[2020] IEHC 54

THE HIGH COURT
JUDICIAL REVIEW

[2019/ 505 JR]

BETWEEN

RYANAIR DAC

APPLICANT

AND

COMMISSION FOR AVIATION REGULATION

RESPONDENT

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 12th day of February, 2020

1. The applicant secured leave on the 22nd of July, 2019, to maintain judicial review proceedings for the purposes of seeking to quash a determination of the respondent of the 31st of May, 2019, made pursuant to s. 45A of the Aviation Regulation Act, 2001 (as amended).

2. In that determination the respondent confirmed its prior directions of the 15th of February, 2019, directing the applicant to pay compensation to five airline passengers in respect of a flight cancellation due to strike action on the 12th of July, 2018, and to a further five passengers in respect of a cancellation as a consequence of strike action on the 20th of July, 2018, in accordance with article 5(1)(c) and article 7(1) of Regulation (EC) No. 261/2004 of the European Parliament and of the Council (the Regulation).

3. By virtue of s. 8(4) of the Aviation Regulation Act, 2001 as inserted by s. 5(1)(b) of the Aviation Act, 2006 the respondent is the relevant body responsible for enforcement of the Regulation.

4. The essence of the applicant's argument is to the effect that it is entitled to a derogation of the obligation to pay compensation, or payment of a fixed sum in accordance with article 7(1) of the Regulation by virtue of article 5(3) of the Regulation.

The Regulation

5. The Regulation is dated the 11th of February, 2004, and is identified in the title as a Regulation establishing common rules on compensation and assistance to passengers in the event of denied boarding, cancellation or long delay of flights. It also appealed a prior Regulation of 1991.

6. The aim of the Regulation is set out at recital no. 1 to the effect that, among other things, it is to ensure a high level of protection for air transport passengers.

7. The Regulation deals with three headings of difficulty which might be encountered by such passengers namely:

   (a) denial of boarding;

   (b) cancellation; or,

   (c) long delay of flights.

8. In recital no. 4 it is provided that the Regulation is there to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.

9. In both recitals 12 and 14 reference is made to an exception when cancellation arises when, an event occurs in extraordinary circumstances, which could not have been avoided, even if all reasonable measures had been taken. In recital 14 reference is made to the fact that extraordinary circumstances may in particular occur including, *inter alia,* strikes that affect the operation of the operating air carrier.

10. It should be noted that article 6, dealing with delay, does not establish an entitlement to compensation under article 7 given the text of the Regulation.

11. Insofar as cancellation is concerned this is dealt with in article 5. The right to compensation under article 7 arises unless the passenger is informed at least two weeks before the scheduled time of the cancellation, subject to various conditions set out in article 5(1). In article 5(3) it is provided that:

> *"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."*

12. Although extraordinary circumstances are not defined by the Regulation, nevertheless, subsequent decisions of the Court of Justice of the European Union (CJEU) have defined extraordinary circumstances within the meaning of article 5(3) of the Regulation as:

> "*all events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control." (Krüsemann v. TUIfly GmbH*, C-195/17, para. 32)

13. In the events therefore to succeed the applicant must establish:

    (i) the event by its nature or origin is not inherent in the normal exercise of the activity of the applicant;

    (ii) the event was beyond the applicant's actual control; and,

    (iii) the event could not have been avoided even if all reasonable measures had been taken.

14. In addition to the foregoing the applicant argues that the decision of the respondent being impugned breaches the applicant's right under article 28 of the Charter of Fundamental Rights of the European Union, which provides that workers and employers have the right to negotiate and conclude collective agreements at the appropriate levels, and in cases of conflicts of interest to take collective action to defend their interests, including strike

action. In this regard the respondent acknowledges a collective agreement can be by a singular employer and a singular representative for employees.

15. The respondent argues that in fact the decision it arrived at was squarely in accordance with EU jurisprudence and on that basis an argument based on article 28 of Charter aforesaid would more properly be addressed to the CJEU.

Relevant CJEU decisions

16. *Wallentin–Hermann v. Alitalia,* C-549/07, December 22nd, 2008.

