Revue de droit comparé du travail et de la sécurité sociale

4 | 2018
English Electronic Edition

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Electronic version

URL: <https://journals.openedition.org/rdctss/1810>

DOI: 10.4000/rdctss.1810

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2018

Number of pages: 166-173

ISSN: 2117-4350

Electronic reference

Kanta Owada, "Workplace harassment in Japanese law", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2018, Online since 01 November 2021, connection on 15 November 2021.

URL: <http://journals.openedition.org/rdctss/1810> ; DOI: <https://doi.org/10.4000/rdctss.1810>

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WORKPLACE HARASSMENT IN JAPANESE LAW

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P sychological harassment in the workplace is a hot topic in Japan. According to statistics from the Japanese Labour Administration, workplace harassment¹ is one of the most frequent grounds for complaints to Departmental Labour Offices (72,067 cases for 2017, i.e., 23.6% of all complaints).² Furthermore, the number of deaths in 2017 due to workplace accidents in the private sector came to 978, out of a total of 58.19 million employees. Among these victims, 241 were cases of *Karôshi* (sudden death due to overwork) and 221 were suicides caused by psychosocial risks (*Karôjistasu*). Unfortunately, the number of suicides has increased in recent years. The annual report produced by police agencies in 2017 showed that the total number of suicides came to 21,321, of which 6,432 were employed persons (30.2%).³ An analysis of motivations for suicide has shown that 1,991 cases were related to work problems, professional failures, human relations, changes in the work environment and work-related fatigue.

The Workplace Mental Health Research Commission, organised in 2010 by the Ministry of Health, Labour and Social Welfare, presented three models for the processes leading employees to commit suicide:

- (1) Transfer → Fatigue + Relationship issues + Depression → Suicide
- (2) Promotion → Fatigue → Failure at work → Relationship issues → Suicide
- (3) Workplace harassment → Depression → Suicide.

1 Sexual harassment is not included in these numbers and is instead handled separately both in statistics and in terms of appeals to the labour administration.

2 It should be noted that harassment is an integral part of certain disputes relating to dismissal or retirement, etc.

3 For male employees, the suicide rate is 193.8 in 100,000 (48.8 for women only, 128.1 for men and women combined). According to C. Cohidon and al. *Suicide et activité professionnelle en France: premières exploitations de données disponibles*, Institut de veille sanitaire, 2010, p. 4, the annual suicide rate in France between 1976 and 2002 was 25.1 in 100,000 (no separate calculations available for women).

It also recognised that employee suicides result in particular from management problems at companies. Thus, although it is known that long work hours may increase employee mortality rates, only half of employees are fully paid for all overtime worked. No truly effective regulation exists to deal with this situation. The labour administration's recommendations alone advocate the establishment of annual overtime caps of 360 hours (45 hours per month); but this does not actually constitute a legally binding measure.

Labour administration policy, however, does emphasise the importance of improving employee awareness of workplace psychosocial risks. When they are identified, these risks are treated at an individual level only, and individual solutions alone are promoted; this is inadequate to the psychosocial risks at hand, which are in fact a reflection of organisational risks. This shows that Japanese labour policy tends to neglect both the role of Trade Unions as well as a collective approach to preventing of workplace health problems, particularly psychosocial risks at work. Although there are Unions that are organised within companies and are thus referred to as "in-house unions," and in spite of a high rate of unionisation (17.1% in 2017), the Unions lack sufficient influence in regard to these new risks, which are referred to as psychosocial risks. This issue implicitly raises the question of how representative the Unions really are for employees, particularly in the context of the occupational health laws.

I - LABOUR LAW AND HARASSMENT⁴

A - THE ABSENCE OF A GENERAL LAW ON HARASSMENT

Despite an awareness of the gravity of the situation, no specific regulations exist on harassment in Japan. However, a special law been adopted to apply in certain cases. In 1997, after the amendment to *Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment*,⁵ provisions were adopted to deal with the problems caused by workplace sexual harassment,⁶ in particular by enshrining in law the obligation of employers to prevent this form of harassment.

