# Peculiarities and Pitfalls of Collective Redundancies

**Felix R. W. Pott**

**Cologne, 11.08.2014**

It is not uncommon for employers to be confronted with rather large problems when issuing a legally effective redundancy notice pursuant to the Employment Protection Act (Kündigungsschutzgesetz - KSchG). The requirements for acting in the legally prescribed manner are even more complex where a collective redundancy is planned, i.e. where a certain percentage of the employees of an establishment are to be dismissed at the same time or within a short space of time. Special duties to provide information and hold consultations as well as to notify can make preparations for and the implementation of such dismissals more difficult and, at times, prolong the process considerably.

## 1. Reconciliation of Interests

If the establishment where a collective redundancy is to occur has a works council, there may be a duty to conclude a reconciliation of interests with the works council before issuing dismissal notices to the employees. The existence of an operational change is a prerequisite (§ 111 of the Works Constitution Act (Betriebsverfassungsgesetz - BetrVG) for this. A reduction in the size of the workforce alone may constitute an operational change if a certain percentage of the establishment's total workforce is made redundant. The relevant thresholds are specified in § 17(1) of the Employment Protection Act (Kündigungsschutzgesetz - KSchG), which provides that a collective redundancy (and thus an operational change within the meaning of § 111 of the Works Constitution Act) occurs where one of the following thresholds is reached:

- more than 5 redundancies in establishments that normally employ more than 20 and less than 60 employees,
- 10% of the employees or more than 25 redundancies in establishments that normally employ at least 60 but less than 500 employees, or
- at least 30 redundancies in establishments that normally employ at least 500 employees.

Moreover, the Federal Labor Court (Bundesarbeitsgericht - BAG) has imposed an additional restriction, namely where at least 5% of the entire workforce is made redundant in establishments with at least 500 employees (cf. Federal Labor Court, Order of 28 March 2006 – 1 ABR 5/05, NZA 2006, 932). If the thresholds are reached, the employer must at the very least seriously attempt to conclude a reconciliation of interests with the works council so as not to expose itself to claims by its employees for compensation for the detrimental effects of redundancy pursuant to § 113 of the Works Constitution Act. An employer will only be considered to have made a serious attempt at concluding a reconciliation of interests if it appeals, should negotiations with the works council prove unsuccessful, to the conciliation committee referred to in § 76 of the Works Constitution Act, and if such committee confirms - should negotiations continue to prove unsuccessful - that negotiations have failed.

## 2. Social Compensation Plan

In addition to the reconciliation of interests process which is necessary from the employer's perspective, the works council will always seek to conclude in particular a social compensation plan to compensate employees for the economic disadvantages that they suffer. However, in the case of staff reductions, the works council can only legally compel the employer to conclude such a social compensation plan (through recourse to the conciliation committee) if the thresholds specified in § 112a (1) of the Works Constitution Act, which are significantly

higher than those in § 17 of the Employment Protection Act (see above), are reached. According to § 112a (1), the works council is only permitted to compel the conclusion of a social compensation plan if

- 20% of the staff or at least 6 employees are to be made redundant in establishments that normally employ less than 60 employees,
- at least 20% of the staff or 37 employees are to be made redundant in establishments that normally employ at least 60 but less than 250 employees,
- at least 15% of the staff or 60 employees are to be made redundant in establishments that normally employ at least 250 but less than 500 employees, or
- at least 10% of the staff or 60 employees are to be made redundant in establishments that normally employ at least 500 employees.

According to § 112a (2) sentence 1 of the Works Constitution Act, an employer cannot be compelled to agree to a social compensation plan where it reduces its staff during the first four years after the company is founded. In addition to the works council's legal possibilities for compelling the employer to agree to a social compensation plan, it also has practical bargaining power. The works council often links its consent to the conclusion of a reconciliation of interests, which is important from the employer's perspective (see above), to the employer's agreement to a social compensation plan, even if same cannot be compelled by law.

## 3. Notification of Collective Redundancy

Where certain thresholds are reached (see point 1 above), it should be noted that an employer is required by § 17 of the Employment Protection Act to notify the responsible job center (Agentur für Arbeit) of a proposed collective redundancy before issuing dismissal notices. If it fails to do so or if its notification is incomplete, the dismissal notices will be formally invalid. It must be noted that, if the establishment has a works council, additional procedural steps need to be initiated before the notification of the collective redundancy is sent to the job center. In particular, pursuant to § 17(2) of the Employment Protection Act the employer must provide the works council with details of the planned collective redundancy during the consultation process. The consultation process is thus particularly important since its proper conduct is an essential prerequisite for a valid collective redundancy notification and thus of each of the respective dismissals. If the works council is not willing to conclude a reconciliation of interests or give its opinion pursuant to § 17(2) of the Employment Protection Act, there must be an interval of at least two weeks between consultation of the works council and the actual issuance of the notification (§ 17(3) sentence 3 of the Employment Protection Act). Thus, at the same time as negotiations for a reconciliation of interests are underway, it would be advisable to prepare a draft notification of collective redundancies for the job center, and to send it to the works council for consultation purposes since it contains the necessary information.

