

the conclusion of this decision is correct.

This case has been appealed to a higher court.

**Prof. TAKAYASU OKUSHIMA**  
**NOBUO NAKAMURA**

## **7. Labor Law**

### **1. Penal Sanction against Incitation of a Public Employees' Strike.**

Decision by the First Petty Bench of the Supreme Court on December 18, 1989. Case No. (a) 204 of 1986. 43 *Keishū* 882.

#### ***[Facts]***

X<sub>1</sub> and X<sub>2</sub> were officials of A (a trade union organized by public school teachers). A, demanding wage increase etc., went on a one-day strike on April 11, 1974. X<sub>1</sub> and X<sub>2</sub> conspired with other officials of A respectively to decide the strike and to give members of A instructions to go on the strike.

X<sub>1</sub> and X<sub>2</sub> were accused of incitation of a public employees' strike.

The court of first instance fined each of the accused a hundred thousand yen. At the second instance, X<sub>1</sub> was sentenced to six months in prison with a year's suspension of sentence and X<sub>2</sub> was sentenced to three months in prison with a year's suspension of sentence. X<sub>1</sub> and X<sub>2</sub> filed a *jokoku* appeal.

#### ***[Opinions of the Court]***

*Jokoku* appeal dismissed.

The accused's claim that Article 37 of the Local Public Service Act, which prohibits public employees' strikes, is unconstitutional does not have grounds in the light of past decisions by the Supreme Court.

X<sub>1</sub> and X<sub>2</sub> committed “incitation” and “planning of incitation” of a public employees’ strike.

**[Comment]**

Article 28 of the Constitution of Japan provides that “The right of workers to organize and to bargain and act collectively is guaranteed”. Article 28 guarantees the right without any conditions and “the right ... to ... act collectively” includes the right to strike. The National Public Service Act and the Local Public Service Act, however, prohibit public employees’ strikes and impose penal sanctions (i.e., imprisonment up to three years or fine up to a hundred thousand yen) on any persons that incite these prohibited strikes. Therefore, constitutionality of these Acts has been questioned.

In a decision rendered on April 2, 1969, the Supreme Court ruled that the provisions concerned were constitutional provided that they were interpreted so as to cover highly illegal incitation of a highly illegal strike only. The Supreme Court, however, changed the view in a decision rendered on April 25, 1973: the Court invoked particular status of public employees and common interest of the nation as a whole and considered the provisions concerned to be constitutional.

The decision in 1989 followed the decision in 1973 which has been largely criticized.

**2. Effect of Union Shop Agreements.**

Decision by the First Petty Bench of the Supreme Court on December 14, 1989. Case No. (o) 386 of 1985. 43 *Minshū* 2051.

**[Facts]**

X<sub>1</sub> and X<sub>2</sub> (plaintiffs, *koso* respondents, *jokoku* respondents) were employees of Y (defendant, *koso* appellant, *jokoku* appellant). Y had concluded a union shop agreement with A (a trade union).

X<sub>1</sub> and X<sub>2</sub> withdrew from A about 8:30 a.m. on February 21, 1983, X<sub>1</sub> and X<sub>2</sub> became members of B (another trade union) immediately and informed Y of this about 9:10 a.m. of the same day.

On the same day, A required Y to dismiss X<sub>1</sub> and X<sub>2</sub> according

to the union shop agreement. Then, Y dismissed X<sub>1</sub> and X<sub>2</sub> about 6 p.m. of the day.

X<sub>1</sub> and X<sub>2</sub> filed an action against Y, demanding a judicial declaration that the dismissal was null and void.

The court of first instance approved the claim of X<sub>1</sub> and X<sub>2</sub>. The court of second instance also approved the claim and dismissed the *koso* appeal. Y, dissatisfied with this, filed a *jokoku* appeal.

### **[Opinions of the Court]**

*Jokoku* appeal dismissed.

A union shop agreement aims at strengthening the trade union indirectly, by making the employer dismiss a worker when the worker does not become or ceases to be a member of the union. On the other hand, a worker has freedom to choose a union in exercising his/her own right to organize. Furthermore, not only the right to organize of the union which has concluded a union shop agreement but also that of other unions should be equally respected. As a result, it shall not be permitted to force a worker to join a particular union if the forcible joining to the union infringes the freedom of the worker to choose a union or the right of other unions to organize. Therefore, the part of a union shop agreement is null and void, which provides the employer's obligation to dismiss a worker who is a member of a union which is not a party to the agreement, whether the worker ceased to be or has never been a member of the union which is a party to the agreement. If an employer dismisses such a worker upon a union shop agreement, the dismissal is null and void as an abuse of right.

### **[Comment]**

A union shop agreement is, in most cases in Japan, a post-entry closed shop agreement concluded at the enterprise level between an enterprise-wide union and an employer. A union shop agreement is often used to expell some workers from the enterprise when the workers stand in opposition to the employer and are in the minority within the union which cooperates with the employer. As a consequence, the effect of union shop agreements has been questioned.

This was the first decision on the matter by the Supreme Court, which took the same position as those of the lower courts.

PROF. KAZUHISA NAKAYAMA  
MADOKA SAITO

## 8. International Law

### 1. The principle of double criminality in extradition.

Decision by the Fifth Special Division of the Tokyo High Court on March 30, 1989. Case No. (*te*) 44 of 1989. 703 *Hanrei Taimuzu* 284.

[Reference: Treaty on Extradition between Japan and the United States of America, Article 2; Japanese Extradition Act, Article 2.]

#### [Facts]

Zhou, the fugitive offender of this case, intentionally conspired with K.Y.L. and others on numerous occasions between January 1985 and December 1987 in eastern New York and other areas, to import more than 100 grams of heroin into the U.S.. He was indicted in the New York Eastern District Federal Court on December 21, 1987, and a warrant for his arrest was issued the same day. The U.S. made a request to Japan for provisional detention on the basis of Article 9(1) of the Treaty on Extradition between Japan and the United States of America (hereinafter referred to as “the Extradition Treaty”). Zhou was provisionally detained in accordance with Article 25 of the Japanese Extradition Act (hereinafter referred to as “the Extradition Act”) and held in the Tokyo Detention House. On March 1, the U.S. made a request to Japan for his extradition based on Article 8 of the Extradition Treaty. Two days later, in accordance with Article 8 of the Extradition Act, the Tokyo High Public Prosecutor’s Office requested the Tokyo High Court to make a judgment