Judgment

APPEAL COURT OF THE HAGUE

Civil law section

Case number : 200.141.812/01

Roll number of District Court : C/09/453749/KG ZA 13-1239

Judgment of 17 February 2015

in the case of

1. **Vakbondsunie van het Europees Octrooibureau ('VEOB, The Hague Department)**
with its seat in Rijswijk,
further herein referred to as 'VEOB'

2. **SUEPO (Staff Union of the European Patent Office),**
with its seat in The Hague,
further herein referred to as: 'SUEPO'

Appellants,
herein jointly also referred to as: VEOB et al.,
Advocate: *mr.* I.M.C.A. Reinders Folmer in Amsterdam,

versus

European Patent Organisation,
established in Munich as well as in Rijswijk,
further herein referred to as: EPO,
Respondent,
Advocate: *mr.* G.R. den Dekker in The Hague.

The proceedings

In the Appeal Summons of 7 February 2014 (with Exhibits) VEOB et al. appealed the judgment of the Judge for Interim Relief of 14 January 2014, rendered in interim injunction proceedings between the parties. VEOB et al. put forward four grounds for appeal in the Appeal Summons against the contested judgment. EPO disputed the grounds for appeal in a Defence in Appeal (with Exhibits) and lodged a Cross Appeal putting forward four grounds for cross-appeal. VEOB et al. responded to this in a Defence in Cross Appeal (with Exhibits). On 17 November 2014 the parties had their case argued before the Appeal Court, VEOB et al. by *mr.* L Zegveld and *mr.* C. Oberman, advocates in Amsterdam, and EPO by its advocate referred to above, in both cases on the basis of summaries of their arguments submitted to the Appeal Court. On that occasion both parties produced further Exhibits. VEOB et al. subsequently lodged another Document in which they expanded their claim. EPO lodged objections to this change of claim. Finally, the parties produced their court files and requested judgment to be rendered.

Assessment of the appeal

1.1 Ground for appeal 1 against the Appeal on the Main Issue has the scope of bringing (again) certain facts to attention. Insofar as is necessary the Appeal Court will take these assertions into account here below. For the rest this ground for appeal fails. The Judge for Interim Relief was not obliged to represent the facts exhaustively.

1.2 Since no grounds for appeal were lodged against the facts which the Judge for Interim Relief represented in his judgment under 1.1 up to and including 1.9, the Appeal Court will also take these facts as a starting point. This case concerns the following.

1.3 EPO is an international public juridical person with branch offices in various European countries. The main office of EPO is based in Munich and it has a branch office in Rijswijk. The EPO was established pursuant to the Convention on the Grant of European Patents (European Patent Convention further herein the 'EPC') which became effective for the Netherlands on 7 October 1977.

1.4 VEOB is an association according to Dutch law, since 22 September 2014 with full legal capacity. The VEOB is a trade union for employees employed by the branch office of EPO in Rijswijk. In 2013 VEOB had 1,155 members, approximately 44% of the employees of EPO based in Rijswijk.

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

1.6 Art. 3 paragraph 1 of the Protocol on Privileges and Immunities of the European Patent Organisation (further herein: the Protocol), which is part of the EPC, provides for the following:

> 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 Art. 23.
>
> (...)
>
> (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.

1.7 The employment conditions of EPO's staff are laid down in the Service Regulations for Permanent Employees (further herein: the Service Regulations).

1.8 A member of staff of EPO who does not agree with a decision made against him can contest this pursuant to the Service Regulations via an internal appeal procedure. This internal appeal procedure entails that an objection to a decision can be submitted to the President of EPO. If the President does not honour the objection, the

case will be submitted to the *Internal Appeals Committee* (further herein: the IAC), which committee will advise the President. The President will then decide on the of this advice whether or not the objection would still be honoured. It is possible to appeal from the President's decision to the *International Labour Organisation Administrative Tribunal* in Geneva (further herein: ILOAT), pursuant to Art. 13 of the EPC which reads as follows:

> **Art. 13. Disputes between the Organisation and the employees 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.

1.9 As from 1 July 2013 onwards the Service Regulations have been supplemented by provisions about work strikes by including a new Art. 30a and a new Art. 65 paragraph 1(c) which read, insofar as relevant:

> **Art. 30 a(...)**
>
> **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.

(...)

Art. 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.

These rules are further detailed in a Circular on Strikes issued by the President of the EPO (Circular 347).

1.10 From March 2013 VEOB et al. announced work strikes. Strikes were held at EPO in March, May, June and July 2013.

1.11 VEOB et al. are of the opinion that the rules on strikes introduced as of 1 July 2013 and the way in which they are being put in practice by EPO are in contravention of the (fundamental) right to strike as laid down in the European Social Charter (ESC), the ECHR, the International Convention on Economic, Social and Cultural Rights (ICESC), ILO Conventions 87 and 98 as well as the EU Charter. The right to strike is allegedly overly restricted by EPO. In addition VEOB et al. take the position that EPO drastically curtailed the facilities necessary for effective communication between VEOB et al. and their members as from 3 June 2013 onwards, and thereby hinders campaigning and trade union work. Lastly, VEOB et al. complain that EPO does not recognise them as social partners and does not want to negotiate collectively with them about the employment conditions of their members.

