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WILL ‘YELLOW’ UNIONS DISAPPEAR AFTER THE AMENDMENT TO ACT ON TRADE UNIONS?

Abstract. The article aims to answer the question whether, after the amendment to the provisions of Act on trade unions, which entered into force on 1 January 2019, the phenomenon of creating and practical functioning of the so-called ‘yellow’ unions that, although developed as a workers’ organisation but in fact function mainly for the purpose of protecting an employer’s interests, will disappear. The article explains the concept of ‘yellow’ unions, discusses the most important recent amendments to the provisions of Act on trade unions, and analyses the binding provisions with regard to potential ‘profitability’ of the development of yellow unions from the point of view of employers’ interests.

Keywords: trade unions, ‘yellow’ unions, company trade union, trade union representativeness.

CZY PO NOWELIZACJI USTAWY O ZWIĄZKACH ZAWODOWYCH CZEKA NAS KRES ŻÓŁTYCH ZWIĄZKÓW ZAWODOWYCH?

Streszczenie. Celem artykułu jest odpowiedź na pytanie, czy po zmianach przepisów ustawy o związkach zawodowych, które weszły w życie 1 stycznia 2019 r. zniknie zjawisko tworzenia i funkcjonowania w praktyce tzw. żółtych związków zawodowych, powoływanych wprawdzie pod szyldem organizacji pracowniczej, ale *de facto* działających głównie w celu obrony interesu pracodawcy. W artykule zostało przybliżone pojęcie żółtych związków zawodowych, omówione najważniejsze ostatnie zmiany przepisów ustawy o związkach zawodowych oraz przeanalizowane zostały obowiązujące przepisy pod kątem ewentualnej „opłacalności” tworzenia żółtych związków zawodowych z punktu widzenia interesów pracodawców

Słowa kluczowe: związki zawodowe, żółte związki zawodowe, zakładowa organizacja związkowa, reprezentatywność związkowa.

1. INTRODUCTION

Employees’ participation in the management of an organisation is incorporated in a civilised and rationally operating company and constitutes an expression of empowerment of people in the process of labour. In addition, it allows resolving animosities between those who manage and those who are managed, and

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developing partnership based on compromise. In the Polish system of employment law, the idea of employees' participation is implemented at the institutional level mainly via trade unions and various types of non-union employees' representation such as works councils or European Works Councils.

Trade unions constitute the basic form of representation of employees. Fundamental trade unions rights and freedoms are laid down in numerous legal acts of international law and the Constitution of the Republic of Poland. The history of trade unions proves that no other representation of employees can equally efficiently represent workers within the scope of both individual and collective labour law. Trade unions definitely have the strongest expert backup and experience, which translate into efficient fulfilment of their role.

However, some employers and management staff do not perceive the activities of and cooperation with trade unions as useful and presenting no problems. It happens that company owners use various methods to prevent the foundation of trade unions in their businesses. Their fears concerning trade unions' activities mainly result from the fact that they perceive union activists as potential demagogues, who will be difficult to make redundant and with whom they will have to negotiate and come to an agreement. Trade union leaders are sometimes perceived as incompetent, demanding and inclined to cause destruction (Gardawski 2001, 126–128). Some employers are afraid of various negative aspects that can occur in connection with trade unions' activities, which include inter alia the increase in costs of operation because of the rise in remuneration, or difficulties in reduction of employment. The size of trade unions and their fragmentation in the workplace can contribute to the development of the so-called 'yellow' unions.

Yellow unions are trade union organisations created under the auspices of an employer and their main objective is to block the activity of a truly representative trade union or other trade union organisations in the company. The so-called yellow union is one that is planned by its founders to support the employer and not the employees. Its foundation is often inspired by an employer only in order to weaken all the trade unions or the only one founded and operating in the company, and as a result prevent the development of a common negative opinion on the introduction of or change in the rules and regulations for remunerating or awarding bonuses. Such a yellow union is able to destroy the unity of the trade union community, e.g. during negotiations on the rise in remuneration, and enable an employer to independently introduce changes in the rules and regulations for working without reaching an agreement on that with trade unions.

On 1 January 2019, amended provisions of Act on trade unions of 23 May 1991¹, hereinafter ATU, entered into force.

