

IN THE NAME OF THE RUSSIAN FEDERATION

CONSTITUTIONAL COURT  
OF THE RUSSIAN FEDERATION

Judgment

of 24 January 2002 No. 3-II

in the case concerning the review of the constitutionality of Section 2, Article 170 and Section 2, Article 235 of the Code of Laws on Labour of the Russian Federation, and Subsection 3, Article 25 of the Federal Law “On Trade Unions, their Rights and Guarantees of Activities”, upon requests of the Zernogradsky District Court of the Rostov Region and the Central District Court of Kemerovo.

Moscow, 24 January 2002

The Constitutional Court of the Russian Federation composed of Presiding Judge Yu. M. Danilov and Judges M. V. Baglay, L. M. Zharkova, V. D. Zorkin, N. V. Seleznev, V. G. Strekozov, O. S. Khokhryakova,

in the attendance of Judge T. V. Kostrova of the Central District Court of Kemerovo, S. A. Popov, deputy of the State Duma, Permanent Representative of the State Duma to the Constitutional Court of the Russian Federation V. V. Lazarev, Representative of the Council of the Federation attorney V. Y. Bakshinskas, and Plenipotentiary Representative of the President of the Russian Federation to the Constitutional Court of the Russian Federation M. A. Mityukov,

pursuant to Section 4, Article 125 of the Constitution of the Russian Federation, Section 1 (Subsection 3), Sections 2 and 3 of Article 3, Section 2 (Subsection 3) of Article 22, Articles 36, 74, 86, 101, 102 and 104 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”,

in an open hearing, examined the constitutionality of the provisions of Section 2 of Article 170 and Section 2 of Article 235 of the Code of Laws on Labour of the Russian Federation, and Subsection 3, Article 25 of the Federal Law “On Trade Unions, their Rights and Guarantees of Activities”.

The reason for the consideration of the case is requests of the Zernogradsky District Court of the Rostov Region and the Central District Court of Kemerovo for constitutional review of the provisions mentioned above.

The ground for consideration of the case is the discovered uncertainty of whether the provisions mentioned above are in conformity with the Constitution of the Russian Federation.

Having heard the report of Judge-Rapporteur O. S. Khokhryakova, statements by the parties, interventions by V. K. Varov for the Ministry of Labour and Social Development, M. N. Lavrentyeva, Judge of the Supreme Court of the Russian Federation, M. G. Belan for the Office of the Prosecutor General of the Russian Federation; and having considered written submissions and other materials, the Constitutional Court of the Russian Federation

e s t a b l i s h e d :

1. The lawsuit of I. N. Vakulenko seeking reinstatement at work, recovery of lost earnings due to involuntary absence at workplace and compensation for psychological distress is pending before the Zernogradsky District Court of the Rostov Region. I. N. Vakulenko is the father of a disabled child. He was dismissed from work under Subsection 3, Section 1, Article 33 of the Code of Laws on Labour of the Russian Federation due to unjustified repeated failure to perform his duties under the labour contract.

The Zernogradsky District Court of the Rostov Region concluded that the provision of Section 2, Article 170 of the Code of Laws on Labour of the Russian Federation (as amended on 30 April 1999) to be applied in the case does not conform to the Constitution of the Russian Federation. Pursuant to this Article, it is prohibited to dismiss employees who are parents of disabled children or children disabled from childhood until the latter attain the age of eighteen, except in case of liquidation, where termination of employment is subject to mandatory re-employment. The Zernogradsky District Court of the Rostov Region stayed the proceedings and requested the Constitutional Court of the Russian Federation for a constitutional review of the provision.