1.12 The claim by VEOB et al. in the Appeal Summons differs slightly from the claim formulated in the initial summons, has the following scope:

(i) EPO is ordered to discontinue its violations of the right to strike and the right to collective bargaining, at any rate with regard to the employees employed in the branch office in Rijswijk;

(ii) EPO is ordered to suspend the operation of Art. 30a and 65 paragraph 1 under c of the Service Regulations and the press release based on it of 28 March 2013 and Circular 347 of 1 July 2013, at any rate with regard to the operation relating to the employees employed in the branch office in Rijswijk;

(iii) EPO is ordered within 10 days, at any rate within a period to be determined by the Appeal Court after service of the judgment, to acknowledge VEOB et al. as social partners with the right to collective bargaining (including strike), and at any rate that EPO is ordered within 10 days after service of the judgment to

admit VEOB et al. to collective bargaining, at any rate with regard to the personnel employed at the branch office in Rijswijk;

(iv) EPO is prohibited from conducting or continuing the consultations regarding the new collective arrangements without admitting VEOB et al. 10 days after the service of this judgment, at any rate with regard to the personnel employed at the branch office in Rijswijk.

1.14 EPO contested the claims in the first place by invoking the fact that it is granted jurisdictional immunity in the Protocol. The Judge for Interim Relief rejected the plea of jurisdictional immunity but rejected the claim. To this end he considered, in brief, the following. It is not in dispute that the activities of EPO in relation to the dispute currently at hand, are official activities of the EPO within the sense of Art. 3 of the Protocol. However, an exception can be made to the immunity thus granted to EPO, for instance if an interested person has no reasonable alternative at his disposal for effectively invoking his rights under the ECHR. The situation in which EPO is forced to be subject to national employment law does not occur in this case. VEOB et al. invoke fundamental rights acknowledged in international conventions. The opinion of the ECtHR in the case of *Mothers of Srebrenica/Netherlands* concerned the United Nations (UN). The opinion pronounced in that case that the UN has absolute immunity is not applicable to EPO. The jurisdictional immunity granted to EPO serves a legitimate purpose. VEOB et al. have no access to the judicial process at the ILOAT. The restriction of access to a court resulting from the immunity granted is disproportionate. This means that EPO's immunity plea is rejected. VEOB et al. can also act independently in this lawsuit and their claims are admissible. VEOB et al. have made sufficiently plausible their pressing interest in the claims relating to the right to strike. However VEOB et al. did not sufficiently substantiate the pressing interest in the claims to be acknowledged and admitted as a negotiating partner. This means that the claims relating to the right to strike must be assessed on its merits. Art. 8 EPC guarantees the operation of EPO as a whole. VEOB et al. are trying to break through this provision with their claims. After all, if the claim were allowed this would result in a fragmentation of EPO, in the sense that different regulations would have to be applied in the Netherlands than in other participating Member States. This affects the essence of the immunity. No submission was made or evidence produced that VEOB et al. cannot take their claims to the central organisation. This leads to their claims being rejected.

2.1 VEOB et al. lodged a Document entailing a supplement to the claim in which what has been claimed under (i) is extended in the sense that it is claimed that EPO will also be ordered to discontinue its violations of the right of assembly and association and its violations of social care. EPO objected to this amendment of the claim.

2.2 In principle, on the basis of the 'rule on lodging two claims', an expansion of the claim should not be lodged after to the Statement of Claim in appeal. However, in this case one of the accepted exceptions to this rule is applicable since the direct reason for the amendment to the claim is undisputedly based on the developments which took place after the Appeal Summons (containing the grounds for appeal) was served (the impediments VEOB et al. assert having experienced in exercising their right of assembly). Added to this is that the expansion of the claim is completely in line with the original claim and is closely related to it. Considering the minor scope of the amendment to the claim, EPO has also had sufficient opportunities during the oral pleading to respond to this substantively. This also means that there is no question of

violation of the principles of due process. Therefore the objection to the amendment of the claim is rejected.

3.1 The Appeal Court will first deal with the grounds for appeal in the Cross Appeal because they have the widest scope.

3.2 Ground for Appeal 1 in the Cross Appeal contests the opinion of the Judge for Interim Relief that EPO has no absolute jurisdictional immunity because the ruling of the ECtHR of 11 June 2013 in the case of *Mothers of Srebrenica/Netherlands* does not imply a change of previous case law of the ECtHR, and because the position of the UN is not comparable to that of EPO. According to EPO this opinion is inaccurate because the ruling of 11 June 2013 is completely general and the rulings of the ECtHR in the cases of *Waite & Kennedy/Germany* and *Beer & Regan/Germany* do not mean that the availability of an alternative judicial process is a condition for respecting jurisdictional immunity.

3.3 This grievance fails. In its rulings of 18 February 1999 in the case of *Waite & Kennedy/Germany* (no. 26083/94) and *Beer & Regan/Germany* (no. 28934/95) the ECtHR considered:

> "68. For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention."

