Judgement

DISTRICT COURT OF THE HAGUE

Commercial Team - Judge for Interim Relief

Case / cause-list number: C/09/453749 / KG ZA 13-1239

Judgement in interim injunction proceedings of 14 January 2014

In the case of

1. The trade union of the European Patent Office (VEOB, The Hague Office), having its registered office in Rijswijk,
2. Staff Union of the European Patent Office (SUEPO),
having its registered office in The Hague,
Plaintiffs,
Advocate *mr.* L. Zegveld in Amsterdam,

versus:

European Patent Organisation (also European Patent Office),
having its registered office in Munich (Germany), as well as in Rijswijk,
Defendant,
Advocate *mr.* G.R. den Dekker in The Hague.

The parties herein will be referred to below as 'the VEOB', 'SUEPO' and 'the Patent Organisation'.

1. The facts

On the basis of the documents and the proceedings during the hearing of 18 December 2013 the starting points of this action are as follows.

1.1 The Patent Organisation is an international organisation governed by public law with 38 participating member States ('Contracting States'). The Patent Organisation was established under the Convention on Grant of European Patents (European Patent Convention, further herein: EPC) and has its headquarters in Munich. In addition, the Patent Organisation has an office in Rijswijk and in various other European countries.

1.2 The Netherlands ratified the EPC on 28 February 1977. On 7 October 1977 the EPC came into force for the Netherlands. The EPC states amongst other things:

"Article 4. European Patent Organisation

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.
(...)

Article 8. 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.
(...)

Article 13. Disputes between the Organisation and the employees of the European Patent Office

1. Employees or 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 for permanent employees, the Pension Scheme Regulations or the conditions of employment of other employees."

1.3 In the Protocol on the Privileges and Immunities of the European Patent Organisation belonging to the EPC (Protocol on Privileges and Immunities: further herein: PPI) states for instance:

"Article 3

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 (....).*

(...)
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."*

1.4 The VEOB is the trade union of the European Patent Office, The Hague office. The VEOB is an association according to Dutch law and has its registered office in Rijswijk. Membership of the VEOB is open to those who are or were employed by the European Patent Office at the office in The Hague.

1.5 SUEPO is the umbrella trade union of the Patent Organisation and consists of the four offices in The Hague (the VEOB), Munich, Berlin and Vienna.

1.6 The VEOB and SUEPO on behalf of their members have announced strikes as from March 2013 onwards. Actual strikes took place in March, May, June and July 2013.

1.7 The employment conditions of the personnel of the Patent Organisation are laid down in the 'Service Regulations for Permanent Employees' (further herein: the Service Regulations). The Service Regulations provide for a special procedure to settle disputes between (former) employees of the Patent Organisation and the Patent Organisation. A (former) employee can first lodge a notice of objection to a decision by the Chairman (or the Administrative Council), and subsequently - if necessary - appeal internally and after that appeal to the International Labour Organisation Administrative Tribunal (further herein: ILOAT).

1.8 As from 1 July 2013 the Patent Organisation has adjusted the Service Regulations. A new article 30a and a new article 65 paragraph 1 under c have been added, stating for instance:

*"**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."

1.9 The new rules have been detailed in a Circular on Strikes issued by the President of the Patent Organisation (Circular 347).

2. The dispute

2.1 The VEOB and SUEPO claim concisely summarised:

I. that the Patent Organisation be ordered to terminate the violations of the right to strike and the right to collective bargaining;

II. that the Patent Organisation be ordered to withdraw Articles 30a and 65 paragraph 1 under c of the Service Regulations and further elaborations of this, at any rate to suspend the operation of these;

III. that the Patent Organisation be ordered to acknowledge the VEOB and SUEPO as social partners with the right to collective bargaining and to allow them to have access to the collective bargaining consultations with regard to the personnel of the Patent Organisation;

VI. that the Patent Organisation be prohibited from conducting or from continuing the consultations about the new collective arrangements concerning the personnel of the Patent Organisation without admitting the VEOB and SUEPO.

