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“Are there holes in the Anti-Power Harassment Law? The dangers posed by the High Court’s reversal on maternity harassment case”, 14 Jan 2020

The High Court’s decision on the maternity harassment lawsuit against the company Japan Business Labo is drawing attention. Although discussions about this case have centered on whether the plaintiff or the defendant is correct, the focus should be on the impact of the High Court’s decision, which dramatically differed from that of the District Court, in addressing workplace harassment. This article examines the differences in the judgements reached by the District Court and High Court, highlighting the risks posed by the latter’s decision...It should also be noted that the case has been referred to the Supreme Court...Regardless of whether this article is correct about the ultimate impact of this case, the aim is to promote dialogue about the problem of maternity harassment by raising public awareness.

A positive development for workers in Japan over the past year has been the passage of the Anti-Power Harassment Law, which addresses power harassment, sexual harassment, and maternity harassment (harassment against employees who are pregnant or have had a child). The law is the result of growing public awareness that workplace bullying and harassment are serious problems, which have been raised in various labour disputes. However, those celebrating the passage of the Anti-Power Harassment Law were dealt a blow with the Tokyo High Court’s decision on a maternity harassment lawsuit in November [2019]. In the case, the court took a stance that could limit workers’ ability to exercise their rights, such as ruling that audio recordings of conversations between employers and employees—crucial for proving workplace harassment—violated the civil codes.

●Lawsuit to determine non-regular employee status

On December 24, 2019, a group of women carrying banners and placards marched in front of the Tokyo High Court, protesting its latest decision. The protestors were members of Matahara Net, an organization made up of victims of maternity harassment and labour union members who are involved in women’s workplace issues, such as problems associated with freelance jobs and sexual harassment. To understand why they were protesting, it is necessary to first look at the statements presented by the District Court and High Court on the maternity harassment case.

The plaintiff in the maternity harassment case was a female instructor and employee at the language school operated by Japan Business Labo. She had a baby in 2013 and approached her employer after she was unable to find a preschool for her newborn during her maternity leave. Japan Business Labo offers two types of options for workers who are returning from maternity leave. If a worker chooses to remain as a regular employee, he or she would work shorter hours

five days a week. If the worker decides to become a non-regular, contract employee, he or she can work three days a week.

In its employee handbook, Japan Business Labo states that if regular employees would prefer to become a contract worker when they return from maternity leave, they could change back to regular worker status at a later date. As an example, the employer wrote, “At the time of starting employment: regular employee (maternity leave) → after maternity leave: contract worker → (employee’s child starts school) → employee returns to regular worker status.” Based on this explanation, the plaintiff thought that she would be able to switch back to regular employee status once she was able to work five days a week. As a result, she decided to become a contract worker for the company and returned to the office in September 2014 following her maternity leave.

However, soon after she started as a contract employee, she found an opening in a preschool that was located near work and asked her employer to change her back to regular employee status. Japan Business Labo declined to consider her request at that time and did not indicate a timeline for her return to regular employee status. Growing concerned about the situation, the plaintiff began making audio recordings of comments made by Japan Business Labo’s president and her supervisors. She also decided to consult the local Labour Bureau and began negotiations to join Women’s Union Tokyo.

When the plaintiff notified her employer that she was consulting the Labour Bureau, the company replied, “If you want to return as a regular employee, it’s best not to make any waves.” It also told her, “If you go to the Labour Bureau, you’ll create a situation where it’ll be more difficult for us to change your employee status.” In May 2015, Japan Business Labo filed a suit with the Tokyo District Court to seek legal recognition that the plaintiff was not a regular employee. However, later that year in August, the company withdrew its case just as her one-year contract was ending. On September 1, 2015, it officially told her that it would not renew her contract and filed another suit with the Tokyo District Court to seek legal recognition as a “former employee.” In response, the plaintiff filed a countersuit in October to be recognized as a regular employee.