It does not appear that the ECtHR reconsidered these rulings subsequently. That this is so is clear from the ruling of the ECtHR of 11 June 2013 in the case of *Mothers of Srebrenica/Netherlands* (no. 65542/12), where the ECtHR made a particular distinction between the case in hand ("*a dispute between the applicants and the United Nations based on the use by the Security Council of its powers under Chapter VII of the United Nations Charter*") and the cases *Waite & Kennedy* and *Beer & Regan* (see that ruling under no. 152), and in which it gave particular importance to "*the mission of the United Nations to secure international peace and security*". This implied that *"the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations*" (see this ruling under no. 154). This ruling by the ECtHR cannot therefore be considered as a deviation from the rule laid down in *Waite & Kennedy* and *Beer & Regan* either. EPO, whose duty is to grant European patents, cannot be considered in any way whatsoever as an organisation comparable to the UN, acting by means of the Security Council on account of its powers under Chapter VII of the Charter of the United Nations. Finally, it appears from the ruling by the ECtHR of 6 January 2015 in the case of *Klausecker/Germany* (No. 415/07) that the line set out in *Waite & Kennedy* and *Beer & Regan* has not at all been superseded.

3.4 This does not alter the fact that the ECtHR also considered in *Mothers of Srebrenica/Netherlands*:

> "164 It does not follow, however, that in the absence of an alternative remedy the recognition of immunity is ipso facto constitutive of a violation of the right of access to a court. In respect of the sovereign immunity of foreign States, the ICJ has explicitly denied the existence of such a rule (Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), § 101). As regards international organisations, this Court's judgments in Waite and Kennedy and Beer and Regan cannot be interpreted in such absolute terms either."

This means that, as EPO rightly argued, the mere fact that an alternative remedy is absent does not mean that a violation of Art. 6 ECHR must be presumed and that jurisdictional immunity must be ignored. However, the latter had not been assumed by the Judge for Interim Relief either.

3.5 In grounds for appeal 2 and 4 in the Cross Appeal, which are suitable for being dealt with jointly, EPO contests the opinion of the Judge for Interim Relief (i) that the immunity of EPO is disproportionate because VEOB et al. don't have direct access to ILOAT and general measures, such as new rules about strikes cannot be challenged initially there, and (ii) that he should consider the claims of VEOB et al. on their merits. EPO puts forward against this that the Judge for Interim Relief ignored that only if the legal protection offered fails *unequivocally*, can it be held that the jurisdictional immunity is disproportionate. There is no question of the latter because the EPO cannot be blamed that ILOAT does not offer a judicial process for VEOB et al. and ILOAT is not a body of EPO. In addition, ILOAT had decided in a recent ruling that being able to challenge initially general rules would prejudice the legal protection in the individual case. Therefore the District Court put too high requirements on the legal protection at EPO, according to EPO. Moreover, EPO is of the opinion that immunity also protects the autonomy of an international organisation to be able to operate without hindrance by the courts of a Members State.

3.6 In dealing with this ground for appeal the Appeal Court puts the following first and foremost. VEOB et al. rely for their assertion that the Dutch Court in this case should ignore the jurisdictional immunity granted to EPO, in the first place on Art. 6 ECHR. The right of access to a court implied in Art. 6 ECHR, according to standard case law of the ECtHR, is not absolute. This right can be restricted provided the core of the right is not impaired and provided the restriction serves a legitimate purpose and is proportionate with regard to the purpose aimed at with the restriction. The ECtHR decided in the cases *Beer and Regan/Germany* (28934/95) and *Waite and Kennedy/Germany* (26083/94) referred to above of 18 February 1999 that granting immunity to an international organisation such as EPO serves a legitimate purpose. In assessing the question of whether the proportionality requirement has been met, it is for the ECtHR a *"material factor"* whether the parties such as VEOB et al. have at their disposal *"reasonable alternative means to protect effectively their rights under the Convention"*. The Appeal Court deduces from the rulings of the ECtHR in the two cases referred to, as well as from its rulings in the cases *A.L./Italy* (41387/98) of 11 May 2000 and *Bosphorus v. Ireland* (45036/98) of 30 June 2005, that this is not about the question of whether the alternative judicial process offers the same protection as Art. 6 ECHR but whether this provides a protection that is *"comparable"* to it.
It is decisive whether the restriction in the access to a national court impairs "the essence of their "*right to a court*" ("*la substance même du droit*") or whether the protection of the rights guaranteed by the ECHR is *"manifestly deficient"*. The foregoing leads the Appeal Court to the conclusion that the assertions of VEOB et al. must be reviewed in connection with the question of whether the jurisdictional immunity granted to EPO has in essence impaired their right to access to a court.

3.7 Contrary to what has been argued by EPO, the Appeal Court holds that in this case the protection of the rights guaranteed by the ECHR is *manifestly deficient*. Indeed, it is not in dispute that VEOB et al. do not have access for their claims to any judicial process at ILOAT, nor to any other judicial process provided by EPO. The rights for which VEOB et al. want protection, the right of association and of assembly, from which are derived the right of collective action and the right of collective

bargaining, are for instance guaranteed by the ECHR (Art. 11), the European Social Charter (Art. 6) and ILO Conventions 87 and 98. Refer for the ECHR more in particular to the ECtHR of 12 November 2008, no. 34503/97 in the case of *Demir and Baykara/Turkey* (freedom of collective bargaining). The ECtHR also qualified a strike prohibition as a restriction of the trade union freedom under treaty law (*Unison/UK*, ruling of 10 January 2002, no. 53574/99). See further the decisions of the Committee on Freedom of Association of ILO, Freedom of association, 5th edition numbers 523, 882, 885 and 886. The absence of any legal remedy also means that, if a Dutch court would in this case not offer a judicial process for VEOB et al., the right guaranteed by Art. 13 ECHR of VEOB et al. to an actual legal remedy before a national body will be violated.

