20 January 2017

First Division

15/02186

LZ/AS

Supreme Court of the Netherlands

Judgment

in the case of:

EUROPEAN PATENT ORGANISATION,
which has registered offices in Munich, Germany and Rijswijk,

APPELLANT in the cassation proceedings,

attorney-at-law: G.R. den Dekker,

and

the STATE OF THE NETHERLANDS (Ministry of Foreign Affairs),
which has its seat in The Hague,

joining the cassation proceedings on the side of the APPELLANT,

attorney-at-law: K. Teuben,

against

1. VAKBONDSUNIE VAN HET EUROPEES OCTROOIBUREAU (VEOB, The Hague chapter),
which has its seat in Rijswijk,

2. SUEPO (Staff Union of the European Patent Office), which has its seat in THE HAGUE,

DEFENDANTS in the cassation proceedings,

attorneys-at-law: R.S. Meijer and A. Knigge.

The parties are also referred to below as ‘the Organisation’ and ‘VEOB et al.’ and the joining party as ‘the State’.

1. The proceedings

For a description of the proceedings thus far the Supreme Court would refer to its judgment of 11 September 2015 (ECLI:NL:HR:2015:2534, *NJ* 2015/369) in which it permitted the State to join the action as a party on the Organisation’s side and referred the case to the list for continued proceedings.

The decision on that procedural issue is annexed to this judgment.

2. The proceedings after disposal of the procedural issue

The case was presented orally and in writing by counsel on behalf of the parties and by G.C. Nieuwland on behalf of the State.

Advocate general P. Vlas advised that the contested judgment be quashed and the case be disposed of by the Supreme Court as set out in 2.20 of his advisory opinion.

Counsel for the parties responded to the advocate general’s advisory opinion in writing on 14 October 2016.

3. Basis for the cassation proceedings

3.1 In cassation, the following can be taken to have been established.

(i) The Organisation is a legal person under public international law established in 1973 by the Convention on the Grant of European Patents (Dutch Treaty Series 1975, 108, and 1976, 101; ‘the EPC’). The EPC entered into effect for the Netherlands on 7 October 1977. The Organisation has 38 member states (Contracting States) and has its seat in Munich. One of the organs of the

Organisation, the European Patent Office, is located in Munich with a branch in Rijswijk.

(ii) Article 4 of the EPC provides as follows:

> '1. A European Patent Organisation, hereinafter referred to as the Organisation, is established by this Convention. It shall have administrative and financial autonomy.
> 2. The organs of the Organisation shall be:
> a. the European Patent Office;
> b. the Administrative Council.
> 3. The task of the Organisation shall be to grant European patents. This shall be carried out by the European Patent Office supervised by the Administrative Council.'

(iii) Article 8 of the EPC provides as follows with regard to privileges and immunities:

> 'The Protocol on Privileges and Immunities annexed to this Convention shall define the conditions under which the Organisation, the members of the Administrative Council, the employees of the European Patent Office, and such other persons specified in that Protocol as take part in the work of the Organisation, shall enjoy, in each Contracting State, the privileges and immunities necessary for the performance of their duties.'

(iv) Article 13 of the EPC reads as follows concerning concerns disputes between the Organisation and the staff of the European Patent Office:

> '1. Employees and former employees of the European Patent Office or their successors in title may apply to the Administrative Tribunal of the International Labour Organization in the case of disputes with the European Patent Organisation, in accordance with the Statute of the Tribunal and within the limits and subject to the conditions laid down in the Service Regulations for permanent employees or the Pension Scheme Regulations or arising from the conditions of employment of other employees.
> 2. An appeal shall only be admissible if the person concerned has exhausted such other means of appeal as are available to him under the Service Regulations, the Pension Scheme Regulations or the conditions of employment.'