In the applicant's opinion, the prohibition to terminate the labour contract with an employee who has a disabled child, in case of wrongful failure to perform employment duties or their undue performance, is not in conformity with Section 3, Article 17 of the Constitution of the Russian Federation and contradicts the principle proclaimed by Section 1, Article 19 of the Constitution of the Russian Federation. Extending such prohibition to a *mala fide* employee who abuses the rights granted to him, and heightened guarantees against dismissal are contrary to Section 3, Article 17 of the Constitution of the Russian Federation, which stipulates that the exercise of the rights and freedoms of man and citizen shall not violate the rights and freedoms of others, and is further contrary to the principle of equality of all before the law and court proclaimed by Section 1, Article 19 of the Constitution of the Russian Federation.

The lawsuit of B. A. Noskov seeking reinstatement at work at "Kemerovskaya GRES", a branch of OJSC Kuzbassenergo, is pending before the Central District Court of Kemerovo. B. A. Noskov is President of the Kuzbass Independent Power Engineering Trade Union, which is

part of the Labour Confederation of Kuzbass. He was dismissed for unjustified absence from work and appearing at work in the state of intoxication (Subsections 4 and 7, Section 1, Article 33 of the Code of Laws on Labour of the Russian Federation).

The Central District Court of Kemerovo concluded that the provisions of Section 2, Article 235 of the Code of Laws on Labour of the Russian Federation and Subsection 3, Article 25 of the Federal Law “On Trade Unions, their Rights and Guarantees of Activities” to be applied in the case do not conform to the Constitution of the Russian Federation, its Article 19 (Sections 1 and 2) and also violate Article 55 due to unlawful restriction of the employer’s rights. Pursuant to the challenged provisions it is prohibited to dismiss an employee who is a member of trade union bodies and who is not relieved of primary work duties without prior consent of the respective trade union bodies. Article 19 (Sections 1 and 2) of the Constitution of the Russian Federation guarantees equality of everyone before the law and court and equality of rights and freedoms of man and citizen regardless of membership in public associations. The Central District Court of Kemerovo stayed the proceedings and requested the Constitutional Court of the Russian Federation for a constitutional review of the provisions.

Thus the subject-matter of the case for consideration by the Constitutional Court of the Russian Federation is:

Section 2, Article 170 of the Code of Laws on Labour of the Russian Federation to the extent that it prohibits to dismiss employees who are parents of disabled children or children disabled from childhood until the latter attain the age of eighteen, when such employees commit disciplinary offences, which under law are grounds for labour contract termination by the employer;

Section 2, Article 235 of the Code of Laws on Labour of the Russian Federation and Subsection 3, Article 25 of the Federal Law “On Trade Unions, their Rights and Guarantees of Activities” to the extent that they prohibit to dismiss employees who are members of trade union bodies and who are not relieved of primary work duties without prior consent of the respective trade union bodies, when such employees commit disciplinary offences which under law are grounds for labour contract termination by the employer.

Both the Zernogradsky District Court of the Rostov Region and the Central District Court of Kemerovo request a constitutional review of the exceptions to the general rules of labour legislation on labour contract termination by the employer. Insofar as the requests concern essentially the same subject-matter and pursuant to Article 48 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation” the Constitutional Court of the Russian Federation is permitted to consider these requests together.

2. The provisions of Section 2, Article 170 and Section 2, Article 235 of the Code of Laws on Labour of the Russian Federation and Subsection 3, Article 25 of the Federal Law “On Trade Unions, their Rights and Guarantees of Activities” directly affect human and civil rights and freedoms in the area of labour and economic activity, which are guaranteed by the Constitution of the Russian Federation.

2.1. Pursuant to Article 37 (Section 1) of the Constitution of the Russian Federation, labour is free; everyone shall have the right to freely use his labour capabilities, to choose the type of activity and profession. These and other guarantees of free labour in Article 37 of the Constitution of the Russian Federation correspond to the norms of the International Covenant on Economic, Social and Cultural Rights. Pursuant to Subsection 1, Article 6 of the Covenant the State Parties to the Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

The norms of Article 37 of the Constitution of the Russian Federation provide for freedom of the labour contract, the rights of the employee and employer to stipulate contractual terms by concurrence of wills and decide on initiating, altering, and terminating labour relations. At the same time these norms set constitutional limits of freedom of labour which the parties may not trespass. Hence, the employer as a party to a labour contract is obliged to ensure working conditions which are compliant with the constitutional requirements above, and the employee is obliged to personally perform his contractual labour function and to follow the internal labour regulations of the company.