3.8 The circumstance that individual employees of EPO can at EPO and subsequently at ILOAT indeed contest any restriction of their right to strike, namely against any measures that might have been taken against them due to violation of the rules on strikes, is in this connection not decisive. Indeed, Art. 11 ECHR guarantees the right of *collective* action and of *collective* bargaining. It would be in contravention of the collective nature of these rights if only individual employees could afterwards contest the impairment of these rights. Such a judicial process cannot be considered as an effective legal remedy to enforce the collective rights that are at issue in this case. With regard to the right of collective bargaining it can be far less understood how this could be put up for discussion at ILOAT in the judicial process of an individual employee, or which other judicial process VEOB et al. could follow.

3.9 It is irrelevant that EPO could not be blamed that ILOAT does not offer the judicial process meant here. What it boils down to is whether VEOB et al. can submit to a judicial authority an impairment of their rights in an efficient judicial process with sufficient guarantees. This is currently not the case at ILOAT. For that matter EPO was not at all obliged to instruct the settlement of disputes to ILOAT. EPO itself could also have chosen to create a judicial process with sufficient guarantees so its plea of the absence of blameworthiness on its side is not successful for that reason either.

3.10 As indicated above the mere fact that an alternative judicial process is absent does not mean that a violation of Art.6 ECHR must be presumed and that the jurisdictional immunity must be ignored. However, the Appeal Court is of the opinion that in this case there are additional circumstances due to which there is indeed reason to do so. Indeed, this case is about the rights of trade unions to take collective action and to conduct collective bargaining, that is to say this is about rights belonging to the fundamental principles of an open and democratic constitutional state and which have been recognised in multiple treaties (referred to above). Moreover, the assertions of VEOB et al. purport that these rights are violated systematically and in a far-reaching way by EPO because the right to strike is restricted in an unacceptable way and VEOB et al. are completely denied the right to participate in collective bargaining, although they are sufficiently representative. In any event it cannot be said of these assertions that they lack *prima facie* any grounds. This means that EPO's plea of jurisdictional immunity granted to it is disproportionate. Therefore the Dutch court has in this case jurisdiction to hear the claims of VEOB et al., which can also mean that this court will take decisions that have consequences for the organisation of EPO.

3.11 EPO also put forward that it is not a party to the treaties referred to above and that it is therefore not bound to them. However, this argument ignores that the Dutch court is obliged to secure the rights and liberties awarded under those treaties for

everyone in its jurisdiction (cf. Art. 1 ECHR). It is true that the Dutch courts should also apply the provisions of the Protocol, but since in this case there is a conflict between the provisions of the Protocol and the provisions of (for instance) the ECHR, the court will have to verify which provision has priority in this particular case. In this case the provisions of the Protocol must give way on the grounds set out above. In this connection the Appeal Court notes that EPO did not dispute the fact that VEOB et al. are governed by Dutch jurisdiction. For now the Appeal Court also considers it sufficiently plausible that this is the case since VEOB as well as SUEPO are established in the Netherlands.

3.12 This means that grounds 2 and 4 in the Cross Appeal fail.

3.13 With ground for appeal 3 EPO objects to the opinion of the Judge for Interim Relief that VEOB et al.'s claims are admissible and that they have their own legal capacity to protect their own interest. Moreover, the Judge for Interim Relief had wrongly assumed that there was a pressing interest. EPO considers it incomprehensible that the Judge for Interim Relief considered on the one hand that VEOB et al. represent the interests of their members while he held on the other hand that VEOB et al. had their own interest in being able to carry out their duties unhindered. That the non-recognised trade unions VEOB et al. have given themselves "tasks" does not concern EPO. The actual interest of VEOB et al. in this action was to break through Art. 8 EPC, which interest according to EPO does not deserve any protection. In addition SUEPO apparently was an empty shell without any members which cannot be considered as a legal entity according to Dutch law. In addition, there was an internal dispute settlement already running at EPO and two cases were pending on the merits in Germany about the claims brought in this lawsuit. In addition, VEOB et al. was in actual fact demanding a declaratory judgment. According to EPO VEOB at al. certainly have the possibility to call a strike but they had not used this intentionally. There is no obligation on EPO to facilitate a call for strike via its e-mail, according to EPO.