(v) Article 3 of the Protocol to the EPC on Privileges and Immunities of the European Patent Organisation (Protocol on Privileges and Immunities; 'the PPI') reads as follows:

> '1. Within the scope of its official activities the Organisation shall have immunity from jurisdiction and execution, except:

a) to the extent that the Organisation shall have expressly waived such immunity in a particular case;
b) in the case of a civil action brought by a third party for damage resulting from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Organisation, or in respect of a motor traffic offence involving such a vehicle;
c) in respect of the enforcement of an arbitration award made under Article 23.
2. The property and assets of the Organisation, wherever situated, shall be immune from any form of requisition, confiscation, expropriation and sequestration.
3. The property and assets of the Organisation shall also be immune from any form of administrative or provisional judicial constraint, except in so far as may be temporarily necessary in connection with the prevention of, and investigation into, accidents involving motor vehicles belonging to or operated on behalf of the Organisation.
4. The official activities of the Organisation shall, for the purposes of this Protocol, be such as are strictly necessary for its administrative and technical operation, as set out in the Convention.'

(vi) VEOB is a trade union for European Patent Office staff. VEOB is an association ('*vereniging*') under Dutch law with its seat in Rijswijk. Membership of the VEOB is open to staff of the European Patent Office who are or have been employed at the Rijswijk branch.

(vii) SUEPO is an umbrella trade union for employees of the Organisation and has four local sections: The Hague (VEOB), Munich, Berlin and Vienna.

(viii) VEOB et al. began calling upon their members to strike in March 2013. Strikes were actually held in March, May, June and July 2013.

(ix) The terms and conditions of employment applying to staff of the Organisation are laid down in the Service Regulations for Permanent Employees ('the Service Regulations'). The Service Regulations set out a special procedure for resolving disputes between the Organisation and the staff and former staff of the Organisation. Any staff member of the Organisation who disagrees with a decision affecting them can, under the Service Regulations, challenge the decision by means of the internal appeal procedure. In accordance with this internal appeal procedure, a request for review can be submitted to the President of the Organisation. If the

President dismisses such a request, the case is submitted to the Internal Appeals Committee, which issues an opinion to the President. The President then decides on the basis of this opinion whether to meet the individual's objections after all. The President's decision can be appealed by filing a complaint with the Administrative Tribunal of the International Labour Organisation in Geneva ('ILOAT') under article 13 of the EPC.

(x) On 1 July 2013 the Organisation added provisions concerning strikes to the Service Regulations, incorporating a new article 30a and a new article 65, paragraph 1 (c), the relevant parts of which read:

> 'Article 30a (...)
> Right to strike
> (1) All employees have the right to strike.
> (2) A strike is defined as a collective and concerted work stoppage for a limited duration related to the conditions of employment.
> (3) A Staff Committee, an association of employees or a group of employees may call for a strike.
> (4) The decision to start a strike shall be the result of a vote by the employees.
> (5) A strike shall be notified in advance to the President of the Office. The prior notice shall at least specify the grounds for having resort to the strike as well as the scope, beginning and duration of the strike.
> (...)
> (8) Strike participation shall lead to a deduction of remuneration.
> (9) The President of the Office may take any appropriate measures, including requisitioning of employees, to guarantee the minimum functioning of the Office as well as the security of the Office's employees and property.
> (10) The President of the Office may lay down further terms and conditions for the application of this Article to all employees; these shall cover inter alia the maximum strike duration and the voting process.
> (...)
> Article 65 (..)
> Payment of remuneration
> (1) (…)
> (a) Payment of remuneration to employees shall be made at the end of each month for which it is due.
> (...)
> (c) (...) the monthly amount shall be divided into twentieths to establish the due deduction for each day of strike on a working day."

(xi) The new rules are explained in a 'Circular on Strikes' (Circular 347) produced by the President of the Organisation.

(xii) VEOB et al. argue that the Organisation, by introducing the new rules in the Service Regulations, has unduly restricted the right to strike and is hampering the work of the trade unions, and that the Organisation is wrongfully denying them admittance to collective bargaining.

