Neutral Citation Number: [2021] EWHC 1476 (Ch)

Claim No. BL-2019-001288

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch D)

His Honour Judge Gerald
Sitting as a Judge of the High Court

29th April 2021

B E T W E E N :-

THE CIVIL AVIATION AUTHORITY

Claimant

-and-

RYANAIR DAC

Defendant

# APPROVED JUDGMENT

(from Agreed Joint Note as ex tempore not recorded)

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

Mr Brian Kennelly QC and Mr Tom Coates
(instructed by Stephenson Harwood) for the Defendant

**HIS HONOUR JUDGE GERALD**

1 In July, August and September of 2018, there were air crew strikes by pilots and cabin crew in Ireland, Germany, Portugal, Netherlands and Belgium causing the cancellation of Ryanair flights which entitled passengers prima facie to compensation under Article 5(1)(c) of Regulation (EC) 261/2004.

2 The Claimant, as well as the passengers individually, are entitled to enforce this right. This is a claim brought by the Civil Aviation Authority under Part 8 of the Enterprise Act 2002 in relation to enforcement proceedings.

3 The strikes followed Ryanair recognising unions in December 2017 which, as part of negotiating employees' pay and conditions and union recognition, in May 2018, sought to shift Ryanair to change to a seniority list system used by legacy air carriers (who operate a "hub and spoke" model) from Ryanair's low-cost carrier model which uses multiple bases, not a single or small number of hubs like the legacy air carriers.

4 Ryanair's business model is based on seniority and location, crew promotions taking effect where, in addition to seniority, the individuals are more flexible on location. If Ryanair had accepted all of the demands of the unions, it would have impinged upon the viability of Ryanair's business model, which has been successful in terms of passenger numbers and the width and depth of country coverage.

5 Those were the Irish union-led negotiations. Negotiators in the other countries took different positions, with different degrees of reasonableness, unreasonableness and impossibility of demands from the Defendant's perspective. Ultimately, all were resolved by negotiated or mediated settlement, and all strike ballots were only voted on by Ryanair employees – not those of other, non-Ryanair employees. Self-evidently, an accommodation was not reached between employees and Ryanair in sufficient time to avoid strikes and equally prior to union recognition. Pre-union recognition, there had been no strikes at Ryanair.

6 It is the Defendant's case that it is not obliged to pay compensation because the strikes amounted to "extraordinary circumstances" within Article 5(3) of the Regulation. Article 5 sets out the consequences of cancellation of flights and provides for three levels of remedies/compensation, each of which are cumulative.

7 Under Article 5(1)(a), the passengers must be provided with reimbursement or rerouting options. In addition, under Article 5(1)(b), they must be provided with the right to care (refreshments and such like) in order to ameliorate the consequences of cancellation. Also, under Article 5(1)(c), there is a right to compensation, which is a money payment of €250, €400 or €600, depending on flight distance unless the passenger is told at least two weeks before cancellation that the flight will be cancelled. The notice period can impact the amount of financial compensation.

8 Whereas Article 5(1)(a) and (b) have no let-out for the air carrier, *i.e.* they must be provided in any event, Article 5(1)(c) has an important qualification, or derogation, which is the heart of what this case is about. This is in Article 5(3), which states:

> "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."

There is no suggestion that the Defendant did not take all "reasonable measures" and therefore the sole issue for determination is whether or not there are "extraordinary circumstances".

10 So far as "extraordinary circumstances" are concerned, the Recitals to Regulation 261 include an important provision which, under EU law is taken into account as an aid of construction of the substantive part of the Regulation. Recital 14 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."

11 It is common ground that those examples are indicative, not determinative, and are not intended to be exhaustive. At first blush, they are all principally concerned with matters that are external to the carrier – in other words, they are nothing to do with the operations of the air carrier *per se* and in respect of which the air carrier has no input or influence, merely how to react to an antecedent or external incident visited upon them.

