**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

On Interpretation of some provisions of Article 239 of the Labor Code

of the Republic of Azerbaijan

15 July 2011                                                                             Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Judges F.Abdullayev (Chairman), F.Babayev, S. Hasanova, J.Garajayev, R.Qvaladze, R.Ismaylov (Reporter Judge), I.Najafov and K.Shafiyev;

attended by the Court Clerk I.Ismayilov,

the legal representatives of interested parties: Judge of the Supreme Court of the Republic of Azerbaijan, Head of the Sector on Labor Legislation in the Social Legislation Department of the Administration of the National Parliament of Azerbaijan Republic Mr. Adil Valiyev,

 expert – Head of Civil Litigation, Labor and Environmental Law Department of Baku State University, Doctor of Law Sciencies Mr. Alish Gasimov,

specialists – Judge of the Civil Chamber of the Supreme Court of Azerbaijan Republic Mr. Baghir Asadov, Deputy head of the Department of Labor Policy of the Ministry of Labor and Social Protection of Population of Azerbaijan Republic,

has examined at an open court session in accordance with special constitutional proceedings under the Article 130 of the Chapter VI of the Constitution of the Republic of Azerbaijan, constitutional case owing to the application of Baku Appeal Court dated to February 18, 2011 No (103)-745/2011.

Having heard the case report of the Judge R.Ismayilov and statements by the representatives of concerned parties, expert and specialists, studied and discussed the case materials, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED:**

Baku Appeal Court when considering a civil case upon S.Tahirzade’s request against «AMEC Services Limited» company for material damage payment for harm caused to the health when performing job functions, considering necessity for interpretation of expressions “employer, guilty (completely or partially) and “through employer’s fault” stipulated by the provisions I and II of the Article 239 of the Labor Code of the Republic of Azerbaijan (further the Labor Code) appealed to the Constitutional Court of the Republic of Azerbaijan (further Constitutional Court).

The appeal states that with the aim of ensuring application of regulations stipulated by the Article 239 of the Labor Code by the Decision of the Cabinet of Ministries of the Republic of Azerbaijan dated to January 9, 2003 No 3 were approved “Terms and conditions of payments as well as an amount of payment to the employee whose health impaired as a result of accident at work or occupational diseases, either to the family members or dependents of the employee died for the reason” (further referred to as the Decision of the Cabinet of Ministries).

According to the item 1.1 of this Decision in case of impairment of employee’s health as a result of accident at work or occupational diseases or death of the employee for the reason (further referred to as the occupational injuries), on the basis of the act of accident investigation guilty (responsible) agencies, departments and organizations (further referred to as the guilty employer (guilty agency)) bear financial responsibility in accordance with the legislation for harm caused to the employee.

Except for harm inflicted due to the intent of the victim, the injury should be compensated regardless the degree of victim’s fault. The appeal also notes that despite the fact that in the indicated item is used the expression “guilty agencies, departments and organizations”, noted in the last sentence of the same item regulation “except for harm inflicted due to the intent of the victim, the injury shall be compensated regardless the degree of victim’s fault” in practice is applied in a such way that if an accident or occupational diseases were in occupational nature, then presumption of culpability of employer (possibility) is accepted as a basis and responsibility for related payments is rested on employer.

When considering the case in Baku Appeal Court representative of the State Labor Inspection Service participated in the proceeding precisely from this point of view pointed out that if an accident and occupational disease are in occupational nature, irrespective of presence or absence of guilt, the employer should bear responsibility.

Baku Appeal Court has found that the meaning of the expression “employer, guilty (completely or partially)” and “through employer’s fault” stipulated by the Article 239 of the Labor Code, as well as “guilty employer (guilty agency)” used in the item 1.1 of the Decision of the Cabinet of Ministries, are interpreted ambiguously by courts, as well as parties to a case and relevant executive authorities (State Labor Inspection Service) which are directly responsible for the application and implementation of these regulations of law.

According to the Baku Appeal Court conclusion, an official interpretation of provision I and II of the Article 239 of the Labor Code will provide the basis to ensure principle of legal definition, identical and correct application of these regulations on similar cases by courts and relevant executive authorities.

