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The Terminal of Marriage in Czech Labor Code

Abstract: This paper deals with arguments defending the purpose of the existence of the provision of Section 318 of Act No. 262/2006 Coll., Labor Code. Both the arguments of legal scholarship and arguments expressed in the explanatory memorandum to the Acts in question are analyzed. This text further presents arguments in favor of repealing this provision which prohibits the performance of dependent work between spouses (registered partners). We base our arguments on international and European Union¹ legal sources, in particular on anti-discrimination legislation prohibiting discrimination on the basis of marital status. In the context of Czech law, the relationship between the provision of Section 318 of the Labor Code and constitutional standards and other statutory norms is described and analyzed. A specific regulation contained in Act No. 234/2014 Coll., Civil Service Act is also presented and considered. The authors point out the absence of similar legislation in legal orders of other Member States of the European Union. In conclusion, the authors express and defend their legal opinion on the obsolescence of the discussed provision of the Labor Code and present suggestions *de lege ferenda*.

Keywords: marriage in the Labor Code, obsolescence of the provisions of Section 318 of the Labor Code, prohibition on employment between spouses and registered partners, proposals *de lege ferenda*

1 Hereafter referred to as the EU.

Introduction

An amendment² to the current Labor Code³ was passed by the Chamber of Deputies. The Act was promulgated on 26 June 2020 in the Collection of Laws, No. 285/2020 Coll. The voices raised in previously written considerations and expert opinions calling for the repealing of the institute prohibiting employment between spouses and registered partners has not been heard again. This paper shall therefore build on the debate, which has already started in the legal community and beyond⁴, and contribute with further arguments in favor of repealing the discussed provision. The present paper (1) points out insufficient argumentation defending the presence of this institute in the LC; (2) describes how this issue is regulated by European Union law; and (3) also presents selected foreign legislation. Attention will also be paid to (4) the issue of specific legislation in the Civil Service Act⁵.

The authors have used the content and critical analysis method; they studied expert opinions on this issue and relevant legislation while taking their own stand on the legal questions raised. The method of horizontal comparison was also used when the authors compared selected foreign legal systems, together with a synthetic method which helped the authors to transform the acquired pieces of information into their final opinion.

1. Insufficient Argumentation in Defense of the Existence of the Prohibition on an Employment Relationship between Partners

The institute of the prohibition on the existence of an employment relationship between spouses made its first appearance in the Czech legal system in the provision of Section 4, para. 2 of Act No. 105/1990 Coll., On the Private Entrepreneurship of Citizens. However, no reasons explaining the introduction of such a restriction have been presented by the legislator. A few years later, the same restriction was taken over by the amendment to the L CoF 1965⁶ into the labor law regulation, again without proper justification. Subsequently, this prohibition was enshrined in the currently

2 The Chamber of Deputies' draft No. 689/01, part No. 1/8, <https://www.psp.cz/sqw/text/tiskt.sqw?O=8&CT=689&CT1=0> (07.06.2020).

3 The Act of 21 April 2006 – Labor Code (Collection of Laws 2006, No. 262, as amended) (hereafter referred to as LC).

4 For example, S. Eichlerová, K zákazu zaměstnávání mezi manžely (a též mezi registrovanými partnery), "Právní rozhledy" 2008, vol. 12, <https://www.beck-online.cz/bo/chapterview-document.seam?documentId=nrptembrhbpxa4s7gez6427gqztg&groupIndex=0&rowIndex=0> (07.06.2020).

5 The Act of 1 October 2014 – Civil Service Act (Collection of Laws 2014, No. 234, as amended) (hereafter referred to as CSA).

6 Provision of Section 629 of Act No. 65/1965 Coll., LC.

valid LC. The only argument presented by the legislator was the civil regulation on communal property of spouses⁷, which is in the eyes of the legislator legitimate cause for the prohibition on an employment relationship between spouses⁸.

