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Diversity of Employment Dispute Resolutions¹⁾:

From the view point of Negotiations, Agreements and Fair labour standards

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Abstract

Employment dispute resolution systems in Japan should be changed along with the change in relationships between employees and employers.

The position in a company of an individual is more important now than it was in the past and that importance will continue to grow. Individual workers' agreements have also increased in addition to traditional collective agreements.

But an individual is at a disadvantage in negotiations with an employer. An individual's conflict with a company usually relates to how he negotiates with his employer as an individual. It is necessary to support an individual in reaching an agreement with a business enterprise. In order to reach an agreement, a neutral position is absolutely essential.

Needless to say, it is better that employment disputes can be solved before a tribunal. We should prepare a new employment resolution system which has a new negotiation system and which is backed up by a new neutral organization.

Keywords : agreement, negotiation, conciliation, arbitration, individual, collective, professional, lawsuit, ADR, tribunal, AWAs, confidentiality, neutrality.

1) This paper includes an amendment to part of "Negotiation and Australian Workplace Agreements", of whose theme I presented the seminar at The University of Melbourne on 31 January 2005. I express my thanks to Professor Richard Mitchell and Director of Centre for Employment and Labour Relations Law Mr Colin Fenwick.

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1. Introduction

With increased international competition and development of technology, companies are seeking high performance through new value in services or goods more than ever. At the same time, employment styles are becoming more diverse according to companies' policies and workers' life styles. In particular, the position in a company of an individual is more important now than it was in the past and that importance will continue to grow.

A company needs inventions in many fields to enhance its reputation. Even though society does not require homogeneous results, it does require eminent results and in today's society, individual relations are more important than ever before. These trends promote more diversity of employment styles.

Given this situation, a new problem has occurred. In addition to traditional collective agreements involving all or a large percentage of the company's workforce, individual workers' agreements have also increased.

The relations between individuals and companies are shifting boundaries for the new era. During this transition period, diverse Employment Dispute Resolution Methods with new employment styles are also needed according to these changes.

Companies wishing to excel in the new era need to have both efficient production processes as well as increased creativity. Companies' achievements can be affected depending on whether a company has excellent researchers and engineers, or not. As this need continues to grow, different types of labour disputes between non-skilled workers and professionals are becoming a more important matter. Non-skilled workers' problems usually relate to the standard of their pay and conditions as a union. On the other hand, Professionals' problems usually relate to how they negotiate with their employers as an individual such as a researcher or an engineer. But an individual is at a disadvantage in negotiations with an employer because of lack of information, resources, union backing, etc.

I am conducting research on a new employment dispute resolution system in the new era from the point of view of negotiation and resolution.

2. Current Individual Labour Disputes in External Corporations

2-1. Law Suit; Labour Dispute in Japan.

How many individual labour disputes and what kind of individual labour dispute are there in courts? In the 1950s and 1960s, there were mainly collective labour disputes. But in recent years, the number of collective labour disputes has greatly decreased. The number of collective labour disputes in 1975 was 1,877²⁾, but in 2002 it was only 634. In other words, the number of disputes in 2002 was only 33.8% of those in 1975.

On the other hand, the number of individual labour disputes has increased. In 1998 the number of lawsuits was 1,793²⁾ and in 2002 it was 2,309. i.e. an increase of 28.8%.

Of the lawsuits in 2002, 59.9%²⁾ were those concerning wages. The next highest number were those concerning confirmation of employment (21.2%). Therefore the total number of lawsuits concerning both wages and confirmation of employment was 81.1%.

The average length of all lawsuit trials was 12 months²⁾ in 2002. The number of trials lasting less than 6 months in 2002 was 38.3%. This figure was not expected based on similar trials conducted in both U.K. and U.S. where more than 50% were concluded in less than 6 months.

The number of lawsuits initiated by workers in 2002 was 2,153²⁾ or 93.2% of all suits. Those initiated by companies were only 138 or 6% of all. We find almost all plaintiffs were workers. But the number of submissions to appeal courts made by employers in 2002 was 179 or 41.1%. So it can be seen from these figures that the number of appeals initiated by employers jumps significantly when compared to the figures for cases initiated by them in the first instance.

