Case C-134/24 [Tomann] [i]

Supplement to the request for a preliminary ruling

Date lodged:

26 February 2024

Referring court:

Bundesarbeitsgericht (Germany)

Date of the decision to refer:

1 February 2024

Defendant, appellant and appellant in the appeal on a point of law:

UR, acting as liquidator of V GmbH

Applicant, respondent and respondent in the appeal on a point of law:

DF

BUNDESARBEITSGERICHT (FEDERAL LABOUR COURT)

6 AZR 157/22 (B)

…

Delivered on

14 December 2023

ORDER

…

In the case of

[UR, acting as liquidator of V GmbH]

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

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

[v]

[DF]

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

the Sixth Chamber of the Bundesarbeitsgericht ordered as follows following the hearing on 14 December 2023 …:

I. The following question is referred to the Second Chamber of the Bundesarbeitsgericht pursuant to the first sentence of Paragraph 45(3) of the Arbeitsgerichtsgesetz (Law on labour courts; 'ArbGG'):

Is the opinion held since the judgment of 22 November 2012 *(- 2 AZR 371/11 -)*, that a dismissal as a legal act infringes a statutory prohibition within the meaning of Paragraph 134 of the Bürgerliches Gesetzbuch (Civil Code; 'BGB') and that the dismissal is therefore invalid if there is no effective notification pursuant to Paragraph 17(1)(3) of the Kündigungsschutzgesetz (Law on protection against unfair dismissal; 'KSchG') when it is announced, adhered to?

II. Proceedings are stayed.

Grounds

A. Facts

The parties still disagree as to whether a dismissal for operational reasons is null and void on the ground that the defendant failed to issue the required collective redundancy notification.

Since 1994 the applicant had worked at V Handelsgesellschaft mbH ('the debtor company'), where no works council had been formed. Insolvency proceedings were initiated against the debtor company on 1 December 2020 and the defendant was appointed as liquidator. Between 12 November 2020 and 29 December 2020, it terminated all 22 of the debtor company's employment relationships still in existence in October 2020 by giving notice or concluding severance agreements. The defendant gave notice of termination of the applicant's employment relationship with effect from 31 March 2021 by a letter of 2 December 2020, which was received on 8 December 2020. In that respect, it dismissed more than five employees in the 30-day period. It had not previously issued a collective redundancy notification pursuant to Paragraph 17(1) of the KSchG. The applicant's employment relationship was terminated with effect from 31 July 2021 on the basis of a subsequent notice of dismissal.

By his action against dismissal, which was brought within the prescribed period, the applicant claims – in so far as still relevant at the present time – that the notice

of dismissal of 2 December 2020 is null and void on the ground the defendant failed to issue the prior collective redundancy notification required.

The applicant has thus far requested that

1. a declaration be issued that the employment relationship was not terminated by the notice of dismissal of 2 December 2020, but continues to exist;

2. the defendant be ordered to continue to employ him … until the final outcome of the dismissal proceedings.

As grounds for its contention that the action should be dismissed, the defendant argued that the debtor company only had 19 employees at the time the insolvency proceedings were initiated and therefore the threshold laid down in Paragraph 17(1) of the KSchG had not been exceeded and it was not required to issue a collective redundancy notification.

By its order of 11 May 2023, the Chamber acknowledged that the debtor company's establishment 'normally' still employed more than 20 employees at the time of the dismissal and that the defendant should therefore have issued a collective redundancy notification before announcing the dismissal at issue. On account of the decision on the penalty for failure to meet the obligation under point 1 of first sentence of Paragraph 17(1) of the KSchG which it had established, it stayed proceedings pending the decision of the Court of Justice of the European Union in the preliminary ruling proceedings – C-134/22 – issued on 13 July 2023.

B. Grounds

As the adjudicating Chamber has already found, the defendant infringed its obligation under Paragraph 17(1) of the KSchG to issue a collective redundancy notification. In the view of the Sixth Chamber, the penalty for that error, and also for all other conceivable errors by the employer in the notification procedure, is not nullity of the dismissal pursuant to Paragraph 134 of the BGB. Rather, the penalty required for such errors must be determined by the legislature. However, the Chamber considers that it is prevented from making such a decision by the decision of the Second Chamber of the Bundesarbeitsgericht on the nullity which ensues from errors in the notification procedure *(judgment of the Bundesarbeitsgericht of 22 November 2012 – 2 AZR 371/11 – BAGE 144, 47).*

I. Notification procedure

1 Paragraph 17 of the KSchG transposes into German law the obligations established in respect of the Member States by Directive 98/59/EC relating to collective redundancies ('Directive 98/59/EC') *(judgment of the Bundesarbeitsgericht of 27 January 2022 – 6 AZR 155/21 (A) – paragraph 14; and of 21 March 2012 – 6 AZR 596/10 – paragraph 21; BT-Drs. 8/1041 p. 4; BT-*

Drs. 13/668, p. 8 et seq.). However, neither Directive 98/59/EC nor Paragraph 17 et seq. of the KSchG contain explicit rules on penalties for errors in the collective redundancy procedure. The Commission proposal to include in Directive 98/59/EC the obligation of the Member States to render 'null and void collective redundancies' in the event of infringements of the directive's requirements *(Proposal for a Council Directive amending Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies of 13 November 1991, p. 6, OJ 1991 C 310, p. 5)* was not taken up by the EU legislature. It merely required Member States to ensure that judicial and/or administrative procedures for the enforcement of obligations under the directive are available to the workers' representatives and/or workers *(Article 6 of Directive 98/59/EC)*.

