



Neutral Citation Number: [2022] EWCA Civ 76

Case No: CA-2021-000633

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

His Honour Judge Gerald (sitting as a Judge of the High Court)

[2021] EWHC 1476 (Ch)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 02/02/2022

Before:

LORD JUSTICE LEWISON

LORD JUSTICE NEWY

and

LORD JUSTICE SNOWDEN

Between:

THE CIVIL AVIATION AUTHORITY

- and -

RYANAIR DAC

Brian Kennelly QC and Tom Coates (instructed by Stephenson Harwood LLP) for the Appellant

Kevin de Haan QC and Michael Coley (instructed by The Civil Aviation Authority) for the

Respondent

Hearing date: 19 January 2022

Approved Judgment

Claimant

Respondent

Defendant

Appellant

This judgment was handed down remotely at 10:30am on 02 February 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Lord Justice Newey:

1.

The question raised by this appeal is whether the appellant, Ryanair DAC (“Ryanair”), is obliged by Parliament and Council Regulation (EC) No 261/2004 (“the Regulation”) to pay passengers compensation in respect of flights that were cancelled in 2018 as a result of strike action by employees of the airline. It is Ryanair’s case that the cancellations were caused by “extraordinary circumstances” within the meaning of article 5(3) of the Regulation and, hence, that compensation is not payable. HH Judge Gerald (“the Judge”), sitting as a Judge of the High Court, rejected that contention in a judgment given on 29 April 2021, but Ryanair now challenges that decision in this Court.

2.

The claim is brought by the respondent, the Civil Aviation Authority (“the CAA”), pursuant to [part 8](#) of the [Enterprise Act 2002](#). That allows the CAA to apply for an “enforcement order” if it thinks that there has been a contravention of the Regulation which harms the collective interests of consumers. In the present case, the Judge made an enforcement order requiring Ryanair to pay affected passengers compensation in the amounts set out in article 7 of the Regulation.

Basic facts

3.

In the past, Ryanair would negotiate staff terms and conditions using a system of employee representative committees. In December 2017, however, Ryanair decided to recognise trade unions for its pilots and cabin crew. During subsequent negotiations with Fórsa, an Irish trade union, over the terms of a recognition agreement, Fórsa sent Ryanair a letter in May 2018 setting out 11 minimum requirements for an agreement governing seniority among Irish pilots. In unchallenged evidence, Mr Darrell Hughes, the People Director at Ryanair, has explained that the airline could not accede to the demands without significantly jeopardising its business model. However, pilots voted in favour of industrial action in a secret ballot and, despite Ryanair putting forward proposals of its own and attending meetings with Fórsa, strikes were held on a number of days in July and August of 2018. Eventually, following intensive mediation between 13 and 23 August 2018, the two sides reached agreement. Ryanair accepted certain of Fórsa’s demands, Fórsa gave way on a number of points, others were the subject of compromises and, in one case, a working group was formed to seek to find a solution. The resulting agreement was ratified by Fórsa’s Ryanair members in September 2018.

4.

There were also strikes between July and September of 2018 in other European countries. Mr Hughes said in his witness statement:

“Ryanair’s impression is that, given that it is a mature multinational company operating in 37 countries and had not been a unionised airline before December 2017, some unions were determined to announce their arrival by striking during 2018. This was especially true in certain countries (including Spain, Belgium, Germany and Portugal) where it is more common for unions to call strikes at the early stages of a negotiating process rather than as a last resort.”

5.

In consequence of the various strikes, Ryanair cancelled a number of flights, including some which had been scheduled to depart from an airport in the United Kingdom.

The Regulation

6.

The Regulation imposes obligations on air carriers to provide assistance and compensation to passengers who are denied boarding or whose flights are cancelled or seriously delayed. Where a flight is cancelled, article 5 entitles the passengers concerned to reimbursement or re-routing in accordance with article 8; to meals, refreshments and, sometimes, hotel accommodation pursuant to article 9; and also, potentially, to compensation of €250, €400 or €600 per passenger, depending on the distance of the flight in question, under article 7.

7.

So far as relevant to the payment of compensation, article 5 provides:

“1. In case of cancellation of a flight, the passengers concerned shall:

...

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

...

3. An operating air carrier shall not 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.”

8.

Some of the objectives of the Regulation emerge from its first four recitals. These are in these terms:

“(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

(3) While Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport created basic protection for

passengers, the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays.

(4) The Community should therefore raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.”

9.

It can be seen that there was concern to ensure “a high level of protection for passengers” and that the numbers of passengers denied boarding, of cancellations and of flights subject to long delays were considered to remain too high notwithstanding the predecessor Regulation, Council Regulation (EEC) No 295/91. With regard to the latter point, the Commission’s proposal for what became the Regulation said this in paragraph 5:

“The Commission believes that, even amended, Regulation (EEC) No. 295/91 would still not protect passengers adequately when confronted by denied boarding or cancellation. The original and the amending regulation oblige air carriers and tour organisers ... to compensate and assist passengers. They do not, however, dissuade them from excessive denial of boarding or cancellation, nor give incentives to balance the commercial advantages against the cost to passengers. Consequently, too many passengers would have continued to suffer from these practices.”

