Muz., 2022(63): 144-149
Annual, eISSN 2391-4815

received – 06.2022
reviewed – 07.2022
accepted – 07.2022
DOI: 10.5604/01.3001.0015.9878

LEGAL SITUATION OF MUSEUM EMPLOYEES IN THE CASE OF MERGING MUSEUMS WITH OTHER CULTURAL INSTITUTIONS

Iwona Gredka-Ligarska
University of Silesia in Katowice
ORCID 0000-0002-9243-3158

Introduction

The legislator allows museums which are cultural institutions (state and local-government museums) to merge with other cultural institutions operating on the grounds of the provisions on running cultural activity (Art. 5a of the Act of 21 November 1996 on Museums [AoM][1]). However, in order to make the merger with another cultural institution legally effective, two premises have to be jointly fulfilled. Firstly, the organizer can use the right to merge cultural institutions only when the merger does not work to the detriment of the existing fulfilment of the museum's tasks. Secondly, the legal effectiveness of the legal operations leading to the merger of cultural institutions depends on the positive opinion by the Council for Museums and National Memorial Sites (Council for Museums).[2] Interestingly, a merger of a museum with a cultural institution has not always been legally admissible. The provisions of Art. 5a AoM in their original wording, in effect between 1 January 1999 and 31 December 2011, allowed mergers of museums which are cultural institutions only with other museums.[3] In the light of the current provisions a museum which is a cultural institution can be merged not only with another museum, but also with another cultural institution which is not a museum. Mergers of cultural institutions comply with the provisions as defined in Arts. 18–19, and 21 of the Act of 25 October 1991 on Organizing and Running Cultural Activity (AoORCA).[4] These stipulations define both material grounds for the merger and the merger procedure.[5] A merger of a museum with another cultural institution consists in establishing one institution composed of the staff and assets of the institutions being merged (Art. 19 AoORCA).

When translating theory into practice, let us mention some cases of museum employees' protests against a merger of a museum with another museum or with another cultural institution which is not a museum.[6] The employees of the cultural institutions being merged are apprehensive about their employment by the new employer, including worsening of their working conditions and remuneration, up to their position being liquidated. They may also be concerned about the leading concept for running the newly-established cultural institution. Therefore, the employees are most often negative about the merger. Meanwhile, the organizers of the cultural institutions which intend to merge often provide argumentation that the merger is necessary in order to rationalize disbursement of public funds and to boost effectiveness of task fulfilling by the cultural institutions involved. In the light of the above, a question arises about the legal situation of museum employees when their museum is merged with another cultural institution. Will they maintain their status, and will their rights be specified? Does the legislator secure the durability of the employment relationship? The conducted analyses will allow to present the *de lege lata* employee situation, and to formulate the *de lege ferenda* conclusions.

Material and procedural bases for a merger

A merger of a museum with another cultural institution shall lead to creating one cultural institution, with all the entailed consequences also for the employees, only if the material and procedural bases for merging the cultural institutions are observed. Complying with the valid regulations is the precondition for the legality of the steps taken by the organizers. In turn, violation of these rules may provide premises for eliminating defective acts from the legal circulation through supervision or court control.[7] A merger of cultural institutions can occur through one of the two modes foreseen by the legislator, i.e., in an act on a merger issued by the organizer or through a contract concluded by the organizers of the cultural institutions being merged. The merger mode depends on the fact whether the merged cultural institutions were established by the same or by different organizers. If the organizer is a minister or head of a central office, the act on the merger is issued as an order. If the organizer of the cultural institutions is a local government unit, the act on the merger is issued as a resolution adopted by its regulatory authority.[8] If the cultural institutions being merged have been established by the same organizer, i.e., the merger will take on the act on merger format, the organizer is obliged to publicize information on the intentions and reasons for such a decision three months prior to issuing the act. Only once this obligation has been fulfilled, the act on the merger shall be issued. The next step in the procedure of the cultural institutions' merger consists in issuing the Charter for the newly-established cultural institution. It is issued by the organizer. Finally, on the day of entering the newly-established cultural institution into the register, the organizer shall delete the cultural institutions which have been merged from the register.