2.2 To this end the VEOB and SUEPO have put forward the following. The Patent Organisation is bound to the treaties and the customary law in which the rights are laid down which are up for discussion in this action. The right to strike is embedded in Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 6 of the European Social Charter (ESC). The right to collective bargaining has been laid down in Article 6 ESC and is also implied in Article 11 of the European Convention on Human Rights (ECHR).
Until 1 July 2013 there were no provisions for strikes in the Patent Organisation. In response to the strikes which the VEOB and the SUEPO have called for since the beginning of this year, the Service Regulations were adjusted in order to regulate strikes to a high degree. Article 30a paragraph 2 of the Service Regulations applies a much too restricted definition of a strike. Strikes of an indefinite period of time, go-slow actions and work-to-rule campaigns are not recognised as strikes. In addition the requirement that strike actions must be related to (individual) employment conditions is too restricted. Article 30a paragraph 2 of the Service Regulations is for that reason a wrongful restriction of the right to strike. This also applies to paragraph 4 of that Article, providing that the vote - also with regard to strikes called for by the trade unions - must take place by *all* the employees. In addition, in practice it is practically impossible to bring about a vote if spontaneous, wild strikes are called for, whereas those strikes are indeed allowed by the ILO. The provision has no exceptions. Article 30a paragraph 10 of the Service Regulations gives the President of the Patent Organisation a *carte blanche* to determine further implementation measures and requirements with regard to a strike action so that there is no certainty whatsoever for striking employees. In addition, this paragraph of the Article is wrongful since it gives the President the authority, in conjunction with Article 30a paragraph 5 of the Service Regulations, to determine the maximum duration of a strike. It is contrary to the right to strike if strikers have to indicate in advance how long the strike will last and even more so if the President determines on the basis of that time indication what the maximum duration of the strike should be. The duration of a strike action depends on the extent to which the employer meets his employees or begins to negotiate with them about their grievances, so that the rationale of the right to strike is not suitable for this to be restricted by time in advance. Moreover, it appears in practice that the President meticulously controls the voting process. This is an unlawful interference in trade union matters.

Therefore since 1 July 2013 employees have also been experiencing more disadvantageous financial consequences from strikes. The new Article 65 paragraph 1 under c of the Service Regulations provides that upon strikes there will be a salary deduction of 1/20th of the monthly salary. Thereby in that connection a day of strike is equalised with one day of unauthorised absence. Salary deduction in the event of allowed forms of absence is calculated on the basis of 1/30th of the monthly salary. Moreover, the calculation of the amount of salary deduction takes place on the basis of half-days and not on the basis of the actual number of hours on strike.
In practice the changes mean a far-reaching restriction of the right to strike. This is not only evident from the text of the Articles and their explanations but also from the application and implementation of this by the management of the Patent Organisation. On the basis of the new rules the Patent Organisation declared as unlawful the work strikes after 1 July 2013 which were announced in March 2013 by the VEOB and SUEPO and which were confirmed in June by the majority of votes by trade union members. In the event of future strikes the Patent Organisation will begin disciplinary proceedings.
The Patent Organisation also obstructs the right to strike in other ways. As from 3 June 2013 onwards the Patent Organisation drastically restricted the facilities which are required for effective communication between the VEOB and SUEPO and its members. For instance the Patent Organisation refused to distribute paper bulletins of the trade unions, installed a filter so that all incoming e-mails from addresses ending on "@suepo.org" are blocked and introduced an automatic block for e-mails sent to more than fifty e-mail addresses. Since trade unions have the right to communication and have the right to use the e-mail facilities of the organisation, these measures are unlawful. The reasoning on which the measures are based is also in contravention of the case law of ILOAT.
The Patent Organisation not only discourages strikes but also wants to put the trade unions out of action. The trade unions are merely tolerated and have no legal status in the organisation. Therefore they have no formal access to negotiations about issues directly involving their members. The VEOB and SUEPO were not consulted with regard to the changes in the working conditions and other work-related measures, let alone that negotiations about the new rules were conducted with them. So the Patent Organisation does not acknowledge the right to collective bargaining either. Work strikes are the only means remaining to affect the policy of the Patent Organisation.
The measures taken by the Patent Organisation form a serious restriction of the right to strike and the right to collective bargaining. The necessity of a provision is urgent because the VEOB and SUEPO announced follow-up strikes for December 2013. The current strike rules make this in actual fact impossible. The VEOB and SUEPO have been deprived of reasonable means of being able to organise the strike. Going on strike involves unacceptable risks for strikers, both financially as well as for their further career.

2.3 The Patent Organisation has conducted a reasoned defence, which will be discussed below, insofar as this is necessary.

3. The assessment of the dispute

3.1 It is first stated that the Patent Organisation as an independent organisation taking part in judicial matters, is bound to the primary sources of law such as the customary international law, the fundamental rights acknowledged in international conventions and other universally recognised legal principles. In itself the Patent Organisation did not dispute this.