2-2. The Prefectural Labour Bureau in each district

The Law on Promoting the Resolution of Individual Labour Disputes came into

2) Lawyers Association, 2003, *Lawyers Association Journal* 55-8.

force in 2001. Through this law, Prefectural Labour Bureaus can help both employees and employers to solve their labour disputes. In the second half of 2001, they had 251,545³⁾ enquires. In the first half of 2002, they had 293,142 and in the second half, 332,430. It can be seen from these figures that the number of enquires is increasing at a significant rate. Of the total number of enquiries in 2002, individual civil disputes accounted for 54,507. That number is also increasing.

2-2-1. Conciliation by The Prefectural Labour Bureau

There were 2,882³⁾ conciliation cases in 2002. Of that total, the number of compromises was 1,086 and the number of withdrawals was 394. Almost half were solved. But 1,388³⁾ or 48.2% of cases which could not be solved were closed.

The ratio of workplaces, with less than 100 employees, which were the subject for applications for conciliation was 56.1%³⁾. Furthermore, the ratio relating to workplaces which had no unions was 55.7%. Therefore the majority of applications were brought in situations where there was no union representation and/or there were less than 100 employees in the company concerned.

2-2-2. Advice and Guidance by The Prefectural Labour Bureau

The same characteristics applied in cases of The Prefectural Labour Bureau where applicants were seeking advice and guidance. i.e. there were no unions and below 100 employees.

The component ratio of workplaces below 100 employees was 66.0%³⁾. These figures demonstrate the need for workers who work at small workplaces to be supported.

3. Current Individual Labour Complaints in Internal Corporation

3-1. The Character of Individual Labour Complaints in Japan

What is the character of individual labour disputes in internal corporation? According to *The investigation on Communication between employee and employer*⁴⁾, there are many complaints concerning "every day management issues"

3) Ministry of Health, Labour and Welfare, "The 2002 fiscal year Individual labor disputes resolution system implementation situation".

4) Ministry of Health, Labour and Welfare, 1999, *The investigation on Communication between employee and employer*.

(51.8%); "work environment"(34.4%); "conditions such as wages/working hours"(31.5%) and "human relations"(31.2%). On the other hand there are fewer complaints concerning dismissal and retirement allowances in internal corporations. Also according to *The investigation of Collective and Individual Labour disputes and resolutions; questions to employee*⁵⁾, there are many similar respondents. The largest ratio of respondents was 26.3% relating to complaints of working hours.

Those relating to special payments were 24.2%, contents and quantity of job 24.1%, annual pay rise 20.7%, workplace managements by supervisor 19.6%, and assessments of an employee's performance 19.3%, respectively. Complaints concerning dismissal and retirement allowance in internal corporations are not a big problem but those concerning working hours, jobs, pay, allowances and assessments, etc are a much bigger problem.

3-2. The character of conflict adjustment methods needed.

3-2-1. The different approach in resolving conflicts

Who do employees think would be the best coordinator to adjust conflicts? Who does the person concerned consult with when a conflict occurs?

According to *The Investigation of Collective and Individual Labour Dispute and Resolutions; questions to employee*, in the case where the pay system was amended, the employee did not consult with a colleague, but with unions or a shop steward. The number of employees who consulted with unions or shop a steward is larger than those who consulted with a colleague. On the other hand, in cases of bullying at a workplace, a sufferer did not consult with unions or shop stewards but with colleagues instead. The number of sufferers who consulted with colleagues is larger than those who consulted with unions or shop a steward.

On the whole, in cases concerning pay disputes, employees tended to solve it institutionally through Unions. But in cases concerning bullying, employees tended to solve it informally through their colleagues with whom they have closer relationship

5) Osaka Prefectural Government, 1999, *The investigation of Collective and Individual Labour disputes and resolutions; questions to employee*.

3-2-2. What kind of employees need to assist in resolving a conflict

According to *The Basic Investigation of Trade Unions*⁶⁾, 54.8% of companies with 1000 or more employees have union representation for employees. But 16.8% of companies with more than 100 but fewer than 1000 employees have union representation while only 1.3% of companies with fewer than 100 employees have representation. These figures show that a smaller number of employees is paralleled by a smaller ratio of union representation.

This tendency is found in *The investigation of Collective and Individual Labour Dispute and Resolutions; questions to employee*. The ratio of trade union representation tends to be decreasing as the numbers of employees of a company decrease.

It should be noted that the employee of a company which is small in both size and number of employees needs to be backed up. This is because there are many cases where employees of small companies are not union members and therefore cannot be backed up by a union. They have no support in resolving a conflict.

