Decision 3341/2017 (XII. 20.) AB

On the dismissal of a constitutional complaint

In the matter of a constitutional complaint, with the concurring reasoning by Dr. Béla Pokol, Justice of the Constitutional Court, the Constitutional Court, sitting as the Full Court, has adopted the following

decision:

1. The Constitutional Court hereby dismisses the petition seeking a finding of unconstitutionality by non-conformity with the Fundamental Law, annulment and general disapplication of Section 2 (4a) of Act CVI of 2011 on Public Employment and Amending Other Acts Related to Public Employment and Other .

2. The Constitutional Court hereby terminates the procedure on the petition seeking a finding of unconstitutionality by non-conformity with the Fundamental Law, annulment and general disapplication of Section 2 (5) (a) (aj) of Act CVI of 2011 on Public Employment and Amending Other Acts Related to Public Employment.

Reasoning

I

[1] 1. The petitioner (represented by Zsuzsanna Amman, attorney-at-law, H-1055 Budapest, Szent István körút 19.,) filed a constitutional complaint with the Constitutional Court pursuant to Section 26 (2) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the “Constitutional Court Act”).

[2] In his constitutional complaint, pursuant to Article 26 (2) of the Constitutional Court Act, the petitioner requested a finding that Section 2 (4a) and (5) (a) (aj) of Act CVI of 2011 on Public Employment and Amending Other Acts Related to Public Employment (hereinafter referred to as the “Act on Public Employment”) were contrary to the Fundamental Law and also sought annulment of the same with retroactive effect to the day of its promulgation, as well as declaration of "general disapplication" of the same.

[3] The complainant, as an employee subject to the Act on Public Employment, considered it contrary to Article XV (2) and XVII (4) of the Fundamental Law that the contested provisions of the Act on Public Employment exclude the application of the provisions of the Labour Code on the amount and granting of leave in the case of public employment, thus the public employee is entitled to only twenty days of basic leave per calendar year, the date of granting of which is entirely determined by the employer.

[4] In his view, the contested provisions of the Act on Public Employment result in a "significant disadvantage" for those in public employment compared to those in employment, since the petitioner as a public employee is not entitled to the additional freedom provided for in Sections 131 to 133 of Act XXII of 1992 on the Labour Code (hereinafter referred to as the “Former Labour Code”).

[5] In his opinion, the regulation of the Act on Public Employment on the granting of leave means that the employer has full control over the granting of leave to public employees, and the Former Labour Code regulation, pursuant to which the date of granting leave must be communicated to the employee at least one month before the start of the leave, does not apply to them. He also refers to an individual case in which his employer did not even 'let him go' for a series of preliminary medical examinations for a long-planned and overdue operation, on the grounds of the contested legislation.

[6] On the basis of the above, it argues that the contested provisions of the Act on Public Employment violate the right to paid leave and discriminate against the public employee. He also referred to the National Declaration of Faith and the Fundamental Principles and Article XII of the Fundamental Law, which underline the importance of the rules of fair employment.

[7] 2. Given that Act I of 2012 on the Labour Code (hereinafter referred to as the “Labour Code”) was already in force at the time of the submission of the petition, the Constitutional Court considered the petition in the context of the provisions of the Labour Code in force at the time of the assessment.

[8] 3. The Constitutional Court contacted the Minister of the Interior in order to express its professional opinion.

[9] 3.1 In the professional opinion of the Minister of the Interior, it cannot be considered disproportionate that a public employee is entitled to only twenty days of basic leave, in view of the following.

[10] Although the employment relationship and the public employment relationship have many similarities, they differ in their purpose, the persons involved and the manner they are financed, which justify different rules. The Act on Public Employment is intended to fulfil the State's obligation under Article XII (2) of the Fundamental Law, which states that "Hungary shall strive to create the conditions that ensure that everyone who is able and willing to work has the opportunity to do so ".

[11] The Minister argued that the legislator took into account the state of the national economy and the situation on the labour market when drafting the Act on Public Employment. Public employment is a temporary solution, the main purpose of which is to activate the long-term unemployed and to help the public employee to return to the labour market by gaining work experience.

[12] He explained that in the public employment relationship, only approximate requirements apply to workers on the labour market; therefore, they are not obliged to be on duty, on-call, on standby, to work without interruption, to work extraordinary hours [Section 2 (5) (a) of the Act on Public Employment], the possibility of working on Sundays and public holidays is more limited [Section 2 (5) (l)], and they cannot be employed outside the scope of an employment contract [Section 2 (6)].