12 That impression is largely borne out by the authorities where "extraordinary circumstances" have been found: the well-known case of *Pešková*[1] concerning a bird hitting a plane; *Germanwings*[2] concerning a screw on the runway causing damage to a tyre; *Moens*[3] concerning petrol spillage on the runway causing delay and cancellation; *LE*[4] concerning an unruly passenger causing diversion and cancellation; and *McDonagh*[5] concerning Icelandic volcanic dust causing cancellation, which was clearly outside of the control of the air carrier.

13 Whilst all those cases concerned something carriers did in dealing with those matters, by contingency plan or otherwise, in and of themselves they were not inherent to or part and parcel of the normal activities of the air carrier or the business of the carrier because they came from outside not within the business of the carrier. In that sense, at first blush, Recital 14 refers to matters *au dehors* the normal activities of the carrier.

14 Another example would be a strike by ground crew which paralyses the airport, leading to cancellations, or politically motivated strikes that have nothing to do with the operations of the air carrier *per se*. Those are examples similar to the five referred to, which concern circumstances or events that are outside of the normal operating activities of an air carrier. The fact that they are matters that an air carrier would have systems or plans to cope with or deal with or respond to does not convert the external to the internal. [##]

15 Apart from those authorities, there is limited authority in this area, most of which are pre-Brexit. Another authority is *Airhelp Limited v Scandinavian Airlines System SAS*[6] which, if applied to this case, would essentially answer it in favour of the Claimant not the Defendant. That decision of the Grand Chamber of the Court of Justice of the European Union ("CJEU") is unusual in that then Grand Chamber did not take on board and conspicuously rejected the opinion of the Advocate General which had been delivered seven days previously. As a result of sections 6(1) and (2) of the European Union (Withdrawal) Act 2018, that authority is not binding upon United Kingdom courts and I am not obliged to have any regard to it, but I do have a discretion to consider it insofar as it is relevant.

16 Obviously, the decision is on point and it is relevant to the matters I have to determine. The Defendant's position is that the decision in *Airhelp* in the Grand Chamber is contrary to, and does not

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[1] Case C-315/15.
[2] Case C-501/17 (*Pauels*).
[3] Case C-159/18.
[4] Case C-74/19.
[5] Case C-12/11.
[6] Case C-28/20.

properly apply, the pre-Brexit authorities and therefore this court should disregard the Grand Chamber's approach but follow that of the Advocate General.

17 The approach I am going to take is not at this stage to have regard to the decision of the Grand Chamber or the Advocate General, but instead to approach the answer to the question I have to determine on the basis of the established pre-Brexit authorities. I will at the end refer to the *Airhelp* case briefly.

18 When approaching the question of whether or not the Defendant air carrier has discharged its burden of establishing that, in this case, the strikes amount to "extraordinary circumstances", there are three applicable principles.

19 The first principle is that the purpose of Article 5 is to provide what has been described as

> "a high level of protection for passengers [or consumers] and take account of the requirements of consumer protection in general, in as much as cancellation of flights causes serious inconvenience to passengers": see *Wallentin-Hermann*[7].

That case concerned mechanical problems which came to light during maintenance or because of a failure to carry out maintenance which were not held to be "extraordinary circumstances" as maintenance and resolution of technical problems by failure to maintain form part and parcel of the standard operating conditions of an air carrier.

20 What follows from that, when construing what constitutes "extraordinary circumstances", is that the Regulation is to be viewed from the point of view of the consumer and the passenger, and not from the carrier's point of view: see *Sturgeon*[8]. This is significant because if the matter is inherent or internal to the carrier's normal activities, the detailed reasons or explanation for the cancellation is of no materiality or interest to the consumer, that being the problem for the air carrier. The headline question is whether or not the cancellation is something which is part of the normal activities of the air carrier.

21 The reason why the CJEU has taken that view is because the Regulation was brought into effect because of a concern that there were high levels of cancellations for commercial reasons, for example, where an air carrier cancelled a flight if it was not full on the basis that it is cheaper to cancel than to fly, which impacts passengers. That is why in terms of Article 5, the first two consequences of cancellations – reimbursement or rerouting and the right to care – are strict liability with no let-out, whereas the right to financial compensation is almost strict, but with the limited get-out or derogation of "extraordinary circumstances".

