Czech Republic

JUDGMENT

of the Constitutional Court

in the name of the republic

The Constitutional Court has ruled in a plenary session composed of the chairman Pavel Rychetský and judges Ludvík David, Jaroslav Fenyk, Josef Fiala, Jan Filip, Tomáš Lichovník (judge rapporteur), Jan Musil, Pavel Rychetský, Vladimír Sládeček, Kateřina Šimáčková, Vojtěch Šimíček, Milada Tomková, David Uhlíř and Jiří Zemánek, on the proposal of the **group of 54 deputies of the Chamber of Deputies of the Parliament of the Czech Republic**, represented by Mgr. Bohuslav Sobotka, to annul the provision of Section 52 h), 54 d) in words "or breach of other duty of an employee stipulated in Section 301a in a particularly gross manner [Section 52 h)]", Section 57, Section 192 (5), second sentence, Section 286 (3) and (4) and Section 313 (2) in words "or due to breach of other duty of an employee under Section 301a in a particularly gross manner" of the Act No. 262/2006 Coll., Labour Code, as amended by the Act No. 365/2011 Coll. and the provision of Section 39 (2) b), including footnote 79, and the provision of Section 54 (1), second sentence, in words "and b)" of the Act No. 435/2004 Coll., on Employment, as amended by the Act No. 365/2011 Coll. under the participation of Mgr. Anna Šabatová, Ph.D., public defender of rights, as an intervener,

a s f o l l o w s :

The proposal to annul the provision of Section 52 h), Section 54 d in words "or the breach of other duty of an employee laid down in Section 301a in a particularly gross manner [Section 52 h)]", Section 57, Section 192 (5), second sentence, Section 286 (3) and (4) and Section 313 (2) in words "or due to the breach of other duty of an employee under Section 301a in a particularly gross manner" of the Act No. 262/2006 Coll., Labour Code, as amended by the Act No. 365/2011 Coll. and the provision of Section 39 (2) b), including footnote 79, and the provision of Section 54 (1), second sentence, in words "and b)" of the Act No. 435/2004 Coll., on Employment, as amended by the Act No. 365/2011 Coll. is dismissed.

R e a s o n i n g f o r a j u d g m e n t:

I
Subject to the proceedings

A group of 54 deputies proposed to the Constitutional Court annulment of particular sections of statutes mentioned above in the heading. The proposal of the deputies is

directed against partial amendment to the Labour Code and the Employment Act, on the basis of which the employer may give termination notice to an employee for violation of the regime of an employee with temporary incapacity to work, while simultaneously excluding the entitlement to unemployment benefit for this reason. The deputies' proposal also challenges the new legal regulation of the conditions, under which a trade union organization operates with an employer.

II
Termination notice to an employee for violation of the regime of an insured individual temporarily incapable to work and exclusion of the entitlement to unemployment benefit for this reason

A. The contested provisions of the Labour Code and the Employment Act and the context thereof

1. By the Act No. 365/2011 Coll., amending the Act No. 262/2006 Coll., Labour Code, as amended (hereinafter referred to as the "Labour Code") and other related acts, with the effect from 1 January 2012 a new termination notice reason was added as set out in Section 52 h). According to this provision, an employer may give notice to an employee who grossly violates other duty of an employee laid down in the provision of Section 301a of the Labour Code.

2. In this context, the Act No. 365/2011 Coll. in the provision of Section 54 d) of the Labour Code stipulated that the prohibition of notice in the protective period according to the provision of Section 53 of the Labour Code does not apply to a notice given by an employee for any other breach of statutory obligation relating to the work performed [Section 52 g)] or violation of other obligation of an employee laid down in Section 301a in a particularly gross manner [Section 52 h)]. The above-mentioned shall not apply only if it concerns a pregnant employee, employee on maternity leave, or employee on parental leave.

3. According to the provision of Section 301a of the Labour Code added by an amendment employees in the first 14 calendar days and, in the period from 1 January 2011 to 31 December 2013, in the first 21 calendar days (the latter will not be further mentioned in the text for the sake of better clarity) of the duration of temporary incapacity to work are obliged to observe the regime of the insured individual with temporary work incapacity as regards the obligation to stay at the time of temporary work incapacity at the place of residence and to respect the time and extent of permitted leave according to the Sickness Insurance Act.

4. Section 57 of the Labour Code provides that for the breach of other duty of an employee laid down in Section 301a in a particularly gross manner [Section 52 h)] an employer can give notice to an employee within one month from the date when it became aware of this termination notice reason, at the latest, however, within one year following the day when such a reason for termination arises. If, during this one month, employee's actions, in which a breach of the regime of an insured person

with temporary work incapacity can be seen, become subject to investigation by another authority, termination notice can be given within 1 month from the date when the employer learned about the outcome of this investigation. By 31 December 2011, the provision of Section 57 of the Labour Code, on the contrary, provided that the employer cannot give notice to an employee or immediately cancel the employment relationship for the breach of obligations laid down in Section 56 (2) b) of the Sickness Insurance Act, if it concerns the regime of temporarily incapacitated to work insured person.

5. The provision of Section 192 (6) of the Labour Code provides that the employer is entitled to check whether an employee who has been recognized as temporarily incapable to work adheres, in the period of the first 14 calendar days, of temporary incapacity to work the regime of the insured person to the temporary work incapacity as regards the obligation laid down by a special legal regulation to stay at the place of residence and to observe the time and extent of permitted leave.

6. Pursuant to the provision of Section 192 (5) of the Labour Code the employer may with regard to the severity of breach of these obligations reduce or refuse to pay the wage or salary compensation, if the employee breaches the obligation to stay at the place of residence and to observe the time and extent of permitted leave in the first 14 calendar days of the temporary incapacity to work. By the Act No. 365/2011 Coll. in relation to adding new reason for termination notice according to the provisions of Section 52 h) the second sentence was added of Section 195 (5), according to which wage or salary compensation may not be decreased or provided if, for the same violation of the regime of temporarily work incapacitated insured individual, a notice was given to an employee pursuant to Section 52 h).

7. In relation to adding the described legal regulation to the Labour Code, the Act No. 365/2011 Coll. added to the provision of Section 1 of the Labour Code, which governs its substantive scope, new letter e), according to which the Labour Code regulates certain rights and obligations of employers and employees in adhering to the regime of temporarily work incapacitated insured person under the Sickness Insurance Act and some sanctions for the breach thereof.

8. With the above-mentioned amendment to the Labour Code the Act No. 365/2011 Coll. also amended the Act No. 435/2004 Coll., on Employment, as amended (hereinafter referred to as the "Employment Act") by adding a new provision of Section 39 (2) b), according to which a job seeker is not entitled to unemployment benefit, with whom in the last 6 months before the job seeker was registered as job seekers the employer terminated employment due to the breach of other duty of the employee under Section 301a of the Labour Code in a particularly gross manner.

B. The alleged discrepancy of the contested provisions of the Labour Code and the Employment Act with constitutional order and international treaties on human rights and fundamental freedoms

9. The group of deputies points out in their proposal to the fact that the draft law was adopted by the Chamber of Deputies despite the fact that a number of negative opinions was raised in the comment procedure, including the Legislative Council of the Government. They referred to the explanatory memorandum itself on the concerned amendment to the Labour Code, which states, *inter alia*, that the proposed amendment to the legal regulation is problematic from a legal point of view. The reason is mainly the fact that if the proposal was adopted, it would be necessary to extend the scope of the Labour Code also to relations arising in relation to incapacity to work, i.e., at a time of work impediment, while the regime of the work incapacitated insured person is governed by public law regulations. The considered further punishment of an employee could constitute inequality between the insured persons, as other insured persons in case of the same breach of the regime of work incapacitated insured person will remain in the system of sickness insurance.

10. The petitioners do not consider a breach of the insured person's obligations to stay during temporary incapacity to work at the place of residence and to observe the time and extent of the permitted leave according to the Sickness Insurance Act a breach of employee's duties (these are not even directly related to the performance of work). The provision of Section 301a of the Labour Code, governing in relation with the provisions of Section 52 h) "other duties of employees", is considered by the petitioners non-systemic and utilitarian, aiming only to the end so that, in addition to public law obligation established by the Act No. 187/2006 Coll., on Sickness Insurance, as amended (hereinafter referred to as the "Sickness Insurance Act") contextually the same obligation is enshrined in mandatory provisions of the

Labour Code (in the sense of its Section 4b (1), first sentence *in fine*), for the sole purposes of enabling to regulate a new notice reason pursuant to Section 52 h).

11. The petitioners consider the penalty for breach of the regime of temporarily incapacitated insured person in the form of withdrawal or reduction of sickness insurance scheme, or more precisely wage compensation from the employer at the time of illness, adequate and fully sufficient. “Alternative” private law sanctions for the same acting (for violation of a public law obligation), which is based on the possibility of a termination notice from the employer, is not adequate and its use puts the insured individual in an unequal position, as admitted by the explanatory memorandum to the Act No. 365/2011 Coll. Also other sanction that simultaneously affects the laid off employee for the same actions stemming from his exclusion from entitlement to unemployment benefit for the following 6 months after the employment relationship terminated that way, as set out in Section 39 (2) b) of the Act on Employment is not proportionate to the significance of the breach of duty under the Sickness Insurance Act and causes unconstitutional effects.

12. For the reasons set out above, the petitioners consider that the contested provisions are in conflict with the principle of equality of persons in rights (Section 1 of the Charter of Fundamental Rights and Freedoms - hereinafter referred to as the “Charter”), according to which statutory limitations of the fundamental rights and freedoms must apply equally to all cases meeting the set conditions (Section 4 (3) of the Charter). The contested regulation is also against the principle of proportionality of legal interference in the sphere of private autonomy that forms a part of the concept of the rule of law (Section 1 (1) of the Constitution of the Czech Republic - hereinafter referred to as the “Constitution”). The petitioners did not anyhow specify the last objection.

13. The contested regulation infringes upon the stated provisions of the Charter, in particular in relation to the right to work enshrined in international treaties on human rights and freedoms. The provision of Section 6 (1) of the International Covenant on Economic, Social and Cultural Rights (No. 120/1976 Coll.), which recognizes the right to work, including the right of everyone to an opportunity to earn a living by work, which he freely chooses or accepts, also commits signatory states to take relevant steps to protect this right. Similarly, Article 1 (1) and (2) of the European Social Charter (promulgated under No. 14/2000 Coll., hereinafter referred to as the “European Social Charter”) binds the Czech Republic with the goal to ensure an effective exercise of the right to work a) to accept as one of its primary goals and responsibilities to achieve and maintain the highest and most stable employment levels in order to achieve full employment, and (b) to effectively protect the right of a worker to earn his living by a freely chosen job. The contested regulation of the new termination notice reason contrary to those obligations of the state exposes employees to disproportionate uncertainty whether – may it be even due to negligent or supposed breach of the regime of work incapacitated insured person - his conduct will be qualified by an employer as a gross violation of the employee’s public duties (it does not first concern the obligations arising from the

labour-law relationship) with the consequence of unilateral termination of labour-law relationship by the employer. Instead of the competent public administration authority the employer becomes the authority that authoritatively decides on the violation of the public law norm - obligations laid down primarily by the Sickness Insurance Act – as well as the right to terminate the labour-law relationship for this reason.

14. By opening space for arbitrariness on the part of employers in terminating labour-law relationship by notice without allowing effective protection of the right to work, the contested regulation according to the petitioners, also violates the aforementioned provisions of international treaties.

15. With regard to the expulsion of an employee with whom an labour-law relationship has been terminated for breach of the regime of work incapacitated insured person, from the claim to unemployment benefit (Section 39 (2) (g) of the Employment Act), the petitioners consider this regulation to be contrary to the principle of the right of citizens to adequate material security during ineligibility to work under Article 30 (1) of the Charter. This statutory regulation also contradicts commitments, which the Czech Republic has assumed by ratification of the European Code of Social Security (No. 90/2001 Sb., hereinafter referred to as the "European Code"), according to which each Contracting Party, for which IV. Part of the European Code (Unemployment Benefits) is in force, shall secure to the persons protected the provision of unemployment benefit in accordance with the following articles of this part (Article 19). Under Article 20 of the European Code the contingency covered includes suspension of earnings as defined by national laws or regulations due to inability to obtain suitable employment, in the case of a person protected who is capable of and available for, work. If a contingency occurs, the benefit must be secured at least to a person protected who has completed such qualifying period as may be considered necessary to preclude the abuse (Article 23). If a person dismissed from employment for violation of the regime of work incapacitated insured person does not earn anything as a result of inability to obtain other suitable employment, the state must secure such a person with a benefit, in particular, if this person has fulfilled the qualifying period for granting unemployment benefit under Section 39 (1) (a) and Section 41 of the Act on Employment.

