

THE PRINCIPLE OF FAVOUR IN CZECH COLLECTIVE LABOUR LAW

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Abstract: *Once rich and flourishing Czech collective labour law world has been profoundly changed during Nazi and mainly Communistic Ara, where the role assigned to collective agreements was diminished to a soft plan implementing directives of the state. After our return to democracy, it is obvious that we have to adopt not only regulations but also to re-build informal structures. The principle of favour has been allowed in Czech labour law only to a limited extent not mainly owing to a constant wave of legal reforms and statutes amendments but because it takes too much time to re-shape scholars, justices and legal practitioners educated in different legal cultures to think creatively.*

Keywords: *Principle of Favour, Trade Unions, Collective Agreements*

INTRODUCTION

Seen from Western European perspective, we cannot say that the principle of favour has been fully recognized by Czech labour law. The notion that collective agreements can derogate “in melius” from the laws or higher ranked collective agreements is still beyond Czech horizon. To start with, Czech collective employment law remains to be quite far from the Western tradition and there are three main reasons for this. Firstly, thanks to the Communist regime, trade unions lost credit.¹ Secondly, legal practitioners, educated in different legal cultures, are slowly regaining skills in creative and democratic collective bargaining. Thirdly, socialism used the legislatures to regulate working-condition-making in favour of employees in statutes and the density of statutory regulations is high. If there are collective agreements, they are mostly negotiated on plant level and agreed benefits or rights are rather modest. Even so, if we compare the state of art in totalitarian socialist Czechoslovakia, where collective agreements ought to be in accordance with laws, directives of central state apparatus and even interests of the society, and the valid Czech regulations, it is obvious that Czech legislation has substantially changed towards flexibility and social dialogue.² Collective agreements, thus, have regained its former position as a powerful negotiating tool, comparable even to an individual employment contract, which parties use to push the regulation towards their needs.³

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¹ Communists followed Nazi policy launched immediately after the rests of Czechoslovakia were under their iron control, not to say murderers hand. They managed to united trade unions under one umbrella organisation. Communists continued in the same policy as soon as they were able to cooperate with Czech local elites. After 1948, united trade unions were incorporated in to the state mechanism and continued to be so despite various attempts to reform the regime until the end of the Communistic regime.

² Cf. TOMESŠ, I., TKÁČ, V. *Collective Bargaining and Collective Agreements*. Prague: Prospectum 1993, p. 143 et seq.

³ The parties may agree on rights and duties that are beyond the scope defined by law include, for example:

- reducing working hours below the number set forth in the Labour Code of 2006;
- increasing or extending entitlements to paid leave or wage compensations; or
- extending leave of absence and subsidies for training and vocational study, and for time off owing to serious personal reasons, etc.

With that in mind, the purpose of this article is to dispel any myths regarding the Czech version of the principle of favour to outline most important specific steps that have been undertaken to move Czech collective labour law in favour of employee's individual interests and of constructive collective bargaining. According to most Czech experts, the Czech principle of favour has been forged by specific status attributed to trade unions (first section of this article) and collective agreements (second section). The Labour Code of 2006 authorises collective agreements to depart from non-mandatory rules (fourth section) and attempted to presume a better position of the employee (third section) in the process of legal actions' interpretation and application.

1. WORKERS' REPRESENTATION

In accordance with Czech law, trade unions are the only legitimate representative bodies of employees that have the right to collective bargaining. Trade unions⁴ represent all employees in labour relations, including those who are not affiliated to any union. The Labour Code of 2006 gives trade unions the right to participate in decision making,⁵ the right to co-determination, and the right to consult and gain information in matters relating to employees interests. Furthermore, trade unions enjoy a significant right of control over the observance of labour law by the employer and the right to perform controls over occupational safety.

Trade Unions unify into confederations, associations or federations. In the Czech Republic a confederation principle prevails, as it secures independence for the Trade Unions. The Czech-Moravian Confederation of Trade Unions (CMKOS) and the Association of Independent Trade Unions (ASO) are representative confederations in the tripartite Council for Economic and Social Agreement.

