

ON BEHALF OF AZERBAIJAN REPUBLIC

DECISION

OF THE CONSTITUTIONAL COURT OF AZERBAIJAN REPUBLIC

On Conformity of Article 143.1 of the Labour Code of Azerbaijan Republic to Articles 25, 37 and 149.1 of the Constitution of Azerbaijan Republic

23 February, 2000

Baku city

The Constitutional Court of Azerbaijan Republic composed of Kh. Hajiyev (Chairman), Judges, F. Babayev, R. Gvaladze, E. Mamedov, S. Salmanova, A. Sultanov (Reporter Judge), B. Garibov,

joined in the proceedings by the Court Clerk, I. Ismayilov,

the legal representative of the body that submitted the petition, Sh. Gidayev, Judge of the Supreme Court of Azerbaijan Republic,

the legal representative of the respondent, I. Abdulazizov, Deputy Head of the Department of Milli Majlis Administration

the specialists: A.-J. Efendiev, Head of the Legal department of the Trade Unions Confederation of Azerbaijan Republic,

M. Aliyev, the employee of the Labour and Ecological Board of Baku State University

V. Guliyev, Head of the Legal department of the Ministry of Labor and Social Protection of population

T. Mamedova, Head of Department of labour policy of the Ministry of Labor and Social Protection of population

being guided by Article 130.3 of the Constitution of Azerbaijan Republic has examined in open judicial session the constitutional case by the petition of the Supreme Court of the Azerbaijan Republic of December 02, 1999 N 05-4/99 on conformity of Article 143.1 of the Labour Code to Articles 25, 37 and 149.1 of the Constitution of Azerbaijan Republic.

having heard and discussed the report of Judge A. Sultanov, statements of the legal representative of the body that submitted the petition, Sh. Gidayev, legal representative of a respondent, I. Abdulazizov, conclusions of the specialists, A.-J. Efendiyev, M. Aliyev, V. Guliyev, T. Mamedova and having examined the materials of the case, the Constitutional Court of Azerbaijan Republic

DETERMINED AS FOLLOWS:

The Supreme Court of Azerbaijan Republic asked for verification of conformity of Article 143.1 of the Labour Code of Azerbaijan Republic, which provides granting of not used holiday at the termination of the labour contract, except for cases of dismissal on items "a" and "g" of Article 70 of the given Code with Article 37 of the Constitution of Azerbaijan Republic.

In connection with petition there are the official texts of Article 143 of the Labour Code of Azerbaijan Republic, which reliability is certified by the Administration of Milli Majlis of Azerbaijan Republic, are enclosed to the constitutional case.

The Constitutional Court of Azerbaijan Republic notes the following:

According to Article 143.1 of the Labour Code at the termination of the labour contract with the employee who has not used his / her holiday for appropriate year (years) of work, at the request of the employee the holiday for this year (years) shall be granted to him / her, and the last day of holiday shall be the date of his / her dismissal. The exception of these provisions constitutes the dismissal on items "a" and "g" of Article 70 of the Labour Code.

The Article 70."a" of Labour Code provides cancellation of the labour contract by the employer in case of liquidation of the enterprise, and item "g " provides cancellation of the labour contract by the employer in case at default by the worker of his / her labour functions or obligations determined by the labour contract, or at rough infringement by him / her of labour duties in cases listed in Article 72 of the present Code.

The Constitutional Court considers, that restriction of the right of the employee on holiday in the mentioned cases does not correspond to the Constitution of Azerbaijan Republic as well as to a number of provisions of the labour legislation and international law acts.

In accordance with Article 37.1 of the Constitution everyone has the right to rest . Legislator, considering holiday as a kind of rest, has specified in Article 113.1of the Labour Code, that labour holiday is the time of rest used by the employee at own discretion with a separation from work for normal rest, restoration of working capacity, protection and strengthening of health and lasting not less than time, stipulated by the present Code.

The Constitution of Azerbaijan Republic provides employees, working on the labour contract with holiday which is a kind of the right to rest.

