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## WHISTLEBLOWER RIGHTS AND PROTECTION IN THE WORKPLACE: THE ROLE OF TRADE UNIONS IN POLAND SELECTED ISSUES

**Abstract.** The article discusses selected problems related to trade unions' functions and their future role in the protection of whistleblowers. The author analyzes the current provisions of the Act on Trade Unions concerning the functioning of trade unions in protecting whistleblowers in the workplace, reporting irregularities (illegal, unethical or otherwise inappropriate activities) and the use of collective bargaining power of trade unions. Workers' representatives have an express right to assist whistleblowers as defined by national law. The author states that the functions of trade unions under trade union law in Poland in reporting irregularities are often perceived as signaling and, consequently, limited.

**Keywords:** whistleblower, trade unions, employers, employees, employed, protection of whistleblowers.

## UPRAWNIENIA I OCHRONA SYGNALISTÓW W MIEJSCU PRACY: ROLA ZWIĄZKÓW ZAWODOWYCH W POLSCE WYBRANE ZAGADNIENIA

**Streszczenie.** W artykule omówiono wybrane problemy związane z funkcjami związków zawodowych i ich przyszłą rolą w ochronie sygnalistów. Autorka analizuje aktualne przepisy ustawy o związkach zawodowych dotyczące funkcjonowania związków zawodowych w aspekcie ochrony sygnalistów w miejscu pracy, zgłaszania nieprawidłowości (działań niezgodnych z prawem, nieetycznych lub w inny sposób niewłaściwych) oraz korzystania z sił rokowań zbiorowych związków zawodowych. Przedstawiciele pracowników mają wyraźne prawo do wspierania sygnalistów w sposób określony przez prawo krajowe. Autorka stwierdza, że funkcje związków zawodowych na gruncie prawa związkowego w Polsce w zakresie zgłaszania nieprawidłowości są często odbierane jako sygnalizacyjne a w konsekwencji są ograniczone.

**Słowa kluczowe:** sygnalista, związki zawodowe, pracodawcy, pracownicy, zatrudnieni, ochrona sygnalistów.

In both the public and private sectors, illegal, unethical, or otherwise improper activities are often difficult to detect. Employees are a key element in disclosing serious irregularities, especially when they know about corrupt behavior or other anomalies and voluntarily provide this information to employers or other

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authorized persons. However, employees who disclose “inside” information are exposed to possible retaliation not only by the employer, but also by their colleagues. Without protection against retaliation, many would-be whistleblowers will decide not to reveal irregularities in their workplace. Therefore, legal protection for whistleblowers must be part of a long-term protection plan (Kobroń 2013, 296; Kobroń 2015, 81–92; Kobroń-Gąsiorowska 2018, 129–142). However, creating provisions of protection is a challenge for every country, because effective whistleblower protection requires a well-synchronized legal framework on criminal, labor, administrative and procedural law. There is no doubt that there will be trade unions that the Polish legislator must take into account. Unfortunately, the lack of proper legislative preparation, i.e. implementation and changes in regulations, may lead to chaos.

On January 1, 2019, the long-awaited amendment to the Trade Union Act – the 1991 Act, was entered into force. One of the main goals of this amendment was to include, among other classes of employees, based on civil law contracts, self-employed individuals, and the possibility of association in trade unions. To this end, the definition of employee was expanded, but the functions of trade unions no longer associated with this definition came in the role of protecting persons reporting irregularities in the workplace. This article will indicate selected problems of redefining the functions of trade unions in their role they may play after the implementation of the provisions in Polish legislation of the Directive of the European Parliament and of the Council on the protection of persons reporting violations of Union law (EU Directive 2019/1937 OF the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law. In short called the whistleblower directive, which is available at <https://eur-lex.europa.eu/eli/dir/2019/1937/oj>).

## **1. WHISTLEBLOWER IS MAINLY EMPLOYED**

I purposely use the word “employed” to show that whistleblowers can provide paid work not only under a traditional employment contract, but under other statuses too. A whistleblower can be an employee, a trainee, an apprentice, a former employee, and also a person in any other traditional employment relationship (Kobroń 2013). Most often, the employed are the most reliable source of information on improper activities in the workplace. By disclosing them, they run the risk, such as dismissal and harassment from the employer as well as harassment and snubbing by their colleagues. Due to historical events, the act of whistleblowing in Poland is marked by very negative connotations. Also, in Polish legal culture, the issue of whistleblowing is still very controversial and criticized for the lack of adequate legal safeguards for the whistleblower. Reporting irregularities is a key mechanism in the fight for integrity and public

interest (Kobroń-Gąsiorowska 2019a, 75–87; Kobroń-Gąsiorowska 2019b, 333–343). Its role as a mechanism for reporting misconduct, fraud and other forms of illegal or unethical behavior allows the public to be aware of infringements, some of which might otherwise never be revealed. This applies especially to democratic countries, in which responsibility and transparency, strengthened by reporting irregularities, are basic values supporting the functioning of the state. Therefore, protecting the whistleblower against retaliation, disproportionate penalties, unfair treatment or mobbing is necessary because it enables the employee to use the appropriate channels in the fight against inappropriate actions and behavior.

