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## LEGAL AND FACTUAL BARRIERS TO THE TERMINATION OF EMPLOYMENT OF A DISABLED EMPLOYEE IN THE SLOVAK REPUBLIC\*

### Abstract

In the first part of the article, the authors analyse the legislation of the Slovak Republic relating to the termination of employment of an employee with disabilities. In that regard, in the main part of the article, they point to the fundamental contradiction of the case-law and practice of public authorities in the question of defining a disabled employee as well as in the question of the authority of a public authority which creates fundamental practical barriers for the employer in the intended termination of employment with such an employee. The conclusion goes from practical problems to theoretical considerations of the justifiability of the legislation in question which aims to protect groups of disabled workers at particular risk.

**Słowa kluczowe:** pracownik niepełnosprawny, rozwiązanie stosunku pracy, wypowiedzenie, zgoda, Urząd Pracy, Spraw Społecznych i Rodziny

**Keywords:** disabled employee, termination of employment, notice, consent, Office of Labour, Social Affairs and Family

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### Introduction

The basic starting point for the execution of private-law relations is autonomy. This is an expression of the freedom of the individual and the ability of the individual to realize their ideas, behave according to their will and to take part in legal relations according

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to their will (Lavdari 2013, p. 429; Dolobáč 2017, p. 62). This autonomy, however, is not unrestricted.

The expression of autonomy as “that which is not prohibited is allowed” is typical of private law and is naturally applied mainly in obligation (civil and commercial) law, where there is a great variability in dealing with different situations and the parties are given great discretion to determine the content of their obligations (Csach 2007, pp. 102–121; Hůrka 2007, p. 884). On the other hand, in the area of rights in rem, inheritance or family law, the freedom to determine the content of the obligation is substantially limited and legislation provides for a precise list of legal relations that a legal entity may establish, so autonomy is reflected in the decision to establish a legal relationship (for example, the establishment of a certain legal status, the disposal of objects of property rights), but less in determining its content (Bezouška 2010, p. 31). Labour law is, by its rigidity, somewhere on the borderline. From the standpoint of autonomy of the will of the individual, it is firmly bound compared to civil or commercial law, but not enough to lose its status as a private-law sector.

Relations between the employer and the employee in the performance of dependent work are based on the legal and factual inequality of the parties. Consequently, the State enters into this private relationship and establishes the limits and brakes preventing abuse, in particular, of the factually unequal position of the parties. This intrusion takes the form of a restriction on the freedom of contract, because it is the one that, in private law, is the weapon of a stronger one (Bejček 1998, p. 1024).

Labour law is built on minimums and maximums, with relatively mandatory standards being the building blocks of fixed boundaries. These are standards that can be changed only in one direction, namely in favour of the employee. Participants in the employment relationship thus know what kind of contracts they are in, how they can adjust their obligations, implement their rights and responsibilities, know which action is allowed and prohibited. In this space, they negotiate their mutual rights and responsibilities.

Legal acts are carried out by the participants separately, in accordance with their own autonomy of the will. In principle, the consent of its participants is required for the establishment, alteration or termination of a legal relationship. The legislation very rarely requires that a legal act be valid only with the consent of another entity, which is neither a party nor an addressee of a unilateral legal act. However, such a case is made by the law for when an employer wants to terminate a disabled employee. An employee with disabilities may be given notice by the employer only with the prior consent of the competent Office of Labour, Social Affairs and Family; otherwise the termination shall be void.<sup>1</sup>

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<sup>1</sup> Provision of Section 66 of the Act No. 311/2001 Coll. The Labour Code, as amended (hereinafter referred to as: „the Labour Code” or “LC”). The consent of the Office of Labour, Social Affairs and Family shall not be required if the notice is given to a staff member who has reached the age for entitlement to an old-age pension, termination on grounds that the employer or part of it is cancelled or moved and the employee does not agree to the change of the agreed place of work, or dismissal for reasons due to

The granting of consent as a condition for the validity of a legal act is a restriction of autonomy of the will, resulting from the requirement for coherence of the autonomy of the will of several entities (Dolobáč 2017, p. 86). Contrary to the process of creating a contract, in this case we are not talking about coherence with a consensual expression of the will of the other party, but about the consent of a third party. While the requirement of coherence with the consensual expression of the will of the other party is natural in private law and contracts constitute the prevailing way of realizing the autonomy of the will, the interference of the state body is a significant public law element restricting the freedom of the parties to the contract. The question is whether such interference in private relations within the private sector (if we consider the labour law sector as such) is adequate and corresponds to the guarantees of contractual freedom and autonomy of will.