Importantly, neither does the doctrine nor the jurisprudence manifest a homogenous position on the legal qualification of the acts on museums' merger with further serious consequences of the fact.[9] The discrepancies showed acutely on the example of the conflict around the act on the merger of the Museum of the Second World War in Gdansk with the Museum of Westerplatte and the War of 1939. In its decree of 30 January 2017 (VII SA/Wa 2411/16), the Voivodeship Administrative Court in Warsaw qualified the order to merge state cultural institutions as an individual, specific, and external act, this implying that if falls within the category of acts controlled by the administrative court. Meanwhile, the Supreme Administrative Court in its decree of 5 April 2017 (II OZ 299/17) did not share this view,[10] which was strongly criticized by a part of the doctrine representatives.[11] A detailed analysis of the quoted divergence reaches beyond the thematic framework of the present paper, and therefore has not been conducted. However, the discrepancies are essential enough to be signalled in the article at this point.

Merger of a museum with another cultural institution as transfer of a work establishment in the understanding of Art. 23^1 of the Labour Code

A merger of a museum with another cultural institution is qualified as transfer of a work establishment in the understanding of Art. 23^1 of the Labour Code (LC).[12] In the case of museums' merger the legal regulation with respect to transformation of any work establishment, not just cultural institutions, is applicable. The provisions of Art. 23^1 LC are the implementation of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.[13] The major function of this Directive is to secure employees' rights, and it is fulfilled by enabling employees to retain employment by the new employer under the conditions offered by the existing employer.[14] Transfer of a work establishment to another employer may result from a legal action, administrative act (e.g. decision of an authority empowered), or a legislative act (e.g., a law).[15]

In order to verify whether the work establishment has been transferred to another employer in the understanding of Art. 23^1 LC it is essential to establish whether the given organizational unit maintains its identity, which in particular is connected with the continuity of this unit's activity.[16] In the event of merging a museum with another museum or with a non-museum cultural institution this task is not difficult. Securing the performance of the existing tasks, namely the activity continuity, constitutes the legal premise for the permissibility of merging museums, this in compliance with the provisions of Art. 5 AoM. In other words, a merger is legally permissible, and shall not be legally effective unless the inviolability of the existing museum's tasks is secured. The verification whether the condition has been fulfilled is conducted by the Council for Museums.[17] Thus, consultation with the Council is obligatory. The requirement to acquire the Council's opinion is addressed by the legislator to the organizer, and constitutes an essential prerequisite of a lawful merger act.[18] Therefore, if the condition of securing the existing activity of the museum has been declared by the organizer, and subsequently verified, and positively assessed by the Council for Museums, then in compliance with the provisions of Art. 23^1 LC there remain no doubts as for the transfer of the work establishment to the new employer.

As a consequence of the transfer of the work establishment, the employer is changed, and the new employer enters the legal situation of the existing employer. Once the work establishment has been transferred, the new employer by operation of law becomes a party to the existing employment relationship established in the employment contract (Art.23^1.1 LC related to Art. 5 LC). In the sentence of 1 February 2000, the Supreme Court emphasized that *the provisions of Art. 23^1 LC are absolutely binding and the taking over of employees in this mode by a new employer occurs by operation of law, irrespectively of any employees' actions.*[19] Additionally, in the case of employment conditions formulated with the provisions of a collective labour agreement, Art. 241^8 LC is applicable. Legal automatism applies, however, exclusively to the employment relationship stemming from an employment contract.[20] Nevertheless, it does not apply to employment relationships established on other than employment contract grounds;[21] those are regulated by Art. 23^1.5 LC. Importantly, the principle of automatism applies only to employees' rights, and does not cover contracts related to employment relationship, e.g. a non-compete agreement.[22] The new employer shall also

abide by the declaration on the termination of an employment contract submitted prior to the transfer of the work establishment, unless the employer carries out acts aiming at withdrawing the declaration before the date of the employment relationship termination.[23]