Additionally, there are two other types of representatives – works councils⁶ and a representative concerned with occupational safety.⁷ However, Czech law, unlike many Western

⁴ Trade unions are private-law associations. In accordance with the law, three members can establish a trade union organization or employer organization. The legislation does not set forth other criteria for association, not even a criterion of representativity. Regrettably, the day-to-day application of the new Czech Civil Code has revealed a number of shortcomings practitioners find difficult to face. The most serious obstacles in the Civil Code's bright future in labour law seem to be doubts connected with trade unions' legal personality. The Civil Code spells out that a trade union is a society (in Czech "spolek"). But trade unions find it excruciating. The main reason given for their level of contempt for new regulations on societies is a sincere restriction to their room of manoeuvre which they even consider to be violating respective ILO conventions. In fact, the Civil Code and supplementary legislation have brought many duties for societies. But the relevant Civil Code's regulations shall apply only if it is appropriate in regard to international obligations of the Czech Republic. Nevertheless, it is true that the clear border line between applicable and non-applicable regulations will be established by case law in the next 15 odd years which makes not only trade unions' legal position in collective bargaining and other negotiations highly uncertain.

⁵ The Labour Code envisions giving trade unions the right to prior consultations on proposals of labour legislation. See Section 320 of the Labour Code.

⁶ Works councils can mediate in relations between employers and employees and are called upon to enforce the right of employees to information and consultation. They have at least 3 members and at most 15 members.

⁷ These rules enabled the Czech Republic to ratify the ILO Workers' Representatives Convention, 1971 (No. 135), in October 2000.

laws, allows the parallel existence and maintenance of trade unions and works councils or other representatives by the same employer to a limited extent. The establishment of works councils is mostly conceived as an alternative solution for those situations where employees' interests cannot be defended by a trade union. Another disadvantage (taken from Czech perspective where enforceability of rights remains to be problematic) is that the law has not conferred the status of a juridical person to these other representatives. Therefore, they cannot negotiate on behalf of all employees with legal effect and cannot conclude collective agreements. The works councils have no authority to call for strikes either.

The Czech Labour Code also contains provisions for the implementation of the European Works Council Directive (Directive 94/45/EC). The European Works Council enables employees of multinational companies meeting certain conditions to have access to information regarding the company and to discuss it with the employer.

An employer is required to create conditions for employee representatives to enable them to perform their duties, in particular to provide them, in accordance with operational means and in appropriate extent, with reasonably equipped rooms, to cover costs of maintenance and operation and to provide them with background documents and information.⁸

2. COLLECTIVE AGREEMENTS

A collective agreement is a contract concluded by an employer or united employers (employer organization) and a trade union or an organization of trade unions. Czech law recognizes two kinds of collective agreements: plant collective agreements and higher-level collective agreements.⁹ Both of them are considered to be sources of law.

There is also a relatively new¹⁰ possibility of entering into so-called 'group' undertaking collective agreements – that means for more than one employer. Such an agreement may be used especially where a group of employers who form a group of a holding type will be interested in such a contract, especially in order to make some rights and duties within the group more transparent and to unite them.¹¹

Pursuant to Section 24, Par. 1 of Labour Code 2006, the trade union contracts on behalf of all employees employed by the employer in question, no matter whether they are members of that trade union (locals) or not. These employees are even prohibited from contracting out from such a collective agreement and also from declaring that they are not to be bound by that agreement.¹² If a plant agreement defines conditions provided to employees in a less favourable manner than those defined by a higher-level agreement, the

⁸ In spite of this, there are cases where employers in certain companies try to exert influence on trade union bodies, including by means of offering certain benefits to trade union representatives.

⁹ The agreements are not distinguished from each other by their content but only by the fact that the higher-level agreement may be concluded only by an employers' organization and a trade unions' organization (for more see the chapter dealing with collective agreements).

¹⁰ Since the 1 January 2007.

¹¹ See PICHRT, J., ŠTEFKO, M. *Labour Law and Industrial Relations – Czech Republic*. The Netherlands: Kluwer Law International, 2015, marg. no. 680.

¹² The Constitutional court created only a narrow exception in decision published under no. 116/2008 Coll., marg. no. 258 et seq.

latter prevails. Apart from this rule, collective agreements are no subject to superior standards. Lesser ranked agreements can overstep a higher-level agreement.

In order to legitimate a collective agreement as a unique covenant binding third persons – employees, the Labour Code sets forth that a collective agreement shall not impose duties on individual employees or diminish their accrued rights. The violation of this rule leads to the nullity of respective stipulation in the collective agreement.¹³ Despite of this general ban, there are a few provisions of the Labour Code that empowers employers and trade unions to strip employees from their rights in a collective agreement (e.g., bonuses for overtime work or parts of bonuses for night work).

