Anonymised version

Case C-381/20

Request for a preliminary ruling

Date lodged:

12 August 2020

Referring court:

Landgericht Köln (Germany)

Date of the decision to refer:

24 July 2020

Applicant:

VR

Defendant:

Deutsche Lufthansa AG

Landgericht Köln (Regional Court, Cologne, Germany)

Order

In the case of

VR v Deutsche Lufthansa AG

on 24 July 2020

the 11th Civil Chamber of the Regional Court, Cologne [(‘the Chamber’)]

[…]

ordered as follows:

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 strike by the air carrier's own employees that is called by a trade union constitute an extraordinary circumstance within the meaning of Article 5(3) of Regulation (EC) No 261/2004?

Grounds:

I.

1. The applicant is taking action against the defendant for payment of compensation of EUR 250 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 ('Regulation (EC) No 261/2004'), together with interest. **[Or. 2]**

The facts of the case are as follows:

On 8 November 2019, under booking reference VNI6ZP, the applicant was booked on flight LH 238 from Frankfurt to Rome-Fiumicino, which was to be operated by the defendant and which should have departed Frankfurt at 4.00 p.m. and arrived in Rome at 5.50 p.m. The flight was cancelled, and the applicant was re-routed via the alternative flights LX 1077 and LX 1726 and reached his destination on 9 November 2019 at 8.55 a.m., i.e. with a delay of 15 hours and 5 minutes.

The distance from Frankfurt to Rome-Fiumicino is less than 1 500 km.

The applicant approached his legal representatives with a view to asserting his rights. By letter dated 17 January 2020 and setting a deadline of 24 January 2020, they requested that the defendant pay compensation of EUR 250. The defendant did not respond to that request.

The reason for the cancellation of flight LH 238 on 8 November 2019 was that the defendant had no cabin crew available to operate the flights due to a strike called by the flight attendants' union UFO on 1 November 2019 for the period from midnight (0.00) on 7 November 2019 to midnight (24.00) on 8 November 2019 with the main aim of enforcing an increase in expenses as well as purser bonuses following the breakdown of wage negotiations. The defendant had 2 165 flights scheduled for the above period, 294 of which were intercontinental flights and 1 871 continental flights. After the strike was called, the defendant drew up and published an emergency flight schedule, which still provided for a total of 1 273 flights, 171 of which were intercontinental flights and 1 102 continental flights. However, it became necessary to cancel further flights, which meant that a total of 1 478 flights were cancelled on 7 November and 8 November 2019. On 9 November 2019 another 30 flights, 9 of which were intercontinental flights and

21 continental flights, had to be cancelled due to the effects of the strike. In total, more than 170 000 passengers were affected by the strike.

According to the defendant's submission, which was not contested by the applicant, on 6 November 2019 it published a special flight schedule to avoid cancellations and delays and deployed 'office flight crews' (*Büroflieger*), launched calls for volunteers, reduced the crew size on the operating flights in accordance with statutory minimum numbers and assigned some flights to Condor Flugdienst GmbH. It also gave Lufthansa Group passengers the option to rebook flights free of charge and, for domestic German flights, the option of using the train even if their flight was not affected by the strike. Passengers affected by the strike **[Or. 3]** were transferred to other flights or the train or were allowed to cancel their journeys free of charge. In addition, the defendant used larger aircraft on certain routes in order to offer passengers affected by the strike alternative travel options. On 5 November 2019, the defendant also convened top-level talks with the aim of preventing the strike. On 7 November 2019, the defendant made a fresh settlement proposal in that regard. In addition, it had made a court application for interim relief that was, however, rejected by the Landesarbeitsgericht (Higher Labour Court) of the *Land* of Hesse at second instance on the evening of 6 November 2019.

2. The Amtsgericht (Local Court) dismissed the action. It took the view – in line with the defendant's objection – that the cancellation was due to extraordinary circumstances within the meaning of Article 5(3) of Regulation (EC) No 261/2004. For further details, reference is made to the grounds of the contested decision.

3. The applicant […] appealed against the judgment of the Local Court. He continues to pursue his claim and argues that – contrary to the opinion of the Local Court – as a result of the decision of the Court of Justice of the European Union of 17 April 2018 in Case C-195/17 (*TUIFly*, EU:C:2018:258) a strike by the air carrier's own employees, initiated by the trade unions, can also be regarded as part of the normal exercise of an air carrier's activity and that there is therefore no extraordinary circumstance within the meaning of Article 5(3) of Regulation (EC) No 261/2004.

The defendant requests that the appeal be dismissed.

II.

The decision on the appeal requires a preliminary ruling by the Court of Justice of the European Union on the question referred.

1. The question is material to the decision:

In the event that, in the present situation, extraordinary circumstances within the meaning of Article 5(3) of Regulation (EC) No 261/2004 exist with regard to the flight at issue so as to release the air carrier from liability, the appeal will be

unsuccessful because the applicant is not then entitled to compensation. On the other hand, if the strike does not constitute an extraordinary circumstance, the appeal would be upheld. **[Or. 4]**

2. The question whether a strike triggered by a trade union constitutes an extraordinary circumstance within the meaning of Article 5(3) of Regulation (EC) No 261/2004 is a question of interpretation of that provision – in this case the constituent element of 'extraordinary circumstances' – which, in cases of uncertainty, is reserved for the Court of Justice of the European Union.