At present the service industry is growing as a ratio of the total industrial structure whereas the ratio of trade union representation is decreasing. The number of employees who can not be protected by a union, is increasing. We have to have a new system to protect such employees.

3-2-3. The requirements of a Liaison officer; Human resource manager and Supervisor

The existence of a liaison officer for solving conflicts in a company is not sufficient in itself. The questions of who appoints the liaison officer and who controls the liaison officer are important matters. At present the company in Japan makes this appointment and also controls the liaison officer. Therefore this position is not a neutral one. It is conceivable that a person who has a complaint would not want to consult with a liaison officer who is not perceived to be neutral, having been appointed and controlled by the opposite party (management) in the dispute. So, even if there is a liaison officer in a company, the function does not necessarily work well.

According to the employees' respondent of the former investigation, *The*

6) Ministry of Health, Labour and Welfare, 2002, *The Basic Investigation of Trade Unions*.

Investigation of Collective and Individual Labour Dispute and Resolutions, the number consulting with a supervisor was 43.7%. On the other hand the number consulting with the human resource manager was only 17.3%. Generally an employee trusts a supervisor more than a human resource manager. The reason for this is that the human resource managers will almost certainly take the side of the company where a dispute arises. An employee does not want to consult with a person who is perceived not to be neutral. If a liaison office, set up within a company to resolve conflicts, is simply just another arm of that company, then the resolution of conflicts will not usually be met to the satisfaction of the employee.

A liaison officer needs to be a neutral position. But in Japan, a company thinks that a Japanese human resource manager system can always solve conflicts between employees and a company.

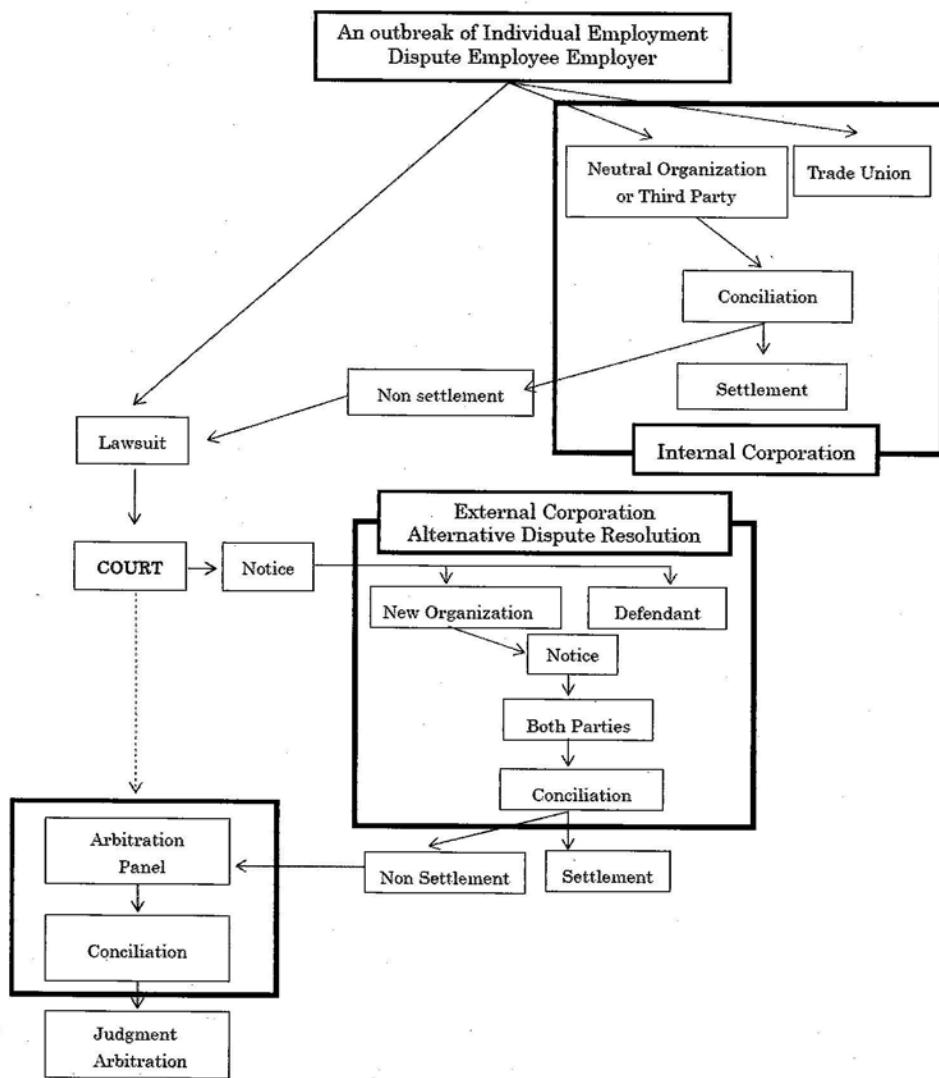
This tendency is stronger where the number of employees is greater than 1,000. In such companies, the ratio of employees who were willing to consult with their supervisor is 44.3% and the ratio of those who were willing to consult with their human resource manager is 11.5%. The numbers wishing to consult with a supervisor exceeds those willing to consult a human resource manager by no less than 32.8%.

