

THE ROLE OF COLLECTIVE BARGAINING IN CZECH LABOUR LAW

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Abstract: *Czech collective employment law remains to be quite far from the Western European tradition. Once rich and flourishing, the Czech collective employment law world had been profoundly changed during the Nazi and mainly Communist Era, 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 had to adopt not only new democratic regulations but also to re-build informal structures. Because of suppressed role of trade unions, poor level of social dialogue and a number of statutory regulations, Czech collective agreements are cursed to play only a secondary role even in the near future.*

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

1. BACKGROUND

During the 28 years since the Velvet Revolution, we have adjusted our policy, but our labour law reforms were not able to remove the rather Eastern European collective bargaining model. It was partially because of our legal traditions. It must also be highlighted that said model has proven its robust vitality under totally different political and social conditions and is favoured by foreign corporations. When 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 have been in accordance with laws, directives of central state apparatus and even interests of the society, and the currently valid Czech regulations, it is obvious that Czech legislation has substantially changed.

Czech collective employment law remains to be quite far from the Western European tradition and there are three main reasons for this. Firstly, thanks to the Communist regime, trade unions lost credit. 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. To analyse the current situation, we start with a short description of formal structures and overall assessment of statutory regulations (first section). It is obvious that statutory law plays still an essential role in Czech labour law. Section two will analyse suppressed role of trade unions, poor level of social dialogue and a number of statutory regulations, as well as collective agreements that are to play only a secondary role. The third section deals with national and transnational collective bargaining, both of which are underestimated in Czech labour law world.

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2. LEGAL FRAMEWORK

Freedom of collective bargaining is protected in Article 27 of the Charter of Fundamental Rights and Freedoms.² According to Articles 3 and 112 of the Constitution, the provisions of the Charter maintain a unique position within the Czech legal order. In fact, the Charter has the same legal effect as the Constitution. Consequently, Czech statutes, secondary legislation, and international treaties must abide by the Charter and it can be amended only by the same approval procedure as that of the Constitution. The amendments must be agreed by three-fifths of all members of the lower house of the Parliament and three-fifths of the majority of the senators present at the time of voting (see Article 39, Paragraph 4 of the Constitution).

Article 27 of the Charter provides that in special cases the activity of trade union organisations and the activity and establishment of other organisations for the protection of economic and social affairs may be limited just by a legal regulation having the force of a statute, given the condition that this is a measure necessary to be taken in a democratic society for the protection of national security, public order or for the protection of the rights and freedoms of others. The creation of possible exceptional limitations is then also determined by Article 44 of the Charter of Fundamental Rights and Freedoms, according to which a statute can limit the rights stated in Article 27, paragraphs 1–3 for members of security forces and the armed forces (that means including the right to be a member of a trade union organisation), if this is related to the fulfilment of the service.³ The right to strike can be limited for people in professions which are essential for the protection of human life and health (according to this article of the Charter of Fundamental Rights and Freedoms).

Statutory substantial limits for collective bargaining are set forth in the Labour Code. The Labour Code authorises collective agreements to depart from non-mandatory rules. This is the most powerful negotiating tool, comparable even to an individual employment contract, which parties use to push the regulation towards their needs. The parties may agree on rights and duties that are beyond the scope defined by law, including the following for example:

- reducing working hours below the number set forth in the Labour Code;
- 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.

Some procedural provisions can be found in the Collective Bargaining Act. The act regulates certain principles of collective bargaining, the extension of higher-level collective agreements, strikes and lock-out and labour law mediation and arbitration. The Collective Bargaining Act only perceives strikes and lockouts as last resorts in settling a collective

² Charta of Fundamental Rights and Freedoms was adopted as an appendix of statute No. 23/1991 Collection. Regarding the extraordinary situation during 1992, when the Charta's predecessor of the Czech Republic was abolished, the Charta was declared again on 16 December 1992 as a component of the Czech constitutional order (Manifestation No. 2/1993 Coll.). The Charta was amended by Act No. 162/1998 Coll.

