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Basic Principles of Labour Law

Unification of labour law at the European level has been continuing. In the Czech Republic, a new Civil Code is being prepared as well. Therefore, I consider useful to think shortly about the basic principles that are typical for labour law and that should determine its future direction. We can thus contribute to the discussion about implementation of the Lisbon Strategy aim – achieving sustainable economic growth with more and better jobs.

It must be said that the basic principles should create an important theoretic basis for interpretation and use of other special provisions of the Labour Code; they should also be a regulator of use of the Civil Code provisions for employer-employee relations. The implementation of the principle “whatever is not prohibited is permitted” and the assessment whether we can deviate from given provisions or not must also be based on the said principles. The nature of given provisions must be assessed mainly from the point of view of the basic labour law principles accomplishment. By no means, the given principles can thus be considered to be declarative sentences only but they are of key importance for interpretation and application of other provisions of the Labour Code and Civil Code to employer-employee relations.

The labour law principles should not be a mere list of employer’s duties without specifying general rules that should be obeyed by an employee during his job performance (such as personal work performance and/or conduct in the employer’s interest during the work performance). The principles should neither be of a declarative nature¹, trying to describe the aim of the labour law (such as care for employer-employee relations). On the other hand, the principles should neither be specific rules relating certain labour-law segment (such as working time, temporary assignment etc.).² Finally, the principles should neither be of limiting and/or prohibitory nature that forms neither any space for parties’ conduct nor develops their conduct. From the point of view of flexicurity,³ the principles would prevent unilaterally the exercise of the parties’ contractual will.

¹ Cf. Bělina M.: *Zákoník práce (Labour Code)*, C.H. Beck, 2008, Praha, p. 51

² Cf.: Svitková, V., Bělina, M.: *Splňuje nový zákoník práce legitimní očekávání? (Does the new Labour Code meet the rightful expectations?)* Právní rozhledy, 2007, no. 2, pp. 43-50

³ Flexicurity is a term used for basic approach to the construction of an employee’s position in his employment regarding his social background. The term itself is composed of the words “flexibility” and “security”, i.e. combination of freedom and flexibility on the one hand, and protection and security on the other hand. Cf. Wilthagen, T.: *Flexicurity: a new paradigm for labour market policy*, Discussion paper. Berlin: social science research centre, 1998.

Principles contained in a legal regulation should be the key rules of general nature upon which the labour law is based. Not only the more specific provisions of the Labour Code, but also the Civil Code provisions used in a subsidiary way should be interpreted and applied according to these principles. No summary of declarations or specific duties should be involved but a balanced set of rules creating the conditions of an employee's work performance (so called "dependent work") for an employer and in return for consideration.

The main principles of labour law follow from the principle of the Civil Code subsidiarity. In this context, the Labour Code would only determine special principles that are of crucial nature for labour law. By such determination, general principles of civil law are modified (e.g. equality of parties is modified by an increased protection of employee's position); at the same time, other provisions – being the subsidiary ones – are effective for labour law as well.

1. Personal performance of employment

It is dependent work that shall be the subject matter of labour law. Dependent work shall be provided with an increased protection due to its specificities given below. Legal regulation should lay down the duty that if some work performed by a physical entity for another physical or legal entity has the character of dependent work, it should be performed in form of employment to have the protection provided by the labour-law regulations.

Legal regulation should lay down the duty for the employer to perform dependent work through his employees within their employment. Only if an activity (work) does not have the character of dependent work, the employer may provide for it not by his employees but by another physical or legal entity (delivery, subdelivery) when the mutual relations will not fall within employer-employee relations but within the Civil or Commercial Code.

Dependent work (employment), contrary to self-employment, has one typical character – superiority and subordination of entities performing the work. Work is performed in a way assigned by the employer who gives instructions by which he manages and controls the work continuously.

Dependent work is further characterized by work performance at employer's expenses (work expenses mean mainly raw materials, energy, material, tools, work aids, workplace, etc.). Dependent work is thus performed predominantly at employer's premises, at his worksite, using employer's material.

Dependent work means work performed on behalf of the employer and at his responsibility. Employees perform their work on behalf of employer and if they cause damage to a third party (customer), responsibility shall be borne by the employer. And

if some damage is caused to the employee by a third person during work performance by such employee, responsibility for it shall be borne by the employer in accordance with the employer-employee responsibility.

