

Selected Issues of Subsidy for Employment of Persons with Disabilities

The provision of the subsidy for employment of PWD is one of the tools used by the state to support the employment of disabled persons. However, the design of this subsidy is not optimally set up and only very general legal regulations concerning the process of its provision, including the obligations of the applicant for this subsidy, give a large scope for arbitrary assessment of applications and the creation of administrative behaviour. The administrative behaviour is therefore faced with the need to adjust the granting of this grant from the perspective of a consistent administrative behaviour moving secundum et intra legem. For this reason, the article discusses the answers to specific questions often faced by applicants for this subsidy and identifies the 'sensitive' points of current administrative behaviour in the granting of this subsidy.

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1. Introduction

In the current pandemic situation, issues related to public employment policy are increasingly coming to the fore¹. The main law regulation in this area is Act No. 435/2004 Coll., on Employment (hereinafter also referred to as the „Employment Act”), which positively legally defines mainly the

1 This text was prepared by Tomáš Sejkora within the programmes „PROGRES Q02 – Publicizace práva v evropském a mezinárodním srovnání” and UNCE/HUM/034 – Výzkumné centrum „Závislá práce v 21. století – otázky a výzvy” which were realized in 2021 at the Faculty of Law of Charles University.

instruments of passive or active employment policy². One of the measures of active employment policy is support for the employment of persons with disabilities, where the Employment Act is intended to create conditions under which disabled individuals have access to increased assistance and care in accessing employment and in employment itself³. The Employment Act also provides other instruments that can significantly influence the situation on the labour market in the employment of specifically disabled persons, one of the most important of those instruments is the subsidy to support the employment of persons with disabilities on the protected labour market under the provision of Section 78a of the Employment Act. subsidy. As Židoňová points out, this benefit is an entitlement benefit, which means it is provided to the employer regardless of the situation on the labour market, so it cannot be classified as an active employment policy⁴. The provision of the entitlement subsidy under Section 78a of the Employment Act does not always correspond to the objectives of the state employment policy, precisely because of its entitlement.

The purpose of this article is to focus on specific theoretical and application problems that have to be faced when providing and drawing the subsidy to support the employment of persons with disabilities on the protected labour market (hereinafter referred to as the „subsidy for employment of PWD”). The article was prepared using a qualitative approach based primarily on the descriptive and analytical scientific method and the results of empirical legal research based on the interaction between employers on the protected labour market and the Labour Office of the Czech Republic. Nevertheless, the article should be considered as only a doctrinal result, as the actual verification of the conclusions expressed in praxis will not be carried out by preparing a follow-up expert article.

2. Basic conditions granting the subsidy

In order for an employer to even consider applying for the subsidy for employment of PWD, it must first resolve its status in relation to the Labour Office of the Czech Republic. Only an employer who employs more than 50 % of persons with disabilities out of the total number of its employees and with whom the Labour Office of the Czech Republic has also agreed on the recognition of the employer as an employer on the protected labour market pursuant to the provisions of Section 78 of the Employment Act will be

2 On the definition of passive and active employment policy compare Ladislava Steinichová et al., *Zákon o zaměstnanosti. Komentář* (Prague: Wolters Kluwer ČR, 2010), 4.

3 Jan Pichrt, „Aktivní politika zaměstnanosti”, [in:] *Právo sociálního zabezpečení*, ed. Kristina Koldinska (Prague: C. H. Beck, 2018), 235.

4 Steinichová et al., *Zákon o zaměstnanosti. Komentář*, 161.

entitled to the subsidy for employment of PWD. This agreement can only be concluded under the conditions stipulated in Section 78(2) of the Employment Act, where the above-mentioned employment relationship of persons with disabilities is supplemented by other conditions, such as the method of payment of wage costs, integrity in the sense of having committed an administrative or criminal offence in the field of employment or labour inspection, or the existence of facts relevant to liquidation or insolvency proceedings. After the conclusion of an agreement on the recognition of an employer on the protected labour market, the employer becomes a subject of the protected labour market⁵ and therefore also a person entitled to apply for a subsidy under the provisions of Section 78a of the Employment Act.

Now to the Subsidy for employment of PWD itself. It is designed to compensate, by way of partial reimbursement, for wages or salaries and other costs incurred by employers in employing persons with disabilities⁶. The subsidy is provided quarterly in retrospect⁷ and the regional branch of the Labour Office of the Czech Republic, in whose district the employer, who is a legal person, has its registered office or in whose district the employer, who is a natural person, has its residence, is competent to provide the subsidy⁸. The application for the subsidy shall include a list of employees with disabilities and evidence that the employees for whom the employer is requesting the subsidy are persons with disabilities⁹.

3. Legal nature of the employment subsidy for employment of PWD

The first question of a theoretical nature opens up over the very nature of this subsidy, the answer to it has implications for financial regulation. There is no doubt that the subsidy for the employment of PWD is a legal form of subsidy within the meaning of Section 3(a) of Act No. 218/2000 Coll., on budgetary rules. According to this provision, subsidy means funds from the state budget, state financial assets or the National Fund provided to legal or natural persons for a specified purpose. The same has also been established by case law, for example in the decision of the Supreme Administrative Court of the Czech Republic of 12 December 2017, No 7 Ads 343/2017-35, which confirms that this subsidy is a special purpose subsidy. As the Supreme Administrative Court of the Czech Republic summarizes, „[t]he subsidized contribution is clearly an incentive measure, its purpose is to stimulate the interest of entrepreneurs in employing persons with disabilities and to compensate

