

## Employment & Benefits - Poland

### Employee-only right to establish and join unions deemed unconstitutional

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September 16 2015

**Facts**  
**Decision**  
**Comment**

In its June 2 2015 judgment the Constitutional Tribunal ruled that Article 2(1) of the Trade Unions Act (May 23 1991) – which grants the right to establish and join a trade union to employees only and not to other persons performing paid work – was unconstitutional. The judgment does not mean that Article 2(1) has lost its binding force, but it should result in its immediate modification.

#### Facts

On June 27 2012 the All-Poland Alliance of Trade Unions (OPZZ) – a nationwide confederation of trade unions recognised as a national representative organisation – submitted a motion to the Constitutional Tribunal to examine whether Article 2(1) of the Trade Unions Act was consistent with the Constitution. Pursuant to Article 2(1):

*"All employees, regardless of their employment relationship, as well as members of agricultural cooperatives, and individuals who perform work on an agency contract, have the right to establish and join a trade union if they are not employers."*

In the OPZZ's opinion, Article 2(1) grants the right to establish and join a trade union to employees only and not to other persons performing paid work (eg, people on civil law contracts or the self-employed) and therefore violates international standards – in particular, Article 2 of the Convention of the International Labour Organisation concerning the Freedom of Association and Protection of the Right to Organise (87), adopted on July 9 1948. Article 2 of the convention states that:

*"workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."*

According to the OPZZ, the only feature distinguishing the subjective scope of this article was the performance of paid work and not the basis on which the work is performed. Due to the incorrect translation into Polish of the term 'workers' used in the convention (which should cover all persons performing paid work), persons other than employees were deprived of the right to establish and join a trade union under the corresponding Trade Unions Act regulation.

Further, in the OPZZ's opinion, the aforementioned regulation contradicted Articles 12 and 59(1) of the Constitution, pursuant to which the state is obliged to ensure the freedom of creation and operation of trade unions, socio-occupational farmer's organisations, societies, citizens' movements and other voluntary associations and foundations, as well as the freedom of association in trade unions, socio-occupational farmer's organisations and employers' organisations.

In the course of the Constitutional Tribunal proceedings, the OPZZ's position was also supported by the speaker of the lower house of Parliament and the public prosecutor general.

#### Decision

The Constitutional Tribunal ruled that Article 2(1) of the Trade Unions Act was inconsistent with Article 59(1) in connection with Article 12 of the Constitution.

In the Constitutional Tribunal's opinion, the subjective scope of the provision that grants the freedom of creation of and association with trade unions under the Constitution includes all workers, but not within the meaning used in the Labour Code.

From a constitutional standpoint, when assessing whether a given person should be recognised as a worker for the purpose of granting the right to establish and join a trade union, it should be ascertained whether he or she:

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- performs paid work;
- performs work on the basis of a legal relationship; and
- has work-related interests that can be protected by trade unions.

If a given person meets the above criteria, he or she should have the right to establish or join a trade union under the Constitution.

The aforementioned subjective scope of the Constitution was narrowed by Article 2(1) of the Trade Unions Act, pursuant to which only employees within the meaning of the Labour Code, members of agricultural production cooperatives and individuals who perform work on the basis of an agency contract are entitled to establish and join a trade union. Such restrictions – based on the type of legal relationship – make it impossible for persons who (pursuant to the Constitution) should have the right to establish and join a trade union to enjoy their constitutional freedoms.

#### Comment

The judgment has not resulted in the loss of binding force for Article 2(1) of the Trade Unions Act or changed its existing wording. However, the judgment should lead to the immediate change of the respective provision, so that it is consistent with the scope of constitutional freedoms. Because a group of non-employees (ie, persons performing paid work on a different basis than an employment contract) is heterogeneous, determining the subjective scope of Article 2(1) and the category of persons entitled to establish and join a trade union may cause difficulties in practice.

The issue of the compliance of Article 2(1) was previously analysed in 2012 by the International Labour Organisation Committee on Freedom of Association. On July 28 2011 the Solidarity trade union submitted a complaint to the International Labour Organisation that Polish legislation restricts the right of certain categories of worker to establish and join a trade union. In its recommendations to the Polish government, the International Labour Organisation requested that it takes the measures needed to ensure that all workers enjoy the right to establish and join a trade union, including those employed under civil law contracts.

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