2021/26

Trade union found liable for organizing an illegal strike (RO)

CONTRIBUTORS Andreea Suciu and Andreea Oprea*

Summary

The Craiova Court of Appeal has ruled that a trade union that organized an illegal strike was civilly liable for the entire prejudice caused to the employer due to the interruption of its business activity. The compensation will be calculated based on the damage incurred by the employer, regardless of whether the strike took place for only two hours, as in the case at hand, if the activity of the unit was disrupted for a longer period of time due to such strike action.
Relying on the findings of ECJ cases *Airhelp* (C-28/20) and *Krüsemann* (C-195/17), the Craiova Court of Appeal strengthened the argumentation of its decision to award damages to the employer. It concluded that a strike organized in violation of legal conditions cannot be considered an 'extraordinary circumstance' according to European case law, as long as the trade union that organized the strike acted within their autonomy as representatives of the employees. In this case, considering the fact that the organization of the strike was outside the decision-making structures of the employer, the latter has the option of enforcing the civil liability of the organizers of the strike for the entire damage caused.

Background

In accordance with the provisions of Law No. 62/2011 on social dialogue, the court, at the request of an interested party, may oblige the organizers of an illegal strike and employees participating in such strike to pay compensation for the damage caused. While it is clear that the employees participating in an illegal strike will be liable based on the provisions of the Romanian Labour Code, the legal dispositions do not clarify the type of liability of the organizers (the trade union) for the illegal strike, nor do they indicate the manner in which how such damage can be determined. For this purpose, one must also consider European case law which may apply to this kind of situation by reference to the differences between the effects of an illegal strike versus a strike which is compliant with the law.

Facts

In the present case, the employer requested that the trade union which organized the illegal strike be obliged to pay damages caused by the strike. The amount of the requested damages was calculated as a result of the unachieved profit for the entire working day and the amount representing the expenses for personnel that did not work due to the strike (either voluntary because they participated in the strike, or involuntary because they were unable to work because of it). Observing the specific activities of the employer (mining), the request was based on the fact that, even if the illegal strike lasted solely for two hours, it affected the entire activity of the unit on that working day.
Although the first instance court ascertained the illegality of the strike, it rejected the claim for damages. Without analysing the trade union's responsibility for organizing an illegal strike, the first instance court argued that in the case at hand, the damage created was not proven given the fact that no evidence was submitted showing that the illegal two-hour strike endangered the employer's activity for the entire working day. Furthermore, the court considered that the evidence submitted was sufficient to issue its ruling, and, consequently, it rejected the employer's request to perform an accounting analysis in order to establish the amount corresponding to the created damages.

Judgment

The first instance court decision was overturned by the Craiova Court of Appeal which granted the employer the right to perform an accounting analysis. The Craiova Court of Appeal subsequently granted the employer the resulting amount of compensation based on that analysis.

* Andreea Suciu is Managing Partner of Suciu | The Employment Law Firm. Andreea Oprea is an Associate at Suciu | The Employment Law Firm.

doi: 10.5553/EELC/187791072021006003003

Particularly interesting in the Court's considerations was the extensive and exhaustive manner in which it argued the nature of the liability of the trade union for organizing an illegal strike. Thus, starting from the national legal provisions which only mention that the organizers of an illegal strike will be liable for the damage created as a result of the strike, the Craiova Court of Appeal went a step further and established by reference to ECJ cases Airhelp and Krüsemann the significant difference between the legal effects of a strike initiated by the trade union in accordance with national labour law rules and one that does not comply with legal regulations.

Therefore, the Court underlined by reference to Airhelp the fact that even if the strike is part of the economic life of any company, the employer does not exercise any control over the decisions taken by a trade union. It follows that the employer does not normally have any significant legal influence on whether or not a strike takes place. Consequently, the fact that the strike is initiated by the trade union in accordance with national labour law enables the employer to prepare the activity of the company in order to minimize the effects of such strike on its current business needs.

Going a step further, in the Krüsemann judgment, the ECJ ruled that a strike which did not observe the legal conditions imposed by the national law does not represent a 'extraordinary circumstance' within the meaning of Regulation (EC) No. 261/2004 (dealing with compensation and assistance to air passengers in the event of cancelled or delayed flights) considering that the strike was triggered by the restructuring process implemented by the airline operator. Therefore, in the Krüsemann case, even if the strike was illegal, the employer could not invoke the 'extraordinary circumstance' exception in relation to the payment of compensation as one of its own actions led to the employees' reaction.

Analysing by analogy the reasoning behind the Krüsemann case, the Court stated that, if Regulation (EC) No. 261/2004 was applicable to the case at hand, the employer would have been able to successfully invoke the 'extraordinary circumstance' exception as there was no previous action of the employer to trigger the employees' reaction. Consequently, in the case at hand, the employer may exercise the right to request damages for the incurred prejudice caused by the illegal strike.