3.14 This ground for appeal fails. There is no contradiction between the consideration that VEOB et al. represent the interests of their members (manifestly the Judge for Interim Relief means: 'looking after') and that they have their own interest in carrying out their duties without hindrance: both opinions - certainly in the case of a trade union - can be accurate at the same time. For that matter the Judge for Interim relief held rightly that VEOB et al. did not conduct a collective action within the sense of Section 3:305a of the Dutch Civil Code, but are pursuing their own interest. Indeed, their claims are aimed at being able to carry out their essential duties as a trade union. Therefore it should not be required from VEOB et al. that they have full legal capacity. Neither is the fact that EPO does not recognise them as a trade union relevant to the admissibility of VEOB et al.'s claims. Considering the number of employees who joined VEOB and SUEPO - not disputed here is that approx. 1155 (44% of the employees based in Rijswijk) and 3,184 respectively (47% of all EPO employees) are members of VEOB and SUEPO -, the statement of purpose and the actual activities of VEOB et al., the Appeal Court considers it sufficiently plausible that they should be considered as trade unions. Neither is there any reason to see that the actual interest of VEOB et al. would (only) be to break through the jurisdictional immunity. Indeed, VEOB et al. brought claims that are easily understandable. There is no reason to hold that they would not have any actual interest, and EPO has not sufficiently substantiated this either.

3.15 Neither does the fact that SUEPO is not a legal entity according to Dutch law preclude them from taking legal action. For that matter the Appeal Court considers it for now sufficiently plausible that SUEPO is an association without full legal capacity according to Dutch law. Indeed, it appears from the constitution of SUEPO that it has its 'provisional seat' in The Hague and that it is a certain organisational structure. Moreover, EPO has insufficiently contradicted that SUEPO has 3,184 members and that it acts as a unit to the outside world. For that matter, this is also sufficiently apparent from the documents. The argument that SUEPO is an empty shell without any members therefore fails. The assertion that there is already an internal dispute settlement process pending at EPO does not affect the jurisdiction of the Judge for Interim Relief either. Indeed, EPO has not suggested that VEOB et al. are involved in this dispute settlement process, or that the claims dealt therein are those made by VEOB et al. in the present proceedings, or that urgent relief can be given in that process.

3.16 The Appeal Court understands EPO's reference to two legal actions on the merits pending in Germany between EPO on the one hand and (in one case for instance) SUEPO to mean that EPO wants to suggest that since there is no urgent interest in those German proceedings, the same should apply in the Netherlands (see written summary of the argument of *mr.* Den Dekker in first instance under 61). This argument fails. The claims brought in these proceedings by VEOB et al. must be considered on their own merits with regard to the urgency. The fact that an action on the merits has been brought elsewhere does not preclude the acceptance of urgency in the present proceedings. Moreover, that VEOB et al. would essentially demand a declaratory judgement is inaccurate. The claims of VEOB et al. do not entail such a claim.

3.17 The assertions of EPO that VEOB et al. have the opportunity to call effectively for a strike but that they did not make use of this, that the organisation of a strike had already appeared possible for a long time, and that there is no obligation on EPO to facilitate the call for a strike via its e-mail, fail. The Appeal Court considers it sufficiently plausible that VEOB et al. experience hindrance, or that they experience a threat of hindrance, from the measures which EPO has taken in connection with the strike actions. This entails that VEOB et al. have an urgent interest in their claims directed against these measures. To the question of whether EPO has the obligation to facilitate the call for a strike via its e-mail, the Appeal Court will discuss this below in its assessment of the substantive claims.

3.18 Apart from a plea of jurisdictional immunity, EPO also relied on the assertion that as an international organisation it is autonomous in the area of personnel, that the internal rules of EPO form its own legal system, and that the national courts should not interfere in this. Be that as it may in general, this autonomy would in any case not go so far as to allow EPO to violate fundamental rights generally acknowledged in Europe without any parties, such as VEOB et al., being able to bring any effective remedy against it. In its arguments that Dutch law is not applicable to this dispute, EPO has no interest since the Appeal Court will not apply Dutch law but will only base itself directly on the norms flowing from treaty laws which VEOB et al. invoked.

3.19 The conclusion is that the Cross Appeal must be rejected.

4.1 Ground for appeal 1 in the Appeal on the Main Issue has already been dealt with above. Ground for appeal 2 in the Appeal on the Main Issue fails because it is directed against a consideration that, as acknowledged by VEOB et al., does not

support the opinion of the Judge for Interim Relief. So VEOB et al. have no interest in ground for appeal 2.

4.2 With ground for appeal 3 in the Appeal on the Main Issue VEOB et al. contest the opinion of the Judge for Interim Relief purporting that Art. 8 EPC guarantees the operation of EPO as a whole, that VEOB et al. intend to break through this provision with their claims, that allowing the claims would result in a fragmentation of EPO in the sense that different regulations must be applied in the Netherlands than in other participating Member States, that thereby the essence of immunity is impaired, and that no submissions have been made or evidence produced that VEOB et al. cannot turn to the central organisation with their claims. The argument of VEOB et al. boils down to this opinion being incomprehensible considering the previous opinion of the Judge for Interim Relief that the jurisdictional immunity should make way in this case. In addition, this opinion is inaccurate because the 'fragmentation' referred to cannot form any reason not to deal with VEOB et al.'s claims as regards substance.

4.3 The Appeal Court considers first and foremost that, as EPO also assumed (written summary of the argument of *mr.* Den Dekker in first instance under 2), VEOB et al. summoned the legal entity EPO. So EPO, and not just a part of EPO, is party to the present proceedings. As noted rightly by EPO, the European Patent Office, being a body of EPO, cannot act independently in legal actions. The Appeal Court has amended this where it mentions the parties at the head of this Judgement, as compared with how this is stated in the judgement of the District Court.

