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Employers' provision of access to information necessary to conduct trade union activities

Abstract

Pursuant to Art. 28 of the Trade Union Act of 23 May 1991 (TUA), employers are obliged to provide information necessary to conduct trade union activities at the request of work establishment trade union organisations. The paper defines what information can be requested by a trade union from employers. The author specifies the scope in which the employer examines the request, in what circumstances it may refuse the preparation and transfer of requested information, and what risk it involves.

Key words: work establishment trade union organisation, information, trade union activities, employer, employer's obligations

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Introduction

The legislator defines a trade union as an organisation bringing together employees, established with a view to representing and defending their rights and professional and welfare interests. The subjective dimension of the freedom of association is laid down in Art. 2 of the TUA. The right to establish trade unions is vested in all persons engaged in gainful employment¹. This includes not only employees but also persons hired on a different basis than an employment relationship, provided that they are paid for their work, do not hire other individuals to perform their tasks, and have employment-related rights and interests which a trade union can deal with. The legislator provides a wide range of individuals and entities that may join trade unions². The legislator's extension of the group of eligible individuals and entities that may form trade unions, or join them, has provided greater opportunities for employed persons to exert pressure on employers to improve their working conditions³. The legislator has decided not to regulate the scope of activities performed by work establishment trade union organisations. The lawmakers only indicated that they include, in particular, voicing a trade union's position in individual employee matters insofar as labour law provisions apply and in individual matters of persons engaged in gainful employment in the scope related to the performance of such work; voicing its positions towards the employer or the staff of a self-governing body in matters related to collective interests and the rights of persons engaged in gainful employment; controlling compliance with labour law regulations at the employing establishment, in particular laws and rules governing occupational health and safety; managing the activities of work establishment social labour inspectorates and cooperation with the state labour inspectorate, and dealing with the living conditions of retired employees and disability pensioners⁴. To perform their tasks, trade union organisations have the right to obtain information under

1 Art. 1 of the Trade Union Act of 23 May 1991 (Journal of Laws 2022, item 854), further referred to as the TUA. Cf. K.W. Baran, *Podstawowe zasady zbiorowego prawa pracy* [in:] *System prawa pracy. Część ogólna*, t. 1, ed. idem, Warszawa 2017, p. 1152.

2 Volunteers, trainees and other persons who personally perform work without remuneration may join trade unions in circumstances and under conditions set out in trade union charters, as laid down in Art. 2(4¹) of the TUA.

3 M. Wujczyk, *Nowe regulacje funkcjonowania związków zawodowych – wybrane zagadnienia*, „Studia z Zakresu Prawa Pracy i Polityki Społecznej” 2019, vol. 26, no. 3, p. 199.

4 Art. 26 of the TUA.

Art. 28 of the TUA. This means that the bodies of work establishment trade union organisations may unilaterally impose an obligation on the employer's governing bodies and employ the establishment's management bodies to prepare and transfer information⁵. As part of this procedure, information may be requested by a work establishment trade union organisation (which means that a trade union which does not have the status of a work establishment trade union organisation cannot submit such a request). The entitlements in this respect were also granted to inter-enterprise trade union organisations under Art. 34(1) of the TUA⁶. The next section of the paper includes a summary of information which a trade union may request from employers and issues related to an employer's obligation to provide such information.

Information necessary to conduct trade union activities

A trade union organisation may demand from the employer, under Art. 28 of the TUA information required to conduct trade union activities. The provision outlines the example range of information a trade union may request and includes details of working conditions and remuneration rules, the employer's operations and its economic status concerning employment and expected changes in this respect, the status and structure of expected employment changes and measures being undertaken to maintain a given level of employment, and actions which may result in significant changes in work arrangements or the legal basis of employment.

Information about employment conditions should be understood comprehensively. It comprises working arrangements, the work environment, equipment at the employing establishment, access to healthcare services guaranteed by the employer, the provision of commuting possibilities and the possibility to raise one's professional qualifications, working time arrangements, holiday leave, or safe and hygienic working conditions⁷. As regards information about remuneration rules, the right to control compliance with labour laws

5 A. Sobczyk, *Zarys systemu prawa pracy. Ustrój społeczno-gospodarczy III RP i ustrojowe prawo pracy*, t. 2, Kraków 2022, p. 370.

6 B. Surdykowska [in:] P. Czarnecki, P. Grzebyk, A. Reda-Ciszewska, B. Surdykowska, *Ustawa o związkach zawodowych. Komentarz praktyczny z orzecznictwem*, Warszawa 2022, art. 28, Legalis/el.

