

## Concerning Certain Aspects of the Selection of Job Applicants Pursuant to Section 30 of the Labour Code<sup>1</sup>

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**Abstract:** *The paper focuses primarily on concerning certain aspects of the selection of job applicants pursuant to the Section 30 of the Labour Code of the Czech Republic in the context of the General Data Protection Regulation. The author first discusses the selection and qualification criteria and subsequently deals also with the prohibition of discrimination and culpa in contrahendo in selecting of job applicants.*

**Key Words:** *Labour Law; Labour Code; Personal Data Protection; Selection of Job Applicants; the Czech Republic.*

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### Introduction

Compared to the Act No. 65/1965 Coll. the Labour Code, the current version of the Act No. 262/2006 Coll. the Labour Code (hereinafter referred to as the “Labour Code”) sets out in more detail (and partly indirectly) the contracting process leading to the conclusion of a contract of employment and, in addition to the prohibition of discrimination, also touches on the protection of personal data upon the commencement of employment. While the Section 30 of the Labour Code covers all the above-mentioned areas in general terms, each of these areas that, to some extent, regulate the employer’s pre-contractual steps taken prior to signing an employment contract and the employer’s autonomy of the will in selecting employees from among individuals seeking employment con-

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tract jobs, is further detailed in subsequent provisions of the Labour Code or in other legal regulations.

The basic regulatory scheme is as follows. In accordance with the concept of freedom of contract, which is typical for private law relationships, and other core values stipulated in the Article 1(1) and the Article 2 of the Constitution of the Czech Republic<sup>2</sup> and in the Articles 1, 2, 3, 7 and 10 of the Charter of Fundamental Rights and Freedoms, an employer has the right to freely select employees, unless otherwise provided by legal regulations (setting qualification requirements, etc.). In connection with the selection of an employee, the employer may only collect the personal data of individuals seeking employment contract jobs that are necessary to make the selection. The employer's conduct in terms of setting the requirements on candidates, shortlisting candidates or selecting employees from the shortlisted candidates must not be discriminatory.

The employee, on the other hand (in addition to the constitutional basis referred to above and the values stipulated in the Article 9 and the Article 26 of the Charter of Fundamental Rights and Freedoms), is free to decide whether he/she wants to commit to perform the offered work for the employer under an employment contract.

In other words, in short, the employment relationship is created upon the manifestation of the free and agreed will of the parties to the future relationship. In the case of an employment contract, this is evident. In the case of an appointment, this is achieved by the employee's acceptance of the appointment as a unilateral act of the employer, in order for the appointment to have legal consequences (to establish an employment relationship).

The process of selection of employees involves a conflict of interests and values embedded in the constitutional order of the Czech Republic. While on the part of the employer, the autonomy of the will and the exercise of the right to property are concerned, on the part of the employee, the right to the protection of human dignity, the right to privacy, the right to the protection of personal data and the right to a free choice of profession are affected.

With respect to the diversity of possible scenarios (depending, inter alia, on the nature of the position to be filled, etc.), the statutory provisions include fairly vague hypotheses. Where a statutory provision is ex-

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<sup>2</sup> See the Act No. 1/1993 Coll. the Constitution of the Czech Republic.

pressed in vague legal terms, an assessment of the facts of the case is required using constitutional tests, while reflecting on the level of interference with the values and interests affected, as mentioned above.

### **Selection of employees – requirements and qualifications**

The Labour Code (in line with the autonomy of the will) allows the employer the freedom to choose an employee from among individuals seeking employment contract jobs. Similarly to other types of contracts, the parties are expected to inform each other of the circumstances that may substantially affect the future contract, its performance and the exercise of rights and fulfilment of obligations by the contracting parties. On the one hand, the law (Section 31 of the Labour Code) requires the employer to inform the employee of key conditions of the employment (the rights and obligations arising from the employment, working conditions, remuneration conditions, other conditions arising from special statutory provisions) and, on the other hand, allows the employer (Section 30 of the Labour Code) to obtain the information on and personal data of individuals seeking employment contract jobs that are necessary to conclude a valid contract that can be performed and complied with by both parties.

In the context of the contracting process, the provision of the Section 30 of the Labour Code precedes the provisions governing the pre-contractual liability contained in the Sections 1728 through 1730 of the Civil Code and, inherently, also the provisions of the Section 1721 of the Civil Code.

From a certain point of view, the employer's freedom to choose is limited by the prohibition of discrimination and the rules governing the protection of personal data. Pursuant to the valid legislation, both the non-discrimination rules and the personal data protection rules must already be reflected in the demand for labour (advertisement showing an intention to fill a position).