5 According to the first sentence of Section 78(1) of the Employment Act.

6 According to the provisions of Section 78a(1) of the Employment Act.

7 According to the provisions of Section 78a(4) of the Employment Act.

8 According to the provisions of Section 78a(1) of the Employment Act.

9 According to the provisions of Section 78a(5) of the Employment Act.

for any reduced revenues and increased costs due to their employment. The funds earmarked for these subsidies are provided from the budget chapter of the Ministry of Labour and Social Affairs and are subject to budgetary rules. By its nature, it is an subsidy for a specified purpose. It is a subsidy which is not granted by the Labour Office on the basis of an agreement, but to which the employer is entitled if the legal conditions are met¹⁰. However, the reasons which led this Court to conclude that the subsidy is for a specified purpose are no longer set out in the written judgment.

For non-purpose subsidies, they must be provided for specific services, goods or a specific programme, and therefore these subsidies oblige their recipients to use the money provided under the subsidy for a specified purpose, which is also a condition for the provision of the subsidy itself¹¹. For this reason „[s]ubsidy for a specified purpose are strictly accountable and the recipient must demonstrate that it has used the subsidy for the specified purpose”¹². It is therefore clear from the above theoretical conclusions that a special purpose subsidy is defined by the definition of the use to which the subsidy is put. At first view, it might seem that this aspect is completely absent in the case of a subsidy for the employment of PWD since the Employment Act does not prescribe the purpose for which the subsidy is to be used. However, the opposite is true. This is because the subsidy can also be provided on a time basis. A very common type of subsidy is the ex-post subsidy, where the funds are provided to the recipient only after the completion of the programme, purchase of a property or purchase of a service by the recipient of the subsidy, and the subsidy thus compensates for the recipient’s expenses that he or she had already incurred for the subsidy from his or her resources before the subsidy was provided¹³.

What is missing in the case law, is the classification of the subsidy for the employment of PWD based on the criterion of the type of expenditure, according to which the subsidy is divided into investment and operating subsidies. This classification has major tax and accounting impacts. While investment subsidies are provided to finance a specific investment, operating subsidies are used to finance operating, recurrent expenditures to meet the needs of the beneficiary in the financial year. Thus, from this perspective, a subsidy for the employment of PWDs is a regular subsidy, as its provision primarily finances the employer’s wage and other costs related to the employment of

10 Decision of the Supreme Administrative Court of the Czech Republic of 12 December 2017, No. 7 Ads 343/2017-35.35.

11 Marie Karfíková, *Teorie finančního práva a finanční vědy* (Praha: Wolters Kluwer ČR, 2017), 176.

12 Ibidem.

13 Ibidem, 177.

persons with disabilities. The Subsidy for employment of PWD is therefore an operating special-purpose subsidy.

4. Formation of the claim

First of all, it should be pointed out that the entitlement to the employment subsidy for employment of PWDs arises by law, but the prerequisite for this entitlement is the timely submission of a written request for this subsidy, no later than the end of the calendar month following the end of the relevant calendar quarter for which the subsidy is requested¹⁴. The Labour Office of the Czech Republic will then grant the subsidy if the employer still meets the conditions set out in Section 78 of the Employment Act for agreeing on recognition of the employer as an employer on the protected labour market and at the same time does not have, as of the last day of the relevant calendar quarter¹⁵:

- any tax arrears recorded in the tax records kept by the relevant tax or customs office,
- any arrears of social security contributions and state employment policy contributions, and
- any arrears of insurance and penalties for public health insurance except in cases where:
 - repayment in instalments has been permitted and the employer is not in delay with the repayment of instalments, or
 - the sum of arrears as of the last day of the calendar quarter did not exceed CZK 10,000 and the employer has paid these arrears by the 15th day of the calendar month following the calendar quarter for which the employer applies for the contribution or has paid them within 5 working days from the date on which the employer learns about these arrears from the Labour Office of the Czech Republic (hereinafter referred to as the „condition of no arrears”). However, in exceptional cases worthy of special consideration, the Minister of Labour and Social Affairs may waive the condition of being debt-free in respect of failure to meet the deadlines set for the payment of the employer’s arrears,¹⁶ or the Ministry of Labour and Social Affairs may waive the condition of no arrears in respect of the sum of the employer’s arrears which exceeded CZK 10,000¹⁷ on the last day of the relevant calendar quarter, in either case, based on a written and reasoned request from the employer.

14 Section 78a(4) of the Employment Act.

15 Ibidem.

16 Section 78a(15) of the Employment Act.

17 Section 78a(16) of the Employment Act.

The Employment Act also sets out obstacles under which the Labour Office of the Czech Republic will not provide a subsidy in the event of a violation of the employer's obligations in the area of employment and labour law.

The components of the application must also be kept in mind to complete the application. According to the provisions of Section 78a(5)(a), the essential document forming part (not an attachment) of the application is a list of names of employees who are persons with disabilities and employees who are persons with more severe disabilities, with their birth number, date of commencement and termination of employment, health insurance company code, funds spent on wages or salaries, including social security contributions and contributions to the state employment policy and public health insurance premiums, where it is an established administrative behaviour that the list of names is documented on a form issued by the Ministry of Labour and Social Affairs of the Czech Republic¹⁸. The issue of this form will be dealt with in the second part of this paper. The other part is to prove that the employee for whom the subsidy is claimed is a person with a disability. This fact is documented only once at the employer's first application and thereafter whenever there is a change in the facts.