Elsewhere in the proposal, the Commission noted that “Denied boarding and cancellation of flights, for commercial reasons, provoke strong resentment” (paragraph 1) and that “[f]or the passenger, cancellation in ordinary circumstances, for commercial reasons, causes unacceptable trouble and delay, particularly when not warned in advance” (paragraph 21).

10.

Recital (14) to the Regulation is also material. It states:

“As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.”

Authorities

11.

We were referred to various decisions of the Court of Justice of the European Union (“CJEU”) as well as several domestic cases. The earliest decision to which we were taken was Case C-549/07 Wallentin-Hermann v Alitalia EU:C:2008:771, [2009] Bus LR 1016 (“Wallentin-Hermann”). That established the following principles:

i)

The preamble to a Regulation may explain its content and, in the case of the Regulation, recitals (1) and (2) show that article 5 was intended to provide a high level of protection for passengers (paragraph 18 of the judgment);

ii)

Since article 5(3) of the Regulation derogates from the principle that passengers have a right to compensation if their flight is cancelled, it must be interpreted strictly (paragraph 20 of the judgment);

iii)

Circumstances are to be characterised as “extraordinary” within the meaning of article 5(3) “only if they relate to an event which ... is not inherent in the normal exercise of the activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin” (paragraph 23 of the judgment);

iv)

The list of events given in recital (14) is neither exhaustive nor definitive. “Extraordinary circumstances” can arise without any such event having taken place and, on the other hand, the fact that such an event has given rise to a cancellation need not mean that there were “extraordinary circumstances”. The Court explained in paragraph 22 of its judgment in Wallentin-Hermann:

“the Community legislature did not mean that those events, the list of which is indeed only indicative, themselves constitute extraordinary circumstances, but only that they may produce such circumstances. It follows that not all the circumstances surrounding such events are necessarily grounds of exemption from the obligation to pay compensation provided for in article 5(1)(c) of the Regulation”.

12.

In Wallentin-Hermann, the relevant flight had been cancelled because an engine defect had been discovered. The Court held that “technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance cannot constitute, in themselves, ‘extraordinary circumstances’ under article 5(3)” (paragraph 25 of the judgment), noting that “air carriers are confronted as a matter of course in the exercise of their activity with various technical problems to which the operation of those aircraft inevitably gives rise” (paragraph 24). The Court also observed, however, that “it cannot be ruled out that technical problems are covered by those extraordinary circumstances to the extent that they stem from events which are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control”, explaining:

“That would be the case, for example, in the situation where it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although already in service, are affected by a hidden manufacturing defect which impinges on flight safety. The same would hold for damage to aircraft caused by acts of sabotage or terrorism” (paragraph 26).

13.

There were also held to be no “extraordinary circumstances” in C-394/14 Siewert v Condor Flugdienst GmbH EU:C:2014:2377 (“Siewert”), where a plane had been damaged by a collision with mobile boarding stairs. The Court said in paragraph 19 of the judgment:

“as regards a technical problem resulting from an airport’s set of mobile boarding stairs colliding with an aircraft, it should be pointed out that such mobile stairs or gangways are indispensable to air passenger transport, enabling passengers to enter or leave the aircraft, and, accordingly, air carriers are regularly faced with situations arising from their use. Therefore, a collision between an aircraft and any such set of mobile boarding stairs must be regarded as an event inherent in the normal

exercise of the activity of the air carrier. Furthermore, there is nothing to suggest that the damage suffered by the aircraft which was due to operate the flight at issue was caused by an act outside the category of normal airport services (such as an act of sabotage or terrorism) ”

Commenting on Siewert in Case C-501/17 Germanwings GmbH v Pauels EU:C:2019:288 (“Pauels”), the CJEU said in paragraph 30 of the judgment:

“Such equipment [i.e. mobile boarding stairs] is indispensable to air passenger transport, enabling passengers to enter or leave the aircraft ... and the use of such equipment ordinarily takes place in collaboration with the crew of the aircraft concerned. Such circumstances cannot therefore be regarded as not inherent in the normal exercise of the activity of the air carrier concerned or outside that carrier’s actual control.”

14.