Therefore, penalties for errors in the collective redundancy procedure must be identified by the Member States in national law. Infringements of Community law must be penalised under conditions, both procedural and substantive *(see judgment of the Court of Justice 10 November 2022 – C-385/21 – [Zenith Media Communications], paragraph 34; of 16 July 2009 – C-12/08 – [Mono Car Styling], paragraph 34 et seq.)*, which are analogous to those applicable to infringements of national law of a similar nature and importance. The penalty must be effective, proportionate and dissuasive *(as regards Directive 98/59/EC, see judgment of the Court of Justice of 8 June 1994 – C-383/92 – [Commission v United Kingdom], paragraph 40; and judgment of the Bundesarbeitsgericht of 22 November 2012 – 2 AZR 371/11 – paragraph 32, BAGE 144, 47)*. It is therefore not only the principle of equivalence and the principle of effectiveness – *effet utile* – *(judgment of the Bundesarbeitsgericht of 27 January 2022 – 6 AZR 155/21 (A) – paragraph 18; and of 13 February 2020 – 6 AZR 146/19 – paragraph 98, BAGE 169, 362; see also judgment of the Court of Justice 17 March 2021 – C-652/19 – [Consulmarketing], paragraph 43)* that must be observed. In addition, the penalty must also be proportionate *(see, for example, judgment of the Court of Justice of 19 December 2019 – C-645/18 – [Bezirkshauptmannschaft Hartberg-Fürstenfeld], paragraph 29 et seq., with further references; Dauses/Ludwigs EU-WirtschaftsR – HdB/Brigola C. I. Grundregeln Stand Januar 2019, paragraph 314 et seq.)*. The national courts are to determine autonomously whether national legislation meets those requirements *(judgment of the Court of Justice of 29 October 2009 – C-63/08 – [Pontin], paragraph 49; and of 23 April 2009 – C-378/07 to C-380/07 – [Angelidaki and Others], paragraph 163, 158 et seq.)*. The same applies to the question whether and, if so, which penalties can be inferred from national law in accordance with the applicable rules.

2 Since its decision of 22 November 2012 *(– 2 AZR 371/11 – paragraph 31 et seq., BAGE 144, 47)*, the Second Chamber of the Bundesarbeitsgericht has found that Paragraph 17(1) of the KSchG, in conjunction with 17(3) thereof, is a statutory prohibition within the meaning of Paragraph 134 of the BGB and that the lack of an effective collective redundancy notification renders the dismissal ineffective in accordance with the principle of *effet utile*. The Sixth Chamber of the

Bundesarbeitsgericht concurred with that finding in its decisions of 13 December 2012 *(see – 6 AZR 772/11 – paragraph 61, and – 6 AZR 752/11 – paragraph 64, 72)* without stating grounds of its own and has subsequently adhered to that view, as has the Second Chamber *(judgment of the Bundesarbeitsgericht of 21 March 2013 – 2 AZR 60/12 – paragraph 42 et seq., with further references, BAGE 144, 366; of 20 February 2014 – 2 AZR 346/12 – paragraph 46 et seq., with further references, BAGE 147, 237; of 13 February 2020 – 6 AZR 146/19 – paragraph 97 et seq., with further references, BAGE 169, 362; of 14 May 2020 – 6 AZR 235/19 – paragraph 134 et seq., BAGE 170, 244; of 27 January 2022 – 6 AZR 155/21 (A) – paragraph 19 et seq., with further references; and of 19 May 2022 – 2 AZR 467/21 – paragraph 13).*

3 Paragraph 17 of the KSchG obliges the employer to carry out the proper collective redundancy procedure required prior to the dismissal. After re-examining the legal situation, the Sixth Chamber of the Bundesarbeitsgericht takes the view that infringements of the obligation to notify properly the competent employment agency of collective redundancies, as laid down in Paragraph 17 (1)(3) of the KSchG, do not render the dismissal null and void under Paragraph 134 of the BGB. In the view of the Sixth Chamber, that provision does not penalise infringements of the obligation to notify according to legal theory thereon, which has not been sufficiently taken into account in previous case-law on the consequences of infringements of the employer's obligation in the notification procedure.

