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Case C-516/20

Request for a preliminary ruling

Date lodged:

14 October 2020

Referring court:

Landgericht Köln (Germany)

Date of the decision to refer:

9 September 2020

Applicants:

JT

NQ

Defendant:

Ryanair DCA

...

Landgericht Köln (Cologne Regional Court)

Order

In the case of

JT and NQ v Ryanair DCA

the 11th Civil Chamber of the Cologne Regional Court, on 9 September 2020 ...

made the following order:

1. The proceedings are stayed.

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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 TFEU:

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

Grounds:

I.

1. The applicants are claiming from the defendant compensation of EUR 400 each plus interest 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 **[Or. 2]** long delay of flights, and repealing Regulation (EEC) No 295/91 ('Regulation (EC) No 261/2004').

The underlying facts are as follows:

The applicants held reservations on 25 July 2018 under the reservation number SZHH9D, on the flight FR1035 from Cologne/Bonn (CGN) to Tenerife (TFS), operated by the defendant. Ordinarily, flight FR1035 should have departed at 12.40 and landed at its destination at 16.25 (times stated are local). Flight FR1035 was cancelled. The defendant did not offer alternative transport that could have enabled the applicants to reach their destination with a delay of less than three hours.

The distance between Cologne/Bonn and Tenerife is between 1 501 km and 3 500 km.

The applicants applied to their legal representatives to enforce their rights. In a letter dated 7 March 2019, the legal representatives requested the defendant to pay compensation of EUR 400 for each passenger, EUR 800 in total, by a deadline of 14 March 2019; however, the defendant refused to do so, invoking exceptional circumstances exempting it from the obligation to pay compensation.

The reason for the cancellation of flight FR1035 on 25 July 2018 was a strike by the defendant's Portuguese, Spanish, Italian and Belgian cabin staff organised by trade unions. The strike lasted from 00.00 on 25 July 2018 until 24.00 on 26 July 2018, and resulted in no cabin staff being available for the defendant to operate the flight. The Italian cabin staff scheduled for the flight that is the subject matter of these proceedings had also taken part in the strike. Crews on 455 of the defendant's flights went on strike for the stated period. The defendant deployed crews from other countries to compensate for the walkout, but it did not have sufficient cabin staff available to cover the loss of staff as a result of the strike. The defendant made reference in this regard, amongst other things, to a press article dated 26 July 2018, which described the reason for the strike as, '*cabin*

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crew members are demanding better employment conditions, including more money. For its part, Ryanair is threatening job cuts'.

2. The Amtsgericht (Local Court) dismissed the action. In keeping with the defendant's objection, it took the view that the cancellation was attributable to extraordinary **[Or. 3]** circumstances within the meaning of Article 5(3) [of] Regulation (EC) No 261/2004. ...

3. The applicants appealed against the judgment of the Local Court. They are continuing to pursue their action, claiming that, further to the decision of the Court of Justice of 17 April 2018 in Case C-195/17, (*Krüsemann and Others*), the trade-union-organised strike by an air carrier's own staff may also, contrary to the view taken by the Local Court, be regarded as inherent in the normal exercise of the activity of the air carrier concerned and cannot therefore constitute extraordinary circumstances within the meaning of Article 5(3) of Regulation (EC) No 261/2004. The applicants also take the view that the defendant should have done something to address the causes of the strike and taken measures to prevent it; differences of opinion between the management and employees of an undertaking are not exceptional and do not arise from outside of an undertaking's operations. The same is true of wage disputes.

The defendant requests that the appeal be dismissed.

II.

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

1. The question is material to the decision:

If, in the present situation, extraordinary circumstances within the meaning of Article 5(3) [of] Regulation (EC) No 261/2004 are applicable for the flight at issue so as to release the air carrier from liability, the appeal will remain unsuccessful because the applicants are then not entitled to compensation. On the other hand, if the strike were not considered to be an exceptional circumstance, the appeal would be upheld.

