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RESTRICTIONS ON THE RIGHT TO INFORMATION IN THE ACTIVITY OF WORKS COUNCILS

Abstract

This article discusses restrictions on the right to information in the activity of works councils regulated in the Act of 7 April 2006 on information and consultation of employees, which are justified by legitimate interests of the employer and the right to keep certain information confidential. First of all, it analyzes the obligation not to disclose trade secrets by the members of works council and other persons as well as consequences of breach by an employee of the aforesaid confidentiality obligation. Subsequently, the author discusses the employer's right to refuse to provide information to the works council, which is limited by the fulfilment of certain conditions. Finally, the paper presents the measure that workers' council has at its disposal in the event of unjustified reservation by the employer of confidentiality of the information or refusal to provide such information.

Słowa kluczowe: rada pracowników, prawo do informacji, tajemnica przedsiębiorstwa

Key words: works council, right to information, trade secret

The right to information is a cornerstone of collective labour relations. The relevant rights are granted not only to trade unions but also to participation bodies, including works councils. It is worth emphasizing that in the Polish labour law system the right to information is not absolute and was significantly restricted under article 16 of the act of 7 April 2006 on information and consultation of employees (*ustawa o informowaniu pracowników i prowadzeniu z nimi konsultacji*) (further called the I&C Act).

Article 16 (1) of the I&C Act sets out the rules governing the trade secrecy in the information and consultation procedures.¹ At the personal level it is addressed to members of works council, its experts and workers' representatives authorised under the agreement concluded in accordance with article 24 of the act in question. In my opinion the fact

¹ See J. Borowicz, *Przestrzeganie tajemnicy pracodawcy a inne pracownicze obowiązki przestrzegania tajemnicy – zagadnienia pojęciowe (Employer's secrecy and other obligations to observe confidentiality)*, *Praca i Zabezpieczenie Społeczne* 1998, 10, p. 3 ff.

that in the commented act the legislature used an organisational term – works council² – allows interpretation according to which it applies to all persons who participate in the council's operations, even if they do not enjoy a member status. In particular I think that the mentioned provision applies also to employees who perform certain ancillary and supporting tasks for the council, such as experts and office staff. In their activity they may have the actual access to the information which is trade secret therefore, given the legitimate interests of the employer, the extensive interpretation should apply.

De lege lata, employees are not entitled to demand that their representatives in the council provide them with information which is trade secret. Any pressure exerted by the staff on the members of the council to disclose such information should be considered illegal.³

Article 16 of the I&C Act applies, *mutatis mutandis*, also to representatives of workers entitled to receive information in accordance with the agreement concluded with workers' representation under article 24 of the Act. It is irrelevant whether they are trade unionists or representatives of non-trade union bodies with participation powers.

According to the provisions of article 16 (1) of the I&C Act the obligation not to disclose trade secrets applies exclusively to persons who obtained such information in connection with their function. Therefore, *a contrario*, it may be assumed that such requirement does not apply if the information was obtained by other means, not in relation with the workplace participation procedures. Such interpretation in no way affects the universal employee's obligation to keep secret the confidential information the disclosure of which might cause damage to the employer [article 100 § 2 (4) *in fine* of the Labour Code (Kodeks Pracy)].

At the material level, article 16 (1) of I&C Act lays down an obligation not to disclose the information which is trade secret. Its essence is the prohibition to disclose, in any form, the data obtained from the employer to any unauthorised person. It is worth noting that it applies only where the employer reserved the confidentiality of such information.

A definition of the term trade secret is of key importance for determination of the legal nature of that obligation. Because of the fact that labour legislation does not define that concept, based on the rules of systemic interpretation a reference should be made to the provisions of article 11 (4) of the act of 16 April 1993 on combating unfair competition (*ustawa o zwalczaniu nieuczciwej konkurencji*).

According to that article, a trade secret⁴ shall mean technological information, organisational information and other information of economic value, which was not

² A different opinion was presented by D. Dörre-Nowak, *Ochrona interesów pracodawcy a proces informowania i konsultacji (Protection of employer's interests and the process of information and consultation)*, in: *Informowanie i konsultacja pracowników w polskim prawie pracy (Information and consultation of employees in the Polish labour law)*, A. Sobczyk (ed.), Kraków 2008, p. 185–186.