5. Amount of the subsidy and selected additional costs of the increase

The amount of the own subsidy for the employment of PWD is regulated by the provisions of Section 78a(2) of the Employment Act, which defines it as a reimbursement of the actual expenditure on wages or salaries in the monthly amount of 75% of the actual expenditure on wages or salaries for an employee in an employment relationship who is a person with a disability, including social security contributions and public health insurance premiums paid by the employer. However, pursuant to the provisions of Section 78a(17) of the Employment Act, together with Government Decree No 388/2020 Coll., this subsidy is capped at CZK 13,600 per employee who has been granted a 1st-3rd degree of disability and CZK 5,000 per month per employee who is a person with a disability.

The employer is also entitled to a lump sum of CZK 1,000 per month for each disabled person in the employment relationship. In addition, an employer may claim an increase in the subsidy for an employee who has been granted a 1st - 3rd degree of disability, but not more than the difference between the amount of CZK 13,600, i.e. the maximum amount of this subsidy, and the amount of the separate employment subsidy for employment of PWD provided to compensate for the employee's wage or salary costs per month. In total, the Labour Office of the Czech Republic may provide the employer with a subsidy, including any increase, up to CZK 14,600 per month for

18 This form is available from <https://www.mpsv.cz/-/jmenny-seznam-zamestnancu>.

people who have been granted 1st – 3rd degree of disability and up to 6.000 per month for people with medical disadvantages¹⁹.

The costs for increasing the employment subsidy for employment of PWD are regulated by the provision of Section 78a(12) of the Employment Act, which typologically distinguishes three individual categories. The first category is the cost of operating staff and assistants, the second category is the cost of transport associated with the employment of persons with disabilities and the third category is the cost of adapting the establishment, and finally, the third category will not be dealt with in detail in this article. In the case of the costs of operational staff and job assistants, this increase in the Subsidy for employment of PWD can be claimed in both cases where these employees are employed directly by the employer in the protected labour market or where the employer outsources them. However, in the case of outsourcing, it should be remembered that only job assistants can be outsourced²⁰.

At this point, it seems appropriate to define how an operational employee's job description differs from a job assistant description. In my opinion, the job description is clear from the job title itself. An operational employee should perform work in connection with ensuring operations, i.e. as a rule, it should be an employee in a managerial or supervisory position performed in connection with the employment of disabled persons. Demonstratively, the specific activities that will be the job description of an operational employee include leading and managing the work team, coordinating the work of persons with disabilities, providing support to these persons, especially by accompanying them to the workplace, providing transport to the workplace and providing overall support for their involvement in the work process at the employer, e.g. through regular organizational meetings with these employees, organizing work performed by persons with disabilities, ensuring health and safety at work, etc. It is thus clear that the aim of employing an operational employee is to achieve the operational viability of the employer's plant employing disabled persons. In contrast, a job assistant will generally perform auxiliary activities related to the employment of persons with disabilities. Again, some of the specific activities that will be included in the job description of the job assistant can be illustrated, such as providing assistance and support to these employees in their work, providing support to employees who are persons with disabilities by accompanying them to the workplace, providing transportation to the workplace and providing overall support in engaging these employees in the employer's work process, e.g. through regular organizational meetings with these employees, helping to create a suitable working environment for these employees or monitoring working conditions. It is clear, that the purpose of employing a job assistant

19 Section 78a(3) of the Employment Act.

20 Section 78a(12)(a)(2) of the Employment Act.

is to provide personal assistance to other disabled employees in their work, but this may not only relate to the organisation of the work they do but may also be so targeted that the job assistant may do the work together with the disabled employee. In addition, although the job description of an operational employee will never include assisting the disabled employee in the performance of his or her work, as will often be the case with a job assistant, there may be some overlap between the job description of the operational employee and that of the job assistant.

Another aspect that very often plays a role in the application of the employment subsidy for employment of PWD increase is the fact that individual regional branches of the Labour Office of the Czech Republic, when assessing the eligibility of the application of this increase, rely on the internal directive Methodological Instruction of the Labour Office of the Czech Republic on changes to the system of support for the employment of PWD (hereinafter referred to as the “Methodological Instruction”)²¹, which, however, is not authored by the Ministry of Labour and Social Affairs of the Czech Republic²². In the case of outsourcing of job assistants, the Methodological Instruction states that the employer may „claim the costs it has incurred for the purchase of job assistance as a service”²³ and at the same time „the job assistance provider with whom the employer concludes an agreement for the provision of work assistance must be authorised to provide such services, e.g. It may have in its object of business the provision of job assistance (it may be stated e.g. in the articles of incorporation, etc.), it may assign its employees to the employer of PWD on the basis of a temporary assignment agreement with its employee or on the basis of the authorisation resulting from Act No. 455/1991 Coll., on Trade Licensing Act, as amended (Trade Licensing Act)”²⁴. From this wording of the Methodological Instruction, it is therefore clear that the employer in the protected labour market should verify the eligibility of the provider for the outsourcing of job assistants. Although this requirement seems legitimate from the point of view of excluding the involvement of an employer in the protected labour market in an illegal business,

21 Asociace zaměstnavatelů zdravotně postižených ČR, z.s., *Metodický pokyn ÚP ČR ke změnám systému podpory zaměstnávání OZP* (Prague: AZZP ČR, 2018), 28.

22 This fact was ascertained from communications with individual regional branches of the Labour Office of the Czech Republic containing copied information from the internal directive to which these branches refer, by comparing them with the methodological instruction of the Association of Employers of the Disabled of the Czech Republic.

