

Unofficial Translation

Ref. No. 353

July 10, 2001

Notification of Disclosure of Judicial Administrative Document

Regarding the disclosure of documents on judicial administration requested on June 21, 2001, it is notified as follows.

1. Name of judicial administrative document to be disclosed

ALIS (No. 1 to No. 22. Name changed from “Administrative, labour and intellectual property cases bulletin”)

2. Summary of the discussion in the consultation of judges on civil and administrative cases related to labour

On October 27, 1998, a consultation of judges on civil and administrative cases related to labour was held at the Supreme Court, and participants discussed mainly on matters involving pay.

We introduce herewith the main topics in the discussion.

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2 Matters regarding disparities in pay, etc.

(7) Is it permissible to establish a disparity in pay between regular employees and temporary workers, even when there are no differences in numbers of years worked, content of work, working hours, etc?

(8) Is it an unreasonable discrimination based on social status, or against public order, good morals or public reason, to treat a worker differently in pay and promotion for a long period of time, based on the grounds that the worker belongs to an employment category of “yo-in (temporary worker)?”

(summary of discussion)

1 Decision regarding the amount of pay is a matter, which, in principle, should be left to the agreement between the parties, and regulation by law is limited to those regarding the Minimum Wages Law, and Article 3 and 4 of the Labour Standards Law as well as Article 7 of the Labour Union Law. Regarding the creation of disparities in pay between regular employees and temporary workers, there was a near consensus that, as such status regarding job systems do not constitute “social status” as provided for in Article 3 of the Labour Standards Law, it does not amount to discriminatory treatment prohibited by the Article, and also, **since there are no positive laws laying down the principle of equal pay for equal work** (see (3)), unless it is a case of violation of public order, it should be interpreted as being valid.

It has been pointed out that among temporary workers, there are those, who, as “para-part-time workers,” are almost the same as regular employees. In the judgment of Nagano District Court Ueda Branch of March 15, 1996 (*Hanrei Times* Vol. 905, p. 276, Maruko Keihoki Temporary Worker Wage Disparity Case), it was decided that in such cases, when the temporary worker’s pay is 80% or lower than that of the regular employee, who has worked the same number of years, it is against public order and good morals and therefore unlawful.

2. Then the question would be, what cases would be against public order. Regarding regular employees and temporary workers, in general, it is normal that, apart from the standards at the time of hiring (for example a competitive test or just an interview), the level of demand for the work that should be provided, the expectation by the employer of continued employment, etc., are different. Therefore, even if difference in pay was created between the two categories, the majority view was that, that alone would not immediately constitute a violation of public order. However, there were strong views that, in addition to there being no difference in number of years in employment, content of work, working hours, etc., in the extremely exceptional cases, in which there are no difference even in standards at the time of hiring, the level of demand for the work that should be provided, the expectation by the employer of continued employment,

etc., and if as a result of an excessive disparity in pay being left for a long period, as well as when the rationality for the employer for maintaining the employment category seems to have been lost, then the disparity would be against the concept of justice, and could constitute a violation of public order.

In this line of thinking, the subsequent question would be what level of disparity would constitute a violation of public order. Some thought that when the temporary workers' pay was 60% or 80% or lower than that of a regular employee, violation of public order should be considered, others submitted that it was difficult to establish a uniform standard of certain proportion of regular employees' pay to determine violation of public order, and that it should be examined according to each specific case taking into consideration the background circumstances in which the disparity arose, etc.

Furthermore, some pointed out that regarding maintaining employment categories, when there is a system in which temporary workers can transfer to regular employees, such as through tests, it would be a factor in determining whether there was a violation of public order.

3 Meanwhile, there were views that in cases, in which it was possible to assess no substantial reason for establishing disparity in pay through employment categories, because there would be a question of what public order the disparity would violate, it should not be considered as constituting a public order violation, instead, it should be considered whether the treatment of the employers constitute a breach of trust or an abuse of power.

(9) In deciding whether there is pay discrimination on grounds of sex, what matters would be given importance?