³ See M. Wujczyk, in: *Zbiorowe prawo pracy. Komentarz (Collective labour law. Commentary)*, K.W. Baran (ed.), Warszawa 2016, p. 793 ff.

⁴ See more in: P. Bogdalski, *Tajemnica przedsiębiorstwa – zagadnienia konstrukcyjne (Trade secret – the construct)*, *Monitor Prawniczy* 1997, 6, p. 228 ff.; A. Michalak, *Deliktowa i kontraktowa ochrona*

made public and in respect of which an entrepreneur took necessary measures to keep it secret.⁵ In particular it refers to information concerning the sources of supply of raw materials and unfinished products, production methods, methods of quality control, utility models and decorative designs, inventions, as well as information relating to commercial,⁶ marketing or financial activity. There is no doubt that also undisclosed *know-how* is considered trade secret. All the types of information listed above have objective economic value in the sense that they directly influence the status of an undertaking and define its market position.

According to a definition laid down in article 11 (4) of the act on combating unfair competition a trade secret covers only such information which is known only to selected individuals. It does not extend to information in the public domain or the information the contents of which may legally become known⁷ to any⁸ interested party. A trade secret takes effect from the moment when the employer reserves its confidentiality. This is laid down explicitly in article 16 (1) of I&C Act. This obligation cannot be implied, therefore a respective statement of an employer is required. Although the analysed act does not specify the form of such statement, for praxeological reasons the reservation of confidentiality of the information should be in writing, at least by adding a clause “confidential”. This means that not all the information of economic value made available to the council enjoy the trade secret status. “Therefore the members of the works council are not subject to the general obligation not to disclose any information obtained in connection with their function”.

Article 16 (1) *in fine* of I&C Act *explicite* defines a temporal scope of the confidentiality obligation. According to that provision it applies for a period of three years following the cessation of duties in the council. According to *interpretatio declarativa*, as regards members of the works council the above obligation is not linked to the council’s mandate. For each of the members the respective period should be calculated separately, as from the date of cessation of duties. Therefore, if a mandate of a member of the council ended prior to the end of the mandate of the whole council, the period of three years should be calculated from that date. Such method of calculation is equally applicable to all other persons who cooperate with the council or perform the council’s tasks (article 24

tajemnicy przedsiębiorstwa – zagadnienia materialnoprawne (Tortious and contractual protection of trade secret – substantive issues), Prawo Spółek 2003, 12, p. 17 ff.

⁵ A judgment of the Polish Supreme Court (SN) of 3 October 2000, I CKN 304/00, OSNC 2001, no. 4, item 59.

⁶ According to a decision of the Anti-Trust Court in Warsaw of 30 October 1996, XVII Amz 3/96, Lex no. 56452, a trade secret is data on the production and sales volumes as well as on the sources of supply and sales market.

⁷ See the act of 6 September 2001 on the access to public information (*ustawa o dostępie do informacji publicznej*) (Journal of Laws [Dz. U.], no. 112, item 1198 as amended). See also K. Tarnacka, *Prawo do informacji w Polsce (The right to information in Poland)*, Państwo i Prawo 2003, 5, p. 69 ff.

⁸ See a judgment of the Polish Supreme Court (SN) of 5 September 2001, I CKN 1159/00, OSNC 2002, no. 5, item 67.

of the I&C Act). In their case the start date is the date of cessation of duties or of the supporting activities (such as expert activities).

The provision commented on is relative in the sense that the period of three years may be extended under an agreement concluded between the employer and the obligated person. The act does not specify the contents of such agreement therefore there is no reason why such agreement should not be an agreement for pecuniary interest.