III

Terms and Conditions of the Trade Union Organization operating with the Employer

A. The contested provisions of Section 286 (3) and (4) of the Labour Code and their context

16. By the Act No. 365/2011 Coll., with effect from 1 January 2012, the provision of Section 286 of the Labour Code, regulating the operation of the trade union, was

supplemented by new paragraphs 1 to 4. The new paragraph 3 stipulates that a trade union organization operates with an employer and has the right to act only if it is entitled to do so under the Articles of Association and at least 3 of its members are in labour-law relationship with the employer. Under these circumstances, only that trade union or its organizational unit can collectively bargain and conclude collective agreements, which has the right to act on behalf of the trade union organization. Paragraph 4 specifies that trade union entitlement with the employer arises on the day following the day, on which it notified the employer that it meets the conditions set out in paragraph 3. If the trade union ceases to meet these conditions, it is obliged to notify the employer thereof without delay.

17. The petitioners point out that the Labour Code links the work of the trade union with the employer to the establishment and existence of a trade union's entitlement with respect to an employer, such as the right to collective bargaining (Section 22, Section 24, Section 286 (1)), the right to information (Section 38 (3), Section 61 (5), Section 62 (2), Section 101 (4) (b), Section 108 (3), Section 276 (1) Section 287 (1)), the right to a hearing (Section 46, Section 61 (1), Section 62 (3) to (5), Section 99, Section 108 (2), 263 (3), 287 (2), 300 (3), 339 (1), 348 (3), 369 (2), consent (Section 217 (1)) and co-decision making (Section 199 (2), Section 255). A special protection of trade union bodies before termination of labour-law relationship by termination notice or immediate termination of employment by employer (Section 61 (2) to (4)) is also linked to the work of a trade union with the employer.

18. To sum up, the provisions of Section 286 (3) and (4) of the Labour Code laid down formal conditions of trade union work with an employer, including:
a) The right of a trade union to operate and act with the employer (must be established in Articles of Association)
b) The fact that the trade union has at least 3 employees in lanour-law relationship and
c) Notification to the employer where it operates showing that it meets the conditions under (a) and (b).

B. The conflict of the contested provisions of Section 286 (3) and (4) of the Labour Code with the constitutional order and international treaties on human rights and fundamental freedoms

19. According to the petitioners, the conditions for the work of a trade union with the employer, which are contained in the provision of Section 286 (3) and (4) of the Labour Code, are in contrariety to the constitutionally guaranteed right of everyone to associate for the protection of economic and social interests in trade unions under Section 27 (1) of the Charter. They also contradict freedom of association in trade; unions as guaranteed by international treaties on human rights and fundamental freedoms.

20. The petitioners point out that, under the International Labour Organization Convention (hereinafter referred to as the “ILO”) No. 87 (No. 489/1990 Coll.), employees without distinction whatsoever shall have the right to establish and, subject only to the rules of the organization concerned to join organizations of their own choosing without previous authorization (Article 2 of the cited ILO Convention). Each ILO Member State, for which this ILO Convention applies, undertakes to take all necessary and suitable measures to ensure that workers are free to exercise rights to organize in trade unions. National legislation shall not such as to impair, nor shall it be applied as to impair the guarantees provided in this ILO Convention (Article 8) (2), Article 11 of the ILO Convention). The same rights are guaranteed by Article 8 (1) of the International Covenant on Economic, Social and Cultural Rights and Article 22 (2) of the International Covenant on Civil and Political Rights, Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the “Convention”) and Articles 5 and 6 (2) of the European Social Charter.

21. The petitioners point out that if the employer is to employ less than 3 employees, then, according to the contested legal regulation, these employees will have a formal possibility to associate in trade union, but this trade union will not have the opportunity to operate with their employer and exercise the rights associated therewith. The law thus creates a formal barrier for these employees to the actual exercise of the rights guaranteed by the Charter and the stated international treaties.

22. The constitutional deficit of the contested regulation is reinforced by the emphasis laid down by the provision of Section 286 (3) of the Labour Code to the effect that a trade union organization only operates with an employer when at least 3 of its members are employed by the employer and omits that employers can also employ employees based on agreement to work outside the scope of employment. It is not clear whether or not also employees working in a relationship based on an agreement to complete a job or an agreement to perform work should or, more precisely, may also be considered employees in the labour-law relationship in accordance with Section 77 (2) of the Labour Code. If the act is interpreted in such a way that, in order to fulfil the conditions of work of a trade union, only employees in labour-law relationship and not employees in employment based on agreements to work outside the scope of employment are decisive, then application of statutory terms prevent employees on the basis these agreements from applying the constitutionally guaranteed right to associate to protect economic and social interests. This right is given not only to employees in the labour-law relationship; it belongs to everyone.

23. The rights associated with the work of a trade union with the employer are established in accordance with the provisions of Section 286 (4) of the Labour Code only on the day following the day when the trade union organization announced to the employer that it meets the conditions for working with the employer. From the

legal regulation it can be inferred that the trade union must not only notify the employer of these facts, but also prove them. Employers can, therefore, in particular require that a trade union inform them, which three employees in employment relationship are members of a trade union. If the trade union complies with this requirement, there is a danger that the employer will resort to terminating the labour-law relationship with these employees in order to prevent the operation of a trade union.

24. In the event that all three employees, with respect to whom the trade union organization announces to the employer they are their members, would also be members of a trade union body, i.e., trade union officials, they should be given special protection against termination of employment, as the ILO considers it. The regulation of protection of trade union officials before the termination of the employment was incorporated into the provision of Section 61 (2) to (4) of the Labour Code. It will be applied only when the trade union operates with the employer. The trade union begins to operate with the employer, however, according to the provision of Section 286 (3) of the Labour Code when the conditions set forth therein are fulfilled and its entitlement with an employer arise on the day following the day, on which it notified the employer that it meets these conditions, or more precisely when these facts have been proved. Due to the application of the specified conditions, the protection of members of the trade union body against the termination of employment by the employer is violated.

25. According to the petitioners, there is a real risk that the employer will resort on the day when he was informed that a trade union is working for him, to termination of labour-law relationship with some of the employees who are members of a trade union, even if he is also a member of this trade union's body. In this context, the petitioners pointed to the special protection of trade union officials against to the termination of the employment enshrined in the Convention concerning protection and facilities to be afforded to workers' representatives in the undertaking, promulgated in the Collection of International Treaties under No. 108/2001 (hereinafter referred to as the "Convention No. 135"). The conditions of fulfilling the termination notice reason and other legal grounds for the termination of labour-law relationship shall be assessed on the day the termination notice was delivered. The trade union official may not be granted effective protection against the lay-off by an employer.

26. For the reasons set out above, the petitioners are of the opinion that the contested legal regulation of the conditions of operation of the trade union with the employer distorts constitutionally and by international law guaranteed right of association to protect economic and social rights, which cannot be formally perceived only as the right to become a member of trade union organization, but as a right to become a member of an organization endowed with the privileges, which national legislation consistent with these guarantees vests in it.

IV

Statements of Participants and Interveners

27. From the statement of the Chairman of the Chamber of Deputies of the Parliament of the Czech Republic, Jan Hamáček, it follows that the draft law was circulated to the Deputies as Parliamentary Press No 411. Explanatory memorandum to the draft law stated that the proposed amendment is in accordance with the constitutional order of the Czech Republic, it is democratic and respects the obligations that the Czech Republic has under international law. Proposal of the Act was approved by the Chamber of Deputies on 19 September 2011 and forwarded to the Senate, which discussed and dismissed it. The Chamber of Deputies voted on the proposal dismissed by the Senate on 6 December 2011 and retained its original draft law. The President of the (Czech) Republic signed the Act on 16 November 2011 and the law was promulgated in the Collection of Laws on 6 December 2011. From the above-mentioned the Chairman of the Chamber of Deputies concludes that the amendment to the Labour Code was adopted following a proper legislative process.

28. The Senate of the Parliament of the Czech Republic expressed its opinion on the proposal of the group of Deputies though its Chairman, Milan Štěch, who stated that the Senate discussed the proposal of the Act No. 365/2011 Coll. on 7 October 2011, whereas after the general debate the bill was dismissed. Reservations of individual senators concerned a number of substantive changes proposed in the Labour Code, including regulation consisting in adding a new termination notice reason by an employer. None of the presenting senators expressed any concrete opinion during the discussion of the senate press to new regulations governing the conditions, under which trade unions operating with the employer will be authorized to act in employment (Section 286 of the Labour Code).

29. The Government in its statement to the proposal of 19 March 2014, signed by the Prime Minister, Bohuslav Sobotka, informed the Constitutional Court it will not exercise its right to enter the proceedings under Section 69 (2) of the Act on the Constitutional Court, as it agrees with the proposal of the group of Deputies. Despite this consensus on the proposal, the government did not even propose changes to the legal regulation. Mainly in the area of social rights, the legislative solution would be certainly more suitable than possible intervention by the Constitutional Court.

30. The public defender of rights, Anna Šabatová, also expressed her opinion to the Deputy proposal for annulment of the abovementioned amendment to the Labour Code and the Employment Act and pointed out the fact that the contested statement of reasons is in no way connected with the performance of the work in labour-law relationship and has no relation with the performance of work tasks and responsibilities. The contested provisions according to the public defender of rights disproportionately interfere with the rights guaranteed by Article 26 (3) of the Charter. The contested provisions are not eligible to fulfil the conditions of the

proportionality test, when such means should be chosen that limits the constitutionally protected value in the least possible way. When considering possible measures the public defender of rights considers that the existing means already lead to the same goal (failure to pay substitute wage, reduction or withdrawal of sickness benefits, sanctions by the Czech Social Administration) and do not, unlike the contested provisions, undermine fundamental rights in their entirety.

31. The contested provisions of the Labour Code are also considerably indefinite compared to other termination notice reasons, for which the Labour Code sets out in a fairly detailed manner, for the fulfilment of which conditions a particular reason may be used. Insufficient concretization of conditions for use gives wide scope for arbitrariness of the employer and its possible misuse. Public defender of rights has for a long time been aware of employees' concerns about the use of judicial defence given the cost, difficulty and duration of litigation. Assuming that violation of the treatment regime by an employee should be impacted by as severe of a sanction as the possibility of termination of the labour-law relationship by notice, it is desirable that the law also provides for more detailed conditions to exercise the control of the treatment regime by an employer.

32. Except for the conditions of operation of trade unions with the employer the public defender of rights has fully agreed with the petitioners' legal arguments and stated that if the provision of Section 286 (3) of the Labour Code stipulates that for the operation of the trade union and the possibility of its acting at least three members are necessary, if they are in the labour-law relationship with the employer, it completely neglects that employers can also work with employees in other labour-law relationships. The right to associate to protect economic and social interests is vested with everyone. It is not possible to exclude employees who carry out an activity with the employer on the basis of other than labour-law relationship. The provision of Section 27 (3) of the Charter is construed in such a way that activity or the formation of trade unions can be restricted only under the most extreme conditions. The right of trade unions to their free activity is not subject in its essence to any limitations, except for those that are necessary in a democratic society for the protection of state security, public order, or the rights and freedoms of others. By setting legal condition of three persons in labour-law relationship denies the right of employees in other than labour-law relationship to act to protect their economic and social rights, which interfere with the very essence of the right enshrined in Article 27 of the Charter. For the reasons outlined above, the public defender of rights argued against the contested legal regulation.

V.

Wording of the Contested Provisions

33. The provision of Section 52 h) of the Labour Code reads as follows:

"An employer may give notice to the employee only for the following reasons: if the employee breaches other duty of an employee laid down in Section 301a in a particularly gross manner."

34. The provision of Section 54 d) of the Labour Code reads as follows:

"The prohibition of termination notice pursuant to Section 53 shall not apply to a notice given to an employee for other violation of obligations arising from the legal regulations relating to the work performed [Article 52 g)] or breach of other duty of the employee laid down in Section 301a in a particularly gross manner [52 h)]; this does not apply if it concerns a pregnant employee, a female employee taking maternity leave or an employee or female employee taking parental leave."

35. The provision of Section 57 of the Labour Code reads as follows:

"(1) The employer may give notice to the employee for violation of other duty of an employee specified in Section 301a in a particularly gross manner [Section 52 h)] only within one month from the date on which he was informed of this termination notice reason at the latest within one year after the date, on which such a termination notice reason arose.

(2) If, in the course of one month, pursuant to paragraph 1, an employee's conduct that may constitute violation of the regime of temporarily work incapacitated insured person is subject to investigation by another authority, it is possible to give notice even within one month from the date when the employer learned about the result of this investigation."

36. The second sentence of Article 192 (5) of the Labour Code reads as follows:

"Wage or salary compensation may not be reduced or not provided if an employee was given notice for the same breach of the regime of temporarily work incapacitated insured person pursuant to Section 52 h)."

37. The provision of Section 286 (3) and (4) of the Labour Code reads as follows:

"(3) The trade union organization operates with the employer and has the right to act only if it is so entitled under the Articles of Association and at least 3 of its members are employed by the employer; only trade union organization or its branch organization can perform collective bargaining and conclude collective agreement under these conditions, if the trade union Articles of Association so authorize it.

