

Anonymised version

Translation

C-816/19 — 1

Case C-816/19

Request for a preliminary ruling

Date lodged:

5 November 2019

Referring court:

Amtsgericht Hamburg (Germany)

Date of the decision to refer:

16 October 2019

Applicant:

QF

Defendant:

Germanwings GmbH

Amtsgericht Hamburg (Local Court, Hamburg, Germany)

[...]

Order

In the proceedings

QF, [...] Pecs, Hungary

[...]

– Applicant –

[...]

v

Germanwings GmbH, [...] Cologne[, Germany]

EN

– Defendant –

[...]

the Amtsgericht Hamburg (Local Court, Hamburg) [...] made the following order on 16 October 2019:

The proceedings are stayed.

The following question on the interpretation of EU law shall be referred to the Court of Justice of the European Union in accordance with Article 267 TFEU:

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

[Or. 2]

Grounds:

1. [...] Stay of proceedings [...].
2. The [...] determination of the dispute [...] depends on the preliminary ruling to be given by the Court of Justice of the European Union in answering the question set out in the operative part.

Description of the subject matter of the dispute

3. The applicant claims compensation in the amount of EUR 250.00 from the defendant.
4. The applicant had a confirmed booking for a flight from Budapest (BUD) to Hamburg (HAM) for flight number 4U7783, which was to be operated by the defendant and was to arrive at Hamburg on 27 October 2016 at 15.00. The flight was cancelled. The reason for the cancellation was a strike by the defendant's cabin crew on 27 October 2016.
5. The defendant had, until 26 October 2016, been conducting wage negotiations with the UFO trade union (Unabhängige Flugbegleiter Organisation e. V.; a trade union for cabin crew in German commercial aviation). An offer put forward by the defendant, which fell short of the demands of the UFO, had been rejected by the UFO in a negotiating session on 26 October 2016, whereupon the UFO had decided to take industrial action affecting all of the defendant's stations, according to the plans communicated to the defendant by the UFO on 26 October 2016.
6. As a result of the strike, 418 of the 530 flights of the defendant that were scheduled for 27 October 2016 were cancelled. The remaining flights proceeded

following a reorganisation of the flight schedule and the leasing of sub-charters. In its replacement flight schedule, the defendant prioritised all ‘water destinations’ which could not be reached by other means of transport or could be reached only with difficulty. The defendant, moreover, primarily cancelled domestic German flights to destinations that could be reached by train. All remaining available employees of the defendant were scheduled to be deployed as replacement crew.

7. The defendant informed passengers affected by the cancellations on 26 October 2016. [Or. 3]

Relevant provisions of EU law

Charter of Fundamental Rights of the European Union (2000/C 364/01)

8. Article 12 (‘Freedom of assembly and of association’) states:

‘(1) Everyone 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’) states:

‘Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.’

European Social Charter (ETS No 35, 18.10.1961)

10. Part I, point 6 states:

‘All workers and employers have the right to bargain collectively.’

11. Part II Article 6 (‘The right to bargain collectively’) provides:

‘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.’ [Or. 4]

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

12. Recital 14 states:

‘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.’

13. Article 5 (‘Cancellation’) provides:

‘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’) provides:

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

(a) EUR 250 for all flights of 1 500 kilometres or less; ...’ [Or. 5]

[...]

15. [...]

National case-law relevant to the question referred

16. The Bundesgerichtshof (Federal Court of Justice, Germany) held, by judgment of 21 August 2012 [...], that [...]:

1. **Where a trade union, in the context of a pay dispute, calls for industrial action by the pilots of an air carrier, this can lead to**

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

2. **The air carrier is in this case exempt from paying compensation in respect of the cancellation of those flights which it cancels in order to adapt the flight timetable to the anticipated effects of the call to strike.**

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

‘The defendant is not precluded from relying on extraordinary circumstances by the fact that the situation was within the defendant’s control.

As a rule, it cannot be assumed that the situation in a wage dispute can be controlled to an extent that extraordinary circumstances must be ruled out. The decision to proceed with a strike is taken by the workers’ side in the context of the autonomy of social partners to which they are entitled and thus outwith the operation of the operating air carrier. It follows that the air carrier [Or. 6] ordinarily does not have any legally significant influence, even vis-à-vis its own employees, as to whether or not a strike will take place. The argument that, in the case of in-house strikes, it is within the operating air carrier’s power to accept the demands and thereby to avert the strike cannot be accepted. That would mean that air carriers would be expected to waive their freedom of association which is protected under EU law and to place themselves at the outset in the position of underdog in a labour dispute. It would not be reasonable to expect an air carrier to do so, nor would it be in the longer-term interests of air passengers.’

Legal arguments of the parties

17. According to the applicant, a strike of own cabin crew does not constitute an ‘extraordinary circumstance’ within the meaning of Article 5(3) of Regulation (EC) No 261/2004. In the applicant’s submission, strikes — and thus also the non-operation and cancellation of flights — must be anticipated in all wage negotiations. They are a typical event that must be expected in the exercise of any business activity, and not an extraordinary event.
18. The defendant contends that a trade union strike is an extraordinary circumstance, irrespective of whether the staff on strike are employees of the operating air carrier or not. Regulation (EC) No 261/2004 does not even draw a distinction as to whether a strike involves own staff members or third parties.

Preliminary legal assessment of this court

19. The referring court assumes that the question referred for a preliminary ruling will be answered in the negative.

20. This court understands the judgment of the Court of Justice of the European Union of 17 April 2018 (C-195/17) to mean that air passengers' right to compensation is precisely not to be dependent on whether or not a strike is legal under the applicable provisions of national employment law or collective agreements; rather, it is only those events which, [Or. 7] 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 that are to be classified as 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation No 261/2004.
21. This court presumes that, if the Court of Justice of the European Union regards even a 'wildcat strike' as an event within the control [of the air carrier concerned], it will *a fortiori* consider a trade union organised strike by an air carrier's own staff to be within the air carrier's control (in that, for example, the air carrier can seek agreement with the trade union concerned), so that 'extraordinary circumstances' would appear not to exist.
22. On the other hand, it is also possible, in this court's view, that the Court of Justice of the European Union might assess a trade union strike differently, since, unlike a 'wildcat strike', trade union strikes are protected by EU Law and by Article 12(1) and Article 28 of the Charter of Fundamental Rights, and that interpreting the decision of 17 April 2018 (C-195/17) in that way would preclude that decision from encompassing trade union organised strikes. The right to strike safeguarded in Article 6(4) of the European Social Charter also supports, according to its introductory sentence and the provision in Part I, point 6, the right to — coordinated — collective bargaining. 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, contrary to the assumptions made in paragraphs 19 to 21, 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 an 'extraordinary circumstance', 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.

Status of the proceedings [before the national court]

23. [...] [Or. 8.]

[...]

[...] [Signature]

[...]