Commentary

Employers' Duty for Safety of Multiple Job Holder Who Worked Excessively Long Hours

The *Daiki Career-Casting and One Other Defendant Company* Case Osaka District Court (Oct. 28, 2021) 1257 *Rodo Hanrei* 17

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I. Facts

The plaintiff, X, worked the late night to early morning shift at a 24-hour gas station under a labor contract concluded with Y1, one of the defendants. Y1 was responsible for the day-to-day running of the gas station, which had been contracted out by A (the gas station's operating enterprise, which was not a party to this case) to B (understood to be the parent company of Y1 and also not a party to the case), and in turn subcontracted to Y1. X requested a colleague to give up shifts to X, and consulted with the colleague and their supervisor, which resulted in the colleague partially accepting X's request (and thereby led to an increase in X's shifts). Directly after, X concluded a labor contract with A as well, such that X worked shifts other than the late night to early morning shift once or twice a week at the gas station for A, in addition to the shifts worked for Y1. As a result, the number of hours worked by X—who subsequently ceased to attend work—for Y1 and A totaled 303 hours and 45 minutes in the month prior to becoming absent, 270 hours and 15 minutes in the second month prior, 271 hours in the third month prior, 268 hours and 30 minutes in the fourth month prior, 256 hours and 45 minutes in the fifth month prior, and 244 hours in the sixth month prior. It should also be noted that in a subsequent merger by absorption, Y1 and A were absorbed into the enterprise Y2, the other defendant in this case.

In this case, X claimed damages from Y1 and Y2 on the grounds that Y1 and Y2 had, among other acts, neglected their duty to reduce X's working hours after having ascertained or being able to ascertain X's working hours, and thereby breached their duty of care (*chūi gimu*) under tort law, and breached their duty to consider to ensure a worker's safety (*anzen hairyo gimu*; "duty for safety") under the labor contract.

II. Judgment

X's claim was dismissed.

1. For several months, X, under the employment of Y1 and A, worked long hours totaling around 270 hours or more per month. This state of affairs was problematic in light of the purpose of Article 32 of the Labor Standards Act (LSA), which prescribes upper limits on working hours (author's note: namely, a weekly limit of 40 hours and a daily limit of 8 hours), to prevent the impairment of workers' health due to long working hours. However, said state of affairs was the result of X making efforts to secure more work opportunities with long working hours and thereby successfully increasing X's own working hours, because X had actively requested a colleague, K, to give up K's scheduled work shift to X and secured K's partial concession.

2. Moreover, X, on X's own request, concluded a labor contract with A to increase X's working

hours by working for days in succession with no days off. X was working for A on days prescribed as days off under X's labor contract with Y1, as X had intentionally continued to work on successive days by arranging to work on said days on X's own active request. The fact that X came to be working for days in succession and for long hours was therefore the result of an active choice by X. Furthermore, Y1's status did not allow it to directly intervene in the labor contract-based relationship between X and A to reduce X's working days.

3. It cannot be recognized that Y1 breached Y1's duty of care toward X under tort law or breached Y1's duty for X's safety under the labor contract. This is based on several factors, including the fact that the tasks assigned to X entailed a considerably low intensity of labor, the fact that Y1 had, under its labor contract with X, allocated Sunday as a day off, and the fact that X's supervisor had pointed out to X that X's way of working presented an issue in light of the laws regarding labor and informed X that X should take time off in consideration of X's own physical health.

4. Given that, as stated above, it was determined that Y1 had not breached their duty of care under tort law or their duty for safety under the labor contract, the court did not recognize the claim that A, by cooperating with the tort of Y1, was liable for a tort. Therefore, as A was not liable for a tort, Y2, the enterprise which inherited A's business, was not subject to such liability and therefore not subject to liability for damages. Having formed no contract with Y1, A also held no authority to directly intervene in the labor contract-based relationship between X and Y1 to allocate days off to X. Therefore, the court did not recognize that A had breached their duty of care toward X under tort law or breached their duty for X's safety under the labor contract and, in turn, Y2, which had inherited A's business, did not inherit the liability for damages.

III. Commentary

1. Work Style Reform and working hours of multiple job holders

Deliberations aimed at developing policy to support new and diverse work styles—known as Work Style Reform (*hatarakikata kaikaku*)—commenced in 2016 and culminated in the revision of key laws and regulations such as the LSA and the Industrial Safety and Health Act, which resulted in the introduction of an upper legal limit on overtime working hours and various measures aimed at protecting workers' health. While such steps meant the introduction of stricter provisions, the government's Work Style Reform, as measures to facilitate diverse working styles, sought to provide policy to foster the practices of teleworking (working from home or remotely) and of pursuing multiple jobs.[1]

One of the contentious aspects of this case was whether the employer should bear the legal liability for long working hours arising from working multiple jobs. Concerning this point, the provisions of Article 38 of the LSA address the calculation of hours worked. Paragraph 1 of said Article prescribes that "[t]o apply the provisions on working hours, hours worked are aggregated, even if the hours worked were at different workplaces." "At different workplaces" has typically been interpreted as covering not only work conducted at different workplaces under the same employer, but also work conducted at different workplaces under multiple different employers (May 14, 1948, *Kihatsu* [administrative notification related to labor standards] No.769). (Moreover, this case can be interpreted as a precedent involving multiple jobs, given that while working at the same workplace, X was working under labor contracts concluded with two different employers.)