Rights of museum employees related to the transfer of a work establishment to a new employer

In the case of a museums' merger, when the transfer of the work establishment to a new employer has been completed, the employees of the cultural institutions merged preserve their status, while their employment relationships continue upon the same conditions as before, and are protected against termination (Art. 23^1.6 LC). It can thus be said that upon the transfer of the work establishment to a new employer the working and remuneration conditions of the employees taken over remain unchanged. Only the employer changes. Together with the transfer of the work establishment to a new employer employees, however, gain new entitlements which should be discussed in more detail. In compliance with the obligation to inform as stipulated by Art. 23^1.3 LC, the existing and the new employer will inform their employees about 1) the expected date of the transfer of the work establishment to a new employer, 2) the reasons for the transfer, 3) the legal, economic and social effects of the transfer for the employees, and 4) about intended acts concerning the employment conditions of employees, and in particular, concerning work, remuneration and requalification conditions. If there are trade unions at the establishment of the existing and the new employer, in compliance with the provisions of Art. 26^1.1 of the Trade Unions Act of 23 May 1991 (TUA),[24] the employers are obliged to provide this information in writing to the trade unions. In the event when there are no trade unions at the establishment, the existing and the new employer shall comply with the obligation to inform by providing information directly to the employees (Art. 23^1.3 LC).

This obligation to provide information: to both establishment's trade unions and employees, has to be fulfilled at least 30 days prior to the anticipated date of the transfer of the work establishment to another employer. Art 23^1.3 LC and Art. 26^1.1 TUA in their literal meaning can be referred to the cases of work establishments being taken over by another already operating employer. In that situation we indeed have to do with the present employer and the new one, but an already existing employer. Instead, in the case of museums' merger we actually have the existing employer, and not even one, but at least two, if the merger involves two cultural institutions, however, 30 days prior to the planned date of the transfer of the work establishment to a new employer, the new employer does not exist as yet. This new employer will only come to existence on the grounds of the merger act issued by the organizer or on the grounds of a contract concluded by the organizers of the cultural institutions being merged. Defining the date of the merger of the cultural institutions (in the merger act or an appropriate contract) is therefore of key importance for the dates as stipulated in Art. 23^1.3 and 23^1.4 LC. The responsibilities of the existing employer shall lie with the cultural institutions being merged, however, the responsibility of the new employer must be performed by the organizer (organizers) conducting the merger. Since 30 days before the anticipated date of the transfer of the work establishment to a new employer that new employer does not exist as yet (cultural institution which will established as the result of the merger), then the responsibility to provide information can lie exclusively with the organizer (organizers). Importantly, pursuant to Art. 18.3 AoORCA, the organizer is obliged to provide public notice of the intent and reasons for the merging of a cultural institution three months before its execution. However, fulfilling this obligation by the organizer is not synonymous with fulfilling the obligation to inform as stipulated in Art. 23^1.3 LC and Art. 26^1.1 AoM, which is more extensive, and specifies that information should be provided to respectively trade unions or employees.

The legislator has not stipulated any sanctions for failing to meet the obligation to provide information from Art. 23^1.3 LC, however fulfilling this obligation is of key importance from the point of view of employees' interests, and remains closely related to their rights as stipulated in Art. 23^1.4 LC. In harmony with the latter, within 2 months of the transfer of the work establishment or its part to another employer, an employee may, without notice, but with seven days' prior notification, terminate the employment relationship.[25] However, in order to make an accurate judgement and make the right decision as for the future employment, the employee requires the information covered with the obligation to provide information by the employer. Employees cannot oppose the transfer of the work establishment to a new employer;[26] nonetheless, they are entitled to know what they can expect in the future in relation to that change. It is possible that the newly-established cultural institution will be run according to a concept different from those implemented by respective cultural institutions before their merger. In a longer perspective, also the employment conditions offered by the new employer can alter. Therefore, if the employer fails to meet the obligation to provide information, employees will be deprived of the knowledge essential for making the right choice: whether to retain the employment relationship with the new employer, or to benefit from the right as stipulated in Art. 23^1.4 LC.