## Materials and methods

The basic objective of this paper is to examine the conditions of special legal protection of disabled employees at the termination of employment, to clarify how it is provided from the point of view of the status and activities of state authorities in the field of social affairs, family and employment services; and to draw attention to the fundamental application problems of the administrative procedure for granting consent to termination of employment. The follow-up objective is to assess the justifiability of the legislation and the consistency of the application procedure of public authorities with guarantees of autonomy of will and freedom of contract.

The primary research source is the text of the generally binding legislation. The subject is of an interdisciplinary nature; therefore it is necessary to take into account the regulations of private and public law. In addition to the Labour Code, it concerns legislation regulating the provision of employment services, the establishment and status of state authorities in the relevant section, administrative proceedings, etc. In interpreting the legislation, we reflected current judicial practice and opinions of state administration bodies. Scientific monographs, articles and contributions from domestic and foreign provenance constituted a supporting source of knowledge.

The current state of legislation and legal science required the application of the analytical method. In order to take into account the wider context of the issue, complexity and clarity of the problem, the descriptive and comparative methods were also used. From the point of view of specific methods of legal science, it is an interpretation of legislation in which we place emphasis on the meaning and purpose of the legislation. In this respect, it is necessary to take into account not only the interest in protecting the weaker party (a disabled employee), but also the objectives and tasks pursued by administrative authorities in the field of public administration.

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which the employer was entitled to immediately terminate employment, or for a minor violation of labour discipline.

## Results and discussion

### Status of a disabled employee

A prerequisite for the application of the procedure under Section 66 LC is the status of an employee with a disability. The concept of an employee with a disability is defined by the provision of Section 40 § 8 LC. This provision grants the status of a disabled employee to an employee who has been recognised as disabled and has submitted a decision on a disability pension to the employer.

The employer is obliged to comply with Section 66 LC only if it has knowledge that the employee is disabled. Otherwise, the employer would *de facto* have to request that consent at each termination of employment by termination (except for the statutory exceptions in Section 66 of the LC), which would be disproportionately burdensome. The judicial authorities have found that if an employee presents evidence that they are a disabled person only during the trial and consequently seeks the court to declare their employment termination invalid, they will not succeed. Such actions of the employee were evaluated by the courts as contrary to the basic principles of the Labour Code, according to which the exercise of rights and duties must be consistent with good manners (see resolution of the Supreme Court of the Slovak Republic of 30 June 2009, File No. 4 Cdo 122/2008).

In practice, however, it is questionable which specific documents the employee should submit to the employer. Despite the wording of the legal definition of a disabled employee (Section 40 § 8 LC), the employee cannot reasonably be required to submit a decision on the disability pension. Under Section 70 § 1 of the Act No. 461/2003 Coll. on social insurance, as amended (hereinafter referred to as: “Social Insurance Act” or “SIA”), the insured person is entitled to a disability pension if, *inter alia*, they became disabled and had pension insurance for the necessary number of years. However, it would not make sense if the scope of the definition of a disabled employee only applied to the person who was entitled to a disability pension and not to the person who is considered a disabled person without entitlement to a disability pension (Barinková 2018, p. 95). In view of the above, it is sufficient that the employee is recognized as disabled, i.e. they have decreased ability to engage in gainful activity by more than 40% due to a long-term unfavourable state of health compared to a healthy natural person (Section 71 § 1 SIA). Assessment of disability is regulated by the Social Insurance Act, in which there is a close relationship between labour law and social security law (Štangová 2017, pp. 264–265).

