Anonymised version

Case C-287/20

Request for a preliminary ruling

Date lodged:

30 June 2020

Referring court:

Amtsgericht Hamburg (Germany)

Date of the decision to refer:

16 June 2020

Applicants:

EL

CP

Defendant:

Ryanair Designated Activity Company

Amtsgericht Hamburg

(Local Court, Hamburg)

[…]

Order

In the case

1) **EL**, […] Villanova di Composampiero, Italy

- applicant -

2) **CP**, […] Villanova di Camposampiero, Italy

- applicant -

[…]

v

Ryanair Designated Activity Company, […] Dublin, Ireland

- defendant -

[…]

the Amtsgericht Hamburg […], on16 June 2020, makes the following order:

1. The proceedings are stayed.

2. The following question on the interpretation of EU law is referred to the Court of Justice of the European Union under Article 267 TFEU:

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?

Is it of any significance in this regard whether negotiations [Or. 2] **with the body/bodies representing the interests of the employees were held prior to the strike?**

Grounds:

1. […] [Matters of national procedure]

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 set out in the operative part of this order.

Presentation of the subject matter of the dispute

3. The applicants seek from the defendant compensation in the amount of EUR 500.00.

4. The applicant had a confirmed booking for a flight from Verona […] to Hamburg […] on 28 September 2018 (flight number FR5074) that was to be operated by the defendant and was due to arrive in Hamburg at 14.50 on 28 September 2018. The flight was cancelled. The reason for the cancellation was a strike by the defendant's cabin crew and pilots. The defendant tried to operate as many flights

as possible following the announcement of the strike, which came with three days' notice. It nonetheless took the view that the flight at issue had to be cancelled.

5. Although negotiations with employees' representatives took place both immediately prior to the strike and earlier, these did not lead to a conclusive outcome.

6. The defendant informed the applicants of the cancellation on the day of departure.

7. […] [irrelevant]

Relevant provisions of EU law

Charter of Fundamental Rights of the European Union […]

8. Article 12 ('Freedom of assembly and of association') reads: **[Or. 3]**

'(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. (…)'

9. Article 28 ('Right of collective bargaining and action') reads:

'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'.

European Social Charter […]

10. Part I, paragraph 6, reads:

'All workers and employers have the right to bargain collectively'.

11. Part II, Article 6 ('The right to bargain collectively') reads:

'With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

(…)

and recognise:

(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'.

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

12. Recital 14 reads:

'As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where **[Or. 4]** 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 effect the operation of an operating carrier'.

13. Article 5 ('Cancellation') reads:

'(1) In case of cancellation of a flight, the passengers concerned shall (…)

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

(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'.

14. Article 7 ('Right to compensation') reads:

'(1) Where reference is made to this Article, passengers shall receive compensation amounting to:

a) EUR 250 for all flights of 1500 kilometres or less, (…)'

15 […] [Provision of national procedural law]

(…) **[Or. 5]**

Relevant national case-law concerning the question referred for a preliminary ruling

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

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.**

2 **In that event, the air carrier is exempt from the obligation to pay compensation for the cancellation of flights which 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.

The Bundesgerichtshof (Federal Court of Justice) gave, inter alia, the following as the reasons for its decision (paragraph 25 et seq.):

'The defendant's reliance on extraordinary circumstances is not precluded because the situation was within the defendant's control.

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 does not usually have any legally significant leverage, even among its own employees, over whether or not strike action is taken. In that connection, the argument that, in the case of internal strikes, an air carrier has it within its gift to meet the demands made and thereby avert a strike, is untenable. If that were the case, the air carrier would be required to forgo its freedom of association, which is protected by EU law, and to start from a weaker position in any industrial dispute. This would be neither reasonable on the air carrier nor in the longer-term interests of passengers'.

Positions of the parties

17. The applicants take the view that a strike by an air carrier's own cabin crew does not **[Or. 6]** constitute 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation (EU) No 261/2004. In their 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 that is to be expected in the course of business, and not an extraordinary occurrence'.

18. 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.

Provisional opinion of this court

19. The referring court assumes that the answer to the question referred for a preliminary ruling is likely to be 'no'.

20. The court construes the judgment of the European Court of Justice of 17 April 2018 (C-195/17) as meaning that a passenger's right to compensation is *not* intended to depend on whether or not a strike is lawful in accordance with the relevant national employment and collective bargaining legislation; rather, the only events that are to be regarded as extraordinary circumstances within the

meaning of Article 5(3) of Regulation (EC) No 261/2004 are those which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier and are beyond its actual control.

21. This court suspects that, if the European Court of Justice considers even a 'wildcat strike' to be a controllable event, it will *certainly* regard a trade-union-organised strike by an undertaking's own employees as being controllable (by means, for example, of an agreement which the air carrier reaches with the trade union concerned), with the result that 'extraordinary circumstances' are likely not to be present.

22. On the other hand, the referring court also considers it possible that the European Court of Justice could take a different view of a trade-union-organised strike, since the latter, unlike a 'wildcat strike', is protected by EU law and by Articles 12(1) and 28 of the Charter of Fundamental Rights, and that an interpretation of the **[Or. 7]** 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. That right is, after all, expressly recognised 'with a view to ensuring the effective exercise of the right to bargain collectively'. Contrary to the assumptions in paragraphs 19 to 21 [above], therefore, the European Court of Justice might proceed from the premiss that a transposition of its case-law to trade-union-organised strikes would constitute an infringement of EU law – a fact which, if true, might be open to inference from recital 14 of Regulation (EC) No 261/2004, which refers to strike action generally as 'extraordinary circumstances' – albeit primarily inasmuch as such transposition would – in effect at least – constitute an interference with the air carrier's freedom of association, which is protected by EU law.

Status of the proceedings

23. The outcome of the dispute depends on the answer to the question referred for a preliminary ruling: the court may otherwise give a ruling on the dispute on all points of fact and law. In so far as this court, in setting out the subject matter of the dispute (paragraphs 3 to 7), has presented the matter in issue as findings of fact, it has already formed a definitive view in that regard.

24. […] [Matters of national procedure]

[…] [Signature]