Therefore, it was surprising that after the adoption of the Registered Partnership Act⁹ the provision of Section 318 of the LC was amended and the prohibition on the existence of an employment relationship was extended to registered partners. The legislator had probably already forgotten that the prohibition had been originally justified by the civil regulation on CPS and that the extension of such a prohibition to registered partners therefore lacks any explanation.

The absurdity of such legislation is further highlighted by the fact that while the LC prohibits partners from entering into an employer–employee relationship and prevents them from performing dependent work for each other¹⁰, other legal norms provide the partners with a number of other options enabling them to cooperate. The legal literature recalls that the employment prohibition was imposed by the legislator to protect the family’s income, to protect the equality between partners and reference is also made to the above-mentioned CPS regime¹¹.

Such arguments on income protection and the equality of partners, however, cannot hold up in the situation when one of the partners can establish a corporation or when both partners are employees of the same employer. If we consider that a personal ways must act on behalf of a legal entity (such as a corporation), we conclude that one of the partners will in fact hold the position of the leading employee¹² and will task the other partner as a regular employee. In addition, a similar “inequality” may occur in a contractual relationship established by a contract for work¹³ or any other type of contract contained in the CC¹⁴, which partners may conclude under the current regulation.

The argument that the prohibition on the existence of an employment relationship between partners is necessary to protect the family income is refuted

7 In the text hereafter referred to as CPS.

8 Explanatory Memorandum to Government Proposal No. 1153/0 for the promulgation of the LC. In: CODEXIS [legal information system], ATLAS Consulting (02.06.2020).

9 The Act of 26 January 2006 – Registered Partnership Act (Collection of Laws 2006, No. 115, as amended) (hereafter referred to as Registered Partnership Act).

10 Provision of Section 2 of LC.

11 L. Jouza, Manželé na jednom pracovišti, “Bulletin advokacie” 2019, <http://www.bulletin-advokacie.cz/manzele-na-jednom-pracovisti?browser=mobi> (05.06.2020).

12 Provision of Section 11 of LC.

13 P. Podrazil, K zákazu výkonu závislé práce me zimanžely a registrovaný mipartnery, “Právní rozhledy” 2018, vol. 20, <https://www.beck-online.cz/bo/chapterview-document.seam?documentId=nrptembrhbpxa4s7giyf6427g4ydo&groupIndex=0&rowIndex=0> (07.06.2020).

14 The Act of 3 February 2012 – Civil Code (Collection of Laws 2012, No. 89, as amended) (hereafter referred to as CC).

by the fact that the term “family” is not defined in law and therefore a family may consist of an unmarried couple. However, these partnerships are not affected by the provisions of Section 318 of the LC, although there is no reasonable cause why partnerships should be exempted from such a prohibition.

At this point, it is also worth noting that the legislator partially mitigated the application of the employment prohibition through the provisions of Section 700 et seq. of the CC, in which the family business institute is defined; under this regime family members, including spouses, can work together. The issue of this regulation is that the registered partners have been excluded completely by the legislator and that this represents just another bead on a necklace of unequal legal regulation between marriage and a registered partnership¹⁵.

As we have already mentioned, in favor of maintaining the prohibition on employment between spouses, a reference is further made to the existence of CPS between them. However, such an argument cannot hold up for the following two reasons:

- 1) Communal property does not arise between registered partners under currently valid legal regulation (see above)¹⁶.
- 2) The regulation of the CPS is based on the autonomy of the will of the spouses to adjust property relations between them according to their wishes. It is therefore by no means logical to limit their autonomy of will through provision of Section 318 of the LC. As Eichlerová points out, the analyzed prohibition “becomes an excess of contractual freedom, on which not only the concept of the Labor Code rests, but also private law... in general”¹⁷.