When analysing the provisions of article 16 (1) of the I&C Act, worth considering are the legal consequences of breach of that provision by the obligated parties. It appears that the most serious consequences of breach by an employee of the obligation not to disclose a trade secret reserved by the employer are those laid down in article 52 § 1 (1) of the Labour Code. Because of the fact that disclosure of such information constitutes a serious threat to the employer's interests, it may be classified as serious breach⁹ of the basic job duties. As regards the members of the council, it is of no relevance whether this occurred during the mandate or after the term of office has been completed. However in the former case the termination of an employment relationship will require consent of the council.

Worth noting is that article 52 § 1 (1) the Labour Code may be applied not only to the members of the council but also to all employees who perform any functions in the activities of the council or of other participation bodies, who breached the obligation not to disclose a trade secret reserved by the employer. On the basis of the *a maiori ad minus* argument I conclude that if such situation occurs it is also possible to terminate the employment relationship upon notice or to give a notice to amend the wage or working conditions (*wypowiedzenie zmieniające*). Disclosure of the information which constitutes trade secret may harm employer's confidence in the employee.¹⁰

More diverse rules apply with regard to financial liability. If a breach of the obligation laid down in article 16 (1) of the I&C Act results in damage, the provisions of articles 114-122 of the Labour Code will apply to the employee.¹¹ The scope of employee's liability will vary, depending on whether the disclosure of the trade secret which was reserved confidential by the employer was unintentional or intentional. In the former case, the employee's liability is limited to the amount of three-month remuneration, and

⁹ See W. Sanetra, *Wina jako przyczyna niezwłocznego rozwiązania umowy o pracę przez zakład pracy* (*Fault as a cause of immediate termination of a contract of employment by the employer*), *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1988, 2, p. 65–66; F. Małyśz, *Rozwiązanie umowy o pracę bez wypowiedzenia z winy pracownika* (*Termination of a contract of employment without notice at the fault of the employee*), *Praca i Zabezpieczenie Społeczne* 1998, 1, p. 25.

¹⁰ See more in: A. Leszczyńska, *Utrata zaufania do pracownika jako przyczyna wypowiedzenia umowy o pracę* (*Loss of confidence in the employee as a cause for termination of a contract of employment*), in: *Ochrona trwałości stosunku pracy w społecznej gospodarce rynkowej* (*Protection of sustainability of employment in the social market economy*), G. Goździkiewicz (ed.), Warszawa 2010, p. 340 ff.

¹¹ See B. Wagner, in: *Kodeks pracy. Komentarz* (*Labour code. commentary*), B. Wagner (ed.), Gdańsk 2007, p. 467 ff.

in the latter case – according to article 122 of the Labour Code – the employee must compensate for the damage in full.

As regards persons who do not enjoy the employee status but are subject to the confidentiality obligation under article 16 (1) of the I&C Act, if they cause damage the general rules will apply. I am thinking here of liability in tort prescribed in article 415 *et seq.* of the Civil Code.

Article 16 of the I&C Act sets out the conditions under which an employer may refuse to provide the works council with the information.¹² Therefore the above provision is particularly important for the functioning of the information and consultation procedure. This is possible only in duly justified cases if, based on the objective criteria, the provision of the information would result in serious disturbance of the operations of an undertaking or business or might result in serious damage to the undertaking or business.

The mentioned provision lays down one general and two specific conditions. Such structure of the provision implies that an employer may refuse to provide the council with the information only where both the general and at least one of the specific conditions are cumulatively met. If a different interpretation was adopted, according to which the occurrence of a “duly justified case” was sufficient, in practice this would mean full discretion of the employer. This undermines the *ratio legis* of the act on information and consultation of employees and strengthens the discretionary power of the employer.

Under the regulation adopted in article 16 (2) of the said act the concept of duly justified cases is a general clause. The scope of the expression is vague and its meaning is established in specific situations based on non-legal factors. Because of the functional context of the information provided to the works councils, it seems reasonable to argue that mainly the organisational and technical, economic, commercial and marketing factors may be involved. According to the provisions of article 16 (2) of the I&C Act, they should be objective so as to enable their verification before courts.