3.2.1 In the interim injunction proceedings in question VEOB et al. claimed, in so far as is relevant to the cassation proceedings, that the Organisation – in any case with respect to the staff employed at the Rijswijk branch – be ordered (i) to discontinue its violations of the right to strike, the right of collective bargaining and the right to freedom of assembly and association and violations of its social duty of care, (ii) to suspend the effect of articles 30a and 65, paragraph 1 (c) of the Service Regulations, (iii) to recognise VEOB et al. as social partners with the right of collective bargaining and action (including strike action) or at least admit VEOB et al. to collective bargaining and (iv) not to conduct or continue consultations regarding new collective arrangements to which VEOB et al. are not admitted.

The Organisation's principal argument was that it had immunity from jurisdiction under article 3 of the PPI.

3.2.2 The interim relief judge rejected the Organisation's plea of jurisdictional immunity and dismissed VEOB et al.'s claims.

3.2.3 The Appeal Court quashed the judgment of the interim relief judge. In the former's opinion, the Organisation cannot invoke jurisdictional immunity. The Appeal Court (i) ordered the Organisation to give VEOB et al. unrestricted access to the Organisation's email system, (ii) prohibited the Organisation from applying article 30a, paragraphs 2 and 10 of the Service Regulations and (iii) ordered the

Organisation to admit VEOB et al. to collective bargaining. The Appeal Court's considerations in this matter were as follows.

In the present case, the protection of the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') is 'manifestly deficient'. Since VEOB et al. have no access to the judicial process at ILOAT or any other judicial process provided for by the Organisation, a violation of article 13 of the ECHR would result if the Dutch courts were to deny VEOB et al. right of access for their claims under article 11 ECHR (consideration 3.7). The possibility for individual employees of the Organisation to challenge, at the Organisation and at ILOAT, any restrictions of their right to strike cannot be considered an effective remedy to enforce the rights of collective action and collective bargaining guaranteed by article 11 ECHR (consideration 3.8). The Organisation could have chosen to create a judicial process with sufficient guarantees (consideration 3.9). For this and other reasons, the Organisation's plea of immunity from jurisdiction is disproportionate. The Dutch courts therefore have jurisdiction to hear the claims of VEOB et al. (consideration 3.10).

With respect to the claims of VEOB et al., the jurisdiction of the Dutch courts had to be assumed by the Appeal Court(consideration 4.5). Furthermore, VEOB et al.'s claims regarding recognition as a negotiating partner are of an urgent nature (consideration 4.7).

The measures taken by the Organisation with respect to internal communication channels are disproportionate (considerations 5.2 and 5.3). Article 30a, paragraphs 2 and 5 of the Service Regulations wrongfully makes a strike impossible if its duration is not known or announced in advance (consideration 5.7). Restricting the right to strike to 'work stoppage', thereby excluding any other type of

collective action in advance, is wrong, as is the condition that any type of collective action must relate to employment terms and conditions (consideration 5.8-5.9).

The Organisation should admit VEOB et al. to collective bargaining, but VEOB et al.'s claim that the Organisation should recognise them as social partners cannot be granted due to insufficient interest. Since these are interim injunction proceedings it would not be appropriate to compel the Organisation to adopt a recognition to which it objects (consideration 5.14).

3.3 The ground of appeal in cassation principally alleges that the Appeal Court wrongfully rejected the Organisation's claim of jurisdictional immunity and presents *inter alia* the following arguments.

The possibility that members of VEOB et al. have to use the internal judicial process at the Organisation and the judicial process at ILOAT to challenge measures that affect them, and the decisions underlying those measures, is a reasonable alternative means for (principally) those members to effectively protect their rights under article 11, paragraph 1 ECHR.

The Appeal Court also failed to recognise that the staff representatives of the Organisation at ILOAT can defend the interests of all staff members. That possibility is also a reasonable alternative means to effectively protect the rights invoked under article 11, paragraph 1 ECHR.

In view of the existence of these reasonable alternative means for the effective protection of the rights invoked by VEOB et al., the Appeal Court wrongfully concluded that (i) the protection of fundamental rights at the Organisation is 'manifestly deficient', (ii) that if in this case the Dutch court did not offer VEOB et al. access to a judicial process, this would constitute a violation of the right to an effective remedy guaranteed by article 13 ECHR and (iii) that in the absence of a

reasonable alternative judicial process for VEOB et al., according the Organisation the immunity that it invoked would be disproportionate.

