HR | PERSPECTIVES
JULY

PCS | Littler

Dear Readers,

In this edition of HR Perspectives we have devoted most of our attention to **the procedure for verifying the number of trade union members.** We encourage you to use this procedure and below we have shared our experiences on how to do it effectively.

Moreover, we are delighted to announce we have received numerous awards in the Rzeczpospolita law firm ranking for 2020 and 2021 published last month. In both rankings, PCS | Littler was recommended in the labour and social insurance law category, and Sławomir Paruch was a recommended lawyer in the same category. Furthermore, our website was chosen as 'best law firm website' in Poland. It is with particular pride that we have received this award because it recognises the quintessence of how we work – striving to be clear and transparent.

We also invite you to read interview with Sławomir Paruch in Rzeczpospolita in connection with his successes in the rankings. Sławomir talks, among other things, about the positive feedback we get from our clients who often consider us to be their first choice HR law firm.

Getting back to the main topic of the July HR Perspectives – over the past year we have represented our clients in dozens of proceedings verifying the number of trade union members. We have been very successful in this area and obtained several precedent-setting judgments, most notably:

- the employer has the right to participate as a party in the proceedings to determine the number of trade union members;
- the employer should be given full access to the files of the proceedings once the data on trade union membership has been anonymised;
- the employer is not obliged to provide the court with the list of employees, and the obligation to provide such a list violates personal data protection laws;
- the court should examine the trade union's internal documents, including membership fee payment confirmations – it does not interfere with self-governance and independence of the trade union.

We elaborate on that below and we are open to discuss the details with you.

Enjoy your reading!

Sławomir Paruch

Robert Stępień

1. The employer as a party to the proceedings - what if the court bars the employer from participating?

The employer has the status of an interested party in the case concerning the determination of the number of trade union members, and thus can participate in the proceedings. It is undisputable that the court should notify the employer about this. Unfortunately, some courts still oppose employers' participation. The good news is that we have effectively challenged such court decisions in the past.

We firmly believe that the employer not only has the right to join the proceedings but should also use it. Challenging the number of trade union members and letting the case run its course could prove counterproductive - the trade union will "own" the case and the court will only confirm the information provided by the union. It would be better not to initiate the whole procedure at all than to do it that way.

2. An inter-company trade union? All involved employers should participate in the proceedings

As mentioned above, it is common for employers to participate in the proceedings to determine the number of trade union members. It stems from the fact that the outcome of the proceedings affects the rights and obligations of the employer. The size of the trade union determines its specific rights (e.g. representativeness, exemption from the obligation to provide work, special employment protection, etc.) and the employer's corresponding obligations.

Consequently, if the proceedings concern an inter-company organisation covering more than one employer, the court should summon all these employers to participate in the case as interested parties.

3. Will the case be heard in chambers or in open court?

The court may hear the case for determining the number of trade union members in chambers. Unfortunately, there are two reasons why hearing in chambers is usually less favourable option for the employer. First, there is no chance to examine witnesses and, second, it deprives the employer of the opportunity to put forward its view on the case before the court. It is in the employer's best interest to persuade the court to hear the case for determining the size of the trade union in open hearing. No effort should be spared to convince the court that an open hearing is necessary and that adopting a simplified procedure for determining the size of the trade union may have a negative impact on the outcome of the proceedings.

4. The employer should have access to all documents reviewed by the court

The employer should be given access to all documents submitted to the file of the case for determining the number of trade union members. Providing access to such documents does not violate data protection rules, including the provision on the restriction of the processing of union membership data to the court and the trade union.

Any contrary practice by the courts challenging this position is incorrect.

If a trade union submits to the case file their resolutions on the new members admission or membership fee payment confirmations, the employer is only forbidden to see who they relate to (the relevant data should be blacked out or otherwise protected against access by the employer). Apart from that, the employer has the right to review such documents, in particular to verify their formal correctness. The formal correctness of those documents is, in fact, crucial for the outcome of such proceedings and for a reliable verification of the trade union's size.

5. The court cannot request the employer to provide a list of employees' names

In proceedings concerning the determination of the number of trade union members, courts often ask employers to provide a list of employees so that the court can verify whether individuals indicated as trade union members are in fact employees. Such a practice is wrong and the court has no right to impose this obligation on the employer. Furthermore, complying with such court's obligation would be a violation of data protection legislation. The submission of such a list is not only excessive but also not required under the applicable legislation and exposes the employer to liability both for disclosing such personal data without a legal basis and for making it available to third parties to the detriment of employees.