2. Whether or not a strike initiated 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 the interpretation of that provision, in this case, the criterion of 'exceptional circumstances', which, in cases of doubt, is a matter reserved for the Court of Justice.

3. In accordance with the view taken by the Chamber to date, the cancellation in the present case is attributable to an extraordinary circumstance within the meaning of Article 5(3) [of] Regulation (EC) No 261/2004. **[Or. 4]**

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(a) With its judgment of 21 August 2012, ... the Bundesgerichtshof (Federal Court of Justice) held that exculpation in accordance with Article 5(3) [of] Regulation (EC) No 261/2004 applies where an air carrier's own employees go on strike as a result of a call by a trade union. The Federal Court of Justice had to rule on a call to strike by the German pilots' representative body, Vereinigung Cockpit, and stated the following (extract):

'…

2. Contrary to the view taken by the Berufungsgericht (Court of Appeal), a trade union's call for a strike within the scope of a wage dispute, such as the announced walkout of the defendant's pilots belonging to Vereinigung Cockpit, which was the cause of the cancellation according to the uncontested findings of the Court of Appeal, may constitute extraordinary circumstances within the meaning of Article 5(3) of the Regulation.

…

(f) The criteria developed by the Court of Justice in respect of technical defects are also to be used when events such as the cases, mentioned in recital 14, by way of example (Court of Justice, *Wallentin-Hermann* v *Alitalia*, 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 come into consideration as a cause of extraordinary circumstances. It is also decisive in this respect whether the cancellation was caused by unusual circumstances outside the scope of the air carrier's normal operational activity and beyond its control.

If, as in the present 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 on-board staff going on strike. No indication of such a distinction is provided by the wording of Article 5(3) of the Regulation, recital 14 or the spirit and purpose of the provision set out above.

Strikes by internal employees are also typically initiated by a trade union wishing to obtain improved employment conditions or higher wages from the other party to the wage agreement, which may be the employer of the workers, but also an employers' organisation. For this purpose, it calls on its members to take part in the labour dispute. Such a labour dispute is a means of 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/ 1 et seq. of 18 December 2000 ...)) and suspends, at least to the extent required to enable the labour dispute, the otherwise existing rights and obligations arising from the contract of employment. The call for a strike, even to the extent that it results in a walkout by the internal workforce, constitutes an 'external' **[Or. 5]** interference for the air

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carrier and does not form part of the normal exercise of its activity. This is because the purpose of the call, as a weapon in the dispute regarding a new or different wage agreement, is specifically to affect and, if possible, completely paralyse the 'normal exercise of activity'. Accordingly, it also 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. In the case of such a strike, the Regulation's purpose of protecting passengers, including through the obligation to pay compensation, from the 'serious inconvenience' (Court of Justice, *IATA and ELFAA*, 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 to a standstill all or significant parts of the normal operational activity of an air carrier. Furthermore, the two situations may ... merge into one another.

(g) The Chamber may take the above interpretation of the Regulation as a basis for its further substantive examination, without previously obtaining a preliminary ruling by the Court of Justice. This is because the aforementioned understanding of the rule results, as stated, from the wording and purpose of the Regulation and is in keeping with the interpretation of Article 5(3) of the Regulation by the case-law already delivered by the Court. The considerations on which the Court based the interpretation of the provision in the decisions cited above also apply in the present dispute. On the basis of that case-law, the Chamber has no doubt that the Court will not reach an assessment in respect of extraordinary circumstances arising as a result of a strike that differs from that in respect of the other situations listed by way of example in recital 14 of the Regulation.

This is not precluded by the fact that the Court of Appeal reached a different conclusion in keeping with a number of opinions expressed in the literature ..., since this is, where more detailed reasons are given, justified, firstly by a corresponding interpretation of Article 19 of the Montreal Convention, and secondly by the assumption that wage disputes with internal employees are part of the general operating risk of the air carrier. However, neither aspect is of decisive importance according to the wording of the Regulation or according to the case-law of the Court of Justice.