4. Preliminary considerations

4.1 According to established case law of the European Court of Human Rights (ECtHR), the right of access to the courts secured by article 6 ECHR is not absolute. In determining the scope of this right, the Contracting States have a certain margin of appreciation, although the final decision regarding observance of the ECHR's requirements rests with the ECtHR. Restricting a litigant's right of access to a court is not permitted if this would impair the essence of the right. Likewise, restrictions that serve no legitimate aim or are disproportionate to the aim sought to be achieved are also incompatible with article 6 ECHR (see ECtHR 28 May 1985, no. 8225/78, *Ashingdane*, consideration 57; ECtHR 18 February 1999, no. 26083/94, *Waite & Kennedy v. Germany*, consideration 59).

4.2 Granting privileges and immunities to international organisations constitutes a restriction of the right of access to a court under article 6 ECHR. According to the ECtHR's established case law, this serves a legitimate aim. According to the ECtHR, the long-standing practice by which states accord immunity from jurisdiction and enforcement to international organisations in their founding instruments or supplementary agreements is necessary to ensure the proper functioning of the organisation free from unilateral interference by individual governments (see *Waite & Kennedy v. Germany*, consideration 63; ECtHR 11 June 2013, no. 65542/12, *NJ* 2014/263, *Stichting Mothers of Srebrenica and Others v. the Netherlands*, consideration 139).

4.3 An important factor in determining whether according jurisdictional immunity to an international organisation is proportionate is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention (see *Waite & Kennedy v. Germany*, consideration 68; ECtHR 29 January 2015, no. 415/07, *Klausecker*, consideration 69; see also Supreme Court 18 December 2015, ECLI:NL:HR:2015:3609, *NJ* 2016/264). If reasonable alternative means are available to a litigant, it can be assumed that according jurisdictional immunity does not impair the essence of their right of access to a court.

4.4 The ECtHR also considered that the test of proportionality referred to above in 4.3 ‘cannot be applied in such a way as to compel an international organisation to submit itself to national litigation in relation to employment conditions prescribed under national labour law. To read Article 6 § 1 of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in such matters would, in the Court’s view, thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation’ (see *Waite & Kennedy v. Germany*, consideration 72).

4.5 Furthermore, it is important that, as the ECtHR states, a civil claim should not override immunity from suit for the sole reason that it is based on an allegation of a particularly grave violation of a norm of international law, even a norm of *ius cogens* (see *Stichting Mothers of Srebrenica and Others v. the Netherlands*, consideration 158).

5. Assessment of the ground of appeal in cassation

5.1 As the considerations in 4.1 to 4.5 show, the Appeal Court gave the proper criterion precedence in its consideration 3.6, in which it determined that a plea of immunity by an international organisation should be rejected if the essence of a person's right of access to a court under article 6 ECHR is impaired or if the organisation's protection of the rights guaranteed by the ECHR is manifestly deficient.

5.2 In subsequent considerations the Appeal Court held that the protection within the Organisation of the rights guaranteed by the ECHR is manifestly deficient and that the Organisation's reliance on the jurisdictional immunity granted to it was disproportionate, and therefore the Dutch courts had jurisdiction to hear the claims of VEOB et al. (considerations 3.7-3.10). The Appeal Court supported this determination with the following arguments:

(i) Since VEOB et al. do not have access for their claims (which are based on the right of collective action and right of collective bargaining guaranteed by the ECHR (article 11), the European Social Charter (article 6) and ILO Conventions 87 and 98) to any judicial process at ILOAT, nor to any other judicial process provided for by the Organisation, the right to an effective remedy before a national authority guaranteed by article 13 ECHR will be violated if a Dutch court does not offer a judicial process for VEOB et al. (consideration 3.7).