## 4. Dismissal

If an establishment does not have a works council, the issuance of a dismissal notice does not usually require any additional procedural steps. Pursuant to § 623 of the German Civil Code (Bürgerliches Gesetzbuch - BGB), the dismissal must be in writing, must be served in good time (preferably with a proof of service) and, where appropriate, include an accurate calculation of the notice period. The latter, however, is not a prerequisite for a valid dismissal. If the employee commences court proceedings, the employer must show that it has fulfilled all of the prerequisites for a valid dismissal, and in the event that the employee disputes this, the employer must prove same. In particular, the employer must provide evidence of compelling operational reasons for the dismissal (§ 1(2) sentence 1 of the Employment Protection Act), and that it has properly selected the employees to be made redundant on the basis of the social criteria prescribed by law (§ 1(3) of the Employment Protection Act).

If a works council exists, it must be consulted pursuant to § 102(1) of the Works Constitution Act prior to each dismissal. The dismissal cannot be effectively issued until after the works council has given its opinion on the proposed dismissal (its consent is not necessary), or until a week has elapsed since it was consulted. As regards the grounds for dismissal, the employer may, during consultations with the works council, in part make reference to the reconciliation of interests if it includes sufficiently detailed information about the elimination of the employee's job. If the reconciliation of interests contains a list of names (i.e. a list of the names of the employees to be dismissed), the court will assume pursuant to § 1(5) of the Employment Protection Act that an operational reason for the dismissal exists. Similarly, the selection of the employees to be made redundant on the basis of social criteria may only be examined by the court for the existence of any blatant errors. However, works councils only rarely agree to such a list of names.

Regardless of the existence of a works council, the employer must in certain cases observe the special protection against dismissal that applies to severely disabled employees or employees on parental or maternity leave. The prior consent of the public authorities is required for the dismissal of these employees. If the prerequisites for consent by the public authorities are met, the consent procedure may take place parallel to consultations with the works council. In addition, it should be noted that works council members also enjoy special protection against dismissal pursuant to § 15(1) of the Employment Protection Act.

## 5. Summary /Checklist

The requirements described create logistical challenges for employers in the case of collective redundancies, particularly where works council are involved, since it is necessary to perform the individual procedural steps and hold consultations in an effective manner and in the correct order. The checklist below assumes that the number of dismissals in connection with a reduction in the size of the workforce meet the requirements of an operational change within the meaning of § 111 of the Works Constitution Act as well as those of a collective redundancy within the meaning of § 17 of the Employment Protection Act. In this case, the employer should proceed by taking the following steps:

1. Inform the works council of the planned reduction in the size of the workforce, and request it to engage in negotiations regarding the conclusion of a reconciliation of interests and, possibly, a social compensation plan
2. Prepare a draft collective redundancy notification, and send it to the works council with a reference to the consultation procedure called for by § 17(2) of the Employment Protection Act
3. Forward the letter of notification in point 2 ("at the same time") to the relevant job center
4. Conclude negotiations on a reconciliation of interests and seek the works council's opinion on the consultations pursuant to § 17(2) of the Employment Protection Act
5. Consult with the works council pursuant to § 102 of the Works Constitution Act on the dismissals contemplated in the reconciliation of interests
6. Notify the responsible job center of the collective redundancy
7. Issue the dismissal notices

The above provides a reliable and effective approach for employers who plan large scale cutback of their personnel. If there is no works council involved, only points 6 and 7 need be followed.

## Note



## Our offices

GÖRG Partnerschaft von Rechtsanwälten mbB

**BERLIN**
Klingelhöferstraße 5, 10785 Berlin
Phone +49 30 884503-0, Fax +49 30 882715-0

**COLOGNE**
Kennedyplatz 2, 50679 Köln
Phone +49 221 33660-0, Fax +49 221 33660-80

**ESSEN**
Alfredstraße 220, 45131 Essen
Phone +49 201 38444-0, Fax +49 201 38444-20

**FRANKFURT AM MAIN**
Neue Mainzer Straße 69 – 75, 60311 Frankfurt am Main
Phone +49 69 170000-17, Fax +49 69 170000-27

**HAMBURG**
Dammtorstraße 12, 20354 Hamburg
Phone +49 40 500360-0, Fax +49 40 500360-99

**MUNICH**
Prinzregentenstraße 22, 80538 München
Phone +49 89 3090667-0, Fax +49 89 3090667-90