In connection with the appeal, the Plenum of the Constitutional Court considers it necessary to note the following.

According to the content of the provision VI of the Article 130 of the Constitution of the Republic of Azerbaijan (further referred as the Constitution) courts may apply to the Constitutional Court on the interpretation of the Constitution and Laws of the Republic of Azerbaijan only on exercise of human rights and freedoms.

Issue raised in the application of Baku Appeal Court is directly related to the exercise of right to work enshrined on the Article 35 of the Constitution.

Being one of the factors impacting exercise of the other constitutional human rights, right to work is important for human dignity and self-determination in society.

According to the provision I of the Article 35 of the Constitution a labor is a foundation of personal and public welfare. Accordingly, a labor has economic and social dimensions. From that point of view the right to work has effect on welfare and development of individual and its family, as well as self-determination in society.

Such appointments of the right to work are characterized by free choice of each person a kind of activity, profession, occupation and the place of employment.

Labour should not degrade human dignity, should be expressed in respectful manner of fundamental human rights and fair payment of wages with arrangement of working conditions ensuring labour safety. Therefore, in Constitution regulatory content of the right to work is characterized also by rights to work under certain conditions not degrading. So, according to the provision VI of the Article 35 of the Constitution everyone has a right to work in safe and healthy conditions, to receive reward for labor without discrimination not less than minimum wage set by the state. Thus, a right of everyone to work in safe and healthy conditions is essential part of a right to work. This right is related with the right to life and right to health protection stipulated on the Constitution. The content of the right of everyone to work in safe and healthy conditions consists of that every employee has a right to work in conditions not having adverse effect and injuring hid/her life and health, meeting safety requirements. In addition to that, the constitutional right provides labor safety, protection of employee’s life, health and labor by employer.

Right of everyone to work in safe and healthy conditions requires appropriate legal regulation ensuring exercise of this right by the state. When performing this obligation the state should create means providing realization of the right to work in safe and healthy conditions as well as effective mechanisms to control its implementation.

The right stipulated on the provision VI of the Article 35 of the Constitution is specified on a number of articles of the Labor Code. So, the code established a comprehensive legal institution called “Labor Safety”, raised out of right to work in safe and healthy conditions.

According to the provision 10 of the Article 3 of the Labor Code, labor safety is a system of safety, sanitation, hygiene, treatment and preventive measures, norms and standards stipulated on the present Code and other regulations, as well as a system of collective contracts, agreements, labor contracts with a view to ensure a right of employees to work in safe and healthy conditions.

According to the provision І of the Article 54 of the Labor Code, employer should ensure a workplace and working conditions meeting sanitary and hygienic standards and compliance of labor safety standards and safety precautions so that employee can perform job functions.

One of the means providing compliance of standards related to labor safety by employer is Mutual Material Liability Institute stipulated on the labor legislation.

Its general framework is set out on the Article 191-194 of the Labor Code.

Mutual relations between material responsibility of employer and employee arise out of nature of labor relations. Due to the fact that these relations are contractual, it stipulates the responsibility to compensate for damage caused to the respondent party, in the event of failure of one of the parties to perform any of obligations deriving from labor relations. Thus, one of the basic principles of labor relations is establishment of legal security for performance of duty on the basis of employment agreement (provision 3 of the Article 2 of the Labor Code). In accordance with the principle, the legislator when listing fundamental rights of employee on employment agreement specified the right to work in condition ensuring labor, life and health safety, as well as to require creation of such conditions (item “g” Article 9 of the Labor Code) and a right to claim damages caused to property and health in the course of labor duties (item “o” of the Article 9 of the Labor Code). Due to the fact that mutual financial responsibility is one of the means ensuring labor safety of regulation of the Article 239 of the Labor Code establishing financial responsibility for damage caused to the employee as a result of violation of labor safety standards, it is systematically related to the Articles 191-194 of the present Code. In that case, responsibility stipulated on the Article 239 of the Labor Code occurs in the presence of conditions indicated on the Article 191 of the present Code.

