Court of Justice of the European Union
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Press and Information

Judgment in Case C-28/20
Airhelp Ltd v Scandinavian Airline System SAS

A strike organised by a trade union of the staff of an air carrier that is intended in particular to secure pay increases does not fall within the concept of an 'extraordinary circumstance' capable of releasing the airline from its obligation to pay compensation for cancellation or long delay in respect of the flights concerned

That is so even if the strike is organised in compliance with the conditions laid down by national legislation

A passenger had booked a seat on a flight from Malmö to Stockholm (Sweden) that was to be operated by Scandinavian Airlines System Denmark – Norway – Sweden (SAS) on 29 April 2019. The flight was cancelled on the day of the flight because of a strike by SAS's pilots in Denmark, Sweden and Norway.

Following the failure of negotiations, conducted by the trade unions representing SAS pilots, that had the objective of concluding a new collective agreement with the airline, the trade unions had called on their members to strike. That strike lasted seven days and resulted in SAS cancelling a number of flights, including the flight booked by the passenger concerned.

Airhelp, to which that passenger assigned any rights that he had vis-à-vis SAS, brought proceedings before the Attunda tingsrätt, Sollentuna (Attunda District Court, Sollentuna, Sweden), claiming the compensation laid down by the Air Passenger Rights Regulation [1] for cancellation of a flight. In this instance, SAS had refused to pay the compensation, taking the view that the strike by its pilots constituted an 'extraordinary circumstance' within the meaning of that regulation [2] since it was not inherent in the normal exercise of its activity of providing air transport services and was beyond its actual control. Airhelp took the view that the strike did not constitute an 'extraordinary circumstance' of that kind since industrial action, such as strikes, which is liable to take place when collective agreements are negotiated and concluded, falls within the ordinary course of business of an airline.

The Attunda tingsrätt, Sollentuna, expressed doubts as to whether the concept of 'extraordinary circumstances' within the meaning of the Air Passenger Rights Regulation encompasses a strike which is announced by workers' organisations following the giving of notice, is lawfully initiated and is intended in particular to secure pay increases. Under Swedish law, notice of a strike does not have to be lodged until one week before the strike begins.

Findings of the Court

By its judgment, delivered by the Grand Chamber, the Court holds that **strike action which is entered into upon a call by a trade union of the staff of an operating air carrier, in**

[1] Article 5(1)(c), read in conjunction with Article 7(1)(a), of 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 (OJ 2004 L 46, p. 1).

[2] Under Article 5(3) of the Air Passenger Rights Regulation, an operating air carrier is not to be obliged to pay compensation in accordance with Article 7 of the regulation 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.

compliance with the conditions laid down by national legislation, in particular the notice period imposed by it, which is intended to assert the demands of that carrier's workers and which is followed by a category of staff essential for operating a flight **does not fall within the concept of an 'extraordinary circumstance' within the meaning of the Air Passenger Rights Regulation.**

First of all, the Court points out that the concept of 'extraordinary circumstances' in the Air Passenger Rights Regulation refers to events which meet two cumulative conditions, the fulfilment of which must be assessed on a case-by-case basis, namely, first, they must not be inherent, by their nature or origin, in the normal exercise of an air carrier's activity and, second, they must be beyond its actual control. [3] It also explains that that concept must be interpreted strictly, in view of the fact that, first, the regulation has the objective of ensuring a high level of protection for air passengers and, second, the exemption from the obligation laid down by the regulation to pay compensation constitutes a derogation from the principle that air passengers have the right to compensation.

Next, the Court examines whether a strike which is entered into upon a call by a trade union of the staff of an operating air carrier, in compliance with the notice period imposed by national legislation, which is intended to assert the demands of that carrier's workers and which is followed by one or more categories of staff whose presence is necessary to operate a flight is capable of constituting an 'extraordinary circumstance' within the meaning of the Air Passenger Rights Regulation.

