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The influence of the threat of terrorism on the right to strike (NL)

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Summary

The Dutch Cantonal judge prohibited a strike because the safety of passengers could not be guaranteed. At the hearing, which took place a few days after the Berlin Christmas market attacks, weight was given to the threat of terrorism. Nor is this the first time the threat of terrorism has been explicitly referred to by a Dutch court in a case concerning the right to strike.

Facts

NS Reizigers ('NSR') is a division of the Dutch Railways. NSR is responsible for passenger train services in the Netherlands (approximately 1.1 million travellers a day) and for employing train drivers and conductors. As from 11 December 2016, the Dutch Railways introduced a new timetable. As a result, new work packages for train drivers and conductors were introduced. Drivers and conductors were unsatisfied with this new timetable, as it meant they had to travel the same short routes too often.

Starting in October 2016, NSR, along with the union for train drivers and conductors ('VVMC') discussed the problems experienced by NSR employees. Other unions participated in these meetings as well. NSR decided to introduce new work packages with effect from April 2017 and informed the employees about this. In a letter dated 8 December 2016, VVMC made complaints about these new work packages. They formulated a number of demands for the new work packages and gave NSR an ultimatum. NSR responded to this letter with an invitation for a new meeting to discuss the matter. VVMC refused this invitation. After the ultimatum, VVMC called its members out on strike. The strike was scheduled for Friday 23 December 2016 and employees were asked to refuse to go to work until 11:00 hours on the train stations in Amsterdam, Rotterdam and Hoofddorp.

Judgment

The burden of proof was first on the organisers of the collective action. They had to demonstrate that the action could reasonably contribute to the effective exercise of the right to conduct collective bargaining. In the case at hand, VVMC argued that it had called for a strike in order to help negotiate a different work package. The court was persuaded that VVMC's action could reasonably contribute to the effective exercise of the right to conduct collective bargaining.

The burden of proof then shifted to NSR to show that the exercise of this right should be limited or excluded on the facts of the case. Great significance was given to the consequences of organising a strike on 23 December, in the light of national security. NSR pointed out that there were not enough police officers available to guarantee the safety of the large number of people in the stations that would be effected by the strike. At the hearing, the representative of NSR said he had been in touch with the police and they had indicated that Christmas fairs and other events required the deployment of more police officers during this period than normally, particularly given the threat of terrorism. They said there were simply not enough police officers available to guarantee the safety of passengers if the strike took place on 23 December 2016, as this was a peak day at train stations. VVMC did not deny these circumstances.

The court also took into consideration that the ultimatum given to NSR could reasonably be interpreted as a timeframe within which NSR needed to respond to the letter from VVMC, and not – as VVMC claimed – as an ultimatum for NSR to adopt a position in the negotiations. The parties are still in negotiations and this can continue into the future. VVMC may be successful in these negotiations and therefore, the interest that VVMC had in organising this particular strike, was

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limited. In those circumstances, holding a strike on 23 December 2016 was disproportionate.

In conclusion, the Cantonal judge found it necessary to prohibit the strike to protect public order and national security, based on the threat of terrorism. The prohibition was set to last until at least 6 January 2017, as requested by NSR. After that date, if a new strike was lawful at that time, VVMC could exercise its right to collective action then.

Commentary

All EU Member States recognize a worker's right to strike. At EU level, the right to strike is enshrined in Article 28 of the Charter of Fundamental Rights of the European Union. Secondly, the European Social Charter ('ESC') enshrines the right to strike in similar terms in Article 6(4). Thirdly, there is the European Convention for the Protection of Human Rights and Fundamental Freedoms. Even though the European Convention does not mention the right to strike explicitly, the European Court of Human Rights has declared that Article 11 of the ECHR includes the right to strike.[1]

The issue is thus not whether a right to strike exists, but how it is exercised and whether there are limits to it, where there are conflicts of interests. The European Convention and European Social Charter state that certain limits are necessary in a democratic society in the interests of national security and public safety, for the prevention crime and disorder, for the protection of health or morals and to protect the rights and freedom of others, and that these limitations should be prescribed by law.

