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

Request for a preliminary ruling

Date lodged:

20 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)

…

Bundesarbeitsgericht

Delivered on

1 February 2024

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 present case has been given a fictitious name which does not correspond to the real name of any of the parties to the proceedings.

[v]

DF

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

the Second Chamber of the Bundesarbeitsgericht ordered as follows following the hearing on 1 February 2024 …:

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

1. Must Article 4(1) of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (‘Directive 98/59/EC’) be interpreted as meaning that a dismissal as part of a collective redundancy subject to compulsory notification can terminate the employment relationship of an employee concerned only once the standstill period has expired?

If the answer to Question 1 is in the affirmative:

2. Does the expiry of the standstill period not only require a collective redundancy notification, but must it also satisfy the conditions laid down in the fourth subparagraph of Article 3(1) of Directive 98/59/EC?

3. Can an employer who has announced dismissals subject to compulsory notification without a (proper) collective redundancy notification give such notification at a later stage with the consequence that, after the expiry of the standstill period, the employment relationship of the employees concerned can be terminated by the dismissals previously announced?

If the answers to Questions 1 and 2 are in the affirmative:

4. Is it compatible with Article 6 of Directive 98/59/EC for national law to leave it to the competent authority to determine, in a manner which is incontestable for the employee and binding on the labour courts, when the standstill period expires in a particular case, or must the employee necessarily be able to bring an action before a court for review of the accuracy of the authority’s determination?

II. … [Staying of the proceedings]

Grounds

A. Subject matter of the main proceedings

1 I. The parties disagree as to the termination of their employment relationship by ordinary dismissal, which the defendant announced in December 2020 with effect from 31 March 2021. It had not issued a collective redundancy notification as required by Paragraph 17(1) of the Kündigungsschutzgesetz (Law on protection against unfair dismissal; 'KSchG'). It also failed to do so at a later stage prior to 31 March 2021. According to the organisation chart of the Bundesarbeitsgericht, the Sixth Chamber thereof has jurisdiction to determine the dispute and would like to dismiss the applicant's action for unfair dismissal in its entirety. The Sixth Chamber considers that it is prevented from doing so – as it showed in detail in an order of 14 December 2023 (- *6 AZR 157/22 [B]* -) – for reasons of national procedural law.

2 II. The Second Chamber of the Bundesarbeitsgericht has previously considered that a dismissal announced without the necessary prior collective redundancy notification is void (ineffective) and therefore cannot terminate the employment relationship. In contrast, the Sixth Chamber would like to take the view in future that the absence or incorrectness of a collective redundancy notification required under EU or national law has no legal bearing on the decision to terminate an employment relationship for which notification had been given. Rather, both the absence of a collective redundancy notification and the incorrectness thereof should be completely inconsequential. It is for the German legislature to lay down a 'penalty' for errors in the notification procedure for collective redundancies. That should not lie in the area of labour law, but must lie solely in the area of employment promotion law *(judgment of the Bundesarbeitsgericht, 14 December 2023 – 6 AZR 157/22 [B] – paragraphs 7, 22, 32, and above all paragraph 35).*

3 III. National procedural law provides for a special procedure where there are differences of opinion between chambers of the Bundesarbeitsgericht. Under Paragraph 45(2) and (3) of the Arbeitsgerichtsgesetz (Law on labour courts; 'ArbGG') a chamber of the Bundesarbeitsgericht may deviate from the case-law of another chamber only if the latter has relinquished its view in response to a corresponding question or – failing that – the Grand Chamber of the Bundesarbeitsgericht has adopted a decision on the correct answer to the underlying question. By order of 14 December 2023 *(- 6 AZR 157/22 [B] -)*, the Sixth Chamber therefore submitted the following question to the Second Chamber pursuant to the first sentence of Paragraph 45(3) of the 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 KSchG when it is announced, adhered to?'

B. Relevant national law

4 I. Kündigungsschutzgesetz in the version published on 25 August 1969 *(BGBl. I, p. 1317):*

‘Paragraph 17

Obligation to notify

(1) The employer is under an obligation to notify the Employment Agency (Agentur für Arbeit) before it makes redundant

1. more than 5 workers in establishments normally employing more than 20 and fewer than 60 workers,

2. 10% of the workers normally employed in the establishment, or more than 25 workers, in establishments normally employing at least 60 and fewer than 500 workers,

3. at least 30 workers in establishments normally employing at least 500 workers

…

over a period of 30 calendar days.

