

Chapter 8

Posting of workers before Dutch courts¹

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Introduction²

Transnational labour mobility increasingly receives attention in the Netherlands. Dutch newspaper *De Telegraaf* headed a news story in 2014: Cheap foreign workers get Dutch people's jobs.³ This was hardly a unique occurrence; the media regularly focus on 'cheap workers' in the Netherlands (generally from central and eastern and southern European EU Member States), and on the problems that they are supposedly causing.⁴ Quite often this media coverage concerns employees who are posted to the Netherlands. The negative sentiment seems to be lacking when Dutch workers are posted abroad. There was some media coverage a few years ago when many Dutch construction workers worked in Belgium during the financial and economic crisis in the Netherlands,⁵ but this cannot really be compared with the attention 'inbound' posted workers receive.

It is not only the media that has concerns about labour migration. The Social and Economic Council of the Netherlands (SER), an advisory body in which employers, employees and independent experts (Crown-appointed members) work together to reach agreement on key social and economic issues, expressed concerns as well. The SER published its *Labour Migration* report in December 2014.⁶ This report observed that the Dutch people do not fully support the EU internal market when it comes to labour migration. It cited several circumstances for this, including the belief that:

1. Insufficient enforcement of (minimum) wage policies and terms of employment, and the exploitation of migrant workers, causes native workers to be displaced and is considered unfavourable to the workers involved, as well as to bona fide companies; and
2. Labour mobility due to the free movement of services will increase at the expense of labour mobility due to the free movement of workers. The SER

2. Some parts of this text derive from my inaugural lecture, Even J.H. (2018) *Balanceren met detacheren*, Den Haag, Boom juridisch. Some parts derive from papers of SENSE, the project on transnational mobility in the road transport sector. <http://www.project-sense.eu>. The content of this chapter was finalised in May 2019.

3. See *De Telegraaf*, 21 November 2014.

4. See for instance the 'Nederlandse scheepswerven buiten Roemenen uit' story on NOS' website, 5 March 2016, which even resulted in questions being asked in the Lower House. See *Parliamentary Papers II* 2015/16, 2161.

5. See for instance the 'Nederlanders zijn de "Polen" van de Belgische bouw' story on NOS' website, 30 March 2015.

6. The Social and Economic Council of the Netherlands' recommendation *Arbeidsmigratie*, 10 December 2014, recommendation no. 14/09.

believes this will result in further cross-border temporary agency work and triangular relationships designed to evade terms of employment and social security obligations, which in turn will result in businesses trying to outcompete each other with regards to terms of employment. This is perceived to be unfair, since it results in an unlevel playing field for businesses and increasingly disadvantageous terms of employment and social security protection.

According to the SER, these trends feed into nationalistic and xenophobic sentiments that are becoming increasingly widespread, causing people to reject further European integration.

In view of all this, it is not surprising, therefore, that transnational posting to (rather than from) the Netherlands has been on the radar of the national legislator for some time, particularly where it applies to sham or bogus employment arrangements. Examples of this include transnational posting through so-called letterbox companies, or entering into employment contracts on the basis of which employees must work excessive hours but only receive pay at minimum wage level. These bogus employment arrangements are the core of the issue,⁷ according to Lodewijk Asscher, the former Minister for Social Affairs and Employment, because they may cause problems in the labour market, which in turn may result in the displacement of native workers.⁸ Asscher clearly advocated 'equal pay for equal work in the same place' to minimise the negative impact on the Dutch labour market when it concerns international posting of employees, and the national legislation has been altered in recent years to implement the actions undertaken in this regard. The Dutch legal framework on transnational posting is set out in section 1 below.

Section 2 brings the national case law on the topic of transnational posting to the Netherlands into focus. Although still modest in volume, we can see that the number of cases has increased over recent years. The cases concern inbound posted workers and are mostly about the alleged abuse of cheap foreign labour in the Netherlands. Some of these cases were high profile. As well as seeming to fuel the political debate to some extent, they also triggered changes in legislation. In response to one particular case, the legislator prohibited almost all the wage deductions when the actual wage paid to the employee dropped below the minimum wage level. Another case showed the difficulty of pinpointing exactly which components of a collective labour agreement made universally applicable constitute the minimum wage. The legislator also stepped in here to introduce a statutory provision setting out all these components in detail. Recent litigation takes place up to the highest national level. Prejudicial questions referred to the European Court of Justice (ECJ) on transnational posting situations are pending in two cases.

