DISCLAIMER: Official version of this Opinion is in Czech language only and this translation serves only as an unofficial version for pilots of Smartwings, a.s. under Czech law employment contract. Please be notified, that in case of discrepancy the Czech version takes precedence.

Smartwings, a.s.
Company ID: 25663135
Prague 6, K Letišti 1068/30, postal code 16008

For the attention of members of Smart Unity, the pilot's union of Smartwings, a.s.

On 27.11.2024

Opinion on Smartwings, a.s.'s compliance with and application of Sections 240 and 241 of Act No. 262/2006 Coll., the Labour Code, as amended.

I. Introduction

1. Smartwings, a.s., Company ID No.: 256 63 135, with its registered office at K Letišti 1068/30, 160 08 Prague 6 (hereinafter referred to as "**Smartwings**") is an employer with which Smart Unity, the pilot's union of Smartwings, a.s., Company ID No.: 217 79 724, with its registered office at Malé sídliště 1100/43, 266 01, Beroun (hereinafter referred to as the "**Trade Union**") operates.

2. The trade union, as an employee representative, after receiving suggestions from some employees regarding Smartwings' compliance with and application of Sections 240 and 241 of Act No. 262/2006 Coll., the Labour Code, as amended (hereinafter referred to as the "**ZP**"), submits its Opinion below.

II. Opinion of the Trade Union

3. A number of employees have already contacted the Trade Union with the same issue of compliance with and application of Sections 240 and 241 of the Labour Code by Smartwings. The case report is essentially the same – an employee who tries to refer to the law is reassured by referring to Smartwings' internal materials that he or she must embark on a business trip in spite of the increased protection provided by law.

4. According to the information provided to the Trade Union, the issue reached such a stage for some employees that these employees were forced to seek legal assistance from a lawyer and to respond officially to planned business trips to which these employees did not give their consent. The Trade union is not aware of any court proceedings in a similar matter.

5. The Trade union considers it appropriate to address this issue comprehensively, as it ultimately affects all Smartwings employees since it has an impact on the activities of Smartwings as an airline company.

6. The Trade union organization structures its Opinion as follows:

    a. Summary of Smartwings' line of argument;

    b. Brief introduction of the legislation;

    c. Evaluation of the conflict between Smartwings' line of argument and the law;

    d. Suggestions to resolve the situation.

7. The purpose of this Opinion is to provide employees with a basic overview of the current situation at Smartwings, as well as stimulate discussion to find a general compromise that will ensure the operation of Smartwings while respecting the legal regulation of the Labour Code.

2.1 Smartwings' line of argument

8. The trade union organization has information from its activities that the first internal document related to the issue of Sections 240 and 241 of the Labour Code was a document entitled *"BUSINESS TRIPS AND SCHEDULING OF WORKING HOURS OF EMPLOYEES, EMPLOYEES-MOTHERS, EMPLOYEES CARING FOR CHILDREN AND OTHER NATURAL PERSONS"* (hereinafter referred to as the "**Material**") with an extent of approximately 1.5 A4. Since this Material is not available to all employees, the Trade Union considers it necessary to quote it in its entirety.

[START OF QUOTE – BE NOTED THAT THIS IS A MACHINE TRANSLATION OF THE ORIGINAL CZECH TEXT]

What does the Labour Code stipulate?

a) With regard to the posting on business trips, Section 240 of the Labour Code states that: pregnant employees and employees caring for children under the age of 8 may be sent on a business trip outside the municipality of their workplace or residence only with their consent; this also applies to a lone employee who takes care of a child until the child has reached the age of 15, as well as to an employee who proves that he/she mainly takes care of a person dependent on the assistance of another natural person in stage II (moderate dependence) to stage IV (total dependence) on a long-term basis.

b) with regard to shorter or other suitable arrangements for working hours, Section 241 (2) of the Labour Code states that: if an employee caring for a child under 15 years of age requests, a pregnant employee who proves that he/she has been caring for a person dependent on the assistance of another natural person on a long-term basis in stage II (moderate dependence) to stage IV (total dependence), for shorter working hours or other suitable adjustment of the stipulated weekly working hours, the employer is obliged to comply with the request, unless serious operational reasons prevent it.