Paragraph 18

Standstill period

(1) Redundancies which must be notified under Paragraph 17 may take effect less than one month after the Employment Agency has received the notification only with the latter’s consent; consent may be given retroactively with effect from the time at which the application was filed.

(2) In certain cases, the Employment Agency may decide that the redundancies shall take effect not earlier than at most two months after receipt of the notification.

…’

5 II. Bürgerliches Gesetzbuch in the version published on 2 January 2002 *(BGBl. I, p. 42, corrigendum, p. 2909, and BGBl. 2003 I, p. 738)*:

‘Paragraph 134

Statutory prohibition

Any legal act contrary to a statutory prohibition shall be void except as otherwise provided by law.

Paragraph 615

Remuneration in the case of default in acceptance and business risk

If the person entitled to services is in default in accepting the services, the party owing the services may then demand the agreed remuneration for the services not rendered as the result of the default without being obliged to provide subsequent service.

…’

6 III. Zehntes Buch Sozialgesetzbuch (Book X of the Social Code) – Social administration procedures and social data protection – in the version published on 18 January 2001 *(BGBl. I, p. 130):*

‘Paragraph 20

Principle of inquiry

(1) The authority shall inquire of its own motion into the facts. It shall determine the nature and scope of the investigations; it shall not be bound by the arguments and requests for evidence of the interested persons or parties.

(2) The authority shall take account of all the facts relevant to the particular case, including those favourable to the interested persons or parties.

…’

C. Relevant provisions of EU law

7 In the view of the Second Chamber of the Bundesarbeitsgericht, the following provisions are relevant secondary EU law: Articles 3(1), 4(1) to (3) and 6 of Directive 98/59/EC.

D. Need for a ruling from the Court of Justice and analysis of the questions referred

I. Need for a ruling from the Court of Justice

8 1. For the reasons set out below, the Second Chamber of the Bundesarbeitsgericht is unable to answer the question referred to it by the Sixth Chamber without a procedure being conducted pursuant to Article 267 TFEU.

9 (a) In agreement with the Sixth Chamber, the Second Chamber considers it possible that the nullity of a dismissal announced without a proper collective redundancy notification pursuant to Paragraph 134 of the BGB constitutes a disproportionate legal consequence – also having regard to the requirements of EU law. The Sixth Chamber set out the supporting reasons in its abovementioned order of 14 December 2023 *(- 6 AZR 157/22 [B] – paragraph 11 et seq., in particular paragraph 26 et seq., on interpretation in conformity with EU law)*, to which reference is made in order to avoid repetition.

10 (b) However, this continues to be assessed differently in German academic writings, at least in the case of a complete failure to notify *(Schubert/Schmitt JbArbR, Vol. 59, p. 81, 96)*. Furthermore, the Sixth Chamber's question is not limited to resolving the issue regarding the nullity of the dismissal resulting from Paragraph 134 of the BGB. The Second Chamber considers that the view set out in the order referring the question, that the absence or incorrectness of a collective redundancy notification required under EU or national law has no legal bearing on the notified termination of the employment relationship for which notification has been given, is incompatible with EU law. Rather, the Second Chamber believes that a distinction must be drawn. The decisive factor is whether the employer has completely failed to issue a collective redundancy notification required under EU law or has in fact done so.

11 (aa) If the employer fails to issue a collective redundancy notification, the Employment Agency responsible for employment services under national law is not aware of the impending redundancies. Accordingly, it is not in a position to initiate the necessary preparations for efforts to find employment for the employees affected by the collective redundancy. In this case of a complete lack of a collective redundancy notification, the Second Chamber would like rule that the legal effects of the dismissal announced by the employer take effect only when the collective redundancy notification has been issued retrospectively, that is to say has been given at a later stage, and the Employment Agency has what it considers to be the necessary preparation time for finding employment. That period is determined in national law pursuant to Paragraph 18(1) and (2) of the KSchG ('the standstill period'). The employment relationship for which notification has been given continues to exist with its previous rights and obligations until the standstill period expires. The legal effects of the dismissal do not enter into force until the end of the one-month period laid down in Paragraph 18(1) of the KSchG or the period set by the Employment Agency pursuant to Paragraph 18(2) of the KSchG. In any event, the employer must continue to pay the employee the agreed remuneration until the expiry of the standstill period in accordance with Paragraph 615 of the BGB, even if it does not employ him or her. This applies even if the employment relationship could have ended at an earlier date due to a shorter notification period. If, on the other hand, the requirements laid down in Article 4 of Directive 98/59/EC did not allow the employer to issue a collective redundancy notification, which it initially failed to give, after receipt of the notification of dismissal and thus eliminate the standstill period, that would be tantamount to the dismissal being rendered void (invalid). In

that case, the Second Chamber would have to answer the Sixth Chamber's question by stating that it – the Second Chamber – is adhering to its previous case-law.