(ii) It would be in contravention of the collective nature of these rights if only individual employees could contest the impairment of these rights after the fact. The circumstance that individual employees can, at the Organisation and subsequently at ILOAT, contest any restriction of their right to strike, in particular any measures that might have been taken against them due to violation of the rules on strikes, cannot be considered an effective remedy for enforcing these collective rights. It is even less clear how the right of collective bargaining could be raised in an individual judicial

process pursued by an individual employee at ILOAT, or what other judicial process VEOB et al. could follow (consideration 3.8).

(iii) Although the absence of an alternative judicial process does not in itself constitute a violation of article 6 ECHR, in the situation in question it does because of the following circumstances: (a) the rights of trade unions to take collective action and conduct collective bargaining are rights belonging to the fundamental principles of an open and democratic state governed by the rule of law which have been recognised in multiple treaties, (b) the assertions of VEOB et al. purport that these rights have been violated systematically and in a far-reaching way by the Organisation because the right to strike has been restricted in an unacceptable way and VEOB et al. have been completely denied the right to participate in collective bargaining, although they are sufficiently representative, and (c) the assertions under (b) are not *prima facie* unfounded. (consideration 3.10)

5.3 The principal ground of appeal in cassation set out in 3.3 with respect to the Appeal Court's judgment as set out in 5.2 is well founded.

5.4 The claims of VEOB et al. are based on the freedom of association, including the right to form and join trade unions, as referred to in article 11, paragraph 1 ECHR. The dispute primarily concerns whether the proportionality requirement in article 6 ECHR has been satisfied in the sense that there are reasonable alternative means to effectively protect the rights of VEOB et al. ensuing from article 11, paragraph 1 ECHR given that the members of VEOB et al. (though not VEOB et al. themselves) can use the judicial processes provided for by the Organisation to seek protection of the rights that article 11, paragraph 1 ECHR aims to protect. This question must be answered in the affirmative on the basis of the following.

5.5 With respect to trade union freedom guaranteed by article 11, paragraph 1 ECHR, it is established ECtHR case law that Contracting States are required to ensure that trade unions are able to act in order to protect the interests of their members, and that the individual members, in order to protect their own interests, have the right that trade unions should be heard by employers (see e.g. ECtHR 2 July 2002, nos. 30668/96, 30671/96 and 30678/96, *Wilson*, consideration 44; ECtHR 12 November 2008, no. 34503/97, *Demir and Baykara*, consideration 143). However, according to the ECtHR, article 11, paragraph 1 ECHR does not secure any particular treatment of trade unions or their members. Limiting trade union freedom does not constitute a breach of article 11, paragraph 1 ECHR if alternative means of protecting the interests in question are available (see ECtHR 27 October 1975, no. 4464/70, *National Union of Belgian Police*, consideration 40; ECtHR 17 July 2007, nos. 74611/01, 26876/02 and 27628/02, *Dilek and Others*, consideration 72).

5.6 It cannot be concluded from ECtHR case law (see in particular ECtHR 2 October 2014, no. 32191/09, ADEFDROMIL, considerations 58-60) that trade union freedom as referred to in article 11, paragraph 1 ECHR necessarily includes a right of access to a court for trade unions. Neither the European Social Charter, nor ILO Conventions 87 and 98 establish in so many words a right of access to a court for trade unions. In so far as VEOB et al. are correct in arguing that trade unions do have that right on the grounds that the collective rights ensuing to them from article 11, paragraph 1 ECHR could not otherwise be effectively protected, this argument does not support their case for the following reasons.

5.7 In the case at hand it has been established (i) that VEOB et al. cannot themselves institute a judicial process with ILOAT or avail themselves of any other judicial process provided for by the Organisation with respect to the claims brought in this lawsuit, (ii) but that employees of the Organisation can challenge measures taken by the Organisation that affect them by means of an internal procedure at the Organisation and subsequently by means of a judicial process at ILOAT, and that in that context they can contest the lawfulness of the decisions on which the measures are based, (iii) that Organisation employee representatives can complain to ILOAT regarding general rules affecting all employees collectively which need not be implemented in individual cases, and (iv) that the Organisation has provided for a judicial process at ILOAT for Organisation employees and their representatives that meets the applicable requirements.