23 Asociace zaměstnavatelů zdravotně postižených ČR, z.s., *Metodický pokyn ÚP ČR ke změnám systému podpory zaměstnávání OZP*, 25.

24 Ibidem.

this requirement is not supported by the Employment Act. The problem is the fact that neither the provisions of Section 78a of the Employment Act nor any other applicable provision prescribes what the applicant for an employment subsidy for employment of PWDs must document, since the general provision of Section 118(2)(a) of the Employment Act, according to which the application must be accompanied by documents certifying the facts stated in the application, applies only to active instruments of active employment policy, whereas an employment subsidy for employment of PWDs is not such an instrument. Thus, by the nature of the case, it can only be reasoned that if it is possible to claim an increase in this subsidy for a particular cost, it must be shown that the particular expense was an expense of the quality required by the Employment Act. The competent regional branch of the Labour Office of the Czech Republic should therefore not require the employer on the protected labour market to prove the authorisation of the provider of employment assistance and it is sufficient to prove the provision of this service and the costs of its acquisition²⁵.

However, the situation in which an employer in the protected labour market secures operational employees and job assistance from its human resources is a glaring evergreen, especially in the case of operational employees. Pursuant to Section 78a(12)(a)(1) of the Employment Act, the deductible costs of the increase in the employment subsidy for employment of PWDs are the wage costs of operational employees and job assistants in the basic employment relationship with the employer, to the extent corresponding to the number of hours worked by operational employees or job assistants in assisting employees who are persons with disabilities. Very often in our praxis, we encounter the fact that regional branches of the Labour Office of the Czech Republic refuse to recognise wage expenses for operational employees if they are employed under an agreement for work, regarding the last sentence of Article V, paragraph 2.1²⁶ and paragraph 2.4.1.1 of the Methodological Instruction²⁷. According to the provisions of Section 3 of the Labour Code, the basic employment relationship is the employment relationship and legal relationships based on agreements on work performed outside the employment relationship, i.e. also agreements on the performance of work. Furthermore, the above-mentioned provision of the Employment Act refers to wage costs, which, according to the effective accounting regulation, include not

25 See, for example, paragraph 24 of the judgment of the Supreme Administrative Court of the Czech Republic of 31 May 2017, no. 7 Ads 285/2016 - 35.

26 „A job assistant can also be a person employed under a work performance agreement or a work activity agreement”.

27 „The applicant shall provide a contract of employment for a job assistant or operational staff member”.

only wages but also rewards based on the agreement on work performance and the agreement on work activity²⁸. As required by the Constitutional Court, „there is a natural requirement that the interpreter of a particular provision of a legal regulation should not limit his or her view to only one or several provisions, but that he or she should understand it as part of a whole (system) which, with regard to the principles of uniformity and non-contradiction of the legal order, forms a logical or logically consistent whole of meaning with its other parts”²⁹, at the same time, no objective reasons can be seen for adapting the interpretation of these general legal terms to the application of the provisions of Section 78a of the Employment Act differently from the Labour Code and accounting regulations.

However, the accessory nature of the increase in the Subsidy for employment of PWD also plays a very important role, as it is not a separate entitlement, but „merely an increase in the subsidy already granted, and this subsidy is undoubtedly linked to a specific disabled employee”³⁰. It should be kept in mind that the increase in the Subsidy for employment of PWD should be applied to specific employees with disability status. If some of these employees are incapacitated for work, they are not eligible for an increase in the subsidy under Section 78a(12)(a) of the Employment Act. On the contrary, as the case law shows, there is nothing to prevent such an increase in the Subsidy for employment of PWD from being applied to the remaining employees with disability status³¹, i.e., to effectively concentrate the work of job assistants and operations employees on those employees of that status who are performing work for the employer at a particular time.

The second type of cost that can be claimed for the Subsidy for employment of PWD, which is the focus of this article, is the cost of transporting employees who are disabled (hereafter referred to as „PWD transport”)

28 As it follows from the provisions of Section 24 of Decree No. 500/2002 Coll., implementing certain provisions of Act No. 563/1991 Coll., on Accounting, as amended, for accounting units that are entrepreneurs accounting in the double-entry bookkeeping system, together with Article 3.4 of the Czech Accounting Standard for Entrepreneurs No. 019, or as stated in Blanka Jindrová, „Účtová skupina 52 - Osobní náklady” *du.cz*, (2014). <https://www.du.cz/33/uctova-skupina-52-osobni-naklady-uniqueidmRRWSbk196FNf8-jVUh4EpgquyPdTMriXxqgImE-pH4M/>.

29 Ruling of the Constitutional Court of 26 February 2009, Case No. I. ÚS 1169/07.

30 Point 27 of the judgment of the Supreme Administrative Court of the Czech Republic of 31 May 2017, No 7 Ads 285/2016 - 35.

31 Compare judgment of the Municipal Court in Prague of 13 September 2017, No. 9 Ad 5/2015-39.

or the cost of transporting materials and products. Unfortunately, the situation, in this case, is also unclear. However, the most important aspect appears to be who incurred the cost of transporting the employee. The wording of Section 78a(12)(b) of the Employment Act implies that it must be the employer's cost. Therefore, if it is a cost incurred by an employee with the status of a disabled person for transport to or from the workplace, it is irrelevant whether the employee will be transported by public transport, long-distance transport or by the employer's motor vehicle, which would employer compensate to the employee, it will not be a transport cost applicable to the increase in the disabled persons' employment subsidy.

