breastfeeding worker challenges, before a court or other competent authority of the Member State concerned, the risk assessment of her work insofar as she claims that the assessment was not conducted in accordance with Article 4(1) of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

2. On a proper construction of Article 19(1) of Directive 2006/54, in a situation such as that at issue in the main proceedings, it is for the worker in question to provide evidence capable of suggesting that the risk assessment of her work had not been conducted in accordance with the requirements of Article 4(1) of Directive 92/85 and from which it can therefore be presumed that there was direct discrimination on grounds of sex within the meaning of Directive 2006/54, which it is for the referring court to ascertain. It would then be for the defendant to prove that that risk assessment had been conducted in accordance with the requirements of that provision and that there had, therefore, been no breach of the principle of non-discrimination.

ECJ 25 October 2017, case C-106/16 (Polbud), Miscellaneous

Polbud – v – Wykonawstwo sp. z o.o., Polish case

Summary

Member States may not impose mandatory liquidation on companies that wish to transfer their registered office to another Member State. A restriction on freedom of establishment may be justified by overriding reasons in the public interest, such as the protection of the interests of creditors, minority shareholders and employees, but a general mandatory liquidation goes beyond what is necessary to achieve the objective of protecting these interests.

Facts

In 2013, the registered office of Polbud was transferred to Luxembourg. Polbud then became 'Consoil Geotechnik Sàrl', a company registered under Luxembourg law. There was no change in the location of Polbud's real head office.

As it transferred its registered office to Luxembourg, Polbud lodged an application at the Polish registry court for its removal from the Polish commercial register. Provisions of Polish law make removal from the commercial register conditional on that company being wound up after liquidation has been carried out. Polbud did not meet this requirement, as it wanted to continue its existence as a company incorporated under Luxembourg law. The Polish commercial register refused the application for removal, and Polbud brought an action against that decision.

Legal framework

In dispute is whether the Member State of origin (in this case Poland) should allow the transfer of a registered offer to another Member State (in this case Luxembourg) rather than imposing mandatory liquidation on companies that wish to transfer. This situation differs from prior judgments such as *VALE* (C-378/10) in which it was the host Member States that imposed restrictions on the company that wished to transfer.

If this situation – the transfer of the registered office of a company, when there is no change in the location of its real head office – falls within the scope of freedom of establishment, it is protected by EU law. After all, Article 49 TFEU requires the abolition of restrictions on freedom of establishment. Under EU law, a restriction on freedom of establishment is only permissible if it is justified by overriding reasons in the public interest, which could be by the objective of protecting the interests of creditors, minority shareholders and employees of the company transferred. It is further necessary that it should be appropriate for ensuring the attainment of the objective in question and does not go beyond what is necessary to attain that objective.

National proceedings

Polbud brought an action against the decision before the *Sąd Rejonowy w Bydgoszczy* (District Court of Bydgoszcz, Poland), which dismissed the action. The company brought an appeal against this dismissal before the *Sąd Okręgowy w Bydgoszczy* (Regional Court of Bydgoszcz, Poland), which dismissed the appeal by an order of 4 June 2014. Polbud then brought an appeal on a point of law before the referring court: the *Sąd Najwyższy* (Supreme Court of Poland). Latter decided to refer three preliminary questions to the ECJ.

Questions put to the ECJ

1. Do Articles 49 and 54 TFEU preclude the application, by the Member State in which a (private limited liability) company was initially incorporated, of

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provisions of national law which make removal from the commercial register conditional on that company being wound up after liquidation has been carried out, if that company has been reincorporated in another Member State pursuant to a shareholders' decision to continue the legal personality acquired in the State of initial incorporation?

If the answer to that question is in the negative:

2. Can Articles 49 and 54 TFEU be interpreted as meaning that the requirement under national law that a process of liquidation of a company be carried out – including the conclusion of current business, recovery of debts, performance of obligations and sale of company assets, satisfaction or securing of creditors, submission of a financial statement on the conduct of that process, and indication of the person to whom the books and documents are to be entrusted – which precedes the winding-up of the company that occurs on removal from the commercial register, is a measure which is appropriate, necessary and proportionate to a public interest deserving of protection that consists in the safeguarding of the interests of creditors, minority shareholders, and employees of the migrant company?
3. Must Articles 49 and 54 TFEU be interpreted as meaning that restrictions on freedom of establishment cover a situation in which – for the purpose of its conversion to a company of another Member State – a company transfers its registered office to that other Member State without changing its main head office, which remains in the State of initial incorporation?

ECJ's findings

The answer to the third question – is freedom of establishment applicable to a transfer of only a registered office of a company incorporated under the law of one Member State to the territory of another Member State, where that company is converted to a company under the law of that other Member State, when there is no change of location of the real head office of that company? – is basically a preliminary question. Only if freedom of establishment is applicable to this situation, does it become necessary to decide whether the Polish legislation that provides that removal of a company from the commercial register is dependent on the winding-up of the company following a liquidation procedure, is compatible with that freedom.

The ECJ clarifies that EU law extends the benefit of freedom of establishment to all companies or firms formed in accordance with the legislation of a Member State and having their registered office, their central administration or principal place of business within the European Union. That freedom includes, in particular, the right of such a company to convert itself into a company or a firm governed by the law another Member State. In this case, freedom of establishment therefore confers on Polbud the right to convert itself into a company incorporated under Luxembourg law, provided that the conditions for its incorporation laid down by Luxembourg law are satisfied and, in particular, that the test adopted by Luxembourg to determine the connection of a company or firm to its national legal order is satisfied.

