The dark side of yellow unions

Due to lack of consent by the only trade union established at the workplace, an employer could not amend the workplace pay rules. But some of the staff supported the changes proposed by the employer. A potential solution would be to create another, competing trade union at the workplace. Then, the two unions' failure to agree on a joint position would allow the employer to introduce the changes unilaterally. But would an employee organisation sympathetic to the employer be regarded as a bone fide union?

Agnieszka Lisiecka

Dr Marcin Wujczyk

Trade unions established at the employer's instigation, or cooperating with the employer with the aim of forcing through solutions desired by the employer, are sometimes called "company unions" or "yellow unions." The term "yellow union" was coined by the communist movement to distinguish "red" unions fomenting class struggle from Christian workers' associations with a solidarity-based approach established in line with the encyclical *Rerum novarum* (*Rights and Duties of Capital and Labour*) issued by Pope Leo XIII in 1891. The current meaning of this term has thus evolved away from the original meaning. The existence of yellow unions can be advantageous to the employer, particularly if the employer encounters difficulty adopting internal workplace regulations such as pay rules.

Trade unions reject changes in pay rules

The rules for amending pay rules in Poland are highly formalised and require joint action by the employer and trade unions (if they are active at the workplace). If there is one trade union organisation functioning at the workplace, the employer is required to agree with the union on amending the pay rules (Labour Code Art. 77^2 §4). Lack of consent prevents enactment of the change, as the regulations do not provide for any alternative. Employers must rely on dialogue in such situations and seek a compromise with the union.

The obligation to agree on changes also exists in a situation where more than one trade union functions at the workplace. There is an exception, however: if all the trade union organisations, or at least representative union organisations within the meaning of Labour Code Art. 241^{25a}, fail to present a commonly agreed position within 30 days after submission of a draft of the regulation, the employer is entitled to introduce the amendments to the regulation unilaterally (under the wording of Art. 30(5) of the Trade Unions Act in effect at the time we advised our client). In other words, if the trade unions (all of them, or at least the representative ones) cannot reach agreement, the employer can act without having to obtain the unions' approval. But if all the unions oppose the amendments to the regulation, the employer will be barred from making the changes. The employer also cannot introduce the changes if they are consistently opposed by all the representative organisations at the workplace, even if the changes are supported by smaller organisations regarded as non-representative.

This rule doesn't provide an easy answer in two instances:

- When there is one representative organisation functioning at the workplace, opposed to the amendment of the work rules, and one non-representative organisation, supporting the proposed changes
- When in addition to a representative organisation at the workplace opposed to the changes, there are several non-representative organisations functioning at the workplace and at least one of them supports the changes proposed by the employer.

It is unclear in these situations whether the employer is bound by the position of the representative organisation (and thus cannot amend the pay rules), or, citing the disagreement between the union organisations functioning at the workplace, the employer is entitled to amend the pay rules unilaterally.

The views on this issue in the legal literature are divided. Some authors argue that the position of the representative organisation is decisive. They claim that the legislative intent was to reinforce organisations with a large number of employees as members. Consequently, the position of the representative organisation should always be binding. Thus if the only representative organisation is against the changes the employer has proposed to the unions, the employer is bound by that opinion despite the absence of a joint position worked out in conjunction with the other unions, and cannot unilaterally amend the pay rules.

Other authors take a literal reading of Art. 30(5) of the Trade Unions Act, which refers to "a jointly agreed position of the representative organisations"—implying there are at least two representative organisations. Following this line of argument, if there is only one representative organisation at the workplace, it is meaningless to refer to a joint agreement by one organisation that would be binding on the employer. In that case, all the trade union organisations at the workplace are treated equally for purposes of this provision, regardless of their size or status. Inconsistent positions on introduction of changes to the pay rules (in the case analysed here, one representative organisation opposing the changes, and one non-representative organisation supporting the changes) give the employer the freedom to introduce the changes. This position was adopted by the Supreme Court of Poland in the judgment of 8 September 2015 (Case I PK 234/14), among other cases.