4.4 The Appeal Court understands the claims of VEOB et al. thus that they are directed against the legal entity EPO, and that VEOB et al. intend that the measures claimed relate primarily to all employees of EPO and subsidiarily to the personnel employed in the branch office in Rijswijk. Furthermore, the Appeal Court takes as a starting point that the measures which VEOB et al. challenges are to be assessed for the entire organisation of EPO and that what is at stake here is not, at any rate not exclusively, local measures relating only to the branch office or the personnel employed at the branch office of EPO in Rijswijk.

4.5 Moreover, it is important that EPO did not dispute that the Dutch court has jurisdiction to hear the present claims pursuant to Art. 24 of the Convention on the Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (EEX Convention) (as from 10 January 2015 followed up by Art. 26 Regulation no. 1215/2012, EU OJ 2012 1.351/1), or pursuant to Art. 11 of the Dutch Code of Civil Procedure. Indeed, EPO only invoked the jurisdictional immunity, not the absence of international jurisdiction. This means that the jurisdiction of the Dutch court is the starting point for the Appeal Court. There is no reason to suspend the present proceedings due to *lis pendens* in connection with the action on the merits pending in Germany in which SUEPO (but not VEOB) is a party, since the present case is about interim injunction proceedings in which only a provisional judgement will be rendered. So there is no reason to fear that contradictory judgements will be pronounced.

4.6 It follows from the foregoing that the opinion of the Judge for Interim Relief cannot be upheld. VEOB et al. instituted their legal action against the legal entity EPO as a whole, and their primary claims relate to all employees of EPO. EPO has been lawfully sued before the Dutch court. This means that the Judge for Interim Relief should have dealt with VEOB et al.'s claims as regards content, whatever the case

with regard to the 'fragmentation' referred to which is in any event not intended by VEOB et al. by their primary claim. Ground for appeal 3 is successful.

4.7 With ground for appeal 4 VEOB et al. contest the opinion of the Judge for Interim Relief that they did not sufficiently substantiate their urgent interest in the claims to be acknowledged and admitted as a negotiating partner. This ground for appeal is also successful. It is an established fact that EPO does not admit VEOB et al. as a negotiating partner. The Appeal Court considers it plausible that - as is the case with any employer with several thousands of employees - occasions will occur with some regularity where central consultations between EPO and its employees can come up for discussion. Against this background the urgent nature is implicit in the claims.

4.8 The foregoing means that the Appeal Court has yet to deal with VEOB et al.'s claims as regards their content. In this connection the Appeal Court will base its opinion directly on the international standards invoked by VEOB et al. and not on Dutch law, as manifestly advocated by VEOB et al. (appeal summons numbers 70 and 71).

5.1 The claim under II (as amended in appeal) entails that EPO is ordered to discontinue its violations of the right of strike and of the right of collective bargaining, as well as of the right of assembly and association, and violations of its social duty of care, at any rate with regard to the employees of EPO employed in the branch office in Rijswijk. The Appeal Court considers this claim largely too vague to be allowed. This also applies to the extension of the claim lodged in appeal during the oral pleadings. Regardless of the fact that the latter has hardly been explained, it can be deduced from VEOB et al.'s representations what the immediate reason has been for this amendment to the claim, but not what VEOB et al. now really claim. It can only be deduced with sufficient clarity from the summons in first instance that VEOB et al. mean that they must (again) be enabled to use the internal e-mail facilities unhindered, in the sense that e-mails originating from '@suepo.org' are no longer blocked, that the use of group mail for trade union purposes is no longer blocked and that trade union representatives who send general communication via their personal work e-mail addresses to EPO employees in connection with trade union related subjects are no longer threatened with disciplinary measures. In this connection the Appeal Court considers the following.

5.2 The ILOAT held in its Judgment 3156 of 6 February 2013, the following:

> "12. As the Tribunal has already had numerous occasions to state in its case law, bodies of any kind which are responsible for defending the interests of international organisations' staff must enjoy broad freedom of speech, subject to the reservations set out below, and in particular they have the right to take to task the administration of the organisation whose employees they represent. This case law, which was originally established with regard to staff unions or staff associations and their officials (see Judgments 496 under 37, 911, under 8, or 1061, under 3), also applies to bodies like the Staff Council of the ITU which are responsible for representing the interests of the staff before the administration of the organisation (see Judgment 2227, under 7).
> 13. In addition, the freedom of speech that these bodies enjoy can be respected only if they also have the freedom of communication which is part and parcel thereof. For this reason, while the executive head of an organisation certainly has wide discretion to determine and if appropriate, alter the scope of the means of communication made available to these bodies, decisions on the matter must not have the effect of