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7. Letter from the Minister for Social Affairs and Employment, L.F. Asscher, to the Speaker of the House of Representatives, on the way in which bogus employment arrangements are being tackled, 11 April 2013, 44872, p1.
 8. The Cabinet's response to the *Arbeidsmigratie* recommendation issued by the Social and Economic Council, 16 June 2015, 151449, pp. 5-6.

1. Posting in the Netherlands: trends and legal framework

Before analysing the legal framework of transnational posting to the Netherlands, let me first address the question of how serious the impact of labour migration on the Dutch labour market is. Given the above, one would expect that the Dutch labour market suffers from (the abuse of) transnational posting to the Netherlands. Research, however, shows that the Dutch labour market as a whole has not been significantly affected by labour migration to the Netherlands. Labour migration does not result in the displacement of native workers in the overall economy. However, it may affect certain groups of employees, in particular those competing with migrant workers, who are mostly working in the lower echelons of the market.⁹ At the same time, the importance of migrant workers in the Netherlands is notably increasing. Of the total growth of the number of employees in the Netherlands between 2005 and 2015, over 60% has a nationality other than Dutch. Most of this increase of foreign labour derives from central and eastern European (CEE) countries.¹⁰

Cross-border labour mobility exists in every sector of the job market.¹¹ Sectors that are traditionally mentioned as having difficulties coping with migrant workers include construction, transportation, agriculture, horticulture and temporary agency work. Although there is no accurate information on the exact number of employees posted from and to the Netherlands, we can make an educated guess by looking at the number of A1 certificates issued to posted workers.¹² According to the figures of the Social Insurance Bank (*Sociale Verzekeringsbank*) (SVB), the Dutch Social Security Administration, 106,500 workers left the Netherlands for another EU Member State using an A1 certificate in 2016, while approximately 132,000 workers entered the Netherlands using an A1 certificate. The 2017 figures show that approximately 97,000 workers left the Netherlands, versus approximately 180,000 incoming workers.¹³ General information from 2015 shows that most migrant workers were from Poland (31%), followed by Germany (18%), Belgium (9%) and the United Kingdom (7%).¹⁴

As for the legal framework for posting of workers, the Posted Workers Directive (96/71/EC) was originally implemented by the Terms of Employment Cross-Border Employment Act (Waga), which came into force on 24 December 1999. At first the Waga focused solely on the construction sector, where terms deriving from collective labour agreements made universally applicable were concerned. After December 2005, however, the Waga applied to collective labour agreements made universally applicable in all industrial sectors.¹⁵ The reason for this change was that the Dutch legislator wanted

9. Centraal Planbureau (2018) *Verdringing op de arbeidsmarkt, Beschrijving en beleving*, Economische beleidsanalyse, 31 October 2018.

10. See Centraal planbureau: <https://www.cpb.nl/sites/default/files/omnidownload/MEV2019-kader-pag-44.pdf>

11. See the *Arbeidsmigratie* recommendation issued by the Social and Economic Council, 10 December 2014, recommendation no. 14/09, p31.

12. There may be a discrepancy between the actual number of posted workers and the number of A1 certificates issued. For more information on this, see the Commission Staff Working Document: Executive Summary of the Impact Assessment, SWD (2012) 64 final, 21 March 2012, 5.

13. See SUWI's annual report 2016, p38, and SUWI's annual report 2017, p52 (open access).

14. These data are based on a combination of Statistics Netherlands' 'Migrant Monitor' and *Parliamentary Papers II* 2017/18, 29407, 209.