(4) Trade union entitlements with an employer shall commence on the day following the date on which the employer has learned that the trade union meets the conditions set out in paragraph 3; if the trade union ceases to meet these conditions, it is obliged to notify to the employer thereof without undue delay."

38. The provision of Section 313 (2) of the Labour Code reads as follows:

"The employer is obliged to state at the request of an employee in separate confirmation data on the average earnings, whether the labour-law relationship, agreement on work performance or agreement on work activity were terminated by the employer for breach of obligations arising from the legal regulations applicable to the work done by an employee in a particularly gross manner or due to a violation of other duty of the employee under Section 301a in a particularly gross manner, and other facts relevant to assessing the claim to unemployment benefit90)."

39. The provision of Section 39 (2) b) of the Act on Employment, including footnote no. 79 reads as follows:

"A job seeker is not entitled unemployment benefit, with whom in the last 6 months before being registered as a job seeker labour-law relationship was terminated by the employer due to breach of other duty of the employee under Section 301a of the Labour Code in a particularly gross manner79)."

Footnote 79 refers to "*Section 52 h) of the Labour Code*."

40. The second sentence of Section 54 (1) of the Act on Employment reads as follows:

"If it is subsequently ascertained that the unemployment benefit or retraining support was unduly denied to a job seeker or granted or provided in a lower amount than in which it belonged or was granted from the later date from which it belonged; it is granted subsequently or increased and paid to a due amount. Similarly, it is processed if the competent authority has decided that the termination of employment or other relationship in case referred to in Section 39 (2) (a) and (b) is invalid."

VI.
Conditions of the Petitioner's Eligibility to Initiate Proceedings

41. The proposal for the annulment of the provisions of the Labour Code and the Employment Act was submitted by a group of 54 Deputies of the Parliament of the Czech Republic and, therefore, in accordance with the conditions contained in the provision of Section 64 (1) b) of the Act No. 182/1993 Coll., on the Constitutional Court. In the case in question we can, therefore, state the conditions for petitioner's eligibility to initiate proceedings have been fulfilled.

VII.
Dismissal of the Oral Hearing

42. The Constitutional Court did not expect further clarification of the case from the oral hearing, so it dropped it pursuant to the provisions of Section 44, first sentence, of the Constitutional Court Act.

VIII.
Constitutional Conformity of the Legislative Process

43. The Constitutional Court in accordance with the provision of Section 68 (2) of the Act No. 182/1993 Coll., on the Constitutional Court, as amended by the Act No. 48/2002 Coll., assessed whether the contested provision was adopted within the constitutionally defined competence and in a constitutionally prescribed manner. The Constitutional Court has already examined that question in the proceeding carried out under file no. Pl. ÚS 1/12 and in its award from 27 November 2012 found that "*The contested laws were adopted and issued within the limits of the constitutionally established competence and in constitutionally prescribed manner*." Therefore, it cannot be done otherwise than concluded that the condition of constitutional compliance of the legislative process has been fulfilled.

IX.
Review on the Merits

A. Terms of Operation of Trade Union with the Employer

1) Constitutional Basis

44. The Charter of Fundamental Rights and Freedoms makes a distinction between general right to associate (Article 20 (1) and (2) of the Charter) and an independent right to freely associate with others to protect their economic and social interests (Article 27 of the Charter), which represents the so-called coalition freedom. Thus, a special form of the right to associate serving to protect economic and social interests [the coalition is understood to mean, above all, the association of employees and employers (...) with the aim to express, to promote and to defend their own interests in creating working, social and economic conditions"- comp. Pavlíček, V. a kol.: *Constitutional law and the theory of state („Ústavní právo a státověda")*. II. part Prague: Leges, 2015, p. 646). The distinction made by the Charter between general and given special right of association [apart from coalition freedom, there are other special types of rights of association, such as association in political parties or association in churches and religious societies] has its reason, above all, in a different logic of these rights: while in case of general right to associate it is primarily about respecting the free sphere, in which individuals can achieve common goals through joint action (i.e., it is possible to say it is a classical *status negativus* in Jellinek's sense), "a coalition freedom represents a form of certain "social self-government", whose mission is to represent public interest in

terms of fulfilment of conditions of the functioning of welfare state, and consequently must indirectly also act against other private entities so that it is sufficiently respected by their partners (especially employers). In this sense, *status positivus* is far more striking for coalition freedom and it is not a coincidence that it does not form a part of political, but economic and social rights (Šimíček, V.: "Right to associate" In: Wagnerová, E., Šimíček, V., Langášek, T., Pospíšil I. et al. *Charter of Fundamental Rights and Freedoms: Commentary. ("Listina základních práv a svobod: komentář")* Prague: Wolters Kluwer ČR, a.s., 2012, p. 477). In this sense, therefore, the systematic nature of the Charter differs from that of the Convention or the International Covenant on Civil and Political Rights (hereinafter referred to as the "MPOPP") that mention coalition freedom (i.e., the "right to establish trade unions in the defence of their interests" and "the right to establish trade union organizations to protect their interests") in the context of general right to associate. Even for the coalition right, however, it holds true, as it does for all fundamental communication rights, that both an individual and trade unions (or, in case of other communication rights relevant associations) may be bearers thereof. With respect to it we can also distinguish between positive and negative aspect of this right, consisting, on one hand, of (a.) the creation of guarantees for its implementation and on the other hand (b.) the impossibility to order someone to become a member of a certain trade union. As the European Court of Human Rights ruled regarding the nature of Article 11 of the Convention (hereinafter referred to as the "ECHR"), its essential purpose "is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, national authorities may, in certain circumstances, be obliged to interfere in the relationship between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of those rights"(see *Sørensen and Rasmussen v. Denmark*, judgment of the Grand Chamber, 11 January 2006, No. 52562/99 and 52620/99, § 57). According to the ECHR, there are two types of positive obligations – positive obligation to ensure the rights of individuals and trade unions against employers (see *Wilson, the National Union of Journalists and Others v. the United Kingdom*, judgment, 2 July 2002, No. 30668/96, § 41) and a positive obligation to protect individuals against the abuse of power by trade unions (*Cheall v. United Kingdom*, decision ECHR, 13 May 1985, No. 10550/83, *ASLEF v. United Kingdom*, judgment, 27 February 2007, No. 11002/05, § 43).

45. Article 27 (1) to (3) of the Charter protects the right to freely associate for the protection of economic and social interests and independence and equality of trade unions. The coalition freedom guaranteed by these provisions is a concretisation of the freedom of association and covers a whole set of trade unions and employers' unions. Trade unions can be perceived as organizations in the field of employment, whose purpose is precisely to defend interests of their members. In order to fulfil the coalition freedom, it is necessary to apply some elementary principles, in particular "freedom of membership and prohibition of discrimination for membership in a particular coalition, even though this membership would constitute an obstacle to employment or, conversely, a necessary condition for the exercise thereof (...) or the constitutional principle of the separation of associations

for the protection of economic and social interests from the state" (Pavlíček, V. et al., *Constitutional Law and the Theory of State* („*Ústavní právo a státověda*"), Volume II, Prague: Leges, 2015, p. 647).

46. According to the second sentence of Article 27 (2) of the Charter, it is inadmissible to limit the number of trade unions organizations, as well as to favour some of them in business or industry. Ban on the limitation of numbers and the preference does not concern only state, but everyone, i.e., above all employers. It is, thus, possible here to talk about the principles of union pluralism and equality. These principles are stated in the Labour Code, in Section 286 (5) and (6) [according to section 5 it holds true that "if the employer has several trade unions, the employer is obliged in cases involving all or more employees where this law or specific legislation requires information, consultation, consent or agreement with the trade union organizations, to fulfil these obligations with respect to all trade unions, unless it agrees with them on other way of informing, discussing or expressing consent." Section 6 then provides that "if there are several trade union organizations with the employer, that trade union acts on behalf of employees in trade relations in relation to individual employees, to which the employee is a member. Trade union with the largest number of members who are in the labour-law relationship with the employer acts on behalf of an employee who is not organized in a trade union in lanour-law relations, unless the employee determines otherwise.]

47. As to the principle of trade union equality the Constitutional Court expressed its opinion in award, file no. Pl. ÚS 83/06 of 12 March 2008 (N 55/48 SbNU 629; 116/2008 Coll.), where it stated that "the principle of freedom of association also results in equality of trade unions in that no trade union organization operating with an employer must not be given preference over another, not even with regard to the types of employees it associates and the number of their members" (point 264). In this judgment, the Constitutional Court reviewed, inter alia, the constitutionality of Section 24 (2) of the Labour Code in the version in force at that time [this provision stated that "if the employer has more than one trade union, the employer negotiates collective agreement with all trade unions; trade unions present themselves and act with legal consequences for all employees jointly and in mutual agreement, if they do not agree with each other and employer otherwise. If the trade unions do not agree on the procedure under the first sentence, the employer is entitled to enter into a collective agreement with a trade union or more trade unions with the largest number of members with the employer."], whereas it concluded (points 265 and 266) that "the Charter of Fundamental Rights and Freedoms in its Article 27 (2) speaks unequivocally; any advantage of any of the trade unions in the enterprise or in the industry at the expense of others is inadmissible. The right enshrined therein is not anyhow limited even by implementing law (see Article 41 (1) of the Charter *a contrario*). Solution to a potential conflict situation foreseen in Section 24 (2) of the second sentence of the Labour Code (principle of majority, representativeness) cannot be accepted from a constitutional point of view. We cannot otherwise but to remind you again that from

the basic constitutional principle of equality it ensues, in particular, that the differentiation in access to certain rights must not be arbitrary and, above all, various entities, in the same or comparable situation, shall not be treated in a different way without objective and reasonable reasons for it. This can apply in the sense of the subject provision of the Charter of Fundamental Rights and Freedoms also to coalition right. Thus, the Constitutional Court acceded to the petitioners' objection that the contested provision of Section 24 (2), second sentence in contravention to Article 27 (2) of the Charter and the provision of Article 3 (2) of ILO Convention No. 87 favours certain trade unions at the expense of others. It is not just about favouring organizations with the largest number of members (majority principle), there are more possible combinations. This, at the same time, breaches Article 1 (2) of the Constitution of the Czech Republic, as amended by the Constitutional Act No. 395/2001 Coll. (the so-called Euro amendment of the Constitutions)."

2) The Review Itself

48. According to the petitioners, the newly introduced rule interferes with the principle of trade union equality, according to which "the trade union operates with the employer and has the right to act only if it is entitled to do so under the Articles of Association and at least 3 of its members are at labour-law relationship with the employer" (Section 286 (3) of the Labour Code). The stated legal rule should unacceptably limit the number of trade unions in enterprise. Reservations are detailed in paragraphs 19 to 22 above. The Constitutional Court did not accede to these reservations. The starting point was a question to which extent we can refer the general principles of association regulation, or more precisely (by their nature) the group rights they are gifted with to trade unions.

49. Under Section 214 (1) of the Act No. 82/2012 Coll., Civil Code, at least three persons guided by common interest can establish association to fulfil as a self-governing and voluntary union of members and associate in it. The principle of gathering (association) of at least three people or legal entities in a common private or public interest have been for a long time among general principles of the law of association (comp. Bílková, J.: *New Law of Association in Questions and Answers („Nové spolkové právo v otázkách a odpovědích))*. Prague: Leges, 2014, p. 28). This ensues already from the fact that an association is founded for the purposes of fulfilling a common interest and, therefore, its establishment by an individual is excluded. The Constitutional Court notes that the principle of trade union equality is not yet affected by the fact that the legislator, similarly as in case of the association, requires that a trade union be able to operate with an employer and act only if it is of the nature of voluntary association of at least three people.

