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Original Japanese judgment available at [092191_hanrei.pdf \(courts.go.jp\)](#)

Case No. 285 of 2021 (Gyohi) for revocation of administrative action request judgment and request for state compensation

July 11, 2023 Third Petty Bench Decision

Judgment

Main text of Judgment

1. The portion of the prior instance judgment relating to the request for revocation of the portion of the decision made by the National Personnel Authority pertaining to the use of the bathrooms is reversed, and the appellee's appeal is dismissed with respect to that portion.
2. The remainder of the appellant's appeal is dismissed.
3. The total costs of the litigation shall be divided into 10 portions, one of which shall be borne by the appellee and the remainder by the appellant.

Reasons

Reasons for the Petition for Acceptance of Final Appeal by Toshimasa Yamashita, the Appellant's Counsel, and others (excluding the excluded portions)

1. In this case, the appellant is a national public officer in the non-career position who has been diagnosed by a doctor as having gender identity disorder, who filed requests to the National Personnel Authority for administrative measures concerning, among other matters, the use of bathrooms in the workplace pursuant to Article 86 of the National Public Service Act, and received a decision to the effect that none of the requests were approved (the "Decision"). The appellant requests the revocation of the Decision by the appellee, among other matters.
2. A summary of the facts and other matters lawfully determined by the prior instance (the "Prior Instance") is as follows.
 - (1) Article 86 of the National Public Service Act provides that an official may request the National Personnel Authority that appropriate administrative measures concerning salary, compensation, and any other working conditions be taken by the National Personnel Authority, the Prime Minister, or the head of the government agency having jurisdiction over the official. Article 87 of the said Act provides that upon the above request, the National

Personnel Authority shall conduct investigations, hearings, or other fact-finding reviews as it finds necessary, and reach a determination on the case with due regard to equity to the general public and the persons concerned, and from the viewpoint of developing and improving the efficiency of the officials.

- (2) a. The appellant (born in 19XX) was hired as [intentionally omitted in the original text] in April XXXX[year], and has been working in the same department of the Ministry of Economy, Trade and Industry ("METI") since May 2004.

The government building where the office of the above-mentioned department is located (the "Building") has three men's and three women's bathrooms on each floor. Although multipurpose toilets for both men and women are not installed on the floor where the above-mentioned office is located (the "Office Floor"), [intentionally omitted in the original text] they are installed on several other floors.

- b. Although born with male biological sex, the appellant has had a strong sense of discomfort with this since childhood. Around 1998, the appellant began receiving female hormones and, around 1999, received a doctor's diagnosis of gender identity disorder. Then, by around 2006, the appellant received [intentionally omitted in the original text] and began to live her private life as a woman from around 2008.

By around March 2010, the appellant had also received a physician's diagnosis that the amount of male hormones in her blood was well below the lower limit of the standard for men of her age and that she was considered unlikely to engage in sexual violence based on sexual urges. The appellant did not undergo gender-affirming surgery for health reasons.

- (3) a. In July 2009, the appellant informed her manager of her gender identity disorder, and in October of the same year, she informed the METI official in charge, of her request to work in women's clothing and to use women's bathrooms. In response to these actions, on July 14, 2010, a meeting was held at METI, with the appellant's consent, to explain the appellant's gender identity disorder to the employees of the department where she worked (the "Briefing Session"). At the Briefing Session, when the METI official in charge asked the attendees' opinions after the appellant left, about her use of the women's bathrooms in the Building, several female employees appeared to be uncomfortable judging from their attitudes about the appellant's use of the women's bathrooms on the Office Floor. The METI official in charge then asked for opinions about the appellant's

use of the women's bathrooms on the floor just above the Office Floor, and one female employee said that she also used the women's bathrooms there on a daily basis.

- b. Based on the communication at the Briefing Session, it was decided at METI to implement a treatment to the effect that the appellant would not be allowed to use the women's bathrooms on the Office Floor and the floors just above and below in the Building, but would be allowed to use the women's bathrooms on other floors (the "Treatment").