●District Court rules that switch to contract employee status is not disadvantageous treatment

A reason why this lawsuit has received particular attention is the growing number of employers who refuse to renew the contracts of employees, who, like the plaintiff, choose to become contract workers after maternity leave. Although employers argue that such practices are legal because they are not “firing” regular employees, the Equal Employment Opportunity Law prohibits them from firing regular workers for reasons such as pregnancy and birthing a child, which fall under disadvantageous treatment. Furthermore, the Child Care and Family Care Leave Act requires employers to offer shorter working hours for employees with children under the age of three. As such, it is likely that the labour practice at the center of the maternity harassment case violates these laws and regulations. The lawsuit has thus drawn attention to how the courts decide on employers’ use of contract employees as legal loopholes.

In their decisions, both the District Court and High Court did not address the employer's right to withhold permission for regular workers who became contract employees to change back to their original status. Instead, both courts stated that Japan Business Labo's policies did not guarantee regular employees' right to return to their original employment status. In other words, the plaintiff could not become a regular employee again unless the company renewed her contract. Since the plaintiff agreed to these terms, the courts declined to grant her regular employee status.

The plaintiff had also argued that she had been subjected to precarious, short-term employment when she became a contract worker, earning 106,000 yen from 480,000,000 yen as a regular employee. However, the courts stated that she chose to become a contract worker so that she could continue working at the company without putting in the hours required of regular employees. The courts thus determined that switching to contract employee status did not rise to the level of disadvantageous treatment.

Despite these decisions, the District Court did rule that Japan Business Labo had acted in bad faith. According to the court, the defendant had already established a system for regular employees to work shorter hours and yet made unreasonable demands after the plaintiff returned to her job after her maternity leave. For example, the court pointed out that the employer had asked her to work seven-hour days—the same as regular workers—and to stay at the office until 11pm. The company had also told her that her family should make plans so that she would not have to miss work to take care of her sick child although employees were guaranteed days off for nursing care. The court thus ordered Japanese Business Labo to pay damages to the plaintiff. Equally important, the District Court ruled that the defendant had failed to provide a adequate reason for not renewing her contract, thereby restraining the company's ability to fire regular workers who become contract employees.

- **Audio recordings of employer statements ruled in violation of civil codes**

The High Court completely reversed the decision of the District Court, which led the plaintiff to file a suit with the Supreme Court.

What was behind the reversal? When comparing the decisions of the District and High Court, several diverging points highlight different understandings about workers' rights. While the District Court granted workers' right to negotiate with employers for better working conditions as a matter of fact, the High Court's ruling is based on the idea that employees must obey employers' demand to the fullest extent possible.

For example, the District Court criticized the defendant for "putting up a façade of supporting various work styles and arrangements." However, in reality, the company had "pressured the plaintiff to change her mind in accordance with its wishes and policies...[,] criticizing and blaming her for her attitude." As such, the District Court ruled that the defendant was inflexible in negotiating with the plaintiff, failing to demonstrate good faith.

In contrast, the High Court reasoned that the plaintiff showed "no sense of reality" when she asked her employer for accommodations, such as working on the weekends or changing her class dates, so that she could return as a regular employee while fulfilling her family obligations. The court further concluded that the plaintiff had made demands based on personal circumstances

with any intention of actually meeting company requirements for regular employees. However, this interpretation fails to take into account current workplace trends. As a way to support their employees' career growth, many companies are encouraging them to work on weekends when they can work only for a limited number of hours during weekdays. Furthermore, the plaintiff proposed adjusting her work schedule partly to make up for the growing number of coworkers who did not want to work on the weekends.

In addition, the District Court ruled that employers could reasonably prohibit audio recordings of conversations at the workplace to prevent leaking confidential information. However, the District Court concluded that this standard did not apply to the audio recordings in this lawsuit and that, as a general rule, they are important in securing evidence as part of labor disputes.

