

JUDGMENT OF THE COURT (Third Chamber)

11 May 2023 (*)

(References for a preliminary ruling – Air transport – Regulation (EC) No 261/2004 – Compensation to air passengers in the event of cancellation of flights – Article 5(3) – Exemption from the obligation to pay compensation – Concept of ‘extraordinary circumstances’ – Unexpected absence, due to illness or death, of a crew member whose presence is essential to the operation of the flight)

In Joined Cases C-156/22 to C-158/22,

THREE REQUESTS for a preliminary ruling under Article 267 TFEU from the Landgericht Stuttgart (Regional Court, Stuttgart, Germany), made by decisions of 3 February 2022, received at the Court on 17 February 2022, in the proceedings

TAP Portugal

v

flightright GmbH (C-156/22),

Myflyright GmbH (C-157/22 and C-158/22),

THE COURT (Third Chamber),

composed of K. Jürimäe, President of the Chamber, M. Safjan (Rapporteur), N. Piçarra, N. Jääskinen and M. Gavalec, Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- TAP Portugal, by K. Brecke, B. Liebert and U. Stepler, Rechtsanwälte,
- flightright GmbH, by M. Michel and R. Weist, Rechtsanwälte,
- the Polish Government, by B. Majczyna, acting as Agent,
- the Portuguese Government, by P. Barros da Costa, C. Chambel Alves, L. Guerreiro and P. Pisco Santos, acting as Agents,
- the European Commission, by G. Braun, G. Wilms and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 February 2023,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

2 The requests have been made in proceedings between TAP Portugal (‘TAP’), on the one hand, and flightright GmbH (Case C-156/22) and Myflyright GmbH (Cases C-157/22 and C-158/22), on the other, concerning the right of passengers to compensation under Regulation No 261/2004, following the cancellation of a flight due to the unexpected death of the aircraft’s co-pilot shortly before the scheduled departure of the flight.

Legal context

3 Recitals 1, 14 and 15 of Regulation No 261/2004 state:

‘(1) Action by the [European] 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.

...

(14) ... 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.

(15) Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft on a particular day gives rise to a long delay, an overnight delay, or the cancellation of one or more flights by that aircraft, even though all reasonable measures had been taken by the air carrier concerned to avoid the delays or cancellations.’

4 Article 5 of that regulation, headed ‘Cancellation’, 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.

...'

5 Article 7(1) of that regulation, which article is headed 'Right to compensation', is worded as follows:

'1. Where reference is made to this Article, passengers shall receive compensation amounting to:

- (a) EUR 250 for all flights of 1 500 kilometres or less;
- (b) 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;
- (c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.'

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

6 The three joined cases concern the cancellation of a single flight, the passengers affected having assigned their rights arising from that cancellation to the companies flightright (Case C-156/22) and Myflyright (Cases C-157/22 and C-158/22), respectively, both of which provide legal assistance to air passengers.

7 On 17 July 2019, TAP, as operating air carrier, was to operate a flight from Stuttgart (Germany) to Lisbon (Portugal), with a departure scheduled at 6.05.

8 On the same day, at 4.15, the co-pilot who was to operate the flight concerned was found dead in his hotel bed. Shocked by this event, the whole crew declared itself unfit to fly. As no replacement staff was available outside TAP's base, the 6.05 flight was cancelled. Subsequently, a replacement crew left Lisbon bound for Stuttgart at 11.25 and arrived there at 15.20. Next, the passengers were transported to Lisbon on a replacement flight scheduled at 16.40.

9 TAP refused to pay flightright and Myflyright the compensation provided for in Article 7(1) of Regulation No 261/2004, claiming that the unexpected death of the co-pilot was an extraordinary circumstance within the meaning of Article 5(3) of that regulation.

10 In the three cases in question, TAP was ordered by the Amtsgericht Nürtingen (Local Court, Nürtingen, Germany) to pay that compensation, on the ground that, like an unexpected and sudden illness, the unforeseeable and sudden death of a crew member is not an external event affecting the carrier because it is one of the risks inherent in the air carrier's activities.

11 TAP brought an appeal before the Landgericht Stuttgart (Regional Court, Stuttgart, Germany), the referring court. That court explains that, according to its research, some German case-law shares the approach taken by the Amtsgericht Nürtingen (Local Court, Nürtingen), and by the French Cour de cassation (Court of Cassation). By contrast, a Netherlands court has recently held that the unexpected illness of a crew member must be treated in the same way as an external event beyond the air carrier's control.

12 Taking the view that the air carrier must, in principle, be responsible for the fitness to fly and availability of its staff and that, therefore, it is also required, in principle, to keep a certain number of replacement staff available, the referring court nevertheless notes that the issue in question is controversial both in European case-law and in academic writing.

13 In those circumstances, the Landgericht Stuttgart (Regional Court, Stuttgart) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling in the three cases before it:

'Is Article 5(3) of [Regulation No 261/2004] to be interpreted as meaning that an extraordinary circumstance within the meaning of that provision exists where a flight departing from an airport outside the base of the operating air carrier is cancelled because a crew member deployed on that flight (in casu the co-pilot), who has passed the prescribed regular medical examinations without restriction, dies suddenly and in a way that the air carrier is unable to foresee shortly before the flight or falls so seriously ill that he or she cannot perform the flight?'

