

Article 11(Elimination of discrimination in the field of employment)

Issues

Questions and Backgrounds

Gov't Report
Paras.

Working Women's Network
Chairperson Shizuko koedo

**Indirect
discrimination**

“employment
management
categories”

Question 1.
(1) Can the practice be considered indirect discrimination, in which most of the male employees and only a handful of female employees (note 2, Chart 1) are placed in the track leading to management positions, while most of the female employees are placed in the track consisting of clerical jobs, under the career-track based personnel system (note 1)?
(2) Company A, a general trading company, and Okaya & Co. (Chart 2), a medium-sized trading company stopped hiring employees for clerical positions, and instead began hiring women for these positions for 3 or 5 year contracts. Can recruiting and hiring only women for definite term contracts be considered as being indirect discrimination?
(3) The provision regarding “employment management categories” in the Guidelines under the Equal Employment Opportunity Law (EEOL) remained unchanged even after the latest amendment of the EEOL. The employers will not be responsible for discrimination against women, if men and women are placed in different employment management categories. Doesn't this practice ignore the Recommendations from CEDAW and constitute indirect discrimination?

286 (i)

Background

1. The Guidelines under the EEOL provides for “employment management categories.” Discrimination against women is prohibited within the same categories, but if the women were placed in a different category, which may be based on characteristics such as job differences or forms of employment, difference in treatment would not constitute discrimination. The separate tracks for men and women that existed before the EEOL were redefined as different forms of employment, and this led to entrenchment and widening of the gender gap. The employment management category based on job differences provided an opportunity for many companies to introduce the career-track based system, as shown in the data below. Also, as shown in the data below (note 2), the percentage of women in the tracks leading to management positions is still around 2-5%, 20 years after the enactment of the EEOL. The EEOL protects the equality of a handful of women in the tracks leading to management positions, but for many women in the tracks for clerical positions, the promise of equal training and promotion remains empty words.

2. Companies implementing career-track based systems (based on the size of company): 2003 (data from Ministry of Health, Labour and Welfare)

Companies with 5,000 employees or more	46.7%
Companies with 1,000-4,999 employees	38.1%
Companies with 300-999 employees	23%
Companies with 100-299 employees	13.7%
Companies with 30-99 employees	5.9%

3. Comments from CEDAW (August 2003)

369. The Committee is concerned at the existing wage gap between women and men, stemming largely from the difference in type of work, horizontal and vertical employment segregation as expressed by the two-track employment management system, and the lack of understanding regarding the practice and the effects of indirect discrimination as expressed in governmental guidelines to the Equal Employment Opportunity Law. (A/53/38)

4. Recommendation for Settlement from the Appeals Court in the Sumitomo Electric Case (December 2003)

Chief Justice Toshio Igaki, Osaka Appeals Court

Efforts towards achieving equality between the sexes have been making steady progress in the international community, mainly through the United Nations initiatives. A society, in which women are not discriminated against on grounds of their sex, in which they can develop their abilities and capacities for their own fulfillment as well as that of the whole society, and in which men and women can work together in social development, is, in the current common international understanding, a truly equal society. The Constitution of Japan proclaims the dignity of the individual and the equality under the law. Our country has, in keeping with the international trends, taken steady steps towards establishing the spirit of equality in the society, such as by the ratification of the International Convention on the Elimination of All Forms of Discrimination against Women (1985) and the legislation of the Basic Law for Gender Equal Society (1999). On the other hand, the stereotypical view of gender roles still firmly entrenched in parts of society remains a major obstacle in achieving equality between the sexes.

In the area of employment, the Law on Equal Opportunity and Treatment Between Men and Women in Employment (the former Equal Employment Opportunity Law) legislated in 1980 was amended in 1996 (entry into force in April 1999; the amended Equal Employment Opportunity Law). The latter required employers to provide equal opportunity to women as well as men in matters of recruitment and hiring, and prohibited discriminatory treatment in assignment, promotion, etc.

These reforms were achieved step by step in the movement towards elimination of sex discrimination, and all women have a right to enjoy the outcome. It must be borne in mind, that to tolerate the vestiges of discrimination based on past social understandings would result in turning one's back to the progress in the society. Moreover, at present, sufficient consideration must be given to not only direct but also indirect discrimination.

(Note 1)

Response by a government official to the question regarding career-track based personnel system, raised during the Diet session in April 2006, in which the draft amendment of the EEOL was discussed.

