been cases in which an employer's disciplinary action, imposed on the grounds of a worker's behavior outside working hours and working place, was approved by the Supreme Court. See, e.g., the Japanese National Railways Chugoku Branch Case (decision by the First Petty Bench on Feb. 28, 1974). In that case, however, the cause for the disciplinary action was the employee's conviction of a crime. In other words, the employee's outside misconduct disgraced the honor of the company, properly justifying the disciplinary action against that employee.

In the current case, X and others, in the handbills distributed to Y's employees and their families, criticized Y's personnel and management policy and appealed for unity. The ground for the disciplinary action imposed on X was criticism on the employer by this expression. These elements are not found in past cases.

As the Supreme Court said in this decision, "employees should not be subject to regulation by the employer for behavior

outside the working place and having nothing to do with the employee's work". However, in what exceptional situations will such a behavior be considered to have an effect on the workplace discipline, and hence be subject to regulation? This is a question to be considered carefully.

In this regard, we should pay attention to the contents of the handbill. The Court found that there had been exaggeration or distortion of the truth, and that X and others had wrongfully abused Y through the handbill. But it is a generally admitted right, also allowable from the viewpoint of corporate democracy, for employees who disagree with an employer on matters of personnel management policy to express their own opinions. Indeed, employees may attack the employer's policy, so that the employees may persuade others. From this perspective, exaggeration and blame should be allowed to a limited extent also in order to promote democracy within the enterprise. The employer is also free to argue against any criticism, of course. And the employer retains means to defend the enterprise if day-to-day management is actually interfered with, such as disciplinary actions and claims for damages. In the current case, it seems fair to say that there was no actual danger of interference with management of the enterprise.

In short, this decision of the Supreme Court may have failed to appreciate the full value of employees' free speech concerning the actions of management.

2. Takeda System Case — A case in which the legal validity of a work rule changed unilaterally by the employer was disputed.

Decision by the Second Petty Bench of the Supreme Court on Nov. 25, 1983. Case Nos. (*o*) 379 and 969 of 1980. The original court decision reversed and remanded. 1101 *Hanrei Jihō* 114; 418 Rōhan 21. The first instance, decision by the Tokyo District Court on Nov. 12, 1976. 842 *Hanrei Jihō* 114. The second instance, decision by the Tokyo High Court on Dec. 20, 1979. 954 *Hanrei Jihō* 3. Reference: Labor Standards Act, Article 90.

[Facts]

X and others (*jokoku* appellee) were female employees of Y (*jokoku* appellant). According to former provisions of the work rules of Y, female employees were allowed to take necessary days of menstruation leave, and they were paid for up to 24 days of such leave per year. Y decided to change this system, in part because Y believed that female emplyees had abused it. Y therefore took the step of changing the relevant rules, without the consent of X and others or of the trade union of which they were members. Under the new rule, female employees could still take necessary days of menstruation leave, but they were to be paid for only two days of such leave a month, and the amount of the payment was to be 68% of base pay (rather than 100% provided under the former provisions). X and others brought actions to claim payment of the amount of wages lost under the new provisions.

In the first instance, the court cited a Supreme Court decision (decision by the Grand Bench on Dec. 25, 1968. 22 *Minshū* 3459. *Syuhoku Bus* Case). According to that decision, an employer, in principle, may not deprive his employees of their vested rights or impose working conditions unfavorable to the employees by making or changing work rules unilaterally. However, an employee may not refuse to respect the new rules on the grounds that he or she does not agree with them, provided that the provisions concerned are reasonable.

The court held that in this case the unilateral change in work rules concerning menstruation leave imposed working conditions unfavorable to female wokers. It was noteworthy, however, that there had been abuses of the right to leave; that the rate of 68% of base pay was not so low as to oblige female employees who needed leave to stay at work; that a balance of employees who took leave and employees who did not should be sought; and that, in light of the increase in base pay, the employees had not been deprived of their vested interest. The court held on the basis of these findings that the new provisions were reasonable and, therefore, that the unilateral change in the work rules was

effective. The request of X and others was dismissed.