Moreover, judicial practice shows that the fact that the employer has been submitted a decision of the Social Insurance Agency on the disability of an employee which has not yet come into force does not have the effect that the employee must be treated as a non-disabled employee. The Regional Court in Trnava held that the state of disability of the employee does not arise by decision of the Social Insurance Agency, that the decision is not constitutional in that regard, but is declaratory in nature and determines the retroactive date on which the person must be regarded as disabled (see judgment of

the Regional Court in Trnava of 30 January 2018, File No. 10 CoPr 4/2017). It follows from the judgment of the Regional Court in Banská Bystrica that for the purposes of Section 66 LC it is sufficient to provide the employer with a certificate of disability by the Social Insurance Agency and the degree of decrease in the ability to carry out gainful activity, which contains a finding that the health status of the employee has been assessed for the purposes of pension benefits by an expert doctor concluding that the employee was recognized as an disabled (see judgment of the Regional Court in Banská Bystrica of 23 July 2014, File No. 15 CoPr 5/2014).

In judicial practice, one can see an effort to interpret Section 66 LC in accordance with its purpose, which is to protect the employee with regard to their disability. However, the Offices of Labour, Social Affairs and Family have a different view of this matter. We have encountered a case where the employer has asked the Office of Labour, Social Affairs and Family to give consent to the termination of a disabled employee, but this proceeding was suspended until the court proceedings on the granting of a disability pension were concluded (cf. judgment of the Regional Court in Trnava of 30 January 2018, File No. 10 CoPr 4/2017). It is therefore clear that the approach of judicial practice and the Offices of Labour, Social Affairs and Family must be united. If this does not happen, there is a risk that the courts will consider termination of employment as invalid due to the absence of the consent of the competent authority; however, the absence of consent will be a consequence of the fact that the Office of Labour, Social Affairs and Family was not willing to decide at the given stage of the disability pension proceedings.

### Procedure for granting consent

The legislation for giving consent to terminate employment with an employee with a disability is brief. The Labour Code is limited to stipulating the requirement that this act must be given consent and specifies who is to grant that consent. Specific provisions on the procedure for granting consent are not included in the Labour Code.

The basic starting point for the procedure under Section 66 LC is Art. 2 § 2 of Constitution No. 460/1992 Coll. Constitution of the Slovak Republic, as amended (hereinafter referred to as: “the Constitution of the Slovak Republic”), according to which state authorities can act only on the basis of the Constitution, within its limits and to the extent and in the manner laid down by law. If the legislature entrusts the granting of consent to the competent (state) body, it must at the same time regulate the scope and manner (legal process) by which that body is to act. The activity of state authorities represents the application of the administrative process (administrative procedure), which is a kind of a legal process (Jakab et al. 2014, p. 30).

The granting (or not) of the prior consent to the employer for the termination of employment in the first instance is decided by the Office of Labour, Social Affairs and Family, which is the state administration body active in the field of social affairs, family and employment services. The jurisdiction of the Office of Labour, Social Affairs and Family is in this case based on Section 5 § 7 of the Act No. 453/2003 Coll. on the state

administration bodies in the field of social affairs, family and employment services and on amending and supplementing certain acts, as amended, and Section 13 § 1(e) of the Act No. 5/2004 Coll. on Employment Services and on amending certain acts, as amended (hereinafter referred to as: “Employment Services Act” or “ESA”). The local authority shall be the Office of Labour, Social Affairs and Family in the district in which the employer has its registered office.

The action of the Office of Labour, Social Affairs and Family to grant prior consent to the employer for termination of employment of a disabled employee is subject to the Administrative Rules, unless otherwise provided by the Employment Services Act (Section 13 § 1(e) point 3 in conjunction with Section 70 § 1). However, the Employment Services Act does not give the specificities of the consent procedure. Information available on the website of the Head Office of Labour, Social Affairs and Family shows that the employer is expected to submit a written application indicating the reason for termination of employment, and additional attachments must be attached to the application depending on the reason for the termination of employment.<sup>2</sup>

The legal state in which the requirements of the application or the scope of the required annexes are not determined by law is not optimal. We are aware that the employer’s application and its annexes are the basis for the decision, and the scope and method of determining the documents for the decision is provided by the administrative authority—compare Section 32 § 2 of the Act No. 71/1967 Coll. on Administrative Procedure (Administrative Rules), as amended (hereinafter referred to as: “AP”). However, the lack of regulation of the formalities of the application may adversely affect the course of the consent procedure or the outcome thereof. As a general rule, if the application does not have the requisites prescribed, the administrative authority will help the party to remedy the deficiencies or, if necessary, invite it to remove them within a specified period; at the same time the authority will inform it that the proceedings will be suspended otherwise (Section 19 § 3 AP). However, in this case, the proceedings cannot be suspended or stopped, since the formalities of the application (except for the general formalities of the submission) are not prescribed by the law. The administrative authority is required to establish, within the time limit for decision pursuant to Section 49 AP (in principle within 30 days from the initiation of proceedings, in particularly complex cases within 60 days), the precise and completely true facts of the case and to that end, to obtain the necessary documents for the decision.