The week following the Briefing Session, the appellant began working in women's clothing and mainly using the women's bathrooms on a floor two floors away from the Office Floor. That has not caused any problems with other officials.

In addition, in ▲ 2011, the appellant changed her name to her current name with the permission of the family court, and began using that name at work in June of that year.

- (4) On December 27, 2013, the appellant filed requests for administrative measures pursuant to Article 86 of the National Public Service Act to, among other matters, treat the appellant in the same manner as female officials in principle, including allowing the appellant to freely use the women's bathrooms in the workplace. The National Personnel Authority, on May 29, 2015, issued a decision denying all of the requests (the "Decision"; the portion of the Decision related to the above request for use of the bathrooms is hereinafter referred to as the "Relevant Decision").
3. The Prior Instance, under the above facts and other circumstances, made the following decision in summary and dismissed the request for revocation of the Relevant Decision.

The fact that METI implemented and continued the Treatment was a response to fulfill its responsibility to create an appropriate work environment for all employees, including the appellant, and therefore, the Relevant Decision cannot be considered to be an abuse of or deviation from the scope of discretionary authority, and cannot be considered illegal.

4. However, the above decision made in the Prior Instance cannot be affirmed. The reasons are as follows.
 - (1) In making decisions on requests for administrative measures pursuant to the provisions of Article 86 of the National Public Service Act, the National Personnel Authority is required to make professional judgments on a wide range of work conditions by conforming with

personnel administration and the actual work conditions of personnel from the viewpoint of fairness to the general public and concerned parties and the development and improvement of efficiency of officials (Articles 71 and 87 of said Act). Said judgment is considered to be left within the discretion of the National Personnel Authority. Accordingly, it is reasonable to conclude that the above judgment is illegal if it is deemed out of the scope of or an abuse of discretionary authority.

- (2) In this case, it can be said that the Treatment was an attempt by METI to adjust the use of the restrooms in the Building from the viewpoint of ensuring an appropriate work environment for its employees, including the appellant.

The appellant has been diagnosed by a doctor as having gender identity disorder, and the Treatment forced the appellant to use either the men's bathroom, which do not correspond to her self-identified gender, or the women's bathrooms which are located on a different floor. As a consequence, the appellant suffered considerable disadvantage on a daily basis.

On the other hand, although the appellant has not undergone gender-affirming surgery for health reasons, she has been administered female hormones and undergone [intentionally omitted in the original text], and she has also received a physician's diagnosis that she is unlikely to engage in sexual violence based on sexual urges. In fact, no problems occurred after the Briefing Session when the appellant began wearing women's clothing and using the women's bathroom on a floor more than two floors away from the Office Floor. In addition, at the Briefing Session, the METI official in charge perceived that only a few female employees appeared to feel uncomfortable about the appellant's use of the women's restroom located on the Office Floor, and there was no indication that any employees clearly objected to the appellant's use of the women's restroom. Furthermore, during the approximately 4 years and 10 months between the Briefing Session and the Decision, there is no indication that an investigation was conducted again to determine whether there were other employees who should be given special consideration to the appellant's use of the women's bathroom in the Building, or that a review of the Treatment was considered.

According to the above, at the latest at the time of the Decision, problems with the appellant's free use of the women's bathrooms in the Building were difficult to assume, the existence of other employees who should have been given special consideration had not been confirmed, and there were no concrete circumstances forcing the appellant to suffer the above disadvantages from the Treatment. In this way, it must be said that the National

Personnel Authority's judgment on the Relevant Decision was grossly inappropriate in that it placed undue emphasis on consideration for other employees without taking into account the specific circumstances of this case, in that it unjustifiably disregarded the disadvantage to the appellant, and in that it did not make a judgment from the standpoint of fairness to parties concerned and from the viewpoint of the development and improvement of efficiency of the officials including the appellant.

