

**Case C-442/20**

**Request for a preliminary ruling**

**Date lodged:**

21 September 2020

**Referring court:**

Amtsgericht Nürnberg (Germany)

**Date of the decision to refer:**

11 September 2020

**Applicant:**

Flightright GmbH

**Defendant:**

Ryanair Designated Activity Company

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**Amtsgericht Nürnberg**

[...]

In the case between

Flightright GmbH

[...] Potsdam

– Applicant –

[...]

and

**Ryanair Designated Activity Company**, [...] Dublin, Ireland

– Defendant –

[...] **[Or. 2]**

concerning a claim [for compensation]

the Amtsgericht Nürnberg (Local Court, Nuremberg) [...] made, on 11 September 2020, the following

### **Order**

I. The proceedings are stayed.

II. The following questions are referred to the Court of Justice of the European Union pursuant to Article 19(3)(b) of the Treaty on European Union and Article 267 of the Treaty on the Functioning of the European Union on the interpretation of Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91:

(a) Does a trade-union-organised strike by an operating air carrier's own staff constitute 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation (EC) No 261/2004?

(b) Is it of any significance that the strike was held in connection with staff demands not previously agreed by contract between the staff and the operating air carrier?

(c) Is it of any significance that the strike in question was triggered by the operating air carrier's conduct during negotiations with the trade union? **[Or. 3]**

### **Grounds**

1 I. [...] [stay of proceedings]

2 The decision on the dispute, which is not open to challenge by ordinary appeal, [...] is dependent on a preliminary ruling from the Court of Justice of the European Union in answer to the question(s) set out in the operative part of this order.

2 II. Description of the subject matter of the proceedings

- 3 The applicant is seeking compensation in the amount of EUR 500.00 from the defendant.
- 4 The passengers [...], who have transferred their claims to the applicant, had confirmed bookings on a flight from Nuremberg (NUE) to Krakow [...] (flight number FR5420) that was to be operated by the defendant and was due to depart from Nuremberg at 14.45 (local time) on 10 August 2018 and arrive in Krakow at 16.15 (local time) on the same day. The flight was cancelled. The reason for the cancellation was a strike by the defendant's pilots on 10 August 2018.
- 5 The defendant had conducted collective bargaining talks with the 'Vereinigung Cockpit' ('the VC'), including on the conclusion of a framework agreement on employment conditions and pay. Negotiations had commenced in December 2017. The trade union wanted a 42% pay rise. The defendant agreed to a 20% rise, which it had in fact paid since the beginning of 2018. On 3 August 2018, the defendant presented an improved offer to VC, on which negotiations had not yet taken place. On 8 August 2018, VC called a pilots' strike. **[Or. 4]**
- 6 Flights were cancelled in Germany and other countries as a result of the strike on 10 August 2018. The remaining flights proceeded following reorganisation of the flight schedule and allocation of other pilots. The defendant also had to contend with strikes in Ireland, Belgium, Sweden and the Netherlands.
- 7 Relevant provisions of EU law
- 8 Charter of Fundamental Rights of the European Union (OJ 2000 C 364, p. 1)
- 9 Article 12 ('Freedom of assembly and of association') states:
- 10 '(1) Every person has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. (...)'
- 11 Article 28 ('Right of collective bargaining and action') reads:
- 12 'Workers and employers, or their respective organisations, have, in accordance with Community law and national law and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in case of conflicts of interest, to take collective action to defend their interests, including strike action'.
- 13 European Social Charter (ETS 35, 18 October 1961) **[Or. 5]**
- 14 Part I, paragraph 6, reads:
- 15 'All workers and employers have the right to bargain collectively'.
- 16 Part II, Article 6 ('The right to bargain collectively') reads:

17 ‘With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake: (...)

and recognise:

18 (4) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into’.

19 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004

20 Recital 14 reads:

21 ‘As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.’ [Or. 6]

22 Article 5 (‘Cancellation’) reads:

23 ‘1. In case of cancellation of a flight, the passengers concerned shall: (...)

24) (c) have the right to compensation by the operating air carrier in accordance with Article 7 (...).

25 (3) An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.’

26 Article 7 (‘Right to compensation’) reads:

27 ‘1. Where reference is made to this Article, passengers shall receive compensation amounting to:

28 (a) EUR 250 for all flights of 1500 kilometres or less, (...)

29 Relevant national case-law concerning the question(s) referred for a preliminary ruling

30 By judgment of 21 August 2012 (Ref.: X ZR 138/11), the Bundesgerichtshof (Federal Court of Justice) held (summary):

31 ‘1. The fact, in the context of a collective bargaining dispute, that a trade union calls on an air carrier’s pilots to stop work may give rise to extraordinary

circumstances within the meaning of Article 5(3) of the Air Passenger Rights Regulation.