This conclusion is supported by the additional context of the legal order. The application of the provisions of Section 6 of the Income Tax Act, which positively and negatively define what is subject to personal income tax for employees, or what performance by the employer is exempt from this tax, has a fundamental impact. If we look to the negative definition of the subject matter of the tax³² or exemption³³ under this provision, we find that neither the personal income tax exemption nor the negative definition of income applies to such reimbursement of an employee's transportation costs to or from the workplace paid by that employee. Therefore, the reimbursement of the employee's transport costs to or from the workplace, if provided by the employer, would constitute income on the part of the employee which would be subject to this tax. Therefore, such reimbursement would be considered as a wage cost for the employee concerned before, but already considered in, the employment subsidy for employment of PWDs itself. However, the situation would be different in the case of reimbursement of travel expenses under the Labour Code, since reimbursement of travel expenses is not subject to personal income tax.

The first alternative is to provide the aforementioned activities of collecting PWD, transporting materials for the work of employees who are persons with disabilities or products made by them through an employee who will use his/her vehicle for this purpose. In this case, the most important question for claiming an increase in the Subsidy for employment of PWD is how to prove the costs that will be claimed. Given the above, it is also true here that proof of the actual incurrence of these costs can be expected. Therefore, it can only be recommended that the application for a Subsidy for employment of PWD should be accompanied by a document showing the employee's obligation to undertake a specific work trip, including the designation of individual stops so that the work trip can be reconstructed (e.g. a work trip order that also includes an agreement to use the employee's car. Furthermore, I believe that it is necessary to prove identification and consumption of used vehicle by

32 See Section 6(7) of the ITA.

33 See Section 6(9) of the ITA.

a copy of the registration certificate, the employee's billing of the business trip and proof of reimbursement of the travel expenses so accounted for will be required. However, the methodological instruction used by many employees of the Labour Office of the Czech Republic provides different documents for proving this method of increasing the subsidy for the employment of PWD, namely „a large technical certificate of the used vehicle, a logbook containing the date, the number of kilometres travelled, the destination and purpose of the journey and its direct connection to the employees who are PWD, and a receipt proving the purchase of fuel”³⁴. However, requiring such data or documents, in this case, would also be unsustainable from an employment law perspective, as it does not reflect the reality that the employee is not obliged to keep a logbook for his vehicle and does not have to prove the cost of fuel to his employer when accounting for a business trip. However, the Methodological Instruction should be agreed with that it is also possible to claim wage expenses for the driver „for the time he has set aside for the regular transport of PWD or material intended for processing by PWD or products processed by PWD”³⁵.

The second alternative is to purchase a company vehicle, which the employee-driver will then use for business trips. In this case, the employee will not be entitled to reimbursement of travel expenses, so only the cost of fuel or parking fees can be claimed to increase the Subsidy for employment of PWD. However, a significant problem may arise in the case of claiming the costs against the Labour Office of the Czech Republic, as the Labour Office of the Czech Republic will most likely require the documents mentioned in the Methodological Instruction. Specifically, a large technical certificate of the used vehicle, a logbook containing the date, the number of kilometres travelled, the destination and purpose of the journey and its direct link to employees who are PWD, and a receipt proving the purchase of fuel³⁶. Requiring these documents is already proportionate compared to the first alternative, and since the burden of proof will be on the employer, it is appropriate to proceed from this list. If the employer is subject to VAT, it is also obliged to keep a logbook for this tax, it is just advisable to adapt the logbook so that it can be used to apply the increase in the Subsidy for employment of PWD.

Concerning the type of transport costs that can be recognised to increase this subsidy, the situation is more complex because the Employment Act uses the vague legal term ‘transport costs’, which is not specified. In contrast, the Methodological Instruction seeks to exclude the eligibility of all costs of an investment character. Article 3.4 of the Methodological

34 Asociace zaměstnavatelů zdravotně postižených ČR, z.s., *Metodický pokyn ÚP ČR ke změnám systému podpory zaměstnávání OZP*, 26.

35 Ibidem.

36 Ibidem.

Instruction lists non-allowable expenses for the increase in question since they „cannot be shown to be related to a specific journey to and from the workplace or to a specific journey with materials or finished products”. However, other legislation dealing with transport costs may support this argument.

For example the possibility to apply a flat-rate transport subsidy under Section 24(2)(zt) of the ITA. According to this provision, this flat-rate expenditure includes costs such as parking and fuel. However, the application of this flat rate does not affect the application of provable expenses related to the acquisition of the motor vehicle itself and the maintenance of its operability, such as the depreciation of tangible assets, repair costs, insurance premiums, maintenance costs, etc. On the other hand, the statutory wording of Section 78a(12)(b) of the Employment Act, does not exclude the application of investment costs to increase the employment subsidy for employment of PWDs. Thus, from one perspective, there can be an unjustified refusal to claim certain types of investment costs which can only be incurred in connection with the employment of employees who are disabled (e.g. the purchase of a vehicle). However, from the second perspective, it is difficult to imagine proving a link between, for example, the acquisition of a vehicle and the employment of such employees. This problem could be eliminated by a change of positive legislation, which would provide the burden of proof of the employer in the protected labour market on the costs claimed by him to grant the subsidy and its increase under the provisions of Section 78a of the Employment Act and to exclude the claiming of any investment costs to claim the increase in the employment subsidy for employment of PWD, thereby heal the current administrative behaviour, which is not supported by positive law.

