

EFFECTS OF THE REORGANISATION OF CULTURAL INSTITUTIONS FOR THE AREA OF EMPLOYMENT RELATIONSHIPS

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Abstract. The article discusses the problem of reorganisation of cultural institutions in the context of employment. The reorganisation of a cultural institution may take the form of a merger or split-up of institutions, and, in extreme cases, complete dissolution of such an entity. These forms of reorganisation are crucial for the employment relations inside the institution. Cultural institutions have legal personality, and they are separate from their founding bodies. Employees of cultural institutions also enjoy a special status: while their employment relations are governed by the provisions of the Labour Code, the specificity of work in cultural institutions is also governed by the provisions of the Act on the Organisation and Pursuit of Cultural Activities.

Keywords: cultural institution; reorganisation; merger; split-up; liquidation; workplace transfer

INTRODUCTORY REMARKS

Pursuant to the Act of 25 October 1991 on the organisation and pursuit of cultural activities,¹ cultural institutions constitute an organisational form for cultural activities. State cultural institutions are established by ministers and heads of central offices; these bodies organise cultural activities by establishing state cultural institutions for which the pursuit of such activities is their primary statutory objective. Local government cultural institutions, for which the pursuit of cultural activities is the main statutory objective, are established by local government units. These bodies empowered to set up cultural institutions are referred to in the Act as organisers.²

The organiser issues a founding act for the cultural institution, which specifies its subject of activity, name and seat and whether the cultural

¹ Journal of Laws of 2020, item 194 [hereinafter: AOPCA].

² It should be noted that the concept of “cultural institution” under the Act on the organisation and pursuit of cultural activities does not cover a cultural institution established by an entity other than those listed in Articles 8 and 9 of the Act, see judgement of the Regional Administrative Court in Poznań of 16 July 2008, ref. no. IV SA/Po 29/08, Lex no. 516026.

institution is an artistic institution.³ Establishing a cultural institution is a two-stage process, since the founding act alone is not sufficient for the establishment of the cultural institution; in order for an institution to be able to start operation, it must acquire the legal personality which it does once registered with the register of cultural institutions maintained by its organiser (Article 14(1) AOPCA).

In the judgement of 16 July 2008 cited above, the Regional Administrative Court in Poznań has stated that only an institution set up by an entity referred to in Articles 8 and 9 AOPCA is subject to registration as a cultural institution supervised by that entity, and this is not discriminatory against natural persons organising and carrying out cultural activities and does not infringe the constitutional principle of equality before the law.⁴

Although it is the authorised founders who establish cultural institutions, the cultural institution is a completely separate entity from the organiser, having financial autonomy in running its economic policy within the framework of its own resources.⁵ The case law emphasizes the autonomy of cultural institutions as legal persons, which also means that the organiser must not arbitrarily modify the scope of activities of the cultural institution, and the organiser can only intervene in the object and manner of its activities within the statutory framework.⁶

On the other hand, between the organiser and the cultural institution established by the organiser there is an organisational link and a legal bond, which, using the terms used in the Act on the organisation and pursuit of cultural activities, must be described as subordination and which is expressed most fully just in conferring powers on the organiser to unilaterally influence its operation in a sovereign way [Antoniak-Tęskna 2019].⁷

The organiser has a number of statutory powers over the cultural institution which it established, mainly due to the owner's supervision exercised

³ Pursuant to Article 11(2) AOPCA, artistic institutions are cultural institutions established to carry out artistic activities in the field of theatre, music or dance, with the participation of authors and performers, in particular: theatres, philharmonic orchestras, opera and operetta houses, symphony orchestras and chamber ensembles, song and dance ensembles and choral ensembles.

⁴ In that judgement, the court pointed out that "it clearly follows from the provisions of the Act that natural persons, legal persons and organisational units without legal personality may conduct cultural activities, but only the entities listed in Articles 8 and 9 of the Act on cultural activities may establish cultural institutions."

⁵ Judgement of the Regional Administrative Court in Warsaw of 20 March 2008, ref. no. I SA/Wa 134/08, Lex no. 506226.

