**Case C-28/20**

**Request for a preliminary ruling**

**Date lodged:**

21 January 2020

**Referring court:**

Attunda Tingsrätt (Sweden)

**Date of the decision to refer:**

16 January 2020

**Applicant:**

Airhelp Ltd

**Defendant:**

Scandinavian Airlines System SAS

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**MINUTES**

16/01/2020

...

**PARTIES**

**Claimant**

Airhelp Limited ...

...

**Respondent**

Scandinavian Airlines System SAS ...

...

**MATTER**

Claim under Regulation (EC) No 261/2004 ...

**[Or. 2]**

**DECISION**

1. The Tingsrätten (District Court) decides, pursuant to Article 267 of the Treaty on the Functioning of the European Union, to make a reference to the Court of Justice of the European Union in accordance with the annexed letter ....

2. The proceedings are stayed pending the decision of the Court of Justice.

**Grounds**

For the reasons set out in the reference for a preliminary ruling annexed hereto, the Tingsrätten (District Court) considers it necessary to obtain a preliminary ruling from the Court of Justice of the European Union in order to give judgment in the case. Since the further processing of the case is dependent on the ruling from the Court of Justice, proceedings shall be stayed.

...

**[Or. 3]**

**LETTER**

...

**Request for a preliminary ruling under Article 267 TFEU**

**Introduction**

1. A dispute is pending before the Attunda Tingsrätt (District Court, Attunda; 'the referring court') between Airhelp Limited ('Airhelp') and Scandinavian Airlines System Denmark – Norway – Sweden ('SAS') concerning the interpretation 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 ('the regulation').

**Questions**

2. The referring court requests a preliminary ruling on the following questions concerning the interpretation of the regulation.

   (a) Does a strike by airline pilots who are employed by an air carrier and who are needed to carry out a flight constitute an 'extraordinary circumstance' within the meaning of Article 5(3) of Regulation No 261/2004, when the strike is not implemented in connection with a measure **[Or. 4]** decided upon or announced by the air carrier but of which notice is given and which is lawfully initiated by workers' organisations as industrial action intended to induce the air carrier to increase wages, provide benefits or amend employment conditions in order to meet the organisations' demands?

   (b) What significance, if any, is to be attached to the fairness of the workers' organisations' demands and, in particular, to the fact that the wage increase demanded is significantly higher than the wage increases which generally apply to the national labour markets in question?

   (c) What significance, if any, is to be attached to the fact that the air carrier, in order to avoid a strike, accepts a proposal for settlement from a national body responsible for mediating labour disputes but the workers' organisations do not?

**Background**

3. The passenger SS ('SS') booked a flight with SAS from Malmö to Stockholm. The flight was due to depart on 29 April 2019 but was cancelled on the same day on account of a strike by SAS pilots in Norway, Sweden and Denmark, which had begun on 26 April 2019 and continued until 2 May 2019. The background to the pilots' strike was that the workers' organisations in Sweden, Norway and Denmark representing SAS pilots had terminated the previous collective agreement with SAS, which would otherwise have continued until 2020, before it expired. Negotiations for a new agreement had been ongoing since March 2019. The pilots' strike lasted seven days. On account of the strike, SAS cancelled more than 4 000 flights, affecting around 380 000 passengers.

4. SS was not offered re-routing, which would have resulted in the delay being under three hours.

5. Airhelp, pursuant to a contract, took over SS' claim for compensation resulting from the abovementioned flight. **[Or. 5]**

**Summary of the arguments of the parties**

**Airhelp**

6. Airhelp has claimed that the referring court should order SAS to pay it a principal amount of EUR 250 and default interest ... from 10 September 2019 until the date of payment.

7. In support of its action, Airhelp has argued, in essence, as follows. In so far as SS was informed of the cancellation less than seven days before the scheduled time of departure, and was not offered re-routing to allow him to depart no more than one hour before the scheduled time of departure and reach his final destination less than two hours after the scheduled time of arrival, he has, in accordance with the regulation, a right to compensation.

**SAS**

8. SAS has disputed Airhelp's claims. In support of its opposition, SAS has argued, in essence, as follows. The pilots' strike constitutes an extraordinary circumstance which could not have been avoided even if all reasonable measures had been taken and SAS is therefore not obliged to pay compensation by virtue of Articles 5(3) and 7 of the regulation.

9. SAS has substantiated its argument in the main proceedings as follows.

10. One of the points of contention in the negotiations was the workers' organisations' demand for a wage increase of 13% over three years, which can be compared with the previous collective agreement entitling pilots to wage increases of 6.5% over three years. Another contentious point involved the pilots' working hours. The workers' organisations demanded, inter alia, greater predictability as regards working hours. **[Or. 6]**

11. On 25 April 2019, the Svenska medlingsinstitutet (Swedish National Mediation Office) submitted a 'request' (proposal for settlement) to the parties in relation to the central collective agreement. The request contained, inter alia, provisions stipulating an annual pay increase of 2.3%. The mediator's pay increase proposal lay within what is known as the band, that is to say, the percentage wage increase which the export industry agreed should apply to the Swedish labour market. The pilots' trade union demanded a wage increase that was significantly above the band. The starting point, under the Swedish labour market model, is that the band should be normative for wage determination for the entire Swedish labour market. The purpose of this is to maintain Swedish competitiveness and to create stability in collective agreement negotiations.