¹ Journal of Laws of 2015 item 1881; the statute was recently changed by the provision of Act amending Act on trade unions and some other acts of 5 July 2018 (Journal of laws of 2018 item

Due to the fact that the subjective scope of the rights of a trade union coalition was fundamentally changed, a question is raised whether it will continue to be 'profitable' for employers to initiate the creation of yellow unions in the new legal state, and whether a decrease in the interest in this form of hampering trade union activities can be expected.

There is a basic assumption that trade unions are created spontaneously as a rank-and-file initiative. In case of yellow unions, it is hard to speak about an initiative at grass roots level. In general, with no real problems, an employer is able to find a sufficient number of loyal and reliable employees in a company who, under the aegis of a trade union, will carry out his orders to destabilise the activities of other and legally established trade unions.

In practice, it is very difficult to prove that a given trade union was founded only for the purpose of destroying the activities of other trade unions in a company.

However, if it could be proved that a given trade union is a yellow one, it would be possible to hold the persons responsible for its creation, its leaders and members criminally liable. In accordance with Article 35 par. 1 (2) ATU, whoever uses their post or function to hamper trade unions' activities conducted in compliance with the provisions of the statute shall be subject to a penalty of a fine or limitation of liberty.

The author of the article primarily uses the formal-dogmatic method and analyzes the provisions of Polish law, taking into account the views expressed in the doctrine and jurisprudence.

It should be noted that there are no in-depth scientific studies on labor law on the subject of yellow trade unions in Poland.

2. THE CHANGE IN THE SCOPE OF THE SUBJECTIVE RIGHT TO TRADE UNION COALITION

Act on trade unions of 23 May 1991 was mainly aimed at broadening the scope of the subjective right to found and join trade unions in accordance with the Constitutional Tribunal judgement of 2 June 2015².

In the above-mentioned judgement, the Constitutional Tribunal indicated that depriving persons employed based on civil law contracts or freelancers of the right to join trade unions violates the Constitution of the Republic of Poland. The scope of the regulation stipulating admissibility of founding trade unions and joining them prescribed in Article 2 par.1 ATU is too narrow in relation to the

1608). The statute entered into force on 1 January 2019 with the exception of Article 1 par. 14 within the scope of Article 25(3) par. 6, which entered into force 12 months after the announcement.

² K 1/13, K 1/13, Journal of Laws, item 791.

constitutional guarantees laid down in Article 59 par. 1 in conjunction with Article 12 Constitution.

The freedom to create trade unions is guaranteed in Article 12 Constitution and, together with the trade unions' freedom to function, it constitutes one of the fundamental features of the political system of our State.

Article 59 Constitution, which ensures the freedom of association in trade unions (i.e. their creation and joining them), develops and specifies this guarantee, and stipulates the trade unions' fundamental rights as well as determines the rules of limiting the right to coalition.

Determining the group of entities having the right to establish trade unions and join them, the legislator used the criterion of the form of employment. However, this criterion was not envisaged in the Constitution of the Republic of Poland as a determinant of a group of entities having the right to associate in trade unions. According to the Constitutional Tribunal, the entities are mainly characterised by the fact that they do paid work and they have professional interests that can be collectively protected by a trade union. In this context, it is not important in what form and based on what type of contract a given person does paid work.

Moreover, the Constitutional Tribunal judged that the limitation consisting in granting cottage industry workers only the right to associate in trade unions (Article 2 par. 2 ATU) with no possibility of creating a union is groundless from the point of view of the function of such an organisation.

In the justification of the judgement, the Tribunal stated that the employer's obligation to implement the freedom of association in trade unions must consist in the provision of opportunities to create and join trade unions for all people who can be included in the category of employees in accordance with the Constitution. The legislator shall be obliged to distinguish, especially among freelancers, which of them match the features of employees and must have an opportunity to consociate in trade unions and which of them should be classified as entrepreneurs.

It should be noticed at the same time that as early as in 2012 the International Labour Organisation made similar recommendation to Poland after a complaint made by NSZZ "Solidarność". The ILO Convention No 87 uses a term 'worker', i.e. a person working/employed. According to ILO's Committee on Freedom of Association, all workers, except members of armed forces and police officers, have the right to establish and join organisations of their own choosing. In addition, the Committee states that the criterion for recognising the right to association does not depend on the employment relationship, which sometimes does not exist in case of agricultural workers, self-employed or freelancers who nevertheless should have the right to associate (par. 254).

In order to establish a trade union it is required that at least ten persons having the right to create a trade union adopt such a resolution (Article 12 par. 1 ATU).

However, since 1 January 2019 the right to establish and join trade unions has been granted to persons who do paid work (Article 2 par. 1 ATU).