The first of the specific conditions laid down in article 16 (2) of the said act is a serious disturbance of the operations of an undertaking or business. This applies in a situation where provision of the information to the works council might constitute a significant dysfunctional factor for the entire undertaking or its part (for example a plant). It is worth emphasizing that the employer who refuses to provide information to the workers' representation does not have to be certain that it would cause such consequences to his company. It is sufficient when, based on the business practice or life experience, there is a serious fear that significant factors seriously disturbing the operations of an undertaking or business may occur. These may be either internal or external. In the latter case it refers to a situation where information provided to the works council would objectively affect the market position of the employer and therefore he would have to limit or even cease production or provision of services.

¹² M. Wujczyk, in: *Zbiorowe prawo pracy... (Collective labour law...)*, p. 794 ff.

The second specific condition laid down in article 16 of the I&C Act is a risk of a serious damage resulting from disclosure of the information to the works council. The provisions of the collective labour law do not define the term “damage”.¹³ Therefore, following the rules of systemic interpretation, it should be accepted that it applies to any kind of harm caused to the employer. It may be both financial and non-financial. In the former case the damage should be considered either damage to property (*damnum emergens*) or lost profits (*lucrum cessans*) which the employer could have expected from his business if he had not disclosed the information. Such damage should be significant. Because of the fact that this concept is immanently imprecise, it may only be assumed that its consequences must significantly affect the market situation of the employer or his economic and financial status.

The damage may also relate to intangible assets. This applies in particular to copyrights in a broad sense or personal rights. Examples may include loss of possibility to broadcast or loss of prestige among clients.

An employer is entitled to refuse provision of information when there is a risk of damage which means a situation where on the basis of his professional or life experience or on the basis of market research there is a well-founded fear of its occurrence. It must be objective and specific (for example a risk of refusal to be granted loan by a bank). Such situation may occur where the members of the council violate the principle of loyalty and convey the information obtained from the employer subject to confidentiality to unauthorised persons.

Article 16 (3) of the I&C Act entitles the workers’ representation to take action before a court in the event of a conflict with the employer regarding the functioning¹⁴ of the information and consultation procedure.¹⁵ In the event of unjustified reservation by the employer of confidentiality of the information or refusal to provide such information, the works council may request a court to:

- grant an exemption from the confidentiality obligation;
- order disclosure of the information;
- conduct consultations.

The above list is enumerative since article 16 (3) of the act is a specific provision, therefore it should not be interpreted extensively. In practice, at the material level, it defines the scope of the works council’s right to a fair trial. The matters are heard by commercial divisions of district courts. A competent court is the one at the seat of the employer to whose activity the matter in dispute relates. In the case of a multi-employer

¹³ See W. Czachórski, *Zobowiązania. Zarys wykładu (Obligations – an outline)*, Warszawa 1983, p. 79–82.

¹⁴ The provision complies with article 6 (3) of Directive 2002/14/EC.

¹⁵ See R. Flejszar, *Status rady pracowników w postępowaniu cywilnym – uwagi na tle art. 16 ustawy z dnia 7 kwietnia 2006 o informowaniu pracowników i prowadzeniu z nimi konsultacji (A status of works council in the civil proceedings – comments on article 16 of the act of 7 April 2006 on information and consultation of employees)*, in: *Informowanie i konsultacja pracowników w polskim prawie pracy (Information and consultation of workers in the Polish labour law)*, A. Sobczyk (ed.), Kraków 2008, p. 196 ff.

undertaking in which particular organisational units enjoy the employer status, a court of proper venue is a district commercial court at the seat of the employer and not at the seat of the undertaking. Such view is supported by a literal interpretation of article 16 (4) *in fine* of the I&C Act.

The court proceedings regarding the validity of the reservation of confidentiality by the employer or refusal to provide the information to the works council are conducted under the provisions of the act on information and consultation of employees (article 16 (3)–(5) and provisions of the Code of Civil Procedure (Kodeks Postępowania Cywilnego) (article 1–12, 506–525 and 691¹⁻⁹). As regards the provisions of Section IVa of the Code concerning the matters involving public undertakings and employees' self-governing representative bodies in an undertaking,¹⁶ they apply *mutatis mutandis*. Under article 16 (4) of the I&C Act, the provisions of article 691¹ § 2 and 691⁷ Code of Civil Procedure were excluded.