12. SAS acceded to the request while the workers' organisations responded to it in the negative and, on 26 April 2019, the workers' organisations initiated the industrial action of which notice was given.

13. The dispute lasted until the evening of 2 May 2019, when a new three-year agreement was concluded. The new collective agreement covers a period of three years until 2022 and means, inter alia, that the pilots receive wage increases of

3.5% for 2019, 3% for 2020 and 4% for 2021. The total wage increase amounts to 10.9% over three years.

14. The examination of whether the pilots' strike constitutes an extraordinary circumstance under Article 5(3) of the regulation must be based on whether the strike, by its nature or origin, is not inherent in the normal exercise of SAS' activity and is beyond its actual control.

15. SAS' normal activity is the operation of aviation activities. A decision by four trade unions to hold a simultaneous strike is not part of SAS's normal activities. Strikes in themselves are very uncommon in the Swedish labour market and strikes do not form part of the normal relationship between employer and employee or their respective industry organisations. The pilots' strike was, moreover, one of the most comprehensive strikes in the aviation industry ever, involving practically every **[Or. 7]** SAS pilot. SAS was unable to organise its activity in such a way that the flights could be operated as planned. The pilots' strike was therefore not inherent in the normal exercise of SAS' activities.

16. The fact that the pilots' strike was lawful implies that SAS was not entitled to order the pilots to work. SAS accordingly could not take any measures to induce pilots to operate the flights. The pilots' strike was therefore not within SAS' actual control.

17. The circumstances in which the European Court of Justice, in *Krüsemann and Others* (C-195/17), found that a wildcat strike was inherent in the normal exercise of the air carrier's activity (see paragraph 49) are absent here.

18. The pilots' strike was not based on any measure taken by SAS that can be regarded as being part of SAS' normal management. The strike was ultimately the consequence of the pilot associations' having demanded specific working conditions and not accepting the mediator's offer, which SAS, however, did. The pilots' strike was therefore not based on any measure taken by SAS.

19. The pilots' strike was not a spontaneous reaction of the staff to a measure that was part of SAS' normal management. On the contrary, the pilots' strike was called by four pilots' trade unions simultaneously and was therefore to a very large degree driven by the trade unions and workers' representatives.

20. Moreover, SAS was not able to avoid the compensation obligation by cancelling the flight once the strike started, since the flight must be cancelled at least two weeks before the planned departure in order for the compensation obligation laid down in the regulation to cease to apply (see Article 5(1)(c)(i)). Under Swedish law, however, a strike must be announced only one week in advance.

21. The pilots' strike that affected SAS and caused the flight to be cancelled constitutes an event which, by its nature and origin, is not inherent in the normal exercise of SAS' **[Or. 8]** activity and is beyond its actual control. It therefore

constitutes an extraordinary circumstance for the purposes of Article 5(3) of the regulation.

**Airhelp**

22. Airhelp has responded to SAS's complaints principally as follows.

23. The strike cannot be regarded as an 'extraordinary circumstance' which removes SAS' obligation to pay compensation. Concluding collective agreements is part of the ordinary business activities of an air carrier and the carrier may, in general, be faced with disputes or even conflicts with its staff in connection with this type of collective and recurrent wage negotiations.

24. Between SAS, on the one hand, and Svensk Pilotförening (SPF), Dansk Pilotforening and Norske SAS- Flygeres Förening, on the other hand, collective agreements on wages and general conditions of employment apply to SAS flight captains and first officers, the so-called pilot agreement. In negotiating such agreements, it is open to the parties to take industrial action such as strikes and lockouts. Where social partners have reached a collective agreement, there is a mandatory social truce for the term of the agreement. This means that the parties may not take industrial action during that period. An unlawful strike or a wildcat strike is a strike called during the mandatory social truce.

25. There have previously been conflicts between SAS and various groups of staff which, on several occasions, have led to industrial action on the part of the workers. The conflicts sometimes arose with regard to pay conditions and improved working conditions but also out of a desire by the workers to have their own influence in the workplace. One conflict that must be highlighted in particular is the so-called 'SAS crisis' of 2012, when SAS found itself on the brink of bankruptcy. Strict savings requirements had been imposed on SAS by major shareholders as a requirement for further lending to it, which led to SAS employees being forced during the currency of the collective agreement then applicable to accept reduced wages for work done in order not to lose their jobs. The pilots were to work more and lose one month's wages per year. **[Or. 9]**

26. The expression 'extraordinary circumstances' within the meaning of Article 5(3) of the regulation is an exception which must be interpreted restrictively. It is apparent from the Court's case-law that only an event which satisfies two criteria can be regarded as constituting extraordinary circumstances. First, the event cannot be inherent in the normal exercise of the carrier's activities. Second, the event must be beyond the undertaking's actual control (see paragraph 32 of *Krüsemann and Others*, C-195/17).

