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# Relationship between time of notification of collective redundancies and time of notice of termination (GE)

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## Summary

The notice of collective redundancies required to be given to an employment agency pursuant to Section 17(1) of the German Protection Against Unfair Dismissal Act (*Kündigungsschutzgesetz*, 'KSchG') can only be effectively submitted if the employer has already decided to terminate the employment contract at the time of its receipt by the employment agency. Notices of termination in collective redundancy proceedings are therefore effective – subject to the fulfilment of any other notice requirements – if the proper notice is received by the competent employment agency before the employee has received the letter of termination.



## Background

Sections 17-22 KSchG contain provisions on collective redundancies. Although the regulations are significantly older, they serve as transposition of the provisions of EU Directive 98/59/EC into German law. The employer is obliged to carry out the consultation procedure with the works council and the notification procedure with the local employment agency in case of terminations exceeding certain thresholds. Errors in one of these procedures could render all notices of termination issued in the context of collective redundancies invalid.

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## Facts

The parties in the case at hand argued about the validity of a termination for operational reasons received by the employee claimant on 27 June 2017, which the defendant insolvency administrator had declared in a letter dated 26 June 2017. The termination was due to the complete plant closure in which the claimant was employed along with 44 other employees. The insolvency administrator agreed with the works council on 22 June 2017, i.e. before the termination, on a reconciliation of interests. In doing so, they also agreed on the conclusion of the consultation procedure in accordance with Section 17(2) KSchG. The insolvency administrator notified the local employment agency of the impending collective redundancies by letter of the same day. The letter was received by the employment agency on 26 June 2017. The claimant argued that the termination was invalid due to a violation of the duty of notification towards the employment agency. The letter of termination, which would legally create the notice of termination, may only be signed after the notification of collective redundancies has been received by the employment agency. The Labour Court of Mannheim (*Arbeitsgericht*, 'ArbG') dismissed the action, while the State Labour Court of Baden-Württemberg (*Landesarbeitsgericht*, 'LAG') granted it.

## Judgment

On appeal by the insolvency administrator, the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') set aside the judgment of the State Labour Court and referred the case back for retrial.

The BAG stated that the termination was not invalid due to a violation of the duty of notification towards the employment agency according to Section 134 of the German Civil Code (*Bürgerliches Gesetzbuch*, 'BGB') in conjunction with Section 17(1) KSchG. The notification of collective redundancies was received by the employment agency in good time before the claimant's termination. Dismissal within the meaning of Section 17(1) KSchG is to be understood as the notice of termination. Pursuant to Section 130(1) first sentence BGB, the notice of termination only becomes effective when it reaches the recipient. Therefore, the timeliness of the notification of collective redundancies does not depend on when the employer submitted the notice of termina-



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tion or signed it, but on when it reached the employee. The opinion of the LAG that the employer must not have decided to terminate the employment before the notification of collective redundancies is received by the employment agency is not compatible with the principles of the law. The information required in Section 17(3) fourth and fifth sentences KSchG for the notification of collective redundancies can only be reasonably provided if the employees affected are known, which means that the employer's decision to terminate the employment has already become sufficiently concrete.

## Commentary

The decision of the BAG must be approved. The Court reaches a convincing conclusion on the basis of ECJ case law and in compliance with general rules of German contract law.

The ECJ decided in the case of *Junk* (C-188/03) that "collective redundancies" within the meaning of Articles 2-4 of EU Directive 98/59/EC are to be understood as the notices of termination. Since the notification of collective redundancies must be submitted before the notices of termination are issued, the BAG had to decide in the present case when a notice of termination within the meaning of Section 17(1) KSchG becomes effective. For this purpose, it relied on the general legal principle, regulated in Section 130(1) first sentence BGB, that a declaration of will (*Willenserklärung*) such as a notice of termination only becomes effective when it reaches the recipient. The BAG rightly sees no reason, based on the clear decision of the ECJ in the case of *Junk*, to bring forward the point in time at which the termination takes effect. Incidentally, this would only lead to legal uncertainty.

The decision, which is well worth reading, illustrates once again that collective redundancies involve many pitfalls for the employer and are not easy to handle. In the context of a collective redundancy procedure, particular attention must be paid to the compliance with formalities, as violations can often lead to the invalidity of a large number of terminations.