7 M. Wujczyk, op. cit., p. 206–207.

vested in work establishment trade union organisations also means that they are entitled to control the amounts of employee remunerations. However, it does not entitle them to demand from the employer details of specific employee's remuneration without their consent, as such actions might result in the infringement of an employee's personal interests. According to the Supreme Court, the notion of „information about remuneration rules” should not be applied only to information about laws governing remuneration-setting processes, as these are available to the public. It includes details of specific economic phenomena occurring at an employing establishment, its financial standing and wage bill. Such information may also pertain to the remuneration levels of a specific professional group or remuneration setting rules applicable to specific types of positions⁸. Such information may have varying ranges due to the differing remuneration methods and mechanisms which comprise remuneration systems. For some employers, it may be limited to references to remuneration setting models included in open-access documents, and where there are no internal regulations specifying such rules, it would be necessary to obtain more comprehensive data which could facilitate the understanding of the ways remunerations of specific employee groups are set at the employing establishment. As stated above, it is possible to speak about „information about remuneration rules” insofar as it does not allow the identification of the amount of a salary paid to specific individual employees⁹. The disclosure of individualised information about employees' salaries without their consent might not only result in the infringement of their personal interests. It should be noted that such information is not necessary to conduct trade union activities, neither in respect of group nor individual interests, except where the interests of a specific employee are threatened in relation to the setting of their remuneration for work, and they turn to a trade union to investigate the matter and for the consent for such data to be disclosed. In such an event, the information about the amount of an employee's remuneration is necessary to conduct trade union activities, and the employer is obliged to provide the information to the trade union under Art. 28 of the TUA¹⁰.

8 Resolution of the Supreme Court of 16 July 1993, I PZP 28/93, Legalis no. 28174; Judgement of the Provincial Administrative Court in Poznań of 14 September 2022, IV SA/Po 267/22, Legalis no. 2753825.

9 Ibidem.

10 Ibidem.

Information concerning the operations and economic status of the employer regarding employment and expected changes in this respect refer to the employer's operations, which are related to the management of the employing establishment, its position on the market, its financial standing, and potential changes to the existing operations and economic status which affect its employees' situation¹¹.

Employment situation should be understood as the number of persons employed under employment relationships and civil-law agreements. Such a listing allows trade unions to identify the actual needs of the employer in respect of the workforce. In addition, the employment structure usually refers to professional groups in service at the employing establishment and the division of employees into specific grades. The information may also refer to employment structure in terms of specified criteria, for instance, age, qualifications or gender¹².

The expected changes to employment refer to the planned, significant increases in the number of employees and the activities which are bound or are likely to result in the reduction of staff¹³.

Work establishment trade union organisations may ask the employer to provide information about personnel turnover in relation to their entire staff and individual professional groups¹⁴. They may also request details of activities aimed at maintaining the current level of employment¹⁵.

Given the above, it is legitimate for a trade union to demand information concerning the total number of employees, the structure of employment basis (employee and non-employee basis); the professional employment structure, personnel turnover ratios, remuneration systems, the principles of setting wage bills, remuneration calculation methods, the methods of dividing a wage bill into payroll and non-payroll funds, wages for individual job positions, the subjective structure of remunerations (e.g. the amount of remuneration for a specific professional group), and the objective structure of remunerations (e.g. the amount of allowances, bonuses, rewards)¹⁶. It should be stressed here that the criteria the employer has applied to award a pay rise may be necessary

11 M. Wujczyk, *op. cit.*, p. 206–207.

12 *Ibidem*, p. 207.

13 *Ibidem*.

14 *Ibidem*, p. 208.

15 *Ibidem*.

16 K.W. Baran, *Prawo związków zawodowych do informacji po nowelizacji ustawy związkowej*, „Monitor Prawa Pracy” 2019, no. 1.

for a trade union to fulfil the goal of its activities related to representing and defending employees' rights and their professional and welfare interests. This knowledge might allow the trade union to analyse the compliance of an employer's activities and the situation related to remunerations at the employing establishment with internal and statutory regulations referring to, e.g., equal treatment. It is also assumed that demanding information about the number of persons who received a pay rise within a given group of staff with similar years of service does not constitute reasonable grounds for claiming that they are pieces of information whose provision would be an excessive burden placed on the employer¹⁷. A trade union may demand „raw” numerical data with a degree of generality that will not result in the disclosure of data of specific employees and which are necessary to conduct trade union activities. According to the case law, for a trade union to perform its statutory tasks and the obligations set out in its charter, it is enough to obtain processed information in the form of statistical data concerning the rules for remunerating individual employee groups¹⁸. It should also be noted that, in the event a given organisational unit employs a small number of staff members, there is the possibility that the remuneration levels of specific employees might be identified on the basis of data on the remuneration amounts divided by individual units. The literature on the subject includes a position that an employer's provision of such indirect information is not forbidden by law because, in such an event, an employee's right to privacy is not directly infringed by the employer's behaviour¹⁹.