Domestic Courts concluded that there were no “extraordinary circumstances” in Huzar v Jet2.com Ltd [2014] EWCA Civ 791, [2014] Bus LR 1324 (“Huzar”), and Lipton v BA City Flyer Ltd [2021] EWCA Civ 454, [2021] 1 WLR 2545 (“Lipton”). In Huzar, where a plane had suffered a wiring defect, Elias LJ, with whom Laws and Gloster LJ agreed, said in paragraph 42 that “the fact that a particular technical problem may be unforeseeable does not mean that it is unexpected”, adding, “[p]roblems of this nature frequently arise”. One factor weighing against attaching importance to the foreseeability of a problem was, Elias LJ considered, that it “would open up endless debate about whether a particular technical problem should have been foreseen or not”. Elias LJ went on in paragraph 46:

“This could become a critical question in many compensation claims and would potentially involve lengthy litigation with, no doubt, expert witnesses being called on each side. Alternatively, simply by raising the defence a carrier would be likely to discourage inconvenienced passengers from pursuing their claims. I doubt whether the draftsman would have intended the exception to have that effect.”

15.

In Lipton, where the plane’s captain had fallen ill while off duty, Coulson LJ, with whom Haddon-Cave and Green LJ agreed, concluded in paragraph 29 that “[t]he non-attendance of the captain due to illness was an inherent part of the respondent’s activity and operations as an air carrier, and could in no way be categorised as extraordinary”. In paragraph 35, Coulson LJ said:

“An air carrier’s operation depends on two principal resources: its people and its aircraft. Wear and tear of the aircraft and its component parts is not extraordinary; the wear and tear on people, manifesting itself in occasional illness, should not be regarded as any different.”

In paragraph 45, Coulson LJ warned against an approach requiring “too granular an investigation”, saying:

“A final reason for concluding that precisely when, why or how the staff member in question fell ill is irrelevant to the proper operation of article 5 arises from the nature of the Regulation itself. The Regulation is concerned to provide a standardised, if modest, level of compensation to those who suffer the inconvenience of cancelled or delayed flights. The exception at article 5(3) has to be considered in that light. Most of these claims are assigned to the small claims track, and the vast bulk of them should be capable of being determined on the papers. In those circumstances, it is contrary to the scheme of the Regulation to allow the carrier to embark on a complex analysis of precisely when, why or how a staff member became ill so as to explain their absence and the subsequent cancellation of the flight.”

However, Coulson LJ noted in paragraph 49 that there “may possibly be a need for a more detailed investigation in a case where there is an issue as to whether or not the recital (14) indicia are in play”.

16.

In contrast, “extraordinary circumstances” were held to exist where a plane had collided with a bird (Case C-315/15 *Pešková v Travel Service AS* EU:C:2017:342, [2017] Bus LR 1134 (“Pešková”)), where a tyre of an aircraft had been damaged by a screw lying on the runway (Pauels), where petrol on a runway had resulted in its closure (Case C-159/18 *Moens v Ryanair Ltd* EU:C:2019:535 (“Moens”)), where there had been an air traffic management decision to suspend flights because of thunderstorms (*Blanche v EasyJet Airline Co Ltd* [2019] EWCA Civ 69, [2019] Bus LR 1258 (“Blanche”)) and where a flight had had to be diverted to disembark an “unruly passenger who had bitten a passenger and assaulted other passengers and members of the cabin crew” (Case C-74/19 *LE v Transport Aéreos Portugueses SA* EU:C:2020:460 (“LE”)). In *Pešková*, the CJEU said in paragraph 24 of the judgment:

“In the present case, a collision between an aircraft and a bird, as well as any damage caused by that collision, since they are not intrinsically linked to the operating system of the aircraft, are not by their nature or origin inherent in the normal exercise of the activity of the air carrier concerned and are outside its actual control. Accordingly, that collision must be classified as ‘extraordinary circumstances’ within the meaning of article 5(3) of Regulation No 261/2004.”

In *Pauels*, the CJEU said in paragraph 24 of the judgment that “where the malfunctioning in question is the sole result of the impact of a foreign object ... , such malfunctioning cannot be regarded as intrinsically linked to the operating system of that aircraft” and, similarly, the CJEU said in paragraph 18 of its judgment in *Moens* that “when the petrol in question does not originate from an aircraft of the carrier that operated that flight, it should be noted that, logically, such a circumstance cannot be regarded as intrinsically linked to the operation of the aircraft that made that flight”. One point made by Coulson LJ, with whom Ryder and King LJ agreed, in *Blanche* was that it would “be impractical for the courts to allow a debate about the merits of a particular [air traffic management decision] long after the event, and in circumstances where [Air Traffic Control] would not be a party to the litigation” (paragraph 31). In *LE*, the CJEU said that “unruly behaviour of such gravity as to justify the pilot in command diverting the flight concerned is not inherent in the normal exercise of the activity of the operating air carrier concerned” (paragraph 41 of the judgment) and that “such behaviour is not, in principle, under the control of the operating air carrier concerned, since, first, it is the act of a passenger whose behaviour and reactions to the crew’s requests are not, in principle, foreseeable and, secondly, on board an aircraft, both the commander and the crew have only limited means of controlling such a passenger” (paragraph 43). The CJEU added, however, that the passenger’s behaviour would have been within the control of the carrier, and so not constituted “extraordinary circumstances”, if:

“it is apparent, which is for the national court to ascertain, that the operating air carrier concerned appears to have contributed to the occurrence of the unruly behaviour of the passenger concerned or if that carrier was in a position to anticipate such behaviour and to take appropriate measures at a time when it was able to do so without any significant consequence for the operation of the flight concerned, on the basis of warning signs of such behaviour” (paragraph 45 of the judgment).