(a) The scope of Paragraph 134 of the BGB is not generally very limited as regards dismissals. As a unilateral declaration of intent, a dismissal can also be a legal act within the meaning of Paragraph 134 of the BGB *(judgment of the Bundesarbeitsgericht of 20 March 2019 – 7 AZR 237/17 – paragraph 39, BAGE 166, 202; and of 19 December 2013 – 6 AZR 190/12 – paragraph 14 et seq., BAGE 147, 60; MüKoBGB/Armbrüster, 9th ed. § 134, paragraph 34; Staudinger/Seibl/ Fischinger/Hengstberger (2021), § 134, paragraph 20).*

(b) In the collective redundancy procedure, the employer also has the legal freedom required for the application of Paragraph 134 of the BGB *(see, in that respect, Staudinger/Seibl/Fischinger/Hengstberger (2021), § 134, paragraph 10 et seq.; MüKoBGB/Armbrüster, 9th ed., § 134, paragraph 9 et seq.)*. Paragraph 17 of the KSchG does not limit the possibility of dismissal as such, but leaves the employer's freedom to take business decisions and thus shape legal transactions unaffected *(see, as regards Paragraph 17(2) of the KSchG, judgment of the Bundesarbeitsgericht of 8 November 2022 – 6 AZR 16/22 – paragraph 47).* Likewise, Paragraph 17 of the KSchG does not lay down a formal requirement for dismissal, as is the case, for example, in Paragraph 623 of BGB which requires the dismissal to be in writing. Paragraph 17(1) and (3) of the KSchG obliges the employer only to provide the employment service with information prior to the dismissal to enable it efficiently to seek solutions to the problems raised the projected collective redundancies within the period specified in Paragraph 18 of

the KSchG *(see judgment of the Bundesarbeitsgericht 13 June 2019 – 6 AZR 459/18 – paragraph 31, BAGE 167, 102; BT-Drs. 8/1041, p. 5).*

(c) However, in the view of the Sixth Chamber, Paragraph 17(1) and (3) of the KSchG does not meet the requirements relating to a statutory prohibition. In that respect, the requisite **prohibitory nature** of the employer's obligations in the notification procedure is lacking.

(aa) Paragraph 134 of the BGB gives expression to the principles underlying the BGB concerning the relationship between statutory and contractual rules. The provision is intended to set out the legal consequences which arise with regard to the effectiveness of legal acts in the case of prohibitions which are not exhaustive with regard to the civil-law consequences of an infringement thereof. It is intended to give effect to such prohibitions by transforming assessments from other areas of law into the law on legal acts. In that respect, the provision has a supplementary nature *(see MüKoBGB/Armbrüster, 9th ed., § 134, paragraph 1; Staudinger/Seibl/Fischinger/Hengstberger (2021), § 134, paragraph 1).*

(bb) On the basis on that objective of Paragraph 134 of the BGB, a law has prohibitory character if it either prohibits the **content** of certain legal acts or the **performance** thereof under certain, prohibited circumstances and therefore seeks to prevent that act *(see judgment of the Bundesgerichtshof (Federal Court of Justice) of 1 June 1966 – VIII ZR 65/64 – on grounds I and 2, BGHZ 46, 24; Staudinger/Seibl/Fischinger/Hengstberger (2021), § 134 paragraph 3 et seq. and 49).* Whether or not that is the case must be determined by interpretation based on the purpose of the provision. The decisive factor is whether the legislature disapproves of the content of the legal act in the interests of third parties or the general public and therefore seeks to prevent its existence or deprive legal acts which have been carried out unlawfully of their successful performance *(Soergel/Meier, 14th ed., § 134, paragraphs 25 et seq. and 32 et seq.).* Ultimately, it depends on whether the legislature seeks to deny the unlawful legal act its intended success (*see Staudinger/Seibl/Fischinger/Hengstberger (2021), § 134, paragraphs 3, 5, and 49; see also MüKoBGB/Armbrüster, 9th ed., § 134, paragraphs 58 et seq. and 66).*

(cc) It was the intention of the authors of the Kündigungsschutzgesetz that the legal effect of the dismissal should not be affected even in the event of infringements of the notification obligation under Paragraph 17(1) and (3) of the KSchG. The legal success of the dismissal is not to be called into question, but the employment relationship is to be terminated on the expiry of the notice period regardless of such an infringement. In the notification procedure, the employer is only subject to administrative-procedural obligations outside the employment relationship, which, in the view of the Sixth Chamber, can and should have no bearing on the effectiveness of the dismissal even if they are fulfilled incorrectly and therefore rule out classification under Paragraph 17(1) and (3) of the KSchG as a statutory prohibition *(see Moll RdA 2021, 49, 55 et seq.; Sagan, Anm. EuZW 2023, 859, 862).*

(1) The notification procedure must be initiated before the notice of dismissal is received by issuing the notification. However, it does not serve to prevent the dismissal because the employment service cannot and should not influence the employer's decision-making process *(see judgment of the Bundesarbeitsgericht of 13 June 2019 – 6 AZR 459/18 – paragraph 28, BAGE 167, 102)*. Rather, the action that it takes is linked to such a decision *(judgment of the Bundesarbeitsgericht of 13 February 2020 – 6 AZR 146/19 – paragraph 71, BAGE 169, 362; see also paragraph 13)* and precisely requires an effective dismissal. The notification is intended to enable the employment service to prepare for the socio-economic burden on the local labour market resulting from the effective dismissal of a large number of employees. It therefore pursues an objective relating only to labour market policy *(judgment of the Bundesarbeitsgericht of 11 March 2023 – 6 AZR 267/22 – paragraph 40; BT-Drs. 8/1041, p. 5)*.