22 Secondly, "extraordinary circumstances" is to be construed strictly or narrowly because it derogates from the high level of intended consumer protection as required by *Wallentin-Hermann*. The phrase is to be given its ordinary meaning, which means the circumstances must be extra- or out of the ordinary. How that has been defined by the authorities is that it:

> "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 *Wallentin-Hermann*.

23 *Wallentin-Hermann* went on to state:

> "24. In the light of the specific conditions in which carriage by air takes place and the degree of technological sophistication of aircraft, it must be stated that air carriers are

[7] Case C-549/07.
[8] Case C-402/07.

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. It is moreover in order to avoid such problems and to take precautions against incidents compromising flight safety that those aircraft are subject to regular checks which are particularly strict, and which are part and parcel of the standard operating conditions of air transport undertakings. The resolution of a technical problem caused by failure to maintain an aircraft must therefore be regarded as inherent in the normal exercise of an air carrier's activity.

"25. Consequently, 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'…

"26. However, 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. 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."

24 What follows from this is that whether or not something is foreseeable does not matter because resolving "difficult technical problems arise as a matter of course in the ordinary operation of the carrier's activity": Elias LJ in *Jet2.com v Huzar*[9] at paragraph 36, commenting on *Wallentin-Hermann* paragraph 24.

25 The test was slightly differently put in *Krüsemann*[10], which concerned a wildcat strike caused by an employer's announcement of corporate restructuring. The Court stated at paragraph 32:

"'Extraordinary circumstances', within the meaning of Article 5(3) of Regulation No 261/2004, are 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."

26 In the English authorities of *Jet2.com* and *Lipton v BA CityFlyer*[11], the Court of Appeal has taken a simpler approach. It has observed that, whilst the test technically has two limbs, the crucial question is inherency – if something is part of the carrier's normal activities, it will be within its control. The authorities suggest a singular test, but Coulson LJ in *Lipton* (which concerned flight cancellation due to crew illness) makes it clear that this does not completely strip the control limb of significance as it requires the identification of the parameters of what is inherent in the carrier's normal activities.

27 What is important from these observations is not to be beguiled by the use of the word "control". The approach by the Defendant here is to take a narrower approach to "control": in other words, is it something that Ryanair could do something about? The Defendant argues that, if you get to a stage in negotiations where the other side just walks out, that is out-with Ryanair's control; it is something which Ryanair cannot control or don anything about.

28 The Defendant's construction of "control" is too narrow. All that is meant by "control" in this context is that, if it is something which is part of the carrier's normal activities, whether or not it involves industrial or other relations, it is to be treated as something that is within the air carrier's control – because it is the activities of the carrier and therefore within or part of its (actual) control. A malfunctioning but well-maintained engine is part of normal activities even if unexpectedly and

[9] [2014] EWCA Civ 791.
[10] Joined Cases C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17.
[11] [2021] EWCA Civ 454.

unforeseeably breaking down, absent hidden or inherent manufacturing defect which is out-with its control being the responsibility of the engine manufacturer or part of *its* (not the air carrier's) normal activities. That neatly illustrates the demarcation between what is inherent, or internal, to normal activities and what is external, as does the bird hitting the plane or the screw on the runway. If falling outside of normal activities, it constitutes "extraordinary circumstances" even if the air carrier has a contingency plan to deal with something from the outside, the extraordinary.

29 The third principle relevant to construing whether something is an extraordinary circumstance is that this is intended as a summary procedure. It is not intended to be something that emits or provides an opportunity for a detailed, granular fact-finding exercise. The reason for that is a natural consequence of the headline point of the Regulation being to provide a high level of consumer protection, and therefore what flows from that is that this is not something which should require consumers to embark on expensive and detailed litigation. It is intended to be a summary procedure, and that is consistent with viewing the Regulation from the consumer's point of view and the relatively modest amount of financial compensation for passengers. From the air carrier's point of view, this can be significant and amount to many millions of pounds, but that is not the approach to the interpretation of the Regulation and is a risk which is inherent in running an air carrier business.