## 2. TRADE UNIONS – CHANGE OF ROLE AND MEANING

Generally, the role of trade unions is seen as whistle in Polish labor law (Kobroń-Gąsiorowska 2019c, 188). With regard to reporting on irregularities, this role has not yet been polemical, which I consider to be a serious oversight. In this perspective, the role of trade unions can now be seen as defensive. Trade unions have limited resources and believe that their primary function with regard to whistleblowing is to advise potential informers and to represent both those who believe that they have been harmed because of reporting concerns, and employed informers who are therefore subjected to mobbing. The first doubt that arises here is whether trade unions perform these tasks well and whether they are effective. A more proactive and collective role of trade unions would be to negotiate policies and procedures for reporting irregularities in the workplace. Research conducted in Poland has consistently shown that informants usually report their doubts first internally (Kobroń 2013). Sometimes, however, reporting an irregularity to a supervisor may be considered as an ordinary, groundless denunciation. I am not saying that this must become the rule, although this problem should not be avoided. However, another question arises as to whether the trade unions may become an alternative reporting point.<sup>1</sup> I am aware that the existing situation and status of trade unions regarding their functioning in connection with the process of bring attention to irregularities is not very stable and not specified by the trade union act. The following legal acts pave the way for comprehensive EU legislation in the field of whistleblower protection:

- Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse [available at <https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A32014R0596>];
- Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 on Regulation (EU) No 596/2014 of the European Parliament and of the

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<sup>1</sup> See: <https://www.pwc.pl/pl/media/2020/2020-03-05-badanie-przestepczosci-gospodarczej-2020.html>.

Council with regard to reporting actual or potential infringements of this regulation to competent authorities [available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015L2392>];

– The European Parliament resolution of 24 October 2017 on reasonable measures to protect whistleblowers acting in the public interest when disclosing confidential information held by companies and public authorities (2016/2224 (INI)) [available at <https://op.europa.eu/pl/publication-detail/-/publication/5c4565d3-c1ea-11e8-8bb4-01aa75ed71a1>].

The above only naturally encourages trade unions to actively cooperate in the protection of whistleblowers. This leaves the regulation of the role of trade unions in this regard to the Member States. The transition period for the whistleblower directive begins for good. Starting from December 17, 2019, Member States have two years to implement regulations in national legal orders providing, *inter alia*, new whistleblower protection institutions. The Directive now offers a reversal of the burden of proof, a wide and open scope of protection not only for employees but also for volunteers, trainees, etc. Although internal reporting is encouraged, reports without direct reporting will also be protected. It is also worth noting that the text clearly emphasizes the role of public authorities, trade unions and civil society organizations in supporting whistleblowers and raising awareness about the existing legal framework. In particular, the European Parliament underlines the “role played by public authorities, trade unions and civil society organizations in supporting whistleblowers in their organization activities” and “underlines the importance of raising employees’ awareness of the existing legal framework for information in cooperation with trade union organizations” [available at [https://www.europarl.europa.eu/doceo/document/A-8-2017-0295\\_EN.html](https://www.europarl.europa.eu/doceo/document/A-8-2017-0295_EN.html)]. Trade unions should become even more important entities in the protection of the employed reporting irregularities. However, such a role of increased union activity may not be easy to accept, especially for businesses.

From the point of view of the above Directives and positions of the European Parliament, trade unions in the role of protecting whistleblowers is to be significant. Changes in national regulations will affect trade union rights. From the point of view of the above remarks, the following problems should be considered: The legislator should consider the possibility of ensuring the right to representation and consultation with trade unions as regards the implementation of internal procedures for reporting irregularities by the employed. Employees as well as other persons providing work in the workplace using internal reporting to the supervisor must be provided with real protection, and not only using a dedicated internal reporting channel. This is not clear enough in the Directive. The use of documents in the workplace for reporting must be secure, without any risk of criminal liability. Directive neither nor even the 2018 Commission Communication on Strengthening Whistleblower Protection at EU Level also indicates potential

problems at the employer-trade union level and, more specifically, the role of trade unions in protecting an employed informant [available at: see Communication from the Commission to the European Parliament the Council and the European Economic and Social Committee Strengthening whistleblower protection at EU level, available at <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/WhistleCommunication.pdf>].

### 3. TRADE UNION “NEW FUNCTIONS” AND WHISTLEBLOWER PROTECTION

The amendment to the Act on Trade Unions, which went into force on January 1, 2019, was a long-awaited amendment. It was supposed to introduce huge changes in the act, because it expanded the scope of the act to include the possibility of association in trade unions also by persons working under civil law contracts, the self-employed and trainees (the “employed”). The possibility of including these persons meant that they could apply to the trade union to represent their interests in the event of a conflict with the employer. According to art. 1 of the Act on trade unions, a trade union is established to represent and defend the interests of working people. This provision undoubtedly defines the main function of trade union activities, i.e. representing the rights of working people of their professional and social interests.