50. As is clear from the foregoing, the purpose of associating in trade unions is a collective protection and promotion of economic and social interests of employees in an enterprise or industry. Objections of the petitioners were directed to the level of undertaking (not the sector), since the contested provision should unacceptably

limit the number of trade unions directly in it. The Constitutional Court considers its own realization of the right to freely associate with others in trade unions for the purpose of protection of economic and social interests (i.e. own activity of trade unions) due to its nature, a group right, for which it holds true that it can be exercised collectively. Group rights can be understood as (1) corporate, i.e. the bearer is a certain group, (2) collectively, i.e. as rights that are shared or jointly held by individuals creating a particular group. While with respect to the first (corporate) concept it ensues already from the nature of the matter that an individual cannot be holder of rights, even for the second (collective) concept it holds true that the bearer thereof cannot be an individual independent of membership in a particular group [in the Czech legal doctrine we might talk in case of the first concept about (1) collective rights, in case of the second concept about (2.) individual rights collectively exercised]. Both with respect to the first and the second group rights' concept, therefore, an individual cannot be a holder of these rights. In case of group rights, it holds true it is only possible to recognize them when the group requesting recognition of a sufficient base, or more precisely if corresponding number of individuals participate in sharing or jointly holding those rights. Only then can the given group be respected and protected by public authority in its quality as the subject of rights. Even because of the need for easy creation of will of relevant group, the European tradition has agreed on the need for the existence of at least three people (namely in the spirit of the classical Roman *tres faciunt collegium*). However, this cannot be considered limitation of the fundamental right within the meaning of Article 27 (3) of the Charter, but a limitation from the nature of the law in question (collectively associate with others in trade unions to protect economic and social interests, or more respectively the right to trade union's own activity arisen this way). Nor can this be considered limiting the number of trade union organizations within the meaning of Article 27 (2) of the Charter. Similarly, we cannot even consider interference in Article 11 of the Convention, Article 22 of MPOPP, Article 8 (1) of the International Covenant on Economic, Social and Cultural Rights, Article 5 and Article 6 (2) of the European Social Charter or the ILO Conventions on Freedom of Association and Protection of the Right to Organize No. 87 (No. 489/1990 Coll.) and the ILO Convention on the Application of the Principles of the Right to Organize and to Bargain Collectively No. 98 (470/1990 Coll.), in relation to which the petitioners' argumentation is outside the ordinary, as is apparent from what is stated in this part of the award. However, another situation would arise if the legislator were to set disproportionate number of members in a trade union within enterprise. In other words, the minimum number of members of the trade union at the level of undertaking is not in itself contrary to the ILO Convention No. 87, however, this threshold must be set at a reasonable level so as not to interfere with the formation of trade union organizations (see the Digest of Decisions and Principles of the Freedom of Association Committee of the Management Board of the International Labour Organization, 2006, Report No. 336, Case No. 2332, § 703).

51. If Article 27 (2) of the Charter talks about the inadmissibility of restricting the number of trade unions and favouring some of them in enterprise and industry, it

must be kept in mind that it anticipates this (1.) for trade unions already formed (i.e., already constituted groups) and (2.) not yet formed, or more precisely (rather) not yet recognized by the state. The second sentence of this article of the Charter, therefore, can be interpreted in temporal terms in two ways. On one hand (1) it prevents restricting employees who would (in enterprise) want to initiate the formation of a trade union (Article 27 (2), second sentence in conjunction with Article 27 (1) of the Charter). In the second sequence, (2.) it is forbidden to disadvantage already formed trade unions. The incriminated legal regulation first does (1.) not interfere with the very creation of trade unions. We cannot in its case state any violation of an individual right to associate in trade unions (Article 27 (1)) of the Charter); freedom of expression of employees at the workplace aimed at persuading other employees to associate themselves to protect and promote their interests in trade unions remains entirely intact. Employees have the opportunity to associate with the trade unions and it is entirely at their discretion whether or not they will use it. For example, even two employees can become members of trade union, but from the point of view of trade union work with the employer it is decisive whether employees have been able to associate at least three people. The requirement of membership of (at least) three employees in a trade union thus establishes the need for interaction among employees as a prerequisite for the possibility of recognizing legal consequences of negotiations of associated persons. Only trade union's acting can be legally relevant in an enterprise, in which at least three people are associated, because only then we can talk about representation of collective interests. If an employer has with respect to a trade union organization certain obligations, in the opinion of the Constitutional Court, it makes sense to provide respective authorizations only to those organizations that have a sufficient staff base, which is a prerequisite to the implementation of group rights. Their realization cannot be considered in isolation from legitimate interests of the employer (e.g. from his right to conduct business). The contested legal regulation, thus, in the opinion of the Constitutional Court cannot stand. The assumption of establishing the employer's obligations in relation to trade unions can be only collective work of the employees. It would not be meaningful to grant extensive rights to the trade union, in which the employees do not want to associate. If the trade union is to have relevant rights, it must function as a group, even at the enterprise level.

52. According to the Constitutional Court, therefore, in case of the contested legal regulation, it does not concern a breach of group right of a trade union (Article 27 (2) of the Charter). In order a trade union organization to have at least certain rights in enterprise towards the employer, it has to be here first of all in the right quality. In order to be a holder of group rights, it must have sufficient staff base, or more precisely it must form a group within an enterprise so that it can subsequently claim group rights (in relation to the employer). Because the contested legal regulation does not apply to a situation where there would be a necessary staff base here, it is not considered an intervention in Article 27 (2) of the Charter. On the contrary, it could be considered, in certain circumstances, abuse of that right if the exercise of group rights was held only by one individual, as might have been the case of

previous legal regulation. This allowed the trade union to operate with the employer, if at least one member of the trade union was employed with it. It could be a trade union organization established with another employer. Despite a very strong duty to inform of an employer toward the trade union organization what was not taken into consideration at all was mutual position of such employers, for example, in the field of competition. The new, challenged legal regulation rectifies unsuitable nature of the previous legal regulation, whereas from the point of view of the Constitutional Court it is decisive that the chosen solution does not deviate from the limits of constitutionality. It is not in contrariety with Article 11 (2) of the Convention, since the subject legal limit in question can be considered necessary to protect the rights and freedoms of others, in particular, to protect the right to pursue business with employers (Article 26 (1) of the Charter).

53. The Constitutional Court does not consider unconstitutional that the contested provision applies only for employees in labour-law relationship. As noted above, the contested provision of Section 286 (3) of the Labour Code provides for the necessary personnel base for the possibility of trade union to act. What is also desirable is its certain stability in terms of time. This can only be ascertained with respect to employees in labour-law relationship. Both the agreement on work performance and agreement on work activity is characterized by a maximum range of 300 hours per calendar year (Section 75 (1) and 76 (2) of the Labour Code), which does not fulfil this assumption of the stability of personnel base. It is by no means the case that the employees outside labour-law relationship could not be represented by a trade union, but to determine the need for the trade unions to act as a certain time-stable and locally identifiable group. Wide entitlements of trade unions are primarily aimed at protecting more complex interests of employees (in an labour-law relationship), which the employer should use primarily to fulfil job tasks (Section 74 (1) of the Labour Code). It should be stressed that issues that are typically solved by trade unions with employers must be negotiated individually with employees outside the labour-law relationship, i.e., in each individual contract separately. As ensues from Article 77 (2) of the Labour Code, these concern the most important elements: transfer to other work and transfer, temporary assignment, severance pay, working hours and rest periods, impediments to work on the part of the employee, vacation leave, termination of labour-law relationship, remuneration and travel allowances.

54. Other objections were raised by the petitioners against the wording of Section 286 (4) of the Labour Code (points 23-26 above). The rights associated with the work of a trade union with the employer arise only on the day following the day the trade union notified the employer that it fulfilled conditions for working with it; not only directly on the day of such notification. The petitioners, therefore, expressed concern that the employer may on the day of the notification terminate the labour-law relationship with the employees - members of the newly established trade union organization to prevent it from acting; or with a member of the trade union body and thus to thwart its increased protection. Under Article 1

of the Convention No. 135, workers' representatives in an undertaking "enjoy effective protection against all measures that could harm them, including lay-off, which would be motivated by their status or their activities as workers' representatives, their membership of trade unions or participation in trade union activities if they are acting under applicable laws, collective agreements or other contractual arrangements."

55. The petitioners do not challenge the provision in question due to direct contradiction with the constitutional order, but due to possible abuse of rights that could weaken the protection of trade union officials or to prevent a trade union from operating with a particular employer. It no longer concerns the case of restrictions of the trade union rights but possible shortcomings in supporting of such a right. Space to promote the right to associate in trade unions and to ensure the protection of trade union officials, however, is already very wide and its filling is the responsibility of the legislators. The above-mentioned Article 1 of the Convention No. 135 generally enshrines the right to protection of workers' representatives. And given the general nature of the right enshrined other Articles 4 and 6 of the cited Convention retain the designation of the types of representatives of workers who will have the right to protection and the material possibilities set by the Convention on national legislation, collective agreements, arbitration awards or court decisions. They then entrust the implementation of the Convention to national legislation, collective agreements, or any other means that conforms to national practice. We can find a similar regulation also in other above-mentioned international documents.

56. The protection of trade union officials is enshrined in the Labour Code in Section 61. Its paragraphs 2 to 4 provide that with respect to a member of a trade union who operates at the employer, during his/her term of office and within one year after the expiration thereof, for termination or immediate cancellation of the labour-law relationship, the employer is obliged to request prior approval from trade union. If a trade union refused to grant consent under paragraph 2 termination or immediate cancellation of labour-law relationship are invalid for this reason; however, if other terms of termination or immediate cancellation are fulfilled and the court in dispute under Section 72 finds that the employer cannot be justifiably required to continue to employ the employee, the termination or immediate cancellation of the labour-law relationship are valid. The requirements for increased protection for trade union officials are fulfilled according to the Constitutional Court.

57. In its Article 286 (4) the Labour Code only "technically" regulates when the authorization of trade union organization to operate with an employer arises. The contested regulation itself does not interfere with the right to associate in trade unions or with the protection of trade union officials. There is also no conflict with fundamental rights. And the question of whether the contested regulation ensures better or worse protection from possible misuse of the right should not be resolved by the Constitutional Court. In this regard, it recalls that "its task as a judicial

authority for the protection of constitutionality (Article 83 of the Constitution) in the proceedings on the proposal to abolish a particular statutory provision is not to in a perfectionist way, point to various inaccuracies in the law or to advise the legislator about more suitable regulation, or to give legislator detailed instructions on how they are at the level of the constitutional right to address all the relevant situations. Its constitutional duty is to assess whether the provisions of a properly challenged law are constitutionally conforming or not" (the above-mentioned award file No. PL ÚS 83/06 dated 12 March 2008). The Constitutional Court with respect to the contested provision did not find contradiction with the constitutional order.

58. Beyond the necessary justification, the Constitutional Court adds that abuse of right is possible on both sides; both by the employer and the employee.

59. An employer may give a termination notice to the employee only for reasons stated exhaustively (Section 52 of the Labour Code). This termination notice reason must be fulfilled at the moment when the employer gives the employee notice. In case of a litigation concerning the invalidity of the termination it is the employer who must demonstrate the existence of reasons for termination notice. It is not, therefore, that the employer would receive a notification of the trade union organization and could, on the same day, arbitrarily give notice to its official. Even if the termination notice was given, the immediate time sequence of the notice to the notification would in a possible litigation sufficiently drew attention to possible abuse of the law.

60. The opposite case constitutes purposeful establishment and notification of the operation of a trade union to an employer in connection with threatening notice for one or more employees. Who is threatened by a notice becomes a member of a trade union body, and the notice is immediately dependant on the consent of that authority. The purposeful nature of such a step is virtually unreviewable because, as already mentioned above, any limitation of the number of trade unions is inadmissible. The employer has the possibility of judicial protection if he can prove in court that he cannot demand that he continues to employ an employee.

61. In both hypothetical cases, it would be up to the court to assess specific circumstances of a particular case and to provide the protection of rights as required by Article 90 of the Constitution. Protection against any possible abuse is sufficiently ensured by judicial review of the validity of a notice.

B. Notice to an employee for violation of the regime of temporarily work incapacitated insured person and exclusion of the entitlement to unemployment benefit for this reason

1) Constitutional Aspects

62. The rights defined in Article 41 (1) of the Charter are not unconditional and it is possible to claim them only within the limits of the law. The legal implementation

must not conflict with the constitutional principles, in other words, the relevant laws shall not annul or deny constitutionally guaranteed social and economic rights. When implementing the constitutional regulation, enshrined in the Charter, the legislator must comply with Article 4 (4) of the Charter, according to which, when applying the provisions on the limits of basic rights and freedoms their essence and meaning must be safeguarded. Social and economic rights, including the right to earn a living by work "is different from classical fundamental rights in that they do no exist a priori as unlimited fundamental rights that may be limited by the legislator only for the reasons foreseen in the Charter, but the legislator gives them the relevant contents and scope. In case of economic and social rights, therefore, constitutional guarantees represent constitutionally guaranteed protection of institutions (employment, wages, social security, family, parenting, etc.), not the protection of specific public subjective rights. As criteria for constitutional review, they can therefore only serve in cases where the legislator would completely ignore or negate the institutional protection of these institutions. The same applies in relation to interpretation of the laws containing the regulation of these institutions. If the general courts interpret and apply such a law, their activity from the constitutional point of view is controllable only from the point of view of possible arbitrariness, but not from the point of view of the (…) [respective] article (...) of the Charter. The concretization of economic and social rights lies solely with a legislator, not the Constitutional Court" [points 49 and 50 of the award Pl. ÚS 17/10 of 28 June 2011 (N 123/61 SbNU 767; 232/2011 Coll.); award sp. Pl. ÚS 20/09 of 15 November 2011 (N 195/63 SbNU 247; 36/2012 Sb.; comp. further award sp. Pl. ÚS 8/07 of 23 March 2010 (promulgated under No. 135/2010 Coll.); award sp. Pl. ÚS 2/08 of 23 April 2008 (N 73/49 SbNU 85; 166/2008 Coll.).