In the given framework, the employer has the right to determine formal qualification requirements (education, previous experience in a similar position, etc.) and other requirements and skills (teamwork skills, stress resistance, etc.) required from the job seeker/future employee. Similarly, the employer has the right to determine the process used to make the selection. The employer may determine the selection process, including the manner in which the intention to fill a certain position and the results of the selection process will be announced.

Submitting the evidence of fulfilment of the determined (legitimate and lawful) qualification requirements, including (certified) copies of the documents underlying such qualifications, may be requested in order to admit job seekers to the selection procedure.

While the employer has the right to select from among the candidates the best one to fill the open position, the assessment of the candidate's suitability depends on the employer's judgment. In the selection process, however, the employer has to only consider the criteria and facts that relate to the future employment (formal qualification requirements and other qualifications and skills required, etc.). The employer is not obliged to inform unsuccessful candidates of the reasons why they were not selected.

The right to determine the selection process, the right to determine the qualification requirements and other conditions and criteria to be fulfilled by the job seekers/future employees as well as the method of selecting the most suitable candidate may be restricted by the statutory provisions stipulating certain qualifications for the performance of a particular job, i.e. the requirements to be met by an applicant for the given job position (full legal capacity, 18 years of age, integrity and good standing, etc.). Statutory provisions may further prescribe the procedures to be used in the selection process. An example of such deviation and restriction of the employer's freedoms is, to some extent, contained in the Act No. 312/2002 Coll. on Officials of Territorial Self-governing Units or in the Act No. 95/2004 Coll. on Conditions for Obtaining and Recognising Professional Qualifications and Specialised Qualifications for the Performance of Medical Professions of Physicians, Dentists and Pharmacists.

An employment contract cannot be signed with an applicant who does not meet the requirements for the performance of a particular job stipulated by the statutory provisions. Pursuant to the Section 580(2) in combination with the Section 588 of the Act No. 89/2012 Coll. the Civil Code, such employment contract, were it concluded, would be null and void. This does not apply if the employment contract concluded with an employee who does not meet the statutory requirements contains a condition precedent stipulating that the legal consequences associated with the employment contract (i.e. commencement of the employment) will not arise until the statutory requirements are fulfilled.

## Certain aspects of the contracting process

The Labour Code (with the exception of the Sections 30 and 31 of the Labour Code) does not regulate pre-contractual negotiations concerning the employment contract. The general provisions contained in the Civil Code are to be followed. In this context, taking into account certain typical situations, the following should be pointed out.

Job advertisements, such as “Driver jobs available” or “Chefs needed, starting from March 1” etc., cannot qualify as a proposal to conclude an employment contract pursuant to the Sections 1731 et seq. of the Civil Code or a public promise pursuant to the Sections 2884 et seq. of the Civil Code.

The provisions governing the public promises cannot, inherently, apply to the conclusion of employment contracts. Considerations on the application of the provisions governing the public competition for the best bid (Sections 1772 through 1779 of the Civil Code) and the public offers (Sections 1780 through 1784 of the Civil Code) are merely theoretical.

The statutory provisions governing preliminary contract to conclude a future contract (Sections 1785 through 1788 of the Civil Code), on the other hand, as well as the provisions on pre-contractual liability (*culpa in contrahendo*) pursuant to the Sections 1728 through 1730 of the Civil Code may be used.

*Culpa in contrahendo*. Similarly to other contractual obligations, the general principle of fairness (Section 6 of the Civil Code) shall apply in the context of pre-contractual negotiations concerning an employment contract. The principle, together with the concept of autonomy of the will (specifically the freedom of the contract), is reflected in the above-mentioned provisions of the Civil Code, inter alia, in that anyone can negotiate a contract without any obligation to actually conclude the contract.

In view of the above-stated principle, it is the duty of the contracting parties when negotiating a contract to inform each other of all facts and legal aspects (which they know or should know) that are necessary for a valid contract to be concluded and for the interest (or the lack of interest) of a party to conclude the contract to be evident to the other party. Further, it is the duty of the persons concerned to maintain confidentiality of confidential information or other similar communication. In the con-

text of labour relations, such information may include information concerning wage amounts or the employer's remuneration system; alternatively, it may also include information on the employer's method or scope of production and other business information. In any case, the information is not generally known to the public. A party to the negotiations shall take care that such confidential information or communication is not unlawfully misused or disclosed without a legitimate reason (e.g. a request for cooperation by a public authority).