My short remark will relate to art. 4, introducing a very broad understanding of the functions of trade unions, which also applies to dignity, rights and material and moral interests, both collective and individual. According to the provisions of the analyzed provision, the main function of a trade union is to defend the rights and interests of working people. The term “moral rights and interests” is vague and the purpose mentioned in art. 4 may also relate to moral collective interests, which in this aspect has lost its significance in its previous burden, but is now gaining by expanding the concepts of law and interests, currently affecting a wide group of working people. I believe that such a broad definition of the role of trade unions in the Act on trade unions will be a huge challenge for trade unions in pursuing the protection of the employed informant who will have to go beyond the provisions set out in the Labor Code.

Another function of trade unions I distinguished is representing the interests of the employed, included in art. 7 of the Act on Trade Unions. My doubts are raised by the regulation of point 2 of this article, which contains the principle of representation in individual cases by trade unions of persons engaged in gainful employment only at its request. It should be noted that there is some inaccuracy in the article 7 under consideration, as it introduces the optional possibility for a trade union to take action at the request of a non-affiliated person, a worker not affiliated with a trade union. The second sentence (point 3) of Art. 7 of the discussed Act sets out the principle of negative trade union freedom, which means

that, in individual cases, a trade union may represent an unaffiliated person only at its request (Florek 2000, 306; Rączka 1996, 30; Skoczyński 1993; Stalina 1994, 59). It is not my intention to deny one of the aspects of the right to freedom of association, but I would like to emphasize that my doubts are raised by the fact that the trade union is not obliged to respond positively to this conclusion, which in my opinion is a solution that undermines the basic function of trade unions, i.e. protection of the interests (as indicated by statute) of all persons employed or paid. The trade union is under no obligation to justify its decisions (Florek 2000, 306; Rączka 1996, 30; Skoczyński 1993; Stalina 1994, 59), which in principle is to be arbitrary and not subject to any control. The individual dimension of the representation of the rights and interests of persons performing work who decide to inform their supervisor or employer about the irregularities found is in my opinion the most important area that requires the active role of the trade union, in the event that such a person turns to the union for help. Depriving such protection of a person who expresses his will to represent his interests by a trade union is an indirect violation of the nature of the trade union's activity, and thus the right to freedom of association of an individual working person.

In my opinion, it is also worth analyzing art. 8 of the Act on trade unions, which is an important component of the basic function of a trade union, which is the protection of the interests of working people. Art. 8 lists the control function of trade unions with provisions regarding employees within the meaning of the Labor Code, namely regular employees, persons performing work on the basis of a civil law contract, the self-employed, and persons working without remuneration. The controlling function of trade unions is manifested in supervising not only the activities of employers, but also public administration bodies (Kobroń-Gąsiorowska 2019c, 188). On the basis of the amended act, a new type of trade union control appears, referring strictly to persons who are not employed within the meaning of the Labor Code and those performing unpaid work. The current control function of trade unions is only whistling, because, in my opinion, they cannot be called even interventionist. If the trade union states that the conduct of the employer, a state administration body, or a local government is unlawful, i.e. it violates the legitimate interests of the employed, it may request the appropriate unit to remove the detected irregularities or even consider the possibility of initiating a collective dispute (Wrątny 1994, 29; Bednarski, Wrątny 2000, 56; Kałużński 1984, 128; Salwa 1998, 17; Goździewicz, Myszka, Piątkowski 2005, 247; Sowiński 1990, 23). The new trade union control function will be the same except that it will also cover people who do not work under a contract of employment.

The last problem is more complex because it concerns actual cooperation between trade unions and employers. The first thought that comes to mind after analyzing the above provision, i.e. art. 8 of the Act on trade unions, is that under the existing provisions, the control function of trade unions is not only limited to signaling irregularities prevailing at a given employer, but



it is necessary to consider what degree of unionization is being dealt with. It should be remembered that in addition to implementing the provisions of the Directive, the Polish legislator must consider and take appropriate legislative measures in determining the position and role of trade unions, which will soon face the challenge of helping an the employed informer and the relationship with the employer. Secondly, on the basis of the current wording of the provisions of the Act on trade unions I do not see the possibility of real cooperation of the trade union with the employer in the field of signaling perceived violations. Regarding ongoing research into reporting irregularities, trade unions have been neglected as organizations that could not only become key elements in informant protection, but also in taking action to stop violations before they occur. In terms of information, it cannot be ruled out that it may be safer for people reporting irregularities to report them to the trade union than to others in authority. This will most likely be the subject of polemics in the literature.

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