Case C-134/22

Request for a preliminary ruling

Date lodged:

1 March 2022

Referring court:

Bundesarbeitsgericht (Germany)

Date of the decision to refer:

27 January 2022

Appellant in the appeal on a point of law:

MO

Respondent in the appeal on a point of law:

SM, as trustee of G GmbH

BUNDESARBEITSGERICHT (FEDERAL LABOUR COURT)

[…]

Delivered on

27 January 2022

ORDER

[…]

In the case of

MO

Applicant, appellant and appellant in the appeal on a point of law,

[…]

SM, as trustee of G GmbH

Defendant, respondent and respondent in the appeal on a point of law,

the Sixth Chamber of the Federal Labour Court ordered as follows following the hearing on 27 January 2022 […]:

I. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU):

What is the purpose of the second subparagraph of Article 2(3) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, according to which the employer is to forward to the competent public authority a copy of, at least, the elements of the written communication which are provided for in the first subparagraph, point (b), subpoints (i) to (v)?

II. The proceedings in the appeal on a point of law are stayed pending a ruling by the Court of Justice of the European Union on the question referred.

Reasons

This request for a preliminary ruling concerns the interpretation of the second subparagraph of Article 2([3]) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies ('the Directive').

The request for a preliminary ruling has been made in connection with a dispute between the applicant and the defendant in his capacity as trustee of G GmbH ('the debtor'). The parties disagree as to whether ordinary dismissal on operational grounds has validly terminated the employment relationship.

A. Facts and subject matter of the main proceedings

The applicant had been employed by the debtor as a welder since 1981. The bankruptcy court initiated insolvency proceedings against the debtor, at its request, by order of 1 October 2019. The defendant, as the court-appointed trustee, subrogated to the employer by virtue of that appointment and exercised the function of employer for the duration of the insolvency proceedings.

On 17 January 2020, it was decided that the debtor would cease all business operations by no later than 30 April 2020, as a result of which it was planned to make more than 10% of the 195 workers still employed redundant in the period from 28 to 31 January 2020. Following the decision to close the business, negotiations on a reconciliation of interests were held with the debtor's works council, for which purpose a draft reconciliation of interests agreement was sent to

the works council on 17 January 2020. The reconciliation of interests agreement was signed on 22 January 2020. That procedure, which is provided for under national law in accordance with the requirements of Paragraphs 111 and 112 of the Betriebsverfassungsgesetz (Works Constitution Law, 'the BetrVG'), is intended to ensure that, in the event of a proposed alteration which, according to the legal definition, includes the closure of the establishment, the workers are involved and their interests are taken into account by at least attempting to conclude a reconciliation of interests agreement. In addition, the financial prejudice caused to the workers by such a measure should be compensated or at least mitigated under a social compensation plan which is enforceable as a matter of principle.

If, as in the present case, the planned measure involves collective redundancies within the meaning of the Directive, the consultation procedure with the competent workers' representatives must also be carried out in accordance with Paragraph 17(2) of the Kündigungsschutzgesetz (Law on protection against dismissal, 'the KSchG'). The two participatory procedures can be combined, provided the employer makes it sufficiently clear if and which procedures are to be conducted simultaneously. Combined procedures are customary in Germany. The draft reconciliation of interests agreement provided in the present case on 17 January 2020 also combined the procedures. By that draft, the consultation procedure with the works council, as the forum under national law responsible for representing the workers, was combined with the procedure for the reconciliation of interests and then duly initiated and conducted. In its final observations of 22 January 2020, the works council stated that it did not see any way in which the projected redundancies might be avoided.

However, a copy of the communication sent to the works council in accordance with Paragraph 17(2) of the KSchG was not forwarded to the Osnabrück Employment Agency, the authority responsible for the notification procedure under national law, in breach of Paragraph 17(3), first sentence of the KSchG and the second subparagraph of Article 2(3) of the Directive.

The Osnabrück Employment Agency was sent a proper collective redundancy notice by means of a form and covering letter dated 23 January 2020, receipt of which was acknowledged by the Osnabrück Employment Agency on 27 January 2020, whereupon, inter alia, the applicant's employment relationship was terminated with effect from 30 April 2020 by letter received by the applicant on 28 January 2020.

The Osnabrück Employment Agency had already scheduled advisory appointments for 153 workers for 28 and 29 January 2020.