Given the above-mentioned European cases and stating that the trade union is a form authorized by law to exercise a specialized activity in the field of protection of its members (by having a high level of responsibility in assessing the way a strike is organized), the Court held the trade union which organized the illegal strike to be civilly liable to cover the damage incurred by the company.

Commentary

This case illustrates that, although the law provides for both the liability of the employees participating in the illegal strike and the liability of its organizers (the trade union), in practice, employers usually file requests for damages against the trade union.

Unfortunately, the liability of the trade union for causing such damage is not directly regulated by the Romanian labour legislation, the courts being obliged to apply by analogy the provisions related to civil matters. Consequently, the arguments of the Craiova Court of Appeal are welcome from the perspective of establishing the trade union's liability for organizing an illegal strike, but also by emphasizing the importance of the effects of the illegal strike versus a 'legal' strike from the perspective of ECJ case law.

Last but not least, comparing the decision pronounced in the case at hand by the first instance court (which did not refer at all to the provisions of ECJ case law), we may observe that the interest of identifying and applying such legal arguments in Romanian judgments has considerably increased – lately especially – in the higher courts.

Comments from other jurisdictions

Belgium (Pieter Pecinovsky, Van Olmen & Wynant): From an EU perspective, it seems rather ironic that the Romanian court uses the case law of the CJEU in *Airhelp* to support the civil liability of trade unions for the consequences of an (illegal) strike. This while the *Airhelp* case could be seen as an important judgment in which the CJEU takes the interests of the strikes into account while balancing them against the economic interests of the employer and clearly refers to the importance of the right to take collective action under Article 28 of the EU Charter of Fundamental Rights. It would also be interesting to see whether the experts of the International Labour Organization and the European Committee of Social Rights would agree with the Romanian courts. It is difficult to assess the position they would adopt, as it is unclear why the strike has been declared illegal in the first place. In any case it seems difficult to successfully claim huge amounts in damages without severely limiting the freedom of association and the right to take collective action (see e.g. the condemnation of the UK by the ILO Committee of Experts on the Application of Conventions and Recommendations in the BALPA Case: Observation (CEACR) – adopted 2009, published 99th ILC session (2010)). In any case, a similar judgment does not seem possible in Belgium, as the trade unions do not have a legal personality and therefore cannot act as a party before a court. Simply put, it is impossible to claim damages from a trade union as they legally do not exist, except for cer-

doi: 10.5553/EELC/187791072021006003003

tain specific actions (such as defending their members). Instead, the employer would have to file a case against the individual participants in the strike, which is very difficult as it nearly impossible to prove the individual damage which an employee partaking in a collective action has caused to the employer, especially when this damage is purely of an indirect economic nature.

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): The decision of the *Curtea de Apel Craiova* seems to be very much in line with the settled case law of the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') in Germany, which in 2016 had to deal with a case in which the airport operator of Frankfurt Airport (Fraport AG) claimed damages due to an illegal air traffic controllers' strike against the air traffic controllers' union (judgment of 26 July 2016 – 1 AZR 160/14). In its decision, the BAG stated that an employer could claim damages against a trade union in the event of an illegal strike and found that the claim was justified, at least in its essence. Solely the decision regarding the compensation amount to be paid remained open, as the previous court decisions had not made any determinations regarding the damages position. Similar to Romania, there is also no provision (in employment law) in Germany that provides the employer with a claim for damages against the trade union. In Germany, such claims are derived from contract and tort law.
According to established case law (which has been criticized by some in the literature), an illegal strike initiated by a trade union constitutes a violation against the right to an established and operating business of the employer who is directly affected by the strike. The prerequisite for a claim for damages shall be that the strike was illegal and that the trade union was responsible for it. This means that not every illegal strike should lead to a claim for damages, but only if the union was aware of the fact that the strike was unlawful and nevertheless initiated the strike or could have been aware that the planned strike would be unlawful if there had been a careful examination of the situation.

United Kingdom (Richard Lister, Lewis Silkin LLP): In the UK, an action for damages is in principle available in the context of an unlawful strike or other industrial action. The employer can sue both trade unions and individual participants for losses suffered as a result of the action although, in the case of a union, there are statutory limits on the level a court may award in any single action. This depends on the size of the union, up to a maximum of GBP 250,000 for one with 100,000 or more members.
In practice, however, it is extremely rare for employers to pursue claims for damages when faced with an illegal industrial dispute. There have been only a handful of reported examples over the years. A far more common (and immediate) course of action is for the employer to apply to court for an interim or 'interlocutory' injunction. This is a temporary order that the industrial action should stop (or, if it has not yet started, must not take place), pending a full hearing at which the court will decide whether it is lawful. It is in fact very unusual for cases subsequently to proceed to full hearing, which means that the initial hearing is in most cases likely to serve as the effective final determination of the matter.

Subject: Unions
Parties: Unknown
Court: *Curtea de Apel Craiova* (Craiova Court of Appeal)
Date: 26 May 2021
Case number: 1632/95/2019*
Internet publication: http://www.rolii.ro/hotarari/60d6a20ae49009d41b00004a

doi: 10.5553/EELC/187791072021006003003