LEGAL UPDATE
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Collective redundancies: Violation of the obligation to report to the Federal Employment Agency - BAG refers the question of sanctions to the CJEU

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If redundancies are planned to an extent which constitutes collective redundancies subject to reporting requirements, employers must overcome numerous formal hurdles. These include a consultation process that must be initiated with the responsible Works Council and provide the Works Council with comprehensive information regarding the planned redundancies. At the same time, the Federal Employment Agency (Agentur für Arbeit) must be sent a copy of the written notification sent to the Works Council. The Federal Labour Court (Bundesarbeitsgericht, BAG) had to deal with the question of whether the infringement of the reporting obligation regulated in section 17 (3) sentence 1 Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz, KSchG) resulted in the invalidity of a termination. At first the BAG did not come to a decision but instead referred the matter to the Court of Justice for the European Union (CJEU) (BAG, decision dated 27/01/2022, case no.: 6 AZR 155/21).

No reporting to the Federal Employment Agency

Insolvency proceedings were commenced regarding the employer in the unfair dismissal proceedings that were the basis of the hearing. Following this the complete closure of the business was agreed. The insolvency administrator accordingly planned the redundancy of all remaining 195 staff who were still employed. A redundancy plan was then agreed with the Works Council. As part of this the required consultation procedure for collective redundancies was carried out in accordance with section 17 (2) KSchG. However, contrary to section 17 (3) sentence 1 KSchG the Federal Employment Agency was not sent a copy of the notification sent to the Works Council. A short time later the employee received notice of the compulsory redundancies and filed a claim for unfair dismissal, in particular based on the infringement of the reporting obligation to the Federal Employment Agency.

Statutory prohibition as per section 134 BGB?

Section 17 (3) sentence 1 KSchG is based on the implementation of EU law, specifically on Art. 2 (3) (2) of the EU Collective Redundancies Directive of 20 July 1998 – 98/59 EC. However, neither the Collective Redundancies Directive nor German law in section 17 KSchG contain sanctions for errors in the collective redundancies process. The BAG therefore relied on general principles. In applying these it was again decided that the non-observance of the employer's obligations in conjunction with collective redundancies represents a violation of a statutory prohibition, which results in the legal transaction being void as per section 134 BGB. The BAG also consistently ruled in the previous case that the termination would be invalid if section 17 (3) sentence 1 KSchG related to a statutory prohibition in terms of section 134 BGB. In essence the question is what is the protective purpose of the obligation to report to the Federal Employment Agency? Compulsory employee protection or merely advance information about the upcoming notification of the collective redundancies?

Deciding the protective purpose

The lower courts decided that sending a copy of the notification sent to the Works Council (merely) serves to provide the Federal Employment Agency with early information. The mediation activities of the Federal Employment Agency could not be prepared in advance or made easier because of the advance information. It was not yet determined whether and how many employees would be entering the labour market at the point the consultation process started. The employer and the Works Council had not even negotiated this in the consultation process. Therefore the court held this to be only a violation of a secondary obligation. This meant that the termination was not invalid as a result. The employee who brought the action maintained that the reporting obligation did provide employee protection. They stated that the obligation should ensure that the Federal Employment Agency was provided as early as possible of notice of the upcoming redundancies in order to be able to adjust their placement efforts or to initiate early job retention measures. The reporting obligation therefore was no directory secondary obligation, in the employee's opinion.

The BAG then referred the question for interpretation of the protective purpose of the reporting obligation to the CJEU. If the CJEU rules that Art 2 (3) (2) of the Collective Redundancies Directive - at least also - provides employ-

ee protection, it seems evident that the BAG would also classify section 17 (3) sentence 1 KSchG as a statutory prohibition in terms of section 134 BGB in accordance with its previous case law and in future adherence to the reporting obligation will become a prerequisite for valid collective redundancies.

Practical consequences

The process again demonstrates that collective redundancies are and remain an explosive subject with many obstacles for employers. The high requirements of section 17 KSchG take centre stage again and again in employment law disputes. Now the CJEU can even narrower define the limits of validity of an already complex process. Regardless of the decision of the CJEU, it is now strongly advisable for employers to also meticulously comply with reporting obligations to the Federal Employment Agency in accordance with section 17 (3) sentence 1 KSchG, along side the legal requirements for the consultation and notification processes. Otherwise they run the risk that the Labour Courts will rule any terminations as invalid based on section 134 BGB in the future. There is no retrospective cure in these circumstances as yet. The original labour policy concept of notification, primarily aimed at setting up employment supporting measures by the Federal Employment Agency, seems to have evaporated.

Note

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