(a) In para. 17 of the Court's judgment it was provided that, where terms appear in a provision which constitute a derogation from a principle or rule for the protection of consumers, that provision be must interpreted strictly.

(b) In para. 23 it is provided that circumstances amounting to extraordinary circumstances within the meaning of article 5(3) of the Regulation, only exist if they relate to an event which, like those listed in recital no. 14 of the Regulation, is not inherent in the normal exercise of the activity of the air carrier and is beyond the actual control of that carrier on account of its nature or origin.

(c) At para. 26 it was indicated that notwithstanding the Court's finding in that case it is nevertheless possible that there would be a technical issue with the aircraft which would be considered extraordinary within the meaning of article 5(3), for example, hidden manufactures defects. It is accepted that this provision of the judgment supports a case by case review of the circumstances.

17. *Sturgeon v. Condor Flugdienst GmbH*, C-402/07 and C-432/07, July 2nd, 2009.

(a) At para. 44 of A.G. Sharpston's opinion it was recorded that the purpose of the Regulation was to increase passenger protection (recital no. 1 of the Regulation). In a prior decision of the European Low Fares Airline Association, the Court was invited to examine the Regulation from the carrier's perspective. However, it refused to do so on the basis that it was from the passenger's perspective that the matters should be reviewed.

(b) An issue arose as to payment of compensation for delay which aforesaid is not incorporated in the text of the Regulation. However, the Court held that equal treatment to air transport passengers was such that if the delay went beyond a certain time (three hours), compensation should be available just as in circumstances for cancellation. The judgment recognised that delay and cancellations were to be treated similarly in respect of the right to compensation.

18. *Pešková v. Travel Services* AS, C-315/15, May 4th, 2017.

(a) At para. 22 the test of extraordinary circumstances within the meaning of article 5(3) is fulfilled if the circumstances by their nature or origin are not inherent in the normal exercise of the activity of the air carrier concerned, and are outside that carriers actual

control. That definition was said to follow from the *Wallentin-Hermann* judgment, although it is noted that reference to nature or origin shifts from the carrier's actual control to whether or not the circumstances are inherent in the normal exercise of the activity.

(b) At para. 42 it was stated that the reasonable measures to avoid the delay in cancelling was the responsibility of the carrier.

19. *Germanwings GmbH v. Pauels*, C-501/17, April 4th, 2019.

(a) This case concerned a screw found in a tyre on an aircraft requiring the tyre to be changed in circumstances where the screw was lying on the runway.

(b) At para. 20 it was held that the extraordinary circumstances test was as per the decision in Pešková, although Pešková and Wallentin-Hermann were quoted as authority for the proposition.

(c) At para. 24 the Court was satisfied that as the malfunction arose solely from a foreign object it is not inherent in the normal exercise of the activity of the air carrier.

20. *Moens v. Ryanair Limited*, C-159/18, June 26th, 2019.

(a) This case involved petrol on the runway resulting in its closure by the airport authority, and at para. 22 it was noted that the petrol did not emanate from the relevant carrier's aircraft, therefore, logically could not be regarded as intrinsic to the operation of the aircraft. It was held at para. 19 that under such circumstances it could not be regarded as inherent by its nature or origin in the normal exercise of the activity of the air carrier concerned.

(b) Paragraph 26 went on to say that it was also beyond the effective control of the air carrier as the maintenance of the runway was in no way within its responsibility.

21. *Krüsemann v. TUIfly GmbH*, C-195/17, April 17th, 2018.

(a) This matter concerned twenty claims against TUIfly (an air carrier), and although was a decision prior to either *Germanwings* or *Moens* aforesaid, nevertheless, it is the most significant decision for the purposes of the dispute arising herein as it is the only decision of the CJEU dealing with cancellation due to strike action.

