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

Case No. (*ne*) 314 of 2006 and 33 of 2007
982 Rodo Hanrei 44

Summary:

Sapporo High Court partially upheld and partially denied the claim by present and former employees of the Nippon Telegraph and Telephone East Corporation that the company's transfer order was unlawful under the Constitution of Japan, Act on Stabilization of Employment of Elderly Persons, Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave, Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (ILO Convention 156) and Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (ILO Recommendation 165).

Reference:

Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (ILO Convention 156), Article 3 and 4; Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (ILO Recommendation 165), Paragraph 20.

Facts:

The appellees (the plaintiffs, Xs) are the present and former employees of the appellant, the Nippon Telegraph and Telephone East Corporation (the defendant, Y).

Xs (5 persons) were ordered to transfer to local branches, subsidiary companies and the Enterprise Sales Division in Tokyo. They insisted that since this order constituted age discrimination, a disadvantageous change of labor conditions, violation of collective labor agreements and transfer regulations, and the coercion of consent, it should be unlawful and null and void, and claimed for compensation for the moral damage caused by it. Furthermore, Xs pleaded that the transfer order was also null and void in light of ILO Convention 156 ratified by Japan in 1995 and ILO

Recommendation 165.

In the first instance, the Sapporo District Court decided that Y's transfer order constituted an abuse of right and was unlawful, and found that 500 thousand yen should be paid to X_1-X_4 and one million yen to X_5 in compensation (the Judgment of the Sapporo District Court on September 29, 2006). Y appealed the decision of the district court.

Opinion:

The appeal is affirmed-in-part (the judgment in the prior instance is revoked-in-part), and dismissed-in-part. The incidental appeal is affirmed-in-part (the judgment in the prior instance is modified-in-part).

1. The necessity of the transfer order in the course of business.

As for the transfer order to X_1-X_4, the present court considers that the aim of Y's assignment of new places of work to Xs is reasonable because the new jobs assigned are not unfit for them and are necessary for the business of Y. The present court considers therefore that any detriments caused by this order are not seriously beyond what employees should ordinarily accept, and does not constitute an abuse of right.

In the Case of X_5, however, the present court considers that X_5's care for his parents, especially for his father, is indispensable, although the first and second transfer orders were necessary for the business of Y. Then, the court finds that the present transfer order inflicts detriments on X_5 and his family, which are seriously beyond what employees should ordinarily accept.

2. Internal effects of ILO Convention 156 and ILO Recommendation 165.

The reason of the decision on the application of international treaties is the same as that of the prior instance.

The court cannot find that ILO Convention 156 is directly in force with regard to the domestic companies and that the labor contracts between the companies and their employees become null and void immediately, since the Convention, from the interpretation of its wordings, only imposes on the Member States including Japan the obligation to make what the Convention provides for an aim of national policy.

As for Paragraph 20 of ILO Recommendation 165, the court considers that it merely requests that family responsibilities and considerations such as the place of employment of the spouse and the possibilities of educating children should be taken into account when transferring workers from one locality to another. It is clear from this that the transfer order cannot be unlawful and null and void under Paragraph 20 even if the transfer adversely affects the employees and their families.

Therefore, the court cannot approve the claim of Xs.

Editorial Note:

As the present case is one of the cases concerning the transfer of personnel of Nippon Telegraph and Telephone Corporation (NTT), it basically concerns issues of labor law. However, it is of significance as a case of international law in that the court discusses the question of the internal applicability of the ILO Convention and Recommendation.

The court regards quite roughly the obligation of the Member States under ILO Convention 156 as to make what it provides for an aim of national policy. However, an article-by-article analysis would be necessary to decide whether an obligation under the Convention is directly applicable in the domestic legal system. In this regard, the court should have examined the meaning of the article in question specifically before deciding on its domestic applicability.

The rights that the workers with family responsibility have in transfer are provided under Articles 3 and 4 of ILO Convention 156 and Paragraph 20 of ILO Recommendation 165. It cannot be said that Article 3 itself gives specific rights to the workers since this Article only provides that the Member States shall make what the Convention provides for "an aim of national policy." Furthermore, Article 4 provides that "[w]ith a view to creating effective equality of opportunity and treatment for men and women workers, all measures compatible with national conditions and possibilities shall be taken." However, Paragraph 9 of the Individual Observations of the Committee of Experts on the Application of Conventions and Recommendations in 2007 says that "the Committee also recalls that in accordance with Article 4 of the Convention, the Government is to ensure that the needs of workers with family responsibilities are taken into consideration in their terms and conditions of

employment, which includes transfers to remote workplaces, and that workers enjoy the right to free choice of employment." It follows, therefore, that Article 4 is not intended to cover legal persons under domestic law such as Y. The present instance should more carefully examine whether these specific articles would be directly applicable to legal persons through the interpretation of each specific article.