⁶ Ibid.; judgement of the Regional Administrative Court in Gorzów Wielkopolski, ref. no. II SA/Go 101/22, Lex no. 3354170.

⁷ Judgement of the Supreme Administrative Court of 7 September 2017, ref. no. II OSK 1790/17, Lex no. 2348658.

over the institution [Antoniak 2012, 58-59; Szewczyk 1996, 44].⁸ A manifestation of this supervision is, above all, the possibility of undertaking actions involving the reorganisation of cultural institutions.

1. FORMS OF CULTURAL INSTITUTION REORGANISATION

Pursuant to Article 18 AOPCA, the organiser may perform a merger of cultural institutions, including cultural institutions operating in various forms, or a split-up of cultural institutions. In the event of a merger of an artistic institution with a cultural institution other than artistic, the cultural institution established as a result of such a merger has the status of artistic institution. The law imposes on the organiser an information obligation to make public the intention and reasons for such a decision 3 months before the issuance of the act on the merger or split-up of the cultural institution.

As already noted above, the organiser has the right to influence on the activities of the cultural unit in a unilateral, arbitrary and sovereign way. The organiser's act on the transformation of a cultural institution is an act of internal management and as such is not subject to review by the administrative court [Antoniak-Tęskna 2019].⁹ The way in which the organiser regulates the establishment of a cultural institution is an organiser's internal act, the established unit is required to perform under the principle of organisational subordination.¹⁰

As provided for in Article 19(1) AOPCA, the merger of cultural institutions consists in creating one institution, which includes the staff and property of the institutions subject to merger. The merger of a cultural institution takes place by way of an act issued by the organiser of the cultural institution. The merger may also take place by way of an agreement concluded between the so-called central-government organiser and the local-government

⁸ Also see the Resolution of the Supreme Court of 8 May 1992, ref. no. III CZP 42/92, OSNC 1992/11, item 196.

⁹ It should be noted that acts of merger or split-up of cultural institutions, as well as acts of intent to do so, are subject to different legal regimes as regards the possibility of reviewing them, depending on whether central or local authorities are concerned. Decisions of ministers and heads of central offices and resolutions of councils of municipalities, district councils and regional assemblies on the split-up or merger of cultural institutions are not automatically appealed against before the administrative court, but resolutions of legislative bodies of local government units are subject to the supervision of the voivodship governor (*wojewoda*) and, therefore, indirectly, also to judicial review of legality by administrative courts.

¹⁰ As in the above-mentioned decision of the Supreme Administrative Court of 8 September 2017.

organizer on the establishment of a new cultural institution or the merger of already existing institutions.

The act of merger of cultural institutions specifies the names of the cultural institutions to be merged, the name, type, seat and subject of operation of the cultural institution established as a result of the merger, the date of the merger of the cultural institution, the rules for the takeover of liabilities and receivables by the institution established as a result of the merger. At the same time, the organiser confers the statutes on the cultural institution created as a result of the merger. On the date of entry in the register of the newly established cultural institution, the organiser strikes off from the register the previous cultural institutions which had been subject to the merger. Thus, upon registration of a new institution, the legal existence of the merged institutions ceases.

The second form of reorganisation of cultural institutions is their split-up. Pursuant to Article 20(1) AOPCA, the split-up of a cultural institution consists in the establishment of two or more cultural institutions based on the personnel and property belonging to the cultural institution being divided. The split-up of a cultural institution may also consist in the separation of a distinct organisational unit or units from a cultural institution in order to incorporate them into another cultural institution or establish a new cultural institution based on the personnel and property of that unit or units. The rules for the transfer of assets included in the balance sheet of the separated units are to be specified by the organiser.

The act of split-up of a cultural institution must contain the name of the cultural institution being split up, the name, type, seat and object of operation of the cultural institutions established as a result of the split-up, the specification of organisational units separated in order to create a new cultural institution or incorporation into the institutions established as a result of the split-up, determination of the rules for taking over the liabilities and receivables by the institutions established as a result of the split-up.

