

Recommendation of the Defender regarding the requirement of a statement of criminal records as the determining criterion for employment

Complainants repeatedly turn to the Defender with a complaint that after having served a prison sentence they cannot find employment because during a selection procedure employers require evidence of no criminal record by a statement of criminal records. They ask whether employers have the right to do it and whether it is discrimination.

Getting employment is the main aspect of re-socialization of a sentenced (convicted¹) person. Renewed participation in the working process is desirable and beneficial not just for a convicted person but also for the whole society, among others with respect to relapse prevention. Therefore, within his power concerning the right to equal treatment, the Defender dealt with a question whether an employer may reject an applicant just and only on the grounds of his or her previous criminal activity and under what circumstances an employer may require evidence of no criminal record. Professions that require having no criminal record as stipulated by special regulations were excluded from the inquiry.²

Facts about the prerequisite of no-criminal record

- 1. For some employments the prerequisite of no criminal record is stipulated by a legal regulation. In all other cases, it needs to be considered whether the submission of a statement of criminal records is necessary and adequate.**
- 2. Not employing a job applicant solely on the grounds of a criminal conviction may constitute in some cases a breach of legal duties of the employer.**
- 3. In case of a criminal record the character of the criminal activity of an applicant (seriousness, relapse) needs to be assessed with respect to the character of the work that an applicant would undertake. For the absolute majority of non-qualified manual jobs, the requirement of no criminal record is inadequate.**
- 4. Requiring a statement of criminal records during an admission process may constitute a breach of the Labour Code, or the Labour Act, in particular if the statement is required as information not directly connected to the entering into employment. Such actions by employers are prohibited in unjustified cases both before and after the commencement of employment.**

¹ The Criminal Register does not record whether the convicted person commenced his or her sentence but the conviction itself – provision of sec. 3 (1) of Act No. 269/1994 Coll. Sb., on the Criminal Register, as amended (hereinafter only “the Register Act”).

² For example, in case of a pedagogical worker pursuant to Act No. 563/2004 Coll., on Pedagogical Staff and on the Amendment to Some Other Acts, a police officer within Act No. 361/2003 Coll., on Service Relationship of the Members of Security Corps, and other occupations.

5. The requirement to submit a statement of criminal records in unjustified cases may constitute a breach of the Personal Data Protection Act and may be sanctioned by the Office for Personal Data Protection.

The Charter of Fundamental Rights and Freedoms guarantees everybody the right to choose freely his or her profession and the right to engage in enterprise and acquire the means of his or her livelihood by work. These rights may be limited but only insofar as their essence and purpose are not violated.³ Therefore a clean criminal record should be requested only when required by law, or when a legitimate reason exists.

Requiring all applicants for any work to provide a statement of criminal records may constitute an infringement of dignity guaranteed by Article 1 Section 1 of the Charter of Fundamental Rights and Freedoms. A rejection of a job applicant who has been convicted of a crime, not related to his or her abilities or qualification or circumstances of the criminal activity (e.g. degree of culpability) may constitute secondary stigmatization of convicted persons.

Pursuant to the Labour Code⁴ an employer may require a statement of criminal records provided it is needed with respect to the character of work. If an employer concludes that in case of certain work it is not appropriate to employ a convicted person, e.g. with respect to security, the employer assesses this factor against the character of the criminal activity of an applicant.

If it is clear from the required statement of criminal records that an applicant committed a criminal activity not related to the character of the demanded work, it is not adequate that he or she should be rejected solely on the basis of this fact. Therefore it will be certainly in place if a person convicted for example of sexual abuse or abuse of a person entrusted to his or her care is not accepted for a position of a caretaker at a children's home or other positions in such facility or a similar facility. Rejecting an applicant convicted for example of a crime against property for the position of a treasurer or a personal banker will be adequate but rejecting him or her to do gardening work will not. If an employer fills in a vacancy of a night watchman, rejecting an applicant convicted of theft will be in place. However, in case of a less serious crime (e.g. traffic accident caused by negligence), a rejection of an applicant is not adequate. Similarly, it will be all right if e.g. an employer does not employ a person convicted of the manufacture of narcotic substance in a position that involves coming into contact with chemicals.