63. With regard to social rights, it can be further stated that their overall limitation is precisely the fact that they are not, as opposed to fundamental rights and freedoms, directly enforceable on the basis of the Charter. Their limitation lies precisely in the need for a legal implementation that is also a condition for concrete realization of individual rights" [paragraph 52 of the award, Pl. ÚS 2/08 of 23 April 2008 (N 73/49 SbNU 85; 166/2008 Coll.)]. In any case, of course, "there can not be a real denial of any social right, because it is also necessary to comply with the principles set out in the Charter. The degree of their compliance must be judged in every individual case of realization of these rights by legal regulation" (point 56 of the award, file no. Pl. ÚS 2/08).

64. With regard to the wording of Article 41 (1) of the Charter, for the review of the constitutionality of laws containing regulation of social rights a narrower space has been given than with respect to the rights of the first generation and anchoring of their existence in the Charter means (with respect to Article 4 (4) of the Charter) that, in case of legal regulation a certain minimum standard must be maintained (i.e. there is a certain lower limit of the limitation, essential content) of social rights. Decision-making on the scope of social rights is amongst significant important political issues that are primarily the subject of election competition and, in the end, elected representatives decide on them in legislative body.

65. Article 26 (3) of the Charter enshrines the right to earn a living by work. However, this right does not imply the right of every individual with respect to the state to have work secured. It is the duty of the state to only create conditions or rules that would best (within possible limits) ensure that everyone can get a job, i.e., to enable to exercise the right to the greatest possible number of stakeholders, as provided for in Article 1 (1) of the European Social Charter. Even for this purpose, labour relations are not left entirely upon contractual freedom, but the legislator lays down conditions of the performance of work. In doing so, they must proceed in such a way that the right to earn a living by work was put in compliance with other values, in particular, the right of the employer to choose his/her colleagues; one can even imagine that too strict setting of the possibility of termination may in certain circumstances intervene in the freedom to do business in an excessive way (Favoreu, L. et al .: *Droit des libertés fondamentales*. Paris: Dalloz, 2009, p. 334). If the legislator's task is to bring into compliance the right to earn a living by work with the right to do business, then the Constitutional Court examines whether the legislator managed to achieve this objective. This holds true that only in case of the obvious error in the legislator's deliberation the balance reached does not have to be respected.

66. According to Article 1 (2) of the European Social Charter, for effective exercise of the right to work the state must ensure effective protection of the right of a worker to earn a living in a freely chosen occupation. However, this does not mean the right to stability of a particular labour-law relationship. A particular labour-law relationship that ceased to exist does not mean losing access to the selected occupation, and it is, therefore, reasonable that the level of protection of the stability of the labour-law relationship is primarily decided by the legislator's reasoning. It is possible to point out here points 28 and 29 of this award, Pl. ÚS 11/08 of 23 September 2008, N 155/50 SbNU 365, in which the Constitutional Court interpreted the right to freely choose employment in relation to the right to work (Article 26 (1) and (3) of the Charter) as public subjective right of an individual imposing a duty on public authorities to "not create unjustified obstacles of public nature with respect to the choice and exercise of activities permitted by law, for which it has the necessary prerequisites (...). They cannot be interpreted in such a way that, in the context of labour law - and therefore, in essence, private law – relationships they would guarantee individuals rank what they imagined. The right to freely choose occupation enshrined in Article 26 (1) of the Charter, is not a subjective right to a particular job at a particular employer, or employment of a particular type or kind, to which the obligation would correspond of a competent state body to provide such employment, possibly even by using state power.

It concerns freedom in free competition to apply for the chosen profession, which, however, does not provide a guarantee for success (...). The constitutional right to free choice of profession does not mean invariability of the performed employment and the prohibition to unilaterally terminate employment." In other words, in case of "the right to choose and prepare for a profession, as well as the right to conduct business and to engage in other economic activities, it would concern the restrictions on their essence and sense if, as a result thereof, a certain group of individuals would be significantly hindered or denied access to a particular profession or the ability to perform a particular activity or if, as a result, a particular job or activity ceases to be able to secure resources for their needs to those who perform them. Any restrictions must of course respect the principle of equality in rights within the meaning of the first sentence of Article 1 of the Charter, or more precisely Article 3 (1) thereof" (paragraph 48 of the award, file No. PL ÚS 5/15 of 8 December 2015, 15/2016 Sb., which refer inter alia to paragraph 278 of the award, file no. Pl. ÚS 1/12 of 27 November 2012, N 195/67 SbNU 333; 437/2012 Coll.).

67. The award, file no. Pl. ÚS 55/13 (paragraphs 51-57) contributed to determine the right to adequate material welfare in unemployment. In this award, the Constitutional Court ensued from the fact that the provisions of Article 26 (3) of the Charter establishes the right to earn a living by work and right of those who cannot exercise this right without their fault, to material security in a reasonable scope. In the opinion of the Constitutional Court, "both for social and economic reasons (...) it is necessary to minimize economic damage and personal breakdown that leads to the loss of employment. But it is equally important to provide the unemployed positive incentives to become re-employed as soon as possible. Generally, it is the essence and sense of the right to adequate material security in case of the impossibility to exercise the right to work, implemented in this case through the institute for unemployment benefits, to moderate in the short term a loss of income that has been lost as a result of a legally defined social event (...). The mechanism of implementing the right in question is that the state provides to the unemployed temporarily and when fulfilling the legal conditions, a certain amount of funds, since (objectively) they could not realize their constitutionally guaranteed right to earn a living by work. It is true that someone who does not meet the conditions of entitlement to such benefit is then referred to assistance in material need under Article 30 (2) of the Charter" (point 51 of the award, file No. PL ÚS 55/13). Material unemployment support is a legal implementation of the right to reasonable material security of those who cannot work by no fault on their own (according to the second sentence of Article 26 (3)) of the Charter). Material security (both under Article 26 (3) and under Article 30 (1) of the Charter) constitutes a higher standard than assuring basic living conditions [Article 30 (2) of the Charter (see paragraph 54 of the award, file No. Pl ÚS 55/13).

68. The Constitutional Court further stated (point 52 of the award, file no. in Pl. ÚS 55/13) that "by statutory regulation this right is mainly implemented through unemployment and retraining benefits. The subject right is vested in those who

“without their fault” cannot earn a living by work (and at the same time are not fit to work). Therefore, it concerns jobseekers who make an effort to find employment and did not cause the loss of previous employment (...). “To minimum standard of this fundamental right could be interfered with “if it was established and proved that the new legal regulation reduces the implementation of the constitutionally guaranteed standard of social benefits to practically disallowing their implementation or even removing them in general” (see paragraph 78 of the award, file no. Pl. ÚS 2/08).

69. The Constitutional Court also expressed opinion on interpretation of material security in unemployment under Article 26 (3) of the Charter earlier in point 262 of the award, file no. Pl. ÚS 1/12 of 27/11/2012 (N 195/67 SbNU 333; 437/2012 Coll.) stating that: “the legislator should establish concrete way, through which this right will be exercised, as well as implement its possible changes. The chosen legal regulation, however, cannot factually deny this social right (award file no. Pl. ÚS 2/08, paragraphs 54 and 56, also award file no. Pl. ÚS C-54/05, paragraphs 46 to 49). Its substance and purpose must always be taken into account (Article 4 (4) of the Charter)”. At the same time, however, it is holds true that “entitlement to unemployment benefits is not unchangeable and it cannot be ruled out that the legislator will expand or reduce it in the future. Any possible changes may relate to both the amount of benefits and the length of promotion period or conditions, under which the will claim arise or last. But it is always necessary to consider whether the statutory scope of rights whose purpose is material security in unemployment, will continue to enable real implementation of the subject constitutionally guaranteed right" (see paragraph 263 of the award, file no. Pl. ÚS 1/12).

70. Under Article 69 letter f) and g) of the ILO Convention No. 102 on minimum social security standards (461/1991 Coll.) it is possible to cease payment of benefit, to which the protected person would be entitled under any part II. to X. of this Convention, in a certain extent inter alia because social event was (f) instigated intentionally by the person concerned and that the person concerned (g) omitted in certain cases, to use medical or rehabilitation services available to him/her, or fails to observe the rules set out to verify the existence of a social event or governing the behaviour of recipients of benefits. Unemployment benefits are also covered by other points h) and i) of the Convention. According to them, the benefit may be withdrawn (h) if a person concerned fails to use employment mediation services, which are available to him/her or (i) if the person concerned has lost his or her employment directly as a result of the cessation of work, which happened on the basis of labour-law dispute, or if he/she left his/her employment on a voluntary basis without sufficient grounds. Similarly, the European Code in its Article 68 (f) and (g) stipulates that the payment of benefit, to which the protected person would otherwise be entitled under some of the parts II. to X. of the Code, can be ceased in the given the extent, among others, because the social event was caused by deliberate fault of the person concerned or person concerned in some cases failed to use healthcare or rehabilitation services available to him/her, or has failed to comply with the established rules verifying the existence of a social event or rules

governing the behaviour of recipients of benefits. Similarly as in case of the Convention, it is also possible, under the European Code, in case of unemployment benefits to cease the payment of the benefit (h) if the person concerned does not use the employment services available to him/her, or (i) if the person concerned has lost employment directly as a result of the cessation of work that occurred on the basis of labour-law dispute, or has left employment voluntarily without sufficient reasons. According to the explanatory memorandum on the revision of the ESZS (see comment on Article 74) it applies that although Article 68 of the European Code speaks only about suspension of benefits according to the control authorities, it allows both refusal and suppression of these benefits. It also holds true that if a social event was caused by an intentional fault of the person concerned, the benefits to which he/she would be otherwise entitled may be refused (*refusées*), withdrawn (*supprimées*) or suspended (*suspendues*). The situation that has the same result is when a given person did not, among other things, behave in a manner consistent with the status of the recipient of the given benefit. The Constitutional Court also examined the applicability of the Charter of Fundamental Rights of the European Union that binds Member States, if they apply Union law (Article 51 (1)). Both the Labour Code and the Employment Act incorporate EU regulations, but the contested provisions are not affected by these provisions (harmonized) [Section 363 and footnote 1] of the Labour Code, footnote 1) of the Employment Act]. The provision of the Charter of Fundamental Rights of the European Union, which fall within the area governed by the contested provisions (Article 30 – protection in case of unauthorized lay-off, Article 34 - social security in case of loss of employment) are, in addition, applicable "in accordance with ... national law and customs".

2) Review Itself

71. Before the Constitutional Court proceeds to its own review of the contested regulation, it considers necessary to remind of a fundamental change in the sickness insurance scheme. In relation to its new regulation made by the Act No. 187/2006 Coll., on Sickness Insurance, the Labour Code from 1 January 2009 imposes the obligation upon employers to provide for a certain period of time from the occurrence of incapacity to work instead of sick pay wage or salary compensation (Section 192 (1) of the Labour Code). A part of the sickness insurance costs was transferred upon the employer by "exchange" for lowering the premium rates. The employers then were made possible to check the observance of the regime of temporarily work incapacitated insured person (Section 192 (6) of the Labour Code). In the event of violation of this regime, the provision of Section 192 (5) of the Labour Code grants the employer authorization to decrease or refuse to provide the wage or salary compensation. Wage compensation is paid out of the employer's resources and not those of the state. And it is this fact that is crucial to understanding current legislation and assessing constitutionality of the contested provisions.

72. If it is an employer, who "from his own pocket" pays to the temporarily incapacitated to work wage or salary compensation, in addition to the labour law also another relationship arises between the employee and the employer. Therefore,

the Labour Code now regulates, among others, "some rights and obligations of employers and employees while adhering to the regime of temporarily incapacitated to work insured person under the Sickness Insurance Act and some sanctions for the breach thereof" [Section 1 letter e) of the Labour Code]. And for the same reason, the provision of Section 301a of the Labour Code enshrines the so-called "other duties of employees" consisting in the fact that "employees are in the first 14 (or 21) calendar days of temporary incapacity to work obliged to adhere to the established regime of temporarily incapacitated to work insured person as regards the obligation to stay at the time of temporary incapacity to work at the place of residence and to respect the time and extent of permitted leave under the Sickness Insurance Act".

73. In the opinion of the Constitutional Court, in the present case, the very core of the right to earn a living by work according to Article 26 (3) of the Charter is not violated, since any systemic threat (in the sense of ignoring and negating the protection of an institute of dependent work) the possibility to earn a living by work cannot be considered at all. Additionally, those employees who have been laid off pursuant to Section 52 h) of the Labour Code are left with *pro futuro* opportunity to earn a living by work, as by this they have not yet lost access to the chosen profession.