Practical application from the point of view of aviation personnel

1. The assessment of an employee's request for release from posting on business trips and/or a request for shorter or other suitable working hours depends on the type of work the employee performs. Although the above-quoted provisions of Act No. work is essential for the employee's work-life balance, yet the protection given by the above provision is not unlimited and cannot be understood absolutely in the sense that some groups of employees could increase the protection resulting from Act No. to such an extent that it would be practically impossible to perform work under the agreed employment contract.

2. If a member of the aviation staff to whom the above-mentioned provisions of Act No. work, repeatedly refuse to go on business trips, refuse to be sent on work stays abroad, or repeatedly request to change their scope, length of stay, place of work tasks, etc. etc., then it would be practically impossible for the employee to perform the work obligations to which he or she committed himself or herself in the employment contract, and the further duration of the employment relationship would lose its meaning. The performance of the work of a member of the airline crew is such a specific type of work that the

employee cannot rely on the Act No. repeatedly refuse business trips or foreign stays, which are de facto an integral part of the performance of his/her work duties.

3. In a situation where a member of the flight staff has undertaken in his employment contract to be a member of the airline for the company. Smartwings (whose main activity is the operation of international commercial air transport), as part of the performance of business duties, is a legitimate requirement of Smartwings (whose main activity is the operation of international commercial air transport). Smartwings is required to require employees with children under 8 or 15 years of age to continuously complete business trips that are usual due to the agreed type of work, i.e. so-called short-term, medium-term or long-term stays.

4. Protection given by Act No. Work is not limitless and has its limits, i.e.:

a) it is a legitimate right of Smartwings to require the employee to document and justify the specific reasons preventing the employee from going on a business trip/stay abroad, e.g. the employee may be required to submit the child's birth certificate (in order to verify the child's age and meet the age condition), a report from the social security authority or an affidavit or other similar document by which the employee can prove, that he/she personally must personally care for the child on the given date, including proof that the other spouse and/or cohabitee do not take maternity or parental leave on the same date, or there are other serious reasons (e.g. serious health reasons) for which neither the other spouse and/or cohabitee or other relative (e.g. grandparent) is able – objectively speaking – to provide care for the child on the relevant date,

b) it is also a legitimate right of Smartwings to require the employee to express a request for a so-called other adjustment of working hours sufficiently in advance of the posting and requests submitted later or at the last minute (e.g. only 3 days in advance) cannot be taken into account,

5. The employer is not obliged to comply with a request for shorter or other suitable working hours if serious operational reasons prevent it. The Act. The thesis does not specify the definition of "serious operational reasons", but according to judicial practice, insufficient staffing can also be considered serious operational reasons. Smartwings is thus not obliged to comply with requests for shorter or other suitable working hours if there is insufficient staffing in the given profession due to the high number of flights in the given period (e.g. the main flight season in the summer months).

[END OF QUOTE - BE NOTED THAT THIS IS A MACHINE TRANSLATION OF THE ORIGINAL CZECH TEXT]

9. The Trade union has no information about who is the author of the Material and when, or whether the Material was officially issued by Smartwings.