14 By decision of the President of the Court of Justice of 4 April 2022, Cases C-156/22 to C-158/22 were joined for the purposes of the written and oral parts of the procedure and of the judgment.

Consideration of the question referred

15 By its question worded identically in the three cases before it, the referring court asks, in essence, whether Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that the unexpected absence – due to illness or death of a crew member whose presence is essential to the operation of a flight – which occurred shortly before the scheduled departure of that flight, falls within the concept of 'extraordinary circumstances' within the meaning of that provision.

16 In that regard, it should be recalled that, under Article 5(1)(c) of Regulation No 261/2004, passengers affected by the cancellation of a flight have the right to compensation by the operating air carrier, in accordance with Article 7(1) of that regulation, unless they have been informed in advance of that

cancellation within the time frames laid down in Article 5(1)(c)(i) to (iii) of that regulation.

- 17 However, Article 5(3) of Regulation No 261/2004, read in the light of recitals 14 and 15 thereof, releases the operating air carrier from that obligation to pay compensation 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.
- 18 According to the Court’s settled case-law, the concept of ‘extraordinary circumstances’ within the meaning of Article 5(3) of Regulation No 261/2004 refers to 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 that carrier’s actual control; those two conditions are cumulative and their fulfilment must be assessed on a case-by-case basis (judgments of 23 March 2021, *Airhelp*, C-28/20, EU:C:2021:226, paragraph 23, and of 7 July 2022, *SATA International – Azores Airlines (Failure of the refuelling system)*, C-308/21, EU:C:2022:533, paragraph 20).
- 19 That said, in view of, first, the objective of Regulation No 261/2004, set out in recital 1, of ensuring a high level of protection for passengers and, second, the fact that Article 5(3) of the regulation derogates from the principle that passengers have the right to compensation if their flight is cancelled, the concept of ‘extraordinary circumstances’ within the meaning of that provision must be interpreted strictly (judgment of 23 March 2021, *Airhelp*, C-28/20, EU:C:2021:226, paragraph 24 and the case-law cited).
- 20 It is appropriate to begin by determining whether the unexpected absence – due to illness or death of a crew member whose presence is essential to the operation of a flight – which occurred shortly before the flight’s scheduled departure, is capable of constituting, by its nature or origin, an event which is not inherent in the normal exercise of the activity of the operating air carrier.
- 21 In that regard, it must be held that measures relating to the staff of the operating air carrier fall within the normal exercise of that carrier’s activities. That is true of measures relating to the working conditions and remuneration of the staff of such a carrier (judgment of 23 March 2021, *Airhelp*, C-28/20, EU:C:2021:226, paragraph 29), which includes measures relating to crew planning and staff working hours.
- 22 Therefore, operating air carriers may, as a matter of course, be faced, in the exercise of their activity, with the unexpected absence, due to illness or death, of one or more members of staff whose presence is essential to the operation of a flight, including shortly before the departure of that flight. Accordingly, the management of such an absence remains intrinsically linked to the question of crew planning and staff working hours, with the result that such an unexpected event is inherent in the normal exercise of the operating air carrier’s activity.
- 23 It should be pointed out that where, as in the present case, the absence is due to the unexpected death of a member of staff whose presence is essential to the operation of a flight and which occurred shortly before the departure of that flight, such a situation, however tragic and final it may be, is no different, from a legal point of view, from that in which a flight cannot be operated because such a member of staff has unexpectedly fallen ill shortly before the departure of the flight. Thus, it is the very absence, due to illness or death, of one or more crew members, even if it was unexpected, and not the specific medical cause of that absence that constitutes an event inherent in the normal exercise of that carrier’s activity, with the result that the carrier must expect such unforeseen events to arise in the context of planning its crews and the working hours of its staff.
- 24 Furthermore, the fact that such an unexpected absence occurred even though the crew member concerned had fully completed the regular medical examinations prescribed by the applicable legislation cannot call into question the conclusion set out in paragraph 22 of the present judgment. Any person, including those who have successfully undergone regular medical examinations, may, at any time, unexpectedly fall ill or die.
- 25 Since the first of the two cumulative conditions referred to in paragraph 18 of the present judgment is not satisfied, it is not necessary to verify whether the second of those conditions has been fulfilled.
- 26 In the light of all of the foregoing, the answer to the question worded identically in the three cases in the main proceedings is that Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that the unexpected absence – due to illness or death of a crew member whose presence is essential to the operation of a flight – which occurred shortly before the scheduled departure of that flight, does not fall within the concept of ‘extraordinary circumstances’ within the meaning of that provision.

Costs

- 27 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 (Third Chamber) hereby rules:

Article 5(3) 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 unexpected absence – due to illness or death of a crew member whose presence is essential to the operation of a flight – which occurred shortly before the scheduled departure of that flight, does not fall within the concept of ‘extraordinary circumstances’ within the meaning of that provision.

[Signatures]