74. Since the regulation of termination notice is intended to offset both the interests of the employee as well the employer, the legal regulation is trying to achieve that the employee is protected, on one hand, by the fact that the employer cannot terminate the labour-law relationship completely arbitrarily (without cause) and interests of the employer are, on the other hand, protected by the option under certain, in law precisely defined circumstances to terminate the labour-law relationship. Although the relationship between the employer (payer of wage compensation) and temporarily incapacitated to work employee (the recipient of this compensation) is not an labour-law relationship, it is very close relationship to this. If the employee breaches his/her obligations at the time of temporary incapacity to work, he/she thereby causes harm to his/her employer. He/she does not work, does not undergo treatment, and yet demands from his/her employer wage compensation. He/she *de facto* "deceives" his/her employer. In addition, by unfounded absence he/she may cause serious economic difficulties to the employer. Particularly gross breach of the duty of temporarily incapacitated to work employee (Section 301a of the Labour Code) can lead to a fundamental breach of trust between the employee and the employer.

75. Therefore, according to the Constitutional Court, the employer cannot be fairly required to continue to employ a person who "deceived" him, tried to steal money from him or otherwise seriously harmed him. Therefore, the Constitutional Court considers the possibility of terminating the labour-law relationship by notice reasonable. It is not just an "alternative private sanction", as suggested by the petitioners, but a way to resolve distorted confidence, which it justifies by protecting the employer's interests. What is important is that the employer can only give termination notice in case of a particularly gross violation of the duty of the employee, i.e., the highest possible intensity of the violation; not during normal violation, or even in case of a serious violation. In other words, the burdening effect for an employee may only occur only in case of the most serious breach of legal obligations on his/her part. The more he/she does not comply with the statutory obligations, the more negative consequences it can have for him/her. The intensity of the breach of obligation is set as strictly here as for the reason, for which the labour-law relationship can be immediately cancelled (Section 55 par. b) of the Labour Code]. It must be taken into account that there can be no double punishment for one breach of duty. The provision of the second sentence of Section 192 (5) of the Labour Code excludes the possibility of reducing or failing to provide wage or salary compensation if it was for the same violation of the regime of temporarily incapacitated to work insured person employee was given notice under Section 52 h) of the Labour Code.

76. The Constitutional Court does not agree with the objection that the contested legal regulation opens room for the arbitrariness of employers (paragraph 14 above). The employer must first of all very carefully examine each individual case of breach of legal obligations and all its circumstances and context. He will always have to properly assess the intensity of the employee's breach of obligation. Since the Labour Code does not define the term "in a particularly gross way", it is "a norm with a relatively indefinite (abstract) hypothesis, i.e. a legal norm whose hypothesis is not set forth directly by law, and which leaves upon the court at its discretion in each individual case to define the hypothesis of the legal norm from broad and previously unlimited circumstances. For concluding whether an employee's behaviour violates obligations according to § 301a reached the intensity of "violation in a particularly gross manner" it is not significant how the employer evaluates it in his/her work order or other internal regulation or how it should be assessed under a collective agreement or possibly under an employment or other agreement of the parties of basic labour relations, and the court is not bound by such a definition when deciding on the determination of invalidity of the termination of the labour-law relationship. The court always assesses in each individual case, how this term will be defined. Definition of the hypothesis of Section 52 letter h) thus depends in each particular case on the consideration of the court; in investigating the intensity of the breach of the duty of the employee the court may consider the post he/she occupies, his attitude towards the performance of the work tasks so far, the time and situation in which the violation occurred, the degree of fault on the part of the employee, the manner and intensity of the breach of

individual obligations of the employee, the consequences of breach of duties for the employer, whether or not by his/her actions the employee caused damage to the employer" (see Drápal, L. Termination Notice Reasons ("*Důvody výpovědi*"). In: Bělina, M., Drápal, L .: Labour Code. Commentary ("*Zákoník práce. Komentář*"). Prague: C. H. Beck, 2012, p. 329). Although the Constitutional Court is aware of the fact that the definition of the term "in a particularly gross manner" will be primarily upon the case law of general courts to make, so much as *obiter dictum* dares to note that it will probably involve cases of "intentional sick days" for the purposes of activities that are incompatible with incapacity to work, i.e., for example, performing other gainful activity or recreation. As is clear from the judgment of the Supreme Court of the Czech Republic, file no. 21 Cdo 5126/2014 dated 15 October 2015, such a reason for termination notice, for example, will involve that the employee who was recognized temporarily incapacitated to work, has not indicated the place of his/her residence with information needed to allow the employer the necessary control.

77. In addition, the law grants an employee who has been laid off by the employer for the aforementioned reason, exactly the same protection as for other termination notice reasons. Under the provision of Section 72 of the Labour Code, the employee may challenge the invalidity of the notice with the court within two months from the date when the labour-law relationship should have terminated with this notice. And in the lawsuit it will be an employer who will have to prove that the employee has breached his/her duty in a particularly gross manner. The unconstitutionality of the legal regulation cannot be caused by hypothetical possibility of abuse, if against all the negative phenomena caused in the context of termination of labour-law relationship, there exists an effective judicial protection (see also paragraph 54 of the award, file no. Pl. ÚS 61/04 of 5 October 2006, N 181/43 SbNU 57; 16/2007 Coll.).

78. To sum up, the contested legal regulation does not violate the "right to work" as claimed by the petitioners in paragraph 13 of this award. This right is not absolute, but is adequately breached by the possibility to terminate the labour-law relationship when the statutory conditions are met. References of the petitioners to relevant articles of the European Social Charter (paragraph 13 above) are inapt. These articles enshrine basic principles, according to which everyone must have the opportunity to earn a living by means of work, which they choose freely and all workers have the right to fair working conditions. These principles cannot be interpreted in such a way that an employee cannot be released from his/her job against his/her will. Employee who has been given notice under Section 52 h) of the Labour Code had "the opportunity to earn a living by means of work", but got rid of this opportunity (at least for this time) in that in a particularly gross way violated his/her duties. After all, even according to the constitutional order of the Czech Republic, the right to earn a living by means of work as laid down in Article 26 (3) of the Charter may be claimed only within the limits of the law (Article 41 (1) of the Charter), which in this situation does not anyhow deviate from the limits of

constitutionality. And, as mentioned above, any abuse of notice is sufficient protected by judicial review.

79. The petitioners are also of the view that the contested provisions are “contrary to the principle of equality of people in rights”. From the reference to the explanatory memorandum to the law in question, it can be derived that they meant possible inequality between the insured persons, as the other insured persons in the same breach of the regime of incapacity to work insured persons will remain in the sickness insurance scheme. When assessing equality, the purpose of sickness insurance must be taken into account. The Sickness Insurance Act regulates sickness insurance “in case of temporary work incapacity, ordered quarantine, pregnancy and maternity and treating or taking care of a member of household and organization and performance of insurance” (Section 1 (1) of the cited act).
The following benefits are provided from sickness insurance: sickness leave, cash assistance in maternity, nursing and compensatory allowance in pregnancy and maternity (Section 4 of the cited Act). The purpose of sickness insurance is to “financially secure economically active citizens in case of short-term loss of earning (income) due to selected social situations conditioned by change in health conditions” (explanatory memorandum to the Sickness Insurance Act, Chamber of Deputies, press volume no. 1005, 4th parliamentary term). If an employee, whose labour-law relationship ended with termination notice pursuant to the provision of Section 52 h) of the Labour Code, becomes temporarily unable to work, there is no “loss of earnings” due to this incapacity or ordered quarantine, but because his/her labour-law relationship has ended. There is nothing to substitute by possible sick pay. Therefore, from the point of view of equality of people we cannot compare insured persons who, despite the violation of their duties, remained employees (and thus insured) with those who were laid off and with their employment terminating not only sickness insurance, but also the right to salary or wage expired. The above-mentioned fully applies even to the treatment benefits, which serve a similar function (Section 39 of the cited Act).

80. Separately, we need to deal with the issue of “equality of the insured persons” with respect to the benefits of financial assistance in maternity and compensatory allowance in pregnancy and maternity according to the provisions of Sections 32 and 42 of the Sickness Insurance Act. Prohibition of notice to a pregnant employee, employee taking maternity leave and employee or female employee taking parental leave [Section 54 d) of the Labour Code] in relation to a 180-day protection period (Section 15 (2) of the Sickness Insurance Act) practically excludes the negative impact of the breach of employee’s obligations under the provisions of Section 301a of the Labour Code on the right to reimbursement of such benefits.

81. The Constitutional Court could not deal with the petitioners§ objection that the contested provisions contradict the “principle of proportionality” of legal interference in the sphere of private autonomy” due to their uncertainty.

82. The public defender of rights pointed out the uncertainty of the termination notice reason under the provision of Section 52 h) of the Labour Code in comparison with other notice reasons, for which the Labour Code sets out in a fairly detailed manner, for the fulfilment of which conditions can a particular notice reason be used. This objection (lacking constitutional dimension) cannot be agreed with. How much more specific is the opportunity to give notice to employees "for a serious breach of duty resulting from legal regulations relating to the work performed by an employee" [Section 52 g) of the Labour Code]? The law can hardly be more specific here, and its interpretation is no longer a matter of general courts.

83. On the grounds of disproportionality, the petitioners also consider unconstitutional the exclusion of a "laid off" employee from the entitlement to unemployment benefit for the following period of 6 months after termination of employment in accordance with Section 52 h) of the Labour Code. As stated in paragraph 15 above, the petitioners argue by Article 20 of the European Code requiring that the protected persons be ensured unemployment benefits. They are omitting, however, Article 68 of this European Code. It admits that the payment of benefit, to which the protected person would otherwise be entitled, can be stopped in the given extent if the social event was caused by the deliberate fault of the person concerned.

84. Pursuant to the provision of Section 39 (2) a) and b) of the Employment Act unemployed job seeker is not entitled to unemployment benefits, with whom in the last 6 months before being registered as a job seeker labour-law relationship has been terminated by the employer due to a breach of duty arising from the legal regulations applicable to work done by him/her in a particularly gross manner or with whom in the last 6 months prior to being registered as a jobseeker employer terminated labour-law relationship due to breach of other duty of the employee under Section 301a of the Labour Code in a particularly gross manner. The Act on Employment, therefore, does not grant any entitlement to unemployment benefit only to those job seekers who have violated their obligations not "only" just in a serious manner, but in a particularly gross manner. Breach of duty by particularly gross manner certainly requires deliberate fault. If thane employee becomes unemployed as a result of an intentional, particularly gross breach of duty, failure to provide unemployment benefit a proportionate and by the European Code directly foreseen consequence. Similarly, Article 26 (3) of the Charter explicitly states that the state in a reasonable extent materially secures citizens who cannot exercise their right to earn a living by work without their fault (see paragraphs 71-72). These last three words are decisive. Without their own fault!

85. Similarly, as the above-mentioned right to earn a living by means of work the right to adequate material welfare enshrined in Article 30 (1) of the Charter can be claimed only within the limits of law (Article 41 (1) of the Charter). And as follows from the above-mentioned, the contested legal regulation does not even interfere with people's equality or is not disproportionate.

86. The Constitutional Court did not find that any of the contested provisions contradict with constitutional order and therefore, in accordance with the provision of Section 70 (2) of the Act on Constitutional Court, dismissed the proposal.

Instructions: The Constitutional Court award cannot be appealed.

In Brno on 23 May 2017

Pavel Rychetský
President of the Constitutional Court

Dissenting opinion of judge Jaroslav Fenyk to the justification of the award Pl. ÚS 10/12.

My dissenting opinion does not apply to the operative part but to the justification of the award Pl. ÚS 10/12.

Regulation according to Section 52 h) of the Labour Code, in my opinion, does not belong to this legal regulation, which is primarily intended to protect employees, especially when it comes to the possibility of terminating labour-law relationship between him/her and the employer. It is a non-systemic provision, which, if misinterpreted, can significantly weaken the protection function of the Code. If the regulation should remain unchanged (i.e. within the award) it will depend very much on the correct interpretation of this provision and the protection of an employee against its abuse by the employer. Although the award in the justification part deals with the question of the gravity of breach of "other duty of the employee", I consider that the interpretation made by the Constitutional Court should be more thorough and with regard to a notice of reason – "a particularly gross breach of other duty" should be directly related to case law of an almost identical notice reason in case of an immediate cancellation of the labour-law relationship by the employer according to Section 55 of the Labour Code. To this end, I put forward the following arguments:

1.1 The assessed Section 52 h) of the Act No. 262/2006 Coll., Labour Code:

"Employer may give employee notice only for the following reasons:

... h) if the employee in a particularly gross manner violates other obligation of an employee provided for in Section 301a."