According to the provision 1 of the Article 191 of the Labor Code when fulfilling mutual obligations upon employment agreement in the process of labor relations employer and employee bear financial responsibility for the damage caused one to another in accordance with procedures set down by present Code and relevant legal acts.

As it can be seen from the content of the Article employer and employee bear financial responsibility for damage caused to one another only in case of existence of labour relations. Therefore, it must be noted that according to the provision 2 of the Article 7 of the Labor Code, labour relations occur when concluding written employment agreement. On the other hand, according to the provision 2 of the Article 49 of the Labor Code, violation of requirements of the present Code, if an employee started to work without written employment contract and with a prior consent (order) of an employer, since that time an employment contract is considered as concluded and written employment agreement should be concluded not less than in three days.

Comparative analysis of these articles with the Article 239 of the Labor Code leads to the conclusion that, even if there is no employment agreement in case of factual occurrence of labor relations between employer and employee, the employer bears financial responsibility for violation of safety standards.

In accordance with the provision 2 of the Article 191 of the Labor Code, in the presence of all of the following three conditions simultaneously occurs financial responsibility for the damage caused intentionally or unintentionally by one party to another:

1. Upon detection of an actual damage;
2. If act of guilty, i.e. act or omission contradicts a law;
3. When there is a causal relationship between act of guilty contradicting a law and a result of this act.

As it is possible to see, when settling the matters on causing damage to each other by employee and employer should be determined actuality of the damage. Actual (real) damage is expressed as injury caused to an employee, health impairment or death of an employee on the Article 239 of the Labor Code.

Unlawful acts or omission of parties on the employment agreement is expressed upon violation of regulations, non-fulfillment or improper fulfillment of duties stipulated on the Labor Legislation.

Specific responsibilities of an employer in the sphere of Labor safety are established on the Article 215 of the Labor Code. According to the content of the Article 239 of the Labor Code, non-fulfillment (improper fulfillment) of the responsibilities may be cause for financial responsibility of an employer. The content of causal relationship as condition of mutual financial responsibility of an employer consists of the fact that the damage occurs as a result of unlawful acts of employer and employee.

In that case, causal relationship may be direct or mediocre. If there is no direct relationship the responsibility of the parties is not excluded. The Court can establish the responsibility by using body of evidences. The legislator has not specified direct fault in the list of conditions of occurrence of responsibilities on the provision 2 of the Article 191 of the Labor Code. Thereby, the Plenum of the Constitutional Court notes that the presence of fault is common and accepted by everyone condition for occurrence of legal liability, stipulated in all areas of right and any exception to the rule should be specified on the legislation directly and unequivocally. Accordingly, cases of responsibility in the event of innocence are possible if it’s specified on the legislation.

So the presence of fault is essential condition for occurrence of mutual financial responsibility. In accordance with this the legislator has defined the content of the provision 2 of the Article 191 of the Labor Code. Although the fault is direct and is not specified as a separate condition in this article, the legislator considers this element necessary for occurrence of mutual financial responsibility. This proceeds from the item “b’ and “v” of the provision 2 of the Article 192 as well as provision 1 of the Article 194 of the Labor Code.

With regard to financial responsibility for violation of labor safety regulations, the legislator considering this principle has defined the content of the Article 239 of the Labor Code. So according to the provision 1 of this Article the employer, guilty (completely or partially) for occupational accident or disease, is obliged to pay in full to employee the damage caused as a result of injury or health impairment in another form, as well as costs on treatment, benefits and other additional costs established by the Civil Code of the Republic of Azerbaijan. As it is possible to see, in case of violation of labor safety regulations only an employer can be brought to justice the guilt of which is proved.

The legislator having specified fault as essential condition for occurrence of financial responsibility has established an issue on who should bear the burden of proving fault as well. So according to the provision 2 of the Article 192 of the Labor Code, the parties making a claim due to causing material damage and its amount, as well as absence of guilt of causing damage to the respondent party are obliged to prove it. Therefore, legislation stipulates the principle of presumption of guilt on issues related to financial responsibility for damage caused by employer and employee to each other. According to the principle, in cases when employer can not prove own innocence is considered guilty.