(2) It also follows from that legislative approach that, according to the unambiguous and uninterpretable intention of the national legislature, the collective redundancy notification does not serve to protect the individual employee affected by a collective redundancy. It does not replace individual efforts to find employment and does not even specifically prepare them. It is merely a 'preliminary measure' *(Schubert/Schmitt JbArbR, Vol. 599, p. 81, 102)*. In that respect, it also has an indirect effect of protecting individuals *(judgment of the Bundesarbeitsgericht of 13 February 2020 – 6 AZR 146/19 – paragraph 103, BAGE 169, 362)*. However, that effect is merely a reflex and not the purpose of the notification procedure *(Gulbins SPA 2023, 93; Boemke jurisPR-ArbR 25/2013, note 2 under C III 3; Holler NZA 2019, 291, 292)*. The finding of employment for the individual employees affected by the collective redundancy is to be carried out by the agency of residence independently of the notification procedure. Both procedures take place as part of different structures and can end at different times.

(d) Even if Paragraph 17(1) and (3) of the KSchG could be classified as a statutory prohibition, the Sixth Chamber takes the view that Paragraph 17(1) and (3) of the KSchG does not, according to its purpose, require the nullity of dismissals made in breach of the obligations on the employer in the notification procedure. On the contrary, that purpose precludes the nullity requirement laid down in Paragraph 134 of the BGB.

(aa) Paragraph 134 of BGB only contains a rule of interpretation with regard to the consequences as to the penalties for infringements of statutory prohibitions. It must therefore be examined in each case whether, according to its purpose, the statutory prohibition seeks to penalise infringements thereof without exception through nullity of the legal act or whether it does not require nullity in that respect, but instead allows another penalty to suffice *(see judgment of the Bundesgerichtshof of 24 September 2014 – VIII ZR 350/13 – paragraph 14; of 4 April 1966 – VIII ZR 20/64 – at point 4 of the grounds, BGHZ 45, 322; see, as regards obligations of a continuous nature, judgment of the Bundesgerichtshof of 7 December 2010 – KZR 71/08 – paragraph 57; Mugdan, Die gesamten*

Materialien zum BGB, Vol. I, p. 969; Staudinger/Seibl/Fischinger/Hengstberger (2021), § 134, paragraph 88; MüKoBGB/Armbrüster, 9th ed., § 134, paragraph 177).

(bb) Paragraph 17(1) and (3) of the KSchG is not intended to influence either the possibility of dismissal as such or the employer's decision on how many employees to dismiss and when, or even to prohibit dismissals subject to notification. Rather, as stated above, that provision concerns only the employer's obligations relating to employment **promotion** law, but not its obligations under labour law. It is a provision with a purely regulatory function, which raises no objections to dismissal as a legal act and merely establishes procedural obligations of a labour market policy nature in the run-up to it. Therefore, in the view of the Sixth Chamber, it does not require nullity of the dismissal as such, which is not affected by that set of obligations, as a penalty for infringements of the obligations laid down therein, but merely a **penalty under employment promotion law** *(see, as regards regulatory provisions, judgment of the Bundesarbeitsgericht of 9 July 1986 – 5 AZR 385/83 – at III 1 of the grounds; judgment of the Bundesgerichtshof of 30 April 1992 – III ZR 151/91 – at II 3 a of the grounds, BGHZ 118, 142; of 27 September 1989 – VIII ZR 57/89 – at II 2 c of the grounds, BGHZ 108, 364; BeckOK BGB/Wendtland, § 134 Stand 1. November 2023, paragraph 13; Soergel/Meier, 14th ed., § 134, paragraph 39; MüKoBGB/Armbrüster, 9th ed., § 134, paragraph 58 et seq.; Staudinger/Seibl/Fischinger/ Hengstberger (2021), § 134, paragraph 109 et seq.)*. In contrast, the nullity of the dismissal previously assumed by the Bundesarbeitsgericht as a penalty, disregarding the intention of Paragraph 17 of the KSchG, leads to an encroachment on the employer's freedom to take business decisions. Such interference goes beyond what is necessary to attain the objective of the notification procedure, which is to mitigate the socio-economic effects of collective redundancies. Therefore, contrary to the previous view of the Sixth Chamber, there is no scope for the **labour-law penalty** of nullity of the dismissal announced in breach of the obligations under employment promotion law arising from Paragraph 17(1) and (3) of the KSchG (*see, as regards the fifth sentence of Paragraph 17(3) of the KSchG, judgment of the Bundesarbeitsgericht of 19 May 2022 – 2 AZR 467/21 – paragraph 17).*

4 In the view of the Sixth Chamber, nullity of the dismissal as a consequence of infringements of the obligations on the employer pursuant to Paragraph 17(1) and (3) of the KSchG cannot be inferred from Paragraph 18(1) of the KSchG either. It is true that dismissals prior to the expiry of the standstill period only 'take effect' with the consent of the employment service. However, that does not constitute a requirement to obtain authorisation from an authority.