At the same time, the Labour Code forbids the replacement of a collective agreement by another contract, for example by an innominate contract pursuant to the Civil Code. In some provisions, the Labour Code even reserves the possibility of negotiating a provision in the collective agreement that derogates from statutes.

The conclusion of a collective agreement is the goal of collective bargaining. There are also other forms and phases of collective bargaining which are not aimed at negotiating plant agreements or higher level agreements or their changes.¹⁴ These are considered to be a part of the social dialogue. They are not subject to legislative regulation and are, in practice, governed by the partners' procedural customs.

Collective bargaining begins when one of the parties submits to the other a written proposal for the conclusion of a collective agreement. The latter is obligated to respond to the proposal in writing within the period of seven days, and to make a statement on those parts of the proposal that have not been accepted. Rejecting the proposal as a whole is not admissible under the law, regardless of the justification. There is no general duty to begin collective bargaining. However, the Collective Bargaining Act states that no later than 60 days before the expiration of a collective agreement, the parties are obligated to commence negotiations on a new collective agreement.

The partners¹⁵ are obligated to negotiate with one another and provide any cooperation requested. A collective agreement is in force for the period explicitly specified within. To make changes or to supplement the agreement, the parties proceed in the same way as when concluding the original collective agreement.

The rights arising from a collective agreement for individual employees are claimed and satisfied like other employees' rights which ensue from their employment relationship or from agreements to work outside the scope of employment.¹⁶

¹³ Section 23 I in fine of the Labour Code.

¹⁴ According to Section 7 of the Collective Bargaining Act, the Ministry of Labour and Social Affairs may issue a ruling that a higher-level agreement starts to be also binding for employers who are not members of the employers' organization that concluded that agreement. A higher-level agreement may only be extended to employers with similar activities, and who are not committed to another higher-level agreement.

¹⁵ The identification of those who can sit at the bargaining table is a crucial factor in concluding collective agreements. For higher-level agreements, it is frequent that the employees' representatives face the problematic absence of competent bodies for collective bargaining within the employers' organizations. That concerns instances where employers' organizations have not been established in accordance with law, or in case they are (or they plead to be) unable to conduct collective bargaining because their articles of association do not give authorization for it (or that authorization is restricted to certain members of the organization and has to be renewed on a case by case basis, etc.).

¹⁶ Section 25 Par. 4 of the Labour Code.

3. MANDATORY PROVISIONS

The democratic revolution in 1989 and the subsequent fundamental changes in the political, social and economic life of society exposed the insufficiency of the existing Czechoslovakian Labour Code of 1965. There have been more than 50 amendments, but the basic framework has remained the same since the Communist era. Therefore, the government decided to develop a new Code that would be more appropriate for the changing conditions.

One of the basic principles that the new Labour Code of 2006 should have been founded upon, was the freedom to shape the content of individual contracts and collective agreements as is suitable to parties' interests and expectations. Because of this rule, both the employer and employee should have been permitted to form their mutual rights and duties of the employment relationship in accordance with their needs to a much larger extent than before. The principle of "anything that is not expressly forbidden by the law is permitted," was set forth in the Constitution and in Article 2, Paragraphs 2 and 3 of the Charter.¹⁷ However, the final and approved version of the respective sections of the Labour Code did not satisfy anybody. It was too complicated and ambiguous. The reason was that the legislature tried to guarantee the same level of protection as in the Labour Code of 1965 and, at the same time, it wanted to widen the room to manoeuvre for both contracting parties.

Parties were not to violate or abandon the Labour Code's regulation when the provisions were declared as overriding (mandatory) rules. Even collective agreements were forbidden so. The Labour Code of 2006 set forth the following categories of rules as mandatory: provisions enumerated in Section 363, Paragraph 2; definitions of parties of labour law relations (e.g., employer, employee or trade unions); provisions referring to the provisions of the Civil Code (the delegation principle); regulations regarding remedies; provisions in which it is explicitly written; and provisions from which the law could be derived. These provisions could not be changed in whole or in part. Parties were to follow them in all their legal documents and agreements.

Subsequently, due to a complaint, the principle of the freedom of contract was examined by the Constitutional Court of the Czech Republic. The Constitutional Court profoundly simplified the principle by its intervention in 2008. Nevertheless, the Labour Code has remained to be very protectionist towards employees because collective agreements shall not violate mandatory, such as provisions the law is explicitly written, provisions from which the law could be derived and provisions enumerated in Section 363, Paragraph 2 of the Labour Code.¹⁸

After a number of changes the Labour Code finally set forth is Section 4a Par. 1 of the Labour Code that collective agreements shall not violate the rights or duties which are stated by this law (the Labour Code) or by a collective agreement as the highest or lowest acceptable.