3. According to the view previously taken by the Chamber, the cancellation in the present case was caused by an extraordinary circumstance within the meaning of Article 5(3) of Regulation (EC) No 261/2004.

a) By judgment of 21 August 2012 […], the Bundesgerichtshof (Federal Court of Justice, Germany) ruled that exculpation under Article 5(3) of Regulation (EC) No 261/2004 applies if the air carrier's own employees go on strike as a result of a trade union call. The Federal Court of Justice had to rule on a call for strike action by the pilots' association Cockpit and stated the following in that regard (in extract):

'…

2. Contrary to the view taken by the appeal court, a trade union's call for strike action in the context of a wage dispute such as the announced walkout of the defendant's pilots who are members of the Cockpit association, which was the cause of the cancellation according to the uncontested findings of the appeal court, may establish extraordinary circumstances within the meaning of Article 5(3) of the Regulation.

[…]

f) The standards developed by the Court of Justice of the European Union with regard to technical defects must also be referred to if events, such as the cases mentioned in recital 14 – by way of example (CJEU, *Wallentin-Hermann* v *Alitalia* [EU:C:2008:771] paragraph 22) – of political instability, meteorological conditions incompatible with the operation of a flight, security risks, and strikes that affect the operation of an air carrier, are the potential cause of extraordinary circumstances. It is also decisive in this respect whether the cancellation was caused by unusual conditions outside the scope of the air carrier's normal operational activity and beyond its control.

If – as in the case in dispute – a strike is involved, it is – at least in principle – irrelevant whether the operation of the air carrier is affected by a wage dispute between third parties, for example by a strike by employees of the airport operator or another undertaking appointed to perform operationally essential tasks such as security control, or by the operating air carrier's own employees such as ground staff or air crew going on strike. Neither the wording of Article 5(3) of the

Regulation nor recital 14 or the spirit and purpose of the provision set out above indicates that such a distinction exists. **[Or. 5]**

Strikes by an air carrier's own employees are also typically initiated by a trade union seeking improved working conditions or higher wages from the other party to the wage agreement, which may be the employer of the employees but could also be an employers' organisation. For this purpose, it calls on its members to take part in the industrial action. Such industrial action is an instrument of the freedom of association protected under EU law (Article 12(1) and Article 28 of the Charter of Fundamental Rights of the European Union [OJ C 364, p. 1 et seq. of 18 December 2000 […]) and suspends – at least to the extent necessary to enable industrial action to be taken – the rights and obligations that otherwise exist under the employment contract. The call for strike action – including where it leads to an employer's own workforce going on strike – is an 'external' interference for the air carrier and does not form part of the normal exercise of its activity. After all, it is the specific purpose of the call for strike action as a tool in a wage dispute for a new or a different collective agreement to affect and, where possible, completely paralyse the 'normal exercise of an employer's activity'. Accordingly, it generally does not concern just one single flight or individual flights, but typically the whole or at least significant parts of the overall activity of the air carrier. The purpose of the Regulation of protecting passengers – including through the obligation to pay compensation – from the 'serious inconvenience' (CJEU, *IATA and ELFAA* [EU:C:2006:10]) paragraph 69; *Wallentin-Hermann* v *Alitalia* paragraph 18) of – fundamentally – avoidable cancellations has just as little effect as in those cases in which an external labour dispute or another event brings all or significant parts of the normal operational activity of an air carrier to a standstill. Moreover, as demonstrated by a case decided by the West London County Court, in which employees of an air carrier were involved in a wildcat strike because the airport operator did not wish to continue using the air carrier for the provision of baggage handling services at the airport (quoted from Galán, www.mondaq.com/article.asp?articleid= 82136), the two situations may overlap.

g) The Federal Court of Justice can base its further substantive examination of the case on the above interpretation of the Regulation without first referring the matter to the Court of Justice of the European Union for a preliminary ruling. This is because, as has been shown above, the interpretation of the provision follows from the wording and purpose of the Regulation and is consistent with the interpretation of Article 5(3) of the Regulation previously provided in the case-law of the Court of Justice of the European Union. The considerations on which the Court of Justice of the European Union based the interpretation of the provision in the decisions cited above also apply in the case in dispute. On the basis of that case-law, the Federal Court of Justice is certain that the Court of the Justice of the European Union would reach the same conclusion in relation to extraordinary circumstances arising as a result of a strike as in the case of the other situations listed, by way of example, in recital 14 of the Regulation.