The lack of sanctions for failing to meet the obligation to provide information from Art. 23^1.3 LC has to be judged critically, all the more so, since the failure to provide timely information as stipulated in Art. 26^1.1 TUA is subject to a fine or restriction of liberty (Art. 35.1.4 TUA). In the doctrine, it has been raised that until the obligation to provide information from Art. 23^1.3 LC is fulfilled, employees may refrain from continuing employment relationship claiming their lack of knowledge of the employment conditions offered by the new employer.[27] It has also been stated that failure to perform or improper performance of the obligation to provide information justifies employer's liability to damages as stipulated in Art. 471 of the Civil Code in relation to Art. 300 LC.[28] However, lack of unequivocal sanctions causes that violation of the obligation to provide information as stipulated in Art. 23^1.3 LC is ignored, this confirmed by the judgement of the Supreme Court of 6 May 2003.[29]

Conclusion

Owing to its limited size, the present paper does not exhaust the topic of the legal situation of employees in the event of merging a museum with another museum or with another cultural institution which is not a museum. The article has tackled the issues most important for the protection of employees' interests. With the museum employees taken over, as well as employees of other establishments in mind, it is recommendable for the legislator to introduce sanctions for the failure to provide information as stipulated in Art. 23^1.3 LC. Violation of this obligation should be added to the catalogue of offences contained in Art. 281.1 LC, qualifying it as an offence against employees' rights subject to 10.000- or 30.000-zloty fine. Introducing sanctions for the failure to meet the obligation to provide information would make that obligation more realistic, and subsequently would consolidate employees' rights in the situation of a work establishment being transferred to another employer as stipulated in Art. 23^1 LC.

Abstract: Mergers of cultural institutions, including museums, quite often arouse controversies and emotions, which we learn about from the media. The employees of the merging institutions involved may feel apprehensive about being secured employment from the new employer. A merger of a museum with another museum or with another cultural institution which is not a museum in legal terms is qualified as a transfer of a work establishment to another employer in the understanding of Art. 231 of the Labour Code. The present paper is dedicated to the legal situation of museum employees of the merged museums. Its major part focuses on the rights of employees related to the transfer of a work establishment to another employer, and the paper answers the question whether employees' interests are sufficiently protected in such a situation. *De lege lata* analysis of the employees' situation yields *de lege ferenda* conclusions, since it seems that the legal protection of the transferred employees could be consolidated.

Keywords: museum employees, museum merger, cultural institutions, transfer of a work establishment to another employer, employer's obligation to provide information.

Endnotes

1 Journal of Laws 1997, no. 5, item 24 with later amendments. English certified translation at: https://www.eui.eu/Projects/InternationalArtHeritageLaw/Documents/NationalLegislation/Poland/museumsact1996.pdf [Accessed: 23 August 2022].

2 Z. Cieślik, in: Z. Cieślik, I. Gredka-Ligarska, P. Gwoździewicz-Matan, I. Lipowicz, A. Matan, K. Zeidler, *Ustawa o muzeach. Komentarz*, Warszawa 2021, pp. 158-159, commentary on Art. 5a AoM.

3 The legal possibility to merge museums with other cultural institutions was introduced as an amendment to Art. 5a AoM through Art. 4.1. of the Act of 31 August 2011 on the Amendment to the Act on Organizing and Running Cultural Activity and some other acts (Journal of Laws 11.207.1230). The amendment came into force as of 1 January 2012.

4 Journal of Laws 1991, no. 114, item 493 with later amendments. English certified translation at: https://www.eui.eu/Projects/InternationalArtHeritageLaw/Documents/NationalLegislation/Poland/actorganizingrunningculturalactivities.pdf [Accessed: 23 August 2022].

5 Z. Cieślik, in: Z. Cieślik, I. Gredka-Ligarska, P. Gwoździewicz-Matan, I. Lipowicz, A. Matan, K. Zeidler, op. cit., p. 159.

