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Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

11 May 2017 (*)

(Reference for a preliminary ruling — Air transport — Regulation (EC) No 261/2004 — Article 5(1)(c) — Compensation and assistance to passengers in the event of cancellation of a flight — Exemption from the obligation to pay compensation — Contract for carriage concluded through an online travel agent — Air carrier having informed the travel agent in good time of a change to the scheduled time for the flight — Travel agent having communicated that information to a passenger by email 10 days before the flight)

In Case C-302/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank Noord-Nederland (District Court, Northern Region, Netherlands), by decision of 18 May 2016, received at the Court on 27 May 2016, in the proceedings

Bas Jacob Adriaan Krijgsman

v

Surinaamse Luchtvaart Maatschappij NV,

THE COURT (Eighth Chamber),

composed of M. Vilaras, President of the Chamber, J. Malenovský and D. Šváby (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

Surinaamse Luchtvaart Maatschappij NV, by A.J.F. Gonesh, advocaat,

the French Government, by D. Colas, E. de Moustier and M.-L. Kitamura, acting as Agents,

the Austrian Government, by G. Eberhard, acting as Agent,

the Polish Government, by B. Majczyna, acting as Agent,

the European Commission, by N. Yerrell and F. Wilman, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

The present request for a preliminary ruling concerns the interpretation of Article 5(1)(c) 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).

The request has been made in proceedings brought by Mr Bas Jacob Adriaan Krijgsman against Surinaamse Luchtvaart Maatschappij NV ('SLM'), an air carrier, concerning SLM's refusal to pay compensation to Mr Krijgsman for the cancellation of his flight.

EU law

Regulation No 261/2004

Recitals 1, 7 and 12 of Regulation No 261/2004 state:

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.

In order to ensure the effective application of this Regulation, the obligations that it creates should rest with the operating air carrier who performs or intends to perform a flight, whether with owned aircraft, under dry or wet lease, or on any other basis.

The trouble and inconvenience to passengers caused by cancellation of flights should also be reduced. This should be achieved by inducing carriers to inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable re-routing, so that the passengers can make other arrangements. Air carriers should compensate passengers if they fail to do this, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.'

Article 2 of that regulation provides:

'For the purposes of this Regulation:

...

“operating air carrier” means an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger;

...

Article 3(5) of that regulation provides:

‘This Regulation shall apply to any operating air carrier providing transport to passengers covered by paragraphs 1 and 2. Where an operating air carrier which has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger.’

Article 5(1) and (4) of that regulation is worded as follows:

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

...

have the right to compensation by the operating air carrier in accordance with Article 7, unless: they are informed of the cancellation at least two weeks before the scheduled time of departure; or

...

4. The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier.’

Article 7(1) of Regulation No 261/2004 provides:

‘Where reference is made to this Article, passengers shall receive compensation amounting to:

EUR 250 for all flights of 1 500 kilometres or less;

EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;

EUR 600 for all flights not falling under (a) or (b).

Article 13 of that regulation provides:

‘In cases where an operating air carrier pays compensation or meets the other obligations incumbent on it under this Regulation, no provision of this Regulation may be interpreted as restricting its right to seek compensation from any person, including third parties, in accordance with the law applicable. In particular, this Regulation shall in no way restrict the operating air carrier’s right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract. Similarly, no provision of this Regulation may be interpreted as restricting the right of a tour operator or a third party, other than a passenger, with whom an operating air carrier has a contract, to seek reimbursement or compensation from the operating air carrier in accordance with applicable relevant laws.’

The dispute in the main proceedings and the question referred for a preliminary ruling

On the internet site www.gate1.nl (‘Gate1 website’), Mr Krijgsman booked a return flight from Amsterdam Schiphol (Netherlands) to Paramaribo (Surinam), operated by SLM. The outbound flight was scheduled to depart on 14 November 2014 at 15.15.

On 9 October 2014, SLM informed Gate1 website that that flight had been cancelled.

On 4 November 2014, Mr Krijgsman received an email from Gate1 website informing him that his outbound flight had been rescheduled for 15 November 2014 at 15.15.

On 20 December 2014, Mr Krijgsman filed a claim for compensation in that regard from SLM. That claim was rejected on 5 March 2015 on the ground that the information on the change to the date of departure had been communicated to Gate1 website on 9 October 2014.

On 12 June 2015, Gate1 website informed Mr Krijgsman that it refused to accept any liability for any harm in respect of which compensation had been claimed on the grounds that, in essence, first, its area of responsibility extended only to the conclusion of contracts between passengers and air carriers, that it was therefore not responsible for changes to flight schedules made by an air carrier, and that the responsibility for informing passengers in such situations fell to the air carrier, to whom the passenger’s email address had been sent in the booking file.

On 12 June 2015, Mr Krijgsman again sought payment from SLM of the flat-rate sum of EUR 600 specified in Article 7(1)(c) of Regulation No 261/2004. That claim was rejected on 3 September 2015.

Mr Krijgsman subsequently brought proceedings before the rechtbank Noord-Nederland (District Court, Northern Region, Netherlands) seeking a provisionally enforceable judgment against SLM for payment of that sum.

SLM disputes that claim. It contends, first of all, that Mr Krijgsman had entered into a travel contract with a travel agent. It then emphasises that all travel agents marketing its tickets, including Gate1 website, were informed of the cancellation of the flight scheduled for 14 November 2014. Finally, it submits that it is common practice for air carriers to communicate information on flights to travel agents which have entered into the travel and carriage contract on behalf of passengers, and that those agents are required to forward that information on to passengers. In the present case, taking into account the information communicated by SLM to Gate1 website on 9 October 2014, Mr Krijgsman had to be regarded as having been informed of the cancellation of his flight more than two weeks before its scheduled time of departure.