Unfair conduct in the pre-contractual negotiations or in the signing of a contract shall result in liability. Unfairness may comprise:<sup>3</sup>

- (a) Initiating and/or continuing pre-contractual negotiations without the negotiating party's intention to actually conclude the contract. The party acting unfairly shall be liable for the damage caused pursuant to the general provisions of the Labour Code governing damage, because the situation involves labour relations;
- (b) Misuse of information obtained during the negotiations. In this case, the party acting unfairly shall surrender to the other party the enrichment/benefits obtained unfairly;
- (c) Failure to ensure confidentiality of the information obtained in the negotiations. In this case, the general provisions on liability for damage pursuant to the Labour Code shall apply because the situation involves labour relations. If the information comprises personal data, both public law liability and private law liability shall apply pursuant to the data protection legislation;
- (d) Terminating pre-contractual negotiations without just cause when the negotiations between the negotiating parties reach a point where, considering the circumstances (the course of the negotiations, the presented attitudes and interests of the parties, the information about other offers, etc.), the conclusion of the contract seems highly probable. The party that spoiled the legitimate expectations (trust) of the other party by abruptly terminating the negotiations without just cause shall be considered to act unfairly.

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<sup>3</sup> Cf. e.g. MORÁVEK, J. *Culpa in contrahendo v pracovněprávních vztazích*. In: D. ČIČKÁNOVÁ, Z. ILLÝOVÁ, V. MIČÁTEK and O. RUŽIČKA, eds. *Bratislavské právnické fórum 2013* [online]. 1. vyd. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2013, pp. 1546-1556 [cit. 2019-04-26]. ISBN 978-80-7160-365-8. Available at: [http://www.law.conference.sk/archiv/bpf\\_2013/sprava/files/zborniky/Session%20of%20Labour%20Law.pdf](http://www.law.conference.sk/archiv/bpf_2013/sprava/files/zborniky/Session%20of%20Labour%20Law.pdf).

## Certain aspects of the personal data protection

At the level of legislation governing the labour relations, the provision of the Section 30(2) of the Labour Code reiterates one of the key obligations of the personal data protection, i.e. the principle of data minimization (Article 5(1)(c) of the General Data Protection Regulation). Labour relations shall further be governed by all the other statutory provisions on the protection of personal data, as contained primarily in the General Data Protection Regulation,<sup>4</sup> known also under the abbreviation “GDPR”, and in the corresponding local legislation, particularly in the Act No. 110/2019 Coll. on the Processing of Personal Data (hereinafter referred to as the “Personal Data Processing Act”).<sup>5</sup>

In the selection of job seekers, the employer is in the position of a data controller with all related rights, duties and responsibilities pursuant to the data protection legislation. The employer may use the services of a personal data processor (e.g. an agency that will identify job seekers) or another data controller (e.g. an agency that will allow the employer to contact candidates from its own database). Theoretically, joint personal data controllers may also be considered. Pursuant to the General Data Protection Regulation, the relationship between the controller and the processor, or the controller and another controller or between the joint controllers needs to be stipulated accordingly (in the form of a processing contract, etc.).

The purpose of the processing of personal data in the selection of individuals seeking employment contract jobs is to conclude an employment contract with the best candidate. The means and methods of processing of personal data depend on the channels selected by the employer and the manner in which the obtained data will continue to be processed; typically, a combination of automated and non-automated processing of personal data will be used, unless the selection method is for-

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<sup>4</sup> See *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)*. OJ EU L 119, 2016-05-04, pp. 1-88.

<sup>5</sup> Concerning the protection of personal data pursuant to the General Data Protection Regulation, cf. e.g. MORÁVEK, J. *Obecné nařízení o ochraně osobních údajů nejen z hlediska právní úpravy pracovněprávních vztahů*. In: Z. GREGOROVÁ, ed. *Pracovní právo 2017: Ochrana osobních údajů, služební zákon a sociální souvislosti zaměstnávání cizinců* [online]. 1. vyd. Brno: Masarykova univerzita v Brně, 2018, pp. 13-47 [cit. 2019-04-26]. Acta Universitatis Brunensis, Iuridica, Volume 609. ISBN 978-80-210-8930-3. Available at: <https://www.law.muni.cz/sborniky/pracpravo2017/files/PracovniPravo2017.pdf>.

malised and regulated by statutory provisions (see the above concerning the Act on Officials of Territorial Self-governing Units).

An employer may only solicit from an individual seeking an employment contract job or from a third party (such as former employer) personal data about the individual that are directly related to the conclusion of the employment contract, i.e. the data that are necessary for selecting the most suitable candidate based on the (legitimate and lawful) selection criteria. The scope of the data will thus vary according to the position to be filled, the related requirements and qualifications. Basic identification and contact information (name, surname, permanent address, date of birth, e-mail address, phone number) may always be solicited.