At dependent work, employer assigns work to employee in accordance with the time of work and rest specified in the Labour Code, being thus allowed to use the employee's working potential in time segments only and under conditions stipulated by the Labour Code. Basic characteristics of dependent work thus include organization of working hours and work assignment in working hours only, observation of working time and working shifts duration, limitation of work overtime and work at night, provision of statutory breaks at work and rest time, provision of leave of absence within impediments in work, assignment of holiday to employee, and working time record-keeping.

It is further typical for dependent work that wage is agreed as regular payment provided to employee for his performance of work. Time unit is an important factor for wage determination; i.e. wage is remuneration depending on the number of hours worked within working time. This remuneration is due periodically for a given period (one calendar month usually) and is due for work performance only, and not for other activities related to it (expenses, responsibility, independent activity). The number of hours worked and/or work standardization, and not the value of the resulting thing, are determining factors of the amount of remuneration.

2. Principle of autonomy of will

This basic principle of private law is based on the presumption that parties can enter private law relationships freely and at their own discretion, and they can arrange the most of rights and duties unless restricted by the law. This principle is represented by directory rules.⁴

3. Contractual principle “whatever is not prohibited is permitted”

This principle proceeds from the previous general private-law principle of autonomy of will and also from freedom of contract. In labour law as such, this is the greatest change due to contrary construction of individual provisions of the Labour Code. The previous Labour Code was of mandatory character and was based on the principle “whatever is not permitted is prohibited”. Parties to labour law relations thus were allowed to perform only what was stipulated or permitted by the law. Divergent provisions not allowed by the law were not permitted, not even if employer agrees so with his employee and/or trade unions.

⁴ Cf. Knappová, M., Švestka, J., Dvořák, J. *Občanské právo hmotné (Civil Substantive Law)*, Aspi. Praha 2005, pp. 51 and 52

On the contrary, the new Labour Code has been drawn using the directory principle “whatever is not prohibited is permitted”. This principle is typical for private law and strengthens markedly the freedom of contract in employer-employee relations and flexibility employing as such. Parties to employer-employee relations will be allowed to act in form which is not prohibited by any legal regulation, or in cases where it is not evident from the nature of a provision that it cannot be departed.

Through the principle “whatever is not prohibited is permitted”, the Labour Code de facto narrows down the field of flexicurity operation. There is a primary possibility for an entity to create, change or cancel his own rights and duties by his own legal activities, even though such rights and duties depart from the law unless the law restricts so. Rights and duties in employer-employee relations can be arranged in deviation from the said law if the law does not restrict (prohibit) so. Entities are thus in their employer-employee relations allowed to do everything what is not prohibited by the law. The flexible concept of the given principle can be restricted within the protective function of labour law if there is some public reason. Entities’ activities according to the principle “whatever is not prohibited is permitted” should be restricted if it follows:

- From the law (the law directly prohibits some specific activity);
- From the nature of the legal provisions;
- From the harmonization provisions (EU law implementation).⁵

4. Relation of labour-law regulations to private-law regulations

Putting labour law in the system of law as such, and particularly in private law, is the key principle pro the labour law concept de lege ferenda. Although labour law shows important protective elements and intervenes the social sphere of parties, there is no doubt that, except for the employment sphere, it itself belongs to the field of private law.⁶ It must be thus bound properly to civil law regulations.

If labour-law regulations do not form a direct component part of civil law, the subsidiarity principle should be used as a basic rule for the Civil Code use in employer-employee relations. According to this principle, the Civil Code provisions shall be used in labour law if the Labour Code cannot be used. The Civil Code shall thus be used for the employer-employee relations:

- If the Labour Code does not exclude it expressly;
- If there is no useful regulation in the Labour Code;
- In a way not contradictory to the labour-law principles.

⁵ See more details in Hůrka, P.: Využití zásady „co není zakázáno, je dovoleno“ v pracovním právu. (*Use of the principle “whatever is not prohibited is permitted” in the labour law*). Právní rozhledy, 2007, no. 23, pp. 883-887

⁶ Bělina, M. Postavení českého pracovního práva v rámci systému evropského a českého práva (*Position of the Czech labour law within the system of European and Czech law*). AUC Iuridica, 2007, no. 3-4, pp. 7-21

5. General private-law principles

The following private-law principles can be applied within the existence of labour law in private law: Good morals protection, *pacta sunt servanda* (agreements must be kept), *neminem ledere* (prevent damage), *bona fides* (in good faith), and *ignorantia legis non excusat* (ignorance of the law is no excuse).⁷

