acquisition of all the remaining shares as the second step may be unfair. Ithink that, if the management cannot show that the MBO is transparent and reasonable, the court should decide a fair acquisition price, because there is an asymmetry of information between the management and shareholders.

8. Labor Law

Z v. State & Central Labor Relations Commission (on INAX Maintenance)

Tokyo High Court, September 16, 2009
Case No. (gyo-ko) 192 of 2009
989 Rodo Hanrei 12

Summary:

This is an appeal court decision in a case concerning whether a person who worked under contract falls into the category of a worker defined in the Trade Union Law. The first court ruled for the plaintiff. The appeal court, however, did not decide that the said employed persons fell into the category of a worker defined in the Trade Union Law, and that the outsourcer's refusal of their offer to negotiate over working conditions and others fell under the category of unfair labor acts as defined in the Trade Union Law.

Reference:

Articles 1, 3 and 7, paragraph 2 of the Trade Union Law

Facts:

X (plaintiff, koso-appellant) is a company doing business in repairing housing equipment. Originally, it was its own employees who were engaged in the repairing. In 1985, the company primarily adopted a system under which persons called "Customer Engineers" (hereinafter referred to as CE) who entered into a subcontract with the company took on the task of repairing, and in order to keep the brand image of X, the

company took steps to use a reliable level of technique for repairing.

CEs, graded by ability, performance, experience, or the like, were instructed on task contents and how to serve customers according to manuals or others, and in addition, CEs were obliged to report to X on their schedule, process and results for each workday and attend the monthly meeting, although each of them could decide on when and how to carry out their task personally.

In September, 2004, CEs joined the Z trade union, and formed its branch. Z and its branch offered collective bargaining on changes in CE's working conditions and others to X. However, X refused it by reason that CE was just a subcontractor, not a worker employed by X.

Hence, Z filed a claim for relief from X's refusal of collective bargaining to the Labor Relations Commission, on the basis of Article 7, paragraph 2 of the Trade Union Law. Then, the Central Labor Relations Commission (hereinafter referred to as Y) ordered X to accept Z's offer for collective bargaining because CE was a worker falling into workers defined in the Trade Union Law. On the contrary, X brought a suit against the government, demanding that the relief order ruled by the Commission should be repealed.

Concerning the said administrative lawsuit, the Tokyo District Court decided in the first instance to turn down X's claim to maintain the relief order on April 22, 2009 (ROHAN 982 at 17), saying that workers covered by the Trade Union Law include not only a person employed based on an employment contract, but also a person who has a subordinate relationship with another person and renders his/her services under the supervision of the latter, then receives a remuneration for the services, and lives on it, and besides, that CEs were incorporated in the organization of business, directed by X on handling of their workforce, and they were paid for their services, and therefore, CEs were categorized as a worker set out in the Trade Union Law, considering whether CEs had the freedom to accept or refuse X's request for their services, whether the former is subject to the time and places designated by the latter, whether the former is supervised on how to perform services by the latter, or whether there is a possible compensation for the services. X appealed the ruling.

This is an appeal court decision on the lower court's ruling. The point at issue was whether a CE fell into the category of a worker as defined in

the Trade Union Law.

Summary of the appeal court decision

The appeal court dismissed the appeal for the following reasons. The court ruled that CEs were not workers defined in the Labor Union Law, and reversed Y's order of relief from unfair labor practices enforcing X to accept Z's offer for collective bargaining.

①General criteria on the range of workers covered by labor laws

This court described the general criteria on the range of workers, based on Article 3 (Definition of a worker) and Article 1 (Purpose of the Labor Union Law). It said that the purposes of the Labor Union Law are to protect the exercise by workers of their autonomous self-organization and association in trade unions so that they may carry out collective actions, in order to elevate the status of workers by promoting their being on equal standing with their employer in their bargaining with the employer, and hence, a worker defined in the Labor Union Law is the proper person to be entrusted with negotiating working conditions or the like on an equal basis with the employer by collective actions, that is, a person who keeps a legal subordinate relationship with another person (the employer), renders his/her services under the supervision of the employer, and then receives a remuneration for the services.

②Specific decision on whether a CE is to be considered as a worker or not

The appeal court gave a specific decision as mentioned below:

Concerning decision factors, the ruling said that the case should be judged by factors based on a legal subordinate relationship, that is to say, it should be decided by considering together whether a person who renders his/her services has the freedom to accept or refuse a request from a person who requests him/her to perform services, whether the former is subject to the time and places designated by the latter, whether the former is supervised on how to perform services by the latter, or the like, and particularly based on the absence or presence or extent of those factors.

In addition, concerning the ways of judgement, the appeal court ruled that it should be made on whether a subordinate relationship supposed by labor laws exists or not, considering comprehensively the relationship between a person demanding services and the one rendering them, not

considering some part of the contract locally, because a subcontracting agreement has a property with which each of the parties bears their own duties and is bound by them to achieve the purpose of the agreement, and hence, some of the agreement in this case may fall into the said criteria, even if the parties had few elements of a subordinate relationship between them.

③Judgement in this case

The appeal court made a judgement on the CE according to the above criteria particularly, and ruled that the CE was not a worker as defined in the Labor Union Law.