It should be noted that a neutral position is absolutely essential in the case of liaison officers for resolving conflicts.

4. A New Flow of Employment Dispute Resolution.

The types of employment disputes are diversifying according to changes in employment relationship. Resolution systems need to change in line with this diversification. Collective Dispute Resolution Systems have been developed and in addition to these systems, in 2001 an individual resolution system was introduced. And in 2004 The Labour Tribunal Act was passed by Councilors. But as I stated above, there are many problems of current dispute resolution systems. We should therefore reform current dispute resolution systems and are need to have a New Employment Dispute Resolution System to solve these problems.

A New Flow of Employment Dispute Resolution, I think, has three stages

(Chart 1) The New Flow of Individual Employment Dispute Resolution

Note: A dotted line means "be pending in lawsuit".

(Chart1). The first is the internal corporation stage. The second is the external corporation and the alternative dispute resolution stage. The third stage is the court stage.

4-1. Internal Corporation Stage

An employee who thinks he/she has had a working condition or human right violated consults with a neutral officer, third party or a trade union. A neutral officer or third party investigates cases and conciliates conflicts. In order to successfully conclude a conciliation process, a conciliator needs confidence and authority in a company.

An employer would want to avoid a lawsuit if he thinks he is going to receive a quick judgment against him. In that situation he would compromise with an employee. That is to say that if a quick judgment or arbitration, with a higher possibility of a disadvantageous judgment to the employer was possible, that employer would also be more likely to compromise with an employee. For example, Advisory, Conciliation and Arbitration Service (ACAS)⁷⁾ in U.K. resolves about 80%⁸⁾ of conflicts before a hearing of the Employment Tribunal.

In this stage it is important that in a court an employee can receive a quick judgment of a case and that a conciliator, based on a neutral position, has the power to investigate a situation relating to problems and keep confidentiality.

4-2. External Corporation Stage (ADR) and Court stage.

At this external corporation stage an application for resolving conflicts is firstly submitted to a court. But before the case is heard by a court, a conciliation hearing is held in an external corporation.

In 2004 the new employment tribunal system was established in Japan. This resolution system is similar to a court system, except that the judgment becomes void if a party files an objection when it doesn't accept a decision.

Except court stage, the way of resolution system at the external corporation

7) ACAS system makes it possible for individual labour conflicts to be solved quickly and has the ability to arbitrate unfair dismissal as well as providing advice, from 2001.

8) ACAS, *Annual Report*

stage (Chart 1) doesn't have a binding arbitration. This main method of solving conflicts is conciliation between an employee and an employer. A conciliator belongs to a new independent organization which belongs to neither a court nor to an administration. The three main steps of this way of resolution at the external corporation stage are as follows.

- (1) Filing a lawsuit. An employee or an employer files a suit in accordance with the law.
- (2) Notification by a court. The court informs the lawsuit contents to the new organization and the defendant.
- (3) The new organization informs the date of a hearing to both parties.

After filing a lawsuit, a proceeding in a court is suspended and a conciliator of the new organization arranges a conflict resolution hearing between an employee and an employer. In a case where conciliation doesn't attain a successful outcome, a proceeding of the case is deemed to have started at the time when he/she firstly filed a lawsuit.

In this court stage it is very important that in a tribunal system, an employee can quickly receive a judgment of a case and that this system has a binding ruling without that ruling becoming void even if the other party files an objection. As compared to the new tribunal system, this binding ruling is very important.