17 M. Rotkiewicz, *Informacje o wynagrodzeniach dla związków zawodowych*, Legalis/el., <https://sip-1legalis-1pl-100008dea0b8d.han.uwm.edu.pl/document-full.seam?documentId=mjuwelrsgqydczmzugu4tc&refSource=guide> [access: 18.01.2023].

18 Judgement of the Appeals Court in Białystok of 25 June 2014, III AUa 2078/13, Lex no. 1493722.

19 D. Wajda, *Pośrednie wskazanie związkowi zawodowemu wysokości pensji poszczególnych pracowników*, Legalis/el., <https://sip-1legalis-1pl-100008dea0b8d.han.uwm.edu.pl/document-full.seam?documentId=mjuwelrsga2tcmbvge3do&refSource=guide> [access: 18.01.2023]. Also, it is worth stressing that measures aimed at counteracting wage discrimination occasionally require an employee to reveal their salary details, even if they are bound by the obligation towards the employer to keep them confidential – H. Szewczyk, *Jawność wynagrodzeń za pracę a unijna zasada „przejrzystości wynagrodzeń” (uwagi de lege lata i de lege ferenda)*, „Praca i Zabezpieczenie Społeczne” 2021, no. 11, p. 5.

The limitations of a trade union organisation's right to demand information

As shown above, the list of information a work establishment trade union organisation may request from an employer is not exhaustive. This means that trade union organisations may request the provision of various pieces of information other than the ones set out in Art. 28 of the TUA, insofar as they are necessary to conduct trade union activities. Therefore, as the legislator has specified that these details should be „information necessary to conduct trade union activities”, there is a limitation as to the range of information which a trade union may demand from employers. The fact that the notion used by the legislator is vague poses certain difficulties. Trade unions may demand pieces of information which are objectively related to their activities and are necessary to conduct them²⁰. A trade union's right to obtain information necessary to conduct trade union activities comprises all aspects of such operations. A trade union is not entitled to any information which does not serve this purpose, i.e., it is not necessary to conduct trade union activities²¹. However, it may be challenging to identify such purpose in a specific matter, because in practice only trade unions can indicate which information is indispensable in a given situational context. Trade unions are not obliged to substantiate their requests. For that reason, if a given employer has any doubts as to the objectives and, consequently, the legitimacy of providing the requested information, the trade union may be asked to specify in detail the purpose for which such information is necessary. It would facilitate the alignment of the range of data provided for trade union activities²². This would need to be carried out before the expiration of the thirty-day time limit for a reply to the request.

The fundamental limit to a trade union's right to demand information from employers under Article 28 of the TAU (as already mentioned) is to specify that it is about information „necessary to conduct trade union activities”. Moreover, it is assumed that the right to demand from the employer information necessary to conduct trade union activities is subject to certain

20 Judgement of the Provincial Administrative Court in Gliwice of 9 January 2020, III SAB/GI 292/19, Lex no. 2777621.

21 L. Florek, *Prawo związku zawodowego do informacji*, „Praca i Zabezpieczenie Społeczne” 2010, no. 5, p. 2–7.

22 K.W. Baran, *Prawo związków zawodowych...*

formal limitations which arise from generally applicable legal regulations²³. The limits are set out in, i.a., the Act on the Protection of Classified Information²⁴, the Act on Combating Unfair Competition²⁵, legal regulations in the sphere of personal data protection²⁶, the GDPR, and the protection of personal interests or professional secrecy. Before providing requested information, employers should thoroughly analyse the scope of the request and the information to be provided, also in the context of the aforementioned legal acts. They should also consult the issues with their Data Protection Officers because the employer, as the controller of the personal data of its employees, is obliged to take responsibility for the security of the data it processes in relation to employment²⁷.

According to legal commentators, the Act on the Protection of Classified Information is said to limit trade unions' access to information. It is also noted that in practice, employers seldom inform employee representatives that any given information is treated as classified information within the meaning of the Act on the Protection of Classified Information, with all the implications of the fact²⁸.