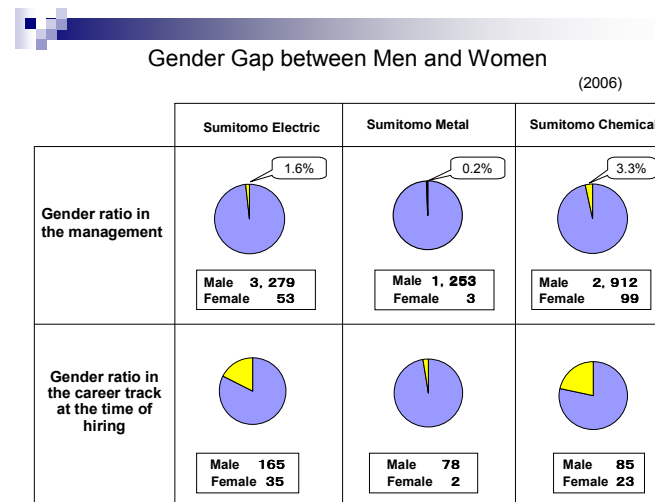
Career-track based employment management is a system in which the company establishes a number of career-tracks based on the contents of the work, such as planning or routine work, or on availability for transfers requiring change of residence, and managing employment by assigning different placements, promotion, or training for each track. Typically, there would be a track for main career jobs, the core work in the company, or work involving planning or negotiations, which require comprehensive decision-making, and with transfers requiring change of residence. Another would be a track for mainly routine work, without transfers requiring change of residence. Some employers introduce tracks, such as those for work similar to those in the core work tracks, but do not include transfers requiring change of residence, in managing employment.

(Note 2)

Ratio of women in main career tracks 2005 (Japan Institute of Workers' Evolution)

Companies with 5,000 employees or more	2.1
Companies with 1,000-4,999 employees	3.6
Companies with 300-999 employees	5.0

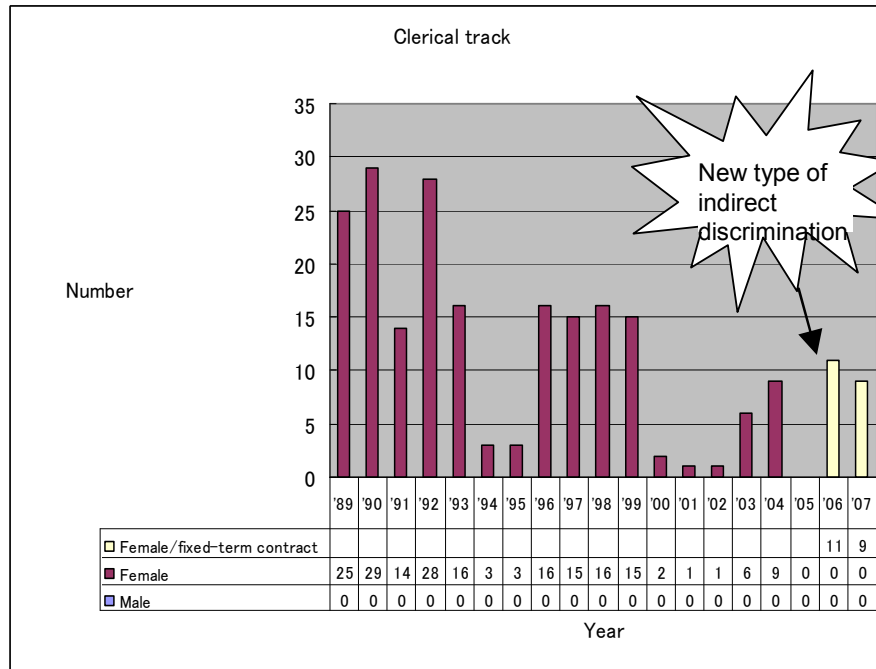
(Chart 1)



(Chart 2)

Okaya & Co., (trading company in Nagoya)

* Hiring women for these positions for 3 or 5 year contracts.



7 cases listed for indirect discrimination

Question 2

In June 2004, the Policy Study Group on Equal Employment Opportunity for Men and Women requested by the Ministry of Health, Labour and Welfare to study the issue of indirect discrimination listed 7 cases that could be considered as being indirect discrimination in its report. In the amended EEOL and the Ministerial Order, however, only 3 of the cases (note 3) were listed in an exhaustive list, and the remaining 4 (note 4) were not included. Why were the 4 cases excluded ?

286(ii)

Background

In response to questions during the Diet session, in which the EEOL was discussed, the government stated that in Japan there were few court cases dealing with indirect discrimination, and no social consensus on what constitutes indirect discrimination.

During the examination of the 4th and 5th Government Report to CEDAW in 2003, a CEDAW Member, Ms. Schöpp-Schilling, indicated that the Japanese government may be placing too much importance on social consensus; that the Convention was designed to change the social system and practice, and that the government should take a more positive attitude in taking a leading role. It should not wait for a consensus to form, but should be aware that the law can change society.