This importance in a court stage backs up the success of conciliation at an external corporation stage.

5. New Labour Conflicts; Three Models of Researchers and Engineers

At present the occurrence of lawsuits between researchers and companies is increasing as indicated by the increasing number of patent lawsuits before the courts. This tendency in Japan is based on the shift from the industrial society to the new era. A company wishing to excel in this new era needs new technologies, new goods, new services and new value. The positions of researchers and engineers in companies are becoming more and more important than ever before.

This tendency can be divided into three models.

Model 1 (Chart 2) is the patent lawsuits concerning the blue light emitting diode which Mr.Nakamura invented at the Nichia Chemistry Company. Model 2 is the other concerning the production of artificial sweetener which Mr.Naruse invented at the Ajinomoto Company. Both models demonstrate the changing employment relationship between business enterprises and researchers/engineers.

These two models are as follows.

(Model 1)

Mr. Nakamura worked at the Nichia Chemistry Company from 1979 to 1999 and invented a Blue, Green and White light emitting diode.

He only received \$250 from the company as compensation. He filed a suit for \$250M in 2001 and was awarded \$250M in 2004 by the court. In January 2005 he reached a compromise settlement with the company by agreeing to receive \$10.5M.

(Model 2)

Mr. Naruse worked at the Ajinomoto Company where he invented a process that can produce an artificial sweetener which is low in calories and is 200 times sweeter than normal sugar.

He received \$125K from Ajinomoto as payment for this achievement. He filed a suit for \$25M in 2001 after he reached retiring age and was awarded \$236K in 2004 by the court.

And Model 3 is the common model in Japan.

(Model 3)

Model 3 is the case of a Shimadzu Corporation scientist who is a Nobel prize-winner. This model reflects general employment relationship of Japan between business enterprises and researchers/engineers.

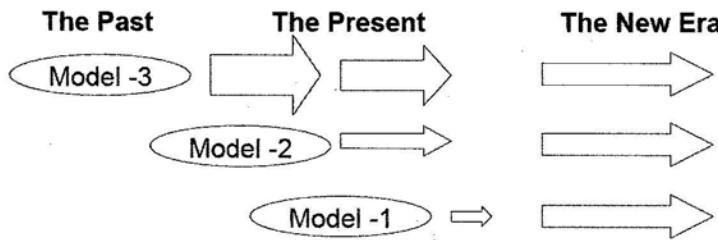
He was a union member of the Simazu corporation Enterprise Union until he received a Nobel-prize in 2002. That year Simazu corporation was in financial difficulties and his salary was reduced following an agreement between the company and the union.

(Chart 2) Three Models of Negotiations in Japan

Model -1 Nichia (Mr.Nakamura)
; Non- Life time Employment and Suits

Model -2 Ajinomoto (Mr.Naruse)
; Life Time Employment (no complaints or few but suits after retirement)

Model -3 Shimadzu (Mr.Tanaka)
; Life Time Employment (no complaints or few)



At present, Model 3 is the most usual in Japan among the three models. There aren't a lot of lawsuits and furthermore conflicts between employees and employers don't often come to the surface. But Model 1 and 2 are becoming more common as the importance of professionals like researchers/engineers in companies grows. In this case, companies should consider meeting their individual desires.

For the new era, the overly strong collective agreement systems should be amended and in the new era individual negotiation systems should be established in parallel with collective negotiation systems.

6. The Implication of AWAs in Japan; New Negotiation System and Australian Workplace Agreements

6-1. The Character of AWAs

The Australian industrial relations system was reformed by Workplace Relations Act in 1996, so that individuals could negotiate working conditions in a business enterprise. The new Australian workplace agreements system was established by this law.

This new system is able to adjust the relationship between a business enterprise

and an individual worker giving more flexibility in negotiating. In the federal workplace relations system, there are Agreement Systems mainly consisting of three categories.

One of agreement systems is the Australian Workplace Agreements (AWAs). Those Agreements are both formal and individual Agreements between an employee and an employer. An employee can negotiate with his/her employer and can make an agreement. AWAs have to be approved by the Office of the Employment Advocate (OEA).

Another type of agreement which is informal are common law contracts between employers and employees which are registered without the approval of the OEA or the Australian Industrial Relations Commission (AIRC). For those agreements, terms and conditions of employees are set under a federal award.