27. Negotiations concerning pay and working conditions, under threat of strike – at least in Member States such as Denmark, Norway and Sweden – are common and predictable for all undertakings and lie within the undertaking's control. A strike by the air carrier's own staff is, as a starting point, a normal activity for the air carrier and therefore inherent in the normal exercise of the air carrier's activities.

Such strikes are normally a reaction to issues which lie within the air carrier's actual control. If the strike is carried out in accordance with the national employment legislation applicable to the parties, which, moreover, implies that the staff and its trade unions have notified the air carrier before the strike begins, the air carrier has time to take the decisions that are necessary to avoid liability to pay compensation, for example by preventing the announced strike or at least minimising the risk of it being carried out.

28. As regards SAS, it is clear that an important underlying cause of the 2019 pilot strike is the decision taken by SAS in 2012, which led to drastic reductions in pilots' wages and working conditions on account of the air carrier's financial difficulties. SAS achieved economic recovery in 2019, so it is absolutely predictable and reasonable that, in the context of new contractual negotiations, pilots should want higher wages and improved working conditions. The pilots considered SAS' rate of remuneration to be below market level while SAS considered the pilots' wage demands unreasonably high. Under the new collective agreement, therefore, the rate of remuneration will, in 2021, be 10.5% higher than what it was in 2018. **[Or. 10]**

29. In the light of the foregoing, the staff strike to which this matter relates is both inherent in the normal exercise of SAS' activities and within SAS' control and therefore cannot be regarded as an extraordinary circumstance.

**Relevant provisions of EU law**

30. Recital 14 of Regulation No 261/2004 states the following:

'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.'

31. Article 5 of Regulation No 261/2004 provides as follows:

'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, unless:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

... **[Or. 11]**

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.'

32. Article 7(1) of Regulation No 261/2004 provides as follows:

'Right to compensation

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;

(b) EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 kilometres;

(c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.'

33. Article 28 of the Charter of Fundamental Rights of the European Union provides as follows:

'Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Union 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.'

34. Under Article 151 of the Treaty on the Functioning of the European Union:

‘The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as **[Or. 12]** to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Treaties and from the approximation of provisions laid down by law, regulation or administrative action.[’]

Article 6 of the European Social Charter of 18 October 1961 provides:

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

**Relevant national legislation**

35. Paragraph 45 of the Lag (1976:580) om medbestämmande i arbetslivet (Law on workers’ participation in decisions) provides, inter alia:

‘Where an employers’ organisation, employer or workers’ organisation is considering taking industrial action or extending ongoing industrial action, it shall notify in writing the counterparty and the Mediation Office at least seven working days in advance. Every day except Saturday, Sunday, any other public holiday, Midsummer Eve, Christmas Eve and New Year’s Eve is regarded as a working day. The time limit shall be calculated from the same time of day as that at which the industrial action commences.’ **[Or. 13]**

**Need for a preliminary ruling**

36. There is no definition of the expression ‘extraordinary circumstances’ in Regulation No 261/2004. In recital 14 of the regulation, however, it is stated that extraordinary 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. The Court of Justice has found that the list in recital 14 of that regulation is indicative and does not automatically

imply the existence of extraordinary circumstances in the situations specified (*Wallentin-Hermann*, C-549/07, EU:C:2008:771, paragraph 22).

37. The Court has interpreted the expression ‘extraordinary circumstances’ in Article 5(3) of Regulation No 261/2004 in a number of cases, (see *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:716; *Wallentin-Hermann*, C-549/07, EU:C:2008:771; *Eglītis and Ratnieks*, C-294/10, EU:C:2011:303; *van der Lans*, C-257/14, EU:C:2012:604; *Pešková and Peška*, C-315/15, EU:C:2015:618; *Finnair*, C-22/11, EU:C:2017:342, and *Krüsemann and Others*, C-195/17, EU:C:2018:258). In that regard, the Court has found that the expression ‘extraordinary circumstances’ is to be interpreted as covering events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are outside that air carrier’s actual control (*Pešková and Peška*, C-315/15, EU:C:2017:342, paragraph 22).

38. The main question in the present case is how the term ‘extraordinary circumstances’ within the meaning of Article 5(3) of that regulation should be interpreted in the case of a strike of which notice is given and which is lawfully initiated by workers’ organisations. The question has not previously been examined by the Court. The parties to the proceedings are in agreement that SAS is liable to pay compensation if the pilots’ strike does not constitute an extraordinary circumstance. If, however, the pilots’ strike does constitute an extraordinary circumstance, the parties agree that SAS is not liable to pay compensation. The points of contention at issue in the main proceedings therefore concern the interpretation of rules of EU law and the interpretation is necessary in order to resolve the dispute. **[Or. 14]**

It is the view of the referring court that there is no available case-law that might apply to this dispute. There is also an interest in a uniform interpretation of EU law with regard to these questions.

...