¹⁷ The Charter of Fundamental Rights and Freedoms was adopted as an appendix of statute No. 23/1991 Collection. After the extraordinary situation of 1992, when the Charter's predecessor was abolished, the Charter was re-established on 16 December 1992 as a component of the Czech constitutional order (Manifestation No. 2/1993 Coll.).

¹⁸ The provisions concerning the freedom of contract were set forth in Sections 2 and 363 of the Labour Code of 2006 (Act no. 262/2006 Coll. as amended by decision 116/2008 Coll.).

The last important change occurred on 1 January 2014 when the new Civil Code came into force. The Civil Code brought new ethos of freedom that constitutes a novel experience for labour law regulations. The legislator considered the Civil Code to be the real restatement of private law.¹⁹ According to Section 580 and Section 1 Par. 2 of the Civil Code, mandatory provisions for collective agreements are provisions in which it is explicitly written; provisions protecting public good, good manners and status of persons. Contracting parties may derive from provisions enumerated in Section 363 of the Labour Code only in favour of the employee.²⁰ Although the Civil Code has facilitated a larger flexibility of labour law relations, the Labour Code still remains very protective of employees due to the rigidity enhanced by the ancillary act, which was designed to react to the enactment of the Civil Code. Therefore, we can only conclude that the long-term desire to reduce employees' protection just entered a new stage which does not appear to be the last one.

4. PRESUMPTION IN FAVOUR OF THE EMPLOYEE

Apart from trade unions, collective agreements and mandatory rules, the Labour law contains one more mechanism for the protection of the worker. This comes in the form of presumptions in favour of the employee when the term used in a legal action (for example, in the contract) can be interpreted in various ways. At the same time, it is important to stress that this presumption set forth in Section 18 of the Labour Code has been accepted by experts with distinctly mixed feelings. The Supreme Court of the Czech Republic is in its representations²¹ more than reluctant to apply it in practise because legal action that could be interpreted in two and more manners would be void and invalid. Scholars have found out that the legislator intended to transform a particular provision protecting consumers from the Civil Code that penalize the individual who has used the dull term for the first time.

CONCLUSION

This paper examines the level of implementation of principle of favour in the Czech labour law. We have to conclude that statutory law plays still essential role in Czech labour law. Because of suppressed role of trade unions, poor level of social dialogue and a number of statutory regulations, collective agreements are to play only a secondary role. The European social model as a dynamic modern European concept based on a well-established belief that the condition necessary to ensure permanent social peace in collective labour relations is the continuous social dialogue of the social partners and organisations repre-

¹⁹ MORÁVEK, J., PÍTROVÁ, L. (ed.). *Rule of law and mechanisms of its protection. Czech perspective*. Prague: RWW, 2015, p. 293.

²⁰ Set forth in Section 4a Par. 3 of the Labour Code.

²¹ BĚLINA, M., DRÁPAL, L. et al. *Zákoník práce. Komentář*. [The Labour Code: Commentary]. Prague: C. H. Beck, 2015. See commentary to Section 18.

senting their interests has not yet come true in Czech conditions.²² The main reason to be blame for is a lack of sufficient informal infrastructure. Scholars, justices and legal practitioners were educated in different legal cultures and it hampers their legal thinking even today.

Taken from legal perspective, the main issue is intra-connected with the definition of mandatory provisions. Czech legislator seems to be unable to widen the room of manoeuvre for contracting parties because he seems to be poisoned by the myth of his paternalistic call. Despite of all expectations, the Czech Labour Code remains to be notable for its non-emphatic reiteration of the protective rationale for the employees. On the brink of new Civil Code that came in force on 1 January 2014 it is even more peculiar. Without stable case law it is almost impossible to identify non-mandatory provisions a collective agreement is left to depart from because we do not know if courts are ready to interpret the new Civil Code as the new liberal general part of collective labour law.

²² Cf. BAGDONAITĚ, A., BLAŽIENĚ, I., PETRYLAIĚ, D., ŚWIĄTKOWSKI, A. M. The Role of Social Dialogue and Collective Agreements in Building the European Social Model. *The Lawyer Quarterly*. 2016, Vol. 6, No. 2, pp. 65–81.