By his application, the applicant in the main proceedings is seeking a finding that the employment relationship was not terminated by the notice of dismissal of 28 January 2020. The applicant claims that the dismissal was null and void. He has based that claim, inter alia, on the fact that the debtor failed to provide the

Employment Agency with a copy of the communication sent to the works council in accordance with Paragraph 17(2) of the KSchG. He argues that, according to Paragraph 17(3), first sentence, of the KSchG and the second subparagraph of Article 2(3) of the Directive, this is a precondition to valid dismissal, not an ancillary obligation to which no penalty applies, and that this is the only way of ensuring that the Employment Agency is advised of impending redundancies as promptly as possible, so that it can start to prepare for them straight away and to adjust its placement efforts accordingly, for example by analysing demand on the job market for the professional categories of workers which will shortly be affected.

The defendant contends that the dismissal was justified on the basis of the decision to close the business and was valid in all other respects; that the failure to forward a copy to the Employment Agency in accordance with Paragraph 17(3), first sentence, of the KSchG does not invalidate the notice of dismissal; that unlike, for example, the provisions on collective redundancy notices (Paragraph 17(1) of the KSchG) or on the consultation procedure itself (Paragraph 17(2) of the KSchG), that rule does not aim to protect the workers affected by collective redundancies or to avoid redundancies; and that the Employment Agency cannot infer the ways in which the projected redundancies might be avoided in the opinion of the works council from the copy, nor would forwarding the copy affect the consultations between the employer and the works council, as the copy merely serves to provide the competent authority with preliminary information, not to fulfil the notification requirement itself.

The Arbeitsgericht (Labour Court) dismissed the action and the Landesarbeitsgericht (Regional Labour Court) dismissed the appeal. By the appeal on a point of law allowed by the Regional Labour Court, the applicant is seeking the same form of order.

B. Legal context

I. Bürgerliches Gesetzbuch (Civil Code)

The Civil Code (‘the BGB’) of 18 August 1896, as re-promulgated on 2 January 2002 *(Federal Law Gazette I, p. 42)* and last amended by Article 2 of the Law of 21 December 2021 *(Federal Law Gazette I, p. 5252)*, reads as follows (extract):

> ‘Paragraph 134 Statutory prohibition
>
> A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.’

II. Law on protection against dismissal

The Law on protection against dismissal (KSchG) of 10 August 1951, as re-promulgated on 25 August 1969 *(Federal Law Gazette I, p. 1317)* and last amended by Article 2 of the Betriebsrätemodernisierungsgesetz (Law on the modernisation of works councils) of 14 June 2021 *(Federal Law Gazette I, p. 1762)*, also serves, in its third section, to transpose the Directive. The law reads as follows (extract):

> 'Section One. General protection against dismissal
>
> Paragraph 1 Socially unjustified dismissals
>
> (1) The dismissal of an employee whose employment relationship has continued for more than 6 months without interruption with the same business or undertaking shall be void where it is socially unjustified.
>
> Section Three. Redundancies subject to an obligation to issue a notification
>
> Paragraph 17 Obligation to issue a notification
>
> (1) [1]The employer is under an obligation to notify the Employment Agency before it makes redundant:
>
> 2. 10% of the regularly employed workers or more than 25 workers in establishments normally employing at least 60 and fewer than 500 workers;
>
> …
>
> over a period of 30 calendar days. [2]Any other termination of an employment relationship brought about by the employer shall be assimilated to redundancy.
>
> (2) [1]If the employer contemplates making redundancies that are subject to the obligation to issue a notification under subparagraph 1 it shall promptly provide the works council with the appropriate information and notify it in writing, in particular, of:
>
> 1. the reasons for the projected redundancies;
>
> 2. the number and professional categories of workers to be made redundant;
>
> 3. the number and professional categories of workers normally employed;

4. the period over which the redundancies are expected to take place;

5. the proposed criteria for selecting the workers to be made redundant;

6. the proposed criteria for calculating any redundancy payments.

[2]The employer and works council shall have an opportunity, in particular, of consulting on the avoidance or limitation of redundancies and the mitigation of their consequences.