17.

Three CJEU cases have concerned strike action by employees of an air carrier: *Joined Cases C-195/17 etc Krüsemann v TUIfly GmbH* EU:C:2018:258, [2018] Bus LR 1191 (“Krüsemann”), *Case C-28/20 Airhelp Ltd v Scandinavian Airlines System* EU:C:2021:226, [2021] Bus LR 674 (“Airhelp”) and *Case*

C-613/20 CS v Eurowings GmbH EU:C:2021:820 (“CS”). In Krüsemann, the CJEU ruled in the operative part of the judgment that article 5(3) of the Regulation:

“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 a restructuring of the undertaking, 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.”

Echoing earlier authority, the CJEU observed in its judgment that “the circumstances referred to in [recital (14) to the Regulation] are not necessarily and automatically grounds of exemption from the obligation to pay compensation provided for in article 5(1)(c)” (paragraph 34), that “any unexpected event need not necessarily be classified as an ‘extraordinary circumstance’” (paragraph 35) and that “the concept of ‘extraordinary circumstances’ ... must be strictly interpreted” (paragraph 36). In a passage which was the subject of much debate before us, the CJEU went on:

“38. In the present case, it is apparent from the file submitted to the court that the ‘wildcat strike’ among the staff of the air carrier concerned has its origins in the carrier’s surprise announcement of a corporate restructuring process. That announcement led, for a period of approximately one week, to a particularly high rate of flight staff absenteeism as a result of a call relayed not by staff representatives of the undertaking, but spontaneously by the workers themselves who placed themselves on sick leave.

39. Thus, it is not disputed that the ‘wildcat strike’ was triggered by the staff of TUIfly in order for it to set out its claims, in this case relating to the restructuring measures announced by the management of that air carrier.

40. As correctly noted by the European Commission in its written observations, the restructuring and reorganisation of undertakings are part of the normal management of those entities.

41. Thus, air carriers may, as a matter of course, when carrying out of their activity, face disagreements or conflicts with all or part of their members of staff.

42. Therefore, under the conditions referred to in paras 38 and 39 of this judgment, the risks arising from the social consequences that go with such measures must be regarded as inherent in the normal exercise of the activity of the air carrier concerned.

43. Furthermore, the ‘wildcat strike’ cannot be regarded as beyond the actual control of the air carrier concerned.

44. Apart from the fact that the ‘wildcat strike’ stems from a decision taken by the air carrier, it should be noted that, despite the high rate of absenteeism mentioned by the referring court, that ‘wildcat strike’ ceased following an agreement that it concluded with the staff representatives.

45. Therefore, such a strike cannot be classified as an ‘extraordinary circumstance’ within the meaning of article 5(3) of Regulation No 261/2004, releasing the operating air carrier from its obligation to pay compensation pursuant to article 5(1)(c) and to article 7(1) of that Regulation.”

18.

In Airhelp, the CJEU (Grand Chamber) ruled in the operative part of the judgment, differing from the Advocate General, that article 5(3) of the Regulation:

“must be interpreted as meaning that strike action which is entered into upon a call by a trade union of the staff of an operating air carrier, in 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 that provision”.

The CJEU concluded in paragraph 30 of the judgment that “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”. The CJEU had said in paragraph 28:

“Despite embodying a moment of conflict in relations between the workers and the employer, whose activity it is intended to paralyse, a strike nevertheless remains one of the ways in which collective bargaining may manifest itself and, therefore, must be regarded as an event inherent in the normal exercise of the activity of the employer concerned, irrespective of the particular features of the labour market concerned or of the national legislation applicable as regards implementation of that fundamental right.”

Turning to whether a strike was to be regarded as beyond the air carrier’s control, the CJEU said:

“37. Accordingly, in order to ensure the effectiveness of the obligation laid down in article 7(1) of Regulation No 261/2004 to pay compensation, a strike by the staff of an operating air carrier cannot be categorised as an ‘extraordinary circumstance’ within the meaning of article 5(3) of the regulation where that strike 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 undertaking. That is precisely the situation in the case of pay negotiations.

38. Nor can that finding be called into question by the fact that the strikers’ demands might be unreasonable or disproportionate or by the strikers’ rejection of a proposal for settlement since, in any event, the determination of pay levels falls within the scope of the employment relationship between the employer and its workers.”

19.