From flexicurity point of view, the principles should provide legal space for as easy creation and implementation of employer-employee relations as possible while maintaining employee's protection at work performance conditions. From the point of view of flexicurity strengthening, the labour law should be based on its own following principles:

6. Prohibition of forced labour
7. Protection of employee's legal position
8. Right for satisfactory and safe work conditions
9. Equal treatment and prohibition of discrimination
10. Proper work performance in accordance with employer's interests
11. Right for information and discussion
12. Right for collective representation

Forced labour prohibition follows from international documents on human rights. In its Article 4, the Convention for the protection of Human Rights and Fundamental Freedoms (209/1992 Sb.) stipulates prohibition of forced and compulsory labour. And the Convention concerning Forced or Compulsory Labour no. 29 defines forced labour in its Article 2(1) as any work for which a person performing such work has not offered himself voluntarily. An employee thus may perform work with his consent only. An employee may neither be ordered to work nor his work may be changed without his consent. According to the above cited sources, the only exception is that recourse to forced or compulsory labour may be had for public purposes only when the public interest outreaches the interests of private persons, i.e. employers as well.

The definition of the principle of protection of employee's legal position will be very complicated. Its classification is quite clear; its definition, however, is more problematic. The employer-employee relations, therefore, have some specificities as compared to other private-law relations. The entities' freedom of contract (agreed depart from the law) is restricted in labour law due to protection of employee who is the weaker party to the legal relation. Legal regulations thus often lay the duty to act in certain way and do not allow divergent arrangement even though the employee agrees to it. Labour law proceeds from the presumption that employee's free will (e.g. at employment contract making) can be determined economically and socially by the pressure to get the job. The labour law wants to compensate this inequality by legal protection or preferential

⁷ See more details in: Knappová, M., Švestka, J., Dvořák, J. *Občanské právo hmotné (Civil Substantive Law)*, Aspi. Praha 2005, pp. 52-55

treatment of employee who is a weaker party. The aim should be to reach equality, which, however, is not easy at all.

We proceed from the fact that for the most part, getting a job is an indispensable prerequisite for a physical entity to satisfy his own needs and needs of persons close to him. Moreover, employees perform work in organizational subordination. Their position thus should be provided with a special protection, both in terms of working conditions and increased employment stability. In the spirit of this principle, the Labour Code provisions should contain some regulations guaranteeing such position of an employee, and such provisions should be interpreted in this respect. Flexicurity in labour law should be drawn up from this principle. Employees should have the possibility to apply their individual will and to arrange more suitable conditions of their performance with their employer, just as employers should have the possibility to control employees' work performance. On the other hand, required extent of working conditions and certain stability of such gainful activity of employees would be ensured within the frame of security which could not be weakened by the parties' agreement. The requirement of satisfactory and safe working conditions is related to this principle as manifestation of security shown in the preceding sentence. This principle must be secured by mandatory legal regulations, especially in the field of safety and protection of health at work, working hours, remuneration, and care for employees.

Employers' duty to ensure equal treatment of employees during their employment follows from equal treatment of all employees. Equal treatment of employees means equal approach of employer to his employees, especially at their engagement in their employment, equal determination of working conditions, equal approach to employees in terms of remuneration and other monetary performance, or performance of monetary value, equal treatment within the frame of professional training, and equal treatment with respect to career advancement of employees.

The principle of prohibition of discrimination prohibits both direct and indirect discrimination in relation to employees. Direct discrimination means such conduct or of omission discriminating between employees directly by reason of a discrimination feature, i.e. employee is put at a disadvantage as compared to another employee just by such reason that is of discrimination nature. Indirect discrimination means such conduct or omission that is neutral as such but leads to putting some employees at a disadvantage. The discrimination features include mainly race, colour, sex, sexual orientation, language, belief and religion, political or other opinion, membership or activity in political parties or political movements, in trade unions and other associations, nationality, ethnic or social origin, assets, descent, health condition, age, marital and family status, or duties to family.

It follows from the nature of employer-employee relations that some exceptions are allowed from the principle of equal treatment of employees and from prohibition of discrimination and it is allowed to differentiate between employees. These are, how-

ever, only exceptions stipulated by the law, or if there is a material reason for such unequal treatment consisting in the given work nature; i.e. if it follows from the nature of work performed by the employee that there is a material reason which represents a crucial requirement for the given work performance and which is necessary for such work performance.