10. On 12. 7. 2024, an internal document entitled *"SCHEDULING OF WORKING HOURS FOR EMPLOYEES CARING FOR A CHILD UNDER 15 YEARS OF AGE TVS-DR-046" (*hereinafter referred to as "**TVS-DR-046**") was issued, this internal document, which is available to employees in the EFA system in the LIBRARY section, primarily regulates the requirements for the application of Sections 240 and 241 of the Labour Code, and also explicitly states: *"If a crew member is repeatedly unable to complete shifts, flights,*

business trips and related work stays outside the Czech Republic as required by Smartwings' operational needs, such an employee would not meet the employer's requirements for the proper performance of work (the possibility of termination of employment under Section 52 (a) of the Smartwings Act). f) of the Labour Code without the employee's right to severance pay)." [BE NOTED THAT THIS IS A MACHINE TRANSLATION OF THE ORIGINAL CZECH TEXT]

11. The Trade union has no information as to whether Smartwings has already attempted to threaten to terminate employment under Section 52(a) of the Employment Act. f) of the Labour Code, while pursuant to Section 61 para. 1 of the Labour Code, Smartwings would be obliged to discuss any termination with the Trade Union in advance.

2.2 Summary of the legislation

12. According to Section 1a, paragraph 1, letter a) of the Labour Code, the basic principles of labour relations include: Labour Code: *"The meaning and purpose of the provisions of this Act are also expressed by the basic principles of labour relations, which are in particular the special statutory protection of the position of an employee."*

13. The terms "legitimate request" and "legitimate right" of the employer correspond to the statutory concept of "legitimate interest of the employer, while Section 1a para. 1 lit. d) of the Labour Code stipulates that: *"The meaning and purpose of the provisions of this Act are also expressed by the basic principles of labour relations, which are in particular (...) proper performance of work by the employee in accordance with the legitimate interests of the employer."*

14. The protection of employees in the Labour Code is also reflected in the so-called one-sided mandatory nature of the protective provisions as stipulated in Section 4a (1) of the Labour Code: *"Deviating regulation of rights or obligations in labour relations may not be lower or higher than the right or obligation stipulated by this Act or the collective agreement as the least or maximum permissible."* The employer can thus provide the employee with higher, not lower, protection.

15. According to Section 240 of the Labour Code, the following applies: *"(1) Pregnant employees and employees caring for children under the age of 8 may be sent on a business trip outside the municipality of their workplace or residence only with their consent; The employer can only relocate them at their request.*

(2) The provisions of subsection (1) shall also apply to a lone employee who takes care of a child until the child has reached the age of 15, as well as to an employee who proves that he/she is mainly alone in the long-term care of a person who, according to a special legal regulation, is considered to be a person dependent on the assistance of another natural person in level II (medium dependence), in stage III (severe dependence) or stage IV (total dependence).

(3) It is forbidden to employ pregnant employees to work overtime. Employees caring for a child under 1 year of age may not be ordered by the employer to work overtime."

16. According to Section 241 of the Labour Code, the following applies: *"(1) The employer is obliged to take into account the needs of the employee caring for a child when assigning shifts.*

(2) If the

a) a pregnant employee,

b) an employee caring for a child under 15 years of age, or

c) an employee who is mainly caring for a person who is considered to be dependent on the assistance of another natural person in stage II (moderate dependence), stage III (severe dependence) or stage IV (total dependence) according to a special legal regulation,

employer in writing for shorter working hours under Section 80 or for another suitable adjustment of the stipulated weekly working hours or shorter working hours, the employer is obliged to comply with the request, unless serious operational reasons prevent it. If the employer does not comply with the request, it is obliged to justify it in writing.

(3) If an employee whose request for shorter working hours has been granted pursuant to subsection (2) requests the employer in writing to renew or partially reinstate the scope of the original weekly working hours and the employer does not comply with this request, he or she is obliged to justify this in writing."