The CJEU noted in paragraph 39 of the judgment that “events whose origin is ‘internal’ must be distinguished from those whose origin is ‘external’ to the operating air carrier”. After referring to, among other cases, Pešková, Pauels and Moens, the CJEU said in paragraph 41:

“The feature shared by all those events is that they result from the activity of the air carrier and from external circumstances which are more or less frequent in practice but which the air carrier does not control 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.”

Relating the external/internal distinction to strikes, the CJEU said:

“42. Thus, in stating, in recital (14) of Regulation No 261/2004, that extraordinary circumstances may, in particular, occur in the case of strikes that affect the operation of an operating air carrier, the EU legislature intended to refer to strikes that are external to the activity of the air carrier concerned. It follows that strike action taken by air traffic controllers or airport staff may in particular constitute an ‘extraordinary circumstance’ within the meaning of article 5(3) of that Regulation (see, to that effect, *Finnair Oyj v Lassooy* (Case C-22/11) [2013] 1 CMLR 18).

43. Since such strike action does not moreover fall within the exercise of that carrier's activity and is thus beyond its actual control, it constitutes an 'extraordinary circumstance' within the meaning of article 5(3) of Regulation No 261/2004.

44. 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.

45. If, however, such a strike originates from demands which only the public authorities can satisfy and which, accordingly, are beyond the actual control of the air carrier concerned, it is capable of constituting an 'extraordinary circumstance' "

20.

In CS, the strike giving rise to the cancellation had been called by a trade union in order to exert pressure in negotiations with the air carrier's parent company. The CJEU ruled in the operative part of the judgment that article 5(3) of the Regulation:

"must be interpreted as meaning that strike action intended to assert workers' demands with regard to salary and/or social benefits, which is entered into upon a call by a trade union of the staff of an operating air carrier in solidarity with strike action which was launched against the parent company of which that air carrier is a subsidiary, which is observed by a category of the staff of that subsidiary whose presence is necessary to operate a flight and which continues beyond the period originally announced by the trade union which called the strike, in spite of the fact that an agreement has been reached in the meantime with the parent company, is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision".

In the course of its judgment, the CJEU said:

"22 Thus, a strike whose objective is limited to obtaining from an air transport undertaking an increase in the cabin crew's salary 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 (see, to that effect, judgment of 23 March 2021, Airhelp, C-28/20, EU:C:2021:226, paragraph 30).

23 Furthermore, in so far as both the social policy within a parent company and the group policy established by that company may have an impact on the social policy and strategy of the subsidiaries in that group, a strike set in motion by the staff of an operating air carrier in solidarity with the strike observed by the staff of the parent company of which that carrier is a subsidiary cannot be regarded as an event which is not inherent in the normal exercise of the latter's activity. As the European Commission remarked in its written observations, it is neither out of the ordinary nor unforeseeable that labour disputes may extend to different parts of a group of undertakings during collective bargaining."

The significance of the CJEU decisions

21.

The United Kingdom has now, of course, left the European Union. However, by virtue of [section 6\(3\) of the European Union \(Withdrawal\) Act 2018](#) any question as to the meaning or effect of any "retained EU law", including the Regulation, is in general to be decided in accordance with pre-withdrawal decisions of the CJEU. A domestic Court is not similarly bound by decisions made by the CJEU since the end of 2020, but [section 6\(2\)](#) states that the Court "may have regard to anything done on or after

IP completion day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal”.

22.

Two of the CJEU cases to which I have referred, Airhelp and CS, were not decided until 2021. It follows that we are entitled to have regard to those decisions but are not bound by them.

The judgment

23.

In paragraph 35 of his judgment, the Judge identified “the broad principles to be adopted when considering the question of whether or not the circumstances are extraordinary” as follows:

“It is a high level, conceptual test necessitating a fairly cursory fact-finding exercise in relation to whether or not the circumstances are inherent or external to the carrier. Once that is established, the test for liability is not fault- but activity-based. The question is whether the occurrence was an inherent, or part of the normal activities of the carrier as opposed to not part of but external to the normal activities of the carrier.”

“What is important in identifying the origins”, the Judge said in paragraph 42, “is not identifying the cause per se but to see whether the circumstances originate or are part of the carrier’s normal activities as distinct from the bird strike or unruly passenger which are outside the normal activities of the air carrier”.

24.

With regard to strikes, the Judge said in paragraph 39:

“It does not follow that because one side walks out and negotiations break down and the union is the one who endorses the position and causes employees to walk out, that the strike is beyond an air carrier’s control; the strikes are nonetheless still part of the normal activities of a business which, ultimately, are resolved by agreement and therefore within the air carriers’ actual control.”

“[N]egotiations between an employer and employees and their representatives, whether unionised or not”, the Judge said in paragraph 43, “are part of the normal activities of air carriers”. In that connection, the Judge said:

“ ... It is a normal part of those negotiations for there to be ebb and flow, one or other or both sides starting with robust or extreme or even outrageous or unreasonable or impossible positions, some knowingly attainable, some knowingly unattainable, which ultimately result in resolution sometimes by compromise in the middle, sometimes in conceding one point as the price of succeeding on another point and any number of combinations in between.