- (3) Therefore, the Relevant Decision should be illegal as a deviation from the scope of, or an abuse of, discretionary authority.
5. Differing from the above, there is a clear violation of law in the decision of the Prior Instance which affects its judgment. The argument is reasoned, and the part of the prior instance judgment which concerns the request for revocation of the Relevant Decision cannot be exempted from reversal. Based on the above, the above claim is justified, the judgment of the first instance court that accepted the claim is justified, and the Court has to dismiss the appeal of the appellee on this point.

The remainder of the appellant's appeal is dismissed because the reasons for the petition for acceptance of the final appeal were excluded in the decision on acceptance of the final appeal.

Accordingly, in the unanimous opinion of the justices, the judgment is rendered as set forth in the main text. The concurring opinions are delivered by Justices Katsuya Uga, Yasumasa Nagamine, Eriko Watanabe, Michiharu Hayashi, and Yukihiro Imazaki.

The concurring opinion of Justice Katsuya Uga is as follows.

1. The reasons for the difference in judgment between the court of first instance and the Prior Instance seem to be the difference in perceptions regarding: (i) to what extent shall the interests of a transgender person - such as the appellant, a male-to-female (MtF) transgender person generally recognized as a woman due to the administration of female hormones and [intentionally omitted in the original text], and who has adopted a female name, but has remained registered as a male on the *koseki* [family registry] - to lead a life in society based on their gender identity be regarded as an important legal interest, and (ii) how much importance shall be placed on the sense of discomfort and embarrassment of fellow female employees in using the same women's bathroom with the knowledge that the appellant is a transgender person with such a condition.

2. In examining this case, the issue at bar is how to evaluate the fact that the appellant is still registered as a male on the family registry. In this case, METI appears to take the position that if the appellant was registered as female on the family registry, she would be treated the same as other female employees in terms of using the bathroom. However, under the current Act on Special Cases in Handling Gender Status for Persons with gender identity disorder, the appellant must undergo gender-affirming surgery in order to change her gender on the family registry. It is well known that the constitutionality of this provision has been contested. Even if we put this aside, gender-affirming surgery is inevitably invasive to the body, dangerous to the life and health of the individual, and imposes a huge financial burden. Furthermore, there are people who cannot undergo this surgery due to their physical constitutions. Therefore, appropriate measures that respect a person's gender identity should be taken to the greatest extent possible, even in cases where the person has not undergone the surgery. In this case, while the appellant had health reasons that prevented her from undergoing gender-affirming surgery for the time being and was still registered as a male on the family registry, METI was required to respect her interest in leading her life in society based on her gender identity as much as possible.
3. METI is obligated to make every effort to maintain a work environment to fully develop and improve the efficiency of its officials (Article 71, Paragraph 1 of the National Public Service Act). It was necessary for METI to consider the appellant's interest in leading her life based on her gender identity, as well as the feelings of her fellow employees, with regard to bathrooms within its buildings. METI justified its decisions in restricting the appellant's interest in leading a life based on her gender identity by prioritizing and emphasizing the sense of discomfort and embarrassment of female employees using the same women's bathroom as the appellant. When examining whether the METI's decisions in this case were justifiable, as the opinion of this Court points out, this Court found there was no concrete risk of problems resulting from the appellant's use of the women's bathroom.

And as of May 29, 2015, when the Decision was made, more than 4 years and 10 months had passed since the appellant began working in female attire, and approximately 4 years had passed since June 2011, when the appellant changed her name and began using it in the workplace. Therefore, at the time of the Decision, even if there was a possibility that some female employees, who identified the appellant as MtF transgender and who was still a male on the family registry, might use the women's bathroom on the Office Floor and the floors above and below it, the focus should not be on the hindrance arising from the foregoing, and

this restriction on the appellant's interest in using the bathroom based on her gender identity under the same conditions as other female employees cannot be justified.