17. In her commentary on Section 240 of the Labour Code, Dr. Randlová[1] states the following: *"**The provisions of Section 240 must be interpreted in such a way that in the case of the above-mentioned groups of employees, individual consent is required for each business trip outside the municipality of their workplace or residence. The argument that employees have agreed on a general consent to business trips in their employment contracts does not hold up here.** At the time of concluding the employment contract, the situation could have been completely different and this consent can no longer be used due to the new family situation. A dispute among labour law experts is whether these employees can give general consent to business trips again after they become aware of their new family situation, or whether it is necessary to request their consent before each individual business trip. The author is of the opinion that general consent is possible, but employees must be able to revoke it at any time if their family situation changes. If the employer sends a protected employee on a business trip or transfers the employee without the employee's consent, the employer faces sanctions of up to CZK 500,000 from the Labour Inspectorate.* [emphasis added]

18. It is also possible to refer to other published sources, such as an article available on https://www.epravo.cz/top/clanky/kdy-muze-zamestnanec-odmitnout-pracovni-cestu-109008.html *"It is not entirely clear the relationship between section 42 para. 1 sentence 1 and section 240 of the Labour Code, which can sometimes bring interpretation problems in practice. Section 42 of the Labour Code speaks of an "agreement" with the*

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[1] Wolters Kluwer's commentary on the Labour Code of the collective of authors Hůrka, Randlová, Vysokajová, Doležílek, Roučková, Doudová, Košnar, Horna.

employee, while section 240 of the Labour Code speaks of "consent" to being sent on a business trip with regard to the listed categories of employees. This is a certain legislative-technical or terminological deficiency,[2] however, I interpret the provisions in question in relation to each other in such a way that in the case of specially protected employees named in section 42 of the Labour Code always requires explicit consent to be sent on a business trip, even if a blanket consent to be sent on (for) future business trips was previously granted, i.e. when a written agreement of the employee on posting on business trips was concluded, usually incorporated directly into the employment contract. ***In other words, employees named in section 240 of the Labour Code who are in the social situations described may refuse a business trip even if they have given their consent to it, in other words, they have concluded an agreement with the employer on sending them on business trips. 3****]"*. [emphasis added]

19. It is also possible to refer to the legal opinion of the Ministry of Labour and Social Affairs on its website https://ppropo.mpsv.cz/V21Vyslaninapracovnicestu: *"The employer also needs the employee's consent to be sent on a business trip outside the municipality of the workplace or residence of a pregnant employee, an employee caring for children under 8 years of age, a lone employee or a lone employee caring for a child under 15 years of age, or an employee who proves that he/she mainly takes care of a person who is considered to be dependent on the assistance of another natural person in stage II (medium dependence), stage III (severe dependence) or stage IV (total dependence) according to a special legal regulation [Section 240]. In these cases, it is not sufficient if the consent was generally stated in the employment contract and the employer is obliged to obtain consent for each business trip."*

20. **Expert literature and publicly available texts agree on the necessity of obtaining individual consent in the event of a situation under section 240 of the Labour Code for each business trip, regardless of the prior general consent in the employment contract**.

21. As far as the regulation of section 241 of the Labour Code is concerned, it is related to the judgment of the Supreme Court of 9.7.2014 file no. **21 Cdo 1821/2013**, which addresses the issue of serious operational reasons: *"In the circumstances of the present case, it was up to the defendant (employer) to claim and prove what problems (complications) would be brought about by the representation of the plaintiff (employee) or employees of other organizational units, and what specifically would have to be reorganized (which specific employees and to what extent such a measure would affect). In other words, how many employees the defendant had, how many of them could (potentially) replace the plaintiff (it was only one working hour a day), what their job description was, in relation to the activity in which they would represent the plaintiff, why other employees could not replace her, etc.* ***The solution may also be to hire another employee on a part-time basis or an agreement to perform work to the extent that the plaintiff's working hours were reduced. It cannot be overlooked that not all operational problems (which could arise if the request for short-time work was granted) are grounds for rejecting such a request****. It must be "serious operational reasons". The purpose of the legal regulation of short-time work under the provisions of section 241 para. 2 of the Labour Code is to enable the employees mentioned in this provision to perform work in an employment relationship*

with regard to their (excusable) other personal and family obligations. Therefore, the assessment of the employer's possibilities is always made with regard to the interests of the employees listed in Section 241 par. 2 of Labour Code." [emphasis added].