(a) If the legislature stipulates that a unilateral legal act requires authorisation, the authorisation is a legal requirement for effectiveness. Without the 'derogation' from the existing prohibition, the legal act is not permitted and is in principle null and void if it is nevertheless carried out. Recourse to Paragraph 134 of the BGB is not necessary for that legal consequence *(see judgment of the Bundesgerichtshof of 28 October 1953 – VI ZR 217/52 – at IV 1 of the grounds, BGHZ 11, 27;*

Staudinger/Seibl/Fischinger/Hengstberger (2021), § 134, paragraph 195; MüKoBGB/ Armbrüster, 9th ed., § 134, paragraph 14; Soergel/Meier 14th ed., § 134, paragraph 79; BeckOK BGB/Wendtland, § 134 Stand 1. November 2023, paragraph 14).

(b) Collective redundancies – unlike dismissals of severely disabled persons or pregnant women, for example – are not subject to State approval, despite the unclear wording in Paragraph 18(1) of the KSchG. The notification procedure does not govern 'whether' but only 'how' dismissals are to be carried out. It only requires that a specific procedure be complied with, but not that authorisation for the dismissal be obtained by the employment service. The standstill period notification is not a declaration of approval for dismissals, which, moreover, must have long taken place by that time. The employment service therefore does not decide, by standstill period notification, whether dismissals falling under Paragraph 17 of KSchG are effective from the point of view of collective redundancy law *(see, however, Moll Anm. AP KSchG 1969, § 17 Nr. 40, under II 2 a)*, nor confirm the effectiveness of the termination of the employment relationship *(see, however, Moll RdA 2021, 49, 57)*. It only decides on the duration of the standstill period, but not on the effectiveness of the collective redundancy notification and thus *a fortiori* not on the effectiveness of the dismissal *(see judgment of the Bundesarbeitsgericht of 28 June 2012 – 6 AZR 780/10 – paragraphs 73, 75, BAGE 142, 202)*.

5 In the view of the Sixth Chamber, an interpretation of Paragraph 18 of the KSchG in conformity with EU law as meaning that the dismissal is null and void if no proper collective redundancy notification has been made *(see, however, to that effect, presumably Moll RdA 2021, 49, 56 et seq.)* is neither necessary nor possible.

(a) First, as stated above *(paragraph 8)*, Directive 98/59/EC precisely does not require the penalty that the dismissals made in breach of the procedural provisions laid down in Paragraph 17(1) and (3) of the KSchG be null and void.

(b) Second, Article 4(1) of Directive 98/59/EC also provides that the projected collective redundancies can 'take effect' not earlier than 30 days after the collective redundancy notification. However, it is obvious in the sense of an *acte éclairé* that no penalty can be inferred from Article 4(1) of Directive 98/59/EC in any event. According to its history, Directive 98/59/EC precisely does not provide for a penalty. That is to be created solely by the Member States.

(c) Thirdly – and crucially from the point of view of the Sixth Chamber – nullity of the dismissal as a legal consequence of errors in the notification procedure, irrespective of whether that is the only penalty under national law which satisfies the principle of *effet utile*, infringes the **principle of proportionality**, which the Member States must also observe when setting penalties. Therefore, in the view of the Sixth Chamber, the penalty of 'nullity of the dismissal' cannot be inferred from any other rule of German law by way of an

interpretation in conformity with EU law. However, neither the Sixth nor the Second Chamber of the Bundesarbeitsgericht have paid sufficient attention to the requirement of proportionality in their previous case-law, but have instead focused exclusively on the requirement of *effet utile*.

(aa) It is true that the requirement of proportionality in relation to the setting of penalties by the Member States is not expressly enshrined in Directive 98/59/EC, unlike, for example, in Articles 12(6) and 20 of Directive 2014/67/EU (OJ 2014 L 159, p. 11) *(see, as regards the requirement of proportionality of penalties for infringements of the directive before the entry into force of the Charter of Fundamental Rights, judgment of the Court of Justice of 8 June 1994 – C-383/92 – [Commission v United Kingdom], paragraph 40)*. Nevertheless, that general principle laid down in the second sentence of Article 52(1) of the Charter of Fundamental Rights is also applicable when applying Directive 98/59/EC and determining the penalties to be set for infringements of the obligations arising therefrom *(see, as regards the freedom of establishment guaranteed by Articles 49 and 63 TFEU, judgment of the Court of Justice of 21 December 2016 – C-201/15 – [AGET Iraklis], paragraph 70; Schubert/Schmitt JbArbR, Vol. 59, p. 81 and 83 et seq.)*. This follows from the first sentence of 51(1) of the Charter of Fundamental Rights. The Member States are bound by the Charter when transposing directives *(judgment of the Court of Justice of 17 April 2018 – C-414/16 – [Egenberger], paragraph 49)*. Therefore, the courts of the Member States must also observe the Charter of Fundamental Rights when interpreting and applying EU and national law which serves to implement EU law *(see, as regards the application of a regulation, judgment of the Court of Justice of 25 May 2016 – C-559/14 – [Meroni], paragraph 44)*, even though there is discretion in implementation *(judgment of the Court of Justice of 9 March 2017 – C-406/15 – [Milkova], paragraph 51 et seq.; Lenaerts/Rüth RdA 2022, 273, 277)*. That is also true of the setting of penalties for infringements of obligations in the collective redundancy procedure. That fulfils an obligation resulting from EU law and therefore the Charter of Fundamental Rights and thus the second sentence of Article 52(1) thereof applies *(see judgment of the Court of Justice of 19 November 2019 – C-609/17 and others – [TSN], paragraph 50 et seq.; Lenaerts/Rüth, loc. cit.)*.