(Note 3)

3 cases included in the Ministerial Order as examples of indirect discrimination

- 1) Height, weight or physical strength requirement in recruitment and hiring
- 2) Mobility requirement, requiring the availability to be transferred anywhere within the country, in recruitment and hiring for the main career track under the career-track based employment category system
- 3) Requirement for promotion, of having experience of being transferred from one workplace to another

(Note 4)

4 cases not included in the Ministerial Order as examples of indirect discrimination

- 1) Requirement of a certain academic degree or having graduated from a certain faculty, in recruitment and hiring
- 2) Head-of-household requirement in application of benefits and provision of family allowances
- 3) Difference in treatment between men and women, resulting from advantageous treatment to full-time employees. Difference in work content, personnel system and management between full-time and part-time workers
- 4) Difference between men and women, resulting from the exclusion of part-time workers from the application of welfare benefits and provision of family allowances.

Question 3

According to the report published by the Ministry of Health, Labour and Welfare on May 30 on the implementation status of the EEOL, the Equal Employment Policy Division received 462 cases of consultation on indirect discrimination. What types of cases were included, other than the 3 cases adopted in the exhaustive list in the Ministerial Order?

Background

1. The response by the government on June 14, 2008 during the Diet session, in which the draft amendment of the EEOL was discussed Regarding the Ministerial Order, if the Equal Employment Policy Division came across cases, which may appropriately be considered as indirect discrimination, during its consultation work, it would provide an opportunity to review the Order. The government will deal with the matter appropriately without falling behind to keep up with the actual situation in the workplace.

Legislative
measures for
the principle of
equal pay for
work of equal
value

Question 4

The government states that Article 4 of the Labor Standards Act (Note1) encompasses the principle of equal pay for work of equal value, and therefore the legislation of the principle as recommended by ILO is not necessary. But as shown below, it is not clear whether Article 4 actually covers the principle. Please clarify how the principle is included in the Article.

Also, what legislative measures would be taken to implement CEDAW Article 11 (d) ?

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(Note1)

Labor Standards Act

Article 4 (Principle of equal pay for men and women)

An employer shall not engage in discriminatory treatment of a woman as compared with a man with respect to wages by reason of the worker being a woman.

Background

1. CEDAW Article 11 (d)

the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work

2. Committee of Experts on the Application of Conventions and Recommendations, ILO, Individual Observation concerning Equal Remuneration Convention, 1951 (No. 100) Japan, Published: 2007

Given the persistent and wide gender pay gap, the Committee hopes that the Government will consider giving legislative expression to the principle of equal remuneration for men and women for work of equal value, with a view to ensuring the full application of the Convention...(para. 4)

. Committee of Experts on the Application of Conventions and Recommendations, ILO, Individual Observation concerning Equal Remuneration Convention, 1951 (No. 100) Japan, Published: 2008

The Committee therefore asks the Government to take steps to amend the legislation to provide for the principle of equal remuneration for men and women for work of equal value. (para. 6)

3. Generally, in the workplace, men and women do not do the same work, therefore, it is difficult to rely on Article 4 of the Labor Standards Act to narrow the wage gap between a male employee in the main career track and a female employee in the clerical track. It is clear that if the principle of equal remuneration for work of equal value had been legislated into law, the judicial process in cases of wage discrimination would not have taken 10 to 13 years, such as in the cases of the Sumitomo companies and Kanematsu.

Question 5

The government states that job evaluations are not appropriate for the employment customs in Japanese companies. However, the Japanese practice of employees working for a single company throughout his/her career has deteriorated, and the employment system has changed to one based on meritocracy.

The creation of an objective evaluation system that is gender neutral is urgently needed, to replace the arbitrary and unfair evaluation conducted by the senior officers of a company. Such a system would be effective not only for the narrowing of the wage gap between men and women but also between ‘regular’ and ‘non-regular’ employees. What is the government’s view on this?