[13] 3.2 The comment by the Minister of the Interior also responded to the part of the petition concerning why the public employer has the right to the full issuance of leave pursuant to Section 2 (5) (a) (aj) of the Act on Public Employment.

[14] He argues that, in particular in the case of public employment of shorter duration (up to four months), the objective pursued may be jeopardised if the granting of leave is not organised. He also pointed out that the rules on the granting of leave in the Labour Code are only partially favourable to workers, since the Labour Code is not in line with the principle of proportionality. Section 123 (5) (a) and (b) of the Labour Code, the employer may, in the case of a particularly important economic interest or for a reason directly and seriously affecting its operations, change the previously notified date for the granting of leave, or the employer may interrupt leave already taken by the employee.

[15] At the same time, the provisions of the Section 6 (1) to (3) of the Labour Code, the principles of reasonableness, good faith and fairness, the obligation of mutual cooperation between the parties, and the principle of the prohibition of the improper exercise of rights under Section 7 must be applied. He also referred to the fact that in the specific case, the Act on Public Employment prescribes the application of Section 55 (1) (j) of the Labour Code, pursuant to which an employee is exempted from his / her obligation to be available and to perform his / her work for a period of absence justified by a particularly serious personal, family or unavoidable reason.

II

[16] 1. The provisions of the Fundamental Law invoked in the petition as infringed read as follows:

"Article XV (1) Everyone shall be equal before the law. Every human being shall have legal capacity.

(2) Hungary shall guarantee fundamental rights to everyone without discrimination and in particular without discrimination on the grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status."

"Article XVII (4) Every employee shall have the right to daily and weekly rest periods and to a period of annual paid leave."

[17] 2. The rules of the Act on Public Employment challenged by the petitioner, in force at the time of the filing of the petition read as follow:

"Article 2 (4a) The amount of leave to which a public employee is entitled shall be 20 working days per calendar year.

[...]

(5) In the case of public employment, the rules

(a) under the Labour Code [...]

[...]

(aj) to grant leave,

[...]

shall not apply, [...]"

III

[18] The constitutional complaint is admissible as follows.

[19] Both the first and second parts of the petition for a declaration of admissibility meet all the (formal and substantive) requirements for admissibility.

[20] Pursuant to Section 30 of the Constitutional Court Act, a complaint filed under Section 26 (2) of the Constitutional Court Act must be filed within 180 days of the entry into force of the contested legal

act. The contested provisions were enacted by Section 74(5) to (6) of Act LXXXVI of 2012 on Transitional Provisions and Amendments to the Labour Code I of 2012, which entered into force on 1 July 2012, while the petition was filed on 19 November 2012 and was therefore filed within the time limit.

[21] The constitutional complaint complies with the provisions of Section 52 (1) to (1b) Constitutional Court Act. Accordingly, it shall contain an indication of the competence of the Constitutional Court under Article 26 (2) of the Constitutional Act on which the complaint is based. The constitutional complaint contains an explicit request and a detailed statement of grounds for the contested act being unconstitutional.

[22] Pursuant to Section 56 (2) of the Constitutional Court Act, the Constitutional Court shall have discretionary power to assess the substantive conditions for the admissibility of a constitutional complaint provided for by law, in particular the conditions of concernment under Sections 26 and 27, the exhaustion of legal remedies, and the conditions under Sections 29 to 31.

[23] The petitioner is, pursuant to Section 26 (2) of the Act, personally and directly concerned by the contested legislation, as he is himself a public employee.

[24] Since the labour dispute could not have led to the fact that the employee's right to influence the granting of leave played a role in the constitutional problem, namely the unilateral decision of the employer, instead of the unilateral decision of the employer, the Constitutional Court was of the opinion that there was no legal remedy procedure to remedy the violation of rights in the given case, and therefore it could not be exhausted.

[25] Section 29 of the Constitutional Court Act stipulates as a substantive condition for admissibility that the constitutional complaint must contain an infringement of Fundamental Law or a constitutional law issue of fundamental importance that materially affects the judicial decision. According to the complaint, the contested provisions restrict the right to annual paid leave and result in unjustified discrimination between public employees and other persons in employment as regards the amount of leave and the manner in which it is granted. The Constitutional Court held that the contested legislation raises a constitutional law issue of fundamental importance and that it is therefore necessary to review the merits of the question whether the distinction between public employees and employees covered by the Labour Code as regards the rules on leave is constitutionally justifiable.

