II Trend of Unfair Labour Practice (ULP) Cases

1 Trade Union Law of 1949 and the Red Purge

The former Trade Union Law (enacted in 1945) prohibits employers from dismissing their employees or imposing other disadvantageous treatment, and punishes employers who have violated these prohibitions (i.e. the (direct) punishment approach).

However, in response to the criticism that the legislation prohibits only a limited scope of employer behavior and provides insufficient remedies, the Diet passed the present Trade Union Law in 1949, which incorporates some concepts of the Wagner Act in the United States, such as prohibiting unfair labour practices, and correcting these practices by issuing administrative orders (e.g. restoring to the original state).

After the present Trade Union Law became effective, the Red Purge under the GHQ occupation represents the first and most serious event for LRC's roles in unfair labour practice cases. The Red Purge means dismissing and excluding communists and their supporters from private corporations or official duties in line with GHQ's instructions. More than 110 workers filed complaints to LRCs, arguing that they suffered unfair labour practices.

In principle, prefectural LRCs were responsible for addressing these Red Purge-related cases, while CLRC was in charge of cases in the first instance for complaints that would pose significant impacts on a nationwide basis. After that, prefectural LRCs handled these cases, and many were resolved through amicable settlements.

Most complaints that resulted in LRC decisions were dismissed or rejected for the following two reasons: Employers did not fire the employee because of his/her involvement in the trade union; or the employees were regarded as spontaneously accepting the employer's personnel reduction.

2 Handling dismissal cases and the scope of back pay

After the 1950s, LRCs mainly handled typical unfair labour practices because many workers filed complaints, arguing that they had been fired by their employers due to their trade union activities. In such cases, LRCs ordered the employers to reinstate the workers to their original positions and pay the back pay. ("Back pay" means that the employer must pay wages that the employee would have obtained if the employer had not fired him/her.)

The problem was whether or not LRCs should deduct intermediate income from the back pay. ("Intermediate income" means income that the worker has earned since he/she was dismissed until returning to his/her original position.) Most LRCs did not deduct intermediate income, but the judicial branch judged the deduction to be necessary because back pay with intermediate income would be incompatible with the principle of restoring to its original state (status quo ante) and would impose a penalty on employers (Supreme Court judgment in 1962).

Nevertheless, LRCs kept supporting the concept of deduction-free back pay, and the

Supreme Court modified its precedent, saying that intermediate income should be deducted in principle, but this should be determined at the discretion of LRC, taking the following factors into consideration: difficulty in finding a new job; the natures/characteristics of his new duties; the amount of intermediate income; and the extent to which dismissal has restricted trade union activities (Supreme Court judgment in 1977). The judicial branch may examine LRC's decisions concerning whether the employer's behavior would fall under unfair labour practice or not, but LRCs have wide discretion in making a decision in fashioning the contents of remedies (Supreme Court judgment in 1977).

3 ULP cases increased during the era of high economic growth

From the 1960s to the 1970s (the high economic growth era), LRCs handled a significantly increased number of examinations on unfair labour practices.

ULP cases at that time had the following characteristics:

(1) Expansion of the "employer" concept

With more and more corporations being reorganized or turning into consolidated subsidiaries of other firms in the high economic growth era, many labour disputes emerged over whether or not a de facto employer would fall under the "employer" concept under Trade Union Law and would be prohibited from unfair labour practices. For example, these disputes relate to the following cases: if the parent firm effectively controls business operations and working conditions at its subsidiaries, or if the client (user) firm might treat outside workers (e.g. dispatch workers or contract-based workers) like its own staff.

In the first labour dispute that falls under this category, LRC judged that an client firm would not fall under the category of "employer" because the contract-based workers did not enter into an employment contract with the client firm (Order of Kanagawa Prefectural LRC in 1967), but the judicial branch judged that the client firm would fall under "employer" in the context of Trade Union Law as long as the firm effectively controlled a contract-based worker (Supreme Court judgment in 1976). Some courts also regarded a client firm as an "employer" of dispatch workers, who are employed by temporary agencies, if the client firm is in a position to determine the fundamental working conditions of such dispatched workers (Order of Osaka Prefectural LRC in 1978, and Supreme Court judgment in 1995).

(2) Increasing discrimination in promotion

As more and more corporations have adopted job-based or performance-based wage programs, performance evaluation by employers has become increasingly important. In this context, an increased number of workers filed complaints, arguing that they suffered discrimination in performance evaluation based on their trade union membership.

This type of labour disputes are likely to occur when a corporation has two or more trade unions with different goals for their activities. In particular, if a trade union conflicts with the other unions, employers tend to intervene, offering better

evaluation, wage hike or better lump-sum payment conditions for workers belonging to one of these unions.

These labour disputes usually have many issues and require many hearing sessions or witnesses because they tend to involve a lot of contesting parties, and repeatedly recur over a long period of time. This has led to delays in the ULP procedure.

To address this problem, LRCs have started to employ a fact-finding approach called a "mass observational method," utilizing inferences through collective comparison.

(3) Gradual increase in cases involving "joint trade unions"

While enterprise-based unionism is widely seen in large companies in Japan, in the mid 1950s, Japanese employees at small- and medium-sized enterprises started to jointly form region-based trade unions, regardless of their employers or industries. Such bodies are called "joint trade unions." As they have brought their labour disputes to LRCs, including those that are actually individual labour disputes, LRCs have been serving as dispute resolution agencies to address such cases.

A typical example is a so-called "asylum appeal" in which a worker participates in a joint trade union after getting fired, and the union files a complaint citing unfair labour practices if his/her former employer refuses to engage in collective labour bargaining regarding the worker in question. In this case, the employer must usually accept negotiations as long as the worker joins the joint union and the union proposes collective bargaining within a reasonable time of the worker getting fired.

As mentioned earlier, LRCs needed to handle diverse cases. From its inception through the 1970s, it took a long period of time for LRCs to complete its first instance and administrative review (second instance) processes. For this reason, experts started exploring a possible solution for expediting unfair labour practice cases, and also discussed whether or not Japan should adopt the omission of one instance among administrative process or judicial review.

4. CLRC-PCGELRC merger, and JR-related cases

As part of the administrative reform process, the government privatized three public enterprises (Japan National Railways, Nippon Telegraph and Telephone Public Corporation, and Japan Monopoly Corporation). Also linked to this, the government reorganized PCGELRC, the agency in charge of handling labour disputes in these three public enterprises, and then merged it with CLRC. During this process, when JNR was privatized and the successor firms recruited and relocated former JNR employees in 1987, many workers filed complaints one after another, arguing that successor firms had imposed discriminatory treatments on many trade union members opposing the privatization of JNR, or encouraged them to withdraw from the trade union. As a result, prefectural LRCs and CLRC received a total of 470 and 263 complaints, as of December 2005.

In these cases, neither the employer nor employees/unions have accepted a settlement