- 32 2. In that event, the air carrier is exempt from the obligation to pay compensation for the cancellation of flights which [Or. 7] it takes out of service in order to adjust its flight schedule to the impact which the calling of the strike is expected to have.’
- 33 The Federal Court of Justice gave, inter alia, the following as the reasons for its decision (paragraphs 25 and 26):
- 34 ‘The defendant’s reliance on extraordinary circumstances is not precluded because the situation was within the defendant’s control.
- 35 As a rule, a situation the controllability of which precludes the existence of extraordinary circumstances cannot be assumed to be present in the case of a collective bargaining dispute. The decision to go on strike is taken by workers within the framework of the autonomy which they enjoy in the collective bargaining process, and thus outside the running of the operating air carrier. It follows that the air carrier usually has no legally significant influence on whether or not a strike is held, even with its own employees. In this case, the argument that, in the case of internal strikes, the operating air carrier has control over the demands being met and the strike thereby being averted is not accepted. The air carrier would thereby be asked to dispense with its freedom of association protected under EU law and to assume the role of the weaker party in the labour dispute from the outset. This would be neither reasonable for the air carrier nor in the longer-term interest of the passengers.’
- 36 Positions of the parties
- 37 The applicant takes the view that a strike by an air carrier’s own cabin crew does not constitute ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation (EC) No 261/2004. In its opinion, any collective bargaining process must allow for strike action, and thus for the non-operation and cancellation of flights too: this is a typical event [Or. 8] that is to be expected in the course of business, not an extraordinary occurrence.
- 38 The defendant takes the view that a trade-union-organised strike constitutes extraordinary circumstances whether or not the striking staff are employees of the operating air carrier. At no point does Regulation (EC) No 261/2004 draw a distinction between strikes held by employees and those held by third parties.
- 39 National case-law
- 40 Following the judgment of 17 April 2018 (C-195/17), by which the Court found that the passenger’s claim to compensation should not depend on whether or not a strike under the relevant national labour and social legislation is legal and that all events which by their nature or origin are not inherent in the normal exercise of

the activity of the air carrier concerned and are beyond its actual control may be classified as ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004, numerous national judgments have departed from the above Federal Court of Justice judgment and denied the existence of extraordinary circumstances. The summary note of the Landgericht Nürnberg-Fürth (Regional Court, Nuremberg-Fürth) of 2 March 2020 (Ref.: 16 S 1060/20), attached hereto and cited by way of example, is in line with the vast majority of case-law.

- 41 However, it is unclear, based on its case-law to date, whether the Court of Justice of the European Union views a trade-union-organised strike differently from a ‘wildcat strike’ since the former, unlike a ‘wildcat strike’, is protected by EU law and by Articles 12(1) and 28 of the Charter of Fundamental Rights, and an interpretation of the **[Or. 9]** judgment of 17 April 2018 (C-195/17) as also applying to trade-union-organised strikes may therefore be precluded. The right to strike guaranteed in Article 6(4) of the European Social Charter – as is clear from the opening sentence of that provision and the heading under Part I, paragraph 6, of the Charter – also operates in the interests of the right to take – coordinated – collective action. It is, after all, expressly recognised ‘with a view to ensuring the effective exercise of the right to bargain collectively’. The Court of Justice of the European Union might, therefore, proceed on the basis that extending the application of its case-law to trade-union-organised strikes would represent an infringement of EU law, as may already be inferred from recital 14 of Regulation (EC) No 261/2004 which describes strikes generally as ‘extraordinary circumstances’, but which would consist above all – ultimately, at least – in interference with the air carrier’s freedom of association, which is protected by EU law.
- 42 However, another view could be taken whereby cases are distinguished based on the reason for the strike. For example, it might be argued that it is necessary to distinguish between whether the strike is intended to avert measures by the air carrier that would give rise to a situation less favourable than the current situation agreed under labour law and by contract. In that case the strike would have been triggered by the (corporate) conduct of the air carrier and would therefore have been ‘within control’. If, on the other hand, the trade union is demanding more than the current conditions and calls a strike which is not specifically triggered by the air carrier, it would be conceivable to class that as ‘extraordinary circumstances’. The judgment of the Local Court, Nuremberg, of 29 November 2019 (Ref.: 240 C-6688/19, which is attached hereto and also summarises the current case-law, is also cited. **[Or. 10]**
- 43 State of proceedings
- 44 The outcome of the dispute depends on the answer to the question referred: In all other aspects, the case has reached a stage appropriate for adjudication in law and in fact. [amplification] [...]
- 45 [...]