Furthermore, the sense of discomfort and embarrassment experienced by female colleagues when they use the same women's bathroom as the appellant with the knowledge that the appellant is registered as male on her family registry is likely caused by a lack of sufficient understanding of transgender people, which can be dispelled to a considerable extent through proper training. Since the appellant "came out" and requested to be allowed to use the women's bathroom in October 2009, even though it was unavoidable to set certain restrictions on the appellant's use of the women's bathroom as a temporary measure after the Briefing Session, it was possible for METI to conduct (and METI should have conducted) continuous training at an early stage to promote knowledge and understanding of transgender people so the imposed restrictions could be reviewed and revised. However, METI did not take such measures, and the only thing it did for about 5 years was repeatedly urging the appellant to undergo gender-affirming surgery. In this regard, it does not appear that sufficient efforts have been made to improve the work environment toward the realization of a symbiotic society that respects diversity.

4. In conclusion, under the facts of this case, the National Personnel Authority, in exercising its discretionary authority, overvalued the sense of discomfort and embarrassment that may be felt by female employees who recognize the appellant as an MtF transgender and still registered as male on the family registry, and undervalued the interests of the appellant, based on her own gender identity, to use the bathroom under the same conditions as other female employees. Accordingly, the National Personnel Authority has unlawfully abused its discretionary authority, and therefore the Relevant Decision shall be declared invalid.

The concurring opinion of Justice Yasumasa Nagamine is as follows.

I agree with the Court's opinion but I would like to elaborate upon the following points.

At the Briefing Session, the METI official in charge perceived, based on their attitude, that several female employees felt uncomfortable. This led METI to introduce the Treatment in an attempt to balance the interests of the employees. However, in terms of the restrictions on the use of restrooms, the appellant was the only one who suffered a disadvantage. Therefore, it must be said that the Treatment was not a fair balancing of the interests. On the other hand, since the appellant began to work wearing women's clothing from the week following the Briefing Session, the Treatment can be considered as a measure to ease a drastic change to avoid confusion due to the

sudden change in circumstances, and, considering the fact that the appellant did not object, it is possible to consider that the Treatment was somewhat rational as of July 2010.

However, given that the appellant has been consistently living her life as a woman in the workplace for over four years up to the time of the Decision, it must be said that METI had a responsibility to investigate whether the female employees' apparent discomfort which the METI official in charge perceived at the Briefing Session had been resolved, to consider whether it was justifiable to continue the Treatment through which unilateral restrictions had been imposed on the appellant, and to change the Treatment as necessary. Moreover, during this period, there were no issues caused by the appellant's use of the women's bathroom. In light of the above circumstances and considering that it is an important interest for everyone, especially for transgender persons, to lead a life in society in conformity with their gender identity, and that such interests should be legally protected, the Relevant Decision in which that National Personnel Authority denied the appellant's request to use the women's bathroom is, as stated in the opinion of the Court, grossly unreasonable.

The concurring opinion of Justice Eriko Watanabe is as follows.

I concur with the opinion of the Court in both its main text of judgment and reasons but would like to offer a concurring opinion regarding the consideration of the use of the bathrooms in the Building by the appellant, who is transgender (MtF).

I do not deny that METI has a certain amount of discretion based on its right to manage facilities, among other matters. However, as the prior instance judgment acknowledges, I believe that gender, as a personal attribute in life in society and human relationships, is closely and inseparably related to the existence of individual's personality and that the ability of individuals to lead their social lives in accordance with their true gender identity is an important legal interest that should be fully respected in the decision-making process.

Despite that, it goes without saying that even important legal interests should be subject to reasonable restrictions when they conflict with other interests, and consideration should also be given to employees who use gender-separated bathrooms on the basis of biological distinctions. Therefore, in this case, it is not denied that when there is a conflict between the interests of the transgender appellant and the cisgender female employees who use the bathrooms in the Building, it is necessary to balance and adjust the interests of both parties.