15. Bulletin of Acts and Decrees 2005, 626.

to introduce as level a playing field as possible, bearing in mind the future accession of CEE countries. The legislator was concerned that posted workers could displace native workers and illegal employment constructions affect the labour market.¹⁶

This concern about the possible use of illegal posting constructions has dominated legal debates in recent years. On 11 April 2013 Asscher announced a plan to combat bogus employment arrangements, defined as arrangements in which ‘the actual situation differs from the situation as presented...for the purpose of evading laws and regulations’.¹⁷ Although bogus arrangements are not necessarily an international phenomenon, Asscher observed a clear connection.¹⁸

One of the legislative measures deriving from this plan was the Act on Combating Bogus Arrangements (*Wet aanpak schijnconstructies*) (WAS), which has been implemented in phases from 1 July 2015. Based on the Enforcement Directive (2014/67/EU), the WAS has, *inter alia*, introduced a chain of liability in every sector of the industry and not just in the construction sector. The WAS furthermore allows the Labour Inspectorate (Inspectorate of Social Affairs and Employment) (*Inspectie SZW*) to easily request information from the party that is deemed to be employer of the employees concerned, and introduces a naming and shaming procedure for those who violate it. The WAS prohibits deducting most of the costs that the employee may owe the employer, with the obligation incumbent on the employer to pay the minimum wage.

The introduction of the Act on Employment Conditions of Posted Workers in the European Union (*Wet Arbeidsvoorwaarden gedetacheerde werknemers in de Europese Unie*) (WagwEU) was a further step in combating abuse and implementing the Enforcement Directive. The WagwEU became effective on 18 June 2016, simultaneously withdrawing the Waga. The WagwEU is therefore also the Dutch implementation Act of the Posted Workers Directive.

Although the primary purpose of the WagwEU is to implement the Enforcement Directive and the Posted Workers Directive, the Dutch legislator paid a lot of attention to the purpose of the Act and its context. It noted that the aims of the Posted Workers Directive, including the protection of the posted workers and the prevention of social dumping, were achieved in the past. After the enlargement of the European Union, however, the economic freedoms were increasingly abused in order to obtain cost advantages by applying bogus employment arrangements. The goal of the WagwEU is to facilitate the enforcement of the Posted Workers Directive. Although the WagwEU applies to both outbound and inbound posted workers, most attention is given to the latter group. The legislator noted that the WagwEU fits well with the aim of the Dutch government to promote equal pay for equal work in the same workplace. The Act is

16. *Parliamentary Papers II* 2004/2005, 29 983, no. 3.

17. Letter from the Minister for Social Affairs and Employment, L.F. Asscher, to the Speaker of the House of Representatives, on the way in which bogus employment arrangements are being tackled, 11 April 2013, 44872, p1.

18. See the Action Plan for the Combating of Bogus Employment Arrangements, p17, in the Letter from the Minister for Social Affairs and Employment, L.F. Asscher, to the Speaker of the House of Representatives, on the way in which bogus employment arrangements are being tackled, 11 April 2013, 44872.

also expected to improve the oversight of foreign service providers, the exchange of information with authorities and inspections in other EU Member States, and the collection of fines abroad. It thus contributes to restoring the balance between employee protection and the free movement of services.

As set out in section 2, national case law by and large focuses on situations involving inbound service providers. Employers are by law obliged to assign certain minimum terms of employment to the personnel that come to the Netherlands to temporarily perform work. This core of terms of employment consists of specific elements of Dutch labour law. Moreover, when a foreign employer starts work in a sector in which a universally applicable collective agreement applies, it is also important that the core terms of employment from this collective agreement also apply. In all situations, the principle of favourability applies, that is, the Dutch core terms do not have to be observed if the original employment conditions of the posted workers are more favourable.¹⁹ Hereinafter, I will focus both on core terms of employment deriving from Dutch labour laws as on those terms deriving from universally applicable collective agreements.

1.1. Core terms of employment from Dutch labour laws

The core terms of employment comprise the following Dutch labour law Acts:²⁰

- (i) Minimum Wage and Minimum Holiday Allowance Act (*Wet minimumloon en minimumvakantiebijslag*) (WML)
- (ii) Working Hours Act (*Arbeidstijdenwet*)
- (iii) Working Conditions Act (*Arbeidsomstandighedenwet*)
- (iv) Placement of Personnel by Intermediaries Act (*Wet Allocatie Arbeidskrachten door Intermediairs*) (WAADI)
- (v) Equal Treatment Act (*Wet gelijke behandeling*).

The WML and the WAADI receive most attention in case law.

