undertake occasional medical check-ups for its employees whenever it believes it is necessary). The employer then should, in accordance with the outcome of the medical check-up, encourage medical treatment or consider taking measures such as temporary leave and observe the progress of the situation. Taking a disciplinary measure such as "instructed resignation" instantly without taking the steps outlined above, on the belief that the absence of an employee is an absence without leave for the grounds of absence are based on the non-existing facts, cannot be regarded as an appropriate response of an employer to the behaviour of the employee suffering from mental illness.

Under those circumstances, the above-mentioned absence cannot be regarded as "absence without leave" or absence lacking reasonable grounds pertaining to disciplinary action under the office regulations, and therefore the disciplinary measure shall be regarded null and void.

Editorial Note:

The present decision is supposedly the first decision of the Supreme Court denying the validity of a disciplinary measure taken against the behaviour of an employee suffering from mental illness. The decision attracts attention as the Supreme Court provides quite concrete description of the steps and measures that the employer is expected to take in the case of continued absence of an employee suffering from mental illness. These are: organizing medical check-up by a psychiatrist, recommending relevant medical treatment and considering measures such as temporary leave, if necessary.

8. International Law and Organizations

Xs v. Y
Tokyo High Court, December 26, 2012
Case No. (*ne*) 5476 of 2009

Summary:

The Tokyo High Court denied the claim for restitution and payments

of damages made by 8,396 local inhabitants who allegedly were forcibly displaced and by an environmental organization supporting them. This is the first case in which the inhabitants of the State which had received Japan's Official Development Assistance (ODA) brought a suit against the Japanese government.

Reference:

Act concerning State Liability for Compensation, Article 1(1); Civil Code of Japan, Article 709; International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).

Facts:

The appellants (the plaintiffs) are 8,396 local inhabitants (X1) who allegedly were forcibly displaced for constructing the Kotopanjang Dam and an environmental organization supporting them (X2).

Japan ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1979 and the Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) in 1992.

The dispute stems from the fact that the Kotopanjang Dam was planned and built by the Indonesian government, with the support of an ODA loan by the Japanese government (Y1). According to Xs, the construction of the said Dam forcibly displaced X1 and destroyed tropical rainforests around the Dam which constituted a part of the World Heritage of Sumatra. Xs made claims for restitution and payments of damages based on Article 1(1) of the Act concerning State Liability for Compensation or Article 709 of the Civil Code of Japan, with alleging that not only Y1, but also Japan International Cooperation Agency having been responsible for the said ODA loan (Y2), and Tokyo Electric Power Services Corporation having been substantially involved in the Dam project (Y3) failed to exercise their due diligence. According to Xs, the substance of due diligence to be exerised shall be decided in accordance with international standards, such as Article 11(1) of the ICESCR providing for an adequate standard of living and the World Heritage Convention.

In the first instance, the Tokyo District Court dismissed all of the

claims submitted by Xs.

Opinion:

The appeal is dismissed.

1. International Covenant on Economic, Social and Cultural Rights

Article 11(1) of the ICESCR merely confirms that the right to an adequate standard of living is to be guaranteed through the social security of States Parties, and proclaims that the States Parties are politically responsible for pursuing a social security policy for realizing the said right, and it does not provides that the States Parties shall grant individuals with the concrete right immediately. This is obvious from the fact that Article 2 of the ICESCR requires each State Party to "achieve progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." Therefore, it leads to the conclusion that, under the ICESCR, Y1 and Y2 assume no obligation of due diligence in terms of the involuntary relocation of inhabitants.

2. Convention concerning the Protection of the World Cultural and Natural Heritage

Xs invoke the World Heritage Convention as a ground for the obligation of due diligence in terms of their forced displacement. However, the Convention merely provides that it is for each State Party to this Convention to identify and delineate the different properties which are situated on its territory and defined as a cultural and natural heritage under the Convention and that each State Party then recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory belongs primarily to that Party and that, for this reason, the Party will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain. It follows, therefore, that the Convention cannot be a ground for the obligation of due diligence of Y1 and Y2 in terms of X1' s alleged involuntary relocation.

Editorial Note:

With regard to the ICESCR, the Japanese government has maintained consistently, as the Ministry of Foreign Affairs mentioned in the Consideration of Japan's Second Report by the Committee on the ICESCR, that "the Japanese government does not regard the Covenant as each provision granting individuals concrete rights." Further, Japanese courts have adopted the same position, as Osaka High Court in 2004 having found that "the ICESCR is not set out to grant individuals with concrete rights immediately." Though the position has been and is harshly criticized by domestic NGOs as well as by the international community including the Committee on the ICESCR, the present court firmly followed the traditional view of the Japanese government and the precedents.

Another interesting issue is whether the ICESCR can be applied to the alleged violations by Japan which took place within the territory of Indonesia, in other words, outside that of Japan, though the present court did not examine it at all. This issue relates to the scope of application of the ICESCR. Unlike other human rights treaties, the ICESCR does not have any provision with regard to its scope of application. Nevertheless, the International Court of Justice (ICJ) founds that the ICESCR might be applied by a State Party to the territories "over which that State exercises territorial jurisdiction" in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. If one applies the criterion set by the ICJ to the present case, it would be difficult to conclude that Japan breached the obligation under the ICESCR as it did not exercise its territorial jurisdiction over the Area of Kotopanjang. Actually, in the present case, all Japan did was just to grant an aid to Indonesia, and Japan was neither directly involved in constructing the dam nor had substntial authority to supervise Y3.

As for the World Heritage Convention, a claim based on the Convention has never been brought before Japanese courts. Therefore, the present case is quite interesting as the first one that a Japanese court examined the nature of obligations imposed on States Parties under Article 4 of the Convention. Although the reasoning of the present court is not necessarily clear, its conclusion that the Convention cannot be a ground for the obligation of due diligence is correct due to the following

two reasons. First, Article 4 manifestly stipulates that it is the State within whose territory a world heritages is situated that primarily undertakes the duty under the convention. Thus, the duty of due diligence based on the convention belongs, if any, to Indonesia, not to Japan, because the dam in question is situated outside the territory of Japan. Second, it is world heritages themselves which the State Parties are obliged to protect, not the inhabitants living around the heritages. It follows therefore that X1 cannot make a claim for the damages they suffered by relying on the Convention. Even supposing that X1 makes a claim for damages against the world heritage in question, it would raise another question whether the inhabitants, not being the owners of the heritage, are eligible for the claim.