The Patent Organisation put forward as its primary defence that it has immunity of jurisdiction so that the Dutch court has no jurisdiction to hear the claims. According to the VEOB and SUEPO a plea of immunity means an unlawful restriction of the right to judicial access, as embedded in Article 6 ECHR.

3.2 The starting point is that the Patent Organisation, established under Article 4 EPC, has privileges and immunities, under the conditions described in the PPI to that end, which are necessary for performing its duties (Article 8 EPC). As appears from Article 3 PPI the Patent Organisation has immunity of jurisdiction in connection with its official activities. It is not in dispute between the parties that the activities of the Patent Organisation associated with the dispute currently at hand, are official activities of the Patent Organisation within the sense of Article 3 PPI.
However, contrary to what has been argued by the Patent Organisation, the immunity arising from Article 3 PPI does not mean automatically that the Judge for Interim Relief must declare that it has no jurisdiction to hear the case. It is true that the right to access to an independent and impartial court guaranteed in Article 6 ECHR is not absolute and that this right can be subject to restrictions, but those restrictions must be in proportion to the aim pursued and they should not go so far that this would prejudice the essence of the right to judicial access. The latter is for instance the case if the interested party has no reasonable alternative for effectively invoking his rights under the ECHR (ECtHR 18 February 1999, case number 26083/94 (*Waite and Kennedy*) and ECtHR 18 February 1999, case number 28934/95 (*Beer and Regan*)).

3.3 The Patent Organisation argued that it ensues from ground for decision 72 of the *Waite and Kennedy* ruling and ground for decision 62 of the *Beer and Regan* ruling that the right to immunity does not depend on the answer to the question whether or not there is access to a court. This argument is not successful. After all, it only follows from those considerations that the proportionality review referred to under 3.2 cannot be applied in such a way that the subjection of an international organisation to national employment law can be enforced. This situation does not occur here since the VEOB and SUEPO invoke fundamental rights acknowledged in international conventions. The VEOB and SUEPO are not invoking national employment law.

3.4 Insofar as the Patent Organisation argues that the ruling of the ECtHR of 11 June 2013, case number 65542/12 (*Mothers of Srebrenica*) entails a change with regard to the previous ruling of the ECtHR, that argument is not followed either. It is true that it can be deduced from that ruling that the absence of an alternative procedure does not entail automatically and in all cases that an immunity plea is incompatible with Article 6 ECHR, but the conclusion cannot be derived from this that respecting the immunity of an international organisation in any event does not mean a disproportional restriction of the right to judicial access. It is true that in the *Mothers of Srebrenica* ruling the conclusion was drawn that the immunity of the United Nations is absolute, but this only gives an opinion on the scope of the immunity of this specific organisation in connection with the performance of its powers with regard to international peace and safety. Therefore this opinion is not applicable to a dispute with another international organisation, such as - in this case - the Patent Organisation.

3.5 The foregoing leads to an assessment of whether the granting of immunity is in proportion with the aim pursued. The rationale for granting immunity to international organisations is to enable those organisations to operate independently and effectively. The immunity of jurisdiction in principle vested in the Patent Organisation, as an inter-governmental organisation, is of great importance to it in order to be able to carry out its (official) activities unhindered and independently of its guest country. All this leads to the conclusion that the immunity of the Patent Organisation serves a legitimate purpose.

3.6 Moreover, in connection with the assessment of the proportionality it is important whether alternative legal remedies are available to the VEOB and SUEPO which effectively protect their right to judicial access. In the opinion of the Judge for Interim Relief this is not the case. Although there is access to the procedure at ILOAT against decisions by (organs of) the Patent Organisation, this procedure is only open to individual (former) employees of the Patent Organisation (see Article 13 EPC and the dispute settlement scheme in the Service Regulations). That the VEOB and SUEPO represent the interests of those individual employees and that a review of the general policy is possible via an individual case, does not detract from the fact that there is no direct judicial access for the VEOB and SUEPO itself. Moreover, general measures such as introducing new rules about strikes cannot be contested in advance, that is to say not before individual employees have actually been affected by this. Considering this, the further characteristics of the procedure at ILOAT, such as the time of the procedure and whether or not it is possible to give provisional relief, do not require any further discussion. All this leads to the plea of immunity of jurisdiction of the Patent Organisation being rejected.