2. The Constitutional, Statutory and Supranational Legal Framework

Under binding international law, discrimination on the grounds of marital status is prohibited. Such a normative requirement arises and can be interpreted from the Convention on the Elimination of All Forms of Discrimination against

15 R. Zapletal and M. Blažek, Selected Impacts of the Possibility to Enter into Marriage by Same-Sex Couples Manifesting in the Area of the Czech Social Security Law, (in:) Z. Králíčková, M. Kornel and J. Valdhans. Dny Práva 2018 – Days of Law 2018. Part I. – Marriage for all? Brno 2019, pp. 7–36.

16 M. Švejdová, Zastřené pracovní právní vztahy, Advanced Master's thesis, Law Faculty, Masaryk University, Brno 2014, [http://is.muni.cz/th/107751/pravf_rl/\(05.06.2020\)](http://is.muni.cz/th/107751/pravf_rl/(05.06.2020)).

17 S. Eichlerová, K zákazu, *op. cit.*, or see R.W. Fetter, Zaměstnávání osob blízkých (a zákaz vzájemného zaměstnávání manželů), “Epravo.cz” 2018, [https://www.epravo.cz/top/clanky/zamestnavani-osob-blizkych-a-zakaz-vzajemneho-zamestnavani-manzelu-106907.html\(05.06.2020\)](https://www.epravo.cz/top/clanky/zamestnavani-osob-blizkych-a-zakaz-vzajemneho-zamestnavani-manzelu-106907.html(05.06.2020)). Translation by the authors of this paper from the Czech original.

Women (Article 11)¹⁸, the Universal Declaration of Human Rights (Article 2)¹⁹ and the International Covenant on Economic, Social and Cultural Rights (Article 2)²⁰. In accordance with the international standards, the regulation is further elaborated at the level of EU law where the agenda of anti-discrimination regulation occupies one of the most prominent positions, as evidenced by a vast number of EU directives dealing with this area of law.

However, none of these EU directives contains a provision prohibiting mutual employment between partners, or from which such a prohibition could at least be inferred. Eichlerová presents an opinion that the starting point for the Czech legislator came from Article 5 of Protocol No. 7 to the European Convention on Human Rights²¹, which enshrined equality between spouses. At this point, we agree with Eichlerová's opinion²² that the legislator misunderstood the provision, which was reflected in the LC in a very unfortunate way. This is also apparent from the fact that among other EU Member States, a far less strict prohibition on work performance between partners is applied, namely the prohibition on the direct management of the work process between partners in the public sector. However, there does not exist a prohibition on mutual employment between partners within the private sector.

So far, the Constitutional Court of the Czech Republic has made only one indirect comment on this institution in which it stated that there might be a legitimate doubt about the justification of such a prohibition²³. The prohibition may violate Article 1 of the Charter of Fundamental Rights and Freedoms²⁴, which states that people are equal in dignity and rights, and Article 3 of the Charter, which guarantees fundamental human rights and freedoms to everybody without distinction. Similar can be noted regarding compliance with such a prohibition in Article 26 of the Charter, which provides everyone with the freedom to choose a profession freely, which also includes the right to freely perform dependent work in an employment relationship.

18 P. Podrazil, K zákazu, *op. cit.*

19 S. Eichlerová, K zákazu, *op. cit.*

20 See for example Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (O.J. L 204/23, 26.07.2006, pp. 23–36), Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (O.J. 180, 19.07.2000, pp. 23–27) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (O.J. 303, 02.12.2000, pp. 79–85).

21 European Convention on Human Rights as amended by Protocols Nos. 11 and 14 and Protocols Nos. 1, 4, 6, 7, 12, 13 and 16 from November 11, 1950.

22 S. Eichlerová, K zákazu, *op. cit.*

23 The Judgment of the Constitutional Court of 12 July 2011, II ÚS 231/10, <http://nalus.usoud.cz/Search/GetText.aspx?sz=2-231-10> (05.06.2020).