The Ministry of Health, Labour and Welfare has recently issued a set of guidelines aimed at fostering the practice of workers pursuing multiple jobs, entitled "Guidelines for Multiple Jobs" (revised in July 2022). A key point of the Guidelines is that employers are responsible for controlling the

aggregate total of hours worked by a worker (the hours worked under their employment and that of other employers) based on self-reported information and other such input from the worker. On the other hand, it also states the necessity for workers to check the working hours and other such employment conditions at the different workplaces and manage one's own working hours and health when working multiple jobs.

2. Significance

Amid such developments in policy, this case was the first judicial precedent in which a judgment was passed on the employer's legal liability concerning long working hours in multiple jobs (it should, however, be noted that the suit was filed in 2017). This case is also distinctive because it entailed a judgment on multiple employers' respective duties of care under tort law and duties for safety under the labor contracts, as opposed to being an issue of an employer or business operator's nonperformance of duty under the LSA or Industrial Safety and Health Act.

It should be noted that the Guidelines also address the employer's duty for safety, listing as one of the examples of breach of duty: "the event that an employer, despite ascertaining that a worker's overall workload and working hours are excessive, takes no consideration of that in any way, to such an extent that the worker's health becomes impeded." According to the facts found, this case is a precedent that does not involve damage to health due to long working hours and working for days in succession and therefore may be significant as a precedent that does not fall under a breach of duty as described in the Guidelines.

3. Legal theory, scope and pending issues

It is important to note here that both duty of care under tort law and duty for safety under the labor contract are obligations of conduct (*nasu saimu*) rather than obligations to achieve a result (*kekka saimu*), and therefore by taking care, or by giving consideration, the employer can be seen to have performed their duty. The specific conduct required to do so also differs from case to case. With regard to cases of long working hours such as this one, the specific conduct required to be recognized to have taken care or given consideration may include measures such as reducing working hours by not allowing the worker to work overtime, ensuring the worker has days off, ensuring that the worker takes their annual paid leave, or reassigning or sending the worker on leave of absence (*kyūshoku*) in the event that said worker is recognized to be experiencing physical or mental health difficulties.

According to the facts found in this case, X requested a colleague to give up shifts to X, and actively sought opportunities to work by forming a labor contract with A in addition to Y1, and therefore consecutive days of long working hours were brought about by X's own choice and on X's own decision. X's supervisor, on the other hand, informed X that a large number of hours worked by X conflicted with the LSA, and also warned X that X should take time off in consideration of X's own health (the supervisor had also ordered X to cease working for A, and X had promised to do so but not fulfilled said promise). Thus, it can thereby be interpreted that Y1 did not breach its duty of care or duty for safety. Therefore, as determined by the court, Y1 cannot be said to have breached its duties. (Moreover, given that despite working long hours and successive days, X had not suffered health damage as a result, the case could not entail a breach of duty for safety or duty of care by Y1 or Y2 in the first place.)

On this basis, it can be surmised that while the government may be pursuing efforts to foster the practice of working multiple jobs, such workers are expected to be self-reliant and self-selecting and bear individual accountability behind the scenes, while employers' legal liability is limited. This corresponds with the stance set out in the Guidelines, which establish that working hours and other such employment conditions should be ascertained on the basis of self-reporting by the worker to the employer, and that workers should be self-organized with regard to working hours and health.

At the same time, as stated in the Guidelines, an employer is theoretically unable to avoid the duty for

safety under the labor contract (or duty of care under tort law) that they bear toward the worker. If a worker working multiple jobs has been self-reporting their state of work to their employer, such as their own working hours and days off, and the employer has recognized the worker's excessive burdens and fulfilled their duty of care and duty for safety, the employer cannot be regarded to have breached their duty (the specific ways in which they fulfilled that duty, however, could be called into question). However, the way in which the employer, upon receiving the worker's self-report, recognized the excessive burden on the worker and the kinds of measures that the employer took, upon having recognized the burden, may become the points of contention in judicial precedents in the future. In that sense, this case implies the issues of future deliberation regarding legal judgments on cases that fall in a grey zone. This is also a precedent in which it was determined that there had been no breach of duty for safety under the labor contract or duty of care under tort law and that, despite working long hours and successive days, the worker had not damaged their health as a result. It therefore has little significance as a precedent for cases recognizing the legal liability of each employer of a worker working multiple jobs.

As one of the points for contention in this case was the duty of care under tort law and duty for safety under the labor contract, the case was not judged to be a precedent of a violation of the upper legal limit on overtime working hours as prescribed under the LSA (100 or more hours of legally prescribed overtime working hours per month, or a monthly average of more than 80 hours of legally prescribed overtime working hours for six months), where, in anticipation of applying penal provisions, work at multiple workplaces (under multiple employers) must be aggregated. Therefore if a judgment on such a case was passed in the court, it would not also entail a judgment as to how the legal liability would be shared between the multiple employers. This is another issue and remains to be addressed.

1. Furthermore, as part of the Work Style Reform, the Industrial Safety and Health Act prescribes that an employer must assess the situation of working hours of workers (Industrial Safety and Health Act, Article 66-8-3). The eligibility criteria for receiving insurance benefits (for cerebrovascular disease or heart disease and mental disorders) under the Industrial Accident Compensation Insurance Act also prescribe that in the event of work at multiple workplaces, the decision on eligibility should take into consideration the aggregate working hours (Sept. 14, 2021, *Kihatsu* No.1, and Aug. 21, 2020, *Kihatsu* No.0821). Therefore, in accordance with laws and regulations regarding workers' health, legal violations are generally assessed on the basis of the aggregate hours worked.

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