As regards, in the first place, the question whether the strike at issue might be categorised as an event which is not inherent in the normal exercise of an air carrier's activity, the Court observes that the right to take collective action, including strike action, is a fundamental right, laid down in Article 28 of the Charter of Fundamental Rights of the European Union ('the Charter'). In that regard, the Court states that **a strike, as one of the ways in which collective bargaining may manifest itself, must be regarded as an event inherent in the normal exercise of the employer's activity**, irrespective of the particular features of the labour market concerned or of the national legislation applicable as regards implementation of that fundamental right. That interpretation must also apply where the employer is an operating air carrier, as measures relating to the working conditions and remuneration of the staff of such a carrier fall within the normal management of its activities. Therefore, **a strike whose objective is limited to obtaining from an air transport undertaking an increase in the pilots' salary, a change in their work schedules and greater predictability as regards working hours constitutes an event that is inherent in the normal exercise of that undertaking's activity, in particular where such a strike is organised within a legal framework.**

So far as concerns, in the second place, the question whether the strike in question could be entirely beyond an air carrier's actual control, the Court points out, first, that, since the right to strike is a right of workers guaranteed by the Charter, a strike's launch is foreseeable for any employer, in particular where notice of the strike is given.

Second, since a strike is foreseeable for the employer, it retains control over events inasmuch as it has, in principle, the means to prepare for the strike and, as the case may be, mitigate its consequences. In that respect, like any employer, **an operating air carrier faced with a strike by its staff that is founded on demands relating to working and remuneration conditions cannot claim that it does not have any control over that action.**

Therefore, according to the Court, **a strike by the staff of an operating air carrier that is connected to demands relating to the employment relationship between the carrier and its staff that are capable of being dealt with through management-labour dialogue within the**

[3] See, to that effect, judgments of 22 December 2008, *Wallentin-Hermann*, C-549/07, paragraph 23 (see also Press Release No 100/08); of 17 September 2015, *van der Lans*, C-257/14, paragraph 36 (see also Press Release No 105/15); of 17 April 2018, *Krüsemann and Others*, C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, paragraphs 32 and 34 (see also Press Release No 49/18); and of 11 June 2020, *Transportes Aéros Portugueses*, C-74/19, paragraph 37 (see also Press Release No 68/20).

undertaking, including pay negotiations, does not fall within the concept of an 'extraordinary circumstance' within the meaning of the Air Passenger Rights Regulation.

Third, the Court notes that, unlike events whose origin is 'internal' to the operating air carrier, events whose origin is 'external' are not controlled by that carrier, because they arise from a natural event or an act of a third party, such as another air carrier or a public or private operator interfering with flight or airport activity. Thus, it points out that the reference in the Air Passenger Rights Regulation [4] to extraordinary circumstances that may, in particular, occur in the case of strikes that affect the operation of an operating air carrier must be understood as relating to strikes external to the activity of the air carrier concerned, such as strikes by air traffic controllers or airport staff. On the other hand, **a strike set in motion and observed by members of the relevant air transport undertaking's own staff is an event 'internal' to that undertaking, including in the case of a strike set in motion upon a call by trade unions**, since they are acting in the interest of that undertaking's workers. However, the Court states that, if such a strike originates from demands which only the public authorities can satisfy, it is capable of constituting an 'extraordinary circumstance' since it is beyond the air carrier's actual control.

Fourth, the Court holds that **the air carrier's freedom to conduct a business, its property rights [5] and its right of negotiation [6] are not impaired by not categorising the strike at issue as an 'extraordinary circumstance' within the meaning of the Air Passenger Rights Regulation.** As regards the right of negotiation, the fact that an air carrier, because of a strike by members of its staff that is organised within a legal framework, is faced with the risk of having to pay the compensation due to passengers for flight cancellation does not compel it to accept, without discussion, the strikers' demands in their entirety. The air carrier remains able to assert the undertaking's interests, so as to reach a compromise that is satisfactory for all the social partners. So far as concerns an air carrier's freedom to conduct a business and right to property, the Court points out that these are not absolute rights and that the importance of the objective of consumer protection, [7] including the protection of air passengers, may therefore justify even substantial negative economic consequences for certain economic operators.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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[4] Recital 14 of the Air Passenger Rights Regulation.
[5] Guaranteed by Articles 16 and 17 of the Charter.
[6] Guaranteed by Article 28 of the Charter.
[7] As provided for by Article 169 TFEU and Article 38 of the Charter.