

U. no: 112/2003-0-0

Date: 06/30/2004

Preface

The Constitutional Court of the Republic of Macedonia, by virtue of Articles 110 and 112 of the Constitution of the Republic of Macedonia, and Article 70 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no. 70/1992), on its session held on June 30, 2004, adopted the following

DECISION

Text

1. Article 171-b paragraph 5 of the Law on Health Care ("Official Gazette of the Republic of Macedonia", no. 38/1991; 46/1993; 55/1995; 41/2002; 10/2004) is hereby REPEALED.

2. This decision has legal effect from the day of its publication in the "Official Gazette of the Republic of Macedonia".

3. Stamen Filipov from Skopje submitted an initiative to the Constitutional Court of the Republic of Macedonia for instigating a procedure for appraisal of the constitutionality of the provision marked in point 1 of this Decision, by reasons that the contested provisions violate several constitutional provisions, namely: Article 8 paragraph 1 lines 3 and 4, Article 32 paragraph 5 and Articles 38 and 51 of the Constitution of the Republic of Macedonia.

Namely, the stipulation that the matters and tasks in paragraph 1 of the contested article, "to be determined by a general act of the healthcare organization", in the first place violated Article 32 paragraph 5 of the Constitution of the Republic of Macedonia, according to which the exercising of the rights of employees and their position cannot be stipulated by a general act, but only by law and collective agreement. The submitter of the initiative also connects this solution to the provision of Article 38 of the Constitution, according to which, the conditions for exercising the right to strike in the armed forces, the police and the administrative bodies can only be restricted by law and in no case by a general act.

4. At its session, the Court determined that according to Article 171-b paragraph 1 of the Law, for the purpose of removing the harmful consequences that can arise from non-provision of health care to citizens during a strike, the administrative body of the health care facility is obliged to provide emergency medical assistance and minimal operation of all organizational parts in the working process. According to the contested paragraph 5 of this Article, the matters and tasks of paragraph 1 of the contested article are determined by the health care organization by a general act.

5. According to Article 8 lines 3 and 4 of the Constitution of the Republic of Macedonia, the rule of law and the division of the state authority into legislative, executive and judicial are fundamental values of the constitutional order of the state.

According to Article 32 paragraph 5 of the Constitution of the Republic of Macedonia, the exercising of the rights of the employees and their position are stipulated by law and collective agreements.

According to Article 38 of the Constitution of the Republic of Macedonia, the right to strike is guaranteed. The conditions for exercising the right to strike in the armed forces, the police and the administrative bodies can be restricted by law.

Article 39 of the Constitution stipulates that every citizen is guaranteed their right to health care, whereupon according to paragraph 2 of this Article, the citizen has the right and the duty to protect and promote their own health and the health of others.

According to Article 3 of the Law on Health Care, everyone has the right to health care, whereupon Article 9 defines health care activity as an activity of special social interest.

The contested provision is positioned in Chapter III of the Law on Health Care, titled "Health care in exceptional conditions and during strike".

Article 171-a of the Law stipulates the conditions under which the right to strike can be exercised within health care organizations. Thus, in accordance with this provision, those employed in the health care facilities can exercise the right to strike on the condition that they do not jeopardize the life and health of citizens in need of health care. This means that the Law does not bring into question the right to strike of employees in health care facilities, as a right guaranteed by the Constitution that arises from the employment. As a right guaranteed by the Constitution, the strike can be exercised on the condition that it does not jeopardize the life and health of citizens in need of health care.

In addition, the uncontested part of the provision in Article 171-b of the Law stipulates that during a strike, the administrative body of the health care facility is obliged to provide two basic functions of the organization: emergency medical assistance and minimal operation of all organizational parts in the working process. The reason for ensuring these elements of health care is to remove the possibility of occurrence of harmful consequences that could arise from non-provision of health care to citizens during the time of a strike.

In the contested paragraph 5 of this Article, the matters and tasks of paragraph 1 of this Article are determined by a general act of the health care facility.