## Comments from other jurisdictions

*Austria (Andreas Tinhofer, zeiler.partners):* In Austria, the courts would have held in this case that the termination of the plaintiff's employment contract was null and void. The reason for this is that the Austrian legislation on collective redundancies affords the employees a higher level of protection than the European Directive on Collective Dismissals (98/59/EC). According to the Directive employers shall notify the competent public authority in writing of any projected collective redundancies (Art. 3(1)). Projected collective redundancies notified to the competent public authority *shall take effect* not earlier than 30 days after the notification (Art. 4(1)).

In Austria, however, employers must not declare a dismissal (or agree on a mutual termination of employment on their own initiative) before the expiry of a 30-day period after the notification to the public authority (*Arbeitsmarktservice* – Employment Service Agency). Unless the authority grants an exemption for 'important business reasons' any premature collective dismissals are ineffective. Whereas the relevant authorities have been very restrictive in the past they adopted a more generous approach during the COVID-19 crisis.

Due to the legal situation described above it is essential for employers to plan redundancies of a least five employees very carefully. According to case law employers may 'spread' redundancies over a longer period of time in order not to trigger the collective redundancies rules (in principle the threshold depends on the number of employees to be made redundant and the size of the business). Quite often employers want to avoid any reputational damage being connected with collective redundancies (at least before COVID-19). It should be noted that in such a case utmost attention must be paid to (internal) communication about the planned redundancies. According to case law any indication of the employer 'contemplating' 'collective' redundancies (i.e. a certain number of employees to be terminated within a 30-day period) could make the collective redundancies legislation apply. If that happens even earlier terminations could be null and void since the lack of notifying the Employment Service Agency cannot be made up for at a later stage.

*Finland (Janne Nurminen, Roschier, Attorneys Ltd)*: In Finland, the employer's obligation to inform the employment office due to redundancy has been arranged differently. According to the Act on Co-operation within Undertakings (334/2007, as amended) when an employer employing more than 20 employees proposes measures which may lead to redundancies the proposal for the negotiations must be also delivered to the employment office. The consequence for failing to comply with this obligation is not however the invalidity of the termination but possible claims for indemnification by the dismissed employees.

Another notification obligation for the employer in case of redundancies was re-introduced into the Employment Contracts Act (55/2001, as amended) in April 2020. According to the amendment, employers who have given notice of termination to at least ten employees due to financial and organizational grounds are obliged to inform the employment office. The aims for this amendment were to improve the employment offices' access to information and foresight as well as to increase employees' access to information on public employment services. This, however, needs to be done only after the employer has dismissed the employees and possible failure to do so has no effect on the validity of the terminations.



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To conclude, in Finland the validity of termination or notice of termination is not linked to the employer' information obligation towards the employment office and thus a similar case is unlikely to come up in Finland.

*Latvia (Andis Burkevics, Sorainen)*: Under Latvian law in case of collective redundancy an employer before serving employment termination notices to employees is obliged to inform the Latvian State Employment Agency (the Agency) 30 days in advance. However, taking into account the current court practice stating that deficiencies in information and consultation procedure prior to collective redundancy alone cannot invalidate the employment termination notice if it is otherwise substantiated, it seems that also in a case where the employer will not notify the Agency about planned redundancy in a timely manner (or will not notify at all) this will not affect the validity of the employment termination notice. The employers are likely to face only relatively low administrative fines and theoretically possible claims from the employees to compensate the salary for the 30-day notification period to the Agency when they would have been still employed.

*United Kingdom (Richard Lister, Lewis Silkin LLP)*: The employer's duty of notification of proposed collective redundancies under UK law appears to be more consistent than the equivalent obligation under German law, as interpreted by the BAG in this case. The relevant UK provision requires the employer to give notice in writing to the Secretary of State of its proposals *before giving notice* to terminate the employees' contracts of employment. The wording of this provision was specifically amended in 2006 in response to the ECJ's judgment in *Junk*, to make it clear that an employer may not wait until the notice period has already begun to run before notifying the Secretary of State.

While there is no UK case authority on the meaning of 'giving notice' in this context, the general position under contract law is that a notice of dismissal will only become effective when it has actually been received and the employee had either read or had a reasonable opportunity to read it (*Newcastle upon Tyne Hospitals NHS Foundation Trust (Appellant) – v – Haywood* [2018] UKSC 22). This is similar to the rule under German contract law applied by the BAG.

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