The Plenum of the Constitutional Court regarding the issue on the impact of volume of the guilt for violation of labor safety standards by employer to the type of its responsibility, considers necessary to point the following.

The labor legislation has established two types of responsibility: limited liability (in that case caused damage is compensated in predetermined limited amount) and full liability (in that case caused damage is compensated in full).

Limited liability is envisaged only in respect to employees and paid in the size of their average monthly salary. Article 198 of the Labor Code provides that except cases provided in Article 199 and 200 of the present Code, in all other cases an employee bears liability for the damage caused to employer in the size up to average monthly wage.

By contrast, liability of an employer under article 195 of the Labor Code has a full nature. In accordance with the item “v” of the Article 195 of the Labor Code in labor relations an employer is fully liable for the damage caused to the employee, the damage caused to employee’s health in the discharge of its duties as a result of occupational accident occurred due to non-compliance of employer with labor safety regulations, as well as causing relevant damage to the members of employee’s family living in dependence on employee died for this reason.

Corresponding to this, according to the content of the provision 1 of the Article 239 of the Labor Code, employer should fully pay the employee caused damage and related expenses that employee incurred. Comparative analysis of the Article 195 and provision 1 of the Article 239 of the Labor Code allows to conclude that regardless full or partial fault of employer in case of presence of conditions stipulated on the Article 191 of the Labor Code responsibility of employer to employee has a full nature. It should be taken into account that in labor relations an employee in comparison with an employer is the weaker party from economic standpoint. Generally, salary is the major source of income for employee and his family. An employer unlike the employee is a stronger party from economic standpoint and has organizational and administrative powers. From this standpoint the legislation stipulates full liability of employer to employee. According to this approach of the legislator in the item 1.1 of the Decision of the Cabinet of Ministries it was established that regardless the degree of the victim’s fault caused damage is compensated.

The expired Regulations “On compensation by agencies, departments and organizations the damage caused to employee sustained injuries, occupational disease in the discharge of its duties or to the family of the employer died for the reason” approved by the Decision of the Cabinet of Ministries No 129 dated to 1996, established different procedure. The item 13 of these regulations provide that if an accident occurred due to the labor injury and happened not only by the fault of establishment but also by gross negligence of the victim, then depending on the degree of victim’s fault one – time and monthly payments issued by the means of establishment could be reduced up to 30 percents by the Labor Protection Commission of the establishment. Thus, in opposite to the previous legislation the current legislation do not provide the mixed liability type for violation of labor safety regulations.

The Plenum of the Constitutional Court considers that in accordance with the content of the Article 239 of the Labor Code in case of the presence of employer’s fault he/she bears responsibility regardless the degree of his/her fault.

On the basis of the abovementioned the Plenum of the Constitutional Court concluded that:

* Provided for Article 239 of the Labor Code financial responsibility for the caused harm to employee’s health due to the violation of labor safety standards or his death for this reason, upon requirements of the Article 191 of the present Code occurs only in the presence of employer’s fault.
* According to the content of the Article 239 of the Labor Code, regardless the full or partial fault of an employer, in the presence of conditions envisaged in Article 191 of the present Code responsibility of employer to employee has a full nature.

Guided by the provision VI of the Article 130 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court” the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Provided for the Article 239 of the Labor Code of the Republic of Azerbaijan financial responsibility for the causing harm to employee’s health due to the violation of labor safety standards or his/her death for this reason, upon requirements of the Article 191 of the present Code occurs only in the presence of employer’s fault.

2. According to the content of the Article 239 of the Labor Code of the Republic of Azerbaijan, regardless of full or partial fault of an employer, in the presence of conditions envisaged on the Article 191 of the present Code responsibility of employer to employee has a full nature.

3. The decision comes into force on the date of its publication.

4. The decision should be published on the newspapers “Azerbaijan”, “Respublika”, “Khalg gazeti”, “Bakinskiy reabochiy’, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

5. The decision conclusively cannot be repealed, altered or interpreted by any body or official.