SUMMARY

2010/69: When is a strike so ‘purely political’ that a court can prohibit it? (NL)

<p>A collective action, such as a strike, that aims to influence government plans, but targets others (e.g. employers) is not only subject to national law, but also to European law as applied by the national courts, which much ascertain whether the collective action is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.</p>

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Facts

On 24 March 2009 the Dutch government announced its intention to raise the age from which state old-age benefits become payable (‘the retirement age’) from 65 to 67. The announcement met with widespread protest. The government decided to seek the advice of the Socio-Economic Council (the ‘SER’). This is an advisory body consisting of equal numbers of employer representatives, employee representatives and independent experts appointed by the Crown. The SER was given until 1 October 2009 to come up with an alternative solution that would address adequately the challenge of an ageing population and the increasing cost of old-age benefits. Due to irreconcilable differences of opinion between the employer

representatives and the employee representatives, the SER was unable to find an alternative to the government's plan, whereupon the SER's attempt to find such an alternative came to an end on 1 October 2009 and the government decided to proceed with its plan to raise the retirement age.

On 1 and 2 October 2009 a number of unions notified the municipal transportation companies of Amsterdam (GVB), Rotterdam (RET) and The Hague (HTM) that they would strike for the symbolic duration of 65 minutes during the morning rush hour on 7 October 2009. The purpose of the strike was to protest against the government's plan, so the unions declared. They asked the managements of GVB, RET and HTM to cooperate, but rather than accede to this request, the companies applied to the court for injunctive relief. They asked the court to order the unions to call off the strike, arguing that the strike was political and therefore not legitimate.

Dutch Law

There is no codified law in The Netherlands on collective action, such as strikes. The law is entirely judge-made. In developing their case law, the courts have relied heavily on the European Social Charter (the 'ESC').[1] In 1986 the Supreme Court found that Article 6 (4) ESC (Part I) has direct (vertical and horizontal) effect and therefore forms an integral part of Dutch law. Article 6 (4) ESC provides:

'With a view to ensuring the effective exercise of the right to bargain collectively, the Parties [...] recognise the right of workers and employers to collective action in case of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.'

I have underlined the words 'conflicts of interest' in order to highlight that the ESC does not bestow a right to strike in case of conflicts of right, i.e. disputes that can be adjudicated by the courts. For example, if an employer disagrees with a union on the interpretation of a provision in a collective agreement, either party can ask the court to rule on the matter, and there is therefore no right to take the law into one's own hand by striking. A demand for a pay raise, on the other hand, does not relate to a legal right or obligation, and a dispute in respect of such a demand is therefore not something that can be resolved by a court; it is a 'conflict of interest' that can only be settled through negotiation.

The ESC does not give workers an unlimited right to strike in cases of a conflict of interest. Article G (Part V) provides that this right "*shall not be subject to any restrictions or limitations […], except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.*[2] Furthermore, *'the restrictions permitted under the Charter to the rights and obligations set forth herein shall not be applied for any purpose other than for which they have been prescribed.*'

Finally, the Dutch courts have developed 'last resort' (*ultimum remedium*) and 'fair play' rules which provide that, even in situations where the conditions set by the ESC for legitimate collective action have been satisfied, the action can still be outlawed if it has not been preceded by sufficient attempts to resolve the dispute by other means[3] or has not been announced clearly and sufficiently in advance.

In summary, whenever a Dutch court is called upon to rule on the legality of a strike (or other collective action), it needs to establish (1) whether there is a 'conflict of interest', and, if so, (2) whether there is a restriction or limitation as provided in Article G ESC, (3) whether the strike was truly called as a last resort and (4) whether the strike was announced sufficiently in advance.

Court of first instance

The plaintiffs argued, *inter alia*, that the strike was aimed, not against themselves, but against a decision by the government that they were unable to influence. A legitimate strike is a strike aimed at inducing an employer to do something it is capable of doing. Article 6 (4) ESC allows collective action in order to restore the balance of power between employers and employees, not to put the government under pressure, so the plaintiffs argue. Had the retirement age issue still been in debate in the Socio-Economic Council (SER), it is conceivable that the strike could have led to an attempt by the managements of GVB, RET and HTM to plead with the employers' representatives in the SER to yield to the demands of the employees' representatives. However, the SER had closed the debate and the government had taken a decision, so there was no longer any means of exerting influence. The court accepted this line of argument and outlawed the strike. The Court concluded that the situation did not harm the

union's right to bargain collectively as protected by Article 6 (4) ESC, because they could still exercise that right effectively. The unions, complying with the court order, called off the strike, but they appealed the judgment in order to be able to determine their position in view of future collective actions.