The WML contains certain minimum wage levels and minimum holiday allowances, which are normally adjusted each year. In January 2019 the minimum full-time wage was EUR 1,615.80 per month, EUR 372.90 per week and EUR 74.58 per day for an adult worker. Minimum wages cannot be paid in cash but must be transferred into the bank account of the employees involved. Save for a limited number of statutory exceptions, setting off or compensating costs to the detriment of the employee, where the actual salary payment to that employee drops below the minimum wage level, is prohibited. Employees are also entitled to a minimum of 8% holiday allowance (paid once a year). The salary payslips of the employees posted to the Netherlands need to be clear and transparent.

¹⁹. This last has not been included in the WagwEU itself, but rather follows from the parliamentary documents. See for instance *Parliamentary Papers II 2015/16*, 344 08, no. 3, p31 (explanatory memorandum).

²⁰. These Acts are not mentioned in the WagwEU as they are considered to be of a 'special mandatory character' in the meaning of Article 9 Rome I.

Conditions for hiring out workers, in particular where temporary employment agencies provide workers, are laid down in the WAADI. The most important provision of the WAADI relevant for the WagwEU is Article 8: unless a (universally applicable) collective agreement provides otherwise, temporary workers are entitled to the same wage and other allowances as comparable workers in the industry where the worker is temporarily carrying out his or her work. Since 1 July 2012, Article 7a WAADI obliges every service provider that hires out employees to companies in the Netherlands, national or otherwise, to register its entity and activity in the commercial register of the Chamber of Commerce. This is aimed at preventing illegal staffing practices and worker exploitation.

1.2. Core terms of employment from universally applicable collective agreements

Moreover, it is important that when a foreign employer is working in a sector in which a universally applicable collective labour agreement applies, the core terms of employment deriving from this collective agreement also apply. Whether a universally applicable collective agreement applies can be verified on a website publishing all universally applicable collective labour agreements,²¹ although, unfortunately, the information is only available in Dutch.²² When applicable, the posted workers are entitled to, pursuant to Article 2(6) of the Act on Declaring Collective Labour Agreements Universally Applicable (*Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*) (WAVV), the provisions of the universally applicable collective agreement which deal with:

- a) maximum working hours and minimum rest hours
- b) minimum number of days holiday, during which the obligation of the employer exists to pay a wage and extra holiday allowances
- c) minimum wage
- d) conditions for making employees available
- e) health, security and hygiene at work
- f) protecting measures with regards to the terms of employment and working conditions of children, youths, pregnant employees or employees who recently gave birth
- g) equal treatment of men and women, as well as other provisions regarding non-discrimination.

Article 2(6) WAVV, as amended on 18 June 2016, together with the introduction of the WagwEU, details which elements deriving from a universally applicable collective labour agreement should be taken into account when determining the minimum wage. These are:

21. <http://cao.minszw.nl>

22. This Dutch-language website does provide a link to an English-language explanation featuring five universally binding collective agreements translated into English, but only one of these agreements is still in force.

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- (i) the applicable periodic wage on the pay scale
 - (ii) the applicable reduction in working hours per week/month/year/period
 - (iii) surcharges for overtime, shift hours, irregular hours including public holiday allowance and shift allowance
 - (iv) interim pay rise
 - (v) expenses allowance including travel expenses and travel time allowance, board and lodging costs and other costs necessary to perform the work
 - (vi) increments
 - (vii) end-of-year bonuses
 - (viii) extra holiday allowances.

This minimum wage pursuant Article 2(6) does not include entitlements to additional occupational pension schemes, to social security exceeding the statutory minimum, or to fees above the wage for expenses to be incurred by employees in connection with the posting for travelling, housing or food.

1.3. Specific administrative measures concerning posting

The WagwEU includes several measures to ensure that the core terms of employment can be enforced more adequately. For example, inspection services from EU Member States can exchange information with each other and imposed fines can be collected on a cross-border scale. In addition, there are four administrative statutory obligations for companies intending to perform temporary work in the Netherlands as foreign service providers. They must:

1. provide information, if requested, to the *Inspectie SZW* that is required to enforce the WagwEU
2. have certain documents such as payslips and summaries of working hours available at the workplace (or have them immediately digitally available)
3. report in advance where, when, and with which employees work will be performed in the Netherlands. (The service recipient in the Netherlands has to check whether the report has been made and whether it is correct)²³
4. appoint someone as a point of contact and who can be contacted by the *Inspectie SZW*.