Pursuant to Article 25a(1) AOPCA, a cultural institution established as a result of a merger or split-up enters into all legal relationships of the merged or divided institution, regardless of the legal nature of these relationships, in particular permits, licences and tax reliefs, which were granted to this institution before its transformation, unless the legislation or the decision on granting the permit, licence or relief provides otherwise. We are dealing here with universal succession, i.e. entering into all the rights and obligations of the merged or divided institutions, including the takeover of receivables and liabilities. Universal succession is characterised by the fact that the consent of the creditors of the merged, divided, transferred or liquidated cultural institutions for the transfer of debt is not

necessary;¹¹ it also covers all procedural rights and obligations, regardless of the stage of the proceedings, and employee rights and obligations [Antoniak-Tejska 2019]. In the sphere of employment relationships, Article 23¹ of the Labour Code¹² is relevant, which means that a cultural institution established as a result of a merger or split-up of existing institutions becomes, by operation of law, a party to the existing employment relationships.

At this point, one should also mention the most far-reaching organiser's decision regarding the existence of a given cultural institution, namely the liquidation of a cultural institution. Pursuant to Article 22(1) of the Act, in particularly justified cases, the organiser may liquidate a cultural institution. The organiser is obliged to make public the intention and the reasons for the liquidation 6 months before the issuance of the act of liquidation of the cultural institution. Where the organiser decides to liquidate a cultural institution, the public notification of the intention and reasons for liquidation six months in advance is supposed to create an opportunity to take action to raise funds that will enable the continued functioning of the cultural institution concerned, since the liquidation of a cultural institution should not be abused and utilised as an instrument to enable the organiser to save funds that it can and should allocate to the activities of cultural institutions.¹³

The legislature, when discussing the conditions for liquidation uses the vague term "particularly justified cases", containing an evaluative phrase that requires assessment of a certain state of affairs. When applying it, it is necessary to provide a detailed and convincing reasons for the decision indicating the choice of evaluation criteria. The organiser is obliged to specify the reasons for the liquidation of the cultural institution, and it is obvious that what is meant here are exceptional, extraordinary events and situations that make it impossible for the cultural institution to continue functioning.¹⁴

The act of liquidation of a cultural institution is the basis for its deletion from the register. Pursuant to Article 24 AOPCA, the liabilities and receivables of the liquidated cultural institution shall be taken over by the organiser.

Due to the liquidation of the cultural institution as an employer, i.e. the liquidation of the workplace, the employment is no longer possible, and therefore there is a basis for the termination of employment relationships based on Article 41¹ LC. The provision of Article 41¹(1) LC refers only

¹¹ Article 519 of the Act of 23 April 1964, the Civil Code, Journal of Laws of 2022, item 1360.

¹² Act of 26 June 1974, the Labour Code, Journal of Laws of 2022, item 1510 [hereinafter: LC].

¹³ Judgement of the Regional Administrative Court in Gdańsk of 4 September 2014, ref. no. III SA/Gd 355/14, Lex no. 1534610.

¹⁴ Judgement of the Supreme Administrative Court of 29 February 2012, ref. no. II OSK 45/12, Lex no. 1252076.

to the complete and final liquidation of the workplace, i.e. one in which no other employer becomes the successor of the liquidated workplace, and the liquidated workplace ceases to exist both in fact and in law.¹⁵

2. MERGER AND SPLIT-UP OF A CULTURAL INSTITUTION AND EMPLOYMENT RELATIONSHIPS

The merger of cultural institutions is a form of terminating the existence of cultural institutions that is distinct from their liquidation. As already mentioned above, the cultural institutions to be merged are struck off from the register of cultural institutions and thus cease to legally exist. Consequently, the legal winding up of an employer which leads to the use of the workplace to continue the existing activity as part of the new organisational structure does not constitute its liquidation within the meaning of Article 41¹ LC, but constitutes a transfer of the workplace, the effects of which in the sphere of labour law are determined by Article 23¹ LC.¹⁶

This means that the newly established cultural institution becomes, by operation of law, a party to the existing employment relationships, therefore the employees of the merged cultural institutions become, also by operation of law, its employees. The new employer assumes all the rights and obligations of the previous employers, and the employees of the merged cultural institutions retain their previous rights and obligations. The provision of Article 23¹ LC is a mandatory rule, the transfer of employees is done *ex lege*, it is not affected by anyone's decision – be it the employers or organisers of cultural institutions.