22. In other words, even a court decision assumes that the employer has *an objective* opportunity to comply with the statutory provisions to adopt such staffing that will enable him to comply with the statutory protection of certain employees under Section 241 of the Labour Code. If the employer fails to do so, then it is a *subjective* decision, which, however, does not constitute serious operational reasons *per se*.

23. With regard to issuing the work rules as a special type of internal regulation that elaborates on the provisions of the Labour Code as regards the obligations of the employer and the employee arising from labour relations, then according to section 306 par. 4 of the Labour Code, the following applies: *"An employer with a trade union may issue or amend the work rules only with the prior written consent of the trade union, otherwise the issuance or amendment is invalid."*

2.3 Conflict of Smartwings' line of argument with the law

24. The Trade union points to a possible conflict between Smartwings' line of argument and the law.

25. As far as TVS-DR-046 is concerned, the conflict is due to the fact that, contrary to section 306 para. 4 of the Labour Code, the last revision of 12. 7. 2024 was not discussed with the Trade Union, and therefore the prior written consent of the Trade Union was not given. TVS-DR-046 is pursuant to section 306 par. 4 of the Labour Code *in fine* is invalid.

26. Even if the invalidity were overlooked, the content of the TVS-DR-046 sets out conditions beyond section 241 of the Labour Code, in particular as regards the substantiation of facts regarding the care of children under 15 years of age, which would put TVS-DR-046 in conflict with the statutory provisions of section 241 of the Labour Code. The Trade union is of the opinion that the employees referred to in the provision of section 240 para. 1 of the Labour Code, nor lone employees caring for a child under the age of 15 under section 240 par. 2 of the Labour Code, they are not obliged to prove anything in terms of care, as the law expressly imposes the obligation to prove the provision of care only to an employee claiming to be caring for a person in the second to fourth degree of dependency on a long-term basis, but does not explicitly impose such an obligation on other categories of employees listed in section 240 of the Labour Code. An interpretation of the provision in question can therefore lead to the conclusion that these other categories of employees are not subject to this obligation.

27. The threat of notice of termination under section 52(a) of the Labour Code itself. f) of the Labour Code for employees who would refer to the legal regulation of section 241 of the Labour Code is a situation that, according to the preliminary research of the Trade Union, has not yet been adjudicated and it is questionable to what extent such a notice of termination would held at court, even considering situation that the employee did not refuse all business trips across the board at all time.

28. As for the Material, we can briefly object to it:

a. it is a one-sided text that contains only a distorted description of the legal regulation and its alleged practical application from the point of view of aviation personnel on a minimal extent (1.5 A4 pages);

b. the Material does not mention the sources that the author took into account in his assessment;

c. The Trade union is not aware of any deviating special regulation for aviation personnel excluding or amending the provisions of sections 240 and 241 of the Labour Code;

d. although the Material refers to case law (the use of the phrase *"(...) according to judicial practice (...)"*) does not mention any specific case-law;

e. the Material does not reflect the basic principles of labour law and any conflict with them;

f. The author of the Material argues only with the legitimate demands of the employer, without comparing them in the context of the legitimate demands of the employees. These must be legitimate interests of the employer in the proper performance of work by the employee. In other words, the employer's interests must have a legal basis (be justified) and must be in accordance with the proper performance of work – although a legitimate request of the employer cannot in any case serve to break the protection guaranteed by the Labour Code;

g. The legitimate requirement of the employer to require employees with children under 8 or 15 years of age to undertake business trips on an ongoing basis, which are usual due to the agreed type of work, i.e. so-called short-term, medium-term or long-term stays, directly clashes with the statutory regulation of Section 240 of the Labour Code, which stipulates that the individual consent of the employee is required;

h. The Material does not deal with the possibility of carrying out commercial air transport without foreign trips, or with minimizing their impact on employees when using the home airport (i.e. the common practice should be that the home airport should usually correspond to the most frequent place of the beginning and end of the service, otherwise it is basically agency employment);

