Anonymised version

Case C-613/20

Request for a preliminary ruling

Date lodged:

18 November 2020

Referring court:

Landesgericht Salzburg (Austria)

Date of the decision to refer:

10 November 2020

Applicant:

CS

Defendant:

Eurowings GmbH

ORDER

The Landesgericht Salzburg (Regional Court, Salzburg), sitting as court of appeal […] in the case between the applicant **CS**, […] […] and the defendant Eurowings GmbH, […] Düsseldorf, […], value in dispute EUR 250.00 plus interest and costs, hereby makes the following order in the appeal proceedings brought by the applicant against the judgment of 3 July 2020 of the Bezirksgericht Salzburg (District Court, Salzburg) […]:

I. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU):

1. *Does a strike by an air carrier's staff called by a trade union to pursue pay demands and/or social benefits constitute 'extraordinary circumstances' within the meaning of Article 5(3) of Regulation (EC) No 261/2004?*

2. *Would it at the very least:*

a) *where staff of the subsidiary company come out in sympathy with a strike called against the parent company (Lufthansa AG) in order to support parent company cabin crew demands being pursued by the trade union, and*

b) *in particular where the strike in the subsidiary company becomes an 'independent' strike, after agreement has been reached with the parent company, because the trade union reiterates the call for and even extends the strike for no apparent reason and the cabin crew of the subsidiary company responds to that call?*

3. *Does it suffice for the purpose of proving extraordinary circumstances that the operating air carrier claims that the* **[Or. 2]** call for the *strike was continued for no reason, as the parent company had met the demands of the trade union, and was ultimately prolonged by the trade union, and who bears the burden of proof where the precise reasons in fact for that have remained unclear?*

4. *Can a strike in the defendant's subsidiary company which was announced on 18 October 2019 for 05.00 to 11.00 on 20 October 2019 and which ultimately was spontaneously prolonged at 05.30 on 20 October 2019 to midnight be regarded as circumstances which are now beyond actual control?*

5. *Are precautions in the form of an alternative flight plan and the use of subcharters for flights cancelled due to a lack of available cabin crew measures appropriate to the situation, taking account in particular of 'water destinations' not easily reached by land and the difference between German domestic flights and internal European flights and, in addition, the fact that only 158 out of a total of 712 flights scheduled for that day had to be cancelled?*

6. *What requirements should be attached on the operating air carrier's burden of assertion that all technically and economically viable measures were taken?*

II. The proceedings on the applicant's appeal are stayed pending receipt of a preliminary ruling by the Court of Justice of the European Union.

GROUNDS:

1. Facts:

The applicant booked a flight (flight number EW 8143) with the defendant from Salzburg to Berlin (Tegel) for 20 October 2019. The scheduled time of departure from Salzburg was 21.05. The scheduled time of arrival in Berlin was 22.15. The flying distance between the two cities is less than 1 500 km. The applicant was unable to board the flight as it had to be cancelled due to a strike (uncontested) by the defendant's cabin crew.

The strike was organised by the trade union 'UFO' (Unabhängige Flugbegleiterorganisation e.V., Independent Flight Attendants' Organisation). The strike came in the wake of pay negotiations with the defendant's parent company (Lufthansa AG) **[Or. 3]**. In order to drive the negotiations forward and increase the pressure on the parent company, the strike was extended to staff of the subsidiaries (Sunexpress Deutschland, Lufthansa CityLine, Germanwings and Eurowings) on 18 October 2019. 712 of the defendant's flights were affected on 20 October 2019. The strike, which was originally limited to the morning (05.00 to 11.00), was prolonged at very short notice on the same day to midnight. As the strike was prolonged, the flight plan prepared for that day could not be adhered to. Due to restructuring of the flight plan, the defendant had to cancel 158 flights, including the applicant's flight.

