Anonymised version

Case C-334/19

Request for a preliminary ruling

Date lodged:

24 April 2019

Referring court:

Landgericht Stuttgart (Germany)

Date of the decision to refer:

28 March 2019

Appellant:

Eurowings GmbH

Respondents:

GD

HE

IF

Landgericht Stuttgart

Order

In the case

1. GD, [...]

   - applicant and respondent -

2. HE, [...]

   - applicant and respondent -

3. IF [...] [...]

- applicant and respondent -

[...]

v

Eurowings GmbH [...]

- defendant and appellant -

[...]

relating to compensation under Article 7(1)(b) of Regulation (EC) No 261/2004 **[Or. 2]**

the Fifth Civil Chamber of the Landgericht Stuttgart (Regional Court, Stuttgart, Germany) [...] issued the following order on 28 March 2019 on the basis of the oral hearing held on 21 February 2019:

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 pursuant to Article 267 of the Treaty on the Functioning of the European Union:

Are the provisions 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, in particular Article 5(3) thereof, to be interpreted as meaning that the spontaneous absence of a significant portion of the flight crew staff — occasioned by their placing themselves on sick leave (‘a wildcat strike’) — of an air carrier that is leasing out an aircraft and crew under a ‘wet lease’ to the ‘operating air carrier’, within the meaning of Article 2(b) of that regulation, but which does not bear operational responsibility for the flights, has as an effect that the ‘operating air carrier’ is also not able to rely on ‘extraordinary circumstances’ within the meaning of Article 5(3) of that regulation, in accordance with [the judgment of 17 April 2018, *Krüsemann and Others*, C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:258] [...]? [**Or. 3**]

Grounds:

I.

1. Each of the applicants is seeking from the defendant compensation of EUR 400, making a total of EUR 1 200, under 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 ('the Air Passenger Rights Regulation') and in accordance with an interpretation of that regulation by the Court of Justice of the European Union, on account of a long delay to a flight, plus interest and pre-litigation legal costs.

2 The applicants had booked with the defendant a flight with flight number EW 2695 from Rhodes to Stuttgart on 12 September 2017, which was scheduled to arrive in Stuttgart at 22:35 (local time) on the same day. The aircraft actually landed in Stuttgart only at 15:36 on the following day. The flight distance between Rhodes and Stuttgart is greater than 1 500 km and less than 3 500 km. The flight was to have been provided by an Air Berlin aircraft which the defendant had leased, along with a crew, by means of a 'wet lease'.

3 Due to the delay in the arrival at the destination, which exceeded three hours, the applicants requested by letter of 18 September 2017 that compensation be paid by the defendant. The defendant refused this by letter of 7 December 2017, on the ground that large numbers of Air Berlin's flight crew staff had placed themselves on sick leave on 12 September 2017. Subsequently, the applicants' representatives requested again, by letter of 22 January 2018, that compensation be paid by the defendant. Once again, the defendant did not accede to that request.

4 The dispute between the parties concerns (i) whether the defendant should be considered to be the operating air carrier within the meaning of Article 2(b) of the Air Passenger Rights Regulation and should therefore regarded as having capacity to be sued, (ii) whether the defendant [**Or. 4**] can rely on extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, within the meaning of Article 5(3) of the Air Passenger Rights Regulation, in the light of the defendant's claim that large numbers of the staff of Air Berlin had placed themselves on sick leave, and (iii) whether the applicants are entitled to have their pre-litigation legal fees paid.

5 By judgment of 19 July 2018 [...], the Amtsgericht Nürtingen (Local Court, Nürtingen, Germany) upheld the action on the ground that the defendant, as operating air carrier, did have capacity to be sued and could not rely on an extraordinary circumstance — which would exempt it from having to pay compensation — occasioned by large numbers of Air Berlin's pilots placing themselves on sick leave, which could only be explained by a 'wildcat strike', and, further, held that the applicants were entitled to the interest and pre-litigation legal fees that they had sought.

6 The defendant lodged an appeal against the judgment of the Amtsgericht (Local Court), which the applicants claimed should be dismissed, and argued that the action should be dismissed and that the judgment from the Amtsgericht (Local Court) varied or, in the alternative, that the proceedings should be suspended and

that the court should refer ‘the question forming the basis of the parties’ dispute [on the interpretation of the Air Passenger Rights Regulation] to the European Court of Justice for a preliminary ruling’ under the third paragraph of Article 267 of the Treaty on the Functioning of the European Union.

7 [Suggestion for the wording of the question to be referred] [...] [**Or. 5**]

8 [...]

9 The defendant also argues that it is not the operating air carrier within the meaning of Article 2(b) of the Air Passenger Rights Regulation and that, unlike in the circumstances of the [judgment of 17 April 2018, *Krüsemann and Others*, C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:258] [...], it had no possibility of preventing the absence of the Air Berlin pilots.

II.

10 [...]

11. The decision on the appeal depends on how the Court of Justice of the European Union answers the question referred for a preliminary ruling in the operative part of the present order.

12 Given that a significant portion of the flight crew staff of the air carrier Air Berlin, from which the defendant had leased the aircraft and crew by means of a ‘wet lease’, placed themselves on sick leave, and in particular in the light of the article from tagesschau.de of 12 September 2017 submitted by the defendant [...], according to which the background to the spontaneous absences caused by staff placing themselves on sick leave related to disputes over the sale of Air Berlin, the present Chamber assumes that this was an ‘agreed action’ and, taking into account [the judgment of 17 April 2018, *Krüsemann and Others*, C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:258] [...], was a ‘wildcat strike’. Is the defendant then also precluded from relying on ‘extraordinary circumstances’ within the meaning of Article 5(3) of the Air Passenger Rights Regulation, because, as it was the operating air carrier bearing the operational responsibility [**Or. 6**], that ‘wildcat strike’ is attributed to it as if it had been carried out by its own staff? If that is the case, the appeal cannot succeed.

13 On the other hand, the appeal would be bolstered if it were to be assumed that, in the event of a ‘wildcat strike’ carried out by the flight crew staff of Air Berlin, which is the lessor or wet lessor, owing to the lack of control or influence of the defendant as the lessee or wet lessee, the defendant can plead extraordinary circumstances within the meaning of Article 5(3) of the Air Passenger Rights Regulation.

14 In this regard, the present Chamber favours the interpretation that, due to the fact that the defendant leased the aircraft and crew from Air Berlin by means of a 'wet lease', with regard to the possibility of relying on an exclusion from claims under Article 5(3) of the Air Passenger Rights Regulation against passengers seeking compensation under Articles 5(1)(c) and 7 of that regulation, the defendant should not be placed in either a better or worse position than it would have been in had it operated the flight itself, and therefore should not be able to rely on 'extraordinary circumstances' within the meaning of that provision in the event of a 'wildcat strike' carried out by the flight crew staff of the lessor or wet lessor. Otherwise, the operating air carrier's obligation would be dependent on whether it uses its own aircraft and crew or whether it uses the aircraft and crew of a leasing air carrier under a wet lease. Any other outcome would also run counter to recitals 7 and 1 of the Air Passenger Rights Regulation.

15 [Comments on the wording suggested by the defendant for the question to be referred] [...]

16 [...] [**Or. 7**] [...]

17 [...]

[...]