It is normal for such negotiations to break down and for one side to walk out. It is normal for both sides to deploy whatever tools are at their disposal, which include withdrawing labour, going on strike; or, for employers, threatening whole or partial closure or workforce reductions as the consequences of what is demanded. Ultimately, resolution is reached, so demonstrating that ultimately the carrier is in control as matters are compromised and negotiated settlement reached.

The fact that control is temporarily lost, for example when all or part of the workforce, whether unionised or not, walks out, or goes on strike, or takes an outlandish position, does not mean that the carrier is not in ‘control’. It merely means that there has been a hitch in negotiations where one side has withdrawn. All of this is inherent or internal, part and parcel of a business or activities of this

nature. It is not random or external to an air carrier, like a bird or a screw. 'Control', whether termed 'actual control' or otherwise, merely means those aspects which are within the four corners of the business, and not from outside of it, serving to identify the parameters of what is inherent in the carrier's normal activities."

25.

The Judge thought the involvement of trade unions irrelevant. He said in paragraph 49:

"The presence of the union is ... a red herring: they were acting on the authority of the employees, so the fact that a new ostensible external third party in the form of a union is involved or interposed does not make the negotiation any different from the normal activities of an air carrier negotiating terms and conditions with its employees."

26.

The Judge went on in paragraph 50:

"It would seem a strange situation for the court to investigate whose fault it was for the breakdown of negotiations, which may be for any number of reasons, such as because [Ryanair] not being prepared to offer or agree to the union proposal, or the other way, for example where the union says 'if you do not agree, we will walk out'. This is part and parcel of running a business and the risks inherent in that business, including negotiations with employees. The mere fact that there is a financial consequence on one side does not change this: it is simply an extra element of risk and something that is not secret as it is part of the Regulation."

27.

The Judge observed in paragraph 54 that "[t]here may be circumstances where, for example, an air carrier's own staff go out on sympathy strike with others which are wholly unrelated to the air carrier's own activities". In general, though, "[t]he fact that there is a strike, whether or not called by a union, provided there is support from the employees, cannot be regarded as external" (paragraph 53). The Judge saw Airhelp "more of a confirmation or clarification of the pre-Brexit authorities and consistent with them" (paragraph 52).

The parties' cases in outline

28.

Article 5(3) of the Regulation exempts an air carrier from paying the compensation for which article 7 provides if it can prove that the relevant cancellation was "caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken". In the present case, the CAA does not suggest that Ryanair failed to take "reasonable measures" so the only issue is whether the strikes giving rise to the flight cancellations amounted to "extraordinary circumstances".

29.

For circumstances to be considered "extraordinary" for the purposes of article 5(3) of the Regulation, they must, first, "relate to an event which ... is not inherent in the normal exercise of the activity of the air carrier concerned" and, secondly, be "beyond the actual control of that carrier". With regard to the first element, Mr Brian Kennelly QC, who appeared for Ryanair with Mr Tom Coates, submitted that the strikes which affected the airline in 2018 were not inherent in the normal exercise of its activity because they had their origins in demands made by external and independent trade unions; because they were not a response to any particular action on the part of the airline; because they were "extraordinary" within the ordinary meaning of that word, especially since their very object was

to disrupt normal activity; and because they were analogous to, say, the manufacturing defects, bird strikes and other one-off external events which the authorities show to constitute “extraordinary circumstances”. As for the second element, Mr Kennelly argued that Ryanair could not control the demands or actions of independent trade unions and that it can be seen on the basis of even a limited factual inquiry that the airline could not have averted the strikes which caused the flight cancellations. Mr Kennelly maintained that, when deciding whether a cancellation was caused by “extraordinary circumstances”, some factual inquiry is necessary, particularly where the situation is one listed in recital (14) to the Regulation.

30.

For his part, Mr Kevin de Haan QC, who appeared for the CAA with Mr Michael Coley, supported the Judge’s decision. The key questions to ask where a cancellation was attributable to a strike are, he suggested, simply whether it was employees of the air carrier who went on strike and, if so, whether the strike concerned the employees’ pay or working conditions. Should the answer to both questions be “Yes”, the strike will not normally amount to “extraordinary circumstances”, although the position might be different if the employees had, say, been trying to ensure that flights on which they were due to work were routed away from an area in which they believed that there was a threat from terrorism. Here, Mr de Haan argued, Ryanair employees were striking over aspects of their working conditions and it could not be appropriate for there to be an inquiry into whether the demands made on their behalf by trade unions were reasonable or quite why it had been considered right to resort to strike action. Breakdowns in negotiations, Mr de Haan said, come with the territory, and the fact that trade unions were involved cannot matter.

Discussion

31.