24 Hereafter referred to as the Charter.

These values are further elaborated in the anti-discrimination legislation. The provision of Section 16 para. 2 of the LC prohibits discrimination, inter alia, on the grounds of marital and family status in employment relationships. The provision of Section 318 of the LC is thus in direct conflict with the anti-discrimination law. Such a conflict may be considered as an internal inconsistency of the LC.

Considering the above-presented international and constitutional norms, and insufficient arguments provided by the legislator justifying the prohibition contained in the provision of Section 318 of the LC, we must conclude that the values protected by anti-discrimination law must prevail before the prohibition contained in the provision of Section 318 of the LC. Moreover, based on the argument presented in this paper, we claim, regarding other effective norms that are part of the Czech legal order, that provision of Section 318 of the LC is obsolete and therefore partners can perform dependent work for each other in an employment relationship.

Even if the above-stated conclusions on obsolescence and unconstitutionality were not confirmed, it is also necessary to point out that the LC does not mention the formalization of a marriage or a registered partnership as one of the reasons for termination of an employment relationship, but only states that an employment relationship cannot exist between partners. It is appropriate to ask about the consequences. Legal opinions generally incline to the conclusion that the employment relationship is terminated by law on the day of the marriage or registered partnership. The reason for the termination of the employment relationship is the factual impossibility of further fulfillment of the employment relationship, as the LC prohibits further performance. Therefore, the obligation is terminated pursuant to the provision of Section 2006 et seq. of the CC due to the subsequent impossibility of performance²⁵.

From the perspective of labor law, however, we encounter several problems. The main problem is: Can the provisions on the subsequent impossibility of performance be applied in labor law? Furthermore, the LC does not contain a procedure for cases where, for example, a marriage or a registered partnership is invalid, which raises further questions about the existence of the relationship.

3. Legislation in Poland and Slovakia

3.1. Poland

Unlike the Czech legislation, Polish legislation does not prohibit employment between spouses. The absence of a prohibition on mutual employment between

25 A. Kottbauer et al, *Zákoník práce – Komentář s judikaturou*, Podle stavu k 1. lednu 2012, včetně novely účinné k 1. dubnu 2012, Prague 2012.

spouses is based on the provision of Section 10 of the Kodeks pracy²⁶, which provides everyone with the right to choose his/her job freely, thus reflecting not only the right of the employee to choose his/her employer without further limitation but also the right of the employer to choose his/her employees freely upon his/her consideration²⁷.

A similarity between both legal orders can be found in the case of employment within a state or municipal administration. Similarly, to the Czech regulation in the CSA, when employed by such an employer, the spouses cannot be in a relationship of direct superiority and subordination to each other. The prohibition on direct superiority and subordination in Poland also applies if the employer is a university, upon provision of Section 118 (7) of Act. No 164, para. 1365, on Higher Education Institutions. However, such a provision shall not apply if the superior position is based on an election.

3.2. Slovakia

The prohibition on mutual employment between spouses was initially enshrined in the provision of Section 12 of the Slovak Labor Code²⁸. This provision applied in the case of establishing the employment relationship after marriage. Such a prohibition was justified by the same arguments as in the Czech Republic, i.e., the existence of CPS²⁹, the principle of equality and also the existence of a mutual alimony obligation between spouses³⁰. However, the provision in the Slovak Labor Code was repealed relatively soon and, since July 1, 2003, Slovak legislation does not contain such a prohibition and a mutual employment relationship between spouses may be established.

Nevertheless, some authors incline to the conclusion that an employment relationship between spouses is still prohibited, because Slovak Act No. 36/2005 Coll., On the Family, contains the principle of equal status between spouses. Any relationship of superiority and subordination, including the relationship constituted under labor law regulation, is therefore excluded on the basis of the principle of equality, thus the regulation in the Slovak Labor Code was superfluous³¹.

26 The Act of 26 June 1974 – Kodeks pracy (Dz.U. z 1998 r., No. 21, item. 94), <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19740240141/U/D19740141Lj.pdf> (11.06.2020) (here after referred to as Kodeks pracy).