However, while the interests of the female employees cannot be disregarded, the appellant has the

important legal interests that are indispensable for her to live as a human being, and under the current circumstances, where misunderstanding and prejudice against sexual minorities still cannot be dispelled, it should not be allowed to balance and adjust the interests of the both parties intuitively or abstractly. Instead, it is necessary to balance and adjust the interests objectively and concretely. In this case, although the appellant had not undergone gender-affirming surgery, she began to work in women's clothing from the week following the Briefing Session, and it could be said that she was more than often recognized as a woman in terms of her patterns of behavior, conducts, and appearance when she led her life in society. With respect to the appellant's use of the women's bathroom, as indicated in the opinion of the Court and the prior instance judgment, it is necessary first to seriously consider what the female employees' interests that should be protected (the female employees' interests that will be lost due to the appellant's use of the women's bathroom) are and to concretely and objectively consider whether the female employees' interests are actually infringed, or are threatened to be infringed.

In this case, METI decided the Treatment, which banned the appellant from using women's bathrooms not only on a floor where the department she worked for was located but also on the floors above and below it, on totally three floors, because the female employees "appeared" to feel uncomfortable at the Briefing Session. METI had continued the Treatment for approximately 4 years and 10 months without reviewing it on the grounds that the appellant had not undergone gender-affirming surgery and was registered as a male on her family register. It must be said that the METI's treatment obviously lacked rationality and lacked fairness as imposing unilateral restrictions only on the appellant. In particular, it has been pointed out that, in general, even if people initially feel uncomfortable with transgender people using bathrooms of their self-identified gender, such uncomfotability can subside as people recognize and understand the transgender people's situation as time goes along (the records of this case show that there seemed to be female employees who thought in this way). It is also pointed out that it is important to implement a necessary process to seek understanding about respect for the legal interests of transgender people in order to resolve people's concerns based on their misunderstandings. From this point of view, even if METI had only temporarily prohibited the use of the women's bathroom only on the floor where the department the appellant worked for was located (or, although the necessity of such measure remains questionable, to prohibit the use of women's bathrooms on the additional two floors above and below) as a measure to ease a drastic change in order to handle the initial confusion of the female employees, METI, as the facility manager, could and should have made efforts to gain the understanding of the female employees and gradually reduced or lifted the prohibition, rather than adhering to whether or not the implementation of gender-

affirming surgery had been undergone.

Moreover, even based on the facts found in the Prior Instance, it is not clear why the female employees did not express their objections at the Briefing Session. Even if it is natural that some female employees were perplexed when they learned that the appellant wanted to use the women's bathroom because they were aware that the appellant was a man, there could be more than one reason why the female employees did not express their objections at the Briefing Session. In other words, it is possible that the female employees did not object because they were aware that the appellant should be allowed to use the bathrooms of her self-identified gender (the records of this case show there seemed to be such female employees). In addition, although it cannot be concluded that there is no possibility that they might have hesitated to state their objections in front of many people, it is quite possible that the female employees did not object for other reasons, including the case where they got perplexed but thought that it was unavoidable for the appellant to use the bathroom of her self-identified gender in consideration of the appellant's situation or that it would not be appropriate to object (the records of this case show there seemed to be female employees who thought in this way).

If the prior instance judgment found the Treatment and the Relevant Decision to be reasonable based on some intuitive and abstract concern of "sexual benefits such as sexual embarrassment and sexual anxiety" without considering the possibility of such diverse reactions of female employees, we are concerned that it may lead to overlooking the existence of women with diverse views.

As described above, with regard to the balancing and adjustment of interests regarding the use of bathrooms, it is certain that consideration for the distinction that has long been made in society between men and women based on biological sex and for employees who have used bathrooms on the premise of such distinction is indispensable. In addition, the balancing and adjustment may vary depending on the individual circumstances of sexual minority employees or on the circumstances regarding the facility, such as the need to consider the safe use of bathrooms, including the elimination of suspicious persons in the case of bathrooms in a workplace that may be used by outsiders. Therefore, it is difficult to make a uniform judgement on the handling of these issues, and it will certainly be necessary to make a judgement on a case-by-case basis.