The latter position currently predominates in the legal literature and the case law. Thus if there is only one union organisation operating at the workplace, or there are several organisations but only one of them is regarded as representative, it is in the employer's interest for a union to be created (even a small one) capable of acting in agreement with the employer. But if there are two or more representative trade unions in place, establishment of another organisation supporting the employer's views will be advantageous to the employer only if the newly established organisation qualifies as a representative organisation. Otherwise, the consistent position of the two (or more) representative organisations will always prevail over the position of the non-representative organisations, and then the employer will be barred from acting contrary to the other unions' views.

Independence doesn't mean refusal to cooperate

But the establishment of such new organisations is often met with charges of the employer's interference with the freedom of union activity. Opponents allege that a com-

pany union is not independent of the employer and does not act in the employees' interests, and thus such a union should not be considered.

An examination of the legality of the operation of a union sympathetic to the employer may raise doubts. A fundamental principle for the functioning of employee representation is the independence of trade unions. This is expressly provided for in the Trade Unions Act and the Right to Organise and Collective Bargaining Convention of the International Labour Organisation (no. 98). But it would be hard to find that encouraging employees to establish such a union is a violation of trade union independence (even if intended as an alternative to trade unions also operating at the workplace). While such actions do raise doubts that the employer may seek to influence the union when it is established, unless and until it attempts to interfere in union activity there cannot be said to be an infringement of the principle of independence.

There are just as many doubts surrounding the allegation that the union would be acting in the employer's interest. This issue is multifaceted. A trade union should act in the best interests of the employees. But ultimately the union decides independently which actions it deems to be advantageous for employees or not. (Indeed, disputes often arise on this issue between union organisations: some will allow only measures awarding immediate benefits to employees, while others allow measures that are immediately disadvantageous, in the expectation that in the longer term they will for example save jobs.) On the other hand, it should be borne in mind that under Art. 7(1) of the Trade Unions Act, when it comes to collective rights and interests, unions represent all employees, regardless of their union membership. Thus a union should not justify its actions by arguing that it regards a decision as favourable for its members. It must also consider whether the decision is advantageous for the staff as a whole. Nonetheless, it is common for unions to place the interests of their own members above the interests of other staff.

Consequently, we should be cautious in treating a new union as a company union solely depending on whether its activities are regarded as favourable to the employees. The law permits a trade union to be established by a minimum of 10 persons performing gainful work. They have a right to decide what union activities they regard as proper and advantageous to their members, as long as they meet the criteria for the number of members specified by the law. A negative view of the union's cooperation with the employer cannot be grounds to deny the union the right to exercise its statutory competencies.

A company union is not necessarily illegal

Even if a trade union in fact acts in the interest of the employer and not the employees, there are no grounds for regarding the union's activities as ineffective or illegal. The law does not provide for any verification mechanism in this respect. This is because determining what is or is not advantageous for members of a trade union is often a subjective issue. Attempts to obtain a judicial ruling that such a union has no right to act, or to initiate proceedings to delegalise the union, have little chance of success. The answer to the problem of a company union is the possibility of establishing another union. If the employees believe that an existing union is acting to their detriment, they can create another, larger union organisation and thus take power away from the organisation they believe is acting against the employees' interests.

Black and white?

In the case described here, the employer managed to work out a compromise with the union operating at the workplace and introduce amendments to the pay rules.

We should add that the amended Trade Unions Act has introduced mechanisms limiting the power of small, non-representative organisations (which are most often the ones accused of acting in the employer's interest). Under the provisions in force from 1 January 2019, even if there is only one representative union functioning at the workplace, its position on introduction of new pay rules will—unlike under the prior law—be binding even if one or more non-representative organisations disagree. It is a condition, however, that the members of the representative organisation comprise at least 5% of the persons performing gainful work for the given employer. Thus, under the new regulations, establishment of a small yellow union will not allow the employer to act unilaterally, even if there is a difference of opinion between a single representative organisation and existing non-representative organisations.

Agnieszka Lisiecka, adwokat*, partner in charge of the Employment practice*

Dr Marcin Wujczyk, attorney-at-law, Employment practice