



Self-non-self discrimination



'Sorry dude, from now you aren't one of us...'

CONSTITUTIONAL COURT has ruled that people who own shares of commercial companies are not entitled to unemployment benefit. Shareholders of limited companies, the judges said, 'take on business risks and with them the responsibility for their own welfare.' For this reason, unlike ordinary employees they are not eligible for benefits if they are made redundant.

Nikolay Gushin was fired from Vladkranpribor Ltd in January 2009. In February, the Employment Centre acknowledged he was unemployed and granted an allowance of \$200 a month. Three months later, however, it discovered that Gushin owned a small stake in another company, Micron Ltd. He was removed from the unemployment registrar and his benefits were terminated, despite the fact that Gushin did not work for the company and received dividends of only \$40 a year.

Gushin, an engineer-designer with 37 years of tenure, disposed of the shares and applied for benefits again. His registration was reinstated but this time he was nominated only \$35 a month. Now Nikolay Gushin was considered to have left his job voluntarily, not as someone who had lost it.

At the hearing in Constitutional Court, the representative of the President Mikhail Krotov said that being a shareholder is a kind of occupation by itself, and if it does not pay off it is the shareholder's problem. 'Even a loss-making company can become the source of income if it is well managed,' he said. 'Dividend is unpredictable. Today, it is 1,000 roubles a year, but tomorrow it may grow to a million. Like any business, it is a risk. And you suggest we go back to socialism'.

The representative of the Federation Council Elena Vinogradova consoled Gushin, 'you can always go there [to the Employment Centre], get free advice and use their services for a job search free of charge.'

And the representative of the Government Mikhail Barshchevsky said – well, never mind. Something about tycoons claiming benefits and that if Deripaska doesn't get paid, no one would call him unemployed.

It is ironic, though, that he mentioned Deripaska whose multi-billion empire Basic Element, deep in debt, received \$5 billion of state money, enough to pay unemployment benefits to all Russian entrepreneurs, if they all suddenly go bust, for half a year.

It is, of course, not the court's business to decide who should get support from the government. It is, however, the court's business to eliminate unjustified discrimination. Russian limited companies are legal entities separate from their members. Shareholders do not work for their companies, even though they can control them.

Judges, it seems, assumed that too many business-owners receive payments, unreported and untaxed, from their companies, and that massive benefit abuse is too probable.

Yet the problem is deeper. The state that lives off the export of raw materials and taxes on consumption doesn't understand small business, doesn't trust it and doesn't need it.

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THE APPROACH IS JUSTIFIABLE

TEXT: Evgeny Reyzman, Counsel, Baker & McKenzie

In fact, this Constitutional Court ruling will bring about hardly any changes in practice. It only confirms that the rule of Article 2 of the Law on Employment of Population in the Russian Federation (dated April 19, 1991 #1032-1) is in compliance with the Russian Constitution. (Under this rule, individuals who are founders/participants of organizations (with the exception of religious ones, charities and other funds) are recognized as employed. In other words, any shareholders of limited liability or joint stock companies are considered employed regardless of the income they receive from their participation in these companies.)

The Law equates shareholders to entrepreneurs, which in general is correct. From the standpoint of formal logic, both the rule and the Constitutional Court ruling are impeccable. This rule has actually been applied in practice at government employment centres for quite a long time. Applicants registering as unemployed are normally warned of the rule in advance and sign a statement confirming that they do not own shares.

Another issue to consider is to what extent the rule is fair socially. Many Russian shareholders who acquired shares during the voucher privatization of mid-nineties receive either nominal dividends or nothing, and they have neither the opportunity and/or a willingness to actively participate in company management so as to increase their income.

It seems that Russian lawmakers and the Constitutional Court are more concerned with possible abuses in case they try to make the Law fair to this category of shareholders. Unfortunately, in this jurisdiction such an approach is more than justifiable: the situation does not seem too terrible with regard to these "nominal" shareholders. In case they really need an unemployment allowance they would have to dispose of their shares in advance of filing an application, at least for some nominal or even symbolic price. Technically, such disposal would not be too difficult



THIS IS A CONFORMIST APPROACH

TEXT: [Dmitry Chernyy, partner, Muranov, Chernyakov and Partners \(dmitry-cherny-muranov-chernyakov-partners\)](http://dmitry-cherny-muranov-chernyakov-partners)

The view taken by the Constitutional Court in the decision №11-P of May 25, 2010 is quite controversial. The disputed rule of the Employment Act considers all founders (members) of commercial companies, without exception or qualification, as employees. The Court found that this approach complies with the Constitution. It noted, however, that the rule doesn't prevent the lawmaker from providing some forms of support to poor shareholders.

I can't agree with this approach. It is perfectly fair that well-off co-owners of companies don't receive benefits that other, less fortunate, people need. However, this isn't the question. Is it right that the law should have such a strict measure as the unqualified prohibition on all co-owners of companies obtaining benefits?

First of all, in practical terms, those who receive substantial income from commercial companies don't usually waste their time claiming a comparatively small unemployment allowance. From this point of view, the issue possibly doesn't merit such detailed regulation.

Secondly, if the lawmaker does think that successful co-owners of companies shouldn't obtain benefits, it should have set criteria so that the state could distinguish successful shareholders (because of their dividends) from their less fortunate peers.

Finally, article 2 of the law considers 'founders (members) of companies' as employed and this wording permits a wide interpretation. For instance, it is not clear whether the law affects people who signed the agreement forming a company and later left it (strictly speaking, they are 'founders' and appear as such in the United Registrar of Legal Entities).

It follows that the law is far from being perfect. If the truth be told, however, the Constitutional Court points out that the law is flawed. Yet, instead of pronouncing the ruling unconstitutional (this is what should have been done), there is only the merest mention that the lawmaker has the right to change the law with respect to poor shareholders.

The Court may have some practical reason for the decision but, from my point of view, a conformist approach like this doesn't do the law any good at all.



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