Apart from the factual relation between the committed crime and the work position to be filled, other circumstances should be taken into account – e.g. whether the criminal activity was committed fraudulently or negligently, or a relapse or the period lapsed since the criminal activity.

³ According to Article 26 and Article 4 Section 4 of the Charter. According to Article 26 Section 2 of the Charter, the exercise of only *certain* professions may be limited. It can be concluded that a lawmaker is not entitled to set limitations for *all* professions in general.

⁴ According to the provision of sec. 316 (4) of Act No. 262/2006 Coll., the Labour Code, as amended (hereinafter only the "Labour Code"), the information may be required only "where there is a factual reason consisting in the character of work to be performed, and provided such requirement is adequate".

If employers come to the conclusion that it is necessary to know criminal records data of an applicant, they may require a statement of criminal records. If they subsequently learn from the statement that the applicant committed a crime whose character is not related to the character of the work activity, they may not reject the applicant solely on the grounds of a record in the Criminal Register.

Pursuant to the provision of sec. 30 (2) of the Labour Code, before the formation of an employment relationship, employers may require only information *directly* related to the conclusion of an employment contract. When selecting candidates, they may take into account their qualification, special abilities or necessary requirements for work. Being without a criminal record is neither an ability nor a qualification requisite; nor is it a necessary general requirement. In addition, pursuant to the provision of sec. 12 (2) of the Employment Act, before an employment contract is made, employers may not request, among others, *“information that goes against good morals, and personal data that are not used to fulfil duties of an employer stipulated by a special legal regulation”*.

The requirement to provide a statement of criminal records before the formation of employment may constitute a breach of duties of an employer pursuant to the Labour Code. After the formation of employment, an employer is entitled to require such information only if it directly relates to the performance of work.

Criminal record data are so-called sensitive data pursuant to the **Personal Data Protection Act**.⁵ Sensitive data may be collected and handled only when permitted by law. Strict regime applies to their processing – they may be processed only if is necessary for the fulfilment of duties of a controller responsible for their processing.

Employers, as data controllers, must state the purpose for which the personal data will be processed, and subsequently process them in an extent necessary for fulfilling the purpose. If they fail to proceed in this way, they may be breaching the Personal Data Protection Act as well as the Charter of Fundamental Rights and Freedoms (pursuant to Article 10 Section 3 of the Charter, everybody is entitled to protection against unauthorized gathering, publication or other misuse of his or her personal data).

If an employer fails to justify adequately the need to collect and process criminal record data, it can be concluded that this constitutes a breach of the provision of sec. 5 (1) (a) or (d) of the Personal Data Protection Act. This is an administrative delict for which the Office for Personal Data Protection may impose a fine.⁶

A failure of an employer to sufficiently justify the need to obtain sensitive data about the criminal history of an applicant or an employee constitutes a breach of the Personal Data Protection Act, and a sanction may be imposed on the employer by the Office for Personal Data.

⁵ Provision of sec. 4 (b) of Act No. 101/2000 Coll. on the Protection of Personal Data, as amended.

⁶ Pursuant to provisions of sec. 44 (2) (a), (c), or sec. 45 (1) (a), (c) of the Personal Data Protection Act, a fine of up to CZK 1 million or 5 million may be imposed for a delict.

A statement of criminal records is issued upon request of an individual and it contains data about all non-expunged convictions.⁷ It is in the interest of a convicted person to file a **petition for expungement with a court**. If the court concludes that the convicted person has led proper life for the period stipulated by law since the remission or service of the sentence, it shall expunge the conviction. The perpetrator of a crime is then deemed to not have been convicted, i.e. the criminal records are “clean” again”.

JUDr. Pavel V a r v a ř o v s k ý
Public Defender of Rights

⁷ The provision of sec. 13 of the Register Act, in connection with the provision of sec. 365 of Act No. 141/1961 Coll., the Rules of Criminal Procedure.