In any case, however, I strongly hope that facility managers will not assume that their female employees will have a uniform sexual anxiety and therefore oppose the use of women's bathrooms by transgender (MtF) people but rather, with the aim for the cohabitation of both groups as much

as possible, take measures to ask employees to understand that the legal interests of sexual minorities are to be respected and implement the process, including giving the education to their employees.

Justice Michiharu Hayashi concurs in the concurring opinion of Justice Eriko Watanabe.

The concurring opinion of Justice Yukihiro Imasaki is as follows.

It is a natural and sincere desire of transgender people to be treated in a manner appropriate to their self-identified gender in various aspects of life in society, and how to realize this desire is an issue that must be discussed by society as a whole. The use of restrooms is only one example, but the necessity of addressing this issue is clear if one imagines the mental anguish of a male-to-female (MtF) transgender person who is forced to use a male restroom against their will, for example.

At the Briefing Session, the appellant disclosed her transgender status in front of the female employees, but no overt objection was raised by the female employees at the subsequent hearing. The appellant has been using the women's restroom on the floor she is allowed to use in accordance with the Treatment in this case for approximately 4 years and 10 months (3 years and 8 months if the leave of absence is excluded) at the time of the Decision, and no problems have been raised during this period. In addition, according to the facts found by the Prior Instance, prior to the Briefing Session, the appellant had been receiving female hormones on a continuous basis since about 1998, and had been spending all of her personal time as a woman since about 2008, and no problems had ever arisen as a result of this.

Although the opinion of the Court directly focuses on the validity of the Relevant Decision on the appellant's request for administrative measures in this case, it goes without saying that, in substance, the core of the opinion was an evaluation of the METI authorities' series of responses to the appellant. If there is a lesson to be learned from this perspective, it is the attitude that should be adopted by facility managers and HR officers at workplaces who faces with this type of problem, which highlights their responsibility to give full consideration to the position of transgender people and to make sincere adjustments.

The challenge lies beyond that. For example, in a case such as this, it is difficult to say that there is a consensus in society to unconditionally accept the free use of bathrooms without explanation (provision of information) to, and understanding (consent) of, other employees who use the same bathrooms. In order to gain understanding and consent, the briefing like the Briefing Session will be held and opportunities for discussion will be provided, but it is undeniable that negative

opinions, resistance, and an anxiety may be expressed as a result. Even if we make every effort to make adjustments with sincerity, it is likely that we will still be unable to gain the consent of all parties concerned (I do hope that this concern is unfounded). The provision of information will also require, on a case-by-case basis, difficult decisions which involve carefully striking a balance between the necessity for protection of privacy and the necessity to inform the concerned parties, when it comes to the timing, to what range of employees, in what form, and to what extent relevant information should be conveyed (specifically, whether or not to inform the fact that the person in question is transgender may be a serious issue in some cases. It goes without saying that this must not be done against the person's will).

However, each workplace differs in terms of organization, size, structure of the facility, and other aspects of the workplace environment, the type of work, the number of employees involved, employees' relationships, and the work situation of the transgender person in question, and these circumstances do not lend themselves to a uniform solution. Therefore, a one-size-fits-all solution may not be appropriate. At this point, there is no alternative but to listen carefully to both the requests and intentions of the transgender person and the views and reactions of other employees, and then seek the optimal solution from the perspective of maintaining the workplace environment and safety management. It is expected that cases of this type will occur in various aspects of society in the future, and that more and more workplace and facility managers, HR officers, and executives will face them. There seems to be some examples in the private companies already, and it is hoped that through further accumulation of cases, standard treatment, guidelines, and standards will take shape. In addition, the hope is that this kind of issue will be discussed and a consensus will be formed in society as a whole, since a resolution cannot be reached without the understanding of a large number of people.

The Decision does not touch on the manner in which public facilities, including bathrooms, are intended to be used by unspecified or a large number of people. This issue should be discussed on another occasion.

(Presiding Justice: Yukihiro Imasaki, Justice Katsuya Uga, Justice Michiharu Hayashi, Justice Yasumasa Nagamine, Justice Eriko Watanabe)