In regulating issues of initiating, altering and terminating labour relations, the federal legislator aims to ensure constitutional freedom of the labour contract according to Articles 71 (Subsection “c”) and 72 (Subsection “k”, Section 1) of the Constitution of the Russian Federation. Consequently, it is entitled to provide for negative legal effects of failure to perform obligations under a labour contract, including termination of a labor contract by one of the parties. Such legal effects are to be adequate to the degree of infringement upon the rights and legitimate interests of the other party. At the same time the federal legislator has to consider other social values protected by the Constitution of the Russian Federation.

2.2. The Constitution of the Russian Federation guarantees freedom of economic activity, support of competition, recognition and equal protection of private, state, municipal and other forms of property as one of the fundamentals of the constitutional order in the Russian Federation (Article 8). According to the Constitution of the Russian Federation, everyone shall have the right to freely use his abilities and property for entrepreneurial and other economic activities which are not prohibited by law (Section 1, Article 34), everyone shall have the right to

have, possess, use and dispose of property, both personally and jointly with other people (Sections 1 and 2, Article 35).

These constitutional rights presume that the employer (natural person or legal entity) enjoys a number of specific powers enabling him to make independent decisions on the management of human resources (recruitment, allocation of staff, dismissal) at his own risk for purposes of efficient economic activities and sound property management. Therefore when the legislator establishes specific guarantees of labour rights pursuant to Article 37 of the Constitution of the Russian Federation, it is not empowered to provide for restrictions distorting the very essence of freedom of economic (entrepreneurial) activity, even when the restrictions are imposed against potentially arbitrary dismissal of an employee. Any other understanding would contravene Article 55 of the Constitution of the Russian Federation stipulating that protection of the rights and freedoms of certain persons shall not lead to denial or derogation of the rights and freedoms of others, and possible restrictions imposed by federal law are to be proportionate and aimed at achieving constitutionally significant purposes.

2.3. Pursuant to the Constitution of the Russian Federation, motherhood and childhood, family shall be protected by the State, care and upbringing of children shall be an equal right and obligation of parents (Sections 1 and 2, Article 38). In the Russian Federation support of family, motherhood, fatherhood and childhood shall be ensured by the State (Section 2, Article 7).

Therefore, the legislator is entitled, *inter alia* by establishing necessary social security standards, to provide for special guarantees and privileges to those employees who are not capable of performing employment duties prescribed by general rules in full and equally to the others due to the need to provide special care for disabled children or persons disabled from childhood. These state guarantees are in conformity with the ILO Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities 1981 (No. 156) (Subsection 2 of Article 1, Subsection 1 of Article 3, Articles 4, 8 and 9) and Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, which are obligatory for the Russian Federation.

The Constitution of the Russian Federation guarantees that everyone shall have the right of association, including the right to create trade unions for the protection of his interests; the freedom of public association activities shall be guaranteed (Section 1, Article 30). This constitutional norm taken together with Article 37 of the Constitution of the Russian Federation implies the duty of the State to ensure freedom of trade unions' activities for purposes of effective representation and protection of the social and labour rights of citizens united by common work and professional interests.

Since free exercise of labour activities by citizens may be impeded by the need to combine their work and responsibilities important for the State and society, the legislator is entitled to provide for social security measures for employees who are members of trade union bodies and who are not relieved of primary work duties. Imposing additional guarantees for such employees, e.g. effective control over the lawfulness of dismissal, are essential to exercise the right to create unions as independent and autonomous associations of workers, which is one of the fundamental rights in a democratic rule of law State.