According Article 37.2 of the Constitution the employees, working on the labour contract are guaranteed with established by the law working day, not exceeding 8 hours, days of rest and holidays, paid holiday not less than once per year and lasting not less than 21 calendar days.

The right of every employee to regular paid holiday is also reflected in Article 24 of the Universal Declaration on Human Rights, Article 7. "d" of the International Pact on Economical, Social and Cultural Rights and Article 3 of the Convention of the International Labour Organisation on paid holidays.

Being guided by provisions of the Constitution of Azerbaijan Republic and international law acts, the legislator has fixed the right on holiday in the Labour Code.

In accordance with Article 110.1 of the Labour Code the employees irrespective of a post, working conditions and term of the labour contract have the right to use holidays established by the present Code. According to these instructions of legislator, the right to use labour holiday arises without any distinctions between the employees.

Nevertheless, contrary to the stated provisions, Article 143.1 of the Labour Code provides that the right to use holidays at the termination of the labour relations depends on the grounds of cancellation of the labour contract. Such distinction does not correspond to the principle of equality, fixed Article 25 of the Constitutions of Azerbaijan Republic.

As it was mentioned above, the Article 70."a" of the Labour Code provides the termination of the labour agreement in case of liquidation of the enterprise. In a view that the liquidation of the enterprise is connected to activity of the employer and occurs at absence in it of fault of the employee, the deprivation him / her at the termination of the labour agreement of holiday can be considered as application to him / her of collecting.

It was stated above, that Article 143.1 of the Labour Code excludes granting to an employee of holiday in case of default by him / her of the labour functions or obligations under the labour contract or rough

infringement of labour duties (Article 70."a" of the Code) . Such an exception leads to the results that the employee in fact is exposed to double punishment: leaves from work and loses holiday.

Article 144.2 of the Labour Code stipulates, that irrespective of the reason and grounds of the termination of the labour contract, money indemnification for the basic holidays, unused by employee should be paid to him / her for all the years of work before the day of dismissal without any conditions and limitations.

However in case of payment instead of holidays of money indemnification an employee loses the certain labour experience and his / her rights in comparison with other employee are restrained.

According to provision of Article 111 of the Labour Code the period of holiday of employee is included in his / her labour experience. The exceptions stipulated in Article 143.1 of the Labour Code result in distinction between the employees specified in this Article and other employees, breaking thus fixed in the Constitution of principle of equality.

Article 149.1 of Constitution stipulates, that the normative and legal acts must be based on the right and validity (equal attitude to equal interests). From this point of view provisions of Article 143.1 of the Labour Code, connected with items "a" and "g" of Article 70 of the present Code, do not correspond to the principle of the equal attitude to equal interests fixed in The constitution.

Taking into consideration the stated above, the provisions of Article 143.1 of the Labour Code connected with items "a" and "g" of Article 70 of the present Codes cannot be recognised as correspondent to Articles 25, 37 and 149.1 of the Constitution of Azerbaijan Republic.

Being guided by Article 130.3.1 of the Constitution of Azerbaijan Republic, Articles 75, 76, 78, 80, 82, 83 and 85 of the Law of Azerbaijan Republic "On Constitutional Court", the Constitutional Court of Azerbaijan Republic

DECIDED:

1. To recognise as null and void Article 143.1 of the Labour Code of Azerbaijan Republic providing restriction of the right to holiday at the termination of labour relations on the grounds, established by items "a" "g" of Article 70 of the present Code, as contradicting to Articles 25, 37 and 149.1 of the Constitution of Azerbaijan Republic.
2. The decision comes into force from the date of its publication.
3. The decision covers also the legal relations which had existed before its adoption, taking into account the terms of appeal, established by the legislation.
4. The decision is subject to publication in the "Azerbaijan" newspaper and "Bulletin of the Constitutional Court of Azerbaijan Republic".
5. The decision is final and cannot be cancelled, changed or interpreted by any body or official.

THE CONSTITUTIONAL COURT OF AZERBAIJAN REPUBLIC