Except in cases of sexual harassment, victims must invoke legal provisions of a general nature when seeking damages before employment tribunals, since no specific anti-harassment legislation exists. The same applies to the employer's obligation to ensure the health and safety of their salaried employees⁷ or, since 2007, when the *Labor Contracts Act* was enacted, to the employer's contractual obligation to ensure the health and safety of their workers⁸ or, since 2017, the prohibition of discrimination against pregnant women

4 The name of the law is quoted in English, as translated by the website Japanese Law Translation, a service of the Ministry of Justice: <http://www.japaneselawtranslation.go.jp/>

5 <http://www.mhlw.go.jp/file/06-Seisakujouhou-11900000-Koyoukintoujijidoukateikyoku/0000133458.pdf>

6 Employers shall establish necessary measures in terms of employment management to give advice to workers and cope with problems of workers, and take other necessary measures so that workers they employ do not suffer any disadvantage in their working conditions by reason of said workers' responses to sexual harassment in the workplace, or in their working environments do not suffer any harm due to sexual harassment. (Article 11)

7 "A person who has intentionally or negligently infringed any right of others, or any legally protected interest of others, shall be liable to compensate any damages resulting in consequence." (Article 709 of Civil Code).

8 "In association with a labor contract, the Employer should give the necessary consideration to allow a employee to work while ensuring his physical safety. " (Article 5).

or women and men on parental leave.⁹ In Japan, the legal definition of harassment is furthermore quite fragmented.

B - THE FRAGMENTATION OF LEGAL DEFINITIONS

Aside from cases of sexual harassment, no legal definition of harassment in general exists in Japan. It was in this context that in 2012 the labour administration adopted a specific definition of its own, and issued guidelines concerning "*Power Harassment*" ("*Pawahara*"). This approach is intended in part to prevent the type of harassment classed as *Power Harassment*.

Power Harassment assumes that line managers have prerogatives. Situations in which they abuse such prerogatives may be described as *Power Harassment*. To protect themselves and avoid the risk of liability, harassers may at times claim that their actions fall within the scope of their professional responsibilities and that their actions were simply intended to give direction to their subordinates.

The notion of "*Power Harassment*" therefore presupposes a hierarchical relationship between superiors and subordinates. However, this condition, which is too restrictive, has been subject to criticism. It has the disadvantage of narrowing the scope of the definition of harassment, which may, for example, prevent certain acts from being classified as harassment when they are committed by clients (external harassment). In this specific case, however, the labour administration continues to implement the legal definition of harassment.

The legal definition of harassment at work in Japan is fragmented because many different terms currently exist to designate the different forms. More than thirty different names are in use, some of which warrant specific mention:

- "*Maternity Harassment*": harassment against pregnant women or women who have given birth.
- "*Parental Harassment*": harassment against women or men on parental leave or asking to benefit from it.
- "*Karôshi (Long working)*": harassment based on long working hours, such as taking on more than 100 overtime hours per month.
- "*New Employee Harassment*": harassment against new hires without experience or knowledge of the company's business.
- "*Academic Harassment*": harassment by teachers of administrative staff or students.
- "*Age Harassment*": harassment based on age against senior employees or young workers.
- "*Marriage Harassment*": harassment of unmarried persons.
- "*Alcohol Harassment*": harassment of those who do not like drinking or do not know how to drink.
- "*Smoke Harassment*": harassment by smokers
- "*Social Media Harassment*": harassment via social networks.
- "*Doctor Harassment*": harassment by doctors, including medical accidents.
- "*Monster Parent*": harassment of teachers by students parents.

⁹ Article 11(2) of *Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment*, and Article 25 of *Act on Childcare Leave, Caregiver Leave and Other Measures for the Welfare of Workers Caring for Children or Other Family Members*.

Victims of harassment seeking to hold the perpetrators responsible must prove the existence of acts of harassment in order to obtain damages. They must prove that the type of harassment they are complaining about has taken place. One of the major drawbacks of this fragmentation of the legal definition of harassment is the absence of a general definition. It is therefore essential that a single notion of harassment be established that can apply to all the situations described.

II - CASE LAW BY CATEGORY OF HARASSMENT

Workplace harassment can be classified into five categories: harassment in the performance of daily tasks (A), harassment by human resources management (B), harassment via offensive attitudes (C), harassment due to discrimination (D), harassment by persons outside the company (E). Each of these categories of harassment has been the subject of various decisions, which have generated the body of Japanese case law on the subject.

A - HARASSMENT IN THE PERFORMANCE OF DAILY TASKS AT WORK

This category of harassment and the case law it has generated include cases of *Karôshi* or suicide due to overwork (*Karojisastsu*). These tragic situations are caused by long working hours (1), extreme workload (2), lack of care or consideration for newly hired workers (3), inappropriate disciplinary action (4), hierarchical positioning in the education field (5).