IV

[26] 1. In the course of the hearing of the merits of the case, the Constitutional Court observed that the National Assembly had repealed Section 2 (5) (a) (aj) of the Act on Public Employment and amended several provisions of law related to this.

[27] Under these rules, which are still in force, a public employee is entitled to a *pro rata* share of leave if his or her employment started or ended during the year; the public employee must be granted seven working days' leave per year in no more than two instalments at the time requested by the public employee; the public employee must notify his / her request at least fifteen days before the start of the leave; in the case of a public employment relationship, unlike an employment relationship, leave may be granted *pro rata temporis*, even during the first three months of the relationship [Section 2 (7) (a) of theAct on Public Employment; Section 122 (2) and 121 of the Labour Code]. The date on which leave is granted must be notified to the public employee no later than fifteen days before the start of

the leave; leave granted after this date may be granted only with the consent of the public employee [Section 2 (7) (b) of the Act on Public Employment; Section 122 (4) of the Labour Code]. Leave must be granted in the year in which it is due; in the case of a legal relationship extending over a calendar year, leave not granted in the year in which it is due for a reason on the part of the public employee must be granted immediately after the reason ceases to exist, and not within sixty days of the end of the employment relationship [Section 2 (7) (c) of the Act on Public Employment; Section 123 (1) and (3) of the Labour Code].

[28] In the light of the above, the Constitutional Court considered whether the proceedings should be terminated on account of being devoid of purpose.

[29] Pursuant to Section 59 of the Constitutional Court Act, the Constitutional Court may, exceptionally, terminate pending proceedings in cases which have become manifestly devoid of purpose, in accordance with the provisions of its Rules of Procedure. The grounds for a petition becoming devoid of purpose are set out in Section 67 (2) of the Rules of Procedure. Points (a) to (d) thereof are clearly not applicable in the present case. Pursuant to point (e), the petition is also devoid of purpose if 'the circumstances justifying the continuation of the proceedings no longer exist or the application has become devoid of purpose for other reasons'.

[30] In line with to the case law of the Constitutional Court, the legal institution of a constitutional complaint has a dual purpose. "The primary purpose of the legal institution of constitutional complaint under Article 24 (2) (c) and (d) of the Fundamental Law is both individual, subjective legal protection: the remedy of the legal prejudice caused by the unconstitutional statute or unconstitutional judicial decision that actually caused the legal prejudice. In the case of constitutional complaints for the review of a statute, the secondary aim is to prevent similar infringements occurring later and thus to objectively protect the constitutional legal order" {Decision 3367/2012 (XII. 15.) AB, Reasoning [13] and [14]}.

[31] The Constitutional Court reviews the unconstitutionality of a repealed statute only exceptionally, if the statute should still be applied in a specific case [Section 41 (3) of the Constitutional Act]. At the same time, the Constitutional Court also stated that "[a]s a constitutional complaint under Section 26 (2) of the Constitutional Act is a special type of procedure replacing abstract ex post review of norms, it presupposes personal involvement. The complaint is therefore based on the application or the effectiveness of the law, but without any specific [judicial] proceedings having been / are being conducted in the matter. As the Constitutional Court points out, where a provision of law has been applied [entered into force] and the complainant considers that this has caused a fundamental rights violation, the investigation may be conducted, in the case of a request received within the time limit, even if the law [provision] has been amended, or even repealed, by the legislator in the meantime, without, however, remedying the alleged fundamental rights violation." {Decision 3208/2013 (XI. 18.) AB, Reasoning [42]; Decision 20/2014 (VII. 3.) AB, Reasoning [227]}. On the basis of the foregoing, it is in principle not excluded that the already repealed provisions of the Act on Public Employment are subject to review.