Further, a situation in which a company formed in accordance with the legislation of one Member State wants to convert itself into a company under the law of another Member State, with due regard to the test applied by the second Member State to determine the connection of a company to its national legal order, falls within the scope of freedom of establishment, even though the company may conduct its main, if not entire, business in the first Member State. The Court noted in that regard, that the fact that either the registered office or real head office of a company is established in accordance with the legislation of a Member State for the purpose of enjoying the benefit of more favourable legislation does not, in itself, constitute an abuse. Accordingly, the decision to transfer to Luxembourg only the registered office of Polbud (that transfer not affecting the real head office of that company) cannot, in itself, mean that such a transfer does not fall within the scope of freedom of establishment.

After the ECJ established that this situations fell within the scope of freedom of establishment, it was required to establish whether that freedom was restricted by Polish law and if so, whether that restriction was justified.

The ECJ observed that although Polbud may in principle transfer its registered office to a Member State other than Poland without the loss of its legal personality, a company incorporated under Polish law, such as Polbud may, under Polish law, obtain the removal of its name from the Polish commercial register only if it has been liquidated. In that regard, the ECJ noted that, under Polish law, the process of liquidation extended to the completion of current business, recovery of debts owed to the company, performance of its obligations and sale of its assets, satisfaction or securing of its creditors, submission of a financial statement on the conduct of that process and an indication of where the books and documents of the company in liquidation are to be deposited. The Court held that, by requiring the liquidation of the company, Polish law was liable to impede, if not prevent, the cross-border conversion of a company. That law therefore constituted a restriction on freedom of establishment.

But could the restriction be justified? Such a restriction may, in principle, be justified by overriding reasons in the public interest, such as the protection of the interests of creditors, minority shareholders and employees. However, Polish law prescribes a general, mandatory liquidation, there being no consideration of the actual risk of detriment to those interests and no possibility of

choosing less restrictive measures capable of protecting those interests. In the ECJ's view, such a requirement goes beyond what is necessary to achieve the objective of protecting the abovementioned interests.

Finally, as regards the argument of the Polish government that the legislation was justified by the objective of preventing abusive practices, the ECJ held that, since a general obligation to implement a liquidation procedure amounts to the establishment of a general presumption of the existence of abuse, such legislation was disproportionate.

Ruling

Articles 49 and 54 TFEU must be interpreted as meaning that freedom of establishment is applicable to the transfer of the registered office of a company formed in accordance with the law of one Member State to the territory of another Member State, for the purposes of its conversion, in accordance with the conditions imposed by the legislation of the other Member State, into a company incorporated under the law of the latter Member State, when there is no change in the location of the real head office of that company.

Articles 49 and 54 TFEU must be interpreted as precluding legislation of a Member State which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, for the purposes of its conversion into a company incorporated under the law of the latter Member State, in accordance with the conditions imposed by the legislation of that Member State, is subject to the liquidation of the first company.

ECJ 9 November 2017, case C-98/15 (Espadas Recio), Part-time work

María Begoña Espadas Recio – v – ServicioPúblico de Empleo Estatal (SPEE), Spanish case

Summary

While a provision that treats the unemployment benefits of vertical part-time workers unfavourably compared to full-time workers falls outside the scope of the Framework Agreement on part-time work, such a benefit scheme may still violate the principle of equal treatment of men and women, for example, if it is indirectly discriminatory towards women.

Facts

Ms Espadas Recio worked as a cleaner part time from 23 December 1999 to 29 July 2013. She worked two and a half hours on Mondays, Wednesdays and Thursdays every week and four hours on the first Friday of every month. Upon termination of her employment contract, she applied for unemployment benefits.

Legal background

The Spanish General Law on Social Security (Ley General de la Seguridad Social, 'LGSS') regulates unemployment protection. Article 210(1) of the LGSS states that the length of time an employee is entitled to unemployment benefits depends on the number of days over which social security conditions have been paid in the six years prior to the unemployment. A royal decree (Real Decreto 625/1985 por el que se desarrolla la Ley 31/1984, de 2 de Agosto, de Protección por Desempleo) stipulates that, when contributions relate to part-time work, every day worked shall be calculated as a day in respect of which contributions have been paid, whatever the length of the day.

Relevant EU directives are:

- Directive 97/81/EC containing the Framework Agreement on part-time work. Clauses 4(1) and (2) of the Framework Agreement say that, in respect of employment conditions, part-time workers shall not be treated less favourably than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds and that, where appropriate, the principle of pro rata temporis shall apply.
- Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. Article 3 says that statutory schemes providing protection against unemployment fall within scope of the Directive and Article 4(1) forbids both direct and indirect discrimination on ground of sex, in particular as regards the scope of schemes and conditions of access, the obligation to contribute and the calculation of benefits.

National proceedings

Upon Ms Espadas Recio's application, the SPEE (Public Employment Service) granted her 120 days of unemployment benefits. Ms Espadas Recio challenged that decision, as she believed she was entitled to 720 days of unemployment benefits. Subsequently, the SPEE granted her 420 days of unemployment benefits, as it took the view that it should take into account only days

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