

SUMMARY

## **2014/11 Deduction of expenses from posted workers's minimum wage allowed (NL)**

***&lt;p&gt;An employer (in this case, a temporary employment agency) was entitled to deduct expenses for housing costs and health insurance premiums from the minimum wage payable to two Polish posted workers, even though such deductions went beyond the deduction limits set in the enforcement policy of the Inspection of Social Affairs.&lt;/p&gt;***

### **Summary**

An employer (in this case, a temporary employment agency) was entitled to deduct expenses for housing costs and health insurance premiums from the minimum wage payable to two Polish posted workers, even though such deductions went beyond the deduction limits set in the enforcement policy of the Inspection of Social Affairs.

### **Facts**

This case involved a Dutch temporary employment agency that deducted from the minimum wage payable to two of its Polish posted employees more than was allowed under the policy described below.

In the Netherlands, statutory minimum wages apply, based on the Minimum Wage Act. A transnational service provider, as referred to in the Posted Workers Directive (Directive 96/71/EC), must apply those minimum wages to posted workers. In practice, some service providers deduct certain costs from the wages paid to posted workers, by setting off these costs against the wages. These are normally expenses incurred in relation to the posted workers, such as the cost of living, travelling expenses and health insurance premiums.

Sometimes they are even fines imposed on the posted worker by the service provider, for example for not putting out the rubbish correctly. According to the Minister of Social Affairs, set-offs are applied in particular in relation to migrants from middle and eastern European countries. As a result of these deductions of expenses by means of set-off against the minimum wage, the payment of the actual wages drops below the level of the statutory minimum wage.

The Minister takes the view that these deductions should therefore cease, with two exceptions. Reasonable expenses paid by the employer on behalf of the employee in respect of housing costs and health insurance premiums may be set off against the minimum wage. These expenses are, according to the Minister, inevitable. In addition, the Minister sees no problem with the employer assisting the employee in finding a place to live and obtaining adequate health insurance, as long as the costs involved are reasonable. In order to give a clear indication as to what is considered reasonable, the Minister has determined that the set-offs should be 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. Since July 2011, these rules have become part of the enforcement policy of the Social Affairs Inspectorate (the 'Inspectorate'), which is the government agency in charge of the enforcement of the Minimum Wage Act. The Minister has also clearly stated that set-offs in violation of the policy would to be regarded as violations of the Minimum Wage Act.

In terms of the pay of the two Polish posted employees in this case, the employer set off more than was allowed under the enforcement policy for housing costs and health insurance premiums. The Inspectorate fined the employer for this violation. The employer found this unacceptable. It argued that Dutch law allows set-offs of expenses up to the so-called "attachment-exempt threshold" (i.e. the minimum income necessary to enable someone to make an acceptable living).. The enforcement policy therefore had no legal basis. According to the Inspectorate, the employer did not pay the actual minimum wage because it set off various costs against the wages due and that was in violation of the Minimum Wage Act.

## **Judgment**

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 relating to 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 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 therefore did not violate any rule of public law by this means. Consequently, there was no justification for the Inspectorate to impose a fine.

### **Commentary**

The ruling is brief and easy to follow. One thing that was not explained was why Dutch law applied. Polish law could very well have been applicable to the employment agreement of the Polish employees. The court's ruling that set-offs are allowed under Dutch law, even if the minimum wage is paid, is convincing, provided that the set-offs are limited to the attachment-exempt threshold. Nevertheless, the Minister of Social Affairs responded firmly to this ruling. In a letter of 15 January 2014 to the Lower House of Parliament, he announced that the Inspectorate would lodge an appeal against the judgment, without explaining the legal grounds for this. 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.

The likely reason for this firm response is that, recently, migrant labour, particularly from middle and eastern European countries, has been a topic of intense debate in Dutch politics. For example, a recent case also involving the use of posted workers building a tunnel on one of the main highways in the south of the Netherlands, has gained considerable media attention. The minimum wage paid to these workers was reduced by about EUR 1,000 per month in order to cover a number of expenses. An expert commission was asked to investigate and concluded in an extensive report that, although this practice could not be considered "modern slavery", the deductions did violate the collective labour agreement that was declared universally applicable. That collective labour agreement stipulated, briefly put, that the employer must reimburse the cost of living (i.e. expenses for food and lodging) of employees over and above their salary, if these employees in all reasonableness are unable to travel from the building site to their home address.

More generally, the expert commission held the view that deductions such as those at stake here, were excessive. Unfortunately, the expert commission did not answer the important question of whether the clause in the collective labour agreement conforms to EU law. It is not beyond doubt that an entitlement to reimbursement of living expenses falls within the scope of the expression "minimum rates of pay", as defined in Article 3.1(c) of the Posted Workers Directive. If this is not the case, the provision may very well be in violation of Articles 56 and 57 TFEU. In fact, a complaint has been lodged with the European Commission on this particular issue, asking the Commission to assess whether or not the provision violates the right to free movement of services.

In another case, a Finnish court has requested a preliminary ruling on a matter very much

akin, in case C-396/13: “is Article 3 of Directive 96/71, read in the light of Articles 56 and 57 TFEU, to be interpreted as meaning that the concept of minimum rates of pay covers basic hourly pay according to pay groups, job guarantee pay, holiday allowances, flat-rate daily allowances and compensation for daily travel-to-work time, as those terms of work are defined in a collective agreement declared universally applicable and falling within the scope of the annex to the directive?”

In the meantime, action by the Minister of Social Affairs is expected. He has already publicly stated that the Dutch labour market cannot cope with the number of migrant workers that exist, especially at the bottom of the labour market. These workers, according to the Minister of Social Affairs, shut out Dutch employees. The Minister has announced legislative measures to counter bogus constructions involving posted workers and to combat the performance of work in the Netherlands on a temporary basis in breach of the rules. He is further attempting to find European partners to address this issue at European level.

### **Comments from other jurisdictions**

*Austria (Martin Risak):* The central question from the Austrian perspective would be whether the minimum wage must be paid in cash or can be paid in kind (e.g. in the form of health insurance cover or accommodation). The courts have interpreted some collective agreements as meaning that the minimum wage must be paid in cash and it is unlawful to offset it against, for example, the private use of a company car. Deductions of the kind described above might be considered to be payments in kind and therefore deemed unlawful. On the other hand, in my view, there is no strong argument against the employer helping the employee, for example, to find accommodation in the country he or she is posted to, as long as the costs deducted from the wages are reasonable and the employee has the chance to opt out of this arrangement. In such a case, the deduction would not amount to an avoidance of the obligation to pay the minimum wage and should be considered lawful.

*Subject: Private international law, Posting of workers and expatriates*

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

*Court: Rechtbank Den Haag (District Court of The Hague)*

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**Creator:** Rechtbank Den Haag (District Court of The Hague)

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