**LEGAL UPDATE LABOUR AND EMPLOYMENT LAW**

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# Turmoil at the Federal Labour Court – is there about to be a change in policy in the event of errors in the collective redundancy notification process?

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## Introduction

If an employer intends to reduce their (number of) staff which would result in exceeding the standard threshold values in section 17 (1) of the German Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz, KSchG) within 30 days, the employer is obligated to consult a Works Council (consultation process) before giving notice of termination for the intended redundancies (collective redundancy notifications) in accordance with section 17 (2) KSchG and to notify the responsible Federal Employment Agency (Agentur für Arbeit) of the redundancies in accordance with section 17 (1) and (3) KSchG.

Errors made when carrying out the consultation process and preparing the collective redundancy notifications have generally led to the invalidity of all notices of termination given which require notifying the Federal Employment Agency in accordance with the case law of the Federal Labour Court (Bundesarbeitsgericht, BAG) established since 2012. The consultation and notification processes therefore present significant risks for employers.

A judgment of the Sixth Senate of the BAG dated 14 December 2023 has now provided hope that this may change in the future.

## Decision of the BAG dated 11 May 2023

On 11 May 2023 the Sixth Senate of the BAG expressed doubts about the previous case law of the BAG and stated that the system of sanctions developed by the BAG for errors in the collective redundancy notification process possibly does not comply with the collective redundancy protection process as laid out in the EU Collective Redundancies Directive and therefore could potentially be disproportionate. In light of this, the BAG (partially) stayed a total of four proceedings due to the uncertainties regarding sanctions in the collective redundancies process and referred the matter to the Court of Justice of the European Union (CJEU) under case number C-134/22.

In the unfair dismissal proceedings that were the basis of the hearing the defending employer issued no or only one collective redundancy notification which was incorrect in the opinion of the BAG before giving notice of termination for the disputed redundancies despite exceeding the standard threshold value in section 17 (1) KSchG.

## Decision of the BAG dated 14 December 2023

After the CJEU handed down its judgment on 13 July 2023 in case number C-134/22, the Sixth Senate of the BAG declared on 14 December 2023 that it intends to abandon its previous case law where a notice of termination given within the scope of collective redundancies is invalid if no or an incorrect collective redundancy notification is given at the time of giving the notice of termination.

This case law, however, is in contradiction with the case law of the Second Senate of the BAG, which until now proceeded from the invalidity of all notifiable notices of termination in the case of errors in the collective redundancy notification process and which has significantly influenced the currently existing sanction systems for errors in the collective redundancy notification process. In light of this, with its judgment dated 14 December 2023, the Sixth Senate of the BAG has asked the Second Senate whether it adheres to its previous legal position. If the Second Senate does not adhere to its previous legal position this would pave the way for a change in the case law. If the Second Senate rules to the contrary and continues to adhere to its previous legal position, the Grand Senate of the BAG will have to be called which consists of the President of the BAG, one judge from the remaining nine Senates and three lay judges each from employees and employers.

## Comments and outlook

While the decision of the BAG on 14 December 2023 has provided hope, it would be premature to react with exuberant cries of joy.

On the one hand, we cannot predict how the Second Senate will rule in this matter. The same applies in the event the Grand Senate is called. On the other hand, it cannot be assumed that in the event of a change in the case law the BAG will conclude that providing incorrect or failing to provide collective redundancy notifications will remain without sanctions for employers. On the contrary, it can be assumed that the BAG will reclassify the system of sanctions for errors in the collective redundancy protection process in the event of a change in the case law. A corresponding claim for compensation for being disadvantaged may, for example, come into question for affected employees in the event of errors in the consultation process by way of application of section 113 of the German Works Council Constitution Act (Betriebsverfassungsgesetz, BetrVG). In the event of providing incorrect or failing to provide collective redundancy notifications it is possible, for example, that a waiting period for dismissals in accordance with section 18 (1) KSchG may come into play, or the affected employee has a claim for compensation.

Employers would continue to be well advised to take the utmost care when carrying out the consultation and notification processes until the BAG has come to a decision on the matter.

**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 author Sebastian Schäfer by phone +49 221 33660-534 or by email seb-schaefer@goerg.de. For further information about the author visit our website www.goerg.com.

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