1 - Karôshi and excessive working time

The most remarkable decision concerning *Karôshi* is that relating to the Dentsu case of 24 March 2000.¹⁰ In that Supreme Court decision, a young employee had been forced to work 147 hours of overtime per month. Harassment was recognised as underlying the duration of the work imposed upon this employee, who finally committed suicide. In this case, the young Ichiro Oshima began working at the Dentsu Company on 1st April 1990 after graduating from university. He was in charge of business planning and events for radio promotions managed by Dentsu. Though he was able to return home in the daytime, he would never actually get back until one or two in the morning. In August 1990, the number of nights he was spending at work began to rise. Starting in November of that year, he would sometimes not come home at all. In July 1991, the leader of the young man's team expressed his opinion that his working conditions were not necessarily so good, and that he was not taking it well. He furthermore started to express himself to others on his team, saying, for example: "Sometimes I can't come to grips with what I'm doing and what I'm supposed to do" or "I can't sleep; I wake up after only two hours of sleep. My insomnia has been getting worse since August and I don't know why." The young man then hanged himself, just after completing work on an event for a radio show he was managing.

His father and mother filed a lawsuit against Dentsu, alleging that their son had committed suicide due to depression caused by exhaustion resulting from the extraordinary extra workload he had to handle. Their lawsuit sought to hold Dentsu liable for failing to fulfil its obligation to ensure the safety of its employees under Article 415 of the Civil Code, and for tortious conduct under Article 709 of the Civil Code. The findings in the ruling also mention that the victim, who did not like alcoholic beverages, was humiliated by having to

¹⁰ Supreme Court, 24 March 2000, RH (Rodo Hanrei, Review of Labour Law Rulings), 779. Dentsu is one of the world's largest advertising companies. See L. Lerouge, *Risques psychosociaux et système japonais de prévention des risques professionnels*, Working Documents, COMPTRESEC, 2013. <https://halshs.archives-ouvertes.fr/halshs-00818332/document>

drink beer poured into a shoe by his superiors. The Supreme Court held that a company has the obligation to organise work in such a way that it causes no mental and physical illness due to accumulating fatigue or undue hardship. On 24 March 2000, the Supreme Court awarded damages totalling €1,377,050 (168 million yen), finding the employer liable under the Civil Code. (Any person employing others shall be held liable for damages caused to third parties by his employees during the course of such activity -Article 715 of the Civil Code).

On Christmas Day 2016, at the same company, *Dentsu*, a young employee committed suicide due to *Karōshi*. She had worked approximately 105 overtime hours per month before her death. The company had skewed the overtime reporting by recording 70-hour workweeks, which was the contractual limit for monthly overtime under the collective agreement negotiated by the labour relations partners of the company. In that particular case, the employee's supervisor had reproached her for 20 hours of work she had performed that were then deemed unnecessary by the company, and reprimanded her for her physical appearance, because she came to work with her eyes looking puffy and tired. On October 5, 2017, the Tokyo District Court sentenced *Dentsu* to pay a fine of €4,100 (500,000 yen) for its breach of the Labour Standards Act.

Karōshi and harassment thus intersect. Harassment precipitates *Karōshi* and, at the same time, the conditions leading to *Karōshi* become a harassment situation. Employers are responsible for working conditions at the company. More particularly, in Japan, they are responsible for the effects of working time on health.

In another case, a young driver committed suicide as a result of long hours of overtime work. In his transport company, the collective agreement stipulated a maximum of 70 overtime hours monthly, which could be extended to 100 hours in exceptional cases. In practice, this driver had worked 63 hours and 45 minutes' overtime in April 2009, 110 hours and 15 minutes in May, 99 hours and 50 minutes in June, 129 hours and 50 minutes in July, 103 hours and 55 minutes in August, and 102 hours and 30 minutes in September. He worked a night shift several times each month (after 10 pm, in each month respectively 2, 2, 1, 16, 9, and 6 times). His supervisor had criticised him for making a few small mistakes that new employees tend to make. As a result, he became depressed and committed suicide. The Sendai District Court sentenced the company to pay compensation for a breach of its obligation to protect its employees' health and safety.¹¹

2 - Overwork and harassment

A brokerage firm was selling bearer bonds and assigning sales targets to its employees. These targets seemed to them very difficult to reach. When one employee was unable to achieve the sales target, his supervisor asked him to sell his own vehicle to ensure sales targets were reached. All this caused serious harm to the employee's mental health, which led him to commit suicide. The Tokyo District Court considered that the target amounts were too high, and that what his supervisor had said to him had caused his suicide. As a result, the company was ordered to pay damages.¹²

3 - Lack of care or consideration and impact on the workload of a new hire

One of the most common types of harassment is that which is suffered by newly-hired young people. When a new hire first joins the company workforce, he has neither the

¹¹ Sendai Trib., 25 June 2013, RH, 1079.