As stated in Article 23¹(2) LC, the previous employer and the new one are jointly and severally liable for the obligations arising from the employment relationship, which arose before the transfer of part of the workplace to another employer. As regards the merger of cultural institutions, the existing employers are struck off from the register, and in the legal sense they cease to exist, so only the newly established cultural institution is responsible for the obligations under the employment relationship, which arose before the merger of the cultural institutions [Antoniak-Tęskna 2019; Gajewski and Jakubowski 2016, 116; Liszcz 2016, 138; Gersdorf and Rączka 2012, 164; Pezda 2010, 34; Hajn 1996, 24].¹⁷

The employees of the merged or (split up) cultural institutions become employees of the resulting cultural institutions and retain the rights under

¹⁵ Judgement of the Supreme Court of 14 March 2012, ref. no. I PK 116/11, OSNP 2013/5-6/51.

¹⁶ Judgement of the Supreme Court of 21 January 2003, ref. no. I PK 85/02, OSNP 2004/13/228.

¹⁷ Also see the judgement of the Supreme Court of 23 November 2006, ref. no. II PK 57/06, OSNP 2008/1-2, item 4.

the employment relationship. Pursuant to the Labour Code, the employees are guaranteed at least the previous terms of labour. Any changes in this respect should be agreed between the parties to the employment relationship or the trade unions operating at the relevant workplace.

Employers are obliged to notify of the transfer of the workplace their respective trade union organizations or directly the employees, if such organizations do not operate at the employers' premises.

Pursuant to Article 26¹ of the Act on trade unions,¹⁸ the previous and the new employer are obliged to notify in writing the trade union organizations operating in each of them, at least 30 days before the expected date of transfer, about the expected date of this transfer, its reasons, legal, economic and social consequences for their employees, as well as intended actions regarding the terms of employment of these employees, in particular working conditions, pay and retraining.

Where it is the trade union organization who receives information from the employer pursuant to Article 26¹ ATU, it must forward that notification to all employees of the employer concerned, since it represents all the employees, both those who are and who are not its members [Maniewska 2009, 18].

It should be stressed that the Act on trade unions penalises the failure to comply with the obligation to notify trade unions, as in accordance with Article 35(1)(4) ATU, it is an offence punishable by a fine or a restriction of freedom.

If the previous or new employer intend to take measures concerning the conditions of employment of workers, they must enter into negotiations with the trade union organizations to conclude a respective agreement, within a maximum period of 30 days from the date of notification of those measures. The agreement shall be concluded by all the trade union organizations which have negotiated the agreement. Nothing prevents the agreement being concluded by two employers – the transferor and the transferee, then it will have a tripartite form. Nothing prevents the trade union organizations which are not formally operating in the workplace being transferred, but which operate with the transferee employer, from participating in the negotiations with the employer in the process of taking over the workplace

If the agreement is not concluded within the prescribed period due to the employer being unable to agree on the content of the agreement with workplace's trade union organizations or representative trade union organisations bringing together the employees,¹⁹ involved in the negotiations, the employer shall independently take action in matters concerning

¹⁸ Journal of Laws of 2022, item 854 [hereinafter: ATU].

¹⁹ In the meaning of Article 25³(1) or (2) ATU.

the conditions of employment of workers, taking into account the arrangements made with the workplace's trade union organizations in the course of the negotiations on the conclusion of the agreement.