1.2 The assessed version of Section 301a of the Labour Code:

"Employees are in the first 14 calendar days and in the period from 1 January 2011 until 31 December 2013 during the first 21 calendar days of duration of temporary incapacity to work subject to the prescribed regime of temporarily incapacitated to work insured person as regards the obligation to stay at the time of temporary incapacity to work at the place of residence and to observe the periods and range of permitted leave under the sickness insurance act. "

1.3 I state beforehand that the required intensity of the violation of the regime of incapacitated to work insured person to raise a notice reason pursuant to Section 52 h) of the Labour Code has not yet been the subject of a detailed interpretation by the

Supreme Court of the Czech Republic. Only in one case did the Supreme Court deal with circumstances of serving notice and related duties of the employee to notify the place of residence by information needed to assist the employer to control the regime of the incapacitated to work insured person. From the judgment in the case of file no. 21 Cdo 5126/2014:

"The Supreme Court of the Czech Republic, therefore, concluded that the fact that an employee who has been recognized temporarily incapacitated to work from 1 January 2012 until 31 December 2013 during the first 21 calendar days of temporary incapacity to work did not indicate the place of his/her residence by data necessary to enable the employer to check whether he/she complies with his/her obligation to stay at the time of temporary incapacity to work in the place of residence and adhere to time and extent of permitted leave, cannot constitute the reason for termination of the labour-law relationship by notice under the provisions of Section 52 h) of the Labour Code."[1]

1.4 In the above-mentioned case, the Supreme Court only briefly stated, that "*the violation of the regime of temporarily incapacitated to work insured person must be caused by an employee and must concern breach by particularly gross manner.* "[2]

1.5 In terms of the assessment of the seriousness of the breach of the regime of incapacitated to work insured person (i.e., duty that is not related to the performance of the work) and, therefore, necessary intensity of this violation due to notice, in my view, interpretation is directly offered by means of case law to "particularly gross" violation of obligation arising from the legal regulations applicable to work performed by an employee, i.e. conditions for the immediate cancellation of labour-law relationship by employer in accordance with Section 55 of the Labour Code.

1.6 The condition of particularly gross breach of duty, which entitles the employer to cancel the employment immediately, was met, for example, in the following cases (case law of the Supreme Court of the Czech Republic):

(I) (21 Cdo 1132/2014) performance of competitive gainful activity;
(Ii) (21 Cdo 1467/2014) handing over the employer's contract to another company;
(Iii) (21 Cdo 1755/2002) driving a company vehicle under the influence of alcohol;
(Iv) (21 Cdo 59/2005) attack on the employer's property outside working hours;
(V) (21 Cdo 633/2006) verbal and physical assault on employee of other company;
(Vi) (21 Cdo 1771/2011) browsing websites instead of the performance of work;

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[1] Resolution of the Supreme Court of the Czech Republic dated 15 October 2015, file no. 21 Cdo 5126/2014.
[2] Ibid.

(Vii) (21 Cdo 2596/2011) fraudulent reporting of hours worked;
(Viii) (21 Cdo 1496/2013) theft - attack on the employer's property.

1.7 It follows from the above-mentioned that these are exceptional cases, which show the highest intensity of the employee's breach. To assess intensity the Supreme Court states:

'The provision of Section 55 (1) b) of the Labour Code belongs to those legal norms with a relatively indefinite (abstract) hypothesis, i.e., to such legal norms, whose hypothesis is not directly established by law, and which leave upon the court at its discretion in each individual case to itself define the hypothesis of a legal norm from a broad, pre-determined and unlimited set of circumstances. To assess whether the employee has breached the obligations arising from the legal regulations applicable to his/her work in a less serious, serious or particularly gross way, the law does not specify, from which viewpoints the court should ensue. In the Labour Code, or in other labour law regulations the terms less serious breach of an obligation arising from the legal regulations applicable to work done by the employee, serious breach of duty ensuing from the legal regulations applicable to the employee performing the work and breach of the obligation arising from legal regulation applicable to the work performed by the employee in a particularly gross manner are not defined, and the possibility and extent of employee penalties for violating such an obligation depend on their definition."

1.8. To assess the intensity of breach of the regime of incapacitated to work insured person in a particularly gross manner, it is necessary to approach it just as in the case of assessment of violation of duties related to the work performed (of the same intensity). The same meaning of these terms is fully confirmed by commentary literature.[3]

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[3] Bělina, M., Drápal, L. et al .: Labour Code. Commentary („Zákoník práce. Komentář"). 2nd edition. Prague: C. H. Beck, 2015, p. 336 states the following citation, which fully takes over and refers to the existing case law conclusions on the assessment of the intensity of particularly gross breach of obligations relating to the work done by an employee:
"The Labour Code does not define what is meant by a particularly gross violation of the employee's duties to comply with the set regime of temporarily incapacitated to work insured person under Section 301a. The provision of Section 52 h) should therefore be considered [similarly as Section 52 g) or Section 55 (1) b)] as a legal norm with a relatively indefinite (abstract) hypothesis, i.e. a legal norm, the hypothesis of which is not directly determined by legal regulation, and which leaves upon the court, in its sole discretion, and in each particular case to define the hypothesis of the legal norm itself from a broad, previously unlimited circle of circumstances. For the conclusion whether the actions of an employee breaching obligations under Section 301a reached the intensity of "breach by a particularly gross manner" it is not significant how the employer evaluates them in its own work order or any other internal regulation or how it is to be assessed under the

1.9 On the contrary, the minimum space is devoted to the identification of cases, in which such a serious breach of the regime of incapacitated to work insured person is concerned. Professional literature only rarely states what violation should it be – if the employee at the time he/she should stay at home, performed the work illegally went for vacation, etc.[4]

1.10 Nevertheless, it cannot be forgotten that particularly gross violation should constitute only exceptional cases. In case of violation of these obligations by a particularly gross manner employee can be penalized in principle with the greatest sanction in the field of employment relations, i.e., by unilateral termination of the labour-law relationship.

1.11 The contested provision is subject to criticism primarily for imposing labour-law sanctions for non-compliance with obligations unrelated with the performance of work:

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collective agreement, or possibly under labour or other contract of the parties to the employment relations, and the court is not bound by such a definition when deciding to determine the invalidity of the termination of the employment relationship. The court always judges in each individual case, how the term "in a particularly gross manner" will be defined and, on that basis, will decide whether the employee was sanctioned for the breach of duty set out in Section 301a according to the law. Definition of the hypothesis of Section 52 h), therefore, in each particular case, depends on the court's consideration; in assessing the intensity of the breach of duty of the employee laid down in Section 301a the court may take into account an employee,
place of work it occupies, its current position as to the performance of work tasks, the time and situation, in which these duties were breached, the degree of fault on the part of the employee, the manner and intensity of the breach of particular obligations of the employee, the consequences of breach of duties for the employer, whether by his/her actions the employee caused damage to the employer, etc. The law leaves here upon the court a wide discretion so that the decision on the validity of the termination of the employment relationship by notice corresponds to the fact whether the employer could be reasonably required that the employee's employment relationship continues."

[4] VYSOKAJOVÁ, Margerita, Bohuslav KAHLE, Nataša RANDLOVÁ, Petr HŮRKA and Jiří DOLEŽÍLEK. Labour Code. Commentary ("Zákoník
práce: Komentář") [ASPI System]. Wolters Kluwer [cit. 2017-5-25]. ASPI_ID KO262_2006CZ. Available in ASPI system. ISSN: 2336-517X, § 52.

- "The legislator may have well realized the inadequacy and the unjustifiable nature that the employer is enabled unilaterally cancel labour-law relationship with an employee for a reason not related at all to the performance of the employee's work and originated in a violation of the law in areas of social security. For this reason, completely artificially by inserting Section 301a into the Labour Code it created from a breach of duty in the area of sickness insurance at the same time violation of employee's employment obligations. "[5]

- "In a totally non-conceptual way it is to make possible to sanction by the highest possible sanction (i.e. by unilateral termination of the labour-law relationship) in the area of labour law, breach of regulations other than those relating to the performance of the work. Specifically, it concerns a case of breach of duty of temporarily incapacitated to work insured person stipulated in Section 56 of the Sickness Insurance Act. There is hardly anything to be changed about this circumstance that the amendment completely artificially (and in complete contradiction with other provisions of the Labour Code) attempts in Section 301a to create from the obligation to observe the regime of temporarily incapacitated to work insured person "other duty of an employee." This is typical example of a conceptually completely wrong sanctioning of violation of obligations in one legal sector by methods of other legal sector. In addition, other sanctions have already been established for violation of these obligations, i.e., a decrease or failure to provide wage compensation (albeit it will not be possible to cumulate them). The state first transferred consequences of the "incompetence" of public law system providing sickness pay to "guard" abuse of the system and the increase in temporary inability to work to an employer and now wants to give them a tool towards employees leading to unilateral termination of labour-law relationship. In addition to the fact that the proposed regulation leads to conceptually completely wrong mixing of labour-law duties and obligations of the temporarily incapacitated to work, we have a reason to believe that it is also in conflict with the constitutional order, especially with the principle of proportionality."[6]

1.12 In the context of the above-mentioned, it is necessary to consider very carefully the intensity of gross violation of the regime of incapacitated to worker insured person. Examples given under point 1.6 represent the most serious forms of breaches that the employee may commit (theft, physical attacks, alcohol, fraudulent actions). <u>In assessing the intensity of violation of the regime of the incapacitated to work insured person their nature could help their employees, employers and courts to determine, which cases of violation of this regime it should concern.</u>

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[5] Bělina, M., Drápal, L. et al.: Labour Code. Commentary ("Zákoník práce. Komentář"). 2nd edition. Prague: C. H. Beck, 2015. p. 1172.
[6] Bělina, M., Pichrt, J.: The draft amendment to the Labor Code (including the link to the draft of the new Civil Code) ("Nad návrhem novelizace zákoníku práce (včetně vazby na návrh nového občanského zákoníku"). Právní rozhledy 17/2011, p. 605.

1.13 The application of such a fundamental institute is tied to an unspecified circle of violation of the regime of incapacitated to that is characterized as particularly gross and should by its contents correspond to the situations, in which the employee committed physical assault, assault against property, fraudulent behaviour, etc., when eventually the employer cannot be fairly required to further keep the employee employed. Typical cases are those of an employee who instead of adherence to the treatment regime leaves the place where he/she should stay and performs another gainful activity and, at the same time, receives sickness pay, or deceives a physician who issues him/her on the basis of false statement of an employee confirmation on work incapacity and employee then take advantage of this situation to repair his/her flat or house, or pretends illness in order to avoid difficult or responsible work the employer rightfully demands from him/her and receives benefits again.

1.14 What is also important, in my view, is that an employee who is recognized by a treating physician temporarily incapacitated to work, is entitled to sickness insurance benefits from the 15th day of his/her temporary incapacity to work. Until then, an employee is entitled to “sickness pay” in the form of wage compensation paid by the employer (excluding the first 3 work days). Employer is, therefore, harmed primarily by wage compensation paid only without reason in this relatively short time, then damage in relation to sickness pay arises to another subject. After this time, it will be necessary to derive the damage caused by the employer from other, but equally serious criteria.

IN BRNO, 26 May 2017 **JAROSLAV FENYK**

The dissenting opinion of judge Ludvík David on the award, file no. Pl. ÚS 10/12

I hereby file dissent to an operative part (and relevant reasoning) of the plenum award, by which the proposal of the group of deputies for the annulment of the provisions of Section 39 (2) b), including footnote 79 and the provisions of Section 54 (1), second sentence, in the words "and b)" of the Act No. 435/2004 Coll., Employment Act, as amended by the Act No. 365/2011 Coll. was dismissed.

By an amendment to the Labour Code, the Employment Act and other laws under No. 365/2011 Coll. the legislator made indeed a major change in the regime of the temporarily incapacitated to work including the payment of sickness benefits and other aspects. For the first 14, or more precisely (from 1 January 2012 until 31 December 2013) 21 calendar days of the duration of temporary incapacity to work of the insured person the employer has taken over payment of benefits, in the form of a wage or salary compensation, who, at the same time, took over among other things, the control of compliance with the established regime. In order for thus established legal status be subject to the Labour Code, Section 301a was incorporated into the Code as a "donkey bridge", indicating an obligation of the employee to observe the prescribed regime at the time of temporary incapacity to work as a "other duty of the employee" (see marginal section of the same provision).

In the commentary to the Labour Code, Prof. Bělina mentioned that the legislator has well realized "*the inapt and unjustifiable of allowing the employer to unilaterally cancel the labour-law relationship with an employee for reasons not at all related to the performance of the work by an employee and originates in the breach of regulations in the field of social security*." That is why the code "*fully artificially*" inserted the provision of Section 301a, which "*from a breach of duty in the area of sickness insurance created, at the same time, violation of labour law duties of an employee*" (Bělina, M. et al., Labour Code. Commentary. („*Zákoník práce. Komentář*") Prague: C. H. Beck, 2012, p. 1066).

From the said amendment a notice reason was also derived under Section 52 h) of the Labour Code, allowing the employer to cancel labour-law relationship with the employee for violation of "*other duties of the employee laid down in Section 301a*" (i.e. violation of the regime of temporary incapacity to work) in a particularly gross manner.