Non-contentious proceedings in matters regarding exemption from the confidentiality obligation or refusal to provide the information are initiated only upon motion of the works council. No other entity has a *locus standi* to file the motions specified in article 16 (3) of the I&C Act. The works council will autonomously resolve whether to exercise its right or not. An inspiration for initiation of the proceedings are obviously the actions of the employer which hamper or even prevent the information and consultation procedures. Pursuant to the provisions of article 691³ of the Code of Civil Procedure in connection with article 16 (4) of the I&C Act, both the works council and the employer have the capacity to be a party to court proceedings. The above provision is a *lex specialis* in relation to article 64 of the Code of Civil Procedure.

The motion of the works council should meet the requirements prescribed in the kpc for pleadings filed with a court (see article 511 of the Code of Civil Procedure). The provisions of the act on information and consultation of employees (I&C Act) do not introduce any changes in this regard. It means that the motion should precisely specify the demand (for example which information, specifically, should be exempted from the confidentiality clause or which specific data concerning the employer the council wants to be disclosed) as well as facts in support of such demand. According to the provisions of article 511 § 1 of the Code of Civil Procedure, it should list the parties interested in the matter in question. Obviously, it will be an employer since the procedure is adversarial and therefore both parties to a dispute must participate. Loss of the capacity to be a party to legal proceedings by any of the parties results in discontinuance of the proceedings.¹⁷

In the proceedings concerning exemption from the confidentiality obligation or refusal to provide information the works council may be represented by any of its members

¹⁶ In this regard see A. Harla, *W kwestii trybu postępowania w sprawach określonych w art. 691¹ k.p.c.* (Procedure in matters specified in article 691¹ of the Code of Civil Procedure), Państwo i Prawo 1990, 7, item 80 ff.

¹⁷ See a decision of the Polish Supreme Court (SN) of 26 May 1994, II CRN 44/94, Monitor Prawniczy 1995, 6, p. 183 ff.

appointed for this purpose (article 691⁴ of the Code of Civil Procedure in connection with article 16 (4) of the I&C Act). A respective resolution should be adopted in this regard.

A representative of the works council in such category of matters may be any employee of an undertaking who has the right to stand as a candidate for election to the works council. Therefore there is no reason why this function should not be taken by activists of any trade union organisation as well as employees who do not belong to a trade union, provided that they meet the criteria laid down in article 9 (2)–(4) of the I&C Act. The council may also be represented before court by a professional lawyer (legal counsel¹⁸ or attorney¹⁹). On the other hand the employer may be represented by a professional lawyer or by other employee of the undertaking. It is worth noting that a standpoint presented by the Supreme Court in its resolution of 12 May 1988, III PZP 56/87,²⁰ according to which a legal counsel of a state-owned enterprise is not obligated to act as a litigation representative of a director in a dispute between the latter and the works council does not apply by analogy.

A motion of the works council for exemption from the confidentiality obligation, for provision of information and for consultation is heard by a commercial court composed of one judge. It is a general rule applicable in the non-contentious proceedings,²¹ therefore it applies also to disputes under article 16 of the I&C Act. If however a case is particularly complex or is precedent, a president of the court may order that it should be heard by three judges (article 47 § 4 of the Code of Civil Procedure in connection with article 13 § 2 and article 509 of the Code of Civil Procedure and article 16 (4) of the I&C Act). Because of the collective nature of a dispute between the employer and the works council, it is sometimes worth taking into account. A reinforced composition of a court usually guarantees a more in-depth assessment of the circumstances that are the subject of the proceedings.

In such category of matters brought by the works council, no hearing must be scheduled. However, if the court finds it appropriate, it may hold such hearing (article 514 § 4 of the Code of Civil Procedure in connection with article 16 (4) of I&C Act). The adversarial hearing contributes to a fuller explanation of the circumstances relevant to the case. If the hearing is not scheduled, the case will be resolved in a court sitting.