(bb) Accordingly, the penalties to be fixed by the German legislature or, on account of its inactivity, the labour courts, for errors made by the employer in the collective redundancy procedure must be appropriate and necessary to achieve the objectives pursued by the implementing provision and must not be disproportionate to them. A penalty is not necessary if the severity thereof no longer corresponds to the seriousness of the envisaged infringement *(see order of the Court of Justice of 19 December 2019 – C-645/18 – [Bezirkshauptmannschaft Hartberg-Fürstenfeld], paragraph 30 et seq.; and judgment of the Court of Justice of 12 September 2019 – C-64/18 and others – [Maksimovic] paragraph 39, with further references)*.

(cc) In the view of the Sixth Chamber, nullity of the dismissal is **not a suitable** penalty for infringements of the employer's obligations under Paragraph 17(1) and (3) of the KSchG because that penalty cannot promote the purpose pursued by the obligation to issue a collective redundancy notification. It mixes the field of individual employment contracts with that of employment promotion law and labour market policy.

(1) German law on protection against unfair dismissal in principle penalises only errors which, if made, should and could have prevented the dismissal specifically announced. This applies in particular to unfair dismissals and particular protection against unfair dismissal. Therefore, dismissals are effective, for example, where errors were made in the application of social criteria, but they did not affect the outcome of that application, that is to say the error in the application was not a cause *(settled case-law, most recently – judgment of the Bundesarbeitsgericht of 8 December 2022 – 6 AZR 31/22 – paragraph 71)*. Similarly, dismissals are not ineffective, for example, if the corporate integration management required under Paragraph 167(2) of SGB IX (Book IX of the Social Code) was not carried out, but the employer can demonstrate that that procedure would have objectively served no purpose *(see judgment of the Bundesarbeitsgericht of 15 December 2022 – 2 AZR 162/22 – paragraph 20)*.

The obligations which the employer has towards the employment service in the notification procedure are not designed to prevent the dismissals. Rather, they are intended to mitigate the – inevitable – socio-economic effects of the projected (effective) dismissals on the local labour market *(see paragraph 18)*. However, that labour market policy objective is not promoted by the penalty of nullity of the dismissals. After recognising the error, the employer is merely compelled to re-announce the dismissals necessary to implement its business decision. That does not reduce the burden on the local labour market, but merely delays it.

(2) In addition, the penalty of nullity of the dismissal in the event of errors by the employer in the notification procedure, which in substance forms part of employment promotion law and thus social law, is not suitable because it is set at the individual employment contract level. This constitutes a system breakdown. In the view of the Sixth Chamber, only penalties which can be attributed to employment promotion law can be suitable.

(dd) However, even if suitability were assumed, nullity of the dismissal as a penalty for errors in the notification procedure would **not be appropriate** in the view of the Sixth Chamber and thus not proportionate in the strict sense. The burden resulting from that penalty is not reasonably proportionate to the ensuing advantages for the implementation of the labour market policy objective of the obligations on the employer at that stage of the collective dismissal procedure.

(1) Contrary to the intention of Paragraph 17 of the KSchG *(see paragraph 13)* and Directive 98/59/EC *(judgment of the Court of Justice of 21 December 2016 – C-201/15 – [AGET Iraklis], paragraph 31)*, the penalty of nullity of the dismissal

developed by case-law interferes profoundly with the freedom to take business decisions. The employer is ultimately prohibited from implementing the projected dismissals at the desired time, even though that is precisely not the aim of the obligations on the employer in the notification procedure. Errors in the notification procedure are thus penalised more severely than other errors in German law on protection against unfair dismissal.

