Anonymised version

Case C-565/20

Request for a preliminary ruling

Date lodged:

29 October 2020

Referring court or tribunal:

Landgericht Köln (Germany)

Date of the decision to refer:

9 September 2020

Applicant:

DS

Defendant:

Deutsche Lufthansa AG

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

Order

In the case of

DS v Deutsche Lufthansa AG

the 11th Civil Chamber of Cologne Regional Court

on 9 September 2020

[…] [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 250 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 held reservations for flights LH 2203 and LH 1682 from Düsseldorf (DUS) to Budapest (BUD), via Munich (MUC), on 7 November 2019, which were to be operated by the defendant, under the booking number WNBKLW. The applicant was scheduled to take off from Düsseldorf at 8 p.m. and land at the final destination of Budapest at 11:25 p.m. Flights LH 2203 and LH 1682 were cancelled. As an alternative, the applicant was provided with replacement transportation on flight EW9784 and reached his final destination at 9:11 a.m. on 8 November 2020, with a total delay of 9 hours and 36 minutes.

   The distance between Düsseldorf and Budapest is less than 1 500 km.

   The applicant instructed his legal representatives to enforce his rights. By email 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 flights LH 2203 and LH 1682 on 7 November 2019 was that it had no cabin crew available to operate the flight due to a strike called by the flight attendant union UFO on 1 November 2019 lasting from 00:00 hours on 7 November 2019 until 24:00 hours on 8 November 2019 in order, first and foremost, to push for an increase in expenses and allowances for flight attendants after collective bargaining talks had broken down. 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 call to strike, the defendant drew up and published a contingency plan, which still

provided for a total of 1 273 flights, of which 171 were intercontinental and 1 102 were continental. However, it was actually necessary to cancel further flights, with the result 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 and 21 were continental. In total, over 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 ground personnel as cabin crew, initiated calls for volunteers, reduced crew sizes on operating flights down to the legal minimum levels, and contracted out a number of flights to Condor Flugdienst GmbH. Moreover, it provided Lufthansa Group passengers with means of rebooking their 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 rebooked onto other flights or onto trains, or were able to cancel their journey 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 extended an invitation to top-level talks with the aim of avoiding the strike. On 7 November 2019, it made a further offer to enter into arbitration in that regard. In addition, it had applied for an interim injunction, the issuance of which, however, was rejected by the Hessisches Landesarbeitsgericht (Higher Labour Court, Hessen) at second instance on the evening of 6 November 2019.

2. The Amtsgericht (Local Court) dismissed the action. In accordance with the defendant's objection, it took the view that the cancellation was caused by extraordinary circumstances within the meaning of Article 5(3) [of] Regulation (EC) No 261/2004. […] [reference to the contested decision]

3. The applicant lodged the appeal against the judgment of the Local Court that was permitted therein. He is continuing to pursue his action, claiming that, as a result of the decision of the Court of Justice of 17 April 2018 in Case C-195/17, (*Krüsemann and Others*), a trade-union-organised strike by an air carrier's own employees 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 an 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 on the question referred. **[Or. 4]**

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 for 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.

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) 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 strike called by the pilots' association Vereinigung Cockpit, and stated the following in this respect (in extract):

'…

2. Contrary to the view taken by the appellate court, 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 appellate court, may constitute 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 enter into consideration as a cause of extraordinary circumstances. It is also crucial 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. **[Or. 5]**

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 2000 C 364[, p.] 1 et seq. of 18 December 2000 […] [reference to national literature]) 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 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 wage 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. 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, as demonstrated by a case ruled on by the West London County Court in which employees of an air carrier went on a wildcat strike because the airport operator did not wish to continue to entrust the air carrier with the ground baggage handling services […], the two situations can merge into one another.

(g) The Chamber 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 the described understanding of the rule results, as stated, from the wording and purpose of the regulation and is in line with the interpretation of Article 5(3) of the Regulation by the case-law already delivered by the Court of Justice. 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 Chamber has no doubt that the Court of Justice 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. **[Or. 6]**

This is not precluded by the fact that the appellate court reached a different conclusion in keeping with a number of opinions expressed in the academic literature […] [reference to national academic literature], since this is, where reasoned in more detail, justified firstly with a corresponding interpretation of Article 19 of the Montreal Convention and secondly with 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 of the European Union.

3. In the present dispute, the strike announcement of Vereinigung Cockpit was, as the Chamber can assess on the basis of the findings of the appellate court 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 pilots under its employ would comply with the call for a strike. It was therefore not a case of making up for a loss of a small number of employees caused, for instance, by illness, but responding to an impending 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 planned thereby 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 reliance on extraordinary circumstances is not precluded 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 scope of the autonomy that they enjoy in the collective bargaining process, and is therefore outside the operation 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 internal strikes, an operating air carrier has it within its gift to meet the demands made and thereby avert a strike, 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 start from a weaker position in any industrial dispute. This would be neither reasonable on the air carrier nor in the longer-term interests of passengers. **[Or. 7]**

(b) In its case-law to date, the Chamber has followed the view taken 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 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 prompt a different assessment either. That decision concerned the particular situation of a ‘wildcat strike’, which was triggered by the surprise announcement of restructuring plans by the air carrier. This is in no way comparable to the present situation, in which there are no specific and current operational measures to which the air carrier’s own employees are responding directly and on their own initiative by means of a ‘wildcat strike’.

Nor is it possible, for instance, to infer from the judgment of the Court of Justice in Case C-195/17 that a lawful strike by a company’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 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.

The Chamber is of the opinion that it is decisive for classification as an extraordinary circumstance in the present situation that the trade union call – in contrast to the ‘wildcat strike’ – is precisely an external influence on the operational activity of the undertaking. 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 is also not possible to invoke against the air carrier the argument that it could counteract or ‘control’ the strike by **[Or. 8]** 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 allowances for flight attendants cannot be classified as an operational measure of 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 of the European Union in Case C-195/17, the opinion is being increasingly expressed in the case-law 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 […] [reference to national case- law], or at least not without the existence of further particular 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 […] [reference to national case- law].

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

[…] [Signatures]