(b) The respondent air carrier notified staff on the 30th of September, 2016, of its intention to carry out restructuring plans and thereafter on the 3rd and 8th of October, 2016, the carrier experienced an exceptionally high number of staff absences on grounds of illness, resulting in significant delays or cancellations. On the 7th of October, 2016, management of the air carrier informed its staff that an agreement had been reached with staff representatives. The carrier suggested therefore that the matter comprised extraordinary circumstances, in that it involved absenteeism which would not be typical of the normal activity of the air carrier.

(c) The Court was asked if the spontaneous absence of a significant part of flight crew staff members constituted extraordinary circumstances within the meaning of article 5(3) of the Regulation.

(d) Para. 32 of the judgment quotes from *Pešková* as to the meaning of extraordinary circumstances, namely, events which by their nature or origin are not inherent in the normal exercise of the activity of the air carrier concerned, and are beyond its actual control.

(e) In relation to recital no. 14 of the Regulation para. 34 refers to the fact that the Court has already had occasion to hold that the circumstances referred to in this recital are not necessarily and automatically grounds for exemption from the obligation to pay the compensation provided. Accordingly, it is necessary to assess on a case by case basis whether the circumstances fulfil the two cumulative conditions of extraordinary circumstances.

(f) The Court was satisfied that an unexpected event need not necessarily be classified as extraordinary circumstances, as such events, even though unexpected, may be considered to be inherent in the normal carrying out of the activity of the air carrier concerned.

(g) In para. 36 it was stated that it is apparent from recital no. 1 of the directive that the aim is to afford a high level of protection for passengers, and the fact that article 5(3) comprises a derogation, that derogation must be strictly interpreted.

(h) At para. 37 it was stated that in the light of the proceeding factors it was appropriate to determine whether a wildcat strike amounted to extraordinary circumstances within the meaning of article 5(3). That strike resulted from a call relayed not by staff representatives, but spontaneously by workers themselves who placed themselves on sick leave.

(i) Paragraph 38 states that the origin of the strike was the carrier's surprise announcement of a corporate restructuring process and the trigger to the cancellation was the wildcat strike.

(j) Thereafter the judgment states:

> *"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 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' at issue in the main proceedings 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' …

46. That finding is not called into question by the fact that the social movement should be regarded as a 'wildcat strike' within the meaning of the applicable German social legislation, as it was not officially initiated by a trade union.

47. Making a distinction between strikes which, under applicable national law, are legal from those which are not in order to determine whether they should be classified as 'extraordinary circumstances' … would make the right to compensation of passengers dependent on the social legislation specific to each Member State, thereby undermining the objectives of Regulation No. 261/2004 …"

22. The parties contend for dramatically different views of the impact of this judgment.

23. The applicant points to the fact that:

(i) The dispute originated in the surprise announcement of the air carrier, whereas in the instant circumstances it is asserted by the applicant that the dispute was initiated by letter of demand from a union, of the 17th of May, 2018, following which the applicant suggested mediation, however, the union indicated that the demands had to be met or strike action would occur.

(ii) The applicant asserts the judgment is relevant only to wildcat strikes.

(iii) The applicant suggests that reference to "such measures" in para. 42 of the judgment refers back to restructuring.

(iv) The applicant states that the word "activity" as it appears in para. 41 is referring back to restructuring referred to in para. 40.

(v) It is not possible to interpret the judgment to the effect that all union strikes are inherent in the normal exercise of the activity of the carrier as this would then apply to every strike. There would be no case by case analysis nor would there be a determination of the cause or origin of the strike.

24. On the other hand the respondent states that:

(i) It is clear that whether the strike is lawful, or not lawful, is not the issue as otherwise the passengers would be deprived of compensation depending on internal/domestic member state legislation.

(ii) The judgment does effectively deal with all employee strikes resulting in cancellations subject to a case by case review which might yield to a departure from the general rule established by *Krüsemann*, such as mentioned in para. 26 of *Wallentin-Hermann*.

(iii) The respondent further states that the responsibility for the cause or origin of the strike leading to the cancellation does not dictate whether or not the passenger receives compensation.

