her child of the family living a quiet and happy life were barbarously murdered at home in broad daylight.

In light of these details of this case, after carefully considering the details favorable to *X*, including the fact that *X* was a juvenile at the time of the crime, the one that *X* did not initially planned to murder the housewife and her child, the one that *X* has no prior criminal record and it cannot be said that there is no possibility that *X* is reformed, and the one that *X* sent the bereaved family an apology letter, an indemnification for the damage from the theft committed by him, and so on, *X* bears extremely great criminal liability, and thus the court cannot choose but uphold the death sentence in the original judgment.

Editorial Note:

This case is well known as "*Hikari-Shi-Boshi-Satsugai-Jiken* (the case in which a mother and her child were killed in Hikari City)" in Japan (Hikari City is located in the eastern part of Yamaguchi Prefecture).

The adjudications of this case generated heated debates in the society. Above all things, the husband of the murdered housewife conducted the vigorous campaign to protest over the judgment of the first instance, and also promoted the nationwide movement to protect crime victims and their family members. On the other hand, the defendant's counsel and some scholars earnestly advocated on behalf of the defendant through a variety of media. Moreover, the judgment delivered upon this case in the Supreme Court in 2006 was criticized by researchers in the field of criminal law. These researchers insisted that the method of applying the standard of selecting death sentence (the so-called *Nagayama* standard) which precedents had formulated was substantially modified in this judgment. Therefore, they blamed the Supreme Court for having not taken the necessary procedure to alter the precedent, in which the Supreme Court has to make a judgment through a full bench.

6. Commercial Law

X v. Y

Supreme Court 2nd P.B., February 29, 2012
Case No.(kyo)21, (kyo)22 of 2012
2148 Hanrei Jiho 3; 1370 Hanrei Taimuzu 108

Summary:

In this case, a shareholder who opposes the company reorganization exercised the right of "the share purchase demand" to the company(it was the case that an increase in corporate value and other synergies were expected by the reorganization), and the "fair price" of the share on the right had become an issue.

Reference:

Art 773, Art. 806 para.1, 807 para.2 of the Company Law

Facts:

A(Tekumo, Y after being merged with B, the other party-Appellant) and B(Koei, outside allegation)are both independent companies with no special capital relationship to each other. A and B respectively held the board of directors meeting on November 18, 2008, and decided to establish a joint holding company C effective on April 1, 2009. It was assumed that an extraordinary general meeting of shareholders of both companies was expected to be held on January 26, 2009, and the plan had been expected to be determined there. Both companies had created the share transfer plan and entered into the contract for management integration, and published it after the stock market of the day was closed. In this plan, it was decided to assign 1 share common stock of C for 1 share common stock of B and 0.9 shares of common stock of C for 1 share common stock of A. This plan was duly approved as planned and C was established on April 1, 2009.

X(Effissimo, Appellant- petitioner)is a shareholder of A and had started to buy a large amount of A shares from October 28, 2008, when the consultation aimed at the management integration of A and B was revealed. X had bought up to 8.36% of the outstanding shares on November 18, 2008, and finally, X's holding rate went up to 16.6% on December 3, 2008.

During this time, the share price of A was 875 yen just before

November 18, 2008 (the date of publication), but the next day fell to ¥ 775, and it remained about 700 yen in January 2009, about 650 to 700 yen in February 2009, and about 500 to 650 yen in March 2009.

On February 12, 2009, X opposed the A's resolution, and meanwhile demanded that A purchase all of X's holding shares of A at the fair price pursuant to Art. 806 para.1 of the Company Law. But the price consultation was not settled among X and A, so a petition for share price determination to the court pursuant to Art. 807 para.2 was filed by X.

The high court held that "fair price" of the A's share should be calculated based on the objective value of the share which would have obtained if there was no resolution at the shareholder's meeting (hereafter the price referred to as "Nakariseba Price"). The reason was that the share price of A had declined at a large rate after the detailed plan of the share transfer was published, and therefore the high court judged that the share exchange ratio did not reflect the increase of corporate value through the company reorganization properly. The high court also held that the objective value of the share should be established based on the market price after the publication of the management integration, the date/period of which should be closed to the effective date of the reorganization as much as possible and the price should have the influence of the share transfer eliminated from it. In consideration of these matters, the objective price was determined at 747 yen, which was calculated at the volume weighted average of the closing market price of A for one month prior to the publication. Y (former A.) and X both appealed against this holding.

Opinion:

The judgment of the prior instance is quashed.

This case remanded to the Tokyo High Court.

"The purpose of granting the dissenting shareholders the right to request purchasing of their shares at fair value is that of giving the dissenting shareholders a chance to exit and ensuring the shareholders who chose to exit the same economic status equivalent to the one when the share transfer had not occurred. Also, by distributing to the dissenting shareholders the synergies and values expected from the share transfer properly, to guarantee them the profit within a certain range. In calculating

the amount of the "fair price", it is reasonable that the fair price of the share should be decided based on the date the share purchase demand was placed by the shareholder, because it is the date the legal relationship similar to a sales contract arises, and the opposed shareholder showed the intention of leaving the company."

