

SUMMARY

2015/16 Deduction of expenses from posted workers's minimum wage allowed – but new legislation coming (NL)

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Facts

The facts of this case were set out in EELC 2014/11. A brief summary is as follows.

A Dutch temporary agency deducts from the minimum wage payable to two of its Polish posted employees more than was allowed under the policy described below.

The minimum wage in the Netherlands is based on the Minimum Wage Act. A transnational service provider, as referred to in the Posted Workers Directive (Directive 96/71/EC), must

apply the minimum wage to posted workers.

However, in practice, some service providers deduct certain costs from the wages paid to the posted workers, by setting these costs off against wages. In this case, housing costs and health insurance premiums were set off against the minimum wage. Pursuant to an enforcement policy of the Minister of Social Affairs, such a deduction is permissible, provided that that it is limited to a maximum of (i) 20% of the gross minimum wage for housing costs and (ii) 10% of the gross minimum wage for health insurance premiums. In this case, the costs deducted exceeded these maximum figures. In consequence, the Inspectorate fined the employer for this breach. According to the Inspectorate, the employer did not pay the full minimum wage because it set off various costs against the wages and it was therefore in violation of the Minimum Wage Act. The employer disagreed and argued that Dutch law allows these set-offs from wages. The enforcement policy therefore had no legal basis.

The District Court subscribed to the employer's point of view, holding that the Minimum Wage Act makes no reference to set-offs. In consequence, the general rules for set-offs should be applied. Set-off is a method by which an obligation to pay money is satisfied other than by payment. The Minimum Wage Act refers to an entitlement to a certain minimum wage, not to the actual payment of that minimum wage. An entitlement logically precedes set-off. Because of the entitlement there is an obligation on the employer to pay but this can be satisfied by the set-off. The Minimum Wage Act does not preclude set-off and therefore the employer did not violate any rule of public law by this means. Consequently, there was no justification for the Inspectorate to impose a fine. The Minister of Social Affairs disagreed with this ruling. He announced that the Inspectorate would lodge an appeal, without explaining the legal grounds of such an appeal. He simply stated that he still believed that set-offs against the minimum wage are not permitted, with the exceptions laid down in the enforcement policy.

Judgment

The Council of State confirmed the decision of the District Court (except for a procedural technicality): i.e. employees do not have the right to actual payment of the minimum wage, but merely an entitlement to a certain minimum wage. Set-offs against these entitlements are allowed. There is therefore no justification for the Inspectorate to impose a fine.

Commentary

Although the Minister of Social Affairs has lost this battle – and it is quite likely that the enforcement policy has come to an end – the 'war' against migrant workers working under the minimum wage is not over yet. About a month after the ruling of the Council of State, a legislative proposal for an 'Act Countering Bogus Constructions' was introduced, which has

since been passed by the Lower House. It is based on Directive 2014/67/EU on the enforcement of Directive 96/71/ EC. It is designed to bring about changes in several Acts, including the Dutch Civil Code and the Minimum Wage Act. It intends to prevent the abuse caused by employees of other Member States being willing to work in the Netherlands below the Dutch minimum wage. According to the Dutch legislator, there should be a level playing field in place in the Netherlands as concerns employment conditions and this should prevent unfair competition.

The proposed Act Countering Bogus Constructions introduces various means of reaching the aforementioned goals. For example, it requires the employer to specify salary slips, in more detail in order to clarify exactly which components of the amount paid are regarded as wages and which are reimbursements for expenses incurred. The minimum wage may also not be paid out in cash, but must be wired into the employee's bank account. The employer may no longer set off any amounts against the statutory minimum wage. Set-offs and deductions from the salary of posted workers are, however, allowed on salary over and above the minimum wage or in relation to (mandatory) holiday allowances. The legislator has also announced that specific exceptions to prohibit set-offs against and deductions from the minimum wage might be introduced by order of Council.

The only type of set-off that will still be admissible relates to advance payments. These may be set-off against the actual payment of the statutory minimum wage. The proposed acts further introduce a detailed 'chain liability system', ensuring that in subcontracting chains, posted workers can hold the contractor of which the employer is a direct subcontractor liable for wages due. The Inspectorate may publish its findings on companies that use posted workers in the Netherlands. It may even inform the social partners if it suspects that a company does not satisfy the minimum mandatory requirements of a universally applicable collective labour agreement, in order to enable them to take measures against that company.

The legislative proposal drastically changes the way the Posted Workers Directive is enforced in the Netherlands. There will be many new rules to assist posted workers and to make enforcement of the rules easier and more effective. More civil servants will also be appointed to oversee compliance. Had the present case been tried based on the proposed rules, the outcome would have been very different.

Comments from other jurisdictions

Austria (Daniela Krömer): The enforcement of the Posted Workers Directive remains a challenge. While there are no comparable legal issues regarding the definition of minimum wage (e.g. housing costs cannot legally be deducted from the minimum wage of posted

workers, or any worker, thus the legal status quo is in line with the ECJ's recent judgment in C-396/13, *Sähköalojen ammattiliitto ry gegen Elektrobudowa Spółka Akcyjna*). The legislator has introduced an Act Against Wage Dumping and Social Dumping in 2011 (§§ 7b to 7m AVRAG), and has since amended it in parts. The Act requires the employer to keep records of the remuneration of the posted employees as well as records regarding their social security status in German available at the work site. The Austrian Financial Police has been awarded competences to enter any premises unannounced and check these documents. Administrative fines are awarded if the documents are not available, not complete or if the employees are not being paid according to the applicable minimum standard; as a final sanction the enterprise is banned from posting workers to Austria for a certain amount of time. Also, a "chain liability system" like the one described in the Dutch proposal has been introduced.

While the administrative fines imposed are heavy, and the competences of the financial police wide, these enforcement mechanisms cannot prevent "informal" agreements between employers and employees regarding the actual pay, or the "pay-back" of already received remuneration in cash by the employee.

Subject: Private international law, posting of workers

Parties: Employer (temporary employment agency) – Social Affairs Inspectorate

Court: Raad van State (Council of State)

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Case number: 201400573/1/A3

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Creator: Administrative Jurisdiction Division of the Council of State

Verdict at: 2014-10-12

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