Relying on recital (3) to the Regulation and, especially, the European Commission’s proposal for the Regulation, Mr Kennelly submitted that the original intention behind the Regulation was to deter air carriers from overbooking and from cancelling flights for commercial reasons. As, however, was noted in Wallentin-Hermann, it can be seen from recitals (1) and (2) that the Regulation was also designed to provide a high level of protection for passengers and, from the point of view of a passenger whose flight is cancelled, it will be unimportant whether the cancellation was for “commercial reasons”. Moreover, the CJEU pointed out in both Wallentin-Hermann and Krüsemann that article 5(3) is to be strictly interpreted.

32.

As was observed by Mr Kennelly, it is apparent from the authorities that, when determining whether an event was inherent in the normal exercise of an air carrier’s activity, it is relevant to ask whether it stemmed from an external source. Wallentin-Hermann shows that a problem arising from sabotage, terrorism or a hidden manufacturing defect can qualify as “extraordinary circumstances”. In Pešková, Pauels, Moens, Blanche and LE, where there were held to be “extraordinary circumstances”, there was in each case an external cause: a bird, a screw on the runway, an air traffic management decision, an unruly passenger.

33.

However, a trade union representing employees of an air carrier cannot be viewed in the same way. It is true that the operative part of the CJEU’s decision in Krüsemann noted that the absence of flight crew staff was “spontaneous”, but it cannot be inferred that the spontaneity was necessary to the decision. It seems to me that, where employees of an air carrier have chosen to be represented by a

trade union, the union must be seen as internal to the activity of the carrier rather than outside it. As Coulson LJ commented in *Lipton*, a carrier's people are one of its two principal resources and, where staff elect to have a trade union speak for them, the union is an adjunct of that resource. In any event, the strikes at issue in the present case did not take place until after the employees had been balloted. In the circumstances, I do not think the fact that trade unions were involved is of any real significance. I agree with the Judge that it is a "red herring".

34.

Nor do I think it important whether the strikes took place in response to any particular action on the part of the airline. In *Krüsemann*, as was recorded in the operative part, there had been "a surprise announcement by an operating air carrier of a restructuring of the undertaking", but a strike called without such a trigger need not amount to "extraordinary circumstances". Suppose, for example, that an air carrier took no steps to increase staff wages. If, because, say, prices had risen or flight crew were being paid better by other carriers, there were a strike, it would not follow from the fact that the strike could not be attributed to an act of the carrier that it had to be characterised as "extraordinary circumstances".

35.

Nor again do I consider it of any great significance that Ryanair staff had not been on strike in earlier years. In *Wallentin-Hermann*, the CJEU said in paragraph 36 of the judgment that "the frequency of the technical problems experienced by an air carrier is not in itself a factor from which the presence or absence of 'extraordinary circumstances' ... can be concluded". In contrast, the CJEU spoke in *Siewert* at paragraph 19 of air carriers being faced "regularly" with situations arising from use of mobile stairs and, in *Lipton*, Coulson LJ said in paragraph 39 that, "as a matter of common sense, frequency will sometimes be relevant to whether or not the event in question could be categorised as being out of the ordinary". However, the root question here is not whether it was unusual for Ryanair to experience strikes but whether they were "inherent in the normal exercise of the activity of the air carrier" and it seems to me that, if Ryanair's business can be seen to have carried with it a risk of strikes, the fact that it might have escaped them hitherto cannot prevent the strikes held in 2018 from being "inherent in the normal exercise of [Ryanair's] activity".

36.

To my mind, paragraphs 41 and 42 of the CJEU's judgment in *Krüsemann* indicate that strikes over pay and employment conditions are not to be regarded as "extraordinary circumstances". The CJEU observed in those paragraphs that air carriers "may, as a matter of course, when carrying out their activity, face disagreements or conflicts with all or part of their members of staff" and that "under the conditions referred to in paras 38 and 39 of this judgment, the risks arising from the social consequences that go with such measures must be regarded as inherent in the normal exercise of the activity of the air carrier concerned". Mr Kennelly naturally stressed the reference to paragraphs 38 and 39 of the judgment, where the CJEU spoke of there having been a "wildcat strike" following a "surprise announcement of a corporate restructuring process", but it appears to me that the CJEU recognised that it is inherent in the normal activity of an airline such as Ryanair that it may find itself at odds with some or all of its employees, and there is an obvious risk of such a dispute leading to strike action on occasion.

37.

Mr Kennelly sought to draw an analogy with *LE*. Passengers, he argued, are just as integral to Ryanair's business as staff, yet *LE* shows that a passenger's behaviour can be so unreasonable as to constitute "extraordinary circumstances". It must similarly be appropriate, Mr Kennelly argued, to ask

whether a strike has stemmed from unreasonable demands by a trade union, the more so since recital (14) to the Regulation specifically identifies “strikes that affect the operation of an operating air carrier” among potential “extraordinary circumstances”.

38.

