**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

## On verification of conformity of Article 247.3 of the Labor Code of the Republic of Azerbaijan to the Constitution of the Republic of Azerbaijan

**21 June 2010 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), S.Salmanova (Reporter-Judge), F.Babayev, S.Hasanova, A.Sultanov and I.Najafov;

attended by the Court Clerk I.Ismayilov,

representative of the body submitted an inquiry – M.Mammadov, the senior advisor of the Scientific and Analytical Department of the Staff of Ombudsman,

representative of respondent body – Vasif Amiraslanov, adviser of Department of the Economical Legislation of Milli Majlis of the Republic of Azerbaijan,

expert – Server Suleymanli, senior teacher of Civil Law Board of Baku State University,

## has examined in open session via special constitutional proceedings in accordance with Article 130.VII of the Constitution of the Republic of Azerbaijan the constitutional case on the basis of inquiry of the Ombudsman of the Republic of Azerbaijan of March 31, 2010 on verification of conformity of Article 247.3 of the Labor Code of the Republic of Azerbaijan to the Constitution of the Republic of Azerbaijan.

Having heard the report of Judge Sona Salmanova and statements of the representatives of the parties, opinion of expert and examined the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Ombudsman of the Republic of Azerbaijan, having submitted to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) an inquiry, asked for verification of conformity of Article 247.3 of the Labour Code of the Republic of Azerbaijan (hereinafter referred to as Labour Code) adopted by the Law of the Republic of Azerbaijan of February 1, 1999, with Article 25.1, Article 35.6, Article 38.3, Articles 71, 147, parts I and III of Article 149 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

According to the specified norm of the Labor Code, at conclusion of employment agreement with employees under 18 the additional conditions, obligations provided by the employer for increasing of labor and professional skills have to be provided. Time spent by employees younger than 18 years on vocational training during the usual working day with the consent of the employer is considered as part of the working day. According to the conclusion of applicant, part 3 of Article 247 of the Labour Code, breaking the principle of the equal relation to equal interests of employees under 18, restricts the circle of rights for work and social security, disagree with the criteria of justice, which are put forward to the normative legal act and do not correspond with the above-mentioned articles of the Constitution.

Plenum of the Constitutional Court considers that in connection with settlement of a question raised in inquiry, first of all, some norms of the Constitution and the international legal acts supported by the Republic of Azerbaijan, and the labor legislation have to be considered.

According to parts I and III of Article 25 of the Constitution, All people are equal with respect to the law and law court. The state guarantees equality of rights and liberties of everyone, irrespective of race, nationality, religion, language, sex, origin, financial position, occupation, political convictions, membership in political parties, trade unions and other public organizations. Rights and liberties of a person, citizen cannot be restricted due to race, nationality, religion, language, sex, origin, conviction, political and social belonging.

According to Article 35 of the Constitution, everyone has the right to choose independently, based on his/her abilities, kind of activity, profession, occupation and place of work. Labor agreements are concluded voluntarily. Nobody may be forced to conclude labor agreement. Everyone has the right to work in safe and healthy conditions, to get remuneration for his/her work without any discrimination, not less than minimum wages rate established by the state (parts II, IV, VI of Article 35).

According to parts I and II of Article 71 of the Constitution to observe and to protect rights and liberties of a human being and citizen specified in the Constitution-is responsibility of bodies of legislative, executive and legal power. No one may restrict implementation of rights and liberties of a human being and citizen.

According to parts I and III of Article 149 of the Constitution Normative-legal acts should be based on law and justice (same attitude to equal interests). The laws should not contradict to the Constitution.

Implementation of the labor rights without any discrimination takes the leading place also in international legal acts. In the Article 23.2 of the Universal Declaration of Human Rights, in Article 7 of the International Covenant on Economic, Social and Cultural Rights the right of everyone to equal pay for equal work without any discrimination.