[32] Section 2 (5) (a) (aj) of the Act on Public Employment excluded the application of the rules of the Labour Code on the granting of leave in the case of public employment. The petitioner sought annulment of the provision with retroactive effect to the date of its promulgation and a prohibition of its application. The contested provision regulated the decision-making powers of the public employer and the public employee in relation to the granting of leave during the period in which it was in force and had no adverse legal effects which could be carried forward to the subsequent period. The public employee's leave was granted at the public employee's discretion during the period in question on the

basis of the provision in force at that time, and a retroactive reorganisation of that leave, which would be more appropriate to the needs of the public employee, would not be possible even if the Constitutional Court were to declare its unconstitutionality and that it could not be applied retroactively. The objective of remedying the breach of rights in the present case does not therefore provide a basis for an examination of the constitutionality of the annulled provision. The complainant's application for annulment of the contested provision of the legislation has become devoid of purpose both in form and in substance, given the changes in the legislative context.

[33] In view of all the above, the Constitutional Court shall terminate the constitutional complaint procedure with regard to Section 2 (5) (a) (aj) of the Act on Public Employment on account of being devoid of purpose based on Section 59 of the Constitutional Court Act and Section 67 (2) (e) of the Rules of Procedure.

[34] 2. The Constitutional Court then reviewed whether Section 2 (4a) of the Act on Public Employment, which determines the annual leave of a public employee in twenty working days per calendar year, violates Article XVII (4) of the Fundamental Law.

[35] 2.1 According to the consistent case law of the Constitutional Court, "[t]he Constitutional Court may use the arguments, legal principles and constitutional contexts developed in its previous decisions in relation to constitutional issues to be examined in new cases, if the content of the relevant section of the Fundamental Law is in conformity with the Constitution, the contextual consistency of the Fundamental Law as a whole, the consideration of the rules of interpretation of the Fundamental Law and the applicability of the findings on the basis of the specific case do not constitute an obstacle and it is deemed necessary to include them in the grounds of the decision to be taken" {Decision 13/2013 (VI. 17.) AB, Reasoning [31] and [32]}.

[36] "The Constitutional Court may, subject to the above conditions, refer to or cite the arguments and legal principles developed in its previous decisions, indicating the repealed decision of the Constitutional Court as a source, and presenting the content or text of the substantive constitutional issue arising in the given case to the extent and scope necessary for the decision of the case. In a democratic state governed by the rule of law, the reasons and sources of constitutional law must be accessible and verifiable for everyone, and the need for legal certainty requires that the considerations in the decision be transparent and comprehensible. Public reasoning is the basis for the justification of a decision." {Decision 13/2013 (VI. 17.) AB, Reasoning [33]}.

[37] The Constitutional Court always reviews the applicability of the arguments set out in previous decisions on a case-by-case basis, in the context of the specific case. In the present case, it has established the following.

[38] 2.2 Article 70/B (4) of the Constitution established the fundamental right to rest, leisure and paid leave. Article XVII (4) of the Fundamental Law establishes as a fundamental right the right to daily and weekly rest periods and annual paid leave. From a comparison of the content of the provisions of the Fundamental Law relating to the right to rest and paid leave, it can be concluded that Article XVII (4) of the Fundamental Law differs from the corresponding provisions of the Constitution in that it specifies its content. Therefore, in its assessment, the Constitutional Court has taken into account the findings of previous Constitutional Court decisions, having regard to Clause 5 of the Final and Mixed Provisions of the Fundamental Law.

[39] As regards Article 70/B (4) of the Constitution, the Constitutional Court already stated in 1992 that the Constitution defines the right to rest, leisure and paid leave as a fundamental right (Decision 1403/B/1991 AB, ABH 1992, 493, 494.AB 1030/B/2004 held that the right to rest is an essential

component of the right to work; however, it stressed that the Constitution does not specify the specific content and conditions of the right to rest (ABH 2005, 1307, 1311). Decision 74/2006 (XII. 15.) AB (ABH 2006, 870, 875) distinguished, in relation to the right to rest, between the inter-work break, daily and weekly rest periods, which are directly linked to rest from work, and the 'ordinary leave', which is intended to provide the worker with a permanent rest, and considered the right to paid leave as a (fundamental) right in its own right. While the Decision 11/2011 (III. 9.) AB explained that the right to regular paid leave is not a right to freedom, but primarily a constitutional guarantee of a legal institution. It does not determine the specific extent of the entitlement, but only its minimum (ABH 2011, 158-159).