On the other hand, the High Court stated that recording conversations could have a negative impact at Japan Business Labo by hindering the free exchange of opinions among instructors. The court thus determined that the company had acted reasonably by prohibiting the plaintiff from recording conversations. The plaintiff was also criticized for making the audio recordings, which constituted a violation of the civil codes and thus obstructed business even if they did not cause actual harm to the employer. As such, the High Court ruled that the defendant had acted within reason by not renewing the plaintiff's contract.

The court also dismissed the need for the audio recordings, saying that the plaintiff could have used written notes about issues at her workplace to share with her union. It further stated that she had only recorded conversations which would be beneficial to her and could be used as "negotiation tools" to pass along to the media.

Workplace harassment—not only maternity harassment—often occurs in private settings that are inaccessible to the public eye. It is thus difficult to prove what actually happened in court without recording such incidents. This hurdle explains why the District Court determined that recording conversations for the purpose of resolving labor disputes was generally acceptable.

The High Court's ruling that Employers have a right to prohibit audio recordings—regardless of whether they contain confidential information or not—would severely limit workers' avenues for addressing labour abuses. If employees attempt to record conversations in the workplace for evidence, the courts may determine that they have violated the civil codes. At the same time, without any recordings, the courts could dismiss workers' petition due to "lack of evidence". This double bind even raises the possibility that workers would not be able to file any lawsuit that alleges workplace harassment.

● **Plaintiff's press conference ruled as defamation**

The High Court landed another surprise when it ruled that the press conference announcing the plaintiff's lawsuit was defamation. It pointed to her statement that Japan Business Labo "threw doubt on her character after she returned to work after having a baby." Concluding that her assertion had "no basis in reality and thus constituted defamation," the High Court ordered the plaintiff to pay damages of 550,000 yen to her former employer. On the other hand, the District Court did not question the plaintiff's words and accepted them as her own thoughts and feelings on the situation...

The High Court's decision poses a danger to workers by dramatically raising the bar on whether they can file a lawsuit for workplace harassment. Even if they feel that they had been victims of such abuse, they may worry that the courts will interpret their claims as fact, rather than a reflection of their own feelings and perception... This constraint could prevent workers from freely expressing their opinion. It could also hinder public efforts to address workplace harassment, which often stem from media coverage of lawsuits...

- **“As a man, I would feed my family with my own earnings”**: employer's statement ruled as **“personal opinion”**

This type of comment, made by a superior involved in hiring decisions, is often cited as a prime example of maternity harassment...

While the District Court said that this statement merely reflected an employee's personal opinion about his own family, it pointed out that these words could be interpreted as faulting the plaintiff for getting pregnant and her domestic partner. The District Court thus criticized this employee's statement as unnecessary and inappropriate and said that it was unacceptable when talking with workers who were returning from maternity leave.

Meanwhile, the High Court determined that the hourly wages of regular and contract employees at Japan Business Labo did not differ when taking into account that the 480,000 yen—paid to the plaintiff as a regular worker—included compensation for a specific number of overtime hours. However, as a general rule, overtime work has been defined as a temporary measure for increased workload. In its judgement, the High Court did not question a system that fails to ensure stable employment unless workers accept overtime; it also did not raise the issue that this wage structure serves to perpetuate maternity harassment. The Child Care and Family Care Leave Act attempts to tackle this problem by requiring employers to offer accommodations to employees, such as revising fixed working hours, in order to ease the burden of child rearing (Article 1). Despite the existence of this law, the High Court accepted the defendant's unwillingness to grant regular employee status to the plaintiff on the basis that she would not be able to meet company requirements. The High Court thus served to weaken legal protections for victims of maternity harassment.

Regulations around maternity harassment unravel as employers shift regular workers into contract employees, and restraints are placed on the use of audio recording and press conferences in labour disputes. If all of these developments become the norm in Japan, they will poke holes in the effectiveness of the Anti-Power Harassment Law. As a result, Japan will not be able to create safe and supportive working spaces, a crucial step in stopping the steady decline of the national birth rate, which hit a record low in 2019. With much at stake, attention will turn to the Supreme Court's upcoming decision on the maternity harassment lawsuit.