(3) [1]The employer must simultaneously forward to the Employment Agency a copy of the communication given to the works council; this must contain at least the details stated in points 1 to 5 of the first sentence of subparagraph 2. [2]The notice referred to in subparagraph 1 shall be given in writing and shall enclose the observations of the works council on the redundancies. [3]If the works council has not made any observations, the notice shall be valid if the employer can demonstrate that the works council was notified at least 2 weeks prior to the notice given in accordance with the first sentence of subparagraph 2 and the stage reached in consultations. [4]The notice must include information on the name of the employer, the registered office and type of establishment, as well as the reasons for the projected redundancies, the number and professional categories of workers to be made redundant, the number of workers normally employed, the period over which it is planned to carry out the redundancies and the criteria for selecting the workers to be made redundant. [5]The notice shall also include, for the purposes of job placement and in agreement with the works council, information on the sex, age, profession and nationality of the workers to be made redundant. [6]The employer shall send the works council a copy of the notice. [7]The works council may send additional observations to the Employment Agency. [8]It must send the employer a copy of the observations.

…’

III. Works Constitution Law

The Works Constitution Law of 15 January 1972 *(Federal Law Gazette I, p. 13)*, as re-promulgated on 25 September 2001 *(Federal Law Gazette I, p. 2518)* and last amended by Article 5 of the Law of 10 December 2021 *(Federal Law Gazette I, p. 5162)*, reads as follows (extract):

‘Part Four. Collaboration by employees and co-determination

…

Division Five. Staff policy

Subdivision Three. Individual staff measures

…

Paragraph 102 Co-determination in the case of dismissal

(1) [1]The works council has to be consulted before every dismissal. [2]The employer has to inform the works council about the reasons for dismissal. [3]Any notice of dismissal that is given without consulting the works council is null and void.

…

Division Six. Financial matters

…

Subdivision Two. Alterations

Paragraph 111 Alterations

[1]In establishments that normally have more than 20 employees with voting rights, the employer has to inform the works council in full and in good time of any proposed alterations which may entail substantial prejudice to the staff or a large sector thereof and consult the works council on the proposed alterations. … [3]The following are deemed as alterations for the purposes of sentence 1:

1. reduction of operations in or closure of the whole or important departments of the establishment;

…

Paragraph 112 Reconciliation of interests in the case of alterations; social compensation plan

(1) [1]If the employer and the works council reach an agreement to reconcile their interests in connection with the proposed alterations, the said agreement is to be recorded in writing and signed by the employer and the works council; … [2]The foregoing also applies to an agreement on full or part compensation for any financial prejudice sustained by staff as a result of the proposed alterations (social compensation plan). [3]The social compensation plan has the effect of a works agreement. …'

IV. Relevant provisions of EU law

In the view of the referring Chamber, the provisions of the second subparagraph of Article 2(3) and of Article 6 of the Directive are relevant.

C. Need for a ruling by the Court and explanation of the question referred for a preliminary ruling

The judgment on the dispute depends solely on whether the dismissal was null and void due to the infringement in this case of the obligation pursuant to Paragraph 17(3), first sentence, of the KSchG, which transposed the second subparagraph of Article 2(3) of the Directive. The applicant has removed other grounds for invalidity which may exist under national law from the appeal on a point of law. Nor is the Chamber convinced that such other grounds for invalidity exist.

I. Neither the Directive nor national law provide for an express penalty for errors committed in the collective redundancy procedure. Where an EU directive does not contain a specific provision covering a breach of its provisions, it is for the Member States to choose a penalty. In doing so, they must ensure that infringements of Community law are punished in accordance with substantive and procedural rules similar to those which apply to infringements of national law of a similar nature and gravity. The penalties applied must be effective, proportionate and dissuasive *(see judgments of 21 December 2016, AGET Iraklis, C-201/15, paragraph 36, and of 16 July 2009, Mono Car Styling, C-12/08, paragraph 34 et seq.)*. Thus, regard must be had both to the principle of equivalence and to the principle of effectiveness (effet utile) *(Bundesarbeitsgericht (Federal Labour Court) judgment of 13 February 2020, Case 6AZR 146/19, paragraph 98, BAGE 169, 362)*. It is for the national courts to determine independently whether national legislation meets the requirements of equivalence and effectiveness *(judgments of 29 October 2009, Ponin, C-63/08, paragraph 49, and of 23 April 2009, Angelidaki and Others, C-378/07 to C-380/07, paragraphs 163 and 158 et seq.)*.

II. The Federal Labour Court has repeatedly held, in keeping with these principles, that breaches by an employer of its obligations in connection with collective redundancies render the dismissal null and void under Paragraph 134 of the BGB on the grounds of the protection of the workers which they are intended to provide.