The duty of the State to ensure adequate protection of employees against any discriminatory acts aimed at circumventing the freedom of associations in the area of labor and right of workers to freely elect their representatives stems from the ILO Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) (Articles 2 and 3) and also from the ILO Right to Organize and Collective Bargaining Convention, 1949 (No. 98). The latter Convention deals with application of the right to organize and to conclude collective bargaining agreements and affords such protection *inter alia* in respect of acts calculated to cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities (Subsection “b”, Section 2, Article 1).

Thus, pursuant to Articles 1 (Section 1), 7, 8 (Section 1), 17 (Section 3), 19 (Sections 1 and 2), 30 (Section 1), 34 (Section 1), 35 (Section 2), 37, 38 (Sections 1 and 2) and 55 (Section 3) of the Constitution of the Russian Federation, when the legislator establishes additional guarantees for employees who have disabled children or children disabled from childhood under the age of eighteen, and for employees who are members of trade union bodies and who are not relieved of primary work duties, it has to balance respective constitutional rights and freedoms. Such balance is necessary to harmonize labour relations in the Russian Federation as a social and rule of law State, which is the legal basis for just reconciliation of employees’ and employers’ rights and interests as parties to a labour contract and members of a social partnership.

3. Pursuant to the challenged provisions of Section 2 of Article 170 together with Articles 213 and 214 of the Code of Laws on Labour of the Russian Federation within the literal meaning and within the meaning attributed to them in law-enforcement and judicial practices, it is impossible to apply such disciplinary measure as dismissal in respect of an employee who has a disabled child or a child disabled from childhood under the age of eighteen. And consequently termination of a labour contract with such employee is from the outset considered illegal. An employee has to be reinstated at work even if he committed a disciplinary offence, which is a legal ground for a dismissal. This should be done irrespective of circumstances which predetermined the need for dismissal, degree of guilt, behaviour before dismissal, etc.

Consequently, in case of dispute it is sufficient for a court to recognize the dismissal illegal and unreasonable if an employee proves that he has a disabled child or a child disabled from childhood who is under the age of eighteen, without considering any other circumstances. The employer will be ordered to pay the loss of earnings due to involuntary absence at workplace and compensation for psychological distress caused by the dismissal. Furthermore, a management official who issued the dismissal order may be held liable for damages caused to the company and be compelled to reimburse the amounts paid for the loss of earnings due to involuntary absence at workplace and compensation for psychological distress.

Dismissal, without a prior consent of the trade union body (as required by Section 2, Article 235 of the Code of Laws on Labour, and Subsection 3, Article 25 of the Federal Law “On Trade Unions, their Rights and Guarantees of Activities”), of an employee who is a member of that trade union body and who is not relieved of primary work duties and who committed a disciplinary offense has a similar effect. The legislator obliges the employer to obtain the trade union body’s consent for dismissal of its member, but at the same time does not oblige the trade union body to reason its objections. Judicial review of the trade union body decision’s legality is essentially limited to examining whether this trade union body has authority to exercise such powers and whether the decision was taken on an appropriate collegiate basis within a procedure prescribed by law.

Therefore the requirement of prior consent of a trade union body to the dismissal of an employee who is a member of a trade union body and who is not relieved of primary work duties means that it is not a court, but a trade union body representing only one party to the dispute who decides on the reasonableness of the dismissal of the employee who committed a disciplinary offence.

The prohibition imposed by Section 2 of Article 170 and Section 2 of Article 235 of the Code of Laws on Labour of the Russian Federation, and Subsection 3, Article 25 of the Federal Law “On Trade Unions, their Rights and Guarantees of Activities” on the dismissal of an employee who committed a wrongful act serving as a ground for labour contract termination by the employer, disproportionately restricts the rights of the employer as a party to the labour contract, economic activity actor, and owner. Such restriction is not necessary for the protection of rights and freedoms stipulated by Articles 30 (Section 1), 37 (Section 1) and 38 (Sections 1 and 2) of the Constitution of the Russian Federation, it violates the freedom of economic (entrepreneurial) activity, right of ownership, distorts the essence of the freedom-of-labor principle and thereby contravenes Articles 8, 34 (Section 1), 35 (Section 2), 37 (Section 1) and 55 (Section 3) of the Constitution of the Russian Federation. As compared with other employees, the challenged norms grant unjustified advantages to and create a possibility for