27 W. Mazur, Mąż i żona w jednej firmie, „Prawo pracy” 2015, <https://hrpolska.pl/prawo-pracy/prawo/m-i-ona-w-jednej-firmie> (11.06.2020).

28 The Slovak Act of 2 July 2001 – Labor Code (Collection of Laws 2001, No. 311, as amended) (hereafter referred to as Slovak Labor Code).

29 Called “bezpodielové spoluvlastníctvo manželov” in Slovakia.

30 Z. Macková, Závislápráca, jej znaky a poistnévztahy, (in:) Pracovní právo 2012. Závislápráce a její podoby, Brno 2012, pp. 147–148, <https://www.law.muni.cz/sborniky/pracpravo2012/files/PracovniPravo2012.pdf> (05.06.2020).

31 S. Medvedová, Aktuálny stav pracovnoprávnej problematiky, “Solen.sk”, <http://www.solen.sk/pdf/Medvedova.pdf> (09.06.2020); similarly also Z. Macková, Závislápráca, *op. cit.*

4. Specific Regulation in the CSA

The CSA deals with the regulation of the legal relationships of civil servants³². The provision of Section 43 (1) of the CSA stipulates that state employees “who are considered as close persons to each other may not be classified in the service in such a way that one is directly subordinate to the other or subject to their financial or accounting control”³³. The third paragraph of the aforementioned provision then recalls situations when the fact referred to in Paragraph 1 of the provision occurs after the establishment of the civil service relationship. According to the stated norm, the civil service organization is obliged to ensure a change in the working relationships of a civil servant so that, for example, two colleagues entering a marriage are not in a superior / subordinate relationship with each other³⁴. A close person means just the spouse or the registered partner³⁵. Considering the public sector, the existence of such a norm is easier to defend. The value of transparency in public administration is protected and the legislator’s effort to prevent mutual financial and accounting control between life partners is also justifiable.

In conclusion to this part, the *de lege ferenda* proposal of the authors to the legislator is to keep such a regulation only in relation to civil servants in the CSA, where such a prohibition is justified by the arguments about control of the exercise of public (state) power and its transparency. The prohibition should also apply to all family members, in respect to close persons who could be in a direct relationship of superiority and subordination, and not only to spouses and registered partners as the current legislation prescribes. In this particular situation, the reason behind such a provision is not protection of CPS, as stated in the context of such a prohibition in LC, nor family income or the aim to maintain equality between partners, but the protection of the public interest, public finances and public administration management.

Conclusion

The arguments leading to the conclusion that the prohibition on employment between partners should be repealed are stronger and more persuasive than those defending the status quo. This institute encounters an international, EU and constitutional legal framework as well as the Czech private law principle of the autonomy of will of the contracting parties and the aim of labor law to strengthen the

32 Provision of Section 1 of the CSA.

33 Provision of Section 43 (1) of the CSA.

34 Similarly L. Jouza, Manželé, *op. cit.* or R.W. Fetter, *Zaměstnávání, op. cit.*

35 Provision of Section 22 of the CC.

flexibility of labor relations³⁶, yet without neglecting the protection of the employee. Employees should, however, be protected only in situations where such a need for protection exists. The employers should not be the addressees of the regulation, which is insufficiently argued by the legislator and upon which there is no demand from the side of employers or employees.

As we argued above, the provision of Section 318 of the LC is even obsolete with regard to the anti-discrimination law regulation. Despite it being ineffective today, the legislator should remove such a provision from the legal order as soon as possible to provide the addressees with necessary legal certainty. We firmly believe that our work in this paper contributes to strengthening the arguments leading to the abolition of the described institution, and that in the future the voices of labor law experts will not be overlooked by the Czech legislator. The law should reflect social reality. Irrational prohibitions should have no space in our legal order.

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36 P. Podrazil, *K zákazu, op. cit.*