1. According to that provision, a legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion, whereby the prohibition need not have been expressed directly in the wording of the law and may also follow from the scheme and purpose of the provision in question. In that respect, the scope of the protective purpose of the infringed provision, in this case Paragraph 17(3), first sentence, of the KSchG, is the relevant provision *(see Federal Labour Court judgments of 21 March 2013, Case 2AZR 60/12, paragraph. 20, BAGE 144, 366; of 22 November 2012, Case 2AZR 371/11,*

paragraph 38, BAGE 144, 47; and of 19 March 2009, Case 8AZR 722/07, paragraph 25, BAGE 130, 90).

2. In the past, the Federal Labour Court has held that failure to comply with the obligation to give notice in a collective redundancy procedure *(Paragraph 17(1), read in combination with subparagraph 3, second and third sentences, of the KSchG)* violates a statutory prohibition within the meaning of Paragraph 134 of the BGB. Consequently, notices of dismissal which are not fully notified are null and void. However, dismissal by the employer in the form of a collective redundancy notice which does not meet the requirements of Paragraph 17(1) and (3) of the KSchG is also null and void. That applies, for example, where the employer fails to attach the works council's observations on the dismissals to the notice or to duly demonstrate that the works council was notified and the stage reached in consultations *(see Federal Labour Court judgments of 14 May 2020, Case 6AZR 235/19, paragraph 135, BAGE 170, 244, and of 13 February 2020, Case 6AZR 146/19, paragraph 101 with further citations, BAGE 169, 362).* Similarly, errors in the notification procedure with regard to the mandatory information referred to in Paragraph 17(3), fourth sentence, of the KSchG render the collective redundancy notice invalid and thus the dismissal null and void (see Federal Labour Court judgments of 13 February 2020, Case 6AZR 146/19, paragraph 108, BAGE 169, 362, and of 28 June 2012, Case 6AZR 780/10, paragraph 50, BAGE 142, 202). The same legal effect applies where notice is submitted to an employment agency which is not competent (Federal Labour Court judgment of 13 February 2020, Case 6AZR 146/19, paragraph 102, BAGE 169, 362).

If the employer has not conducted or has not properly conducted the consultation procedure provided for in Paragraph 17(2) of the KSchG, that also renders the dismissal null and void under Paragraph 134 of the BGB *(see Federal Labour Court judgment of 22 September 2016, Case 2AZR 276/16, paragraph 36, BAGE 157, 1, and of 21 March 2013, Case 2AZR 60/12, paragraph 19 et seq., BAGE 144, 366).*

3. The legal effect of the dismissal being null and void in such cases due to violation of a statutory prohibition within the meaning of Paragraph 134 of the BGB is similar to the legal effect under national law where dismissals are socially unjustified *(Paragraph 1(1) of the KSchG)* or where the works council was not heard or not properly heard within the framework of its powers of co-determination on individual measures before notice of dismissal was given *(Paragraph 102(1), third sentence, of the BetrVG).*

III. However, the referring Chamber cannot itself determine whether infringement of the obligation under Paragraph 17(3), first sentence, of the KSchG to send the Employment Agency a copy of the communication given to the works council also renders the dismissal null and void. In order to determine whether failure to comply with that obligation must be regarded as violation of a statutory prohibition within the meaning of Article 134 of the BGB, it is necessary, in the

absence of an express prohibition, to determine the protective purpose of the first sentence of Paragraph 17(3) of the KSchG. That in turn requires clarification of the protective purpose of the second subparagraph of Article 2(3) of the Directive and thus interpretation of that provision, which it is for the Court alone to make in a preliminary ruling procedure pursuant to Article 267 TFEU *(see, in that regard, judgment of 6 October 2021, C-561/19, paragraphs 27 and 28).*

1. It is clear in particular from recital 2, that the Directive is also designed to protect workers in the event of collective redundancies *(judgments of 21 December 2016, AGET Iraklis, C-201/15, paragraphs 27 and 32, and of 9 July 2015, Baikaya, C-229/14, paragraph 32. See also judgment of 17 December 1998, Lauge and Others, C-250/97, paragraph 19).* The provision of the second subparagraph of Article 2(3) of the Directive is intended to foster the aim of the Directive to ensure that employers, authorities with competence for the collective redundancy notice (in Germany the competent Employment Agency) and workers' representatives act jointly *(see Proposal for a Council Directive on the harmonisation of the legislation of the Member States relating to redundancies COM(72) final 1400, p. 3).* It might be possible to achieve that aim only if the competent authority is informed of the projected dismissal of a larger number of workers as promptly as possible. In order to safeguard this and thus also the protection of workers, the employer might be obliged to send the copy to the competent authority pursuant to the second subparagraph of Article 2(3) of the Directive.