¹² Tokyo Court, 13 December 2013 unpublished.

knowledge nor the experience necessary for the position. His supervisor asks him to do a particular job, but with what little he knows, the new hire is unable to do it. His work then becomes like a heavy psychological burden. It is not uncommon for such a work overload to drive employees to suicide. The employer and the superiors must take young employees' mental health into consideration and assign them appropriate objectives and workloads when they are starting out on the job.

4 - Disciplinary sanctions and harassment

Following a collision with another vehicle, a bus driver for a road transport company ended up with damage to the body of his bus. His employer ordered him to stop driving and reassigned him to the task of pulling up weeds around the bus depot, saying that this was intended to correct his driving errors. Performing the new job required the employee to be exposed to the hot sun for long hours in view of his colleagues and passing pedestrians. The Yokohama District Court found that this disciplinary sanction could not possibly result in any improvement to his driving techniques and ordered the company to pay damages.¹³

At another company, *Japan Railway (JR)*, a driver was ordered to copy out the company's internal regulations in an isolated room, with no means of communication with his team. This disciplinary sanction was found by the Osaka District Court to constitute harassment.¹⁴

In addition to the imposition of work as a disciplinary sanction, we may also mention unnecessary work. An example is the case of the supervisor who ordered his subordinate to translate a book into English. This employee was not a translator and thus had no experience in translation. It took him two weeks to finish the job, which was of no use to the company. The Tokyo District Court characterised the imposition of this work on the employee as a situation constituting harassment.¹⁵

5 - Workplace harassment based on hierarchical position at educational institutions, or Aca Hara (Academic Harassment)

Victims in this category of harassment may be students, assistants or adjunct professors to whom the professor administers evaluations or examinations, or applies discriminatory measures in connection with grants and promotions. It is difficult for these victims to stand up against the professor, who holds a position of authority. In a case that occurred at a medical school, a teacher unfairly refused to issue his assistant a document necessary for her work, and blocked her office, leaving a container of contaminated water in front of the door to prevent her from conducting her research. The assistant who had suffered this unfair treatment ultimately obtained compensation for the acts of her academic advisor, which were recognised as constituting harassment. The court upheld her argument and found the University responsible due to its obligation to ensure the safety and health of civil servants in the exercise of their profession.¹⁶

B - HARASSMENT BY THE HUMAN RESOURCES DEPARTMENT

This type of situation covers managerial policy and management behaviours likely to constitute acts of harassment. An employer at an electricity company, for instance, once sought to dismiss a few employees who had criticised him. The management began to

13 Yokohama Court, 21 September 1999, RH, 771.

14 Osaka Court, 19 September 2007, RH, 959.

15 Tokyo Court, 13 March 2001, RH, 805.

16 Court ruling, 11 October 2000, RH, 799.

monitor communications amongst employees, secretly listening to telephone conversations and surreptitiously inspecting locker rooms. Management exerted pressure to break down friendships among the employees. The Supreme Court condemned this series of measures as detrimental to the right to freely establish personal relationships.¹⁷ The policy and activities of the human resources department must respect this right among employees. Failure to do so constitutes human resources harassment.

Another example of managerial harassment might include staff reshuffling. In Japan, in general, employers tend all too much to simply invoke their power to modify employment contracts, ignoring whether they have employee consent. Indeed, it is not easy for an employee to oppose a change of workplace or position proposed to him. The employer can thus abuse this power, and this may cause major strain in an employee's professional and personal life. In one case, an employee objected to the transfer to another department that his employer had informally proposed. Faced with this refusal, the employer decided to artificially eliminate the department that the employee was working in, and moved him to the new post. The Tokyo District Court found that the change had caused major inconvenience to the employee and was unfair and abusive, and nullified that measure.¹⁸

C - HARASSMENT BY OFFENSIVE ATTITUDES

In general, this type of harassment consists in physically or psychologically offensive attitudes such as violence, threats or neglect. Workers may for instance be forced to use their own resources to perform services at work, or be subjected to jokes, slander or defamation. In such a situation, multiple types of liability may be recognised: criminal liability for the individual perpetrator, and civil liability for the employer itself, which will have to pay the penalty for harassment at its company. In Japan, in the absence of specific provisions concerning workplace psychological harassment, general criminal law are implemented.