The final alternative is to outsource the activities, where, in the case of proving transport costs to increase the transport subsidy for employees who are PWDs, a contract with an external carrier is likely to be required, which should show a clear link from the provision of the activities relevant to this method of increasing the employment subsidy for employment of PWDs, a tax document issued by the external carrier and proof of payment for this service. However, these documents should be tailored to the expected proceeds of the Labour Office of the Czech Republic, which will most likely require proof of a specific contractor-provided trip with the relevant employees, e.g. by attaching a tax document showing that the transport was carried out concerning specific employees.

6. Relation of the employment subsidy for employment of PWD to income taxes

It is clear from the nature of the Subsidy for employment of PWD that it affects the employer's income. Therefore, the provision of this subsidy from public budgets should also be seen in a tax context, primarily from the perspective of income taxes. Taxation in the case of an employer who is

a natural person is easy, as the subsidy for employment of PWD is exempt from personal income tax under the provisions of Section 4(1)(u) of Act No. 586/1992 Coll., on Income Taxes („ITA”).

As regards the contribution to support the employment of PWD in the protected labour market, the principle of taxation of this contribution is different from the perspective of income taxation of legal entities that are not public benefit taxpayers³⁷. Income taxes are generally based on the principle of tax symmetry³⁸, which is, however, distorted in the case of personal income tax and corporate income tax for some public benefit taxpayers³⁹ due to the exemption of subsidies. The meaning of tax symmetry is the postulate that only expenses that are materially and temporally related to taxable income can be claimed as tax-deductible expenses⁴⁰.

For the application of tax symmetry for corporate income tax, the provisions of Section 23(5) of the ITA and Section 25(1)(i) of the ITA are therefore decisive. According to these provisions, in principle, expenses incurred on income that is not subject to tax, on income that is exempt from tax or not included in the tax base cannot be recognised as expenses incurred to achieve, secure and maintain income. In other words, expenses incurred in connection with the acquisition of exempt or non-exempt income cannot be claimed as tax-deductible.

If the Subsidy for employment of PWD as an operating subsidy is exempt from corporate income tax, the above provisions would have to result in a proportionate reduction in the expenditure incurred by the employer to generate that income, i.e. including wage costs, to determine the tax base. Therefore, a scheme is applied according to which the operating subsidy will be included in the income of the relevant accounting unit and will be taxed by the employer as income. At the same time, the employer, in the form of a legal entity, will not be forced to proportionately reduce otherwise tax-deductible expenses in connection with the receipt of this subsidy and will claim these expenses at the standard unreduced rate. Although the Ministry

37 Compare section 18a(1)(b) of the ITA.

38 Petra Snopková, „Odpočet na podporu výzkumu a vývoje a jeho možné problémy v praxi”, [in:] *DNY PRÁVA 2016 – DAYS OF LAW 2016 Část II. Rekodifikace daní z příjmů (90 let od Englišovy daňové reformy)*, ed. Petr Mrkývka, Damian Czudek a Jiří Valdhans (Brno: Masarykova univerzita, 2017), 308.

39 Compare section 18a(5) of the ITA.

40 See Michal Liško, „Příjmy spadající pod čl. 7 Evropské charty místní samosprávy a výdaje na ně”, [in:] *DNY PRÁVA 2016 – DAYS OF LAW 2016 Část II. Rekodifikace daní z příjmů (90 let od Englišovy daňové reformy)*, ed. Petr Mrkývka, Damian Czudek, Jiří Valdhans (Brno: Masarykova univerzita, 2017), 192.

of Finance of the Czech Republic is aware that this approach does not fully preserve tax symmetry in comparison with natural persons and legal entities that are public benefit taxpayers, unfortunately, the elimination of this unequal treatment of subsidies is being worked on only in the draft of the new Income Taxes Act⁴¹.

It can therefore be concluded that the contribution to support the employment of persons with disabilities on the protected labour market will, as income and revenue from an accounting perspective, enter the corporate income tax base as income. However, this conclusion applies only to operating subsidies, since in the case of an investment subsidy, the ITA provides for different procedures when dealing with an investment subsidy in connection with the determination of the input price of a depreciable tangible or intangible asset⁴².

7. Relationship of the subsidy for the employment of PWD to VAT turnover

Another tax regulation to which attention should be paid is Act No. 235/2004 Coll., on value-added tax (hereinafter referred to as the „VAT Act”), primarily from the perspective of assessing whether the provision of a subsidy to support the employment of PWD is a taxable supply and whether it enters a turnover. This Act defines turnover in the provision of Section 4a, according to which turnover for this Act means the aggregate of the consideration exclusive of tax, due to the taxable person for supplies made with the place of supply in the domestic territory if the consideration is for

- a) taxable supply,
- b) an exempt supply entitled to a tax deduction, or
- c) a supply exempt from tax without entitlement to a tax deduction pursuant to Sections 54 to 56a of the VAT Act, if they are not an ancillary activity carried out on an occasional basis.

It is therefore clear from the above definition of turnover that it includes only consideration for taxable supplies, exempt supplies with a right to deduction and exempt supplies collected without a right to deduction (e.g. income from the rental of immovable property). Consideration is defined by Section 4(1)(a) of the VAT Act as an amount of money or the value of a non-monetary supply that is provided in direct connection with the supply and a subsidy to the price. However, the Subsidy for employment of PWD is only

41 „Zápis z jednání Koordinačního výboru s Komorou daňových poradců ČR ze dne 17.6.2020”, MFČR. [accessed: 9.08.2021]. https://www.financnisprava.cz/assets/cs/prilohy/d-prispevky-kv-kdp/ZAPIS_KV_KDP-06_2020.docx.