(summary of discussion)

In specific cases, in deciding whether the pay disparities between the relevant men and women is because of discrimination against women, often, comparison would be made with male employees, who were employed at the same time as the relevant women, have the same educational background, and are of the same age. On what circumstances should be considered in making the comparison, it is difficult to set forth a general standard, as there are various circumstances depending on each case, but there was a near unanimous recognition, that the following factors would come under consideration: (1) whether the pay regulation, which creates the relevant pay disparity explicitly refers to "men" and "women," (2) whether the nature of the pay in the relevant company is seniority based, or based on job evaluation (if in case of former, it is easier to argue that regardless of the specific job content, women should be treated the same as the men based on seniority), (3) whether the male workers and female

workers were hired according to the same hiring standards/ procedures, (4) whether the work content of the male workers and female workers are the same or not, and (5) seen as a whole, whether there is a significant difference in treatment between male workers and female workers in the relevant company.

Regarding this issue, it was also pointed out that method of evaluating the situation of groups could also be applied in cases of discrimination against women.

(10) When there is an 8:2 disparity in promotion between male and female employees, who were hired at the same time, who received the same pay, and who were of the same age, can it be said that there is an unreasonable discrimination? If there is an unreasonable discrimination, and when the discriminated female employees have a claim to promotion, what is the scope of female employees who should be granted promotion?

(summary of discussion)

The overall rate of promotion of male and female employees by itself does not constitute grounds for the existence of discrimination, and should be seen as one of indirect facts.

Since promotion is normally granted only after the evaluation of the employers, it is difficult to recognize a claim for promotion.

If, hypothetically, there is an unreasonable discrimination in promotion between male and female employees, and if claims for promotion were recognized for the relevant discriminated women, the question would arise, what the scope of female employees, who should be granted promotion would be. Basically, regarding the relevant female employees, it would be sufficient to select a comparable male employee for each female employee, conduct a comparison, and decide whether she is not inferior in performance results, etc. If each female employee were found not to be inferior regarding performance results, etc, compared with their male comparators, it can be said that promotion should be recognized for all female employees.

Furthermore, with the amendment of the Equal Employment Opportunity Law, the provision regarding discriminatory treatment in assignment, promotion, etc., has been changed from one placing a duty to make an effort, to one of prohibition since April 1, 1999. Some expressed the view that this should also be taken into consideration.

(11) If discrimination in pay (discriminatory personnel evaluation) was found, what is the calculation for the amount of loss due to the disparity in pay?

(12) In a claim for compensation for damages for pay disparity on grounds of discrimination against women, how should the damage amount be evaluated?

(summary of discussion)

If pay disparity between male and female workers was found to have arisen from discrimination against women, as well as to have been based on differences in performance results, competence, work content, etc., it is not easy to prove the amount that should have been paid if there had been no discrimination, and it would have to be considered according to each case. But the following views were expressed regarding calculation of damages in such cases. (The basic idea is quite similar in cases of discrimination based on ideology, and other grounds.)

#### 1 1<sup>st</sup> theory

In some cases, it is possible to acknowledge a modest amount, which might be the minimum amount, and in those cases, damage claims may be admitted, even if only partially. If that is not the case, then the compensation for claims regarding the loss arising from the difference in pay would have to be dismissed, and only the claim for damages would be admitted.

#### 2 2<sup>nd</sup> theory

Even in such cases, it should be possible to calculate appropriate damages applying Article 248 of the Civil Procedures Law.

(13) In cases, in which the employer has conducted evaluations based on discriminatory ideas for a long period of time, and has continued to pay unjustly lower wages based on the evaluation, what consideration should be given in setting the base date for calculating the lapse of right of claim for damages (damages for the difference in pay, as well as compensation) based on tort?

(summary of discussion)

1 The claim for damages based on tort, in cases, in which the employer has conducted evaluations based on discriminatory ideas for a long period of time, and has continued to pay unjustly lower wages based on the evaluation, lapses according to the statute of limitations provided for in the first paragraph of Article 724 of the Civil Code. The base date for calculating the statute of limitations would differ according to the tort in each case.