The most serious lack of legislation is that the law does not define the conditions for granting consent, the fulfilment of which the Office of Work, Social Affairs and Family is to examine. This state, in our opinion, creates room for the arbitrariness of the administrative body’s decisions. Judicial practice does not improve the situation in this regard either. According to the judgment of the Regional Court in Trnava, the Office of Labour, Social Affairs and Family is obliged to examine the facts of the

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<sup>2</sup> [https://www.upsvr.gov.sk/zamestnavatel/udelenie-predchadzajuceho-suhlasu.html?page\\_id=284386](https://www.upsvr.gov.sk/zamestnavatel/udelenie-predchadzajuceho-suhlasu.html?page_id=284386) (access: 28 October 2021).

grounds for notice for which the employer intends to terminate its employment of a disabled employee (see judgment of the Regional Court in Trnava of 10 December 2013, File No. 20 S 41/2012). However, the Supreme Court of the Slovak Republic stated in another case that in order for the Office of Labour, Social Affairs and Family to be able to act on the employer's application, it is necessary to prove that in relation to the workplace of the disabled employee, there were facts establishing the reason for termination of employment; otherwise, the subject matter of the proceedings before the administrative authority is absent and the proceedings must be stopped (see judgment of the Supreme Court of the Slovak Republic of 24 July 2014, File No. 5 Sžo 69/2013). In the light of the foregoing, it is questionable whether the existence of a grounds for notice is merely a procedural condition or is sufficient in itself to give a decision to give consent.

Should the existence of a grounds for notice be considered a procedural condition, the question of which other criteria the administrative authority should examine for the purpose of a substantive decision would remain unanswered. The law does not specify any such criteria, which contradicts the constitutional requirement for a state authority acting according to the extent and in the manner laid down by law (Art. 2 § 2 Constitution of the Slovak Republic). For comparison, we can refer to the procedure for deciding on matters of protection of whistleblowers when notifying serious anti-social activity pursuant to Section 7 of Act No. 54/2019 Coll. on the protection of whistleblowers and on amending and supplementing certain acts.<sup>3</sup> The Office for the Protection of Whistleblowers shall grant consent to the employer's proposed act against the protected whistleblower only if the employer proves that the proposed act has no causal link with the qualified notification, otherwise the application to grant consent will be refused. The Office for the Protection of Whistleblowers therefore essentially oversees compliance with the principle of equal treatment against the protected whistleblower. The question arises as to whether a similar role belongs to the Office of Labour, Social Affairs and Family in the proceedings for giving consent to terminate a disabled employee.

### Issue of the decision and appeals

The result of the administrative procedure is the issue of a decision. Consent, which, in the context of the Labour Code, is a condition for the validity of a legal act, does not constitute a specific form of decision; the competent authority issues an individual administrative act which is designated as a decision. In particular, the Office of Labour, Social Affairs and Family issues a decision to grant or not grant prior consent.

Consent is deemed to have been granted if a decision to grant consent has been issued and has entered into force. Under Section 52 § 1 AP a decision which is impossible to appeal is final. Pursuant to Section 53 of the AP the party has the right to appeal

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<sup>3</sup> The employer may, in principle, act against a protected whistleblower for which they have not given consent only with the consent of the Office for the Protection of Whistleblowers.

a decision of the administrative authority unless otherwise provided by law or unless the party to the appeal has surrendered in writing or orally in the minutes. The law does not exclude an appeal against a decision of the Office of Labour, Social Affairs and Family to grant or not grant consent, i.e. an appeal against that decision is admissible. The right to appeal belongs to any party to the proceedings, i.e. not only the employer who applied for consent, but also the disabled employee to whom the employer intends to give notice.

