

LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

Berlin, 14. Juli 2023

CJEU on collective redundancies - now errors can also be made without consequences

Violating the obligation to report to the Federal Employment Agency does not invalidate the redundancies

Irfan Dogan, Dr Friederike Hoffmeister, Dr Axel Dahms

1. Introduction

In its judgment dated 13 July 2023 case no.: C-134/22, the Court of Justice of the European Union (CJEU) held that the EU Collective Redundancies Directive (98/59/EG) is to be interpreted so that the employer's obligation to send the responsible authorities a copy of the consultation document is not a protection for the benefit of the employee.

With its decision dated 27 January 2022 (6 AZR 155/21), the Sixth Senate of the Federal Labour Court (Bundesarbeitsgericht, BAG) referred the matter to the CJEU for a preliminary ruling, asking how an infringement of the employer's obligation to provide the Federal Employment Agency with information should be sanctioned within the scope of collective redundancies that are subject to reporting requirements (Ms Ceren Smajgert, LL. B. (London) has already written about this in the [Legal Update dated 12 April 2022](#)).

In principle, notifying mass redundancies represents numerous formal hurdles that companies must overcome. This also includes the obligation, before the notice of termination is

given, to inform the responsible employee representation in writing of the planned redundancies and hold a consultation process with them where the planned redundancies are discussed (section 17 (2) of the German Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz, KSchG)). The Works Council at the employer will receive a written notification which must contain the reasons for the planned redundancies, the number and occupational groups of the employees to be made redundant, the time period of the planned redundancies and the envisaged criteria for selecting the employees who are to be made redundant. Non-adherence to these provisions threatens nothing less than the invalidity of the notices of termination in accordance with section 134 of the German Civil Code (BGB). At the same time, the employer is to forward a transcript of the minutes of the Works Council's written consultation to the Federal Employment Agency in accordance with section 17 (3) sentence 1 KSchG. The CJEU now stated that infringing this obligation of the employer to report to the Federal Employment Agency does not grant any individual protection. The decision of the BAG is still pending but it is likely that an infringement of

section 17 (3) sentence 1 KSchG would not result in the invalidity of the dismissal.

2. Background of the CJEU's decision

In unfair dismissal proceedings, the Sixth Senate of the BAG dealt with the question of whether infringing the reporting obligation in accordance with section 17 (3) sentence 1 KSchG should be penalised. In the opinion of the Senate, it depends what the protective function of the reporting obligation is, as the German legislature implemented Article 2 (3) (2) of the Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies with section 17 (3) sentence 1 KSchG. In the event of inconsistencies, the CJEU is responsible for interpreting secondary Union legislation.

Neither section 17 KSchG nor the Collective Redundancies Directive envisage express sanctions for errors in the collective redundancy notification process. In the absence of EU law, it is up to the member states to determine what the legal consequences of an infringement should be. In doing so, the member states must ensure that the sanction is effective, proportionate and dissuasive, and that an infringement is not generally punishable under substantive and procedural regulations. In applying these principles, the BAG in the past had repeatedly accepted that infringements of the employer's obligations in conjunction with collective redundancies, such as the consolidation of the Works Council, led to the termination being void in accordance with section 134 due to the intended employee protection.

3. The decision of the CJEU

After interpreting the EU Collective Redundancies Directive, the CJEU decided that Article 2 (3) (2) is to be interpreted as not granting any

individual protection, which has been implemented into German law in section 17 KSchG. As always the CJEU examined the four methods of interpretation - wording, systematic context, purpose and history - in a very dogmatic manner.

a) Wording

The CJEU briefly stated at the beginning that according to the wording of Article 2 (3) (2) there is no indication as to the purpose of the reporting obligation.

b) Systematic context

It follows from the systematic context that Article 2 (3) (2) grants employees collective protection, not individual protection.

The fact that the relevant provision is not found in Section III ("Procedure for collective redundancies") but instead is situated in Section II ("Information and consultation") supports this view. At this stage, a collective redundancy notification is merely sent and the consultation process with employee representation has not been carried out.

c) Purpose

It also follows from the purpose that Article 2 (3) (2) grants employees collective protection, not individual protection,

as the authorities should initially only be provided with an overview of the grounds for the planned redundancies, the number and the categories of the employees to be made redundant, the number and the categories of the employees normally employed, the time period in which the redundancies should be carried out, plus the envisaged criteria for selecting the employees who are to be made redundant, in so far as national legislation and/or practice confers the power therefore upon the employer, through the transfer of the transcript of the consultation.

The responsible authorities have no further active role in the consultation process. They are only the addressee of the transcript which only serves informational and preparation purposes.

d) History

The CJEU finally held from the

history of the provision that it is a labour market objective which likewise does not provide individual protection. This confirms the assumption that the transmission of the consultation transcript is merely of informational and preparative character.

4. Evaluation and outlook

In our opinion, the decision of the CJEU is welcome. It makes clear that an infringement of section 17 (3) sentence 1 KSchG does not result in the invalidity of the dismissal due to lack of individual protection.

It must be agreed that after all it would be a matter of pure formality to allow the validity of a dismissal on operational grounds to fail in the event of an infringement of the aforementioned reporting obligation. At this stage of the proceedings, the authorities cannot guarantee any possibility of individual protection to the benefit of the affected employee.

The judgment reduces the risk for employers of costly collective redundancies process - one point less than can lead to the invalidity of a dismissal on operational grounds. It should be noted, however, that the request for a preliminary ruling did not deal with the scope of protection provided by the consultation process as such. Thus, with the present jurisprudence of the BAG the fact remains that an infringement of section 17 (2) KSchG will lead to the invalidity of the dismissal and this provision must be observed when carrying out staff cutbacks as part of collective redundancies.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the authors Irfan Dogan on +49 30 884503-122 or by E-Mail to idogan@goerg.de and Dr. Friederike Hoffmeister on +49 30 884503-122 or by E-Mail to fhoffmeister@goerg.de. For further information about the authors visit our website www.goerg.com.

Our Offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN

Kantstr. 164, 10623 Berlin
Phone +49 30 884503-0
Fax +49 30 882715-0

HAMBURG

Alter Wall 20 - 22, 20457 Hamburg
Phone +49 40 500360-0
Fax +49 40 500360-99

FRANKFURT AM MAIN

Ulmenstr. 30, 60325 Frankfurt am Main
Phone +49 69 170000-17
Fax +49 69 170000-27

COLOGNE

Kennedyplatz 2, 50679 Cologne
Phone +49 221 33660-0
Fax +49 221 33660-80

MUNICH

Prinzregentenstr. 22, 80538 Munich
Phone +49 89 3090667-0
Fax +49 89 3090667-90