Moreover, imposing such an obligation on the employer breaches the rule regarding the distribution of the burden of proof - it is the trade union's responsibility to prove the correctness of the declared number of members and that those members are, in fact, employees.

6. The court should examine the union's internal documents - it does not interfere with self-governance and independence of the trade union

Contrary to the arguments put forward by trade unions, trade unions' self-governance and independence do not stand in the way of examining their internal documents necessary for establishing the number of its members by the court.

Self-governance of a trade union means that the union can autonomously determine the rules of its functioning (including union membership), and independence means that it can do so without the employer' interference. However, once the union has set out specific rules, it has a duty to abide by them. The court, in turn, should carry out all the necessary steps leading to the establishment of the trade union's size beyond any reasonable doubt. In particular, the court should verify whether the admission of particular employees to the union was compliant with the union's statute. And this cannot be done without a thorough examination of the statutory documents.

7. The court should examine the membership fees payment confirmations

Under the statutes of many trade unions, failure to pay membership fees for a certain period usually results in the employee's automatic removal from the list of trade union members. Therefore, the examination of the documents concerning membership fees is necessary to reliably determine the size of the trade union. Especially given that trade unionists hardly ever pay their fees regularly, in particular, if they are not deducted by the employer from employees' salaries. And this is not necessarily due to the formal exemption from membership fees. A membership declaration and a resolution on a new member admission are not enough to keep the status of a union member. These documents are necessary to acquire membership but do not warrant its maintenance for a specific period and its existence on a specific date.

8. The court should verify whether the documents originate from an authorised body

In the course of the proceedings to establish the number of its members, the trade union provides a number of documents, such as resolutions on new members admission (if the statutes of a given trade union provide for such an obligation). When examining these documents the court should verify whether they were issued by a body which, in accordance with the applicable law and the statutes of the trade union, is authorised to adopt them. Documents signed by an inappropriate body have no legal effect and should not be taken into account when deciding the case.

9. The court should pay attention to the date of document creation

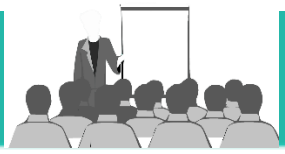
The practice where a trade union declares a certain number of members to the employer and only later collects from employees documents confirming their membership is unlawful. The court, when examining the number of trade union members, should pay particular attention to the date on which the individual documents were drawn up.

If it turns out that an employee was included in the total number of trade union members declared as at 30 June 2021 but the documents (such as a membership declaration or a statement on the election of a particular trade union as the one in which the employee should be included) were drawn up after that date, the court should pick up on the unlawful action of the trade union and reduce its size accordingly.

10. The proceedings have not been concluded by the time the next information on the number of members is submitted? The employer should lodge further objections

Due to the substantial number of documents that are reviewed by the courts, it is often the case that the prescribed 60-day deadline for hearing the case for determining the number of trade union members is missed. Moreover - the deadline for the trade union to submit next declaration on the number of its members also passes.

What should the employer do in this situation? In our opinion, the employer should lodge further objections. We believe that if the employer has any doubts about the number of members declared by the union in the previous declaration, then these doubts still remain and, therefore, it is also reasonable to challenge the new information. There are no laws that would prevent the employer from doing so.



Workshop: HR strategy for the times of pandemic in practice

We invite you to participate in a workshop organised by PCS Paruch Chruściel Schiffter | Littler Global together with Proability.

Date: 9 September 2021, 9:00 - 14:40, on-site.

Panellists: Bartosz Wszeborowski, advocate, and Piotr Kozłowski, trainee-advocate.

Registration and detailed agenda here | More: *here.*

Rzeczpospolita's Law Firm Ranking 2021:

- **Slawomir Paruch** recommended in the labour law and social security category.
- PCS Paruch Chruściel Schiffter | Littler Global recommended in the labour law and social security category.
- PCS' website recognised as **the best** law firm websites in Poland.

Thank you, and congratulations to all awarded firms and lawyers!

How to build a first choice HR law firm

It turned out the pandemic was the best time to debut. The COVID-19 crisis has brought new needs and challenges. And those who feel and understand this new reality are the ones who have seats at the table. - Sławomir Paruch comments for Rzeczpospolita.

Read more: *here.*