Court of Appeal

Although GVB, RET and HTM raised the following issues: 2 (disproportionate damage to third parties' rights), 3 (last resort) and 4 (untimely notification), the focus of the debate was whether the strike was a 'purely political' one and therefore not, as the expression goes, 'protected by Article 6 (4) ESC'. The Court of Appeal began by referencing two Supreme Court judgments.

The first of these judgments (1986) concerned a rail strike that was aimed against a decision by the government to introduce legislation curtailing certain terms of employment that had previously been included in the collective negotiation with unions. The Supreme Court ruled that strikes that are aimed against government policy whilst targeting others than the government, fall within the scope of Article 6 (4) ESC, provided they are aimed against government policy in the field of terms of employment. Strikes aimed against other types of government policy, being 'purely political', fall outside the scope and are therefore, in principle, illegitimate.

The other Supreme Court judgment (1994) concerned a strike in the port of Rotterdam. It was aimed against legislative plans by the government (mainly reduction of sick pay). The strike was held to be legitimate, as these plans threatened to impact negatively on the unions' bargaining power with respect to new collective agreements. Such a 'setback' in bargaining power is sufficient, so the Supreme Court held, to accept that a strike falls within the scope of Article 6 (4) ESC.

Returning to the present case, the court acknowledged that raising the retirement age is an issue Parliament needs to resolve and that it was therefore not an issue that was on the bargaining table between the employers and the unions. However, raising the retirement age

will certainly influence future negotiations between companies such as GVB, RET and HTM and the unions, the existing terms of employment being predicated on a retirement age of 65. In the event the law is amended so as to raise the retirement age to 67, the unions will suffer a setback in their negotiating position. This fact constituted an argument in favour of allowing the strike. However, GVB, RET and HTM argued that 'the setback argument' cannot be used unless and until the test as to whether or not a strike is aimed against something that 'tends to be (or should be) the subject matter of negotiation with unions' has been passed. The court rejected this argument. Although, admittedly, the retirement age, being set by an Act of Parliament, is not a subject for negotiation with unions, it is so interwoven with items that do tend to be negotiated with unions (a rise in the retirement age inevitably influencing the unions' bargaining power with respect to related items) that it would go against the grain of Article 6 (4) ESC to deny the unions the right to strike, also taking into account the limited scope of the collective action at issue. The Court underlined the fact that Article 6 (4) ESC does not only protect the right to bargain collectively, but also safeguards the unhampered exercise of that right.

Commentary

All around Europe unions have been initiating collective actions against decisions made at municipal and/or national governmental level as well as in the private sector, regarding such matters as cost-cutting, restructuring, reforming labour market conditions, raising the national retirement age, etc.

Political strike?

Since the end of 2009 several collective actions have been battled over in the Dutch courts. The actions targeted *inter alia* a municipal public waste disposal service and private cleaning companies at Schiphol airport. The unions involved won all the cases. In each case the main question was whether the collective action should or should not be deemed to be 'political' collective action not protected by Article 6 (4) ESC.

Dutch courts are reluctant to deem a strike to be political. Interestingly, the boundaries of what constitutes a 'political strike' are not clear. In its 1986 decision in the railway strike case, the Dutch Supreme Court referred to the conclusion of the European Committee on Social Rights (ECSR) that qualified political strikes 'as being outside the purview of collective bargaining'.[4] The Supreme Court in that case concluded that the mere fact that the collective

action was aimed against the government, though (only) effecting and damaging other (third) parties, did not make it a political strike. In that particular case, the government interfered directly with employment benefits that had previously been established through collective bargaining. Given this element, it is understandable why in that particular case the collective action was protected by the ESC.

The conclusion can be drawn that since the 1986 Supreme Court decision, Dutch courts have taken a lenient approach to strikes. Whenever issues related to employment benefits are involved, directly or indirectly, collective actions are almost automatically considered to fall within the scope of the ESC, and therefore considered legal, provided the last resort test has been passed and the fair play rules have been observed (first negotiations, then, if they fail, proper and timely announcement of the specific collective action) and provided that none of the restrictions allowed by Article G ESC can be invoked. These rules are also valid in cases of secondary actions (work-to-rule, go-slow, slow-down etc.) or solidarity actions. There are only a few cases where a strike has failed to meet the test. One of those cases involved a highway blockade, which was considered not to be legitimised by the ESC because of its extreme nature.[5]