2. Forms of order sought and arguments of the parties:

The applicant is seeking compensation of EUR 250 under Article 7(1)(b) of Regulation (EC) No 261/2004, as the cabin crew strike for which the defendant was to blame resulted in cancellation of the flight. The applicant claims that these were not extraordinary circumstances within the meaning of Article 5(3) of Regulation No 261/2004 ('the Air Passenger Rights Regulation') and that, on the contrary, the defendant was to blame. The applicant maintains that the strike was due to restructuring measures by the defendant and could have been avoided by it in good time by entering into the necessary negotiations and agreements. The applicant states that wage disputes are inherent in the normal operation of an air carrier. It claims that the agreement reached subsequently illustrates that the defendant could have settled the dispute and that the strikes were therefore caused by internal company decisions; and that strikes are inherent in the normal exercise of the defendant's activity and the strike was not beyond its control.

The defendant contests the claim and contends that the flight was cancelled due to extraordinary circumstances. It argues that the strike was called on 14 October 2019 against Lufthansa AG alone, but was then extended to its subsidiary companies, including the defendant, on 18 October 2019. It states that the strike was originally called for 05.00 to 11.00 and that it was not until 20 October 2019 that the trade union spontaneously, and without prior notice, prolonged it to midnight. The defendant was advised accordingly at 05.30 on the same day, hence why the emergency plan for the original period was of no use. The defendant states that by using subcharters on the day in question, the defendant only had to cancel 158 out of the 712 flights affected and that it had taken all available measures and that the substitute flight plan was designed to minimise the inconvenience to all passengers. It adds that, Lufthansa AG had **[Or. 4]** conceded on 18 October 2019 and announced a 2% pay rise. The defendant adds that the warning strike at Lufthansa had been cancelled, whereas the strike at the defendant had gone ahead, even though there were no grounds for it. The defendant maintains that the strike was not therefore inherent in the normal operation of an air carrier, nor was it within the defendant's control, in particular

as the extension of the strike to other companies and its prolongation constituted unavoidable extraordinary circumstances for the defendant.

3. Previous proceedings:

The court of first instance dismissed the forms of order sought. In light of the facts recounted above, it found that strikes that result in flight cancellations are to be regarded as extraordinary circumstances within the meaning of Article 5(3) of the Air Passenger Rights Regulation, which were beyond the defendant's control. The court of first instance stated that, although, as the parent company, Lufthansa AG had met the demands, the strike had not only gone ahead, it had been extended; and that, as a subsidiary company of Lufthansa AG, the defendant was unable to achieve an agreement that was binding on the parent group. According to the court of first instance, despite the extension of the strike at short notice, the defendant had prepared an emergency plan. The prolongation of the strike shortly after it had begun was a circumstance beyond the defendant's control. The court of first instance added that, although the strike had affected 712 flights that day, the defendant had managed to limit cancellations to 158 flights and thus the minimum possible.

The applicant lodged an appeal against that judgment on the grounds that the court of first instance had made an incorrect finding in law. By the appeal, the applicant requests that the action be upheld in its entirety.

[…]

As the court of appeal, the Landesgericht Salzburg (Regional Court, Salzburg), now has to rule on the appeal [.] […]

A further four appeals by which applicants are claiming compensation on precisely the same grounds are pending before the Regional Court, Salzburg. However, those actions were successful at first instance. Eurowings GmbH, which is also the defendant in those proceedings, requested by each of its appeals that judgment be varied so as to dismiss the actions or, in the alternative, that two questions on strikes as extraordinary circumstances be referred to the Court of Justice of the European Union for a preliminary ruling. **[Or. 5]**

Legal assessment:

4. Legal basis:

Article 5(3) of the Air Passenger Rights Regulation states that an operating air carrier is not to 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.

Recital 14 of the Air Passenger Rights Regulation provides that obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances that could not have been avoided even if all reasonable measures had been taken. Such circumstances may include strikes that affect the operation of an operating air carrier.