Most Member States have embedded the right to strike in their constitutions, but this is not necessarily the case. Limitations on the right to strike should be prescribed 'by law', but this can either mean by statute or case law. The latter is the case in The Netherlands, where there is no statutory right to strike. Instead, the Dutch Supreme Court ruled in 1986 that Article 6(4) of the ESC was directly applicable.[2] The Dutch legislature has therefore repeatedly maintained that no Dutch legislation is needed.

In principle, it is up to the unions to decide how they wish to negotiate. In order to decide whether a form of collective action falls within the actions protected by Article 6(4) of the ESC, it is important to determine if the action contributes to the effective exercise of the right to collective bargaining. If the organisers of a collective action can demonstrate that the action could reasonably contribute to the effective exercise of the right to collective bargaining between employers and employees (Article 6 (4) ESC), there is a case for the lawful exercise of the fundamental social right to conduct collective action.

The burden of proof then shifts to the employer or the party demanding that the exercise of the right to collective action should be limited or excluded. The employer must demonstrate that this is justified according to the criteria listed in Article G ESC, which is the provision of the ESC that says that action can only be limited if there is a pressing social need. In other words that in a democratic society, a strike can only be prohibited if this is necessary to protect the rights and freedoms of others, public order, national security and public health or morality. The Dutch courts apply a case-by-case law approach, taking all circumstances into account, including whether procedural rules have been followed.

For many years, the lawfulness of a strike in The Netherlands was assessed on the basis of the so-called 'rules of the game test'. In essence, a strike was unlawful when the procedural rules (the 'rules of the game') were not followed. The rules of the game were satisfied if the court found that the strike was used as a last resort ('ultimum remedium') and that there had been timely notification. In recent years, on several occasions the European Committee of Social Rights (ECSR) has said that the Dutch criteria do not comply with the ESC, because a strike can only be restricted on the grounds laid down in Article G ESC.

In the *Amsta* case of 2015, the Dutch Supreme Court brought Dutch case law in line with the ESC, so as to address the ECSR's repeated criticisms. The Supreme Court ruled in that case that the procedural rules should be considered as a "point of view" when assessing whether restrictions should be imposed under Article G ESC.[3] In another case, the *Enerco* case, the Supreme Court held that Article 6(4) ESC must be broadly interpreted. In that case, a trade union called a strike to prevent a sea vessel from emptying its coal cargo at a particular place. Whilst the vessel looked for other locations in the Netherlands, the trade union declared its solidarity and asked employees from other companies to refuse to unload the cargo. The main question before the Supreme Court was whether asking employees from other companies to refuse to unload the cargo, which was basically a strike against a third party (the alternative company that had no conflict with the trade unions or workers, as such) could qualify as industrial action within the boundaries of the ESC. The Supreme Court confirmed that it could.[4]

To cut a long story short: the right to strike in the Netherlands has been fundamentally reformed in the past

1. European Court of Human Rights 12 November 2008, Application no. 34 503/97 (*Demir and Baykara v. Turkey*).
2. The Dutch Supreme Court confirmed this for the first time in a judgment in 1986 (Hoge Raad 30 May 1986, *NJ* 1986, 688 (*NS*)).
3. Hoge Raad 19 June 2015, ECLI:NL:HR:2015:1687 (*FNV c.s./Amsta*).
4. Hoge Raad 31 October 2014, ECLI:NL:HR:2014:3077 (*FNV c.s./Enerco*).

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few years, bringing it into line with international obligations.

The case at hand is interesting for two reasons. First of all the Cantonal judge, by balancing the various interests, applied the Dutch right to strike in a way that was not in compliance with the rules set out in the *Amsta* case by the Supreme Court.

Secondly – and the reason for writing this case report – the influence of the threat of terrorism on the right to strike is notable. The hearing for this case took place on 22 December 2016. This was only three days after the attack in Berlin, where a terrorist deliberately drove a truck into a Christmas market leaving 12 people dead and 56 others injured. Dutch police forces had stepped up patrols at Christmas markets across the country, after the tragedy in Berlin sparked fears of copycat terrorist attacks.