As regards the terms of employment of the employees transferred, it should be emphasised that the employer who takes over another workplace is bound by the terms of individual employment contracts resulting, *inter alia*, from the remuneration system in force at the workplace being taken over.²⁰ The content of the contractual employment relationship is determined not only by the employment contract, but also by the regulation of internal by-laws, remuneration schemes adopted by the employer and generally applicable labour law provisions. The change on the employer's part as a result of the transfer of the workplace does not mean that the new employer is still bound by the content of the by-laws in force at the transferred workplace, but that the elements of the employment relationship of the employees of the transferor employer resulting from the provisions of those acts binding the new employer until changed by an amending agreement or amending notice. As the Supreme Court points out, this relationship stems from the institution of the new employer's entry into the existing employment relationship with the employees of the acquired workplace, and not from liability for the obligations arising prior to that transfer.²¹

Thus, if the new employer intends to take action regarding changes in the terms of employment, for example: if within a certain period of time from the date of the transfer of the workplace, it intends to consolidate and thus adapt the remuneration system for the transferred employees to the rules in force at the new employer, which will mean the elimination of a remuneration component to which the former employer was entitled and which is not covered by the remuneration system applied at the new employer, it is obliged to amend these terms and conditions in accordance with the requirements of the procedure of amending notice (or amending agreement).²²

If there are no trade union organizations operating at the employers undergoing the transfer of the workplace, each of them shall inform its employees in writing of the expected date of the transfer of the workplace, the reasons for it and the legal, economic and social consequences for the employees, as well as the intended action concerning the terms

²⁰ Judgement of the Supreme Court of 15 June 1993, ref. no. I PK 63/93, I PRN 63/93, OSP 1994, vol. 5, item 95; judgement of the Supreme Court of 21 September 1995, ref. no. I PRN 60/95, OSNP 1996/7/100.

²¹ Judgement of the Panel of Seven Judges of the Supreme Court of 29 October 1992, ref. no. I PZP 52/92, OSNCP 1993, vol. 4, item 48.

²² Subject to Article 241⁸ LC.

of employment of the employees, in particular the terms and conditions of work, pay and retraining.

At the same time, it should be noted that the failure of the previous employer to comply with the obligation to provide information and instruction under Article 23¹(3) LC does not affect the effect of the transfer of the workplace or its part consisting in assuming by the new employer of the rights and obligations of a party to the employment relationship.²³ The Supreme Court pointed out that the failure to notify employees in writing of the subjective change of the employer does not have the features of a gross breach of the employer's basic obligations towards the employee within the meaning of Article 55(1¹) LC, as it does not pose a direct threat to the continuation of the employment relationship on the previous terms and conditions of work and pay.²⁴

Providing employees with the above information is very important, it is a manifestation of the implementation of the protective nature of the labour law provisions. The information is intended to familiarise the employee with the new situation of working for a new employer. Despite permanence of employment, the *ipso iure* entry into the existing employment relationship and the guarantee of the existing terms and conditions of work and pay, the employees may not be interested, for various reasons, in working for the new entity, so they should be given the opportunity to familiarise themselves with the new situation in order to decide whether or not to continue their employment.

Pursuant to Article 23¹(4) LC, within 2 months of the transfer of a workplace or part thereof to another employer, the employee may terminate his employment relationship without notice of termination, with seven days' advance notification. The termination of employment in that way causes for the employee the effects related under the provisions of labour law to the termination of the employment relationship by the employer upon notice. If the employee does not intend to continue employment with the new employer for any reason, he may terminate his employment relatively quickly, without having to "wait" for the expiry of the notice period. This regulation attempts to reconcile, on the one hand, the protection of the workplace and, on the other hand, freedom of work; its essence is that the exercise of the worker's right to freely choose his employer does not lead to unfavourable legal consequences for him, therefore the choice of one of the two equivalent legally protected goods is on the part of the employee.²⁵ Where the employee uses this "simplified" termination procedure, the employee

²³ Judgement of the Supreme Court of 8 January 2002, ref. no. I PKN 779/00, OSNP 2004/1/7.

²⁴ Judgement of the Supreme Court of 6 May 2003, ref. no. I PKN 219/01, OSNP 2004/15/264.