Third parties

As to the position of third parties, the Committee on Social Rights has ruled that, when assessing the legality of a strike, that damage caused to third parties and financial loss sustained by the employer can only be taken into consideration in exceptional cases, when justified by a 'pressing social need'.[6] The employers involved are considered to be such 'third parties' (referred to in Article G as 'others'). Claims by these third parties have therefore almost always been rejected in The Netherlands in the past, except in situations where there was a high risk of disproportionate damage.[7]

Given the above, it is not surprising that the Appellate Court decision is widely supported by Dutch legal practitioners, who believe that Article 6 (4) ESC should be interpreted broadly. If it were interpreted narrowly, the right to bargain collectively – a highly regarded right – would

be less effective than it is supposed to be. In this respect it is interesting to note that the Dutch courts interpret the ESC more broadly than the Committee on Social Rights itself does.[8]

Restrictions under Community law?

This broad view, combined with the 'setback test', make me wonder, without necessarily wanting to question the view expressed above, whether the recent developments in European case law regarding collective actions would affect the outcome if such a collective action case were to be brought before the ECJ by the companies damaged by the collective actions.

The right to take collective action is to be exercised in accordance with European Union law, as stated explicitly in the recitals to the Charter of Fundamental Rights of the European Union.[9] One of the tasks of the Community is, after all, the promotion of 'a harmonious, balanced and sustainable development of economic activities and a high level of employment and of social protection'. Commercial activities should be supported by a competitive market, thus contributing to the creation of an effectively functioning internal market.[10]

Influence of Viking and Laval?

In this respect the Viking and Laval cases are worth a closer look. The ECJ held *inter alia* that, in areas where the Community does not have jurisdiction, the Member States remain, in principle, free to lay down the conditions for the existence and exercise of the rights at issue (e.g. the right to take collective action), but they must nevertheless exercise that freedom consistently with Community law.[11]

In *Viking* the ECJ held that the right to strike is subject to restrictions under European law where the effect of a strike may disproportionally impede an employer's freedom to provide services. Earlier this year, the ECJ confirmed that, although the right to strike is recognised as a fundamental right, explicitly referring to the ESC and the Charter (and which forms an integral

part of the general principles of Community law, the observance of which the Court ensures), the exercise of that right may nonetheless be subject to certain restrictions.[12]

It follows from *Viking* that the non-applicability of Article 153(5) TFEU (previously 137(5) EC) to the right to strike (or to impose lock-outs) does not in itself exclude collective action from the application of Community law.[13]

In this context it can also be pointed out that in *Viking* the ECJ rejected the unions' claim that the immunity of a collective bargaining agreement from the EU's rules on competition, as ruled by the ECJ in Albany should be applied by analogy to the right to collective action.[14] In Albany, in brief, the ECJ ruled that agreements concluded in the context of collective negotiations pursuing social policy objectives should be regarded as falling outside the scope of Article 81(1) EC (now 101 (1) TFEU). In Viking, by contrast, the ECJ ruled that 'it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms [i.e. the freedom of establishment and the freedom to provide services] will be prejudiced to a certain degree'.[15] In other words, a collective action falls within the scope of the free movement provisions of the Treaty, which have a horizontal direct effect.

Before *Viking* it was common ground that a collective action is governed by national law and that disputes were left to Member States to resolve. This enabled national courts to apply EU law – as far as possible – consistently with national conceptions of what is or is not a proportionate collective action.

When looking at permissible restrictions that may be placed upon the right to strike, the ECJ in *Viking* seems to add one more level by introducing a new principle of proportionality bearing in mind the notion of the provisions of Community law. As regards the appropriateness of the action and whether or not it goes beyond what is necessary, *Viking* shows that the national court must take Community law into account.

In *Viking* the objective pursued by the strike was the protection of the jobs and conditions of employment of the union's members. The ECJ ruled that, even if the strike could reasonably be considered to fall within the objective of protecting workers, '*such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat.*'[16] Whether or not that is the case is for the national court to decide. If so, then the national court would have to ascertain whether the collective action initiated is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective.[17] Moreover, the ECJ stated that even if it is ultimately for the national court, the Court of Justice may provide guidance, based on the file in the main proceedings and on the written and oral observations submitted to it, in order to enable the national court to determine the particular case before it.