The next type is a certified agreement (CA). This agreement is usually made between an enterprise and some or all of its employees. Federal certified agreements have to be approved by the AIRC. A federal award system is applied to workers who are not covered by an AWA or CA⁹⁾.

The relationship between a business enterprise and a worker is mainly decided collectively by the AIRC on the basis of Awards and Certified Agreements. But AWAs (individual contracts) between a business enterprise and an individual became a new possibility under Workplace Relations Act.

It is an important point that the existence of AWAs make it possible for both enterprises and individuals to be able to conclude an individual agreement. And an enterprise can adapt flexibly to the environmental changes that surround that enterprise. An individual can also adapt flexibly to his/her new life style.

It should be noted that AWAs are able to exclude an effect of collective agreements so that both business enterprises and individuals can be more active and flexible. In other words, the individual approach was upgraded in addition to maintaining a collective approach, leading toward a new era.

9) There is a work classification listed in an award. Industry Sectors provide minimum wage rates and employment classifications information for those not covered by an AWA, Certified Agreement or Federal award. They are determined by the primary business activity of the employer.

6-2. The Back Up System in Australia; The Office of Employment Advocate

An Employment Advocate¹⁰⁾ (EA) was newly established in Australia by Workplace Relations Act in order to realize fairness between employees and employers.

The main functions of the EA are:

- ① To examine individual AWAs to determine whether the contents of the agreement fall below a present condition or general conditions.
- ② To give advice with regard to this law and also give advice about AWAs to both workers and managers (managers of small businesses are also included).
- ③ To process violations, etc. with regard to AWAs
- ④ To help an individual with a plea
- ⑤ To publish statistics related to AWAs

As shown above, the EA was established as a new function. It should be also noted that EA does not realize fairness through collective bargaining but through examination as a neutral organization. But it is also important for us to consider in the light of neutrality whether fairness is realized or not through a government organization.

6-3 Individual Negotiation.

An individual may be able to get better conditions through this individual negotiation system in which case an individual agreement may surpass a collective agreement gained through collective bargaining. An individual may negotiate with his company in order to get better individual conditions.

A person who can have opportunities to negotiate pay and conditions with the company has a tendency to do so. In particular a person who is involved in an advanced business has a tendency to do so if he has such opportunities¹¹⁾. According to *AWA Employee Attitude Survey, September 2001*, the ratio of professional employees in AWAs who are willing to negotiate individually is about

10) This is one of the employment protection government organizations.

11) This is according to the research paper of EA, "AWA Employee Attitude Survey, September 2001". This survey was performed from May to June in 2000. The number in the AWAs system surveyed was 1,040 and the response rate was 24%. On the other hand, the number randomly surveyed was 1,010 and the response rate was 9%.

80%, but the ratio for a random sample of workers is about 60%.

The number of negotiations conducted has increased by the introduction of the new system. The number of AWA employees who are willing to negotiate for pay and conditions stands at 78.6%. The number of those who are not willing stands at 19.5%. AWA employees are more willing to do so directly than Random employees (Figure 1).

Of all individuals who have had an employer of more than two years—those in AWAs who are willing to negotiate for pay and conditions stands at 81.1% whereas those from the random sample are at 63.3% (Figure 2). It is a fundamental problem after all if there is no opportunity for negotiations.

(Figure 1)

Willing to negotiate pay and conditions directly (%)			
	Yes.(A)	No.(B)	(A)-(B)
Males	68.4	31.0	37.4
Females	65.4	30.9	34.5
AWA employees	78.6	19.5	59.1
Random employees	66.7	31.2	35.5

Note: All percentage figures have been rounded

Source: Agreement making in Australia under the Workplace Relations Act 2000 and 2001¹²

(Figure 2)

Individual willing to negotiate pay and conditions directly with employer by employment duration

	Employment Instrument	Yes (%)	No (%)	Don't Know (%)
Current employer for more than 2 years	(A) AWAs	81.1	17.6	1.3
	(B) Random	63.3	34.6	2.1
	(A)-(B)	17.8	-17.0	-0.8

(source) OEA, AWA Employee Attitude Survey, 2001

When the AWAs sample is observed the number earning above \$75 thousand is greater than from the random sample (Figure 3).