6 See e.g.: https://www.ozzip.pl/informacje/malopolskie/item/2448-krakow-protest-przeciwko-polaczeniu-bunkra-i-mocaku [Accessed: 6 June 2022]; https://polskieradio24.pl/5/3/Artykul/1672147,Minister-przesunal-date-polaczenia-Muzeum-II-Wojny-Swiatowej-z-Muzeum-Westerplatte-i-Wojny-1939 [Accessed: 6 June 2022].

7 Z. Cieślik, in: Z. Cieślik, I. Gredka-Ligarska, P. Gwoździewicz-Matan, I. Lipowicz, A. Matan, K. Zeidler, op. cit., p. 161. See also: Sentence of the Supreme Administrative Court of 26 February 2019, II OSK 3524/18, LEX no. 2642679; sentence of the Supreme Administrative Court of 28 September 2016, II OSK 3182/14, LEX no. 2274948; sentence of the Supreme Administrative Court of 6 April 2016, II OSK 1899/14, LEX no. 2081344; sentence of the Supreme Administrative Court of 15 November 2005, II OSK 235/05, LEX no. 196688.

8 Z. Cieślik, in: Z. Cieślik, I. Gredka-Ligarska, P. Gwoździewicz-Matan, I. Lipowicz, A. Matan, K. Zeidler, op. cit., p. 160.

9 Extensively on the legal qualification of the acts on merging cultural institutions, see P. Antoniak, *Ustawa o muzeach. Komentarz*, Warszawa 2012, p. 52; K. Zalasińska, *Muzea publiczne. Studium administracyjnoprawne*, Warszawa 2013, p. 139; Z. Cieślik, in: Z. Cieślik, I. Gredka-Ligarska, P. Gwoździewicz-Matan, I. Lipowicz, A. Matan, K. Zeidler, op. cit., p. 131; S. Grajewski, A. Jakubowski, *Ustawa o organizowaniu i prowadzeniu działalności kulturalnej. Komentarz*, Warszawa 2016, source: Legalis; Z. Czarnik, J. Posłuszny, 'Zakład publiczny', in: M. Cherka et al., *Podmioty administrujące*, Warszawa 2011 („System Prawa Administracyjnego", ed. by R. Hauser, Z. Niewiadomski, A. Wróbel, vol. 6), p. 460.

10 LEX no. 2268515. See also: M. Sieradzka, *Kognicja sądu administracyjnego w sprawach o połączenie instytucji kultury. Glosa do postanowienia WSA z dnia 30 stycznia 2017 r., VII SA/Wa 2411/16*, source: LEX.

11 See Z. Kmieciak, 'Postępowanie sądowoadministracyjne – skarga na zarządzenie Ministra Kultury i Dziedzictwa Narodowego o połączeniu instytucji kultury – zażalenie na postanowienie o wstrzymaniu wykonania zaskarżonego zarządzenia – zakres kontroli zaskarżonego aktu. Glosa do postanowienia NSA z dnia 5 kwietnia 2017 r., II OZ 299/17', *Orzecznictwo Sądów Polskich*, 9 (2017), item 87; Z. Cieślik, in Z. Cieślik, I. Gredka-Ligarska, P. Gwoździewicz-Matan, I. Lipowicz, A. Matan, K. Zeidler, op. cit., pp. 132-133, 153-155.

12 English version of the Polish Labour Code at: http://www.en.pollub.pl/files/17/attachment/98_Polish-Labour-Code,1997.pdf [Accessed: 23 August 2022].

13 EUR-Lex L.2001.82.16 of 2001.03.22.

[14] M. Tomaszewska, in: *Kodeks pracy. Komentarz*, vol. 1: *Arts. 1-113*, academically ed. by K.W. Baran, 5th edition. 5, Warszawa 2020, source: LEX, commentary on Art. 23^1 LC; Ł. Pisarczyk, *Przejście zakładu pracy na innego pracodawcę*, Warszawa 2002, p. 181.

[15] See Sentence of the Supreme Court of 16 March 2010, II PK 191/09.