However, it is well-established that the mere fact that an event is mentioned in recital (14) does not render it “extraordinary circumstances”: see Wallentin-Hermann, at paragraph 23 of the judgment, and Krüsemann, at paragraph 34. Inclusion in the list means only that events of that kind may produce “extraordinary circumstance”, and “strikes that affect the operation of an operating air carrier” are most obviously likely to represent “extraordinary circumstances” if they do not involve the carrier’s own staff. A strike by air traffic controllers or airport staff, for example, could amount to “extraordinary circumstances” (as the CJEU noted in *Airhelp*, at paragraph 42).

39.

Further, I do not think the question whether any particular strike constituted “extraordinary circumstances” can depend on whether a demand made by staff of an air carrier, or by a trade union on their behalf, was unreasonable. In the first place, it would not be extraordinary for an employer to deem a demand unreasonable. As the Judge said, it is normal for negotiations to involve “ebb and flow, one or other or both sides starting with robust or extreme or unreasonable or impossible positions”. Secondly, an inquiry into whether a strike was the consequence of an unreasonable demand would not be consistent with the objectives of the Regulation. In *Huzar*, Elias LJ thought it significant that attaching importance to the foreseeability of a problem would “open up endless debate”. In *Lipton*, Coulson LJ observed that it would be “contrary to the scheme of the Regulation to allow the carrier to embark on a complex analysis of precisely when, why or how a staff member became ill so as to explain their absence and the subsequent cancellation of the flight”. Likewise, the Regulation would not afford passengers the high level of protection intended if an airline could escape paying compensation on the basis that a strike which had caused a cancellation had arisen from an unreasonable demand by or on behalf of its staff. An inquiry into such a question would be disproportionate in the context of a claim for, at most, €600 per passenger; it would be hard for a passenger to obtain evidence to gainsay anything the air carrier said on the subject and any union would not be a party to the proceedings; and the Court would be ill-placed to adjudicate on a point of that kind.

40.

Plainly, strikes are capable of amounting to “extraordinary circumstances”. In *Airhelp*, the CJEU said that a strike which “originates from demands which only the public authorities can satisfy” could be an “extraordinary circumstance”. Despite *CS*, it may well be, as the Judge suggested, that a sympathy strike whose aims were wholly unrelated to the strikers’ employer’s activities would also constitute “extraordinary circumstances”. Perhaps it is the case, too, that, as Mr de Haan was disposed to accept, a strike in which an air carrier’s staff sought, say, to have flights re-routed in response to a terrorist threat would represent “extraordinary circumstances”. Absent, however, the involvement of an external factor such as terrorism, it seems to me that a strike concerning the pay or employment conditions of employees of an air carrier will not involve “extraordinary circumstances”. Negotiations with employees about such matters are clearly “inherent in the normal exercise of the air carrier concerned” and they carry with them the risk that one or both sides will make demands that the other sees as unreasonable, that they will break down and that the employees will resort to strike action. As the CJEU said in *Krüsemann*, “air carriers may, as a matter of course, when carrying out ... their activity, face disagreements or conflicts with all or part of their members of staff”. The possibility of

“disagreements”, “conflicts” and even strikes in relation to pay and employment conditions is inherent in running the business of an air carrier and so a strike about pay or employment conditions will not be “extraordinary circumstances” regardless of whether the employees’ demands are seen as reasonable or achievable. Moreover, the fact that employees are represented by a trade union will make no difference.

41.

This conclusion, while not founded on Airhelp, accords with the CJEU’s decision in that case. In Airhelp, the CJEU described a strike as “one of the ways in which collective bargaining may manifest itself” and said that a strike by staff of an air carrier “cannot be categorised as an ‘extraordinary circumstance’ ... where that strike 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 undertaking”. I agree.

42.

Mr Kennelly suggested that, were this Court to interpret the Regulation in the way that the CJEU did in Airhelp, there would be unintended consequences and perverse incentives, not least because the position of trade unions in collective negotiations would be strengthened in an undesirable way. However, in the context of international travel there is virtue in a passenger’s rights to compensation being the same whether his flight is from, say, London Stansted or Dublin. In fact, an air carrier which had to make cancellations as a result of a strike would have an incentive to cancel flights from the United Kingdom rather than European Union airports were we to accept Mr Kennelly’s interpretation of article 5(3) of the Regulation.

43.

The upshot is that, in my view, the Judge was right to reject Ryanair’s contention that the flight cancellations at issue were caused by “extraordinary circumstances” in his impressive judgment. The strikes from which the cancellations arose, relating as they did to employment conditions of employees of Ryanair, did not constitute “extraordinary circumstances” whether or not the aims of the strikers were reasonable or achievable and notwithstanding the involvement of trade unions.

Conclusion

44.

I would dismiss the appeal.

Lord Justice Snowden:

45.

I agree.

Lord Justice Lewison:

46.

I also agree.