According to Article 7.6 referred to as “The right of children and young persons to protection” of the European Social Charter which the Republic of Azerbaijan is a party too since January 6, 2004, for ensuring of effective implementation of the right of children and teenagers to protection, the Parties undertake to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer should be treated as forming part of the working day.

In the national legislation the leading normative legal act governing the labor relations which arose in connection with using of working ability of natural persons is the Labour Code. This Code establishes the minimum standards of the labor rights of individuals and rules providing implementation of these rights.

Article 2 of the Labour Code reflects the principles making the basis of Code, including equality of the parties of the labor relations, protection of their interests by ensuring justice and rule of law. According to the specified principles, the parties in the labor relations – the worker and the employer have the equal rights and duties. The labor Code protects both the worker, and the employer, and granting advantage to any of the parties is inadmissible.

According to Article 7.5 of the Labour Code terms, procedures and duration of employee's training in a new profession or specialty and the parties' obligations governed by an appropriate agreement or employment contract signed pursuant to the consent obtained. In other words, realization of the right of the worker for professional advancement is carried out on the basis of a mutual consent of the worker and the employer. According to Article 9 of the Code, one of basic rights of the worker according to the employment contract is right to professional advancement, getting of new profession and professional development.

One of the basic principles of legal regulation of labour is also inadmissibility of discrimination in the field of labour. According to Article 16 of the Labour Code, in the labor relations it is strictly forbidden to allow any discrimination between employees on the basis of citizenship, sex, race, nationality, language, place of residence, economic standing, social origin, age, family circumstances, religion, political views, affiliation with trade unions or other public associations, professional standing, beliefs, or other factors unrelated to the professional qualifications, job performance, or professional skills of the employees, nor it be permitted to establish privileges and benefits or directly or indirectly limit rights on the basis of these factors. At the same time, it is necessary to consider that granting to separate categories of persons of certain privileges, privileges in the labor relations is not considered as discrimination. It is caused by special care of the state for the members of society who are most of all needing social protection, including women, disabled people, persons, with limited opportunities of health under 18.

According to Article 9 of the Law of the Republic of Azerbaijan “On Employment” of July 2, 2001, reflecting the exclusive attitude of the legislator towards such persons, the state by creation of additional workplaces and the specialized enterprises, the organizations (including the enterprises and the organizations for work of disabled people and persons under 18 with limited opportunities for health reasons), organizing training according to special programs, and also taking other measures, provides additional guarantees to the categories of citizens which are especially needing of social protection and meet with difficulties with employment (young people under 20 years old, to the lonely parents and parents having many children, those who raising one several several children who did not come to age, to the parents raising children with limited possibilities for health reasons, persons who had less than two years till a retirement age, to disabled people, to persons under 18 with limited possibilities for health reasons, to the citizens released from completion of sentence, to displaced persons, veterans of war, families of deceased soldiers).

In the Labour Code other rules of use of labour of persons under 18as one of the social groups relating to this category are established. In Chapter Thirty Eight of the Code which is called “Specifications of employing of workers under 18”, the preferential rules of persons of this category differing from others in connection with giving employment, working hours, release from work are provided. One of these privileges is connected with increase of their labor and professional skills. According to Article 247.2 of this chapter, observance by the employer of the guarantees established by the present Code for employees under 18 is obligatory. Part 3 of this article establishes that when concluding an employment contract with employees, under 18, the additional conditions, obligations provided by the employer for increase of their labor and professional skills have to be provided. But it is specified in the second offer of 3 parts that time spent by employees who is under 18, on vocational training during the working day, with the consent of the employer is considered as part of the working day. Following from the content of the mentioned provision if employer does not give his/her consent then the time spent for vocational training can not be considered as working hours.