12 (bb) If the projected collective redundancies are notified to the Employment Agency, the employer has initiated an administrative procedure in which the completeness of the collective redundancy notification is checked by the authority. This is subject to the principle of the investigation of the facts by an authority of its own motion *(Paragraph 20 of SGB X)*, that is to say the Employment Agency is obliged to work towards supplementation of incomplete information by the employer. Under national procedural law, the Employment Agency alone decides whether the notification is in the proper form and the duration of the necessary preparation time for the forthcoming finding of employment. If the authority fixes the expiry of the standstill period *(Paragraph 18 (1) and (2) of the KSchG)* on a specific date, that decision is, in the view of the Second Chamber, incontestable for the employee and binding on the labour courts. In that case, the latter may not conclude on their own authority that the collective redundancy notification was 'actually' incorrect and therefore the standstill period has not (yet) started or expired.

13 2. Since Paragraphs 17 and 18 of the KSchG must be interpreted by the national courts in accordance with EU law, the prescriptive content of Articles 3(1), 4(1) to (3) and 6 of Directive 98/59/EC is relevant to the Second Chamber's answer to the Sixth Chamber's question of 14 December 2023. It is true that the Second Chamber considers that the existing decisions of the Court of Justice of the European Union support its interpretation of the relevant EU law. However, the Chamber does not consider that the strict requirements of an *acte clair* or *acte éclairé* are satisfied, and is therefore referring the above questions to Court of Justice.

II. Analysis of the first question

14 The Second Chamber – unlike the Sixth Chamber – construes Article 4(1) of Directive 98/59/EC as meaning that an employment relationship terminated in the course of a collective redundancy subject to notification under EU law cannot be ended before the expiry of the standstill period under Paragraph 18(1) and (2) of the KSchG. The effects of the dismissal are 'suspended' until it expires *(see opinion of Advocate General Tizzano of 30 September 2004 – C-188/03 – [Junk] paragraph 68)*. In that respect, the standstill period acts as a 'minimum notice period'. This is made clear by the second sentence of the first subparagraph of Article 4(1) of Directive 98/59/EC, under which any provisions governing individual rights with regard to notification of dismissal are to remain unaffected.

15 Contrary to the view of the Sixth Chamber, the Second Chamber considers that this consequence under labour law also constitutes the necessary and sufficient response under EU law to the absence or incorrectness of a collective redundancy notification. It ensures that the Employment Agency, as the competent authority,

has sufficient time to seek solutions to the problems raised by the projected collective redundancies *(see Article 4 (2) and (3) of Directive 98/59/EC)*. The employees concerned do not lose their 'old' employment relationships before the expiry of the standstill period and do not 'enter the labour market' until such time.

III. Analysis of the second question

16 The Second Chamber further construes Article 4(1) of Directive 98/59/EC as meaning that the standstill period laid down therein – and thus also that laid down in Paragraph 18(1) and (2) of the KSchG – can only start and thus expire if the required collective redundancy notification meets the requirements set out in the fourth subparagraph of Article 3(1) of Directive 98/59/EC. First, that is demonstrated by the comprehensive reference in Article 4(1) of Directive 98/59/EC to Article 3(1) thereof. Second, that is the only way to achieve the purpose of the collective redundancy notification described in the first question referred, which is to enable the authority, *on the basis of the required information*, to seek solutions to the problems raised by the projected collective redundancies *(see Article 4(2) and (3) Directive 98/59/EC)*.