[16] So-called Spijkers Criteria. See ETS sentence of 18 March 1986 in case 24/85, Josef Maria Antonius Spijkers *versus* Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV; M. Tomaszewska, in: *Kodeks pracy…*, source: LEX.

[17] In the doctrine it has been emphasized that merging a museum with another cultural institution requires an opinion of the Council for Museums precisely for the fact that Art. 5a AoM allows a merger only if it does not act to the detriment of fulfilling the existing tasks. See Z. Cieślik, in: Z. Cieślik, I. Gredka-Ligarska, P. Gwoździewicz-Matan, I. Lipowicz, A. Matan, K. Zeidler, op. cit., p. 162; sentence of the Supreme Administrative Court of 6 April 2016; II OSK 1899/14; LEX no. 2081344.

[18] Z. Cieślik, in: Z. Cieślik, I. Gredka-Ligarska, P. Gwoździewicz-Matan, I. Lipowicz, A. Matan, K. Zeidler, op. cit., p. 162.

[19] I PKN 508/99, OSNP 2001/12, item 412.

[20] M. Tomaszewska, in: *Kodeks pracy…*, source: LEX.

[21] It may be worth remembering that in harmony with the Polish legislation employment relationship can be established trough an employment contract, selection, appointment, or a cooperative employment contract.

[22] M. Tomaszewska, in: *Kodeks pracy…*, source: LEX.

[23] Sentence of the Supreme Court of 13 May 1998, I PKN 101/98, OSNP 1999/10/332.

[24] Journal of Laws 2022, item 854.

[25] The termination of the employment relationship in accordance with this procedure has the same effects on the employees as those provided for in the provisions of labour law in relation to the termination of an employment relationship with notice by an employer. (Art. 23^1.4 LC, second sentence).

[26] A. Sobczyk, P. Korus, 'Test Spijkersa i test Süzen a pojęcie części zakładu pracy opartej o kryterium osobowe', *Praca i Zabezpieczenie Społeczne*, 1 (2017), p. 9.

[27] G. Goździewicz, T. Zieliński, in: *Kodeks pracy. Komentarz*, ed. by L. Florek, 7th edition, Warszawa 2017, Art. 23 (1), source: LEX, commentary on Art. 23^1 LC; see also W. Muszalski, in: *Kodeks pracy. Komentarz*, ed. by W. Muszalski, Warszawa 2000, p. 69, commentary on Art. 23^1 LC.

[28] Sentence of the Supreme Court of 18 September 2003, I PK 280/02, unpublished. See also K. Jaśkowski, in E. Maniewska, K. Jaśkowski, *Kodeks pracy. Komentarz*, 11th edition, Warszawa 2019, Art. 23 (1), source: LEX, commentary on Art. 231 LC; M. Gersdorf, in: *Kodeks pracy. Komentarz*, ed. by Z. Salwa, Warszawa 2008, p. 84, commentary on Art. 231 LC.

[29] I PKN 219/01, OSNP 2004/15/264.

Iwona Gredka-Ligarska PhD
Doctor of Laws and lecturer at the Institute of Law, Faculty of Law and Administration at the University of Silesia in Katowice, a lawyer President of the Programme Council of the National Institute for Museums and Public Collections in 2016–2022. A specialist in cultural heritage law, museum law, civil law, and labour law. ICOM member. Author of dozens of academic publications dedicated to the legal aspects of museum operations and heritage preservation; iwona.gredka-ligarska@us.edu.pl.

Word count: 3 699; **Tables:** –; **Figures:** –; **References:** 29
Received: 06.2022; **Reviewed:** 07.2022; **Accepted:** 07.2022; **Published:** 09.2022
DOI: 10.5604/01.3001.0015.9878

Competing interests: Authors have declared that no competing interest exits.
Cite this article as: Gredka-Ligarska I.; LEGAL SITUATION OF MUSEUM EMPLOYEES IN THE CASE OF MERGING MUSEUMS WITH OTHER CULTURAL INSTITUTIONS. Muz., 2022(63): 144-149
Table of contents 2022: https://muzealnictworocznik.com/issue/14332