42 Compare section 29(1) of the ITA.

an operating subsidy, not a price subsidy, otherwise, the subsidy would be provided in connection with the employer's obligation to provide its supplies at a discount from the price of the supply. Therefore, it can be summarized that the contribution to support the employment of PWD does not enter the turnover for the VAT Act.

Nor will the granting of this operating subsidy have any effect on the reduction or proportional application of the input VAT deduction. As the Supreme Administrative Court of the Czech Republic has concluded, it is possible to claim input VAT deduction also for expenses paid from this subsidy. According to the decision of this Court, „[t]he reimbursement by means of a subsidy must be regarded only as a source of financing, the purpose of the use of the benefit in question being the only determinant of the amount of the claim. This premise is, according to the Supreme Administrative Court, absolutely crucial in the present case. If the received taxable supply is used exclusively for a taxable activity (section 72(2)(a) of the VAT Act), then the taxpayer is fully entitled to deduct input VAT even if the subsidy provider reimburses the taxable supply received at 100 percent⁴³.

It is therefore also the case that the payment of the subsidy to support the employment of people with disabilities on the protected labour market should not result in a reduction or proportional application of the input VAT deduction.

8. Calculation of the coefficient for determining the subsidy increase

A fundamental practical problem, which is crucial both for the Labour Office of the Czech Republic and for the claimants themselves, is the fact that the Subsidy for employment of PWD is applied for via an electronic form prepared by the Ministry of Labour and Social Affairs of the Czech Republic⁴⁴. Indeed, this form uses the term „Average quarterly recalculated number of employees who are PWD subjects to the increase in the subsidy”, which is not a legal concept established by generally binding legislation. Although the Employment Act and Decree No.518/2004 Coll., which implements the Employment Act, deal with the issue of the contribution to the employment of PWD, neither of these legal regulations uses the term „Average quarterly recalculated number of employees who are PWD to whom the increase in the contribution applies”. On the contrary, these regulations work only with the legal terms „Average quarterly recalculated number of employees” and „Average annual recalculated number of employees”.

43 Judgment of the Supreme Administrative Court of the Czech Republic of 10 October 2013, No 9 Afs 8/2013-42.

44 This form is available from <https://www.mpsv.cz/-/zadost-o-prispevek-na-podporu-zamestnavani-osob-se-zdravotnim-postizenim-na-chranenem-trhu-prace>.

It is therefore quite evident that the term „Average quarterly recalculated number of employees who are PWD subjects to the increase in the subsidy” is a term introduced only by the above-mentioned application form of the Ministry of Labour and Social Affairs of the Czech Republic. In addition to this fact, it is also necessary to take into account the fact that the contribution to support the employment of persons with disabilities on the protected labour market is a non-standard subsidy within the meaning of Section 3(a) of Act No. 218/2000 Coll., on Budgetary Rules and on Amendments to Certain Related Acts, since, as stated in the explanatory memorandum to the Employment Act, it is an entitlement payment to which the employer is entitled if the conditions set out by law are fulfilled.

If we also take into account the recent decisions of the Constitutional Court concerning form submissions in the tax area, it is quite obvious that the form cannot extend the scope of a person’s obligations beyond the scope established by generally binding legislation, i.e. in violation of the constitutionally established reservation of the law in Article 2(4) of the Constitution, Article 2(3) and Article 4(1) of the Charter. According to the Constitutional Court,⁴⁵ the law must provide at least a general framework of the data that can be requested through the form, which, however, cannot be so general as to preclude any abstract review of constitutionality by the Constitutional Court. It is then up to the implementing legislation (a decree of the relevant ministry) to determine the specific data that can be requested by the form. The Constitutional Court emphasizes that it has to be done in the form of legal regulation, and therefore it is not possible to expand the scope of the data with a separate form.

While this fact alone would not be so fundamental, the crux of the problem lies in how the form handles this term. This form uses the term „Average quarterly recalculated number of employees who are PWD subjects to the increase in the subsidy” to determine an additional „Coefficient for determining the amount of claimed costs” not governed by generally binding legislation. This coefficient, calculated in the manner identified by the application form, results in an overall adjustment to the maximum amount of the applicable increase in the Subsidy for employment of PWD. The form therefore arbitrarily determines, without any support in generally binding legal regulations, the amount of the increase in the employment subsidy for employment of PWD that can be applied. Therefore, if the administrative authority relies solely on this form without complying with the generally binding legal provisions, it may render the decision issued by this administrative authority unlawful. This is especially the case if the application of the so-called coefficient for determining the amount of claimed costs limits the employer’s

45 Compare ruling of the Constitutional Court of 6 December 2016, Case No. Pl. ÚS 32/15.

entitlement to an increase in the Subsidy for employment of PWD in violation of the Employment Act.

However, this is not the end of the difficulties of applying the form-required „Average quarterly recalculated number of employees who are PWD subjects to the increase in the subsidy”. Another problem is the lack of clarity on how to quantify this value. There are two ways of interpreting the term „Average quarterly recalculated number of employees who are PWD subjects to the increase in the subsidy”, based on either a categorical or a subjective approach. The categorical approach is based only on a general categorisation of employees into PWD, a person with medical disadvantages and others. The subjective approach, on the other hand, is based on an assessment of whether a particular employee may have been subject to the benefit in a particular case.