³ The law in the Czech Republic does not allow for a membership of members of armed forces in political parties, political movements and trade union organisations. As far as members of armed forces are concerned, the prohibition on being a member of a trade union organisation applies to members of the security forces.

dispute. The legislation defines a strike as a partial or total interruption of work on the part of employees. A lock-out is a partial or total interruption of work enforced by employers. A special type of strike is a so-called solidarity strike defined in the relevant legislation as an action in support of other employees who are striking in a dispute. Only the relevant trade union can declare a strike. The Collective Bargaining Act only deals with strikes (solidarity strikes) concerning the conclusion of collective agreements (Section 16 et sequence). Strikes over the fulfilment of obligations in a collective agreement are not permitted, and a collective dispute on the fulfilment of the agreement is resolved in the presence of a mediator or, should that fail, an arbitrator whose decisions may be generally reviewed in court. Other kinds of strikes, for example strikes that do not involve collective bargaining, are admissible provided they are not contrary to the Charter.

Trade unions represent that labour law provisions contained in the Labour Code and the Collective Bargaining Act are conclusive, but this idea goes against old Czechoslovakian tradition and current regulation in Section 4 of the Labour Code.

The Collective Bargaining Act distinguishes between collective disputes relating to the conclusion of a collective agreement and disputes concerning the application and enforcement of obligations arising out of an agreement – but not those relating to the claims of an individual employee. The court ruled that the Collective Bargaining Act is not the sole determiner of the right to strike.⁴ Therefore, employees may strike in cases other than those which are set forth in the law. However, they shall not abuse the right for simply personal reasons. In every case, the right must be exercised in compliance with constitutional regulation in the Charter.

2.1. Trade unions

A trade union is an incorporated association, which means it is a separate entity from its members. The union rule book, like the articles of association of a company, provides for the institutions that govern the union. Trade unions are voluntary associations. Because of the doctrine that nobody can be forced to join a union established before WWII, the closed shop had been rejected and remain to be so up to today.

In accordance with Czech law, trade unions are the only legitimate representative bodies of employees that have the right to collective bargaining. Trade unions⁵ represent all

⁴ See Supreme Court decision on 14th November 2002, file number 21 Cdo 2104/2001, published in Sb.NS 2003, No. 7-8, p. 540.

⁵ Trade unions are private-law associations. In accordance with the law, three members can establish a trade union organisation or employer organisation. 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 the new regulations on societies is a significant restriction of their room for 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.

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,⁶ 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 are generally organised on industrial lines, but not in a pattern: one union per industry and one industry per union. Firstly, both local trade unions and their upper organisations are trade unions from a legal perspective. Secondly, employees can be represented by more local trade unions at the same employer. Czech law does not recognise shop stewards; employees are represented by trade unions. There are employers with dozens of local trade unions in the Czech Republic.⁷

Additionally, there are two other types of representatives – works councils⁸ and a representative concerned with occupational safety.⁹ However, Czech law, unlike many Western legal orders, 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 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.¹⁰ Employees are entitled to time off work for union's work; all representatives are entitled to undertake these activities during working hours and not to take time off. But only trade union officials enjoy the highest protection against dismissals for trade union activities. Section 61 of the Labour Code states that a dismissal to trade union offi-

⁶ The Labour Code envisions giving trade unions the right to prior consultations on proposals of labour legislation. See Section 320 of the Labour Code.

⁷ As an example, we can mention ČEZ a.s. with 36 trade unions.

⁸ 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.

⁹ These rules enabled the Czech Republic to ratify the ILO Workers' Representatives Convention, 1971 (No. 135), in October 2000.

¹⁰ 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.

cial is to be regarded as automatically void and invalid, unless the employer has got valid grounds for dismissal and a court considers the further employment of the trade union official as unjust.¹¹ Other representatives of employees are under substantially weaker protection. This is true even for European Works Council members.¹²

There is nothing like an independence test set forth in the law. Hence, even a “house union” that is controlled by middle management or by senior executives is a trade union. Czech courts have derived a rather loose test that checks if the trade union in question protects employees’ interests, but most “house unions” are to pass it.¹³

2.2. Collective Agreements

A collective agreement is a contract concluded by an employer or united employers (employer organisation) and a trade union or an organisation of trade unions. Collective agreements must contain substantive stipulations that state norms for employees. There can be procedural parts thereof as well, but collective agreements without normative (substantive) stipulations are excluded *per se*.

