



Airline strikes: extraordinary circumstances?

Lee Finch & Ann-Marie O'Neil examine the high threshold for determining which events are outside an airline's control

IN BRIEF

- ▶ Industrial action by an airline carrier's employees touching on their conditions of employment did not amount to an 'extraordinary circumstance' for the purposes of Art 5(3) of Regulation (EC) 261/2004.
- ▶ Where flights are cancelled as the result of such strikes, carriers are liable to pay compensation to the affected passengers.
- ▶ Involved consideration of CJEU decisions which had been issued after the end of the implementation period.

Ryanair recognised unions for the first time in December 2017. Subsequently, unions in multiple jurisdictions commenced negotiations with Ryanair. The Irish union, Fórsa, made 11 demands in relation to the seniority structure among Irish pilots. Ryanair argued that these demands could not be satisfied as they would compromise its business model and ability to operate as a low-cost airline. As a result of the failed negotiations, pilots and cabin crew employed by Ryanair went on strike in July, August and September 2018.

The strike caused the cancellation of multiple Ryanair flights scheduled to leave the UK which, *prima facie*, entitled affected passengers to compensation. Ryanair refused to pay compensation, arguing that the strikes amounted to 'extraordinary circumstances'. As a result, the Civil Aviation Authority (CAA) commenced

proceedings under Part 8 of the Enterprise Act 2002 seeking an enforcement order requiring compensation to be paid.

The enforcement order was granted by the High Court ([2021] EWHC 1476 (Ch)) and Ryanair appealed.

The underlying law

The entitlement to compensation stems from Regulation (EC) 261/2004 ('the regulation'). This EU legislation still forms part of domestic law following Brexit. Art 5(1)(c) of the regulation provides passengers with a right to compensation in specified circumstances. The amount of compensation can vary between €250–€600 depending on the flight distance. The first four recitals to the regulation make it clear that the regulation is aimed 'at ensuring a high level of protection for passengers.'

Art 5(3) provides an exception to the compensation requirement in Art 5(1)(c) of the regulation, stating:

'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.'

The defence provided in Art 5(3) of the regulation has two limbs. First, that the cancellation was as a result of

'extraordinary circumstances'; and second, that it could not have been avoided if all reasonable measures had been taken. In this case, there was no suggestion that Ryanair had not taken all reasonable measures. As such, the first limb of the test was the sole issue for determination. Recital 14 of the regulation provides some assistance to the construction of 'extraordinary circumstances':

'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.'

The defence in Art 5(3) has provided fertile ground for litigation across the EU. *Wallentin-Hermann v Alitalia-Linee Aeree Italiane SpA* (2008) C-549/07 established that circumstances are 'extraordinary' for the purpose of the regulation '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' [23]. In *Wallentin-Hermann*, it was determined that a technical problem did not constitute 'extraordinary circumstances'.

Additional cases which did not find extraordinary circumstances included *Siewert and Others v Condor Flugdienst GmbH* (2020) C-394/14 in which mobile boarding stairs had collided with the plane, and *Lipton and another v BA City Flyer Ltd* [2021] EWCA Civ 454, [2021] All ER (D) 129 (Mar) in which a flight was cancelled due to the pilot falling ill. The courts found the flight delays had been as a result of an inherent part of the carrier's activity and operations.

On the other hand, a number of cases have concluded that the 'extraordinary circumstances' hurdle had been surpassed. Extraordinary circumstances were found in *Pesková and Peska v Travel Service* (2017) C-315/15 involving a bird strike, *Germanwings GmbH v Pauels* (2019) C-501/17, where a screw on the runway damaged the tyre of an aircraft, and *LE v Transport Aéreos Portugueses SA* (2020) C-74/19, [2020] All ER (D) 53 (Jul) in which a flight had to be diverted due to an unruly passenger. The key determining factor in these matters was an external element which caused the delay.

The appeal

Ryanair argued two main points. First, that the strikes were not inherent in the normal exercise of its activity because they originated from the activities of the union as an independent and external party, and the strikes intended to disrupt normal activities, making them more analogous to a bird strike or a screw on the runway. Second, Ryanair contended that in the case of strikes, the court should adopt a more detailed analysis to determine with which party the fault for the strike lay. In this matter, Ryanair had no control over the strikes and could not have prevented them due to the unreasonable demands of the union.