i. The document considers insufficient staffing in the sense of serious operational reasons preventing a reduction in working hours to be a situation where there is insufficient staffing in a given profession in a given period (e.g. the main flight season in the summer months) due to the high number of flights. However, it would not follow from this reasoning that a specific reduction in the working hours of a particular employee is prevented by insufficient staffing (e.g. the impossibility of substitutability), but that a specific reduction in the working hours of a particular employee should be prevented by a general shortage of employees in a certain period – if an employer voluntarily contracts a higher number of flights than it is able to perform in a certain period due to a general lack of staffing, then it is a

different situation than an assessment specific impacts of a specific application of a specific employee.

29. **The Trade union emphasizes that the legal regulation of sections 240 and 241 para. 1 of the Labour Code represents the legal possibility for employees in a specific life situation to seek protection of their (no less legitimate) interest in the realization of family life. Proper upbringing of children then also represents an undoubted public interest, when the existence of the state depends on the upbringing of future generations.**

2.4 Suggestions for resolving the situation

30. The Trade union calls on Smartwings to respect the statutory provisions of sections 240 and 241 of the Labour Code, while at the same time requesting that in accordance with section 306 para. 4 of the Labour Code, the Labour Code requested the prior written consent of the Trade Union to amend TVS-DR-046.

31. The Trade union respects the specific nature of Smartwings' operations, but this specific nature cannot justify breaking the law.

32. The Trade union would like to point out that Smartwings' activities are directly dependent on airline personnel and their commitment, and the long-term willingness of Smartwings employees not to insist on compliance with the law cannot be confused with a blanket non-application of protection institutes in air transport.

33. The Trade union is also aware that strict compliance with sections 240 and 241 of the Labour Code may cause employees who do not meet the conditions specified here (especially if they have grown children) to feel that they are disadvantaged compared to this group of employees, all the more so because they may be sent on business trips more often, on which it would not be possible to send employees enjoying increased protection under sections 240 and 241 of the Labour Code.

34. The Trade union therefore proposes to stimulate a discussion on setting up a system that would:

    a. allow Smartwings to operate while respecting sections 240 and 241 of the Labour Code;

    b. motivate employees protected under sections 240 and 241 of the Labour Code to voluntarily undertake business trips or accept foreign stays;

    c. compensate (e.g. financially) employees who are not protected under sections 240 and 241 of the Labour Code, if their shifts and business trips are planned to cover employees enjoying increased protection under sections 240 and 241 of the Labour Code.

III. Conclusion

35. In view of the above:

I. The Trade union emphasizes that the legal regulation of sections 240 and 241 para. 1 of the Labour Code represents the legal possibility for employees in a specific life situation to seek protection of their (no less legitimate) interest in the realization of family life. The proper upbringing of children then also represents an undoubted public interest, when the existence of the state depends on the upbringing of future generations;

II. The Trade union is of the opinion that TVS-DR-046 is invalid pursuant to section 306 para. 4 of the Labour *Code in fine*, as the revision of 12 July 2024 was not discussed with the Trade union;

III. The Trade union has a number of objections to the Material, the main being that the Material, which is presented to some employees as a legal analysis or legal opinion of Smartwings, does not in fact comply with the law, expert publications, and case law;

IV. The Trade union respects the specific nature of Smartwings' operations, but this specific nature cannot justify breaking the law. The Trade union therefore calls on Smartwings to start complying with the law;

V. The Trade union therefore proposes to stimulate a discussion on setting up a system that would:

a. allow Smartwings to operate while respecting sections 240 and 241 of the Labour Code;

b. motivate employees protected under sections 240 and 241 of the Labour Code to voluntarily undertake business trips or accept foreign stays;

c. compensate (e.g. financially) employees who are not protected under sections 240 and 241 of the Labour Code, if their shifts and business trips are planned to cover employees enjoying increased protection under sections 240 and 241 of the Labour Code.

Smart Unity, pilots' union of Smartwings, a.s.