Boontje { ADVOCATEN ARBEIDSRECHT

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When can employers successfully apply for a ban on strikes?

Compared to neighboring countries, the right to collective action (including the right to strike) is used sparingly in the Netherlands. Yet, from time to time, this phenomenon rears its head. For example, the number of lost working days due to strikes in 2017 was no less than 306.3 per 1000 employees, the highest number since 1989. The recent increase in the number of strikes has resulted in interesting case law on the subject. Recent case law shows that even though the right to collective action is considered to be a fundamental right, employers in the Netherlands are regularly successful in requesting an injunction or a legal restriction to this right.

Under which circumstances is the right to collective action protected by law?

The right to collective action in the Netherlands is not based on national legislation. The subject is mainly governed by case law. Based on established case law, employees and trade unions can base the right to collective action directly on Article 6(4) of the European Social Charter (ESC). If the right to collective action falls within the scope of this provision, an employer will in principle have to respect this right, even if the actions lead to (economic) damage. According to the Supreme Court of the Netherlands, a collective action falls within the scope of Article 6(4) of the ESC if it 'could reasonably contribute to the effective exercise of the right to collective bargaining'. In other words, in the case of a conflict of interests that can be settled by collective bargaining, workers and trade unions have the right to strengthen their negotiating position by undertaking collective action. A typical example of such a situation is collective bargaining on working conditions or social plans. By contrast, legal disputes which can be submitted to the courts (such as disputes about the interpretation of or compliance with a statutory provision or a collective bargaining agreement) do not fall within the scope of Article 6(4) of the ESC, which means that collective actions in case of legal disputes are in principle unlawful.

Moreover, as long as collective action could contribute positively to the exercise of the right to collective bargaining, employees and trade unions are free to choose the form of action. Examples include traditional strikes, but also short-term 'puncture actions' (short work stoppages in vital parts of the company, disrupting the production process), 'punctuality actions' (protocols are overly carefully observed, causing delays) and gate blockades (blocking access to the company premises).

Under which circumstances may the right to collective action be restricted

In case a collective action falls within the scope of Article 6(4) of the ESC, a restriction on this right is only possible if the conditions of Article G of the ESC are met. Article G stipulates that restrictions can only be imposed if they 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’. According to established case law of the Supreme Court of the Netherlands, a restriction in compliance with Article G of the ESC may only be imposed if there is ‘a pressing social need’ for such a restriction.

Whether this is the case is a question of proportionality, taking into account all the circumstances of the case. The interests of the employees and trade unions must be weighed against the interests of the employer or third parties, which are infringed by the collective action. In this balancing exercise, the nature and duration of the action may be relevant, but also the relationship between the (effects of the) action and the objective pursued, the damage caused by it to the interests of the employer or third parties, and the nature of those interests and the damage. It may also be of importance whether or not the employees or trade unions have complies with the so-called 'rules of play': collective action must be announced timely and may not be undertaken too soon is the process of negotiations (it is an 'ultimate remedy'). If these rules of play are not observed, the collective action is not automatically unlawful, but this fact is a 'point of view' when considering whether there is a pressing social need to impose a restriction.

Restrictions to the right to collective action in practice

In a number of recent rulings, the Dutch courts have imposed a restriction on the right to collective action. A number of examples are discussed below:

- *Amsterdam Court of Appeals 6 February 2018 (VNV vs. Easyjet):*

  This case originated from a conflict over the formation of a collective bargaining agreement between the airline company Easyjet and VNV, a pilots' trade union. Negotiations on this collective agreement stalled in the summer of 2016. Subsequently, several strikes took place during the summer, as a result of which a number of flights had to be cancelled. As a result, Easyjet applied for a ban on further work stoppages and strikes during the remaining weekends in August and the first weekend in September. Both the Court of First Instance and the Court of Appeal sustained this request. The basis of this ruling was not the (economic) damage Easyjet would suffer as a result of the strikes, but the inconvenience these strikes would cause to passengers. Easyjet had demonstrated that passengers at other airports would also be affected as a result of the cancellation of a flight from or to Amsterdam Schiphol. Partly due to the pressure caused by the holiday season, the interests of passengers outweighed the interests of employees in exercising their right to strike.

- *Court of The Hague 13 December 2018 (PostNL vs. FNV):*

  This case originated from a conflict between PostNL (a postal delivery company) and the trade union FNV. Because the negotiations regarding the renewal of a collective bargaining agreement between the parties had stalled, the FNV announced work stoppages and strikes in December 2018. PostNL then successfully initiated summary proceedings, in which it applied for a ban on work stoppages of more than 15 minutes a day in the period around Christmas and New Year's Eve. The court sustained the request for an injunction, because PostNL had demonstrated that the period in question was by far the busiest of the year (50% more letters and parcels than in the rest of the year) and that even short work stoppages would result in considerable backlogs. This would affect not only consumers, but also business relations and PostNL itself would suffer considerable damage. Furthermore, it had become plausible that the letter mail and parcels to be delivered would also include medical devices and medical correspondence, of which the delivery could not be postponed. Finally, the court took into account that the strike had not been used as an ultimate remedy and that there was still sufficient cause to continue the negotiations.

- *Court of Limburg 9 January 2019 (VDL Nedcar vs. FNV):*

This case, too, was the result of a dispute over the formation of a new collective bargaining agreement. In connection to this dispute, the trade union FNV announced a number of strikes at VDL Nedcar in the period from 20 June 2018 up to and including 11 January 2019, of which a number have in fact taken place. VDL Nedcar is a so-called 'Vehicle Contract Manufacturer' that manufactures passenger cars in the service of BMW, the sole client of the VDL Nedcar. Around the period in which the strikes took place, VDL Nedcar was also negotiating with BMW about a continuation of their collaboration after the end of the current production cycles (in 2022 and 2023). BMW informed VDL Nedcar regarding its concerns about the reduction in delivery reliability as a result of the strikes and that it would draw consequences for the allocation of future production to VDL Nedcar. For that reason, VDL Nedcar applied for an injunction banning further strikes. The court sustained the request. This ruling was based on the fact that BMW's possible withdrawal as VDL Nedcar could have far-reaching social consequences. VDL Nedcar employs approximately 6,000 people, which makes the company of great importance for employment in the region. In the given circumstances a restriction of the right to strike was therefore considered to be a pressing social need.

Although the established case law of the Supreme Court of the Netherlands shows that a restriction on the right to collective action should only be possible under exceptional circumstances, the above examples illustrate that employers in the Netherlands may have a reasonable chance of success if they request that the court will impose a restriction to the right to collective action. This is especially true if the collective action does not only affect the company, but has a broader (social) impact, such as possible consequences for employment, public health and public order and safety.

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