As a rule, the court hearing (*rozprawa*) and the court sitting (*posiedzenie*) are open. According to article 9 *in fine* of the Code of Civil Procedure the parties to the proceedings

¹⁸ Article 691⁵ § 1 *in fine* of the Code of Civil Procedure in connection with article 16 (4) of the I&C Act. See also J. Grabowski, E. Przeszło, *Zasady reprezentacji podmiotów gospodarczych przez radcę prawnego* (Rules of representation of economic operators by a legal counsel), *Radca Prawny* 1994, 6, p. 53 ff.; J. Naworski, *Reprezentowanie podmiotów gospodarczych przed sądem przez radcę prawnego* (Representation of economic operators before a court by a legal counsel), *Radca Prawny* 1995, 5, p. 23 ff.

¹⁹ Article 4 (2) and (3) of the act of 26 May 1982 – Lawyers Act (*prawo o adwokaturze*), consolidated text: *Journal of Laws [Dz. U.]* of 2002, no. 123, item 1058.

²⁰ OSNCP 1989, no. 4, item 58.

²¹ Por. K. Korzan, *Podmioty postępowania nieprocesowego* (Parties to non-litigation proceedings), part I, Rejent 2005, 2, p. 9 ff.

have the right to consult the files of the case and obtain copies or abstracts of the files. However, according to article 16 (5) of the I&C Act, in matters discussed here, a court may – upon request of the employer or *ex officio* – restrict, to a necessary extent, the right of access to the evidence attached to the files of the case if disclosure of such evidence might pose risk of disclosure of a trade secret as well as other secrets protected under separate laws. There is no legal remedy against the decision of the court restricting the right to access the evidence.

The court proceedings should comprehensively explain the circumstances of the case. There is no doubt that also in this case a rule applies according to which a party to the proceedings who invokes certain facts should prove them. This means that the burden of proof in matters laid down in article 16 (3) of the I&C Act lies primarily with the works council. In the course of the evidentiary procedure the council will have to prove that the employer has unduly imposed the confidentiality clause on the information provided to the council or has violated the conditions laid down in article 16 (2) of the said Act by refusing to convey the information to the requesting party.

If the request of the works council proves justified, the court will issue a decision.²²

- exempting the works council from the obligation to keep the information confidential;
- ordering that specific information be made available to the council;
- ordering consultations in a particular case.

These are rulings on the merits. They re-define the legal relationships between the parties to the proceedings.

The parties have the right to a legal remedy against a decision of the court issued in matters laid down in article 16 (4) of the I&C Act.²³ Depending on the type of the ruling, it may be either an appeal (*apelacja*) or a complaint (*zażalenie*). The appeal may be lodged against decisions on the merits, and the complaint may be lodged against other decisions however only those which are explicitly specified in the Code of the Civil Procedure. There is no cassation appeal (*skarga kasacyjna*) against a decision issued by a court in the second instance.

The normative mechanisms of protection of trade secret established in article 16 (1)–(5) of the I&C Act do not violate the provisions on the protection of confidentiality adopted in separate laws. The “separate laws” should be understood to mean any statutory provisions concerning safeguarding the confidentiality of information. The scope of these provisions in the Polish legislative system is strongly varied, depending on the nature of the protected information. Some of them have very broad material and personal scope

²² See K. Lubiński, *Prawomocność materialna orzeczeń w postępowaniu nieprocesowym* (Substantive validity of rulings in non-contentious proceedings), *Państwo i Prawo* 2003, 11, p. 43 ff.

²³ See in particular A. Zieliński, *Zwyczajne środki zaskarżenia (odwoławcze) w postępowaniu nieprocesowym* (Ordinary legal remedies in non-contentious proceedings), *Monitor Prawniczy* 2002, 2, p. 57.

(such as employer's secret²⁴ – article 100 § 2 (4) of the Labour Code), while other relate to a narrow area of application (such as geodetic or cartographical secret).

In conclusion, I think that the right of works councils to information in the labour law system is limited. The legislature also takes into account the legitimate interests of the employer and the right of the latter to keep certain information secret. This is subject to judicial control as prescribed by the standards of the rule of law.

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²⁴ See: J. Borowicz, *Przestrzeganie tajemnicy... (Confidentiality...)*, p. 3 and 8.

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