The appeal is decided by the Head Office of Labour, Social Affairs and Family, which carries out, at the second instance, state administration in matters where the administrative procedure at first instance is decided by the Office of Labour, Social Affairs and Family (Section 12(t) ESA). However, the appeal is submitted with the administrative authority which issued the contested decision, i.e. the Office of Labour, Social Affairs and Family (Section 54, § 1 AP). The appeal must be submitted within 15 days from the date of notification of the decision (Section 52 § 2 AP).

When the decision to grant consent becomes final, the employer may proceed with the termination. Of course, other conditions for the validity of the termination must also be fulfilled. First of all, it should be emphasised that the granting of the consent by the Office of Labour, Social Affairs and Family does not replace the employer's obligation to discuss the termination with the employees' representatives (Section 74 LC). Discussion means mutual discussion, explaining the reasons for the termination of employment and, if possible, finding alternatives to termination of employment. The employer's application or the accompanying draft notice must contain the particulars of the termination pursuant to Section 61 § 2 LC (see judgment of the Supreme Court of the Slovak Republic of 28 September 2006, File No. 1 Cdo 72/2006). However, it is not necessary to obtain the consent of the employees' representatives after discussing the issue.

The decision of the Head Office of Labour, Social Affairs and Family can be challenged in the administrative judiciary. A natural person (employee or employer) or a legal entity (employer) must lodge an administrative action within two months of notification of the decision of the public authority against which it is directed (Section 181 § 1 of Act No. 162/2015 Coll. Administrative Rules of Procedure, as amended, hereinafter referred to as: "ARP"). The defendant is the public authority which decided on an ordinary appeal, i.e. the Head Office of Labour, Social Affairs and Family (Section 180 § 1 ARP).

In the context of the judicial review of the decision of the Head Office of Labour, Social Affairs and Family, it should be noted that an annulment of a final decision by the Administrative Court does not affect the validity of the legal act already carried out. The validity of legal acts is assessed at the moment and in the light of the circumstances in which the act was carried out. This essential basis for assessing the validity of legal acts was confirmed by the Supreme Court of the Slovak Republic in its judgment of 27 May 2014, File No. 2 MCdo 10/2013, in proceedings for the invalidity of a notice given to a disabled employee on the basis of a final decision by the Head Office of Labour, Social Affairs and Family, which was later annulled in the administrative judiciary (see judgment of the Supreme Court of the Slovak Republic of 27 May 2014, File No. 2 MCdo 10/2013).

## Conclusion

The authors' conclusion will be twofold. We respect the need for increased protection of workers with disabilities, but at the same time we have to point out the clear practical problems that disproportionately burden the employer. First, we can mention the point of view of time. The employer is obliged to seek the consent of the competent authority before the termination of an employment relationship with a disabled employee, which, by default, has 30 days for the decision, or, if it evaluates the case as particularly complex, the time limit is 60 days, which can even be extended further by an Appellate Body. With regard to potential appeal proceedings, the validity of the decision is a matter of several months. During this time, the notice might lose its justifiability (for example, due to unsatisfactory performance of tasks that must be submitted within six months of notification) or the employer might be obliged to pay the employee 100% wages even if they cannot perform any work (for example, as a result of organisational changes or loss of medical fitness of the employee). The employer remains in an uncertain situation with regard to the application and the financial losses during this period are not compensated in any way.

Another major problem is the uncertainty resulting from the vague anchoring of the "good procedure." The Office subjects its consent to the submission of a broad spectrum of documentation. The procedure is excessively formalized. For example — according to the requirements of the Office published on the website,<sup>4</sup> an employer who is interested in terminating employment of a disabled employee by giving notice for organizational reasons must submit:

- a) a decision on an organizational change, or minutes from the collective statutory body meeting on which the organisational change was approved,
- b) the organisational structure before and after the organisational change,
- c) the employment contract, including amendments, of an employee who is a disabled citizen (presented to prove job description),
- d) the confirmation of the Social Insurance Agency of the disability of the employee (mostly it is a decision of the Social Insurance Agency on the disability of a citizen on the granting/refusal of the right to a disability pension),
- e) the statement of a trade union body on the discussion of organizational changes, if the employer has one, or a discussion of this matter by the employees' representatives.