A person doing paid work is an employee or a person working for remuneration on a basis other than an employment relationship provided that he or she does not employ other people to do the job, regardless of the basis of employment, and has such professional interests connected with this work that can be collectively protected (Article 1(1) par. 1 ATU).

The requirement of non-employment of other persons indicates that a job must be done in person, i.e. with no participation of other persons regardless of the legal relationship based on which they would work. The fact of employing other persons indicates the person involved has the features of an entrepreneur.

Non-employment of other persons "to do this kind of work" means that in order to recognise a person as one doing paid work within the meaning of ATU, it is *inter alia* required that the activities connected with that work (its type) are performed by a worker in person. The type of work shall be interpreted based on its nature and the nature of activities that a person other than an employee doing paid work should perform.

The adoption of such a definition of a person doing paid work means that, as a result, since 1 January 2019 trade unions have been able to associate persons who had no right to coalition before: those employed based on a commission contract regulated in Articles 734–751 Civil Code, a service provision contract to which the provisions on a commission contract are applied by analogy (as indicated in Article 750 Civil Code) and a specific task contract (regulated by the provisions of Articles 627–646 Civil Code), as well as the so-called self-employed (persons who have their own non-agricultural business and do it as sole traders).

3. CHANGES IN COMPANY TRADE UNIONS' REPRESENTATIVENESS VERSUS YELLOW UNIONS

The latest amendment to Act on trade unions was mainly aimed at applying the full right to trade union coalition, i.e. the right to establish and join trade union organisations, to all persons doing paid work regardless of the type of their employment basis. The aim was to be fulfilled *inter alia* by the establishment of relevant mechanisms protecting leaders and members of trade unions who are not employees against unequal treatment due to their membership of trade unions. The provisions concerning trade unions' representativeness were also amended and moved from Labour Code to Act on trade unions.

Trade unions' representativeness can be defined as a trade union's ability to represent employees in a situation when more than one trade union organisation seek this right (Goździewicz 2000, 63). The principle of representativeness is mainly applicable at a company level. It most often occurs as a collision norm in

a situation in which all company or inter-company trade unions cannot come to an agreement on establishing common representation. Then, representativeness is a criterion for taking a decision which trade union organisation should have the right to undertake particular activities.

As a consequence of the latest amendment to Act on trade unions, the legislator also strengthened the rights of a representative company trade union organisation in a situation when there is only one representative organisation functioning and one or a few smaller ones that want to have influence on the rules and regulations for remunerating and awarding bonuses.

In accordance with the amended Article 25(3) par. 1 and 2 ATU, a representative company trade union shall be the one that:

1) is an organisational unit or a member of a supra-company trade union organisation recognised as representative within the meaning of Act on the Social Dialogue Council consociating at least 8% of persons doing paid work for the employer, or

2) one that consociates at least 15% of persons doing paid work for the employer.

If none of the company trade unions meets the above-mentioned requirements, an organisation that has the largest number of members who do paid work for the employer shall be a representative trade union.

In order to establish the number of persons doing paid work who are members of a company trade union, only persons doing paid work who have been members of this organisation for at least six months before negotiations or bargaining start are taken into account. The six-month period of membership of a given trade union is applicable to all persons doing paid work, i.e. also employees (Article 25(3) par. 7 ATU).

The principle of representativeness is also applicable to the establishment of the rules and regulations for awarding bonuses, a company social benefits fund, and a plan of leaves in case there are more than one company trade union functioning in the workplace.

In accordance with Article 30 par. 4 and 5 ATU, in cases concerning collective rights and interests of persons doing paid work, company trade unions can establish common trade union representation. In cases requiring that a company's trade unions come to an agreement or agree on the stand, those organisations present their jointly agreed stand. The way in which the stand shall be negotiated and presented by an established common trade union representation shall be laid down in the agreement reached by the trade unions concerned.

If trade unions or representative organisations each of which consociates at least 5% of employees fail to present a jointly agreed stand within 30 days from receipt of a document from an employer, having considered different stands of a company's trade unions, an employer takes a decision concerning its adoption (Article 30 par. 6 ATU).

The 30-day period runs from the date when an employer presents a draft document, e.g. rules and regulations for remunerating (or an amendment to it). After its expiry, having considered a company's trade unions' stands, an employer can establish the content of the rules and regulations (e.g. for working or remunerating) independently. In case all trade unions present a unanimous negative opinion, an employer cannot introduce the rules and regulations for remunerating or awarding bonuses independently (the Supreme Court judgement of 12 February 2004, I PK 349/03, OSNP 2005/1, item 4, MPP – supplement 2005/8, item 15, PiZS 2005/4).

