**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

On interpretation of Article 115.1, Article 116.1 and Article 136.2 of the Labour Code of the Republic of Azerbaijan

# 17 June, 2003 Baku city

The Constitutional Court of the Republic of Azerbaijan composed of A. Sultanov (Chairperson), Judges F. Babayev, B.Garibov (Reporter Judge),R. Gvaladze, E. Mamedov, I. Najafov and S. Salmanova,

attended by the Court Clerk I.Ismayilov,

the legal representatives of the subjects interested in special constitutional proceedings: B. Asadov, Judge of the Supreme Court of the Republic of Azerbaijan and I.Abdulazimov, Deputy Chief of the General Department of the Administration of the Milli Majlis of the Republic of Azerbaijan and Senior Referent of Legal Department of the Cabinet of Ministers of the Republic of Azerbaijan H.Ashrafov;

the expert: A.Kasumov, Head of the Civil Procedure, Labour and Environmental Law Board of the Baku State University, candidate for Legal Sciences;

the specialists: T.Mammadova, Head of the Labour Policy Department of the Ministry of Labour and Social Security of the Population and A.Efendiyev, Head of the Legal Department of the Confederation of the Trade Unions of Azerbaijan;

 in accordance with Article 130.4 of the Constitution of the Republic of Azerbaijan has examined in open judicial session via special constitutional proceedings the case on inquiry of Supreme Court of the Republic of Azerbaijan of 15 May 2003,

N 8-4/03 concerning interpretation of Article 115.1, Article 116.1 and Article 136.2 of the Labour Code of the Republic of Azerbaijan,

having heard and discussed the report of Judge B. Garibov, the statements of legal representatives of the subjects interested in special constitutional proceedings B.Asadov, I.Abdulazimov, H.Ashrafov, expert opinion of A.Kasumov, information of T.Mammadova and A.Efendiyev, the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Supreme Court of the Republic of Azerbaijan in its inquiry notes that in Article 115.1 of the Labour Code of the Republic of Azerbaijan it is specified “on working conditions and features of labour function”, Article 116.1 - “depending on the period of service” and in Article 136.2 of this Code - “if an employee is concurrently entitled to two or more additional vacations provided for in Articles 115 and 116 hereof, the longest additional vacation should be combined with his base vacation”. Because of not clear wording of second part of Article 136.2 of the Labour Code concerning the order of addition of the basic and additional vacations and occurrence of complexities at its application in the activity of institutions, enterprises and organisations, and also in judicial practice, being based on its negative influence on independent judicial practice, the Supreme Court asks to give interpretation of a Article 115.1, Article 116.1 and Article 136.2 of the Labour Code of the Republic of Azerbaijan.

The official texts of Article 115.1, Article 116.1 and Article 136.2 of the Labour Code of the Republic of Azerbaijan certified by the Administration of Milli Mejlis of the Republic of Azerbaijan are enclosed to materials of the case.

In connection with inquiry the Constitutional Court of the Republic of Azerbaijan specifies that the right to rest is among fundamental laws and freedom reflected in the Constitution of the Republic of Azerbaijan.

According to the Article 37 of the Constitution, everyone has the right for rest. For those who work on the base of labor agreements 8-hour working day, national vacations and at least one paid vacation with duration of at least 21 calendar days are guaranteed.

The provisions connected with the right to vacation have found its reflection also in a number of international legal acts which the Republic of Azerbaijan is a party too. According to Article 3.1 of the Convention of the International Labour Organization “On vacations with pay”, adopted in 1970 and ratified by the Republic of Azerbaijan on 19 June, 1994, every person is entitled to an annual paid vacation of a specified minimum length.

According to principles and norms of the Constitution and the International Convention, the rest time as well as the procedure and conditions of granting of vacation also are among of relations regulated by the Labour Code of the Republic of Azerbaijan. According to the decision of the Constitutional Court of 29 November, 2000, duration of the additional vacations given to workers along with the basic vacations is aimed, on one hand, at recovery of the worker’s health and his ability to work and, on the other hand, is a stimulus for his long and productive work., depending on character of work and on the period of service.

According to point “a” of Article 112.1 of the Labour Code of the Republic of Azerbaijan which provides for different kinds of vacations it is indicated that the labour vacation consists of the basic and additional vacation.

In the second part of article 113 same Codes it is specified that the labour vacation consists of the annual basic vacation which provided to the workers executing labour duties by appropriating trade (position) throughout a year, and the additional vacation depending on character of manufacture of work and the seniority, as well as to the women having children, can be granted both either together or separately.

On the basis of the Article 115.1 of the same Code, the employees engaged in underground work or in hazardous or arduous occupations and those whose occupations involve increased sensitivity, excitement, or mental and physical stress should be eligible for additional vacation time. Depending on the nature of the working conditions and duties, additional vacation time must be no less than 6 calendar days.

In the Article 116.1 of the Labour Code it is noted that depending on their period of service, employees should be eligible for the following amounts of additional vacation time: period of service of five to ten years - 2 additional calendar days; period of service often to fifteen years - 4 additional calendar days; period of service of over fifteen years - 6 additional calendar days. It is necessary to note that to the workers specified in Article 116.3, the additional vacations for the period of service (including on working conditions) are not given.