As regards the limits of a request to an employer for information necessary to conduct trade union activities, it should be pointed out that a distinction should be made as to the premises related to the subjective and objective scope of providing information under Art. 28 of the TUA and the Act on the Access to Public Information²⁹. The procedures set out in the AAPI and the resulting entitlements are separate and independent of the rights vested in trade unions

23 M. Włodarczyk, *Prawo do informacji [in:] System prawa pracy. Zbiorowe prawo pracy*, ed. K.W. Baran, vol. 5, Warszawa 2014, Lex/el.

24 Act of 5 August 2010 on the Protection of Classified Information (consolidated text, Journal of Laws 2019, item 742).

25 Act of 16 April 1993 on Combating Unfair Competition (consolidated text, Journal of Laws 2020, item 1913, as amended).

26 Act of 10 May 2018 on Personal Data Protection (consolidated text, Journal of Laws 2019, item 1781).

27 While providing data, consideration should be given to the fact that the disclosure of an employee's remuneration details without their consent may be treated as infringement of personal interests under Art. 23 and 24 of the Civil Code – Resolution of the Supreme Court of 16 July 1993, I PZP 28/93, Legalis no. 28174.

28 B. Surdykowska, *op. cit.*

29 The Act of 6 September 2001 on the Access to Public Information (consolidated text, Journal of Laws 2022, item 902), further referred to as the AAPI.

pursuant to the TUA³⁰. Under the TUA, only the employer is an entity obliged to provide information under the TUA, and the information such an employer discloses is not categorised as public information and does not need to concern public matters. At the same time, the indispensability of such information to conduct trade union activities is a prerequisite for its disclosure. Trade union organisations are entitled to demand from the entity information which has the properties of public information according to the AAPI³¹. A trade union organisation can choose the procedure for requesting information. The status of a trade union does not mean that the application of the AAPI is excluded³². The case law also demonstrates a more restrictive view, stating that if public information is the object of the request, Art. 28 of the TUA is not applicable in such a matter, and the entity concerned has no grounds to invoke limitations arising from the said legal provision³³. The procedure provided for in this legal regulation is independent of the one guaranteed in the Act on the Access to Public Information. It constitutes *lex specialis* concerning the latter Act and is not subject to assessment as part of access to public information³⁴.

Employer's obligation to provide information

If under Art. 28 of the TUA, the data a trade union requests is related to the objectives of trade union activities pursued by such an organisation, the employer concerned is obliged to provide access to it. The verification of the objectives of trade union activities may be problematic at times, as only the trade union can identify the data which are necessary for a specific situation. As indicated above, if the employer has any doubts, it may consider submitting a request to provide additional details of the purpose for which the given information is requested within 30 days of the trade union's request.

30 Judgement of the Provincial Administrative Court in Poznań of 3 December 2021, IVSA/PO 817/21, Lex no. 2650485.

31 Ibidem.

32 Judgement of the Provincial Administrative Court in Warsaw of 16 April 2020, VIII SAB/Wa 7/20, Legalis no. 2419956.

33 Judgement of the Provincial Administrative Court in Łódź of 18 July 2019, II SA/Łd 310/19, Legalis no. 2195477.

34 Judgement of the Provincial Administrative Court in Opole of 21 December 2018, II SAB/Op 111/18, Legalis No. 1867088.

Furthermore, the employer may refuse to provide information if, for example, it has reasons to suspect that the information which the trade union requests is not directly related to the activities of the trade union and will be used for political, publicity or particularistic purposes, or that its range clearly goes beyond the statutory obligation to keep trade unions informed³⁵. It should be clarified that it is the employer who bears the risk of the wrong assessment of the request. Thus, the failure to provide information (or disclosing incomplete or inaccurate information) or the failure to provide it on time (within 30 days of the receipt of the request), although not penalised directly, may be classified as hindering trade union activities conducted in line with the provisions of the Act and result in liability under Article 35(1)(2) of the TUA. Such conduct may be punishable by a fine or the restriction of liberty.

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Udostępnienie przez pracodawcę informacji niezbędnych do prowadzenia działalności związkowej

Streszczenie

Zgodnie z treścią art. 28 ustawy z 23 maja 1991 roku o związkach zawodowych, pracodawca ma obowiązek udzielić na wniosek zakładowej organizacji związkowej informacji niezbędnych do prowadzenia działalności związkowej. W artykule wskazano, o jakie informacje związek zawodowy może zwracać się do pracodawcy. Określono, w jakim zakresie pracodawca bada wniosek i w jakich sytuacjach oraz z jakim ryzykiem może odmówić przygotowania i przekazania zawnioskowanych informacji.

Słowa kluczowe: zakładowa organizacja związkowa, informacje, działalność związkowa, pracodawca, obowiązki pracodawcy