It has become clear that the position of the unions with regard to collective actions in transnational issues has become more complicated. The *BALPA*-case provides us with a significant example. The British Airline Pilots' Association ('BALPA') was influenced by *Viking* and *Laval*, which decisions made the union decide not to follow through with a strike, stating that it would risk bankruptcy if it was required to pay the damages claimed by British Airways who argued that the strike was illegal under *Viking* and *Laval*. BALPA has expressed its concern that the application of *Viking* and *Laval* by the UK Courts will result in injunctions against collective action if a strike's impact on the employer is judicially determined 'to outweigh the benefit to workers'. In the current context of globalisation, such cases are likely to be ever-more common.

So what about national issues? Although the Dutch situation as described does not deal with a transnational situation, as was the case in *Viking* and *Laval*, where, moreover, specific European Directives were applicable (in *Viking* the Services Directive and in *Laval* the Posting Directive), in my view the outcome of these cases could also influence the way national issues need to be judged given the newly introduced proportionality test by the ECJ in stating that the right to take collective action must be exercised consistently with Community law and that the national court will need to ascertain whether the strike is suitable for ensuring the

achievement of the objective pursued and does not go beyond what is necessary to attain that objective. Given the nature of the ECJ criterion, which seems to set a higher standard for justifying collective actions in general, I see no reason why the ruling should not apply at the European level in the same way as it does for transnational collective action. Here may therefore lie territory to be challenged when a suitable case arises. As to the Dutch situation, I am curious about whether the general 'setback-argument' will hold when it comes to a test.

Comments from other jurisdictions

Ireland (Georgina Kabemba): In Ireland an injunction would only have been granted if it were considered that the strike was not 'in contemplation or furtherance of a trade dispute', the phrase 'trade dispute' being defined as meaning 'any dispute between employers and workers which is connected with the employment or non-employment, or the terms or conditions of or affecting the employment, of any person'. There is no requirement that the dispute be 'wholly or mainly connected' with terms or conditions of or affecting employment and consequently, provided that it can be shown by the trade union that there is a real connection, the strike should be protected. It should be noted, however, that the European Social Charter is not regarded as forming an integral part of Irish law.

Footnotes

1 European Social Charter (revised, 1996), ETS (European Treaty Services) (now CETS, Council of Europe Treaties Services) No 163, available on htpp://conventions.coe.int.

2 Also known as the 'proportionality' test.

3 The Supreme Court seems to have determined the ultimum remedium test to be an independent test in its 2000 ruling in the Douwe Egberts case. The theory rests on the sequence of sections 1, 2/3 and 4 of Article 6 ESC: the unions have a duty to negotiate (section 1), the government has a duty to promote mediation and arbitration (sections 2 and 3) and finally there is the conditional right to strike (section 4). The Committee on Social Rights has criticised The Netherlands for adopting this position, which would seem to outlaw so-called warning strikes, such as the one reported above (see Conclusions XVI-1 p. 444-447 and Conclusions XVII-1 dated 6 April 2004). For this reason, some authors argue that the 'last resort' test is really no more than one of the elements to be taken into consideration when applying Article G.

4 European Committee on Social Rights, Conclusions I, p38 para (e) and VIII, p97.

5 Supreme Court 19 April 1991 (NJ 1991/690).

6 European Committee on Social Rights , Conclusions XIII-1, ps157-158, report for 1990-1991.

7 E.g. District Court Rotterdam 9 March 2007, LJN BA1088.

8 R.M. Beltzer and E.M. Hoogeveen, Comment on the ESH, dated 1 January 2008.

9 Charter of Fundamental Right of the European Union, 2010/C 83/02, OJ 30 March 2010 C 83/389.

10 Article 3 (3) TEU.

11 ECJ 11 December 2007, C-438/05 (Viking) and ECJ 18 December 2007, C-341/05 (Laval).

12 ECJ 15 July 2010, C-271/08 (European Commission - v - Germany).

13 Viking, pararaph 41.

14 ECJ 22 September 1999, C-67/96 (Albany).

15 Viking, paragraph 48-55.

16 Viking, paragraph 81.

17 Viking, paragraph 84.

Subject: Fundamental rights

Parties: FNV Bondgenoten – v – HTM Personenvervoer and ABVA KABO – v – GVB and RET

Court: Gerechtshof (Court of Appeal) of Amsterdam

Date: 4 May 2010

Hardcopy publication: JAR 2010/140

Internet publication: www.rechtspraak.nl, LJN BM3468

Creator: Gerechtshof Amsterdam (Court of Appeal Amsterdam)
Verdict at: 2010-05-04
Case number: LJN BM3468