The employer is entitled to request evidence of the representations provided by the job applicant to the extent that he/she has fulfilled the relevant requirements. In the event of qualification requirements stipulated by law, the employer is, in fact, obliged to request satisfaction of the requirements. If certain representations are supported by submitted deeds or documents, the employer should respect the principle of minimisation and the principle of necessity and should make copies of such documents or keep the documents containing other than the necessary data only if it is required by law or if it is necessary to protect the rights and legitimate interests of the employer/controller pursuant to the Article 6(1)(f) of the General Data Protection Regulation. In other cases, submission of the relevant document for inspection and record of the submission of the document and verification of the representation made should be sufficient.

It is for the purposes of protection of the legitimate interests of the job applicants that the employer cannot request from them data of any type. Even in the period of the employment relationship, the employer may not request from an employee information that is not related to the work performed and to the labour relations. Section 30(2) of the Labour Code only contains a general prohibition to request data that are not directly related to the conclusion of the employment contract. Section 316(4) of the Labour Code, on the other hand, contains a non-exhaustive list of information which, according to the legislator, does not directly relate to the performance of work and the employment relationship and, therefore, cannot be solicited from the employee by the employer. The above-mentioned data cannot be requested from an employee, much less from a job seeker. The list of information contained in the Section 316(4)



of the Labour Code also applies for the purposes of the Section 30(2) of the Labour Code and may be an indication of the information which cannot be required before the commencement of the employment; in the area of labour relations, Section 30 of the Labour Code in combination with the Section 316(4) of the Labour Code is primarily linked to the Article 5(1)(c) of the General Data Protection Regulation.

The provision of the Section 316(4) of the Labour Code can, nevertheless, be transcended: concerning data that are subject to relative prohibition, upon the satisfaction of a particular statutory requirement; concerning remaining data if the employer is required by a special legislation to know the data and, where direct legal authorisation is missing, if the need to know the information is called for by the nature of the matter.<sup>6</sup>

When seeking employees through advertising, the employer must already specify in the advertisement the scope of data that will be required from an applicant for the purposes of concluding the employment contract and that will be processed for the same purpose, together with other data collected during the selection process. At this stage, the employer must also ensure compliance with the information duty pursuant to the Article 13 of the General Data Protection Regulation.

If a job applicant provides the employer with more personal data than the data necessary for the purpose of the processing or than the data specified by the employer in the advertisement, the employer shall be obliged to dispose of the excess data. This does not apply to the excess personal data contained in the documents supporting the satisfaction of the requirements or qualifications, where maintaining integrity and retaining the document or a copy of the document by the employer is expected.

Concerning the legal basis for the processing of personal data, the processing of personal data for the purposes of selecting the best candidate for a job will be based on the Article 6(1)(b) of the General Data Protection Regulation. If the selection process is formalised and regulated by a statutory provision (see the above concerning the Act on Officials of Territorial Self-governing Units), the legal title stipulated in the Article 6(1)(c) of the General Data Protection Regulation may also serve as a basis for the processing.

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<sup>6</sup> See MORÁVEK, J. *Ochrana osobních údajů v pracovněprávních vztazích*. 1. vyd. Praha: Wolters Kluwer, 2013. 435 p. ISBN 978-80-7478-139-1.

Only after a job applicant has declared his/her interest in entering into the employment contract, the employer may contact a person other than the employee to solicit personal information about the employee. Such person may primarily be the previous employer who may, pursuant to the Section 314(2) of the Labour Code, provide assessment of the employee's work (personal reference) to a third party. Obtaining personal information about an employee from his/her previous employer constitutes the obtaining of personal data from a source other than the data subject. Consequently, upon receipt of the information, the employer must comply with the information duty toward the applicant pursuant to the Article 14 of the General Data Protection Regulation, unless one of the exemptions from the information duty is fulfilled pursuant to the Article 14(5) of the General Data Protection Regulation or pursuant to the Article 8 or the Article 11 of the Personal Data Processing Act.

In order to comply with the accuracy obligation pursuant to the Article 5(1)(d) of the General Data Protection Regulation, the employer may request an applicant in the selection procedure, particularly if the procedure is expected to take a long time, to notify the employer without delay of any changes in the personal data previously submitted for processing in the selection procedure.