3. In the present dispute, the strike announcement by Vereinigung Cockpit was, as the Chamber can assess on the basis of the findings of the Court of Appeal itself, capable of giving rise to extraordinary circumstances within the meaning of Article 5(3) of the Regulation.

(a) In the present dispute, the defendant had to expect that the vast majority of the pilots employed would comply with the call for a strike. It was therefore not a case of compensating for the loss of a small number of employees caused, for instance, by illness, but responding to the impending **[Or. 6]** loss of at least a considerable proportion of the piloting staff. 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 entire flight schedule and therefore a significant number of the flights

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planned could not be operated or not operated as scheduled; it therefore had cause to respond to the announcement of the strike and to reorganise the flight schedule such that, firstly, the impact of the strike on the passengers would be as low as possible under the circumstances and, secondly, it would be in a position to resume normal operation as soon as possible once the strike came to an end. Such a situation cannot be classed as normal activity of an air carrier.

(b) The defendant's reference to extraordinary circumstances is not ruled out because the situation was within the defendant's control.

As a rule, the ability to control the situation, which excludes extraordinary circumstances, cannot be assumed in the case of a wage 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 is therefore outside the operation of the operating air carrier. It follows that the air carrier usually has no legally significant influence on whether or not a strike is held, even with its own employees. In this case, the argument that, in the case of internal strikes, the operating air carrier has control over the demands being met, thereby averting the strike, has no validity. The air carrier would thereby be asked to dispense with its freedom of association protected under 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 the passengers.'

(b) In its case-law to date, the Chamber has followed the view held by the Federal Court of Justice and considers it still to be correct in respect of the present situation of a strike called by the trade union.

The Chamber holds the view that the judgment of the Court of Justice of the European Union of 17 April 2018 in Case C-195/17 (*Krüsemann and Others*) does not prompt a different assessment. That decision concerned the specific situation of a 'wildcat strike', which was triggered by the surprising announcement of restructuring plans by the air carrier, to which the air carrier's employees responded directly and spontaneously. This is not comparable with the present case where the members of a trade union followed a trade union call to strike.

It is also not possible, for instance, to infer from the judgment of the Court of Justice in Case C-195/17 that a lawful strike by internal employees cannot constitute an extraordinary circumstance. We can only infer from paragraphs 46 **[Or. 7]** and 47 of the decision in particular that it is irrelevant for the classification of a strike as an extraordinary circumstance whether or not the strike is lawful under national law. However, it does not follow that certain circumstances of the strike should, in themselves, be excluded from exculpation or that a lawful walkout by the airline's employees as a result of a call to strike by a trade union, could not, in principle, constitute an extraordinary circumstance, because, as a result of the initiation by the trade union, it does not fall within the scope of the air carrier's normal operational activity and it cannot be controlled by the air carrier.

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In the Chamber's view, it is decisive for classification as an extraordinary circumstance in the present case that the trade union call – in contrast to the 'wildcat strike' – is, in fact, an external influence on the undertaking's operational activity. This strike call is beyond the air carrier's control and a strike prompted in this way cannot be classified as forming part of the normal exercise of the activity of the air carrier concerned: strike calls and strikes serve precisely to disrupt that operation or bring it to a standstill ....

In the Chamber's view, it can also not be cited against the air carrier that it could counteract 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. For this reason, the Chamber holds the view that even the existence of a particular wage structure or the lack of willingness to increase wages or to change employment conditions cannot be classified as an operational measure by the air carrier that would be comparable with the announcement of restructuring plans, as in Case C-195/17.

(c) However, in view of the decision of the Court of Justice in Case C-195/17, the opinion that, in the case of an internal strike organised by a trade union, it is no longer possible to assume the existence of extraordinary circumstances **[Or. 8]** ..., or at least not without the existence of other special circumstances ..., is now being increasingly adopted in the case-law. Some of the views taken 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 appropriate.

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