 According to the Article 136.1 of the Labour Code defining the procedure of addition of the basic and additional vacations, the basic vacation provided by Article 114 of the present Code, should be given according to Articles 115 and 116, only together with additional vacations.

In the second part of same Article it is specified that if an employee is concurrently entitled to two or more additional vacations provided by Articles 115 and 116 hereof, the longest additional vacation should be combined with his basic vacation.

The legislator differentiated the essence of the additional vacations provided by Articles 115 and 116 of the Labour Code.

So, if the terms of additional vacations defined in Article 115, are aimed, first of all, at indemnifications to the worker who has received during execution of labour activity the influence of negative factors which harm his health, the terms of additional vacations specified in Article 116 serve for stimulation of the worker for long works in economic sphere.

According to the period of service of the worker the right to additional vacation from the moment of possession the certain experience of the work provided in the legislation, unlike its formation connected with features of working conditions and labour functions, occurrence of the right to additional vacation for the worker with heavy and harmful working conditions of corresponding industry contacted available term of work by a trade or on a post not less than six months within working year.

 Such position together with other bases is among the major factors distinguishing the specified rights one from another on the legal character.

Taking into account the features of working conditions and labour activity, intensity and duration of the negative factors having negative influence on health of workers, in view of a reality of risk of more frequent infection with illnesses of professional character, the legislator has established in Article 115 of the Labour Code the minimum terms of additional vacations.

 At the same time it is necessary to bear in mind that the presence of the right to some additional vacations, fixed in Articles 115 and 116 of the Labour Code, does not provide their simultaneous use in full. According to Article 136.2 of the Code if an employee is concurrently entitled to two or more additional vacations provided by Articles 115 and 116 hereof, the longest additional vacation should be combined with his basic vacation.

 So, from the text of Article 115.1 of the Code it gets evident that the duration of additional vacation, according to character of working conditions and labour activity, should be not less than 6 calendar days. From a part 2 of this article providing the statement by corresponding enforcement authority of the list of harmful and heavy industries, professions and positions, granting the right to additional leave on working conditions and character of labour activity, with instructions of duration of additional vacations, it is possible to draw a conclusion that the legislator has established various terms of additional vacations on features of working conditions and labour activity.

 In Article 116 of the Labour Code there are specified three concrete additional vacations for the period of service. Regarding Article 136.1 of the same Code it is underlined that the basic and additional vacations, the basic vacation provided by Article 114 of the present Code, should be given, according to Articles 115 and 116, only together with additional vacations. Apparently, the legislator, recognising the right to additional vacation as on working conditions and character of labour activity, and for the period of service, defines their granting as imperative norm with an addition condition to the basic vacation of the established additional terms. By granting to the worker of vacation restriction of joining to the basic vacation, only one of these rights creates an impression that this right remains behind frameworks of legal ensuring and had declarative character.

The legislator has sufficiently large powers in regulation of the social rights and the solution of economic problems. Milli Mellis of the Republic of Azerbaijan, being based on Article 94.1.16 of the Constitution, using the constitutional law, regarding Articles 136.2 of the Labour Code has established the joining to the basic vacation of only one most long additional vacation from two or more, provided by Articles 115, 116 of the same Code.

In the Article 115.2 of the Labour Code it is specified that list of hazardous and arduous industries, workplaces, occupations and positions, types of employment and employee categories entitling to additional vacation time according to working conditions and duties should be approved by the relevant authority and the duration of additional vacation time shall be indicated therein. But in spite of the fact that by the Decree of the President of the Republic of Azerbaijan N122 of 15 April, 1999 these powers have been transferred to the Cabinet of Ministers of the Republic of Azerbaijan, the specified document has not been confirmed.

Being based on the aforesaid, the Constitutional Court of the Republic of Azerbaijan considers that according to Article 136.1 of the Labour Code of the Republic of Azerbaijan the basic vacation should be given to the worker only together with the confirmed additional vacations established by Article 115 on working conditions and character of labour activity, and also Article 116 of the present Code for the period of service.

On the basis of a part 2 of this article if an employee is concurrently entitled to two or more additional vacations as on working conditions and character of labour activity, and for the period of service provided by Articles 115 and 116 hereof, the longest additional vacation should be combined with his base vacation.

Being guided by parts IV and VI of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 66, 75, 76, 78, 80, 81, 83 and 85 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. In accordance with Article 136.1 of the Labour Code of the Republic of Azerbaijan the basic vacation should be given to the worker only together with the confirmed additional vacations established by Article 115 on working conditions and character of labour activity, and also Article 116 of the present Code for the period of service.

On the basis of a part 2 of this article if an employee is concurrently entitled to two or more additional vacations as on working conditions and character of labour activity, and for the period of service provided by Articles 115 and 116 hereof, the longest additional vacation should be combined with his base vacation.

2. On the basis of the Decree of the President of the Republic of Azerbaijan N122 of 15 April, 1999 to recommend to Milli Mejlis of the Republic of Azerbaijan to ensure without delay the execution of provision provided for Article 115.2 of the Labour Code of the Republic of Azerbaijan.

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

4. The decision is a subject to publication in the "Azerbaijan" newspaper and “Bulletin of the Constitutional Court of Azerbaijan Republic”.

5. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.