Regarding the legal status of collective agreements, we have to confess that the big question from the eve of Czech labour law at the beginning of the previous century has returned in labour law and civil service law stronger than ever. The main reason for this reflection is not only the current recodification of the Czech private law that reopens the previously partly addressed question pertaining to the level of independence of labour law codification but also the new civil service act and governmental wild practice in collective bargaining. In 2016, the government used the higher-rank collective agreement to exclude a law, and a year later there was an informal ban on collective bargaining due to some ill-formulated arguments concerning governmental privileges. From the legal perspective, Czech and Czechoslovakian collective agreements were private law contracts. It changed with the Communism era. Since 1989, when Czech legal theory returned to terms such as private and public law, few scholars have published articles that collective agreements are public law agreements,¹⁴ or a mixture of private and public law.¹⁵ Based on recent court decisions, it seems clear that collective agreements are classified as contracts of private law with two signs of public law: they are sources of law and they cannot be opted out.¹⁶ Extended higher-rank agreements are considered to be public law agreements.¹⁷

¹¹ This is the unique protection guaranteed by Czech Labour Code; no other employee enjoys the same level of legal protection against dismissals.

¹² As derived by Supreme Court decision docket file No. 21 Cdo 398/2016.

¹³ Cf. Supreme Court decision docket file No. 21 Cdo 1037/2009.

¹⁴ Cf. ZOULIK, F. Problematika rekodifikace soukromého práva v České republice. *Bulletin advokacie*. 1994, No. 10, p. 10 et seq.; LAZAR, J. et al. *Občanské právo hmotné*. Bratislava: Iura edition, Bratislava, 2006, p. 38.

¹⁵ TOMEŠ, I., TKÁČ, V. *Kolektivní vyjednávání a kolektivní smlouvy*. Praha: Prospectum, 1993, p. 167; TKÁČ, V. *Od-bory, zaměstnavatelé, zaměstnanecké rady*. Košice: PressPrint, 2004, p. 264; and Supreme Court decision of 18 January 2017, file No. 21 Cdo 5763/2015.

¹⁶ Supreme Court decision of 18 January 2017, docket file No. 21 Cdo 5763/2015. Cf. Constitutional Court decision of 11 June 2003, file No. Pl. ÚS 40/02 or Highest Court in Prague decision of 22 November 1994 file No. 6 Cdo 94/94.

¹⁷ Supreme Administrative court decision file no. 9 As 329/2016–42.

Czech law recognises two kinds of collective agreements: plant collective agreements and higher-level collective agreements.¹⁸ Both of them are considered to be sources of law.

A particularly serious problem had been the inability to conclude higher-level collective agreements in the public sector and, in particular, in the sector of public administration. Public law intended to limit collective bargaining in Sections 132 and 143 of the State Civil Act for state officials, Section § 199 of the Act on Armed Civil Servants. The laws stated that civil servants could only specify terms of their service but they were forbidden to establish new benefits.¹⁹ In fact, however, collective agreements concluded by the government created few rights or benefits (e.g., enhanced privacy or extended sick days).²⁰ Afterwards, experts rightfully pointed out that the trade unions operating within the sector of public administration were able to conclude real collective agreements of a higher level by reason of the pre-election fight.²¹

There is also a relatively new²² 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.²³

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.²⁴ If a plant agreement defines conditions provided to employees in a less favourable manner than those defined by a higher-level agreement, the latter prevails. Apart from this rule, collective agreements are not 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.²⁵ Despite this general ban, there are a few provisions of the Labour Code that empower employers and trade unions to strip employees of their rights in a collective agreement (e.g., bonuses for overtime work or parts of bonuses for night work).

¹⁸ 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’ organisation and a trade unions’ organisation (for more see the chapter dealing with collective agreements).

¹⁹ Cf. KOTTNAUER, A., ŮLEHLOVÁ, H., PŘIB, J. *Služební zákon* [Civil Service Act]. Ostrava: Sagit, 2002, p. 202.

²⁰ Cf. Article III (4) of the collective agreement concluded by the Czech government in 2016.

²¹ ŠUBRT, B. Kolektivní dohoda vyššího stupně pro zaměstnance ve služebním poměru. *Práce a mzda*. 2017, No. 6, p. 51.