But this is not the first time the threat of terrorism has been explicitly mentioned by a Dutch court in a case concerning the right to strike. On 3 August 2016, a few weeks after the terrorist attack in Nice, France, and a few months after the bombings at Brussels Airport and metro station, the Court prohibited a strike by ground staff of the airline KLM (for the duration of the trial) based on the damage the strike could cause. In that matter, weight was given to the additional security measures that were in place at Schiphol Airport because of the threat of terrorism. In order to protect public order, the court (temporarily) prohibited the strike.[5] The Court of Appeal upheld the decision a few weeks later. The threat of terrorism also played a role in a case concerning a strike by police officers during an international congress.[6]

The right to strike is a fundamental right and therefore restrictions on it should be possible on narrow grounds only. However, it seems now that the courts may prohibit a strike at the time it could have the biggest impact (e.g. for the KLM strike: the middle of the summer holiday; for the NSR strike: the day before Christmas) – as the consequences of the action are seen as the responsibility of the unions, rather than the employers. But the court could shift some of the burden onto employers, for example, by expecting them to hire a private company to guarantee the safety of passengers or, more drastically, to shut down public transport or cancel all flights for the duration of the strike.

It is not hard to find arguments in favour of the court's decision to prohibit the NSR strike, however. What if a terrorist attack had happened and its impact had been worse because of the strike and the chaos it caused? No court would want to be responsible for that.

5. Rechtbank Noord-Holland (District Court Noord-Holland) 11 August 2016, ECLI:NL:RBNHO:2016:6696.
6. Rechtbank Breda (District Court Breda) 21 July 2015, ECLI:NL:RBDHA:2015:7373.

The real problem is the burden of proof: if a public-facing organisation can prevent a strike solely by claiming that public safety is at risk, what negotiation powers are left to the trade unions? In the case at hand, the 'threat level' was 'assumed'. International airports, railway or bus stations and other public gathering places will always have a higher risk of terrorism. But this – in our opinion – should not be enough in itself to prohibit a strike. There needs to be 'present danger', preferably supported by official statements by, for instance, the police and counter terrorist intelligence.

When strikes should be limited under Article G ESC to protect the public, is up for discussion. The exceptions under Article G are the protection of public order, public health, national security and morals – in other words, to prevent social disruption. But there is not even consensus about what social disruption means. In a famous right to strike case in the Netherlands in which the Appellate Court had decided that a strike during rush hour would lead to social disruption because there would be no public transport, the Advocate General of the Supreme Court noted that anyone who had lived during World War II and the Dutch hunger winter of 1944, would not necessarily think that lack of public transport because of a strike during rush hour amounted to social disruption.[7] That might put things into perspective, or maybe not...

Comments from other jurisdictions

Finland (Kaj Svanljung and Janne Nurminen, Roschier, Attorneys Ltd): In Finland, the Ministry of Economic Affairs and Employment may postpone a strike for a maximum of fourteen days from the date it was supposed to start if it is considered to affect essential functions of the society or to violate the public interest to a considerable degree. The threat of terrorism would have to be significant in Finland and this has therefore not been used as a reason to prohibit a strike here. However, the Finnish Act on Mediation in Labour Disputes would allow for the prohibition of a strike on the basis of terrorism and national security. For example, a strike affecting air traffic in Finland was postponed in February 2017, as it would have impacted on public interest, given that it was to take place during the winter holidays.

Romania (Andreea Suciu, Catalin Roman): According to the Romanian Law on Social Dialogue No. 62/2011, a strike can only be used as a last resort, after all the preliminary steps to try to resolve the dispute have been taken. The Court will therefore analyse first of all whether all legal procedures have been followed.

7. Hoge Raad (Dutch Supreme Court) 21 March 1997, *JAR* 1997/70.

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Note that the following categories of workers are not entitled to strike: prosecutors; judges; military personnel and staff with special status within the Ministry of National Defence; the Ministry of the Interior, the Ministry of Justice and the institutions and structures for supervision and control, including the National Administration of Prisons, the Romanian Intelligence Service, the Foreign Intelligence Service, the Special Telecommunications Service; personnel employed by foreign armed forces stationed in Romania; and other personnel who are prohibited by law from exercising this right.

Railway personnel may strike only if a third of the activity of the railways will remain operative, but subject to that, the lawfulness of a strike is still assessed based on the so-called 'rules of the game test' and so a strike will be considered unlawful only if the procedural rules have not been followed.

It is hard to imagine a Romanian Court assessing a strike as unlawful for public safety reasons, yet if the activity of the railway system was reduced to 29%, the strike would be automatically unlawful.

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