We are convinced that this gives the Office arbitrary authority without a legal basis. Of course, we cannot claim the Office may not require both synergy and submission of the written documentation necessary for the decision, but the requirements for the employer must also be proportionate and non-burdensome. In administrative proceedings, the

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<sup>4</sup> [https://www.upsvr.gov.sk/zamestnavatel/udelenie-predchadzajuceho-suhlasu.html?page\\_id=284386](https://www.upsvr.gov.sk/zamestnavatel/udelenie-predchadzajuceho-suhlasu.html?page_id=284386) (access: 28 October 2021).

burden of proof is borne by the administrative authority, not the party. The example requirements listed above do not comply with these assumptions and *de facto* force the employer into a procedural procedure, according to which only at the end (in the example above after the factual implementation of the organizational changes and even after the discussion of the termination with the employees' representatives) will the consent of the Office with the termination of the employment relationship be given. In our view, the Office does not have the power at all to examine the eligibility of the employer's organisational change or the quality of the discussion with the employees' representatives, such authorization belongs only to the court in any dispute over the invalidity of termination of employment. The question of what the Office will actually consider represents further uncertainty for the employer. Last but not least, consistent practice is not given at all; each Office treats these requests differently, in particular as regards their content examination.

The second line of our conclusion is legal-philosophical. The protection of and support for people with disabilities in employment relations is an expression of material equality and non-discrimination. The prohibition of discrimination can be viewed, in accordance with the material understanding of the principle of non-discrimination, as equality of possibilities or equal opportunities. The basic content basis for the principle of non-discrimination is the requirement for public authorities to treat legitimate human rights holders the same in the same situations and unequally in unequal situations. This fulfils the material concept of non-discrimination. While the first principle has been completely obvious since the beginning of the protection of fundamental rights and freedoms, the second has gradually evolved, including under the influence of the decision-making practice of the Strasbourg authorities, which have stated that discrimination can occur if states do not treat differently those persons whose situation is significantly different without objective and reasonable justification.<sup>5</sup> The concept of material equality, contrary to the formal understanding of non-discrimination, assumes that there are certain (objectifiable) handicaps which may make it difficult for the holders to access the exercise of rights or to certain social benefits (education, access to the market, etc.). This disadvantage then acts in practice as an obstacle to fair competition with other players who do not suffer from this disadvantage and who are equally applying for the rights or social goods.

Quite rightly, the legislature has taken a number of measures to promote the employment of disabled people which are included in the Employment Services Act. A number of support schemes are provided with efforts to correct for health disadvantage in the labour market, whether for employers employing such persons or directly for people with disabilities. We can mention, for example, contributions for the establishment of

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<sup>5</sup> Judgment of the European Court of Human Rights of 6 April 2000, *Thlimmenos v. Greece*, Application No. 34369/97; judgment of the European Court of Human Rights of 18 January 2001, *Chapman, Coster, Beard, Lee and Jane Smith v. United Kingdom*, Application Nos. 27238/95, 2876/94, 25289/94 and 25154/94 (Svák 2006, p. 973; Kmec et al. 2012, pp. 1212 ff).

a protected workshop and a protected workplace, contributions for maintaining disabled citizen's employment, contributions for a disabled person for self-employment, etc. The authors of this article have no ambition to assess the success and effectiveness of specific measures, but consider the overall employment support policy expressed by the support schemes to be correct. Positive motivation should take precedence over punitive one. The above ideas can also be transferred to the above-mentioned adjustment of the need for the Office's consent to terminate employment. It is very questionable whether this legislation, namely keeping an employee expressly against the will and contrary to the interests of the employer, is correct and effective. We believe that overly paternalistic protection and, in particular, vague, inaccurate formal requirements associated with a lengthy process rather discourage employers from employing those concerned and should be reviewed by public authorities or legislators.

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Act No. 311/2001 Coll. The Labour Code, as amended.

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Act No. 461/2003 Coll. on social insurance, as amended.

Act No. 5/2004 Coll. on Employment Services and on amending certain acts, as amended.

Act No. 162/2015 Coll. Administrative Rules of Procedure, as amended.

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