Paragraph 20 of ILO Recommendation 165 says that "[f]amily responsibilities and considerations such as the place of employment of the spouse and the possibilities of educating children should be taken into account when transferring workers from one locality to another." From the interpretation of this clause, the present instance leads to the conclusion that there is no legal obligation imposed on the legal persons. However, as the Recommendation has no binding effect even on the Member States themselves, the present instance should deny the legal obligation not from the interpretation but from the very advisory nature of the Recommendation.

In view of the nature of obligations under ILO Convention 156, the realization of which are to be achieved progressively, it would be difficult for the present instance to apply ILO Convention 156 directly to workers with family responsibilities and to recognize their right as alleged by Xs.

X v. state of Georgia of the United States of America

Supreme Court 2nd P. B., October 16, 2009

Case No. (*ju*) No. 6 of 2008

2064 Hanrei Jiho 152; 1313 Hanrei Taimuzu 129

Summary:

In the cases of private acts or *acta jure gestionis*, foreign State immunity in employment matters could not be invoked in Japan, unless otherwise "the subject matter of the proceeding is the dismissal or termination of employment of an individual" and "such a proceeding would interfere with the security interests of that State." The claim of the appellant, on the confirmation of the status entitled by the contract and the payment of wages after dismissal, could not be regarded as a claim for 'reinstatement,' but is a claim relating to 'dismissal.' The judgment of

prior instance, based on the understanding of the act as 'sovereign' or *jure imperii* with considering the claim as relating to 'reinstatement,' should be judged as wrong.

Reference:

Part I, Chapter 2 of the Code of Civil Procedure; Art. 11 of the United Nations Convention on Jurisdictional Immunities of States and Their Property; Art. 9 of the Law of Civil Jurisdiction over Foreign States or the like.

Facts:

Georgia Ports Authority (hereinafter, 'the Authority'), who is a part of the appellee, the state of Georgia, operates facilities owned by the appellee, to develop and promote foreign and domestic trade among the U.S., herself and sister states. It had been long since the Authority had established a Far-East representative office in Tokyo. The appellee hired the appellant, a Japanese resident, as a local staff in June 1995, with 624,205 yen per month for an indefinite period. All this employment procedure was done orally between appellant and 'A', the representative of the office at the time. The appellant's working place was limited to Japan and the social insurance contribution in the Country was duly made by the appellant.

In December 1999, the appellee gave an announcement of dismissal to the appellant, with the close of the office in June 30, 2000. She also notified that, if the appellant wished, the job tenure would be extended to September 15 of the same year. The appellant asked for the continuation of employment after September 15, and was rejected. Finally the appellee delivered a document of dismissal on September 12, 2000.

The prior instance dismissed the ruling of the first instance by considering the plaintiff's allegation as a part of 'reinstatement,' the matter as related to the sovereign activity of a State, and judging she could naturally claim immunity from jurisdiction. A claim for 'reinstatement' based on the preceding dismissal would necessitate the court to examine whether there was any "legitimate reason" for dismissal, which would include the inquiry as to the business policy or financial condition of the employer. The prior instance regarded this as interference with sovereignty.

Opinion:

The judgment of prior instance is quashed.

This case is remanded to the Tokyo High Court.

The judgment of prior instance cannot be supported for the following reasons.

1. A Sovereign State can enjoy immunity in the Japanese legal system when the nature of its act is 'sovereign,' but will not enjoy it for the *acta jure gestionis* or private acts except under special circumstances.

2. As Japanese social insurance was applied for the employment of the case, the employment relationship could be regarded as private and contractual, and it would not be regarded as an exercise of public power by the appellee.

3. According to the discussion among States for adoption of the "United Nations Convention on Jurisdictional Immunities of States and Their Property," the common understanding was that, in principle, foreign States would not enjoy immunity when the employee sought redress from the foreign State employer. Although the prior instance referred to Art. 11 (2(c)) of the said convention, this article prescribes about the very beginning of an employment relationship, and the case in question falls under the category of Art. 11(2(d)) on the dismissal, according to which, a State can invoke immunity if "the subject matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State."

4. As the dismissal in the case is an act of *jure gestionis*, and Japanese exercise of jurisdiction over it does not interfere with the security interest of the appellee nor violate her sovereignty, the judgment of prior instance is wrongful.

The judgment has been rendered unanimously.

Editorial Note:

The judgment on foreign State immunity from civil jurisdiction, delivered by the Supreme Court on July 21, 2006, changed the trend toward restrictive immunity based on the distinction between acts *jure imperii*

and acts *jure gestionis*. The case applied this doctrine to the matter of employment. Behind the case was the understanding that to avoid wrongful dismissal for protection of workers accords with the international trend and custom. The idea that when the employee sought redress from the foreign State employer, the latter, in principle, would not enjoy immunity is based on the notion that the rights of employee should be protected under existing contracts.

This is the first occasion for the Supreme Court to judge the immunity of a state as 'a constituent unit of a federal State,' and the immunity in employment matters.