(2) In contrast, the nullity of dismissals which are made in breach of the obligations under Paragraph 17(1) and (3) of the KSchG does remove the burden on the local labour market resulting from collective redundancies. However, that normally only leads to a delay in that burden because the employer is compelled to repeat the redundancies necessary to implement its business decision *(see paragraph 34).*

(3) Looking at the entirety of the interests to be taken into consideration, the disadvantages for the affected employers caused by the declaration of nullity of the dismissal are not reasonably proportionate to the advantages thereby gained for the achievement of the labour market policy objectives which the legislature pursues by the notification obligation. The severity of that penalty no longer corresponds to the seriousness of the envisaged offence and is therefore disproportionate, in the view of the Sixth Chamber *(see Schubert/Schmitt JbArbR, Vol. 59, p. 81, 96, albeit with a different opinion in the case of a complete failure to issue notification).*

(ee) In the view of the Sixth Chamber, that evaluation result cannot be countered by arguing that, according to the previous case-law of the Sixth and Second Chambers of the Bundesarbeitsgericht, not all infringements of the obligations under Paragraph 17(1) and (3) of the KSchG render the dismissal null and void. On the contrary, that case-law, for its part, establishes an inconsistency in the legal consequence of nullity of the dismissal in the event of errors in the notification procedure because the differentiations identified are not strict. The Sixth Chamber considers that the required strictness can only be achieved by ensuring that no conceivable errors in the notification procedure render the dismissal null and void.

(1) However, the Sixth and Second Chambers have developed a very **differentiated system of legal consequences and penalties** with regard to possible errors in the notification procedure.

(a) If **no collective dismissal notification** is issued at all, that always results in the dismissal being null and void (*judgment of the Bundesarbeitsgericht of 19 May 2022 – 2AZR 467/21 – paragraph 13; and of 20 January 2016 – 6 AZR 601/14 – paragraph 18, BAGE 154, 53).*

(b) If the employer makes errors in connection with the inclusion of the works council in the notification procedure under the **second and third sentences** of Paragraph 17(3) of the KSchG, the dismissal is also null and void *(judgment of the Bundesarbeitsgericht of 14 May 2020-6 AZR 235/19 – paragraph 135 et seq.,*

BAGE 170, 244; and of 22 November 2012 – 2 AZR 371/11 – paragraph 42 et seq., BAGE 144, 47).

(c) Errors in the information which 'must' be provided within the meaning of the **fourth sentence** of Paragraph 17(3) of KSchG also render the dismissal null and void *(most recently judgment of the Bundesarbeitsgericht 131 February 2020 – 6 AZR 146/19 – paragraph 92 et seq., BAGE 169, 362).*

(d) By contrast, errors in the information which 'should' be provided within the meaning of the **fifth sentence** of Paragraph 17(3) of the KSchG do not result in the dismissal being null and void. That applies both in the event of their complete absence *(judgment of the Bundesarbeitsgericht of 19 May 2022 – 2 AZR 467/21 – paragraph 12 et seq.; and of 19 May 2022 – 2 AZR 424/21 – paragraph 11 et seq.)* and in the event of substantively incorrect or insufficient information *(judgment of the Bundesarbeitsgericht of 11 May 2023 – 6 AZR 267/22 – paragraph 41).*

(e) If the employer does not forward to the works council a copy of the notification submitted to the employment agency contrary to the **sixth sentence** of Paragraph 17(3) of the KSchG, that does not affect the effectiveness of the dismissal *(judgment of the Bundesgerichtshof of 8 November 2022 – 6 AZR 15/22 – paragraph 79 et seq.; and of 8 November 2022 – 6 AZR 16/22 – paragraph 74 et seq.).*

(f) The only issue that remains unclear is the consequences of an infringement of the employer's obligation under the first sentence of Paragraph 17(3) of the KSchG to forward a copy of the notification to the works council to the Employment Agency at the same time as the notification *(order for reference from the Bundesgerichtshof of 27 January 2022 – 6 AZR 155/21 (A) –; see, in that respect, judgment of the Court of Justice of 13 July 2023 – C-134/22 – [G GmbH]).*

(2) However, in the view of the Sixth Chamber, that system of penalties developed by the case-law does not fit in harmoniously with the labour market policy purpose of the notification procedure *(paragraph 18 et seq.).*

(a) In the view of the Sixth Chamber, the different treatment of errors in relation to information which must and should be provided is not strict. It is not possible to see why, on the one hand, errors in the information which should be provided do not render the dismissal null and void in accordance with the intention of the legislature, as identified by the Second Chamber, even though precisely that information is of considerable importance for the preparation of the employment service for the socio-economic burdens on the local labour market resulting from the projected collective redundancies, but, on the other hand, errors in the information which must be provided always result in nullity of the dismissal, even though in any event the information provided pursuant to the first sentence of Paragraph 17(2), point 1 (reasons for dismissal), point 5 (application of the social

criteria) and point 6 (calculation of severance pay) of the KSchG is irrelevant to the tasks of the employment service. Nor it is possible to understand why, for the labour market policy purposes of the notification procedure, information which should be provided on gender, age and occupation should be less relevant than, for example, the information which must be provided pursuant to the fourth sentence of Paragraph 17(3) of the KSchG.

(b) There is also a lack of consistency in the fact that the inadequate notification of the works council's view of the necessity of the notified collective redundancies, which is at best secondary to the employment service's knowledge of the expected socio-economic burden on the labour market and dealing with it, results in nullity of the dismissal on account of the classification of the second and third sentences of Paragraph 17(3) of the KSchG as a statutory prohibition by the Sixth and Second Chamber, whereas inadequate knowledge of the relevant information which should be provided in that respect is irrelevant to the validity of the dismissal.

