Anonymised version

Case C-566/20

Request for a preliminary ruling

Date lodged:

30 October 2020

Referring court or tribunal:

Landgericht Köln (Germany)

Date of the decision to refer:

7 October 2020

Applicant:

DG

Defendant:

Deutsche Lufthansa AG

[…] Landgericht Köln (Regional Court, Cologne, Germany)

Order

In the case of

DG v Deutsche Lufthansa AG

on 7 October 2020

the 11th Civil Chamber of the Landgericht Köln (Regional Court, Cologne) [('the Chamber')]

[…] [composition of the court]

made the following order:

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 pursuant to 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 125.00 plus interest under Regulation (EC) No 261/2004 of the European Parliament and of the Council of **[Or. 2]** 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').

   The underlying facts are as follows:

   The applicant was booked on flight LH 1124 from Frankfurt (FRA) to Barcelona (BCN) on 8 November 2019, which was to be operated by the defendant, under booking number 02C06C. The applicant was scheduled to take off from Frankfurt at 7:10 a.m. and land at the final destination of Barcelona at 9:10 a.m. Flight LH 1124 was cancelled. As an alternative, the applicant was provided with replacement transportation from Frankfurt to Valencia on flight LH 1164 on 7 November 2019. He was not provided with replacement transportation to Barcelona.

   The distance between Frankfurt and Barcelona is less than 1 500 km.

   The applicant instructed his legal representatives to enforce his rights. By letter of 9 December 2019, the legal representatives requested the defendant to pay compensation of EUR 250, setting a deadline of 16 December 2019, but the defendant refused to do so, citing exceptional circumstances releasing it from the obligation to pay compensation.

   The defendant submits that the reason for the cancellation of flight LH 1124 on 8 November 2019 was that it had no cabin crew available to operate the flight 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 stated period, of which 294 were

intercontinental flights and 1 871 were continental flights. After the strike was called, the defendant drew up and published a contingency plan, 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 and 8 November 2019. Another 30 flights had to be cancelled on 9 November 2019 due to the strike, of which 9 were intercontinental flights and 21 were continental flights. In total, more than 170 000 passengers were affected by the strike. **[Or. 3]**

According to the defendant's submission, which has not been contested by the applicant, the defendant published a special flight schedule on 6 November 2019 to avoid cancellations and delays, and deployed 'office flight crews' (*Büroflieger*), launched calls for volunteers, reduced crew sizes on operating flights in accordance with statutory minimum numbers and assigned some flights to Condor Flugdienst GmbH. Moreover, it gave Lufthansa Group passengers the option to rebook flights free of charge and, in the case of domestic flights within Germany, the option of travelling by train even if their flight was not affected by the strike. Passengers affected by the strike were transferred to other flights or the train, or were able to cancel their journeys free of charge. In addition, the defendant used larger aircraft on certain routes in order to provide alternative travel options for passengers affected by the strike. On 5 November 2019, the defendant also convened top-level talks with the aim of preventing the strike. On 7 November 2019, it made a further 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) upheld the action. It took the view that the defendant had not been released, pursuant to Article 5(3) [of] Regulation (EC) No 261/2004, from the obligation to pay compensation incumbent on it pursuant to Article 5(1)(c) in conjunction with Article 7(1) of that Regulation. There was no extraordinary circumstance within the meaning of Article 5(3). This would require the occurrence of an event which, by its nature or origin, is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond its actual control. Following the decision of the Court of Justice of 17 April 2018, C-195/17, when assessing whether a strike is to be classified as an extraordinary circumstance within the meaning of Article 5(3) [of] Regulation (EC) No 261/2004, account has to be taken of the cause of the strike, even if, as in the present case, it was initiated by a trade union. Wage disputes are an inherent part of a company's normal commercial risks. A strike caused by such a dispute, whether in the form of a 'wildcat strike' or initiated by a trade union, always has to be classified as having been caused internally (by the company's own workforce), and thus not as an extraordinary circumstance within the meaning of Article 5(3) of the Air Passenger Rights Regulation.