"If the company reorganization(e.g. the share transfer)does not increase synergies or the fair value of the corporation, there is no room to consider the appropriate distribution of corporate value. So, as a general rule, the "fair price" of the share should be understood as the Nakariseba Price at the date the share purchase demand was made."

"As for the company reorganization carried out between the companies with no special capital relationship, if the share transfer has been effected under the condition that the information which would be the basis of the shareholders decision were fully disclosed and the decision of the shareholders meeting were properly made, the determined share transfer ratio can be understood as fair as long as there is no special circumstances sufficient to allow a reasonable judgment of the shareholders has been hampered."

"If the shares were listed, it is reasonable to use the market price as a basic data in determining the "fair price". In such a case, the methods of calculating the "fair price" are left to the reasonable discretion of the court. If the share transfer ratio were recognized as fair and it were not the case that the increase of corporate value is estimated, the fair price can be determined by the market price at the time the right of share purchase demand was exercised by the opposing shareholder or using the average value of the market price for a certain period of time".

Editorial Note:

Our Company Law has admitted to the opposing shareholders in the company reorganization the right to request their shares to be purchased at "fair value" by the company. In recent years, it is often contested what the "fair price" is. As to the fair price, there are 2 types of price which are admitted; (1)the share price that would have obtained if there was no company reorganization(Nakariseba Price), (2)the share price that reflects the synergy resulting from the reorganization(Synergy Distributed Price). It has become a problem deciding which type of price

should be applied in any case.

So far, the court confirmed that the "Nakariseba price" should be the fair price in the case of the absorption-type company split among 100% parent-subsidiary companies which did not involve an increase in corporate value and synergy. And the criteria date for the fair price should be settled on the date the opposed shareholder had made the share purchase demand (Rakuten v. TBS; Supreme Court 3rd P.B., April 19, 2011, Case No. (kyo) 30 of 2011, 2119 HANREI JIHO 18).

On the other hand, in this judgment, the court made it clear that the fair price should be the "Synergy Distributed Price" if the company reorganization involved an increase in company value. Although there are several approaches as to the determination of criteria date for the fair value (in particular, (1) when the reorganization was published, (2) when approval of the reorganization was resolved at the general meeting of shareholders, (3) when the right of share purchase demand was exercised by the opposing shareholder, (4) when the right of share purchase demand expired, (5) when the effect of the reorganization occurred), the court made it clear that No. (3) "when the right of share purchase demand was exercised" should be employed as the criteria date, citing the same reason as the 2011 decision.

As to the calculation of the fair price based on the Synergy Distributed Price, while assuming the above mentioned framework, the court ruled that if the company reorganization is carried out between the companies with no special capital relationship and the effect of the share transfer had occurred under the condition that the information needed was fully disclosed and the decision of the shareholders meeting was properly made, the determined share transfer ratio could be understood as fair as long as there was no special circumstances sufficient to allow that a reasonable judgment of the shareholders has been hampered. Then, the court would be able to choose either of the market prices; the market price at the time the right of the share purchases demand was exercised or the price calculated using the average value of the market price for a certain period of time. The methods of calculating the "fair price" were left to the reasonable discretion of the court.

Thus, this decision is premised on the company reorganization that is carried out among the companies with an arm's length relationship. Thus,

it is pointed out that the judgment of the fairness of the merger ratio in the absence of independent relationships needs to be considered separately.

7. Labor Law

Hewlett Packard Japan case
Supreme Court, April 27, 2012
Case No. 903 of 2011, 1055 Rodo Hanrei 5

Summary:

Employer's appeal dismissed. Continuous absence at work of an employee suffering from mental illness is not an "absence without leave" pertaining to disciplinary action under the office regulations. The employer should organize a medical appointment with a psychiatrist for such an employee as well as recommend relevant medical treatment and consider measures such as temporary leave, if necessary.

Reference:

None.

Facts:

X, an employee of Y (Hewlett Packard Japan), alleging that he was being observed and harassed by a group of people through the interference of colleagues at work, asked Y to investigate the issue. However, the results of investigation carried out by Y turned out unsatisfactory to X. X then asked Y to give him a special temporary leave until the present case gets resolved. Y did not allow such a leave and encouraged X to come to work. In response to that, X persisted that he would not be able to come to work until he is factually convinced that the present situation has been settled. Thus, X took all paid leave that he was entitled to and continued absence for the additional 40 days. On 28 August 2008, Y notified X of "instructed resignation" as of 30 September 2008, on the grounds of "absence without leave" (referred to hereinafter as the "disciplinary measure").