2. However, the referring Chamber considers that there are serious arguments which refute the assumption that the second subparagraph of Article 2(3) of the Directive is intended to provide individual protection.

a) It was the intention of the national legislature that Paragraph 17(3), first sentence, of the KSchG should ensure that the employment administration is informed promptly *([…]).* That intention was rooted in the earlier understanding that dismissal occurs when the period of notice expires. That understanding was abandoned in national case-law following the judgment of 27 January 2005, *Junk*, C-188/03. 'Dismissal' within the meaning of Paragraph 17(1) of the KSchG means receipt of the notice of dismissal *(settled case-law of the Federal Labour Court since judgment of 23 March 2006, Case 2AZR 343/05, BAGE 117, 281).* The previous understanding also explains why Paragraph 17(3), first sentence, of the KSchG requires a copy of the communication given to the works council to be forwarded simultaneously; in that regard, it gold-plates the Directive. That approach was based on the national legislature's understanding that the consultation procedure is usually conducted after dismissal *([…]).*

b) Where, based on the current understanding of 'dismissal' in EU law, the consultation procedure is conducted before notice of dismissal is given, as in the present case, forwarding a copy of the communication sent to the works council at the start of the consultation procedure, as required under the second subparagraph of Article 2(3) of the Directive, will not have any effect on the placement efforts

of the employment administration. It is not known at the time of the communication to the works council whether any, and if so, how many workers will enter the job market, and if so when, and which workers will be affected. This is precisely what has (yet) to be discussed in the consultation procedure with the works council, the aim of which is to enable the works council to make constructive proposals in order to avoid, or at least reduce, the collective redundancies or to mitigate the consequences of collective redundancies by recourse to accompanying social measures *(Federal Labour Court judgment of 13 June 2019, Case 6AZR 459/18, paragraph 27, BAGE 167, 102; see also judgments of 3 March 2011, Claes, C-235/10 to C-239/10, paragraph 56, and of 10 September 2009, Akavan Erityisalojen Keskusliitto and Others, C-44/08, paragraph 53)*, and thus enable the works council to influence the course of action decided on by the employer *(see Federal Labour Court judgments of 13 June 2019, Case 6AZR 459/18, paragraph 41 with further citations, BAGE 167, 102, and of 26 January 2017, Case 6AZR 442/16, paragraph 25, BAGE 158, 104)*. Thus, individual protection is still out of the question at the time when the Directive requires the obligation laid down in the second subparagraph of Article 2(3) of the Directive to be fulfilled.

c) The purpose of the collective redundancy notice is, in turn, to allow the competent authority to seek solutions to the problems raised by the projected collective redundancies within the period laid down in Article 4(1) of the Directive ('standstill period') which, as a rule, is 30 days *(judgment of 27 January 2005, Junk, C-188/03, paragraphs 47 and 51; judgment of the Federal Labour Court of 13 June 2019, Case 6AZR 459/18, paragraph 31, BAGE 167, 102)*. That clearly follows from Article 4(2) of the Directive. Under the Directive, that action by the competent authority is therefore triggered by the employer's notification pursuant to Article 3(1) of the Directive. In the view of the referring Chamber, that suggests, based on the scheme of the Directive, that the earlier mandatory notification under the second subparagraph of Article 2(3) of the Directive cannot, on the other hand, provide individual protection. That conclusion would also be logical in that, as we have seen, the question of whether any, and if so, how many workers will enter the job market, and if so when, and which workers will be affected is not finalised until consultations have been completed.

d) In the view of the referring Chamber, these considerations suggest that the second subparagraph of Article 2(3) of the Directive, and thus also Paragraph 17(3), first sentence, of the KSchG, do not form part of the notice or the consultation procedure, and are simply procedural provisions. Their infringement, even taking account of the principle of equivalence and effectiveness in national law, would therefore not entail the same legal effect as infringement of the obligation to give notice or engage in consultations and thus would not render the dismissal of an individual worker affected by the collective redundancy null and void, especially given that, as illustrated by the present case, in which counselling appointments were made for more than 100 workers as soon as the collective redundancy notice was received, the prompt start of placement efforts can be

guaranteed notwithstanding infringement of the obligation under Paragraph 17(3), first sentence, of the KSchG.

D. [procedural matters] […]

[…]