3.7 Moreover, the Patent Organisation takes the position that the claims by VEOB and SUEPO must be declared inadmissible. This is ignored insofar as the Patent Organisation bases this on the fact that they cannot take legal action independently. After all, differences between the entry in the Trade Register and the Articles of the VEOB cannot substantiate this opinion and these differences are of no concern to the Patent Organisation (in this respect). The Patent Organisation did not dispute that the VEOB is a legal entity as is also evident from the Trade Register. The right to take legal action independently arises automatically from this. In addition, since it arises from the documents produced that the Patent Organisation acknowledges the existence of SUEPO and since the Patent Organisation has not put forward any concrete indications demonstrating that SUEPO is not a legal entity, it should be assumed in these interim injunction proceedings that SUEPO can also take legal action independently.

3.8 The allegation of the Patent Organisation that the claims of VEOB and SUEPO cannot be declared admissible because these claims constitute in effect a collective claim within the sense of Section 3:305a of the Civil Code, is also ignored. The Patent Organisation argues rightly in itself that a foundation or association with full legal capacity can only bring a legal action serving to protect similar interests of other persons and that the VEOB and SUEPO are not such an association or foundation. However, the VEOB and SUEPO have alleged explicitly that they have their own interest in the relief sought. Although the objective of the VEOB and SUEPO is to represent the interests of their members, and to that extent any interest they have covers the interest of their members, the personal interest of the VEOB and SUEPO consists of them getting the opportunity to carry out their duties without any restrictions. Through their claims the VEOB and SUEPO intend in essence

to be enabled to organise strikes effectively and to be admitted as negotiating parties in connection with the formation of new regulations. This interest must be abstracted from the question of whether they are also entitled to this.

3.9 The Patent Organisation also disputed the urgent interest of the VEOB and SUEPO in the relief sought. However, the Judge for Interim Relief is of the opinion that they have made their urgent interest in the claims relating to (rules with regard to) the right to strike sufficiently plausible. Although the strike for December 2013 previously announced has been called off and there are no concrete plans to organise a new strike in the short term, the intention and - according to the opinion of the VEOB and SUEPO - the necessity for this are still present. The urgent interest of the VEOB and SUEPO is based on the allegation that under the current rules and circumstances they are not able to organise (independently) their intention to organise a strike with the details they desired. The Judge for Interim Relief does agree with the Patent Organisation that the VEOB and SUEPO have insufficiently substantiated their urgent interest in the claims serving to be acknowledged and admitted as negotiating partners. No submission was made or evidence produced that the Patent Organisation intends to adjust or supplement its internal regulations in the short term.

3.10 It arises from the foregoing that the claims relating to (rules about) the right to strike must be assessed on their merits. The VEOB and SUEPO have alleged that it should be assessed whether the Patent Organisation is observing the fundamental human rights on Dutch territory and that by bringing the claims the intention is to bring about changes in the office of the Patent Organisation in the Netherlands (Rijswijk).

3.11 Article 8 EPC guarantees the operation of the Patent Organisation as a whole so that uniform regulations can be applied organisation-wide. The VEOB and SUEPO intend by their claims to break through this provision. After all, to allow (a part of) the claims would result in a fragmentation of the Patent Organisation, within the sense that different regulations must be applied in the Netherlands than in other participating member States. This would impair the essence of the immunity, namely that the internal regulations of international organisations are not dependent on the national legislation and national judicial opinions. That - as held above - a procedure for the VEOB and SUEPO is absent within the legal system of the Patent Organisation to act against decisions by (organs of) the Patent Organisation, does not justify an opinion of the Dutch Judge for Interim Relief with regard to the lawfulness of the regulations. After all, no submission was made nor any evidence produced that it is not possible for the VEOB and SUEPO to turn to the central organisation with these claims.

3.12 The foregoing leads to rejection of the claims. As the parties found at fault the VEOB and SUEPO will be ordered to pay the costs of the action.

4. The decision

The Judge for Interim Relief:

- rejects the relief sought;

- orders the VEOB and SUEPO to pay the costs of the action, until now estimated on the part of the Patent Organisation at €1,405, of which €816 as the fee for the advocate and €589 as the court fee.

- declares the order to pay the costs of the action provisionally enforceable.

This judgement has been rendered by *mr.* G.H.I.J. Hage and pronounced in public on 14 January 2014.

hvd

[signature] [signature]