30 This point is set out by Coulson LJ's judgment in *Lipton*:

> "45. 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.
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> "46. In any event, there are obvious difficulties in identifying precisely when, why or how someone first falls ill. Is it when they first exhibit the symptoms? Or is it when they are first exposed to the infection? Why are they unwell? How has that happened? If a crew is on a particularly tight schedule, with a meal then a flight, then a rest and then a repeat for the return flight, how can it be safely worked out when, why or how the crew member actually fell ill, and whether that happened, as the respondent would have it, on their own time or the carrier's time? The scheme under the Regulation is not designed to investigate these questions. Without wishing to trivialise the issue or the illness in this case (about which we have no details), I am of the view that the consumer's right to compensation under the Regulation cannot depend on when and where the member of staff ate the suspect prawn sandwich…
>
> "48. This approach is consistent with the authorities. The analysis of causation in the cases noted above is generally cursory: see *Pešková* and *Siewart*."

31 One only needs to consider the enquiries needed to consider the circumstances of how negotiations broke down to see how lengthy and extensive such an inquiry would be, and potentially inconclusive as to which party caused negotiations to break down, and whether same was part of the cut-and-thrust of negotiations, brinkmanship or one party over-playing its hand.

32 The Defendant referred to the passage of *Lipton* where Coulson LJ stated:

> "49. …I can see 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 (as occurred in *Krüsemann*) but that is not this case."

33 The Defendant submitted that, in cases in which the Recital 14 indicia were in play, the factual inquiry was more complicated. It was necessary to analyse why a strike had occurred – what were the circumstances before the unions went on strike? Here, the negotiating parties are concerned with the terms and conditions of an employee's employment, which, as already alluded to, would be a complex and potentially inconclusive enquiry in a detailed factual investigation.

34 In my judgment, this misinterprets the meaning of the relevant passage in *Lipton*. Coulson LJ was saying, by parity of reasoning, that, where there is a strike, it may be necessary for a further detailed but limited investigation to determine whether the strike was outside of the normal activities of an air carrier or part of its normal activities. Viewed on that level, the nature of the further inquiry would be circumscribed. It would not be intended to delve into the reasons why a negotiation broke down. It just means: was the strike *au dehors* the normal activities of the air carrier? An example might be a politically motivated secondary picket of the air carrier which had nothing to do with the activities of the air carrier in question but resulted in cancellations, which would be established by a circumscribed fact-finding exercise. [##]

35 Drawing those strands together, these are the broad principles to be adopted when considering the question of whether or not the circumstances are extraordinary. 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.

36 In *Lipton*, Coulson LJ made further observations as to what forms part of the normal activities of a carrier:

> "35. The interpretation noted above is also consistent with the authorities concerned with technical defects. As set out in Section 5.3 above, defects in the aircraft (what was called mechanical "wear and tear" in *Jet2 v Huzar*), have regularly been held to be an inherent part of an air carrier's activity and not an extraordinary circumstance. In my view, those cases strongly suggest a similar answer to this appeal. 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. To put it another way, the captain is just as much part of "the operating system" (*Pešková*) as the mechanical components of the aircraft."

37 In *Krüsemann*, the CJEU said that the wildcat strikes had its origins in the carrier's restructuring process:

> "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
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> "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.
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> "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.
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> "42. Therefore, under the conditions referred to in paragraphs 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.
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> "43. Furthermore, the 'wildcat strike' at issue in the main proceedings cannot be regarded as beyond the actual control of the air carrier concerned.
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> "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."

39 In my judgment, the point made there by the CJEU in relation to "control" is not in the literal, narrow sense but is in the wider sense of something which is within the ambit of the normal activities of the business, hence the reference in the authorities to "*actual* control" *i.e.* who or what is in *actual* control. 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.

40 What follows from that, in my judgment, is that it makes no difference who causes the walk-out. It is difficult to see any material difference between this case and *Krüsemann.* In *Krüsemann*, it is clear that the strike was caused by the employer announcing at short notice its corporate restructuring. Why should it make any difference if the unions make unreasonable demands? The union's position was endorsed by the employees – why should it make a difference that the employees make the demands at short notice? Why is that an extraordinary circumstance? It is all to do with the normal activities of the air carrier. To hold otherwise would be tantamount to holding that the air carrier, the business, is not in *actual* control of its employee's terms and conditions of employment so not part of its normal activities which, once stated, reveals the illogic and unreality of the Defendant's position.