3. The defendant […] brought an appeal against the judgment of the Local Court. It continues to pursue its request that the action be dismissed and submits that, in the

decision cited by the applicant, **[Or. 4]** the Court of Justice largely took account of the circumstances of the 'wildcat strike' on which Case C-195/17 was based and that it was therefore not possible to infer from the preliminary ruling of 17 April 2018 that any strike by an air carrier's own employees was inherent in the normal exercise of the activity of an air carrier and within the control of the air carrier concerned. This was not the case with the present strike by the defendant's employees which was organised by a trade union. It was impossible for any company to control the demands of its employees that were not attributable to a decision that the company made immediately beforehand. The demands made by the UFO in the present case were certainly not foreseeable. Nor could 'controllability' be measured against a requirement to comply with any demands. Furthermore, a transfer of the conclusions of the Court of Justice's judgment of 17 April 2018 to the present case did not take account of the fact that recital 14 of Regulation (EC) No 261/2004 explicitly mentioned and recognised as an extraordinary circumstance strikes that affected the operation of an air carrier.

The applicant 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 are applicable to the flight at issue so as to release the air carrier from liability, the appeal is unsuccessful because the applicant is then not entitled to compensation. If, on the other hand, the strike did not constitute an extraordinary circumstance, the appeal would be successful.

2. The question of 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 the interpretation of that provision – in this case of the criterion of 'extraordinary circumstances' – which, in cases of doubt, is a matter reserved for the Court of Justice of the European Union. **[Or. 5]**

3. In accordance with the view taken by the Chamber up to this point, 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 on the basis 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 this respect (in extract):

‘…

2. Contrary to the view taken by the court of appeal, 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 court of appeal, may establish extraordinary circumstances within the meaning of Article 5(3) of the Regulation.

[…]

f) The standards 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 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 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 air crew 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 seeking improved working conditions or higher wages from the other party to the collective 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 **[Or. 6]** 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 […] [reference to national literature]]) and suspends, at least to the extent required to enable industrial action to be taken, the rights and obligations that otherwise exist under the employment contract. The call for strike action – even in so far as it leads to an air carrier’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. This is because the purpose of the call, as a mechanism in the dispute regarding a new or amended collective agreement, is specifically to affect and, if possible, completely paralyse the ‘normal exercise of activity’. Accordingly, it also generally does not affect 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 to protect 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 external industrial action or another event brings to a standstill all or significant parts of the normal operational activity of an air carrier. Furthermore, as demonstrated by a case decided by the West London County Court in which employees of an air carrier were involved in wildcat strike action because the airport operator did not wish to continue using the air carrier for the provision of baggage handling services at the airport […], the two situations may overlap.

g) The Federal Court of Justice can 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 of the European Union. 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 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 Federal Court of Justice is certain that the Court of Justice 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 […] [reference to national literature], the court of appeal 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. 7]**

3. In the present 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 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 assume that the vast majority of 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 outside the business of the operating air carrier. It follows that the air carrier does not usually have any legally significant leverage, even among its own employees, over whether or not strike action is taken. In that connection, 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 untenable. If that were the case, the air carrier would be required to forgo its freedom of association, which is protected by EU law, and to assume the role of the weaker party in any industrial dispute. This would be neither reasonable for the air carrier nor in the longer-term interests 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.

The Chamber takes the view that 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 either. 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 **[Or. 8]** to the present situation, which does not involve specific 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. It can merely be inferred from the decision, in particular from paragraphs 46 and 47, 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.

The Chamber is of the opinion that it is decisive for classification as an extraordinary circumstance in the present situation that the trade union's call for strike action – in contrast to the 'wildcat strike' – is precisely an external influence on the operational activity of the undertaking. 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: calls for strike action and strikes are specifically intended to disrupt operations or bring them 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 is of the view that even the presence of a certain wage structure or the lack of willingness to increase wages 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 with the announcement of **[Or. 9]** 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, in the case of an intra-company strike organised by a trade union, it can no longer be assumed that extraordinary circumstances exist […] [reference to national case- law], or at least not in the absence of additional special circumstances […] [reference to national 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.

[…] [Signatures]

[…] [certification as true copy]