abuse of the right for employees who have disabled children or children disabled from childhood under the age of eighteen, or those who are members of trade union bodies and who are not relieved of primary work duties. This is inconsistent with Article 19 of the Constitution of the Russian Federation ensuring equality of everyone before the law and court and guaranteeing equality of rights and freedoms of man and citizen.

It is not possible for an employer to prove in court the need for and reasonableness of dismissal of a *mala fide* employee who committed a disciplinary offence, and in case of terminating the labour contract with an employee who is a member of a trade union body and who is not relieved of primary work duties, to prove unlawfulness of the trade union body's objection to the dismissal. In effect, the employer is denied a possibility to protect his rights and lawful interests in court proceedings, i.e. his constitutional right of access to court is essentially limited.

Meanwhile, pursuant to Articles 17 (Section 1), 18, 46 and 118 of the Constitution of the Russian Federation, Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 of the International Covenant on Civil and Political Rights, administration of justice shall meet the requirements of fairness and ensure effective restoration of rights, while judicial protection shall be complete, which means not only a possibility to address a court, but also an obligation of the court to render a just and reasoned decision. The right to universal judicial protection is reaffirmed by the European Court of Human Rights, e.g. in its Judgments in the cases of *Golder v. the United Kingdom* of 21 February 1975, *Deweert v. Belgium* of 27 February 1980, and by the Constitutional Court of the Russian Federation in its Judgment of 6 June 1995 in the case concerning the review of the constitutionality of Paragraph 2, Section 7, Article 19 of the Law of the RSFSR "On Police", and Judgment of 23 February 1999 in the case concerning the review of the constitutionality of Section 2, Article 29 of the Federal Law "On Banks and Banking".

Concluding from the above and pursuant to Sections 1 and 2 of Article 71, Articles 72, 75, 100 and 104 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the Constitutional Court of the Russian Federation

h e l d :

1. To recognize the provision of Section 2, Article 170 of the Code of Laws on Labour of the Russian Federation as non-conforming to the Constitution of the Russian Federation and its Articles 19 (Sections 1 and 2), 34 (Section 1), 35 (Section 2), 37 (Section 1), 46 (Section 1) and 55 (Section 3), to the extent that it prohibits to dismiss employees who are parents of disabled children or children disabled from childhood under the age of eighteen, when such

employees commit disciplinary offences, which under law are grounds for labour contract termination by the employer.

2. To recognize the provision of Section 2, Article 235 of the Code of Laws on Labour of the Russian Federation, and Subsection 3, Article 25 of the Federal Law “On Trade Unions, Their Rights and Guarantees of Activities” as non-conforming to the Constitution of the Russian Federation and its Articles 19 (Sections 1 and 2), 34 (Section 1), 35 (Section 2), 37 (Section 1), 46 (Section 1) and 55 (Section 3), to the extent that they prohibit to dismiss employees who are members of trade union bodies and who are not relieved of primary work duties, without prior consent of the respective trade union bodies, when such employees commit disciplinary offences, which under law are grounds for labour contract termination by an employer.

3. Pursuant to Sections 1 and 2, Article 79 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, this Judgment shall be final and shall not be subject to any appeal, it shall come into force immediately upon pronouncement, shall be directly applicable, and shall not require confirmation by other authorities and state officials.

4. Pursuant to Article 78 of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”, this Judgment shall be published in the Collection of Laws of the Russian Federation and Rossiyskaya Gazeta. The Judgment shall also be published in the Bulletin of the Constitutional Court of the Russian Federation.

Constitutional Court  
of the Russian Federation

No. 3-II