The referring court takes the view that Regulation No 261/2004 does not specify the conditions in accordance with which the air carrier is required to inform passengers of flight cancellations in the case where the contract is entered into via a travel agent or website.

In those circumstances, the rechtbank Noord-Nederland (District Court, Northern Region, Netherlands) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘What (procedural and substantive) requirements must be imposed on the performance of the obligation to inform referred to in Article 5(1)(c) of Regulation No 261/2004 in the case where the contract for carriage has been entered into via a travel agent or the booking has been made via a website?’

Consideration of the question referred

It is apparent from the decision to refer that the applicant in the main proceedings, a passenger who, via an online travel agency, bought a ticket for a flight operated by SLM, seeks to recover from that air carrier the compensation specified in Article 5(1)(c) and Article 7 of Regulation No 261/2004, on the ground that he had not been informed of the cancellation of that flight at least two weeks before the scheduled time of departure.

It is, however, not disputed, according to that decision, that, more than two weeks before the scheduled time of departure of the flight in question, that air carrier informed the online travel agency that that flight had been cancelled, but that that agent did not inform the applicant in the main proceedings of that cancellation until 10 days before the scheduled time of departure. In this regard, it is in no way apparent from that decision that the applicant challenges the conditions in which that information was provided and its operative effect.

Thus, by its question, the referring court asks whether Article 5(1)(c) and Article 7 of Regulation No 261/2004 are to be interpreted as meaning that the operating air carrier is required to pay the compensation specified in those provisions in the case where a flight is cancelled and that information is not communicated to the passenger at least two weeks before the scheduled time of departure, including in the case where that air carrier, at least two weeks before that time, had communicated that information to the travel agent via whom the contract for carriage had been entered into with the passenger concerned and that passenger had not been informed of that cancellation by that agent within that period.

Article 5(1)(c) of Regulation No 261/2004 provides that, in the case of cancellation of a flight, the passengers concerned have a right to receive compensation from the operating air carrier in accordance with Article 7 of that regulation, unless they are informed of the cancellation of the flight at least two weeks before the scheduled time of departure.

In accordance with Article 5(4) of Regulation No 261/2004, the operating air carrier has the burden of proving that it informed passengers of the cancellation of the flight in question and of proving the period within which it did so.

According to settled case-law, for the purposes of interpreting a provision of EU law, it is necessary to consider not only its wording, but also its context and the objectives of the rules of which it is part (see judgment of 16 November 2016, *Hemming and Others*, C-316/15, EU:C:2016:879, paragraph 27 and the case-law cited).

In the present case, as the French, Austrian and Polish Governments and the European Commission have noted in their written observations, it follows from the clear wording of those provisions that, since the operating air carrier is not able to prove that the passenger concerned was informed of the cancellation of his flight more than two weeks before the scheduled time of departure, that air carrier must pay the compensation specified in those provisions.

Contrary to what SLM contends, this interpretation applies not only when the contract for carriage has been entered into directly between the passenger concerned and the air carrier, but also when that contract has been entered into via a third party such as, as is the case in the main proceedings, an online travel agency.

As it follows both from Article 3(5) of Regulation No 261/2004 and from recitals 7 and 12 thereof, the operating air carrier which performs or intends to perform a flight is alone liable to compensate passengers for failure to fulfil the obligations under that regulation including, in particular, the obligation to inform set out in Article 5(1)(c) thereof.

Such an interpretation is the only one which fulfils the objective of ensuring a high level of protection for passengers set out in recital 1 of Regulation No 261/2004 by guaranteeing that a passenger whose flight was booked via a third party before its cancellation is able to identify the entity liable for payment of the compensation specified in Article 5(1)(c) and Article 7 of that regulation.

Nonetheless, it should be noted that the discharge of obligations by the operating air carrier pursuant to Regulation No 261/2004 is without prejudice to its rights to seek compensation, under the applicable national law, from any person who caused the air carrier to fail to fulfil its obligations, including third parties, as Article 13 of that regulation provides (see, to that effect, judgment of 17 September 2015, *van der Lans*, C-257/14, EU:C:2015:618, paragraph 46 and the case-law cited).

That article provides, in particular, that Regulation No 261/2004 in no way restricts the operating air carrier's right to seek reimbursement from a tour operator or another person with whom the operating air carrier has a contract.

In the light of the foregoing, the answer to the question referred is that Article 5(1)(c) and Article 7 of Regulation No 261/2004 must be interpreted as meaning that the operating air carrier is required to pay the compensation specified in those provisions in the case where a flight was cancelled and that information was not communicated to the passenger at least two weeks before the scheduled time of departure, including in the case where that air carrier, at least two weeks before that time, communicated that information to the travel agent via whom the contract for carriage had been entered into with the passenger concerned and the passenger had not been informed of that cancellation by that agent within that period.

Costs

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

Article 5(1)(c) and Article 7 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, must be interpreted as meaning that the operating air carrier is required to pay the compensation specified in those provisions in the case where a flight was cancelled and that information was not communicated to the passenger at least two weeks before the scheduled time of departure,

including in the case where the air carrier, at least two weeks before that time, communicated that information to the travel agent via whom the contract for carriage had been entered into with the passenger concerned and the passenger had not been informed of that cancellation by that agent within that period.

[Signatures]

* Language of the case: Dutch.