(iv) The respondent lays particular emphasis on *Finnair Oyj v. Timy Lassooy*, C-22/11, where at para. 34 it was indicated that the objective of the Regulation was to ensure a high level of protection for passengers by means of a broad interpretation of the rights granted to them. Further at para. 38 it was stated that having regard to the requirement to interpret strictly the derogation from provisions granting rights to passengers, an air carrier cannot be exempted from its obligation to pay compensation in the event of denied boarding on the ground that its flights were rescheduled as a result of extraordinary circumstances (it should be noted that the claimed extraordinary circumstances, resulting in a denial of boarding in that case was not referable to the date of strike by staff at Barcelona Airport, but rather is referable to the denial of boarding on the days following such strike that is, the knock-on effect). The respondent contends that the judgement supports a broad interpretation of passenger rights, and a strict interpretation of the derogation provision.

Decision

25. By reason of the foregoing jurisprudence, the following principles emerge in aid of interpretation on whether or not the derogation contained in article 5(3) of the Regulation applies in the instant circumstances:

(1) When terms appear in a provision which constitute a derogation from a principle or rule for the protection of consumers that provision is interpreted strictly *(Wallentin-Hermann) (Finnair).*

(2) The primary purpose of the Regulation is to increase passenger protection and the Regulation must be examined from a passenger perspective (*Sturgeon).*

(3) The objective of the Regulation is to seek to ensure a high level of protection for passengers by means of a broad interpretation of the rights granted to them (*Finnair*).

(4) Although extraordinary circumstances is not defined within the Regulation, case law defines it as referring to events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier, and are beyond its actual control (*Pešková*).

(5) Community legislation did not mean that those events *inter alia*, in recital no. 14 of the Regulation (the list being only indicative) themselves constitute extraordinary circumstances, but only that they may produce such circumstances. Not all the circumstances surrounding such events are necessarily and automatically grounds of exemption from the obligation to pay compensation (*Wallentin-Hermann).*

(6) Although the Regulations do not provide for compensation for delay, nevertheless, a requirement for equal treatment of passengers meant that compensation was payable to passengers who suffered delay beyond a certain time (three hours), and therefore the directive has been effectively modified by the CJEU (*Sturgeon*).

(7) The restructuring and reorganisation of undertakings are part of the normal management of those entities (*Krüsemann*).

(8) 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 (*Krüsemann*).

(9) In dealing with cancellations or delays by reason of a fault in an aircraft, a malfunction solely from a foreign object is not inherent (*Germanwings*), and when not within the control of the airline (*Moens*), compensation is not payable, i.e. the derogation applies.

(10) No insight is afforded within the judgments as to why reference to "nature or origin" originally referred to "control", were subsequently referred to "inherency". Nevertheless, in applying *Krüsemann*, nature or origin is indicative of inherency.

(11) It is necessary to look at the circumstances and assess same on a case by case basis (*Wellenntin-Hermann* and *Krüsemann*).

26. Given the principles mentioned in paras. 40 and 41 of *Krüsemann* it appears to me unstateable to suggest that the strike, because of the involvement of the union, might be considered extraordinary, whereas not extraordinary on the basis of a wildcat strike. In this regard the union acted as agents for the members of the applicant's staff, or some of same, and in fact *Krüsemann* in part involved such agents and that the dispute was resolved with staff representatives. Further, domestic law on whether a strike is lawful or not, cannot control the application of an EU directive.

27. It is significant in my view that the Court in *Krüsemann* did not engage in the nature of the restructuring, the nature of the grievance of staff members, or indeed the terms of the settlement. Therefore, it is clear that in this regard the Court did not seek to apportion blame to either side in respect of inherency. This view is consistent with a

broad interpretation of the passenger's rights and the need for equal treatment in respect of such passengers.

28. At para. 38 of *Krüsemann* the Court states that the origin of the strike was the carrier's surprise announcement and at para. 39 it is stated that it was not in dispute that the strike was triggered by the staff.

29. I do not accept the applicant's suggestion that para. 41 when mentioning carrying out of their "activity", the Court was referring solely to restructuring – the word "activity" appearing in the definition of extraordinary circumstances has a far broader meaning than restructuring and reorganisation, as is apparent from the case law aforesaid and reference to "as a matter of course" in para. 41 of *Krüsemann*.