The CAA supported the judgment of the High Court and argued that working condition disagreements are an inherent part of running a business which employs staff. The involvement of a trade union is an irrelevant factor. Further, the analysis for the court should be a simple two-stage test. First, whether those striking were employees of the carrier; and second, whether the strike concerned pay or working conditions. If both factors were satisfied, then the strike would not normally amount to 'extraordinary circumstances'.

The court held ([2022] EWCA Civ 76) that the involvement of a trade union

did not render the actions of employees external to Ryanair's business. It was further held that it was neither necessary nor desirable for the court to embark on a detailed assessment of the cause of a strike or which party was 'to blame'. The court noted that negotiations often involve two parties diametrically opposed with each party considering that other is being unreasonable and, in any event, coming to a determination on whether one party had been unreasonable would be disproportionate to the sums claimed in compensation through the regulation. It was the court's over-arching view that the requirement for an investigation of the type contended for by Ryanair would run contrary to the purpose of the regulation which is to provide a high level of protection to the consumer.

In the circumstances, the Court of Appeal agreed with the High Court that the strikes that had resulted in the delay and cancellation of Ryanair's flights arose as a normal incidence of Ryanair's business and did not constitute extraordinary circumstances. Consequently, compensation was due under the regulation.

Brexit implications

The matter was heard after the Brexit implementation period (IP) ended at 11pm on 31 December 2020. This means that pursuant to s 6(1) and (2) of the European Union (Withdrawal) Act 2018, the court was not bound by any Court of Justice of the European Union (CJEU) decisions made after this date, but regard may be had to it. Judge Gerald in the High Court noted that a relevant case in this matter was that of *Airhelp Ltd v Scandinavian Airlines System SAS* (2020) C-28/20 which was decided after the end of the IP. He commented (at [15]) that *Airhelp*, 'if applied to this case, would essentially answer it in favour of the Claimant and not the Defendant'.

Interestingly, notwithstanding the conclusion of the CJEU, Ryanair placed reliance on *Airhelp*, but argued that the decision of the Grand Chamber should be disregarded in favour of the Advocate General's opinion which supported Ryanair's position. Judge Gerald did not refer to *Airhelp* in his judgment, but, in reaching its decision, the Court of Appeal considered two post-IP cases (*Airhelp* and *CS v Eurowings GmbH* (2020) C-613/20) and agreed with the reasoning therein.

Future developments

There remain a number of grey areas which may be the subject of further litigation; for example, it is unclear whether the Art 5(3) defence could be

made out where the strike concerned employee working conditions caused by an external and extraordinary event. The court did note that it was possible for strikes by a carrier's employees to constitute extraordinary circumstances, such as where the demands can only be satisfied by a third party or a demand to reroute flights avoiding terrorist threats. In these circumstances, there are contributing external factors, absent which, a strike cannot be considered extraordinary.

The timely judgment coincides with the Department for Transport's ongoing aviation consumer policy reform consultation. Proposals have been made to better protect consumer's existing rights, as well as strengthen those rights. However, it is not all one-way traffic—the consultation is also considering concerns raised by the industry that compensation rates require review because they are not appropriate in an age of low-cost airlines where the total fare can be an order of magnitude lower than the compensation due under the regulation. One proposed approach would be to align the aviation regime with the domestic regimes already in place for other modes of transport—for example the rail industry's Delay Repay scheme which provides compensation as a percentage of the ticket price. Any changes implemented following the consultation are likely to result in an important departure from EU law.

The Department for Transport is also considering strengthening the CAA's powers. This may result in the CAA having the authority to issue sanctions for breaches of consumer law and failure to comply with information requests made by the CAA.

Finally, it is worth noting that the consultation may result in a move towards mandatory alternative dispute resolution (ADR). Currently, airlines can opt into an ADR scheme which provides a fast and cheap route for consumers to escalate complaints and pursue compensation but, given the voluntary nature of the scheme, the protection it offers to consumers is limited. For example, Ryanair cut ties with the scheme in 2019 following the strikes; this meant consumers could not utilise the ADR scheme and ultimately resulted in this litigation. If the proposals within the consultation are adopted—in particular more proportionate percentage refunds and mandatory ADR—the prospect of further litigation in the *CAA v Ryanair* mould is significantly reduced.

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