41 In *Lipton*, Coulson LJ observed that it was not appropriate to distinguish between different types of strike:

> "34. Mr Shah sought to distinguish *Krüsemann* on the basis that the CJEU's decision turned on the fact that it was a 'wildcat strike' due to the air carrier's own proposed reorganisation. He said that this showed that a detailed analysis of causation was required. I disagree with that for two reasons. First, I do not accept that the precise nature of the strike ultimately made any difference to the outcome in *Krüsemann*, for the reasons explained by the CJEU at [47]. Secondly, I consider that the CJEU was required in that particular case to do a certain amount of investigation, because strikes are one of the indicia of extraordinary circumstances listed in Recital 14. That is not the case here where, as I have said, staff absence is not identified in Recital 14 at all."

42 There is no need for a detailed investigation. As I have already said, the factual investigation is not something which needs to be wide ranging or detailed as that would be inimical to the summary procedure or broad-brush approach that should be taken in this area of consumer protection. What is important in identifying the origins 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.

43 Moving on to matters in the area of negotiation of terms and conditions, as a matter of principle, practicality and reality, negotiations between an employer and employees and their representatives, whether unionised or not, are part of the normal activities of air carriers. 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.

43 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, threating 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 compromises and negotiated settlement reached.

43 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.

45 The central submission of the Defendant was that *prima facie* the negotiations of terms and conditions were inherent in the normal activities of the air carrier but became external and therefore extraordinary by involvement of the third party union over which the carrier had no control, and by reason of the extremity of the position of the union, it was the union that caused the employees to go on strike and therefore that was equivalent to a hidden defect so constituting “extraordinary circumstances”. The economic aspect was that if a carrier is responsible for the compensation in the event of strikes, then the union walking out on short notice means that notice periods cannot be complied with and the carrier faces the consequences of having to pay cancellation compensation.

46 I am unable to accept that these considerations are applicable in this case so as to make the strikes “extraordinary circumstances”. *Prima facie*, in my judgment, the Defendant’s position confuses inherency with something that is an outside circumstance or activity or event. What it does is to adopt the heresy of eliding the internal with the external, and unnecessarily complicates the simple, straightforward approach of the CJEU's pre-Brexit authorities as adopted by the English cited. It would also ride roughshod over the principle that the case should be viewed from the consumer's perspective, summarily, providing them with a high level of protection.

47 In more detail, by recognising the unions and negotiating with them and dealing with them, their involvement was or became an internal part of the carrier's activities, inherent in its normal activities. Whilst some of the positions were initiated by the unions, there is no evidence that they were not approved by the Defendant’s employees. Those employees adopted the unions' proposal

and it was those employees who drove the unions' negotiating stance. Once that is identified as a simple matter of fact, it cannot be said that the union is an external third party in the sense identified in the authorities because its representatives and proposals had been approved by the employees of the carrier and were merely representing or acting at the behest of its employees.

48 Exactly the same position applies where the employees operate *via* the employee representative committees, which is how this carrier formerly negotiated. Neither is it of any materiality that legacy carriers and non-Ryanair employees were represented by the same unions and were represented on the negotiating team and making suggestions to Ryanair staff: ultimately these individuals were acting on behalf of and with the endorsement of the Ryanair employees. It is not accurate to say that non-Ryanair employees made any of these recommendations out-with Ryanair. Neither is it material, if it be the case, that the unions were controlled by competitors, because their negotiating positions were approved of and adopted by the Defendant's employees who were the ones, and the only ones, voting to strike.

49 Following on from that point, whilst in the narrow sense the Defendant cannot "control" the activities of the union, neither can it in the narrow sense "control" the activities of its employees or their decision to strike or what terms to offer and what to reject. I cannot see why the same position could not have been reached without union recognition. The presence of the union is therefore 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. There is no evidence to suggest that the union commanded the employees what to do and that they had no alternative. It may be different if (which there is not) there was evidence of activity such as secondary picketing, which may be an example of strike activity of a third party which has nothing to do with Ryanair employees and stops employees from going into work.