The court in the second instance held that an employer, in principle, could not impose working conditions unfavorable to his employees by changing work rules unilaterally without the consent of the employees or their trade union(s). Further, the court stated that there might be room to allow the unilateral change if the change dealt with working conditions simultaneously and uniformly, but that there was no room to allow unilateral changes in the wage calculation system, which would reduce the real wages in the long run, as in the current case. The change in the wage calculation system was a matter about which there arose a direct clash between the interests of labor and management. Therefore, in such a case, it was proper to say that an employer might not change the rules unilaterally even if the change seemed reasonable in his eyes. Then the court concluded that if abuse of the right to menstruation was to be restrained in the future, then the employer should seek another means to do so.

Y, dissatisfied with this, filed a *jokoku* appeal.

[Opinions of the Court]

The decision by the Grand Bench of the Supreme Court on Dec. 25, 1968, does not need to be changed. Therefore, even if the unilateral change in the work rules in the current case was unfavorable to X and others, the change may be considered effective provided that it was reasonable.

In judging whether or not the change was reasonable, the meaning of and need for the change should be reviewed, i.e., the following matters are to be examined:

(i) the degree of disadvantage which the change creates for employees;
(ii) any wage increase made in connection with the change;
(iii) whether or not the employees abused the menstruation leave, thus making the change necessary;
(iv) details of any negotiations with the trade union;
(v) other employees' attitudes;
(vi) treatment of menstruation leave in related companies;

(vii) general circumstances surrounding practices for granting such leave in Japan.

The original court took the view that there was no room to allow the unilateral change of work rules, which would reduce the real wage in the long run, and denied the effect of the change in the current case without examining whether or not the change was reasonable. That court was wrong in interpreting and applying the law.

[Comment]

The attitudes of the Supreme Court expressed in a previously-cited decision (*Syuhoku Bus* Case) were given more concrete clarifications by this ruling. First of all, this decision clearly reconfirmed that an employer might change work rules unilaterally, provided that the change was reasonable, even if it was unfavorable to employees. Secondly, the decision showed elements necessary for the examination of whether the change was reasonable (i.e., the meaning of and need for the change), and pointed out that it was necessary to examine the details of any negotiations about the change with the trade union, national practices concerning this matter, and so on. This decision should give the existing case law more concrete parameters.

Still, this decision will not solve the fundamental problem posed by the previously-cited Grand Bench decision (*Syuhoku Bus* Case). Employers in Japan frequently change work rules or working conditions unilaterally. One cause for this situation lies in the provisions of the Labor Standards Act. In Japan, work rules determine wages, hours of work and other important details of working conditions, when there are no applicable collective agreements otherwise. The provisions of Article 90 of the Labor Standards Act can be read to imply that an employer who has listened to opinions of the trade union or the representative of the employees may then make or change work rules. Therefore, employers often use the provisions of the Article as justifications to carry out a plan with which their employees do not agree. But it is clearly against the principle of "equal voice" in setting work-

ing conditions to allow an employer to determine working conditions unilaterally. Therefore, the Supreme Court has confined the right to unilateral changes within the framework of "rationality". This framework, however, does not change the reality that an employer may determine working conditions without the agreement of the workers. And arguably no one can definitely state standards for neutral and fair "rationality" in industrial relations.

Consequently, we should interpret the Labor Standards Act from the standpoint of the principle of "equal voice" in determining working conditions. Even if negotiations between workers and employers come to an impasse, negotiations in good faith must eventually lead to some agreement. Though it may be difficult for an employer to obtain the consent of all employees, it is usually possible to agree with the trade union or the representative of the employees. There seems to be no reason to give the employer the unilateral authority to determine working conditions about which there is a dispute between the workers and the employer.

By Prof. KAZUHISA NAKAYAMA
KUNIYUKI MATSUO
MADOKA SAITO

8. International Law

a. Public International Law

A case in which the accused was not deemed a so-called "refugee" and therefore not granted remission of punishment.

Decision by the Ninth Criminal Division of the Tokyo High Court on December 6, 1982. Case No. (*u*) 2189 of 1981. Charges of violation of the Immigration Control Order and the Alien Registration Act. 1076 *Hanrei Jihō*, 150.