²⁵ Judgement of the Supreme Court of 25 May 2000, ref. no. I PKN 647/99, OSNP 2001/21/644.

shall not be entitled to compensation or severance pay.²⁶ The Supreme Court adopted the view that the termination of the employment relationship under 23¹(4) LC does not entitle to be paid the severance pay provided for in Article 8 of the Act of 13 March 2003 on special rules of termination of employment relationships with employees for reasons not attributable to employees,²⁷ unless the reason for termination of employment was a serious change to the detriment of the employee.²⁸

The transfer of the workplace or its part to another employer may not constitute a reason for the termination of the employment relationship by the employer, and this also applies to an amending notice.²⁹ The employer taking over the workplace may not change the employee's terms of employment to his detriment for the reasons of the mere takeover of the workplace, regardless of whether the employee agrees to such a change.³⁰ In one of the rulings, the Supreme Court indicated that the transfer of the workplace or its part to another employer may not be the only reason justifying the termination of the employment relationship by the employer, but it should be assumed that justified circumstances and reasons for making organizational changes on the part of the employer undertaken for the sake of recovery from a difficult economic situation known to employees does not prevent such an agreed defining of the content of the employment relationship by the parties who agree to less favourable remuneration terms in order to achieve goals beneficial to both parties; this means that the transfer of the workplace to another employer does not preclude voluntary modifications to the terms of employment by agreement of the parties.³¹

The discussed principles of employment permanence under Article 23¹ LC do not apply to individuals working under civil-law contracts:

²⁶ The resolution of the Supreme Court of 10 October 2000, ref. no. III ZP 247/00, OSNP 2001/3/63 adopted that an employee who, as a result of the transfer of the workplace to another employer, has chosen the option of terminating the employment relationship without notice of termination, with 7 days' advance notification (Article 23¹(4) LC), is not entitled to compensation for any notice period that does not run after the termination of the employment relationship.

²⁷ Journal of Laws of 2018, item 1969.

²⁸ Resolution of the Panel of Seven Judges of the Supreme Court of 18 June 2009, ref. no. III PZP 1/09, OSNP 2011/3-4/32.

²⁹ The judgement of the Supreme Court of 17 January 2017, ref. no. I PK 326/15, unpublished, it states that Article 23¹(6) LC prohibits notice of termination of employment (and amending notice) by the employer only for one reason, i.e. the transfer of the workplace or its part to another employer, and therefore the mere transfer of the workplace or its part to another employer does not prevent the notice of termination by the employer, if it is justified by other actual and material reasons.

³⁰ Judgement of the Supreme Court of 7 February 2007, ref. no. I PK 269/06, OSNP 2008/5-6, item 68.

³¹ Judgement of the Supreme Court of 20 June 2007, ref. no. I BP 61/06, Lex no. 951495.

assignment contracts or contracts for specific work, as they are not employees within the meaning of Article 2 of the Labour Code. Thus, the new employer does not automatically become, on the basis of Article 23¹ LC, a party to these civil law relationships. However, it should be kept in mind that the new cultural institution assumes all rights and obligations of the merged cultural institutions and takes over their receivables and liabilities on the day of the merger (Article 25a AOPCA).

On the day of transfer of the workplace or part of it, the employer is obliged to propose new working and pay conditions to employees who hitherto have been working on a basis other than an employment contract, and to set a time limit, not shorter than 7 days, by which the employees may submit a declaration of acceptance or refusal to accept the proposed terms. Where new working and pay conditions are not agreed, the current employment relationship is terminated at the end of a period equal to the period of notice, counted from the date on which the employee submitted a statement of refusal to accept the proposed terms, or from the date by which he could submit such a statement. This provision applies to people hired on the basis of non-contractual employment, i.e. appointment, nomination, election, as well as a cooperative employment contract.

In the case of employee claims against the employer based on the provisions of the Labour Code, such as, for example, damages or compensation for mobbing, after the takeover of the entire workplace, in the event of liquidation of the previous employer, as already indicated above, only the new employer is liable [Sadlik 2012, 10; Gersdorf and Rączka 2012, 181].