5.8 The following considerations apply in so far as VEOB et al. have based their claims in these proceedings on the right of collective action. The members of the VEOB et al. can challenge measures affecting them, and the decisions underlying those measures, in an internal procedure at the Organisation and subsequently by means of a judicial process at ILOAT. Given the considerations set out in 4.2, 4.3 and 5.5, these remedies, although inferior to those offered by national law, must be regarded as a sufficiently reasonable alternative means to effectively protect the right of collective action ensuing from article 11, paragraph 1 ECHR.

The fact that a legal remedy can be pursued only after a breach has occurred does not necessarily make it ineffective (see ECtHR 20 January 2011, no. 36036/04, *Makedonski*, consideration 56; ECtHR 27 October 2016, no. 55977/13, *NDP v. Germany*, consideration 23). The fact that members of VEOB et al. could only contest the provisions laid down by the Organisation and challenged by VEOB et al.

in this suit after the fact, i.e. once measures had been taken against them, is not sufficient to justify the conclusion that the remedy available to them is not an effective remedy as referred to in article 13 ECHR.

5.9 In so far as VEOB et al. have based their claims in these proceedings on the right of collective bargaining, these claims – in view of the Organisation's reasoned refutation of them based in part on the ILOAT case law cited in the documents in the action – are untenable in that VEOB et al. failed to demonstrate that the employee representatives have insufficient means of seeking protection of that right before ILOAT. In this respect, it is important that article 34, paragraph 1, first sentence of the Service Regulations states that '[t]he Staff Committee shall represent the interests of all staff'. Furthermore, it is also important that the preamble to the Service Regulations states that the Organisation commits itself vis-à-vis ILOAT to the observance of human rights ('The Administrative Council and the President of the Office note that when reviewing the law applied to EPO staff the ILO Tribunal considers not only the legal provisions in force at the European Patent Organisation but also general legal principles, including human rights.').

On all these grounds, it must be assumed in these interim injunction proceedings that it cannot be said that the judicial process at ILOAT available to the employee representatives of the Organisation is not a sufficient reasonable alternative for VEOB et al. to effectively protect the right of collective bargaining invoked by VEOB et al. under article 11, paragraph ECHR.

5.10 The conclusion is that – contrary to the ruling of the Appeal Court– in the present case it cannot be said that the means provided by the Organisation of protecting the fundamental rights guaranteed by the ECHR are 'manifestly deficient'

nor can it be said that the Organisation's reliance on the jurisdictional immunity accorded to it is disproportionate. The Appeal Court – and the interim relief judge – wrongly rejected the Organisation's plea of jurisdictional immunity.

5.11 The contested judgment cannot be upheld. The remaining grounds of appeal in cassation need not be considered.

5.12 The Supreme Court can dispose of the case itself. Since the Organisation can invoke the jurisdictional immunity granted to it under article 3 PPI with respect to VEOB et al., the Dutch courts have no jurisdiction over VEOB et al.'s claims against the Organisation.

6. Decision

The Supreme Court:

quashes The Hague Appeal Court's judgment of 17 February 2015;

quashes the judgment of the interim relief judge at The Hague District Court of 14 January 2014;

declares that the Dutch courts have no jurisdiction to hear the claims of VEOB et al. against the Organisation;

orders VEOB et al. to pay the costs of the proceedings assessed up to this judgment at:

- €1,405 on the part of the Organisation in the first instance proceedings;
- €3,386 on the part of the Organisation in the appeal;
- €952.37 in disbursements and €2,600 in fees on the part of the Organisation and €848.34 in disbursements and €2,600 in fees on the part of the State in the cassation proceedings, and €68.07 in disbursements and nihil in fees on the part of the

Organisation and €68.07 in disbursements and €800 in fees on the part of the State in the proceedings on the procedural issue.

This judgment was given by Vice-President F.B. Bakels as the presiding judge, and Justices C.A. Streefkerk, A.H.T. Heisterkamp, G. Snijders and M.V. Polak, and was pronounced in open court by Justice G. de Groot on 20 January 2017.