12) Department of Employment and Workplace Relations, Office of the Employment Advocate, 2002, *Agreement making in Australia under the Workplace Relations Act 2000 and 2001*

(Figure 3)

Respondents by Income

		Under A\$10,000	A\$10,000 ~ A\$24,999	A\$25,000 ~ A\$49,999	A\$50,000 ~ A\$74,999	A\$75,000 ~ A\$99,999	A\$100,000 ~ A\$149,999	A\$150,000 +	
(A)	AWA S Sample	%	7	15	41	24	9	3	0
(B)	Random Sample	%	4	19	47	22	5	1	1
	(A)-(B)	%	3	-4	-6	2	4	2	-1

(source) ibid. figure 2

In the case of researchers/engineers, annual income is usually in the higher bracket because of the nature of the job they are involved in. Therefore, professionals will agree to accept AWAs only in cases where their present conditions are exceeded. However an enterprise is unlikely to agree with an employee who has no achievements to be rewarded. AWA is the system which has the advantage of increasing choices for both enterprises and individuals.

Furthermore, the "No Disadvantage Test" of an EA examines whether the condition of an AWA falls below the conditions of an award or not.

It might be referred to the AIRC in cases where there is doubt whether it falls below the Award (i.e. the current terms and conditions are not eroded.)

Another point for consideration regarding AWAs is that of an individual's ability to choose a negotiating agent in order to negotiate his/her individual agreement with the enterprise.

It is necessary to support an individual in reaching an agreement with a business enterprise because naturally the individual doesn't have the same resources at his/her disposal that a union or other negotiating agent would have.

Nor would it be likely that an individual would have the same information collection ability, negotiating ability, overall judgment, technical knowledge, etc. It is natural that a business enterprise is less likely to agree to an individual's special requests during negotiations where that individual isn't represented by a negotiating agent.

This freedom to choose a negotiating agent is considered necessary because of

the individual's perceived inferior position. As such, the introduction of negotiating agents for individuals ensures that all aspects of relevance will be covered and it also brings rationality into the system.

The individual can choose a negotiating agent—a close friend, a specialist, a trade union, etc¹³⁾. The system must be seen to treat the individual fairly in cases where the individual negotiates with a business enterprise. Individual negotiation systems, including those between researchers and employers, need to have negotiation agent systems.

6-4. The Problem of AWAs in Australia

AWAs in Australia are significant in the light of the introduction of individual negotiation systems in addition to collective negotiation systems.

But the present AWAs system in Australia is too widely applied to all workers, involved in non-skilled work, who are at a disadvantage in negotiations with employers now.

I think that for the new era, the AWAs system should be amended and a New AWAs System needs to be put in place for select applicants.

For example, it is "the method of Blue Collar Exemption from AWAs" like the method of White Collar Exemption from the Fair Labor Standards (FLSA) Act in U.S¹⁴⁾. The AWAs System is not a worker's protection system. It is the reason why the method of Blue Collar Exemption from AWAs is needed.

The method of this restriction should be depended on the classification criterion. I think a new AWAs System need to meet the classification wage criterion. For example the classification criterion of wages is \$25k. A person earning below \$25k can not be applied to AWAs (Figure 3). But in the case of America, President Bush has amended the classification criterion for White Collar Exemption in order for it to be widely applied in 2004¹⁵⁾.

Australia introduced a reformed employment (negotiation) system which allows an individual to independently take an active part towards the new era and which

13) Dual representation is not permitted.

14) The FLSA is a law to protect workers. The method of white Collar Exemption is an exemption from FLSA.

15) Notice of Proposed Rulemaking (68 FR 15560)

also upgrades the system that backs an individual. It is important that an individual agreement can be created based on the present conditions of employment.

7. Employment Dispute Resolutions and Labour Laws

With the exception of collective labour disputes, employment disputes brought to trial have been mainly argued as a judgement on rights until now. But resolution of employment disputes include three factors; arrangements, negotiations and rights.

A problem of rights considers which party has a right in a conflicted matter. A problem of arrangements means advice, conciliation and arbitration on a disputed matter. And a problem of negotiation means the procedure of negotiations and a relationship between an individual and a company.

In the present industrial and information societies, employment dispute resolutions need to be prepared in the light of three factors like these. In other words, the usual way of resolving individual disputes between employees and employers is not satisfactory. In particular, the usual way of resolving individual disputes can not be satisfactorily applied to conflicts between researchers and employers. Therefore, in order to resolve these problems, a means of resolution specific to each situation, needs to be found and adopted.