Pursuant to para. 7 of the Regulation of the Minister of Family, Labor and Social Policy of 10 December 2018 on employee files,³² in the case referred to in Article 23¹ LC or in separate provisions providing for the legal succession of the new employer in employment relationships established by the previous employer, the previous employer must transfer the employee files to the new employer. It should be noted at this point that employers sometimes use the practice of concluding new employment contracts with the transferred employees on the occasion of a transfer of the workplace. This is a wrong practice, because the employees being taken over become, by operation of law, employees of the new employer, and the conclusion of a new employment contract is not constitutive in this case as far as the existence of the employment relationship is concerned, it only determines its content.³³

³² Journal of Laws of 2018, item 2369.

³³ It was pointed out in the judgement of the Supreme Court of 29 September 1998, ref. no. I PKN 349/98, OSNP 1999/20/653 that also the issuance of an employment separation certificate to an employee by the previous employer has no legal significance in relation to the consequences of taking over the workplace by the new employer, because it is not

3. RELATIONSHIP OF EMPLOYMENT OF THE MANAGERS OF CULTURAL INSTITUTIONS UNDER MERGER

Pursuant to Article 15(1) AOPCA, the manager of a cultural institution is to be appointed by the organiser for a limited period of time, having consulted the trade unions operating in that cultural institution and the professional and authors' associations competent for the type of activity carried out by the institution. The manager of a cultural institution shall be appointed for a period of three to seven years.

The appointment of the manager of a cultural institution may be preceded by a competition, but in local government cultural institutions, the list of which is to be determined by regulation by the minister responsible for culture and heritage protection, the appointment of a candidate for the post of manager by means of a competition is obligatory.³⁴ However, the minister responsible for culture and heritage protection may agree to appoint a candidate nominated by the organiser to the post of the manager without a competition.

A dismissal of the manager shall take place in the same manner. It is not necessary to consult trade unions and professional and authors' associations where candidate for manager is selected through the competition procedure

As has already been pointed out, the merger of cultural institutions results in the loss of legal personality of the merging institutions, since those institutions are struck off from the register of cultural institutions and thus their legal existence ceases. The legal liquidation of an employer, which will, however, in essence lead to the use of the workplace to continue the existing activity within only a new organisational structure, does not constitute liquidation of the workplace, but a transfer of the workplace. The newly established institution in place of the merged institutions becomes, by virtue of Article 23¹ LC, a party to the employment relationships of employees of the merged institutions.

Does this also apply to the managers of the institutions subject to merger? If a new institution is established as a result of a merger of cultural institutions, the act of appointing the manager of one of these cultural institutions being merged shall not form a basis for holding the position of the manager of the institution established as a result of the merger. This

an event causing the termination of the employment relationship, and the employee would not become an employee of the transferee employer by operation of law only where his employment relationship was terminated before the new employer took over the workplace.

³⁴ The competition procedure is also obligatory where it is provided for in the statutes of the cultural institution; see judgement of the Regional Administrative Court in Olsztyn of 14 July 2016, ref. no. II SA/Ol 629/16, Lex no. 2083854.

is so because the act of appointment concerns a specific cultural institution, which in this case ceases to legally exist and is struck off from the register. However, regarding Article 23¹(5) LC, a question arises as to its application to the employment relationship of the manager of a cultural institution being merged. According to that provision, on the day of transfer of the workplace or part of it, the employer is obliged to propose new working and pay conditions to employees who hitherto have been working on a basis other than an employment contract, and to set a time limit, not shorter than 7 days, by which the employees may submit a declaration of acceptance or refusal to accept the proposed terms. The application of this provision to an appointment does not, in principle, raise any doubts either among scholars in the field or in the case law [Pezda 2010, 44]. It is even noted that Article 23¹(5) LC should refer primarily to staff members employed on the basis of appointment in managerial positions in the workplace being taken over [Świątkowski 2016, 164]. However, with regard to appointed employees, the exclusion of the possibility of termination of the employment relationship by amending notice should be stipulated.³⁵ According to the established case law of the Supreme Court, it is unacceptable to terminate the working and pay conditions of an employee employed through appointment.³⁶