No matter how non-systemic and conceptually controversial (particularly gross breach of discipline is otherwise a reason for immediate cancellation of labour-law relationship by an employer under Section 55 of the Labour Code), which the petitioners also object, this regulation is, I do not think - here in compliance with most of the plenum - that it would be necessary to annul it. It did not have to happen because it is a sub-constitutional regulation that does not show extremely excessive and constitutionally unacceptable consequences for employees.

However, I perceive the established legal status differently in terms of its reflection into the Employment Act. In this act, the above-mentioned amendment in 2011 added text, according to which a job seeker is not entitled to unemployment benefit, with whom in the last 6 months prior to being registered as job seeker labour-law relationship was terminated on grounds of violation of other duty of the employee according to Section 301a of the Labour Code by particularly gross manner.

Such a “transfer” or “extension of the consequences” of an employee’s offence in the area of employment to the area of social security is what I consider constitutionally unacceptable: termination notice and loss of employment is followed by the loss of entitlement to unemployment benefit.

* * *

Under Article 26 (3) of the Charter, everyone has the right to earn a living by work.

Citizens who cannot exercise this right without their guilt are in a reasonable extent materially secured by the state; the law lays down the conditions.

The term “without its fault” used in the second sentence of that article, according to the present interpretation reflects a legal procedure, under which the entitlement to unemployment benefits is lost in case of termination of labour-law relationship due to a qualified violation of work obligations (see Section 39 (2) a) of the Employment Act and more specifically by J. Wintr in Wagnerová, E .; Šimíček, V .; Langášek, T .; Pospíšil, I. et al. Charter of Fundamental Rights and Freedoms. Commentary. („*Listina základních práv a svobod. Komentář*“) Prague: Wolters Kluwer, 2012, p. 586, p. 22). But it is a question of whether it should burden of the laid off employee, in terms of entitlement to unemployment benefit, such a fault, which constitutes violation of the established (treatment) regime of incapacity to work (hereinafter referred to as “PN”) and which was totally inorganically assigned to the labour-law relationship. I guess that is not the case.

The answer can be achieved by measuring the legitimate goal, which here is societal interest in the (limited) merit of receiving unemployment benefit and the means directed to that end, which is termination due to breach of the PN regime as an exclusion from the entitlement to benefit. In my opinion, such means is disproportionate to the objective and incompatible with it.

The Labour Code contains both mandatory and optional standards, whereas the labour-law relationship established by employment contract is significantly governed by optional standards. That means the “distorted confidence” of an employer who, in order to protect his interests, warrants termination of the labour-law relationship pursuant to Section 52 h) of the Labour Code for particularly gross

violation of the PN regime (see paragraph 75 of the plenum award) is saturated by this notice.
The employee's offense should not have another impact; the labour-law relationship is manifested after its termination essentially as merely other claims conditioning legal fact (set-off of its duration for the purposes of pension insurance). The employer should not directly influence by his own manifestation of will legal relationships arising after termination of labour-law relationship with the exception of filing a work report.

"Moving" the sanction for termination notice even to the area of social law - in case of unemployment benefit it is a social benefit, even regulated by the Employment Act - does not mean anything other than a mix of a private and public law element, and moreover unnecessary double punishment for the same act.

If a plenum majority tolerates simultaneous presence of these elements in relation to the same act of an employee, then it ad hoc resigned on the existence of constitutional law doctrine on distinction of horizontal and vertical legal relations.

Disproportionality in relation to the means and objective of legal regulation can thus be demonstrated by simply comparing act and its consequence from the point of view of non-systemic nature and intensity. The violation of PN regime as a ground for termination, on one hand, and the loss of not only the labour-law relationship, but also unemployment benefits together with the (potential) rise of the state of material need, on the other. As to the latter circumstance it should be noted: isn't human dignity beginning to be at stake here?

The incompatibility of both here lies in a legal framework allowing for a double sanction for the same act, which is fundamentally undesirable.

* * *

Other argumentative and also rhetorical aspects of the plenum finding should not be left without criticism.

The text of the award is characterized by deference against the text of sub-constitutional legal regulations, and, on the contrary, offensive nature against the employee (points 74, 75 and, in particular, point 84 with its mentor exclamation mark at the end). Most of the plenum justifies its conclusions in terms of casuistry by pointing to the borderline case where the employee "deceives" the employer (also with the help of a physician, by simulation?) and at time PN performs some activity to its benefit. That is, however, classical pars argumentation position for this and only one side of a coin: "ungrateful" employee approach and an objective, deceived employer gets generalized.

However, the constitutional review of legal norm must not neglect the consequences of opposite situation, namely potential abuse of notice (tied to a high

delict intensity) by the employer, for example, because “uncomfortable” and unreachable at home employee went during PN time to buy (outside the allowed leave) food, the need for its one-time help arisen with respect to a family member living elsewhere, etc. Then, such an employee may find himself in almost fatal situation of material need, and even in case of the use of legal means of defence is left with yearlong litigation.

It is not necessary to elaborate that social sensitivity, not just strictness and respect for the law, should be an inherent part of the perception of reality by the Constitutional Court. However, no matter how the plenum of the Constitutional Court has already previously interfered in general provisions of the Labour Code in essence in favour of contractual freedom and, to a certain extent, the equality of participants (award of Pl. ÚS 83/06, among others to Section 2 (1), the employee remains a weaker party in relation to the employer (comp., for example, points 202, 216 of the award or dissidents of the judges Rychetský, Musil and judge Janů). It should be less acceptable that legal circumstances relevant for the labour-law relationship be transferred to the area of social rights in such a way the legal regulation challenged by the petitioners has done. The legislator should carefully weight individual's limitations and his protection rather than punish without hesitation.

The subject provisions of the Employment Act should have been cancelled for contrariety with Section 26 (3) of the Charter of Fundamental Rights and Freedoms by the Constitutional Court.

Ludvík David

Dissenting opinion of Pavel Rychetský and Kateřina Šimáčková on a part of the operative part and justification of the award of file no. Pl. ÚS 10/12, relating to the petition for annulment of Section 39 (20 (b) of the Act No. 435/2004 Coll., Employment Act, as amended

1. We disagree with the decision of the majority in the plenum because, for the following reasons, we believe that parts of the discussed petition, which were directed against the provision of Section 39 (2) b) of the Employment Act, should have been ruled on favour of for the contradiction of the contested regulation with the right to security in unemployment guaranteed by Section 26 (3) of the Charter on Fundamental Rights and Freedoms and the right to judicial protection of this right within the meaning of Section 36 (2) of the Charter.

2. We endorse the conclusion of the majority in relation to the contested legal regulation of conditions of operation of the trade union with the employer even with respect to the possibility of the employer to give notice to the employee for serious violation of the regime of temporarily incapacitated to work insured person. However, we cannot agree with the conclusion on the constitutional conformity of the contested provision of Section 39 (2) (b) of the Employment Act, according to which a job seeker is not entitled to unemployment benefit with whom in the last 6 months before registration as job seekers employer terminated the labour-law relationship because of the breach of other duty of an employee under Section 301a of the Labour Code (violation of treatment regimen) in a particularly gross manner. The majority deals with this provision in its dismissive award only in paragraphs 82 and 83 and does so in an insufficiently convincing manner.

3. It is clear that the petitioners sought the annulment of the relevant termination notice reason in the Labour Code, and therefore, in their proposal, they have not separately and in more detail dealt with the reasons of unconstitutionality of the contested provision of the Employment Act, because its annulment would result in the annulment of the contested provision of the Labour Code. In agreement with the majority we are of the view that notice from the labour-law relationship for a serious violation of the treatment regime is constitutionally conforming and gives employees the possibility of legal protection against possible misuse of this institute by the employer.

4. However, the termination notice for this reason has based on the contested provision of the Employment Act an automatic impact even on the security of the unemployed person concerned. If the employer unreasonably, arbitrarily or unfairly “lays” off an employee from work for an alleged and serious violation of the treatment regime, it automatically means that the individual to whom the employer has addressed that notice loses the right to an unemployment benefit. And in order to gain this benefit, he/she is forced to lead usually complicated, lengthy and costly court dispute with the employer. All this at a time when he/she lost income from original job and needs resources and strength to find a new job. The contested legal

regulation forced him/her to sue the employer whether the notice is legal, although he/she might not even be at all interested in being employed by him or sue him, and although he/she has no income, from which he/she would finance the dispute. Only if after several years he/she succeeds in a dispute with his/her employer, he/she will be entitled to unemployment benefits, which he/she needed a few years ago to survive the time before finding another job.

5. Entitlement to unemployment benefit (even if under Section 41 of the Charter it can be claimed only to the extent guaranteed by law) is a fundamental right guaranteed by Section 26 (3) of the Charter. If the legislator conditions access to this benefit in specific cases by a decision of an employer, this is not a reasonable way of preventing that work ineligibility is abused, since this purpose can be achieved more rationally and through a more proportionate intervention in the rights of the person concerned. The purpose, to which the disputed regulation leads, is to prevent access to unemployment benefit to those persons who have violated the treatment regimen in a particularly gross manner. The legal regulation should, in accordance with the European Social Security Code, published under No. 90/2001 Collection of international treaties explicitly state that this violation should have the nature of deliberate fraudulent misconduct in abusing the work incapacity. The purpose of protection against fraudulent abuse of incapacity to work would, however, have been reasonably achieved by the authority, which decides on granting the unemployment benefit assessing whether and in which way in a person concerned violated the treatment regime and accordingly decided to grant/not grant him/her this benefit. The competent authority's decision would then be judicially reviewable in administrative justice. The person concerned then would not be forced to claim its fundamental social right through private law suit with an employer.

6. The contested regulation, comprising the accumulation of sanctions against a person who should have breached the treatment regimen, is also the subject of repeated criticism of the Committee of Ministers of the Council of Europe in relation to the obligations of the Czech Republic resulting from the European Social Security Code (compare resolution CM/ResCSS (2014) 3 of 8 October 2014 and resolution CM/ResCSS (2015) 3 of 10 September 2015, also in a document of the International Labour Organization "The state of application of the provisions for social security of the international treaties on social rights: ILO Technical Note: Czech Republic/ International Labour Office. Geneva: ILO, 2016, ISSN 2415-1416). Criticism is also directed against an overly general determination of the situations when this sanction will be applied, which goes beyond Section 68 of the European Social Security Code.

7. Serious violation of the treatment regimen may constitute a reason for lay-off from work and in case of fraudulent abuse of such incapacity to work also the reason for not granting security in following unemployment; however, the breach of duty should in the legal text be determined more clearly. It is primarily not possible to link one to another; the loss of entitlement to benefit to a "layoff", and thus force a

person who is excluded from receiving unemployment benefit to be engaged in labour-law dispute, and only according to the outcome of this dispute, through victory in dispute with his/her employer, only secures access to the possibility to claim unemployment benefits. Such a procedure is inconsistent with the purpose of Section 36 (2) of the Charter establishing the right to judicial protection against interference with any constitutionally guaranteed fundamental right.

8. The entitlement to an unemployment benefit is a fundamental right guaranteed by Section 26 (3) of the Charter. The Charter in Section 36 (2) states that everyone affected in fundamental right has the right to judicial protection. In case of serious breach of the treatment regimen claimed by the employer, the unemployed person concerned is not provided direct legal protection of his/her right to entitlement in unemployment because in order to obtain this benefit he/she is primarily forced to engage in litigation with the employer about the invalidity of a notice. The contested provision of the Act on Employment, therefore, interferes with the right to judicial protection of social right to security in unemployment and results in a denial of direct justiciability of the social right in question in this particular case. Individual affected by his/her right to security in unemployment must be ensured direct judicial protection of that right.

9. The intention of a legislator was to prevent abuse of work incapacity acknowledged by doctors, “minor side incomes”, work “on their own projects”, leisure activities, etc. The assessed provisions, which may in some cases described in the statement of the public defender of rights, lead to arbitrary interference in employees’ rights, actually respond to fundamental, unresolved systemic problem in recognizing people incapacitated to work based on providing “medical sick note” to people who are in sufficiently good health conditions to abuse work incapacity. Even this reason points to the incomprehensible nature of the contested legal regulation because it would be wiser and more conducive for the protection of rights of the persons concerned to solve the nature of a problem - fairer decision-making about the recognition of incapacity to work, not its consequences - abuse of work incapacity.

10. To conclude, we summarize that, for the reasons set out above, a part of the proposal should have been ruled in favour of and the provision of Section 39 (2) b) of the Employment Act should have been annulled, because it constitutes disproportionate and unreasonable interference in the right to security in unemployment, the subject of permanent criticism of our country by international organizations, and also the interference in the right to claim direct judicial protection against interference with the right of an individual to security in unemployment.

In Brno on 23 May 2017

Pavel Rychetský

Kateřina Šimáčková