For an individual who is a union member, a system whereby individual agreements can surpass collective agreements, as the occasion may demand, is needed in advance.

The Japanese employment system for researchers/engineers, particularly in big companies, currently depends on a conventional collective relationship through the effect of article 16 of Trade Union Law¹⁶⁾. A new system is needed so that the current system does not apply to an individual such as a researcher/engineer in all

16) Any portion of an individual labour contract contravening the standards concerning conditions of work and other matters relating to the treatment of workers provided in the collective agreement shall be void. In such a case, the invalidated part of the individual labour contract shall be governed by the provisions of the standards. With respect to matters as to which the individual labour contract certain no provisions, the same rule shall apply.

cases as is now the case. Reforming the employment system for an individual means being flexible in meeting their individual needs and/or desires and should be tackled.

This attempt will need new negotiation systems in particular between researchers/engineers and employers. Though the usual employment conflicts currently centre around those of employee rights and/or employment standards, new conflicts such as those between researchers/engineers and employers will be based on many diverse requests ranging from monetary factors to research issues. But Japanese enterprises are not able to provide individual treatment to an individual such as a researcher/engineer because of current collective agreements or shop regulations. In order to solve this problem, one thing that must be tackled is the amendment of the rule in article 16 of Trade Union Law to allow for an individual such as a researcher/engineer to be able to exclude the effect of collective agreements and to protect an individual from unfair one-sided negotiations. In other words individual negotiation procedures which are based on law are needed between an individual such as a researcher/engineer and an employer.

Namely, a new system to resolve conflicts between employees and employers, needs three different approaches. One is the usual method where a conflict is resolved in a court or tribunal to decide which party should have a right. Another approach is through advice or conciliation. And the third approach is through negotiations¹⁷⁾ for professionals such as a researcher/engineer and a manager, etc. This third method requires an amendment to the effect of article 16 of Trade Union Law, so that the effect of an individual agreement can be superior to the effect of a collective agreement.

8. Conclusion

The current society is shifting to a new era. In the new era, companies are seeking high performance through new value in services or goods more than ever.

17) The means of negotiating AWAs is uniform. There is little room for negotiation. A shop regulation in Japan is similar to AWAs in setting wages and conditions.

Just as the duties and skills of jobs have been upgraded to meet modern day demands including inventions and development, the relationship between an employee and a company must also change. Employment dispute resolution systems in Japan should be changed along with the change in relationships between employees and employers. These changes are occurring as companies develop. It is a fundamental necessity that a judicial system determines whether a working condition meets a fair labour standard or not. But in addition, a new system is needed which allows negotiation between individuals such as professionals or a researcher/engineer and employers. In the new era, an inventor has become more important because companies are seeking high performance through new value in services or goods more than ever. In fact the number of patents lawsuits is growing and the tendency for such lawsuits is likely to increase further from now on. Therefore a new negotiation system between professionals and employers is required. The AWAs¹⁸⁾ system in Australia is a system which allows the benefits of an individual agreement to surpass those of a collective agreement. In the new era this rule should be added to the current labour law in Japan.

In addition a negotiation system for professionals and researchers/engineers with employers is required. Without such a system, individual agreements can not work well. Even if the effects of an individual agreement can surpass the effects of a collective agreement, an unfair one-sided agreement to the disadvantage of the employee may still exist and a fair negotiation system is therefore needed.

For example, EA does not realize fairness through collective bargaining but through examination by a neutral organization. It is important that a neutral organization is established.

Finally, the conciliation and arbitration system should be upgraded in Japan. Though a judicial system is needed to determine which party has a right and whether a working condition meets a fair labour standard or not, a new system of negotiation for individuals, such as a researcher/engineer, with an employer is needed where the terms and conditions of an individual agreement can surpass

18) There is the problem in Australia of the overuse of this system which is widely applied to workers.

those of a collective agreement. A conciliation and arbitration system is a key factor in cases where different types of employment disputes can be resolved. It is better that employment conflicts can be solved before a tribunal. For example ACAS in U.K. solved about 80% of conflicts before a tribunal. ACAS is based on a neutral position and resolves disputes whilst maintaining confidentiality.

We should prepare a new employment dispute resolution system which has a new negotiation system and which is backed up by a new neutral organization.

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