Analysing the above situation in more detail, one should refer to Article 15(6) AOPCA that lists grounds for dismissing the manager of a cultural institution, which contains neither merger nor liquidation of the institution. In the matters not covered by the Act, the issues related to the employment relationship of managers of cultural institutions are governed by the provisions of the Labour Code. In such a case, it seems that it can be assumed that the dismissal of the manager of a cultural institution subject to merger takes place on the basis of Article 70 LC, provided of course that Article 23¹(5) LC is not considered applicable in this case. This is supported by the fact that the manager of a cultural institution has been appointed to a position in a specific entity, which in this case is struck off from the register and loses its legal personality. Therefore, the act of appointment as the basis for establishing an employment relationship in this institution does not extend to the newly established cultural institution replacing the merged entities. Accepting the possibility of changing the terms of employment of the manager based on Article 23¹(5) LC would in fact mean a change in the position, the manager could no longer be the manager of the liquidated institution, and as the Supreme Court adopted in one of its judgements, changing the working and pay conditions, and in particular

³⁵ As in the judgement of the Supreme Court of 20 August 2009, ref. no. II PK 43/09, OSNP 2011, No. 7-8, item 102.

³⁶ Resolution of the Supreme Court of 21 December 1987, ref. no. III PZP 47/87, OSNC 1989/9/131.

the type of the employment (position) of an employee hired based on an appointment may be made by way of dismissal and establishing an employment relationship with the employee on new terms, if the dismissing body is competent for this purpose.³⁷

Due to the fact that Article 15(6) AOPCA contains an exhaustive enumeration of reasons for dismissing the manager of a cultural institution, it is a provision of a special nature, which, in accordance with the principle of *lex specialis derogat legi generali*, excludes the possibility of applying the general rules of the Labour Code to a dismissal of the manager of a cultural institution. The provision in question applies only to managers of cultural institutions and only their dismissal from office, so a dismissal may only take place in strictly defined cases. However, excluding the possibility of dismissing the manager of a cultural institution subject to merger, which will lose its legal personality as a result of the merger, solely due to the lack of such a reason in the list contained in the Act, seems to be too far-reaching. In this perspective, it should be stated that the provisions of the Act on the organisation and pursuit of cultural activities that in fact exclude the option of dismissing the manager of a cultural institution subject to merger due to strictly defined grounds for such dismissal, will not be applicable.

Taking into account the above doubts regarding the legal grounds for dismissal of managers of cultural institutions, the list of grounds for dismissal of managers of cultural institutions listed in Article 15(6) of the AOPCA should be extended (as a proposal for future legislation) to include the merger of cultural institutions [Antoniak-Tęskna 2019].

CONCLUSIONS

The reorganisation of cultural institutions in the form of a merger of institutions (or their split-up), i.e. a reorganisation not resulting in the actual liquidation of these entities, and the use of these institutions as workplaces in order to continue existing activities within the new organisational structure, constitutes a transfer of the workplace protected under the Labour Code. This means that a new entity enters into the existing employment relationships of employees of the merged institution as their employer, which ensures that employment is preserved and continued in the new institution, essentially in its previous form, in accordance with the terms of the contracts previously concluded. The personnel of the merged institutions must not be adversely affected by the reorganisation activities of the organisers of those institutions empowered to decide on the legal status of the institution. The continuation of the employment relationship with the new employer

³⁷ Ibid.

on the existing terms of employment takes place also when the founders – the organisers taking binding decisions about cultural institutions – have agreed otherwise.

These rules do not apply to the managers of institutions subject to the merger, since, due to the above-mentioned differences, they do not automatically become employees of the newly created entity, which consequently means that the manager of the newly established cultural institution should be appointed in accordance with the relevant provisions of law. The procedure for appointing and dismissing the manager of a cultural institution is regulated in the Act on the organisation and pursuit of cultural activities, which are provisions having precedence over the general principles adopted in the Labour Code. The absence of merger of cultural institutions, resulting in the deletion of the merged cultural institution from the register and thus resulting in the loss of its legal personality, on the list of grounds for dismissal of the manager of that institution raises numerous doubts and requires appropriate legislative action to extend the statutory grounds for dismissing the manager before the end of the term of office.

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