This is not precluded by the fact that, in line with a number of opinions expressed in legal literature […], the appeal court reached a different conclusion. To the extent that more detailed reasons are given at all, this conclusion is justified, first, by pointing to a corresponding interpretation of Article 19 of the Montreal Convention and, second, by the assumption that wage disputes with internal employees are part of the general operating risk of an air carrier. However, neither aspect is decisive either in the light of the wording of the Regulation or according to the case-law of the Court of Justice of the European Union. **[Or. 6]**

3. In the case in dispute, the strike notice issued by the Cockpit association was – as the Federal Court of Justice is able to assess on the basis of the findings of the appeal court – capable of giving rise to extraordinary circumstances within the meaning of Article 5(3) of the Regulation.

a) In the case in dispute, the defendant had to assume that the vast majority of the pilots employed by it would comply with the call for strike action. Hence, this was not a question of compensating for the absence of a small number of staff caused, for instance, by illness, but of responding to the impending absence of at least a significant proportion of pilots. The defendant had to assume that, as a result of the strike, it would not have a sufficient number of pilots available to maintain the full flight schedule and that, as a result, a significant number of flights scheduled by it could not be operated either at all or as planned; it therefore had reason to react as soon as the strike was announced and to reorganise the flight schedule in such a way that, on the one hand, the inconvenience caused to passengers by the strike would be as small as possible in the circumstances and, on the other, that it would be in a position to resume normal operations as soon as possible after the end of the strike. Such a situation cannot be classed as normal activity of an air carrier.

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

As a rule, it cannot be assumed that the situation in the case of a wage dispute can be controlled in such a way as to rule out the existence of exceptional circumstances. The decision to go on strike is taken by employees in the context of their freedom of collective bargaining, and thus outwith the business of the operating air carrier. It follows that the air carrier does not usually have any legally significant influence, even among its own employees, on whether or not strike action is taken. The argument that, in the case of strikes within the company, 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, which is protected by 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 passengers.'

b) In its previous case-law, the Chamber followed the view taken by the Federal Court of Justice and it still considers this to be correct with regard to the present situation involving a strike called by a trade union.

In the opinion of the Chamber, the judgment of the Court of Justice of the European Union of 17 April 2018 in Case C-195/17 (*TUIFly*) does not warrant a different assessment. That decision concerned the particular situation of a 'wildcat strike' which was triggered by the sudden announcement of restructuring plans by the air carrier. This is by no means comparable to the present case, which does not involve specific **[Or. 7]** and current operational measures to which the air carrier's own employees are directly responding on their own initiative with a 'wildcat strike'.

Nor can it be inferred from the judgment of the Court of Justice of the European Union in Case C-195/17 that a legal strike by an air carrier's own employees cannot constitute an extraordinary circumstance. The only thing that can be inferred from paragraphs 46 and 47 of the judgment, in particular, is that it is irrelevant for the classification of a strike as an extraordinary circumstance whether or not the strike is legal under national law. However, it does not follow from this that certain strike situations should be excluded from exculpation *per se* or that a strike by air carrier employees that is legalised by a trade union's call for strike action could not in principle constitute an extraordinary circumstance because, as a result of the initiation of the strike by the trade union, it is not part of the air carrier's normal operational activity and cannot be controlled by it.

According to the Chamber, the decisive factor for classification as an extraordinary circumstance in the present case is the fact that the trade union's call for strike action – in contrast to the 'wildcat strike' – constitutes an external influence on the company's operational activity. This call for strike action is neither within the control of the air carrier and nor can the strike thus triggered be attributed to the normal exercise of the activity of the air carrier concerned: the call for strike action and the strike are specifically intended to disrupt operations or bring them to a standstill (Federal Court of Justice, judgment of 21 August 2012, […]).

According to the Chamber, it cannot be argued that the air carrier could thwart or 'control' the strike by agreeing to the demands made by the trade union, as that would undermine the freedom of association by linking the dispute with the trade union with the obligation to pay compensation under Regulation (EC) No 261/2004. That is why the Chamber also considers that the existence of a certain salary structure or the unwillingness to increase salaries or, as in the present case, expenses and purser bonuses, cannot be classified as an operational measure of the air carrier that would be comparable to the announcement of restructuring plans, as was the case in Case C-195/17.

(c) In the light of the judgment of the Court of Justice of the European Union in Case C-195/17, however, the view is increasingly being expressed in recent case-

law that, **[Or. 8]** in the case of an intra-company strike organised by a trade union, it can no longer be assumed that extraordinary circumstances exist (Landgericht Düsseldorf (Regional Court, Düsseldorf), judgment of 26 August 2018 […]; Landgericht Berlin (Regional Court, Berlin), decision of 11 February 2020 […]; Landgericht Bad Kreuznach (Regional Court, Bad Kreuznach), order of 20 January 2020 […]; Landgericht Nürnberg-Fürth (Regional Court, Nuremberg-Fürth), order of 2 March 2020 […]; Landgericht Memmingen (Regional Court, Memmingen), order of 30 March 2020 […]; Amtsgericht Frankfurt (Local Court, Frankfurt), judgment of 8 August 2019 […]) or at least not in the absence of additional special circumstances (Landgericht Hamburg (Regional Court, Hamburg), judgment of 21 May 2019 […]; judgment of 3 June 2019 […]). Some of the opinions expressed in the literature also reject exculpation in the case of a strike by the air carrier's own employees […].

For this reason, the Chamber considers the reference for a preliminary ruling to be pertinent.

[…]