[40] Article XVII (4) of the Fundamental Law, very similarly to Article 70/B (4) of the Constitution, establishes as a fundamental right of the employee the right to daily rest periods directly related to work, to weekly rest periods for the employee's long-term rest, and to annual paid leave. Anyone who works in the context of an employment relationship (contract of employment or other employment relationship) and does not decide how to use his or her working time (known as contingent work) is entitled to these rights. Obviously, this right should not apply to persons who are not in an employment relationship (such as self-employed persons or persons in a liberal profession), since they decide for themselves, without the consent of others, when to rest and when to work. The Fundamental Law defines the content of the right to rest in more detail than the Constitution because, in addition to annual paid leave to ensure the worker's long-term rest, it also refers specifically to daily and weekly rest periods directly linked to work. The fact that the content of the provision of the Fundamental Law is identical to that of the Constitution justifies taking account of the Constitutional Court's previous practice.

[41] An important element of the right to paid leave as a fundamental right is the regularity of the leave. The worker is entitled to paid leave at fixed intervals, typically annually (or *pro rata* in the case of shorter periods of fixed-term work). During the period of leave, the worker is released from his / her obligation to work, while at the same time becoming entitled to payment of wages.

[42] 2.3 Subsection (4a) of Section 2 of the Act on Public Employment determines the amount of the annual paid leave challenged by the petitioner in twenty days.

[43] The amount of annual paid leave is not provided for in the Fundamental Law.

[44] The Constitutional Court's case law in relation to Article Q (2) of the Fundamental Law is that, in accordance with the principle of *pacta sunt servanda*, it accepts and enforces an interpretation of the content of fundamental rights which is in conformity with international legal obligations, as long as this interpretation is compatible with the provisions of the Fundamental Law. If the Fundamental Law formulates the content of a fundamental right in the same manner as an international treaty, the level of protection of fundamental rights provided by the Constitutional Court cannot be lower than the level of protection of international law {*see* Decision 36/2013 (XII. 5.) AB, Reasoning [26]; Decision 3076/2017 (IV. 28.) AB, Reasoning [40]}.

[45] Accordingly, the Constitutional Court will also take into account the relevant international law requirements in reviewing the provision challenged in the present case.

[46] In this context, the International Labour Organisation (ILO) Convention No 132 on paid annual leave (promulgated by Hungary by Act LXVI of 2000) should be taken into account in determining the minimum period of paid annual leave. According to Article 3 (3) of this Convention, the period of leave may in no case be less than three working weeks per year of service. Under Article 3 (2), each Member State ratifying the Convention is required to specify the duration of the leave in the declaration

annexed to its instrument of ratification. In its declaration annexed to the instrument of ratification, Hungary has specified a minimum annual leave period of twenty days.

[47] The Constitutional Court notes that the legislature is also bound by Article 7 (1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, which sets the minimum period of paid annual leave at four weeks at least.

[48] On the basis of the above, the Constitutional Court held that twenty working days of leave per year cannot be considered as a restriction of the right guaranteed by Article XVII (4) of the Fundamental Law. This period is provided for in Section 2 (4a) of the Act on Public Employment and therefore does not violate Article XVII (4) of the Fundamental Law.

[49] Within the meaning of Section 116 of the Labour Code, the basic leave is also twenty working days per year. As there is no difference between the basic leave granted in a public employment relationship and in an employment relationship, the provision at issue does not infringe Article XV of the Fundamental Law.

[50] On this basis, the Constitutional Court dismissed the petition in this part.

Budapest, 5 December 2017

Dr. Tamás Sulyok, Chief Justice of the Constitutional Court

Dr. István Balsai, sgd., Justice of the Constitutional Court

Dr. Ágnes Czine, , sgd., Justice of the Constitutional Court

Dr. Egon Dienes-Oehm, sgd., Justice of the Constitutional Court

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Dr. Ildikó Hörcher-Marosi, sgd., Justice of the Constitutional Court

Dr. Béla Pokol, sgd., Justice of the Constitutional Court

Dr. László Salamon, sgd., Constitutional Judge

Dr. Balázs Schanda, sgd., Justice of the Constitutional Court

Dr. István Stumpf, sgd., Justice-Rapporteur, Justice of Constitutional Court

Dr. Marcel Szabó sgd., Justice of the Constitutional Court

Dr. Tamás Sulyok, sgd., Chief Justice of the Constitutional Court on behalf of Dr. Péter Szalay, Justice of the Constitutional Court, prevented from signing

Dr. Mária Szívós, sgd., Justice of the Constitutional Court

Dr. Varga Zs. András, sgd, Justice of the Constitutional Court