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NEWS IN LABOUR LAW FLASH NEWS
JUNE 2010

Criticism of employer as the grounds for immediate termination of employment

On 19 April 2010, the Constitutional Court passed a decision under ref. no. I. ÚS 1990/08 in which it expressed its opinion concerning the issue of admissibility of termination of employment on the grounds of criticism expressed by an employee at the expense of employer. In this case, an employee at an internal meeting sharply criticized some shortcomings in the operations and management of the employer's branch office.

The employer responded by immediate termination of the employment as his critical words allegedly could have been detrimental to the employer's interests and could be qualified as an extraordinary gross violation of work discipline.

The Constitutional Court, however, did not accept the decisions of trial courts in favour of the employer. The Court did not consider it to be a lawful ground for immediate dismissal and referred the case back to the court. The Court stated that the criticism enjoys the protection of the right to free speech, which is to be considered a constitutive element of the democratic society.

The Court also stated that every standpoint or criticism is principally admissible in respect of the importance of the freedom of speech. The freedom of speech may be restricted only in specifically defined cases on the grounds of qualified circumstances.

In the Constitutional Court's opinion, the words of the dismissed employee might have been in a certain respect detrimental to the criticized person; however, the criticism was expressed during an internal discussion held at an internal meeting, it was not published anywhere. The dismissed employee intended to point to some shortcomings in the operation and management of the branch office rather than directly and maliciously criticize someone in order to do harm.

It follows from the Constitutional Court's decision that generally any criticism would not represent a violation of employee's duties, for which the employee may be subject to sanctions. Therefore, it must be always examined within the entire wording and context whether or not the statement concerned did go beyond the limits of still being fair and whether or not it still enjoys the constitutional protection.

To conclude, should the employer judge the options as to what kind of measures could be taken against the criticizing employee, the employee's acts must be always considered in the light of the matter as a whole. The employer must always take into account any prospective harm that may be incurred to the employer; the employee's inducement that led him to the criticism and, of course, also the nature and severity of the sanction intended. Should litigation be instigated, the courts are likely to view the correctness of the employer's pursuit under the criteria stipulated by the Constitutional Court that would probably be set in jurisdiction concerning the new labour code in years to come.
Also, it should be kept in mind that the employer bears the risk that upon improper consideration the employer must pay out wages to the unlawfully dismissed employee during the whole dismissal protection period.

Contributors with above-standard income are eligible to above-standard pensions

On 16 April 2010, the Constitutional Court passed a decision under ref. no. Pl ÚS 8/07 dated 23 March 2010 through which it found the provision of Section 15 of the Retirement Income Insurance Act no. 155/1995 Coll. unconstitutional as the consequences thereof do not represent a sufficient constitutionally guaranteed right to an adequate material support pursuant to Art. 30 clause 1 of the Chart of Fundamental Rights and Freedoms and leads to inequality between various groups of the pension recipients.

Pursuant to Section 15 of the Retirement Income Insurance no. 155/1995 Coll., the pensions consist of two components, i.e. a fixed basic amount and a percentage amount which is dependent of the beneficiary's income. Up to a certain level, the basic amount, i.e. the average monthly income of the beneficiary in the period concerned, is counted towards the pension in full amount; once the limit is exceeded, the pensions becomes significantly lower.

A plaintiff, an ex-judge, filed an administrative complaint against the decision on pension allowance of the Czech Social Security Office which assessed him a disability pension for 2006 amounting to CZK 13,346.00 despite the fact that during 1986-2005, i.e. prior to the occurrence of the accident due to which he had become disabled, his average income was CZK 68,635.00 (not only at that time it was considered non-standard income). Therefore, his disability pension for 2006 was equal to 19% of his original income. The plaintiff he also pointed to the fact that in 2004, an average pension equaled to 44% of the gross average income. The Regional Court in Ostrava agreed with the plaintiff and proposed that the Constitutional Court review the provision of Section § 15 of the Retirement Income Insurance Act.

According to the Constitutional Court, the adequacy of the constitutionally secured material support needs to be interpreted in such a way that allows him/her a social dignity of existence but also with respect to the previous status of the insured person as a contributor of the funds from

which the material support is being provided.

The ruling passed by the Constitutional Court does not abolish Section 15 of the Retirement Income Insurance Act with immediate effect but postpones the effect thereof until the end of September 2011 as to provide the government with a sufficient time space to correct the concept. By then, Section 15 remains applicable. Some speculations have already occurred as to whether or not this step would finally represent the last step leading to an extensive reform of the Czech retirement system. So far, we have only seen a minor progress.

To conclude, it is possible that this decision might finally be, in its timeframe, the last impulse that would lead to a substantial reform of the Czech pension system. Until now, just small steps were done. Also, a discussion would be renewed on contribution assessment ceiling (now internationally high sixfold of the average income).

As of 1 May 2010, inconspicuous changes in the area of coordination of social security rules with a great impact on the employers and the employees operating abroad

On 1 May 2010, Directive of the European Parliament and European Council (EC) no. 987/2009 has come into effect providing for the implementing rules to Directive no. 883/2004 dated 29 April 2004 on coordination of social security rules. Both Directives are to bring many changes and are directly applicable in the member states.

It generally applies that the contributions into the social security system and health insurance should be paid into the system of the state in which the employee is employed. Since the observation of this rule is not always reasonable, there are several exceptions from the rule.

Secondment of employee

One of the exceptions from the rule above is the so-called secondment of employees to other EU member states. On request of an employer, the Czech Social Security Administration or any other government authority, which deals with the issue in a given member state from which the employee is being seconded, issues the so-called E101 form which documents the affiliation of the seconded employee to the social legislation of the state from which he/she is seconded. Based on this certificate, the employee may continue to contribute to the social security and health insurance in the state from which he/she was seconded.

Whereas until the end of April it was possible to request only the issuance of E101 form for one year, new provisions provide for 24-month secondments directly without the necessity to deal with an extensive administration. However, it applies even under the new amendment that the seconded employee cannot replace other person. Therefore, by continuous shifting of various seconded employees it is not possible to be subject to the legislation of another state.

Exception of performance of employment in two or more member states

In German-Czech or Austrian-Czech practices one can frequently meet cases when an employee works for more employers in both neighbouring states. In parallel employment, the employee has concluded more than one employment contracts with several employers. In order to define the respective social security system, it is newly necessary to consider whether or not the employee performs a major part of work in the respective state. This is newly defined via a specific fix percentage ratio; in order to do so, either the work hours or remuneration of the employee must be considered. If the ratio is less than 25% of the total assessment, it applies that the major part of the work is not performed there the exception shall not be applied. The burden of evidence lies with the involved employee, or his / her employer.

To conclude, given the extremely high employer's contributions and not very high social allowances in the CR (see the Constitutional Court's decision in this newsletter), the employers will seek to, as long as it is possible, leave the seconded manpower in the residential social security system. Newly, it is without any difficulty for the employees to be seconded for more than two years. Further, granting of an exception for more than three and maximally up to five years is further subject to decisions of the chronically underfinanced social security authority. Also, for employees working long-term in Czech subsidiaries, the volume of such an activity must be better documented since 1 May on the basis of their activities in both countries.

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