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 the Defendant 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.

51 For these purposes, at the point in time when the union employees went on strike, the Defendant was not in a position to satisfy and avert the strikes and did not have sufficient time to give notice to passengers within the time-frame laid down by Article 5, but this does not mean that they were not in "control", or that it was out-with normal activities. All that this means is that there was a hitch in the negotiations, that the employees were adopting the recommendations of the union, which were ultimately unsuccessful. Viewed from the employees' perspective, they were simply using one of the tools in their arsenal to try and advance their case, as was Ryanair who was refusing to accede to union-employee demands.

51 Why is that any different from the *Krüsemann* situation? It is impossible during dynamic negotiations to lay fault on either side. The minute that is articulated, it immediately reveals the heavily fact-specific nature of the inquiry. Each side no doubt regards the other as having extreme or unreasonable views, and it is not for the court to become overly involved in fact finding. It is not a granular, but a broad-brush, headline approach. The test of "extraordinary circumstances" is high-level conceptual, not fault based.

52 In reaching these conclusions, I have not referred to *Airhelp. Airhelp* is more of a confirmation or clarification of the pre-Brexit authorities and consistent with them, in my judgment, the key parts of that decision being as follows:

> "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.
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> "29. That interpretation must also apply where, as here, the employer is an operating air carrier. The court indeed held, in paragraphs 40 to 42 of the judgment of 17 April 2018, *Krüsemann*, that operating air carriers may, as a matter of course, when carrying out their activity, be faced with disagreements or conflicts with all or part of their staff. Like the restructuring measures and measures of reorganisation at issue in the case which gave rise to that judgment and the labour disputes to which they are liable to lead, measures relating to the working and remuneration conditions of an operating air carrier's staff fall within the normal management of that carrier's activities.
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> "30. Thus, a strike whose objective is limited to obtaining form 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.
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> "35 …since the occurrence of a strike constitutes an event that is foreseeable for the employer, the latter has, in principle, the means to prepare for it and, as the case may be, mitigate its consequences, with the result that the employer retains control over events to a certain extent.
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> "36. … 'extraordinary' attests to the EU legislature's intention to include in the concept of 'extraordinary circumstances' only circumstances over which the operating air carrier does not have any control. Like any employer, an operating air carrier faced with a strike by its staff that is founded on demands relating to working and remuneration conditions cannot claim that it does not have any control over that action.
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> "37. …a strike by staff of an operating air carrier cannot be categorised as a ' extraordinary circumstance' within the meaning of Article 5(3) … 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 with the scope of the employment relationship between the employer and its workers."

53 In reality, in my judgment, all that is being said is that negotiations relating to terms and conditions are part of the normal activities of the air carrier and are to be treated in that way. The 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. The distinction between internal and external is articulated as follows which, in my judgment is consistent with the approach adopted above and of pre-Brexit authority:

> "42. Thus, in stating, in recital 14…, that extraordinary circumstance may, in particular, occur in the case of strikes that affect the operation of an operating air carrier, the EU legislature intended or 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'…

"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."

54 One part of the *Airhelp* judgment appears at first blush to be a little over-reaching, being paragraph 45 where it refers to strikes by the air carrier's own staff originating from demands that only public authorities can satisfy, and this being the only circumstance as falling within Recital 14. There 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. However, I consider that this is in the nature of an *obiter* comment and not an indication that strikes will only be extraordinary where they originate from demands which only a public authority can satisfy. Either way, it is not material to the facts and circumstances of this case.

55 The conclusion I have reached is consistent with that of the Grand Chamber of the CJEU in *Airhelp*, but I have reached it without having to refer it. I am not prepared to adopt the Advocate General's approach for reasons that are obvious. It seems to me, respectfully, that he has fallen into the trap of not distinguishing what is part of the normal activities of an air carrier and what is not. It is a red herring that a union is involved; the union acts on behalf of the employees and are just their mouthpiece. Unless the union is operating against the employees, it makes no difference at all.

56 I therefore find that the strikes in this case do not fall within the definition of extraordinary circumstances, and therefore an enforcement order should be made.