II. Consultation procedure

For the sake of completeness, the Sixth Chamber points out that, notwithstanding the above concerns about the current system of penalties for errors made by the employer in the notification procedure, it sees no reason to question the penalty for errors in the consultation procedure established by the case-law of the Bundesarbeitsgericht.

1. According to the consistent case-law of the Sixth Chamber *(see most recently judgment of the Bundesarbeitsgericht of 13 June 2019 – 6 AZR 459/18 – paragraph 39, BAGE /67, /02)* and Second Chamber *(since judgment of the Bundesarbeitsgericht of 21 March 2013 – 2 AZR 60/12 – paragraph 19 et seq., BAGE 144, 366)* of the Bundesarbeitsgericht, errors in the consultation procedure result in nullity of the dismissal pursuant to Paragraph 134 of the BGB.

2. That penalty clearly complies with the principle of effectiveness and, in the view of the Sixth Chamber, is required by the principle of equivalence. The consultation procedure lays down a collective right to obtain information and is intended, inter alia, to enable the works council to submit constructive proposals to the employer in order avoid collective redundancies or reduce the number of workers affected *(judgment of the Bundesarbeitsgericht of 13 June 2019 – 6 AZR 459//8 – paragraph 27, BAGE 167, 102; see, as regards Directive 98/59/EC, judgment of the Court of Justice of 13 July 2023 – C-134/22 – [G GmbH], paragraph 37 et seq.; and of 10 September 2009 – C-44/08 – [Akavan Erityisalojen Keskusliitto AEK and Others], paragraph 51, 64)*. Unlike the notification procedure, works council influence on the employer's decision-making is therefore intended, as is the case with Paragraph 102 of the Betriebsverfassungsgesetz (Law on industrial relations; 'BetrVG'). The penalty for errors in the consultation procedure can therefore not fall short of the penalty of nullity of the dismissal laid down in the third sentence of Paragraph 102(1) of

the BetrVG. In the view of the Sixth Chamber, the third sentence of Paragraph 102(1) of the BetrVG requires the penalties to run concurrently. Paragraph 17(2) of the KSchG is, notwithstanding the fact that it is enshrined in law against unfair dismissal, in substantive terms a procedure shaped by the law on industrial relations *(judgment of the Bundesarbeitsgericht of 22 September 2016 – 2 AZR 276/16 – paragraph 37, BAGE 157, 1).* According to general principles, the purpose of participation rights under the law on industrial relations also includes, in any event, protection for workers, and therefore the consultation procedure, like the consultation of the works council pursuant to Paragraph 102 of the BetrVG, has an individual protection function *(Moll/ Katerndahl Anm. AP KSchG 1969 § 17, No 48 under I 1 b, with further references; another view in Schubert/Schmitt JbArbR, Vol. 59, p. 81, 88 et seq.).*

3. In the view of the Sixth Chamber, the consequence of nullity in the event of errors in the consultation procedure is also in keeping with the requirement relating to proportionality. It promotes the purpose pursued by the consultation procedure and is in keeping with the principle that errors in the implementation of participation procedures to protect individuals prior to the dismissal decision, which are at least potentially a cause for a decision on the application of criteria, result in nullity of the dismissal.

4. At the same time, it follows from the foregoing that Paragraph 17(2) of the KSchG, unlike Paragraph 17(1) and (3) thereof, is a statutory prohibition within the meaning of Paragraph 134 of the BGB *(see, in that respect, paragraph 15 et seq.).* The legislature clearly intends to prevent dismissals which have taken place without regard to the works council's influence on the employer's decision-making process, which is provided for in law. Infringements of Paragraph 17(2) of the KSchG affect the employer's obligations under labour law. That provision therefore does not have a purely regulatory function *(see, in that respect, paragraph 22).* Rather, it demands a penalty under labour law in the form of nullity of the dismissal.

III. Relevance to the decision

On the basis of the considerations set out above, the Sixth Chamber of the Bundesarbeitsgericht intends to amend its case-law on the legal consequences of errors in the notification procedure. Directive 98/59/EC does not prohibit such a change in penalties by the Member States *(judgment of the Court of Justice of 17 March 2021 – C-652/19 – [Consulmarketing], paragraph 44 et seq.).* However, by deciding that failure to issue a collective redundancy notification does not result in nullity of the dismissal, the Chamber deviates, in a manner which is relevant to this decision, from the decision of the Second Chamber of the Bundesarbeitsgericht of 22 November 2012 (– 2 AZR 371/11 – BAGE 144, 47), according to which the dismissal is rendered null and void if no effective collective redundancy notification has been issued when it is received (paragraph 37, 42 et seq., 48). It is therefore necessary to ask the Second

Chamber, pursuant to the first sentence of Paragraph 45(3) of the ArbGG, whether it adheres to the abovementioned legal opinion. …

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