IV. Analysis of the third question

17 1. The Second Chamber considers that a dismissal announced without the required (proper) collective redundancy notification does not have to be 'irremediably' void, that is to say ineffective. Rather, the purpose of the notification procedure is also fully achieved if the employer is able to issue a collective redundancy notification at a later stage – in accordance with the requirements set out in the fourth subparagraph of Article 3(1) of Directive 98/59/EC – and thus (retroactively) eliminate the standstill period. That does not require a new notification of dismissal. The fact that the standstill period only begins with the subsequent notification ensures that the competent authority always has the minimum period of time embodied in the standstill period before the employment relationship concerned is terminated in order to seek solutions to the problems raised by the collective redundancies on the basis of the necessary information *(see Article 4(2) and (3) of Directive 98/59/EC)*.

18 2. In the view of the Second Chamber, the decision of the Court of Justice of the European Union of 27 January 2005 in *Junk (- C-188/03 -)* does not preclude this. In that decision, the Court of Justice did not state a view on how the employer is to [act] where notifications of dismissal are given before a (proper) collective redundancy notification is issued. Rather, it merely found that dismissals are only possible 'without penalty' after they have been notified to the competent authority, that is to say at the immediate start of the standstill period – which is then often included in the applicable notification periods. By contrast, the Court of Justice has not held that dismissals announced without prior (proper) notification must be 'irremediably' void. That also seems improbably in the light of the provisions of the Directive 98/59/EC and the origin thereof *(judgment of the Bundesarbeitsgericht, 14 December 2023 – 6 ARR 157/22 [B] – paragraph 8)*.

Rightly, the 'penalty' for late issue of a (proper) collective redundancy notification can be, inter alia, that the legal effects of the notification of dismissal do not take effect temporarily and the employer must remunerate the employees concerned pursuant to Paragraph 615 of the BGB until the expiry of the standstill period and thus possibly beyond the expiry of the notification period, even if he or she has not actually employed them, despite the dismissal being effective in principle.

19 3. Merely by way of clarification, the Second Chamber notes – in this respect in line with the Sixth Chamber – that the possibility of taking action at a later stage does not extend to the consultation procedure pursuant to Article 2 of Directive 98/59/EC. If it was not carried out at all or was not carried out properly before the dismissals were announced, the dismissals are (and remain) void under Paragraph 134 of the BGB. That is because the consultation procedure – unlike the notification procedure – primarily serves to avoid dismissals. That purpose can no longer be achieved by subsequently carrying out consultations after the dismissals have been announced. It would not guarantee that the consultations between the employer and employee representatives to avoid redundancies would be open in terms of the outcome. It would be much more difficult for workers' representatives to achieve the 'withdrawal' of a redundancy that has been announced than to secure the abandonment of an announcement that is being contemplated *(judgment of the Court of Justice of 27 January 2005 – C-188/03 – [Junk] paragraph 44).*

V. Analysis of the fourth question

20 1. Based on the 'alternative' wording in Article 6 of Directive 98/59/EC and recital 12 thereof ('administrative and/or judicial procedures'), the Second Chamber considers that it is sufficient if the competent authority under national law alone examines a collective redundancy notification issued by the employer to establish whether or not it is proper and, if it is, determines the end of the standstill period in the specific case. The authority's determination as to the end of the standstill period is to be taken as binding by the labour courts in the context of a dispute between the employee and employer regarding the termination of the employment relationship. The employee cannot contest the authority's determination by means of judicial review. In the view of the Second Chamber, that follows from the purely labour market policy orientation of the notification procedure. Unlike the consultation procedure, it primarily protects the labour market and the competent authority. In contrast, the employee is affected only by default. He or she is to lose his or her 'old' employment relationship only after the competent authority has been able, on the basis of the necessary information, to seek solutions to the problems raised by the collective redundancies *(see Article 4(2) and (3) of Directive 98/59/EC)*. If the authority considers itself sufficiently informed in that regard, the employee and the courts must accept that fact.

21 2. In its decision of 5 October 2023 *(- C-496/22 – [Brink's Cash Solutions] paragraph 45)*, the Court stated that Article 6 of Directive 98/59/EC requires the Member States to ensure effective *judicial* protection for worker's representatives and/or workers. However, the Second Chamber considers that that requirement relates solely to the consultation procedure under Article 2 of Directive 98/59/EC, in which no authority participates, and which – unlike the notification procedure under Articles 3 and 4 of Directive 98/59/EC – directly serves the (collective) protection of the employees concerned in the sense of a possible avoidance of redundancies (see paragraph 19 above). Nor would a different interpretation be compatible with the 'alternative' wording of Article 6 and recital 12 of Directive 98/59/EC ('administrative and/or judicial procedures') as described above.

…