In this case, the personal data retention period is limited by the purpose of the processing, which is the conclusion of the employment contract. As soon as the employment contract with the selected candidate is concluded, the legal title for the processing of personal data is exhausted. Further processing by the employer of personal data of the candidate with whom the employment contract was signed shall rely on the Article 6(1)(b) and the Article 6(1)(c) of the General Data Protection Regulation, or equivalent legal titles stipulated in the Article 9 of the General Data Protection Regulation; such subsequent processing (necessary to comply with legal and contractual obligations) includes other personal data (birth number, information on dependent persons, etc.) for which there was no place in the phase of the selection procedure.

The personal data of unsuccessful candidates need not always be destroyed after the selection procedure is concluded. The personal data of unsuccessful candidates may continue to be processed for any of the compatible purposes.<sup>7</sup> This may include, for example, the processing of

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<sup>7</sup> See the Article 6(4) of the General Data Protection Regulation and the Section 6 of the Personal Data Processing Act.

personal data for the purposes of defence in an anti-discrimination dispute. Similarly, the employer may consider processing the personal data of unsuccessful candidates for the time of the hired employee's probationary period if the position is one where the staff turnover is extremely high. In both cases, the processing of personal data would be based on the legal grounds stipulated in the Article 6(1)(f) of the General Data Protection Regulation.

In relation to the subsequent processing of personal data, the information duty pursuant to the Article 13 of the General Data Protection Regulation has to be complied with, unless otherwise implied by the Article 13(4) of the General Data Protection Regulation or by the Section 8 and the Section 11 of the Personal Data Processing Act.

The personal data of unsuccessful candidates may be retained and further processed, strictly on the basis of their consent, for the purposes of creating a database of unsuccessful participants in the selection procedure who may be contacted in the future and offered employment by the employer in the event of future vacancies as potential job seekers.

If the processing of personal data in the database of potential job seekers follows the selection procedure announced by the employer, where the consent to the processing is given upon entering the selection procedure, the information about the selection procedure must include the basic wording of the consent using clear and plain language. The consent must be actively given. Failure to give consent to inclusion in the database cannot be sanctioned by exclusion from the selection procedure. Applicants must be able to withdraw their consents at any time, easily and free of charge.

In the case of the list of potential job seekers, personal data will be processed to the extent determined by the consent to the processing of personal data. The principle of necessity and the principle of accuracy shall be observed, i.e. the database can only include accurate information necessary for the fulfilment of the final purpose. This is also key in determining the period of time for which the consent to processing will be granted.

## Legal consequences of the failure by a job seeker to provide true and accurate information

The consequences of the failure by a job seeker to provide true and accurate information primarily depend on whether the employer is entitled to request the relevant information from the job seeker.

If the employer as the controller is not entitled to obtain certain information (the employee's personal data), because such information is not necessary to conclude the employment contract, there will be no legal consequences if the job seeker does not (even deliberately) give a true answer to the question aimed at obtaining such information. The employer's inaccuracy concerning facts that do not relate to the conclusion of an employment contract is of no legal significance.

If the false information (the job seeker's data) is relevant to the conclusion of the employment contract, the situation has to be considered pursuant to the Sections 583 through 585 of the Civil Code on acts in error. The provisions of the Civil Code referred to above distinguish between an act in error concerning a decisive circumstance and an act in error concerning a secondary circumstance that has or has not been declared decisive. Regarding the error concerning a secondary circumstance, the important thing is whether or not the error was a result of trickery. Depending on the circumstances, the act (here, the employment contract) is either voidable (with the right to invoke an annulment of the act enjoyed exclusively by the employer)<sup>8</sup> or valid, but the misled person (the error not resulting from trickery and concerning a secondary circumstance that was not declared decisive) is entitled to claim an appropriate compensation from the person who caused the error.

## Final conclusions

The topic of selecting the job seekers is still relevant today. While the fundamental principles of the regulatory scheme have not changed, the General Data Protection Regulation introduced certain novelties, e.g. the duties to notify and to communicate personal data breaches (Articles 33 and 34 of the General Data Protection Regulation) that also apply in this context and involve a number of problematic aspects, one of them being the principle *nemo tenetur*.

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<sup>8</sup> See the Section 579 of the Civil Code.

The pre-contractual liability in the selection of job applicants, outlined above, is not clearly defined. For the time being, we must await relevant judicial decisions.

Finally, employers still struggle with respecting the anti-discriminatory legislation. This is most clearly manifested in the formulation of labour demand; rather than looking through the prism of the applicable legislation, employers use a somewhat emotional approach and look for waitresses, female assistants, fresh graduates, etc. Rather than the employers' approach, however, the excessive strictness of the valid legislation and/or its application seems to be an issue, as nothing implies the existence of a group of employers permanently attacking the human dignity.

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