In the field of European law, the principle of equal treatment and prohibition of discrimination has been projected into EU directives dealing with partial segments of protection. These are particularly directives related to equal treatment between men and women – the Council Directive 75/117/EEC relating to the application of the principle of equal pay for men and women, the Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women in employment and training, the Directive 2002/73/EC of the European Parliament and the Council by which the preceding Directive has been amended, the Directive 2006/54/EC of the European Parliament and the Council by which equal opportunities and equal treatment of men and women in matters of employment and occupation have been implemented, the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and particularly the Council Directive 2000/78/EC establishing a general framework for equal treatment. Within the framework of equal treatment and prohibition of discrimination, I would definitely recommend general comprehensive approach leading to anchoring of this principle in a legal regulation, and particularly to its application.

The essential principle proceeding from the nature of dependent work performed by employee for his employer consists in no transfer of risk from employer's activity to employees. Employees are organizationally subordinated to their employer in performing their work; they perform their work according to employer's instructions. Their employer specifies where and when and which work will be performed; he directs the way of work implementation; work is performed for the employer and on his behalf. Employees thus can hardly decide content of their work and ensure its output and profit. Work is performed at employer's risk; employer thus bears responsibility towards third parties. Employees can incur directly neither any rights nor duties from acts of such third parties. Employees thus cannot bear direct consequences of employer's economic activities. These consequences should not be reflected in wage, liability for damage, or contractual penalty.

In the interests of balance of labour-law principles, employees should also bear some duties and have a general personal commitment to act in certain way in their legal relation. Due performance of work in accordance with their employer's interest should be their basic aim. Due performance of work should proceed from individual contractual covenants supported by employer's internal rules and his individual instructions related to work performance. However, the said principle leads employees a bit farther: they should act in accordance with their employer's interests at performing their work and in direct connection with it (principle of loyalty). Employer's interests include

successful implementation of his activities, observance of legal regulations, company representation in public, protection of health and property etc.

Regarding the nature of work performed by employees, i.e. dependent work directed by employer to employee in organizational subordination, employee must be provided with adequate information about facts relating to work performance. For this purpose and in accordance with the Directive 2002/14/EC of the European Parliament and the Council establishing a general framework for informing and consulting employees, employer is obliged to inform employees or to discuss with them directly the basic matters related to work performance.

The only principle mentioned here which is of collective nature is the employee's right to be represented. On the one hand, employee has the right to associate with other employees to protect their work interests, but also the right to be represented by his representatives in employer-employee relations. The above given principles cannot be prohibited in any way. On the other hand, there is an individual's right to be represented, i.e. manifestation of his will as a fully competent person to allow another person to create employee's rights and duties in employer-employee relations. As it follows from the judgment of the Constitutional Court of the Czech Republic, an individual has the right to decide whether or not he will be represented.

In conclusion, we must say that the list of labour-law principles in this article need not be full and comprehensive. Its aim is to point out the basic rules by which the employer-employee relations are or should be governed. There is a question whether they should be specified explicitly in a legal regulation, or whether they should only follow from its application, from the practice of the courts, and legal science. Future direction of the labour law should proceed from the said principles and partial regulations should be based on them; this is of crucial importance.

A munkajog alapelvei

A dolgozat áttekinti a munkajogban érvényesülő alapelveket, amelyek e jogág jövőbeni fejlődési irányát is meghatározzák. A munkajog elsődleges alapvető jellegzetességeként a szerző a munka függő jellegére utal, majd pedig megemlíti a felek szabad akaratának elvét és ezzel összefüggésben az „ami nem tiltott, az megengedett” elvet. A dolgozat felhívja a figyelmet arra, hogy a polgári jogi alapelveknek kisegítő jelleggel, mintegy háttérszabályként érvényesülniük kell a munkajogban. Ezt követően a dolgozat bemutatja a munkajog speciális alapelveit, így különösen a kényszermunka tilalmát, a munkavállaló védelmének elvét, a megfelelő és biztonságos munkafeltételekhez való jogot, az egyenlő bánásmód elvét, a munkáltató érdekeinek megfelelő munkavégzés kötelezettségét, a munkavállalók információhoz és konzultációhoz való jogát, valamint a kollektív érdekképviselőhöz való jogot. Végül a szerző utal arra, hogy az általa említett elvek köre korántsem teljes, ugyanakkor a jövőben törekedni kell a munkajogi alapelveknek a minél kimerítőbb meghatározására és alkalmazására.