However, the subjective approach encounters an inappropriate construction of the form itself and the aforementioned terms, which have no support in generally binding legal regulations. Indeed, the Employment Act is based on subjective criteria, where it assumes that, for example, the wage costs of job assistants or operational employees were spent on those activities of those employees that directly or indirectly affect the assistance to employees who are PWD. However, the role of the „Average quarterly recalculated number of employees who are PWD covered by the increase in the subsidy”, and therefore the „Coefficient for determining the amount of claimed costs”, is based on the objectification of this activity leading to a logical categorisation, i.e. a categorical approach. This coefficient was created only and precisely to create a mechanism for not examining a subjective criterion, i.e. whether, for example, a specific operational employee assisted employees who are PWD, thus easing the situation on the part of the Labour Office of the Czech Republic when checking and also on the part of the employer when proving entitlement to a contribution to the employment of PWD.

In contrast, the categorical approach is to interpret the term „Average quarterly recalculated number of employees who are PWD subject to the increase in the subsidy” as merely identifying the category of employees who are PWD to be included in this special recalculated number. This is due to the terminology of the Employment Act since according to the provisions of Section 67(2) of this Act, persons with disabilities (i.e. PWD) are natural persons who are recognised by the social security authority as disabled in the third degree, disabled in the first or second degree or disabled. The „covered by the increase” part of the term „Average quarterly recalculated number of employees who are PWD covered by the increase” is used according to this approach for the reason that otherwise this special recalculated number would have to include the hours worked (as well as the unworked hours specified by the implementing decree to the Employment Act) by PWD who are not disabled but only people with medical disadvantages. According to the

provisions of Section 78a(3) and (12) of the Employment Act, it is excluded that the increase in the employment subsidy for employment of PWDs is also granted to persons with medical disadvantages.

It follows from the above that the application form for the employment subsidy for employment of PWD requires applicants to provide values, which the form subsequently recalculates, but in a way, and above all with consequences, which are not foreseen by the Employment Act or the implementing legislation. This approach to the design of the content of this form by the Ministry of Labour and Social Affairs of the Czech Republic is justified because the design of the subsidy itself is not optimal, but unfortunately, it may lead to the fact that the decision to provide the employment subsidy for employment of PWD could subsequently be found illegal by the courts.

9. Conclusion

For quite a long time now, the subsidy for employment of PWD has been one of the tools that the Czech Republic can use to influence the labour market participation of disabled people. Nevertheless, there are several partial problems associated with the provision of this subsidy, manifested in inconsistent administrative behaviour of public authorities and uncertainty in the legality of the procedure of applicants for this subsidy. As far as tax issues are concerned, the situation here can be clearly distinguished through the correct classification of the Subsidy for employment of PWD under operating subsidies. As a result of this sub-classification, it is then clear that the operating subsidy will not enter into turnover for VAT purposes. Nevertheless, it is possible to find that there is no uniform agreement across the financial administration as to whether or not to include this contribution in turnover. In the case of corporate income tax, the situation is more problematic, as there is a breach of tax symmetry between legal entities, legal entities that are public benefit taxpayers and natural persons. However, the result is that, for legal persons, this subsidy must enter the tax base as income, with the result that any expenses related to the financing of the activity for which the contribution is granted will also be eligible for such a legal person.

However, the administrative behaviour of the Labour Office of the Czech Republic poses a fundamental problem for general practice. First, this public authority requires that the application for an employment subsidy for the employment of PWD should be submitted via an electronic form prepared by the Ministry of Labour and Social Affairs of the Czech Republic, the content of which, however, does not comply with the Employment Act. Through the filling in of data and coefficients unknown to the law, the amount of this subsidy is thus adjusted in individual applications in a way not foreseen by law, which in the light of recent case law of the Constitutional Court in the area of tax form submissions raises the question of the legality of this procedure of the state administration. However, the behaviour of

the Labour Office is at least uniform on this issue. This cannot be said about the approach to the assessment of claims for an increase in the employment subsidy for the employment of PWD. The basic problem is the fact that the Labour Office of the Czech Republic has adopted as an internal instruction a document created by a private association, even though it comes from the employers of PWD. One can only assume to what extent a rigorous legal analysis was behind the creation of this document, however, the conclusions of this document often do not correspond to the systematics or the purpose of the relevant legal regulation of the Employment Act. For example, it cannot be assumed that an operational employee would have to be employed by an employer in the protected labour market for that employer to claim an increase in the employment subsidy for employment of PWDs in respect of the wage costs of the operational employee since the Employment Act allows for the claiming of an increase in the subsidy in respect of wage costs, which is a broader term than just the cost of the employee's work under the employment contract. A similar problem also persists for another expenditure eligible for claiming an increase in the Subsidy for the employment of PWD, namely transport costs.

In practice, it would therefore be beneficial for the Labour Office of the Czech Republic to unify its administrative behaviour across its branches, for example by retraining its employees or creating its methodology for contributing to the employment of PWDs. In such a case, it would not occur that even within the same branch of the Labour Office of the Czech Republic, different officials would approach applications for this benefit differently. Also, the creation of a methodology of their own, with which they would optimally acquaint employers in the protected market, would help to stabilize this market, since employers in the protected labour market are highly dependent on the timely provision of this subsidy and any delay caused by clarifying specific requirements not foreseen by law for filling out the application for evidence may have a fatal consequence for them. It is also primarily in the interest of the State that there should be stable businesses specialising in the employment of disabled people who would otherwise not find employment in the labour market.

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