²² Since 1 January 2007.

²³ See PICHR, J., ŠTEFKO, M. *Labour Law and Industrial Relations, Czech Republic*, IEL. 2nd edition. The Netherlands: Kluwer Law International BV, 2015, marg. no. 680.

²⁴ The Constitutional Court of the Czech Republic created only a narrow exception in the decision published under No. 116/2008 Coll., marg. no. 258 et seq.

²⁵ Section 23 (I) in fine of the Labour Code.

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.²⁶ 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 partners²⁷ 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.²⁸

3. DECENTRALISATION AND CENTRALISATION OF CZECH COLLECTIVE BARGAINING

The main problem for the unions has been the sharp decline in union density after 1989. In short, trade unions have been losing numbers since 1989. At the end of a strong 1980s, they had almost the same number of members as the whole United Kingdom's union movement. Today, trade unions are close to the oblivion. The current percentage

²⁶ 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' organisation 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.

²⁷ 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' organisations. That concerns instances where employers' organisations 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 authorisation for it (or that authorisation is restricted to certain members of the organisation and has to be renewed on a case by case basis, etc.).

²⁸ Section 25 Par. 4 of the Labour Code.

of trade union members compared to the whole workforce is around 10 %.²⁹ There were 1627 plant collective agreements and 19 higher-level collective agreements in 2015.³⁰

As we have already discussed, one of the strong reasons is a mixed legacy. Communists followed Nazi policy launched immediately after Czechoslovakia was under iron control, not to say murder's hand. They managed to unite 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 into the state mechanism and continued to be so despite various attempts to reform the regime until the end of the Communist regime.

Although Czech law had adjusted and, like many foreign laws, does allow the parallel existence and maintenance of trade unions and works councils or other representatives by the same employer, trade unions are still preferred above all. Trade unions are the only legitimate representative bodies of employees that have the right to collective bargaining. Trade unions represent all employees in labour relations, including those who are not affiliated to any union. The Labour Code gives trade unions the right to participate in decision making,³¹ 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.

The regulation concerning the possible extension of collective agreements to employers who are not willing to conclude such an agreement has been introduced as a legal instrument to enhance the fight against social dumping.³²

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²⁹ There are no official statistics for the whole country. The last nationwide statistics published by trade unions described union density as 17 percent in 2009.

³⁰ MINISTRY OF LABOUR AND SOCIAL AFFAIRS. Výsledky z šetření Informace o pracovních podmínkách. In: *Ministry of Labour and Social Affairs* [online]. 19. 2. 2018 [2018-03-15]. Available at: <<http://www.mpsv.cz/cs/3360>>.

³¹ The Labour Code envisions giving trade unions the right to prior consultations on proposals of labour legislation. See Section 320 of the Labour Code.

³² Employers who are not bound by any collective agreement may have taken advantage of that fact (e.g. less remuneration).

³³ Regulations on extending higher-level agreements have been made more concrete by the specific measure agreed on between the government and social partners in the tripartite Council of Economic and Social Agreement ("Procedure on extending higher-level collective agreements"). According to this procedure a commission, which works at the Ministry of Labour and Social Affairs as an advisory body to the Minister, negotiates the extension of higher-level agreements. The Ministry of Labour and Social Affairs must review the content of higher-level agreements for compliance with the labour law regulations prior to extending them, and must publish its notice about extending the binding force of a higher-level agreement in the Collection of the Law.

4. CONCLUSION

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 employment relations is the continuous social dialogue of the social partners and organisations representing their interests has not yet come true in the Czech Republic.³⁴ The main reason is a lack of sufficient informal infrastructure. Scholars, judges and legal practitioners were educated in different legal cultures and it hampers their legal thinking even today.

Taken from a legal perspective, the main issue is interconnected with the definition of mandatory provisions. Czech legislature seems to be unable to widen the room of manoeuvre for contracting parties because it seems to be poisoned by the myth of its paternalistic call. Despite all expectations, the Czech Labour Code remains notable for its non-emphatic reiteration of the protective rationale for employees. On the brink of a 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 employment law.

³⁴ Cf. BAGDONAITĖ, A., BLAŽIENĖ, I., PETRYLAITĖ, 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, p. 17.