The Court finds that the Constitution does not exclude the possibility that the manner of exercising particular rights and freedoms be stipulated by law, in order not to bring into question the exercising of other rights and freedoms. In relation to health care and in this particular case, the Law guarantees and stipulates the right to strike of health care professionals, and yet determines that this right must not be of harm to other freedoms and rights of the individual and the citizen, which in this case is the right to health care, i.e. the life and health of citizens in need of health care.

By virtue of the above stated, the Court marked that there is no constitutional barrier to stipulate the means of exercising the right to strike by law, i.e. the means of behavior of the subjects in exercising of this constitutionally guaranteed right, at the same time ensuring that the stipulation of these relations does not bring into question the constitutionally guaranteed right to strike, but also the other constitutionally guaranteed rights and freedoms. This notion is derived from the obligation of the health care professionals to provide emergency medical assistance and minimal operation of all organizational parts in the working process during strike, in order to remove the possibility of occurrence of harmful consequences that could arise from non-provision of health care to citizens during the time of a strike.

Health care activity and the health care itself belong to the group of activities that the law defines as activities of special social interest related to their primary meaning for the lives and health of people. Considering the characteristics of health care, as mechanism that secures the exercise and protection of what is inextricably bound with the human existence, it is quite clear why the legislator determined it as an activity of special social interest. Hence, the state is undertaking measures in terms of creation and provision of conditions for health care to be exercised at all times and in all situations, including times of a strike. This, above all, refers to the provision of a minimal level of health protection that will eliminate, or at least reduce to a minimum, the possibilities of harmful consequences for the lives and health of people that could arise from non-provision of the health care. The strike, as a legitimate means of the workers for exercising other rights (economic and social above all), represents organized termination of work, which in its terms leads to a disturbance of the regular working process. This disturbance brings into question the needed level of health care, whereupon the legislator authorizes the health care organization to determine, by general act, all matters and tasks whose completion is necessary in order to remove all harmful consequences that could arise from non-provision of the health care to citizens during the time of a strike.

Having in consideration the enunciation of the provision from Article 38 of the Constitution of the Republic of Macedonia, the Court establishes the general character of the constitutional guarantee for the right to strike of all workers, and hence the legitimacy of health care professionals to exercise this right. Yet, according to the opinion of the Court, the establishment of the conditions under which this right can be exercised in this exceptionally important sphere of life and health of people, can only be subject to legislation, and in no case to the general act that would be brought by the health care facility itself. The Court marked that health care and its influence on the life and health of all citizens is too subtle and important, and thus the authorization of health care facilities to independently, by general act, determine these matters and tasks, the completion of which is necessary for removal of possibly harmful and negative consequences, is considered to be unacceptable. The Court marked that this is not a case of simple operationalization of the legal provision from paragraph 1 of the Article 171-b, i.e. that the general act of the organization will only further stipulate the means of implementation of what is already defined in the Law itself, but also in this case the health care facility determines the matters and tasks by a general act, i.e. by grasping into the essence of the matter, it gains the right to independently determine what must be provided in times of strike in its own general act. With this, health care facilities are given the space to determine, create or change by their own act the existing conditions under which the right to strike in health care sector can be exercised, and not to do it based on law, and due to this, the Court found that the contested provision is not in accordance with the above mentioned provisions of the Constitution of the Republic of Macedonia.

6. By virtue of the above stated, the Court decided as in point 1 of this Decision.

7. This Decision was delivered by the following composition of the Court: President of the Court Liljana Ingilizova-Ristova and judges Trendafil Ivanovski PhD, Mahmut Jusufi, Mirjana Lazarova Trajkovska, Vera Markova, Bajram Polozani PhD, Igor Spirovski and Zoran Sulejmanov PhD.

U. no: 112/2003
June 30, 2004
Skopje

PRESIDENT
of the Constitutional Court of the Republic of Macedonia

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Liljana Ingilizova-Ristova