Reflection in the labor legislation of the norm of such contents, puts persons under 18 in more inadmissible situation than other persons and first of all contradict to the purposes of Chapter into which this norm is included and to the principle of equality of the parties provided in the labor legislation. Thus, the Labour Code put consideration of time spent for vocational training during the working day as working hours directly into dependence not on will of the employer but on agreement of the parties (Article 7 of the Labour Code). However the challenged norm made consideration of time spent by persons under 18 on vocational training during the working day as working hours dependent unilaterally from the will of the employer. Though, apparently from the name and contents of Chapter Thirty Eight of the Labour Code containing Article 247, this Chapter serves for the purposes of creation of more admissible guarantee mechanisms in connection with the labor right of employees who is under 18.

Also it should be noted that the point “h” of Article 179.2 of the Labour Code provides the obligatory instruction on preservation of a workplace and an average salary of the worker when an employer sends him for professional development with day release. In this sense whereas the salary of all employees directed on advanced training courses with day release, the dependence of consideration of time spent by persons under 18, on vocational training during the working day as working hours from a consent of the employer does not seem reasonable from the logical point of view.

Thus, in the second sentence of Article 247.3 of the Labour Code, phrase “with the consent of the employer” putting persons under 18 in unacceptable situation in relation to other persons, breaks equality with respect to the law and law court, the guarantees of  equality of rights and liberties of everyone established in Article 25 of the Constitution. At the same time, the specified situation can not be considered to corresponding to following essential principles enshrined in Article 149 of the Constitution, – normative-legal acts should be based on law and justice (same attitude to equal interests), laws should not contradict the Constitution. The given edition of the second sentence of Article 247.3 of the Labour Code includes the unequal relation not only to equal interests but to interests of persons under 18 demanding more attentive approach in comparison with others.

On the other hand, it also follows from the Article 7.6 of the European Social Charter which is a component part of legal system of the Republic of Azerbaijan that the Republic of Azerbaijan accepts obligations to set the time spent by young persons in vocational training during the normal working hours with the consent of the employer as a forming part of the working day. Concerning this provision of the Charter it is necessary to emphasize that as the employer's consent is required in such case, but this consent is unambiguously provided not in the relation of establishment of time spent for vocational training as working hours but as consideration of vocational training of young employees in working hours. In other words, on the basis of these provisions if employer agreed to absence of young employee in the working hours for vocational training the time spent for this has to be considered as working hours.

According to Article 12.2 of the Constitution, rights and liberties of a person and citizen listed in the present Constitution are implemented in accordance with international treaties wherein the Republic of Azerbaijan is one of the parties.

According to Article 148.2 of the Constitution, the international agreements wherein the Republic of Azerbaijan is one of the parties constitute an integral part of legislative system of the Republic of Azerbaijan.

According to Article 1 of the Labour Code, the labor law system of the Republic of Azerbaijan also consists of the international treaties signed or supported by the Republic of Azerbaijan with respect to labor and socioeconomic issues.

According to Article 151 of the Constitution, whenever there is disagreement between normative-legal acts in legislative system of the Republic of Azerbaijan (except Constitution of the Republic of Azerbaijan and acts accepted by way of referendum) and international agreements wherein the Republic of Azerbaijanis one of the parties, provisions of international agreements are applied.

According to the above-stated, the Plenum of the Constitutional Court comes to a conclusion that the provision “with the consent of the employer” in the second sentence of Article 247.3 of the Labour Code of the Republic of Azerbaijan has to be recognized as contradictory to parts I and III of Article 25, parts I and III of Article 149 of the Constitution of the Republic of Azerbaijan. At the same time, as according to part X of Article 130 of the Constitution this circumstance is the basis for null and void of the specified provision, Plenum of the Constitutional Court considers that there is no need for additional check of compliance of the challenged norm with Article 35.6, Article 38.3, Articles 71, 147, parts I and III of Article 149 of the Constitution specified in inquiry.

Being guided by parts VII, IX and X of Article 130 of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To recognize the provision “with the consent of the employer” in the second sentence of Article 247.3 of the Labour Code of the Republic of Azerbaijan as null and void in view of its contradiction with parts I and III of Article 25, parts I and III of Article 149 of the Constitution of the Republic of Azerbaijan.

2. The decision shall come into force from the date of its publication.

3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

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