30. In my view the wording of para. 44 of *Krüsemann* is such that some responsibility is attributed to the air carrier by reason of its surprise announcement, and this supports the applicant's argument that the origin of the strike, in reviewing the definition provided in para. 32, emanated from the employer, whereas in the instant circumstances the applicant argues that the origin of the within dispute was the letter of the 17th of May, 2018, from the union. The respondent on the other hand suggests that "*the strikes may be said to have stemmed from Ryanair's decision not to accede to all eleven minimum requirements set out by Forsa in its letter to Ryanair of 17th May, 2018 … the strikes … may be said to have resulted from decisions of Ryanair."* (pg. 4 of the respondent's decision of the 31st of May, 2019)

31. It does appear to me therefore, that the potential to attribute responsibility on the union, and consequentially impact on the categorisation of the within circumstances as being extraordinary circumstances, in accordance with article 5(3) of the Regulation, has to be considered.

32. Although it is possible that "nature and origin" can potentially relate to either inherency or control, same cannot refer to both by reason of the totality of the judgment in *Krüsemann*.

33. The responsibility and therefore negative impact on TUIfly is mentioned at para. 44 of the judgment of *Krüsemann*, which in fact is dealing with the second limb of the extraordinary circumstances definition, namely, control. This is so because the possible responsibility attributed to TUIfly is contained in para. 44, following para. 43 which states that the strike could not be regarded as beyond the actual control of, *inter alia*, TUIfly. Thereafter in para. 44 the reasoning for such a conclusion is set out, namely, that the wildcat strike stemmed from TUIfly's decision, and the strike ceased following agreement that TUIfly concluded with staff representatives.

34. By using the terminology "apart from the fact that …", it is clear that cessation of the strike following agreement between TUIfly and staff representatives, of itself rendered the strike as being an event which could not be regarded as beyond the actual control of the air carrier concerned.

35. The reference to the attributing of responsibility applies only in relation to the control element of the extraordinary circumstances definition, as opposed to the inherency element. However, even if I am wrong in this regard by reason of the wording of the judgment in *Krüsemann* as aforesaid, it does appear to me that the cessation of the dispute following agreement between the parties was such as to render the dispute within the control of the air carrier. I am satisfied that this is *acte clair* from a reading of the judgment of *Krüsemann* as a whole and in particular paras. 40 to 45 inclusive thereof.

36. In the events, as it is necessary for the applicant in order to succeed to comply with both elements of the extraordinary circumstances test, the applicant must fail in its argument that the within dispute, being a disagreement or conflict with part of the members of staff, via a union, is not within the exception provided by article 5(3) of the Regulation. Accordingly, there is no necessity to examine whether or not the cancellations could have been avoided even if all reasonable measures had been taken. Furthermore, as the decision of the respondent, in making a finding that extraordinary circumstances do not exist, is in accordance with the *Krüsemann* judgment, therefore, the complaint in respect of article 28 of the Charter of Fundamental Rights does not fall to be determined by this Court.

37. Although both parties called in aid of their respective arguments, various documents such as the explanatory memorandum, having regard to the dates of same and the date of the *Krüsemann* judgment together with other judgments of the CJEU, hereinbefore referred to, I am satisfied that such documents are not required to assist in the resolution of the dispute between the parties.

38. There is no manifest error in the decision of the respondent in relation to the examination of the existence or otherwise of extraordinary circumstances (as per Fennelly, J. in *SIAC Construction Ltd. v. Mayo County Council*, [2002] IESC 39), to enable the applicant to succeed in its claim.

39. The applicant has tendered a booklet of judgments of a number of member states in support of the suggestion that the derogation provision in the directive is not uniformly interpreted, however, given the Courts involved (e.g. a justice of peace and Bray District Court) and further having regard to the very limited analysis contained therein, such conflict in interpretation does not warrant a reference to the CJEU under article 267 of the Treaty on the Functioning of the European Union.