CEs could refuse X's request when they had other jobs, and they would never be treated disadvantageously even if they refused it actually. In addition, when and how to perform their duties of repair and maintenance were at their own discretion, and the CEs could increase fees for repair and maintenance charged to customers at their option, though there were nationally-unified standard fees for them. However, on the other hand, CEs were required to perform their duties, following the time slot for X's placement of order to CEs or different instruction manuals, report to X after finishing their duties or attend the area meeting. When CEs broke such requirements, a warning could be sent to CEs or the agreement could be cancelled. However, it is just a restraint derived from the nature of subcontracting under the said subcontracting agreement, under which repair and maintenance ordered by X are supposed to be conducted throughout the country above a certain technical level. That does not force CEs to accept the subcontracting, and does not mean that X denies their discretion in performing their duties so that X could supervise them, either. Therefore, CEs have the freedom to accept or refuse X's request for their services, and could perform their duties without any condition of times or sites specified and under no specific supervision of X, and they were paid on the basis of their performance. Finally, the appeal court ruled that a CE was inherently a person accepting subcontracting, that is to say, just one partner that X outsourced to, which fits the reality.

Editorial Note:

1. Points of issue in this case

Nowadays, many Japanese companies tend to outsource their business to cut costs. As a result, persons who actually render their services as a person incorporated in the organization of business under the organizational control and live on remuneration given by the entity, though formally on a contract or commission basis, are increasing in number.

In fact, could the Labor Union Law protect such persons who render their services? Recently, the range of workers covered by the Labor Union Law is becoming an important point of issue under the labor laws, while types of work are becoming diversified. The concept of a worker is also used in the Labor Standards Law. Whether there is a difference of the range or criteria of workers between the Labor Union Law and the Labor Standards Law is disputed now.

2. Current handling by the Labor Relations Commission, cases and theories

The Labor Relations Commission has recognized a broader range of persons who render their services than defined in the Labor Standards Law as workers in the Labor Union Law, following its decision on whether it should recognize the necessity and relevance of coverage of protection by collective bargaining. In this case, for instance, the order issued by the Central Labor Commission (1987 ROKEISOKU at 12, Oct. 3, 2007) accepted the concept of a worker under the Labor Union Law in a moderate manner, compared with a worker as defined in the Labor Standards Law, on the ground that the CE who rendered his/her services was incorporated in the organization of business and the other party X under the said agreement specified ways to perform him/her services unilaterally, supervised him/her concerning services, and accordingly, in fact, he/she could not refuse X's request for his/her services.

On the contrary, the Supreme Court ruled in the Case on the CBS Orchestra Trade Union (Supreme Court 1st P. B., May 6, 1976, 252 RODO Hanrei at 27) that each member of the Orchestra had no freedom to accept or refuse tasks because he/she was incorporated in the organization of

business, the company had the power to exercise supervision over the handling of the workforce, and he/she was paid for his/her services, and accordingly, each member is a worker as defined in the Labor Union Law.

However, in this case, there was no reference to the difference of a worker between the Labor Union Law and the Labor Standards Law. In addition, the above criteria of judgement showed two possible interpretations; that is, it might be based on some criteria close to the concept of a worker under the Labor Standards Law, or otherwise.

As a result, the lower courts have tended to recognize workers in the Labor Union Law in the broader range of workers, using the criteria of workers defined in the Labor Standards Law, though they were actually applied in a moderate way, based on a subordinate relationship, to judge workers defined in the Labor Union Law (for instance, the first trial decision in this case). However, there are recently a series of decisions which revoked a relief order under which the Labor Relations Commission recognized the concept of a worker by stringently applying a subordinate relationship to the case: for instance, the Tokyo District Court's decision on a chorus member in the Case on the New National Theatre (July 31, 2008, 968 ROHAN at 5), the Tokyo High Court's decision on it (March 25, 2009, 981 ROHAN at 13), and the Tokyo District Court's decision on a subcontracting person handling complaints on products in the Case on Victor Service Engineering (August 6, 2009, 986 ROHAN at 5).

Many theories have the common view that the legislative purpose is different between the Labor Union Law and the Labor Standards Law, and accordingly, each concept of a worker is different. In addition, since they consider that whether or not a worker falls into the category of a worker defined under the Labor Union Law, it should be judged from the viewpoint of whether or not the person should be protected by the Labor Union Law, and so they are critical of recent decisions at the lower court that interpreted both laws equally and stringently. However, there are different opinions on specific criteria on the concept of a worker defined in the Labor Union Law, and its unified view has not been established.

3. Features of this appeal court's decision

Generally speaking, the high court decision mentioned about the legislative purpose of the Labor Union Law, and showed its own decision on

the Labor Union Law, saying that a worker defined in the Labor Union Law is the proper person to be entrusted with negotiating working conditions or the like on an equal basis with the employer by collective actions. However, the court set specific criteria, dependent on the presence or absence of a legal subordinate relationship. It set the same criteria on the concept of a worker as that in the Labor Standards Law, - whether or not a person rendering his/her services has the freedom to accept or refuse request for their services, whether or not there is a possible compensation for his/her services, whether or not he/she is subject to the designated time and places, or whether or not he/she is particularly supervised on his/her services -, and stringently interpreted the range of workers under the Labor Union Law in the same way as in the Labor Standards Law. As previously explained, that corresponds to the recent tendency of decisions where the concept of a worker in the Labor Union Law are judged stringently.

Many researchers are critical of this decision here because the difference of the legislative purpose between the Labor Union Law and the Labor Standards Law still remains to be considered or the court did not understand the necessity or relevance of coverage of protection of an economically-dependent person rendering his/her services by collective bargaining under the Labor Union Law.

And they also have the criticism that the court respected the text of the agreement as it was written, in judging the relevance of the above criteria, insisting that it should be judged by the reality of its operation.

This decision has been appealed to the Supreme Court. Besides, the Tokyo District Court's decision in Case on New National Theatre as mentioned above has already appealed to the Supreme Court. Much attention is being paid to how and on what criteria the Supreme Court will decide the concept of a worker under the Labor Union Law.

9. International Law and Organizations

Xs v. Y
Sapporo High Court, March 26, 2009