curtailing, through overly restrictive measures, the rights and freedoms which they are allowed in order to perform their function (see, with regard to staff unions or associations, Judgments 496 and 911, or Judgment 1547, under 8, and, with regard to a staff committee, Judgment 2228, under 11).
14. Hence, the ITU is wrong in referring to the Staff Council's ability to circulate e-mails to all staff members as a "privilege", as it did in the above-mentioned decision of 21 May 2010 and in its submissions to the Tribunal. A body of this kind has a legitimate right to avail itself of this facility, unless there is good cause for restricting it. Nor does the ITU have any grounds to accuse the Council, as the Secretary-General did in his memorandums of 3 September 2010, of "failing in its duty to provide all members of staff with objective, reliable and established information". Indeed, the Union should under no circumstances seek to review the accuracy of information disseminated by the Council.
15. The freedom of speech and the freedom of communication of the bodies in question are not, however, unlimited. Not only is an organisation entitled to object to misuse of the means of distribution made available to its staff committee (see the aforementioned Judgement 2228, under 11), but it also follows from the case law cited above in consideration 12 that the right to freedom of speech does not encompass action that impairs the dignity of the international civil service, or gross abuse of this right and, in particular, damage to the individual interests of certain persons through allusions that are malicious, defamatory or which concern their private lives.
16. Since organisations must prevent such abuse of the right of free speech, the Tribunal's case law does not absolutely prohibit the putting in place of a mechanism for the prior authorisation of messages circulated by bodies representing the staff. An organisation acts unlawfully only if the conditions for implementing this mechanism in practice lead to a breach of that right, for example by an unjustified refusal to circulate a particular message."

5.3 Against this background the Appeal Court considers the measures taken by EPO disproportionate. It is the nature of the activities of trade unions such as VEOB et al. that they can criticise (the representatives of) the employer, also via the internal communication channels. It would be otherwise only if such messages were unnecessarily abusive or defamatory, if the privacy of employees were violated or if the dignity of the 'international civil service' were prejudiced. There is no sufficient proof that one or more of these cases occurred here. The expressions which EPO manifestly considers the most serious cases ("authoritatively knocking about" and "dictatorial tactics") do not, according to the provisional opinion, of the Appeal Court exceed the limits within which trade unions should remain when they direct themselves to their members via internal e-mail.

5.4 Therefore the claim under II can be allowed to that extent.

5.5 With their claim under III VEOB et al. challenge in the first place three provisions of the Service Regulations, namely Art. 30a par. 2, Art. 30a, par. 4 and Art. 30a par. 10.

5.6 According to VEOB et al. Art. 30a par. 2 of the Service Regulations is too restrictive because it prohibits a strike of a general duration because it does not allow collective actions other than work stoppages (such as go-slow actions) and because it has been stipulated as a condition that strikes must be related to "the conditions of employment" (employment conditions).

5.7 It has been provided in Art. 30a par. 5 of the Service Regulations that for instance the duration of the strike must be reported in advance to the President of EPO. This shows that in Art. 30a par. 2 of the Service Regulations the term "limited duration" means a strike action the duration of which is determined in advance. The Appeal Court is of the opinion that this wrongfully renders impossible a strike with a duration that is not known or announced in advance. Indeed, the possibility of holding a strike with a duration that is not determined or has not been announced to the employer in advance is an essential part of the right to strike.

5.8 The Appeal Court also considers the restriction of the right of strike to 'work stoppage' wrong. Indeed, it cannot be excluded a priori that collective actions other than work stoppage are also a suitable form of taking action which - depending on the circumstances and the form of action - do not have to be more damaging for the employer than a work stoppage. Whether such other collective forms of taking action are allowed will have to be assessed in each individual case. However, there is no reason to exclude categorically such forms of taking action in advance. Contrary to what EPO argues it cannot be deduced from the ruling by ILOAT of 14 July 2004 (no. 2342) that a collective action other than a work stoppage is not allowed by definition.

5.9 The same applies to the condition that the collective action should relate to employment conditions. VEOB et al. rightly argue that collective actions that are not strictly related to the employment conditions of the employees are not by definition inadmissible. This should also be assessed in each individual case, but it is in contravention of the right of collective action to entirely exclude such other actions in advance.

5.10 The rule of Art. 30a par. 4 that a decision to hold a strike should be the result of a vote amongst the employees of EPO is, as acknowledged by VEOB et al., in itself not in contravention of the right of collective action. This would only be the case if the right to strike were disproportionately restricted by this (cf. Committee on Freedom of Association of the ILO, Freedom of association, 5th edition, numbers 556 and 557). VEOB et al. did not sufficiently substantiate that this is the case pursuant to Art. 30a par. 4. It does not automatically follow from the requirements included in Circular 347, part B.6 (a quorum of 40% and a majority of over 50%). In addition, the assertion by VEOB et al. that the voting requirement makes it impossible to hold 'wild strikes' will not benefit them. Since they acknowledge that voting requirements are in themselves not unlawful, they argue in essence that the Service Regulations should make an exception in this case. However, they don't claim that EPO be ordered to make such an exception. Since for that matter the voting requirement in itself is lawful, the Appeal Court does not see any reason to order EPO to leave this inapplicable. This part of the claim will be rejected.