Background

1. Committee of Experts on the Application of Conventions and Recommendations, ILO, Individual Observation concerning Equal Remuneration Convention, 1951 (No. 100) Japan, Published: 2007

Recalling that one of the matters addressed by the guidelines is the need to improve employment and wage-management systems, inter alia, with a view to ensuring objectivity and transparency of wage decisions, the

Committee notes JTUC-RENGO’ s position that, in order to implement the principle of equal remuneration for work of equal value, there is a need to study and develop measures of objective and non-discriminatory job evaluation. (para. 6)

2. Committee of Experts on the Application of Conventions and Recommendations, ILO, Individual Observation concerning Equal Remuneration Convention, 1951 (No. 100) Japan, Published: 2008

The Committee wishes to emphasize that the principle of equal remuneration for men and women for work of equal value necessarily implies a comparison of the jobs or work performed by men and women on the basis of objective factors such as skills, effort, responsibility, or working conditions. (para. 6)

3. The chart below shows the results of a job evaluation used by the plaintiffs in the Kanematsu case. It compares the work done by the plaintiffs and their male colleagues in the same section. In Ms. Oda's case for example, she is paid 63 to her male counterpart's 100, but as a result of the job evaluation, her work was evaluated at 102 to her male counterpart's 100. The case demonstrates that job evaluation is possible even under the Japanese career-track based personnel system.

4. Kanematsu wage discrimination case

In 1985, after the enactment of the EEOL, Kanematsu Corporation introduced a career-track based personnel system. The male employees were placed automatically in the main career track, and women in the clerical track. The wage gap was such that a 45 year old female employee would be earning less than a 27 year old male employee. Several female employees filed suit in 1995 in the Tokyo District Court, and in 2008, won a partial victory in the Tokyo Appeals Court, which decided that the career-track based system violated Article 4 of the Labor Standards Act. Because there is no system of job evaluation in Japan, the above chart was prepared by a group of academic experts and women working in trading companies. The group used the job evaluation system used in Ontario, Canada, to compare the work of the plaintiffs and their male colleagues in the same sections. This is the second case, in which the plaintiffs won, using the job evaluation system. The first was the Kyo Gas wage discrimination case in 2001, which used the same method.

Equality
of results

Question 5

Is the objective of the EEOL to achieve equality of opportunity and not of results ?

Does the government share the same view with Nippon Keidanren shown below ? (Example 1.)

(Example 1.)

In June 2006, during the Diet session, in which the amendment of the EEOL was being discussed, the representative from Nippon Keidanren made the following statement as a witness. “In discussing the draft amendment bill, discussion was conducted from the perspective that the EEOL was designed to achieve equality of opportunity and not of results.”

(Example 2.)

In 1994, women working for Sumitomo manufacturing companies, including Sumitomo Electric Industries, applied for mediation at the (former) Osaka Young People and Women’s Bureau. Their complaint was that they were earning 240,000 yen less in a month, compared with the male employees, who had the same academic backgrounds (senior high school graduates), who started working for the company in the same year as they did, and who had been promoted to section chiefs at the time of the complaint. But the Bureau dismissed their applications, on the grounds that the male and female employees were hired in different hiring categories, and therefore the EEOL did not apply. In 1995, the women filed suit against not just their employers but also against the government. During the judicial process, the government submitted a preparatory document in February 1996. It stated that the EEOL required the same objective conditions for men and women in providing opportunities in placement and promotion, as well as promotion, but it was apparent that it did not require the same results for men and women.

Background

1. General Recommendation 25, Temporary Special Measures, CEDAW

In the Committee’s view, a purely formal legal or programmatic approach is not sufficient to achieve women’s de facto equality with men, which the Committee interprets as substantive equality. (para. 8)

Equality of results is the logical corollary of de facto or substantive equality. (para. 9)

2. The grounds for not initiating mediation in the Sumitomo Electric Industries case

The male employees selected by the plaintiffs as comparators, had belonged to a different job category (expert jobs), even prior to their promotion to management positions. Before transferring to expert job positions, the plaintiffs were

hired by the branch offices, while the male employees were hired by the main office. Therefore, because the recruitment slips, time of hiring and other conditions are different, the plaintiffs and the male employees belong to different hiring categories.

The difference in treatment in employment management due to the difference in recruitment and hiring does not fall within the scope of the EEOL. Therefore, the male employees selected by the plaintiffs as comparators cannot be used as comparators in deciding whether the treatment was unequal.

3. Preparatory document submitted by the government in the Sumitomo Electric case, February 14, 1996

The EEOL does not prohibit all discrimination against men or women in employment. The reason is, because when laws are legislated, amended or abolished, the contents should look into the future, while at the same time, should not be removed from the situation at that time. For the EEOL, it is necessary that the law consider in full, the labor situation and awareness of women workers, the employment practices of this country, working environment including working hours and other working conditions, the situation in which women bear family responsibilities such as household duties and child-raising, situation regarding improvement of conditions enabling women to manage both work and family life, and the social and economic situation of this country, including the society's views on women's work.

* It is apparent that the EEOL requires the same objective conditions for men and women in providing opportunities in placement and promotion as well as promotion, but does not require the same results for men and women.

* Mediation provided for in Article 15 of the EEOL is part of an administrative service to support peaceful solutions of conflicts.