For example, at an institute of chemistry, an employee sought revenge against a woman employed at the same establishment, for private reasons of a sentimental nature. He smeared poison inside her shoes. When she put her shoes on, she suffered serious injuries to her feet and legs. He was prosecuted for assault and sentenced to seven years' imprisonment. In that case,¹⁹ the punishment of this conduct fell within the jurisdiction of the criminal court. To avoid risking liability in a harassment situation, employers must prevent this kind of behaviour by taking action in advance.

More recently, it has been recognised that the Internet can be used to humiliate an employee via emails, blogs, chat and other digital devices, which can be used anonymously. No real developments have yet been made in Japan toward thinking about effective ways to prevent this kind of harassment.

D - HARASSMENT DUE TO DISCRIMINATION

Discriminatory harassment is discrimination based on sex, age, disability or nationality. Here we will look at cases of discrimination on grounds of sex. The typical case of what is known in Japan as "sexual harassment" involves discrimination between women and men in terms of career advancement and professional promotion.

For example, at a certain financial institution, the men would be advanced to a department manager position between 13 and 15 years after being hired as tellers. Six

17 Supreme Court, 5 September 1995, RH, 680.

18 Tokyo Court, 26 June 2006, RH, 934.

19 Shizuoka Court, Numazu section, 20 September 2013, LEX/DB [25501757](#).

years after that, they would be promoted to office manager. By contrast, women hired at the same time and with the same tenure would only rarely see any career advancement. One female employee was finally made the department manager after 36 years of service, and no female representative was ever made an office manager. For these reasons, the employees at this company claimed a salary adjustment to compensate for the lack of promotions that they should have been given in consideration of their tenure. They also asked to be appointed to the same positions as those held by men hired at the same time.

A decision pronounced in the first instance by the Tokyo District Court upheld the request for a salary adjustment, but refused to order the promotions, on the grounds that only the employer has the power to make decisions regarding employees' professional promotions.²⁰ Upon appeal, the Court accepted all of the petitioners' claims, finding that this would be the most appropriate means of remedying this unjustified difference in treatment.²¹

More recently, gender discrimination has been acknowledged in connection with name changes subsequent to civil marriages.²² 96% of those who changed their name after marriage were women.²³ There is a link here with sex discrimination and harassment against women. Indeed, if a member of a deliberative assembly or a group of artists changes his or her name after marriage, he or she may continue in practice to use his or her birth name. On the other hand, at a company, persons changing their names after marriage are required to notify management of such change and proceed to use their new name. This considerably disadvantages researchers or teachers in the academic field, however, since these people's articles must henceforth be published under the family name of their spouse. Previous work, published under their birth name, is not affected by such changes.

On 16 December 2015, the Supreme Court found these rules concerning the changing of names after marriage to be constitutional.²⁴ Nevertheless, a growing proportion of the female population is advocating a change to this rule, so as to permit spouses to continue using their individual family names.

The discriminatory measures used against people on the basis of their sex quite frequently include harassment. Special sexual harassment regulations exist, which permit victims to seek redress. This shows how important the law is in efforts to combat harassment, so as to prevent it and help its victims. It is important that we heed this lesson.

One of the biggest problems with workplace harassment is the lack of a general legal definition of psychological harassment, which needs to be addressed as quickly as possible. Laws on harassment in Japan are closely related to the laws on discrimination, as they are in a number of English-speaking countries (United States, United Kingdom, Australia, etc.). Nevertheless, it is appropriate that we work toward the adoption of legal texts specific to each type of harassment, so as to more closely address their real nature and specific characteristics. That is our most important task.

20 Tokyo Court, 27 November 1996, RH, 740.

21 Tokyo, 22 December 2000, RH, 796.

22 'and : 及び(および), かつ(かつ), 並びに(ならびに) / A and B, C, and DA husband and : 及び(および), かつ(かつ), 並びに(ならびに) / A and B, C, and D and wife shall adopt the surname of the husband or wife in accordance with that which is decided at the time of marriage.' (Article 750).

23 Ministry of Labour, 2016.

24 Cass., 16 December 2015, MinSyu (Review of civil law judgments), 69-8.