5.11 Art. 30a par. 10 of the Service Regulations provides: "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." VEOB et al. argue rightly that this provision wrongly gives the President the authority to determine a maximum duration for the strike. The Appeal Court refers to what it considered to this end above with regard to Art. 30a par. 2 of the Service Regulations. The claim will be allowed to that extent. For the rest the argument of VEOB et al. fails. The fact that the President can lay down further regulations is in itself not unlawful. Since the claim is directed against Art. 30a par. 10 as such and not against the way in which the President uses his powers pursuant to this, the claim cannot be allowed to that extent.

5.12 Moreover, VEOB et al. object to Art. 65 par. 1 under (c) of the Service Regulations, pursuant to which EPO is entitled to deduct wages from a striking employee up to the amount of 1/20th of the monthly wage for each strike day. VEOB et al. consider this measure disproportionate since in this way a strike is made equivalent to an unauthorised form of absence. For permitted absence 1/30th of the monthly wage is deducted per day. The parties agree that the criterion to be applied is whether this measure by EPO is one "of such gravity as to disturb the proper balance between the rights and duties of the parties". In the preliminary opinion of the Appeal Court there is no question of this here. The Appeal Court considers a deduction of 1/20th of the monthly wage per day not disproportionate since a month has approx. 20 working days. EPO is also not obliged in this respect to make a strike day equivalent to a day of authorized absence. Moreover, VEOB et al. have not sufficiently substantiated, and therefore the Appeal Court does not consider it plausible, that the difference between a deduction of 1/20th and 1/30th of the monthly wage per day would in practice result in the strike being abandoned.
In the preliminary opinion of the Appeal Court the same applies to Circular 347 part B.6 of the President which provides that joining a strike for more than four hours per day will lead to a wage deduction of 1/20th of the monthly wage and that joining a strike of less than four hours to 1/40th of it. In the preliminary opinion of the Appeal Court the President in his calculation method, which is in essence a rounding off exercise, did not go beyond the scope of Art. 65 par. 1 under (c) of the Service Regulations. Neither does the Appeal Court consider it plausible that this method would in practice be experienced as an obstacle to joining a strike. Therefore this part of the claim will be rejected.

5.13 Finally, VEOB et al. claim (under IV) that EPO be ordered to acknowledge VEOB et al. as social partners with the right of collective bargaining (including strike), at any rate to admit VEOB et al. to the collective bargaining; and (under V) to forbid EPO to conduct or continue the consultations about new collective arrangements without admitting VEOB et al.

5.14 These claims can largely be allowed. It has already been established above that VEOB et al. are sufficiently representative. The Appeal Court did not find any valid arguments in EPO's assertions why they should not be admitted to collective bargaining. The right of collective bargaining has also been regarded by the ECtHR as an essential part of the freedom of assembly and association guaranteed by Art. 11 ECHR (ECHR 12 November 2008, no. 34503/97 in the case of Demir and *Baykara/Turkey*). The Appeal Court will therefore order EPO to admit VEOB et al. to collective bargaining. EPO having to recognize VEOB et al. as social partners cannot be granted. In this respect, apart from the order to be admitted to collective bargaining, VEOB et al. have insufficient interest. Since what is at stake here is an interim injunction, the Appeal Court does not consider it appropriate to force EPO to a recognition to which it objects. Since the Appeal Court will allow the claim under IV as set out above, VEOB et al. have insufficient interest in their claim under V to forbid EPO to conduct or continue the negotiations without VEOB et al.

6.1 The foregoing leads to the conclusion that the judgement of the Judge for Interim Relief in the Appeal on the Main Issue will be quashed and that the claims of VEOB et al. will be allowed as stated below in the operative part of the judgement.

6.2 As the party found at fault, EPO will be ordered to pay the costs of the action in first instance and in appeal, in the Appeal on the Main Issue as well as in the Cross Appeal.

Decision

The Appeal Court:

In the Cross Appeal:

- rejects the appeal;

In the Appeal on the Main Issue:

- quashes the judgement appealed from and re-delivers judgement;

- orders EPO within 7 days after service of this judgement to give VEOB et al. unhindered access to EPO's e-mail system, more in particular to make sure that e-mails originating from '@suepo.org' are no longer blocked, that the use of group mail for trade union purposes is no longer blocked and that trade union representatives sending general communications via their personal work e-mail address to EPO employees in connection with trade union related subjects are no longer threatened with disciplinary measures;

- prohibits EPO with immediate effect from applying Art. 30a par. 2 of the Service Regulations and Art. 30a par. 10 of the Service Regulations (insofar as this provision grants the authority to the President to determine a maximum duration for the strike);

- orders EPO to admit VEOB et al. to collective bargaining within 14 days after service of this judgement;

- rejects any further or other claims;

In the Appeal on the Main Issue and the Cross Appeal:

- orders EPO to pay the costs of this lawsuit, *in first instance* assessed at €665.71 for disbursements and at €1,405 for the advocate's fee, and *in appeal* at €781.52 for disbursements and at €4,023 for the advocate's fee, and determines that failure to pay within fourteen days after this judgment will mean that statutory interest will be due on these amounts from the fifteenth day onwards;

- declares this judgment provisionally enforceable.

This judgment has been rendered by *mr.* A. Dupain, *mr.* S.A. Boele and *mr.* H.C. Grootveld, and pronounced in a public hearing of 17 February 2015 in the presence of the Court Clerk.

[signature] [signature]