For the record, it should be indicated that, due to a considerable ideological diversity of trade unions at a company level and their frequent fight for influence, trade unions are not always interested in the creation of common representation or presentation of a common stand (Seweryński 2000, 131).

In the legal state before 1 January 2019, the above regulation (laid down in the former Article 30 par 4 and 5 ATU) supported the principle of trade union pluralism rather than the principle of representativeness. In a situation when a few trade unions functioned in a company and only one of them had the features of a representative one, it was sufficient to get consent of one organisation, even of the one that was not a representative trade union, to change or adopt rules and regulations for remunerating or working (in case of a negative stand of the remaining trade unions, including the representative one) to give an employer the right to introduce those new rules and regulations independently (Kozek 2016, 68–70).

The Supreme Court also confirmed this conclusion in its judgement of 8 September 2015 (I PK 234/14, LEX no. 2122365), in which it stated that in a company where more than one trade union function, an employer shall not be bound by one representative trade union's stand in order to introduce rules and regulations for remunerating (former Article 30 par 5 ATU).

In the Supreme Court's opinion, one cannot accept the stand that in the light of the provision of Article 77² § 4 Labour Code, in case there are many trade unions in a company, the opinion of one of them, provided that it is the only one having the feature of representativeness within the meaning of Article 241^{25a} LC, is sufficient and binding (in the negative or positive sense) in order to introduce the rules and regulations for remunerating in accordance with the employer's proposal. Firstly, the provision uses a plural form to speak about representative trade unions within the meaning of Article 241^{25a} LC, which indicates that it concerns more than one organisation. Secondly, it uses a phrase: "jointly agreed stand", which refers to trade unions as well as representative trade unions within the meaning of Article 241^{25a} LC. The linguistic (grammatical) interpretation of the phrase does not raise any doubts that it concerns such a stand that has been jointly developed by all trade union organisations in a company or at least representative trade unions within the meaning of Article 241^{25a} LC, i.e. such that has been developed

after reaching an agreement by those trade unions. The term 'jointly' means 'together with someone else, together with others', and the term 'agree' just means 'make things match, eliminate differences, give consent, standardise, coordinate, harmonise'. Thus, a 'jointly agreed stand' occurs in relations between at least two entities, which excludes the assumption that the stand of one trade union organisation is such as well.

The Supreme Court judgement indicated for sure did not contribute to curbing the practice of founding the so-called yellow unions.

In the light of Article 12 par. 1 ATU, a trade union shall be founded based on a resolution of its establishment adopted by at least ten persons having the right to establish trade unions. Although the normative regulations in force still do not allow blocking the establishment of a trade union well disposed towards an employer if the founders of the organisation have all rights of coalition, a considerable change was introduced in the form of Article 30 par. 7 ATU, in accordance with which the provision of Article 30 par. 6 ATU is applicable by analogy if there is only one representative trade union organisation consociating at least 5% of employees in a company. This means that if there is one big representative trade union organisation (which meets the additional requirement of at least 5% of employees in a company), it can on its own block the introduction or change in the rules and regulations for remunerating or awarding bonuses even if other unions or a union give their consent to it.

This means that in practice the creation of the so-called yellow unions can turn out to be not so profitable as before. However, it will still be profitable for employers where the biggest trade union organisation does not consociate at least 5% of the staff employed. In the light of the managerial concept of an employer, there are many big employers that are composed of divisions, branches or other organisational units countrywide (e.g. hypermarkets). In case of such employers, it is very difficult for one or a few trade union organisations to reach the threshold of at least 5% of all employees of the given employer. In such cases, the temptation to found yellow unions can be quite big because if there are a few company trade unions but none of them consociates at least 5% of all employees, they can effectively block the introduction of or changes in the rules and regulations for remunerating if they present their jointly agreed negative stand referred to in Article 39 par. 6 ATU. Then, one yellow union that has a status of a company trade union organisation is sufficient to destroy this unity and let an employer introduce such rules and regulations independently or amend them. Theoretically, it could even be a union that consociates persons who are not employees, i.e. other persons doing paid work who have worked for at least six months for an employer that is subject to this organisation's operations (compare Article 25(1) par. 1 (2) ATU).

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