5. Questions referred:

The Court of Justice of the European Union clarified in Case C-195/17 that events may be classified as extraordinary circumstances within the meaning of Article 5(3) of the Air Passenger Rights Regulation if, by their nature or origin, they are not inherent in the normal exercise of the activity of the air carrier concerned and are outside that carrier's actual control. The Court of Justice held that he circumstances referred to in recital 14 are not necessarily and automatically grounds of exemption from the obligation to pay compensation. It stated that it is necessary to assess, on a case-by-case basis, if the cumulative conditions are fulfilled, namely that the events, 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. It found that in light of the objective of the Regulation, which is to ensure a high level of protection for passengers, the concept of extraordinary circumstances must be interpreted strictly. According to the Court, when judging a strike, it is necessary to disregard whether or not the strike is legal under the relevant national law, in order to make an appraisal independently of the labour and wage legislation of each Member State. It found that restructuring and reorganisation of undertakings are part of the normal management of those entities. According to that judgment, the wildcat strike among the staff of the air carrier concerned, which had its origins in the undertaking's surprise announcement of restructuring plans, was the manifestation of a risk inherent in the normal exercise of the activity of the air carrier concerned. **[Or. 6]**

The Court's answer to the question referred was that Article 5(3) of Regulation (EC) No 261/2004, read in the light of recital 14 thereof, must be interpreted as meaning that the spontaneous absence of a significant part of the flight crew staff ('wildcat strikes'), such as that at issue in the disputes in the main proceedings, which stems from the surprise announcement by an operating air carrier of restructuring plans, following a call echoed not by the staff representatives of the company but spontaneously by the workers themselves who placed themselves on sick leave, is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision.

However, the Court still did not have to consider a case that is strongly marked by a situation that extends across a group of companies. Thus, the question arises as to whether and for how long it is inherent in the normal exercise of the activity of the air carrier concerned that staff of the subsidiary come out in sympathy with a strike called by a trade union against the parent company, in order to support pay demands of the parent company's cabin crew being pursued by the trade union. This question arises in particular where the strike in the subsidiary company

becomes an ‘independent’ strike, after agreement has been reached with the parent company, because the trade union reiterates the call for and even extends the strike for no apparent reason and the cabin crew responds to that call. It follows from paragraphs 27 and 28 of the judgment of the Court in Case C-315/15 that events may be classified as ‘extraordinary circumstances’ if, by their nature or origin, they are not inherent in the normal exercise of the activity of the air carrier concerned and are outside that carrier’s actual control, both conditions being cumulative. The court of appeal concludes from the answers to the questions referred, taken together, that actual control is important not only in terms of whether the consequences can be avoided by taking appropriate measures, but also in terms of whether or not certain events are still inherent in the normal exercise of the activity of the air carrier concerned.

It would appear from paragraphs 27 and 28 of the judgment of the Court in Case C-315/15 that the answer to the question of the burden of proof is that the operating air carrier bears the burden of proof both of the extraordinary circumstances and of the fact that they could not have been avoided even by measures appropriate to the situation. Appropriate measures means measures which, at the time those extraordinary circumstances arise, meet, inter alia, conditions which are technically and economically viable for the air carrier concerned. Furthermore, however, the question has not yet been answered as to whether it suffices, within the meaning [Or. 7] of that burden of proof and burden of raising an issue in its favour for consideration by the court (Behauptungslast, ‘the burden of assertion’), that the defendant contends that, even though the parent company met the demands, the trade union reiterated the call for and ultimately even extended the strike. It should perhaps be noted in this context that the applicant complains that the defendant has said nothing about the reason for the strike and the concerns of the defendant’s staff.

The referring court is of the opinion that excessive requirements should not be imposed on the defendant air carrier’s burden of assertion and proof in this context. Nor can that burden extend so far as to have to exclude all even remotely conceivable reasons that can be ascribed in the abstract to the air carrier as to why the trade union and the employees called out on strike insisted on striking. If the reason for a strike is because wage negotiations have stalled but agreement is then reached, there is no reason to reiterate the call for and extend the strike if no causes that can be ascribed to the defendant come to light in the process.

In terms of the management of the strike by the parent company and the defendant, as its subsidiary company, it is reasonable to accept that, where 712 flights are cancelled on one day, it is impossible to serve all routes and priorities must be set. It would therefore appear to be acceptable in principle to set priorities for the purpose of such restructuring, as argued by the defendant with reference to the need to minimise the inconvenience to all passengers. The applicant has challenged that approach, whereby just 158 flights were ultimately cancelled as a result of the restructuring, but without substantiation.

[…]