1.4. Enforcement, in particular the role of social partners

When obligations in the labour laws are not observed, the *Inspectie SZW* may impose a fine. If the core provisions from the universally applicable collective agreement are not observed, employees and/or social partners may institute an action against the employer. Social partners and, in particular, trade unions play an important role in

23. The duty to report will become effective at a later time when a digital system is ready to submit the report. This means that at this time no reports have to be submitted by the service provider and verified by the service recipient.

enforcing (applicable) collective labour agreements in practice. This is also the case when it involves posted workers.

A trade union is entitled to establish the nullity of a provision in the individual employment agreement that deviates from a collective labour agreement to which it is a party, even without having to establish its interest in such an action. The trade union may demand specific performance and/or payment of damages. The Supreme Court even allows a trade union that was not a party to the collective labour agreement to demand specific performance (but not payment of damages) from the employer who breached the normative provisions of the collective labour agreement. The trade union is allowed legal standing in Court on the basis of a specific article in the Dutch Civil Code (DCC) - Article 3:305a DCC - which entitles associations to serve the interests of a group of persons, provided that their articles of association so stipulate.²⁴ According to the legislator in the parliamentary history of the Waga, this Article allows trade unions to also demand specific performance when posted workers are involved.²⁵ In practice, both this Article and the WAVV in general are used to justify a legal action from the trade unions against companies who, according to the trade unions, fail to comply with the collective labour agreements declared universally applicable when posting workers from another Member State to the Netherlands.²⁶

It is also worth mentioning that social partners are entitled to grant powers to a specific foundation under private law in charge of ensuring that a generally applicable collective labour agreement is abided by. Typically, that foundation is entitled to impose a civil penalty to employers who are in violation of the collective labour agreement at stake, and may, like social partners, also start litigation against companies posting employees.

Although the enforcement of universally applicable collective labour agreements is by and large a private matter, resulting in civil proceedings when breached, there is an exception to this rule. Should one of the social partners who requested the extension of the collective labour agreement, or any foundation that has been put into place to monitor the compliance of the universally applicable collective labour agreement, have reasonable suspicion that a company does not comply with that universally applicable collective labour agreement, and should it consider bringing the matter to court, it can request that the Minister of Social Affairs investigates said company on such a compliance. This can assist the party's furnishing of proof. The *Inspectie SZW* performs the actual investigation.

The same kind of co-operation between social partners and a foundation on the one hand, and the *Inspectie SZW* on the other, applies to the compliance with employment conditions of the Netherlands with regards to the posting of workers to the Netherlands. Information derived from the *Inspectie SZW* can be passed on to these social partners and/or foundation. Although not yet in force, in the future the Minister of Social

24. Hoge Raad 27 March 1998, JAR 1998/99.

25. See *Parliamentary Papers II* 1998/1999, 26 254, no. 3, p6 (explanatory memorandum).

26. See for instance the District Court Groningen in summary proceedings, 5 October 2012, ECLI:NL:RBGRO:2012:BX9234 (FNV/Remak).

Affairs will furthermore be able to tip off the social partners or foundation with regard to information obtained through the notification obligation incumbent on the service provider. This enables the social partners and/or foundation to assess whether that service provider is compliant in regards to its obligations under the WagwEU.

1.5. Court system

Pursuant to Article 6 DCC procedure (*Wetboek van Burgerlijke Rechtsvordering*), which implements Article 6 of the Posted Workers Directive, the Dutch court is competent in cases concerning the core terms of employment of employees who temporarily perform their work in the Netherlands. The Netherlands is divided into 11 district courts (*rechtbanken*), four courts of appeal (*gerechtshoven*) and one Supreme Court (*Hoge Raad*) when it concerns civil proceedings. There are no specialised labour courts in the Netherlands, only ordinary courts. When administrative proceedings are concerned, more often in particular cases concerning social security, the highest court is the Central Appeals Tribunal (*Centrale Raad van Beroep*) or, in other administrative cases, the Council of State (*Raad van State*). Cases are as a rule public and many (but certainly not all) rulings are published in professional law magazines and/or online.

2. Case law

There is some case law concerning the WagwEU and in particular its predecessor the Waga. Although they are not great in number, some of these cases were high profile and received a lot of media attention. Annex VI of this book lists all (civil) cases published online by the courts involving posting of workers. These cases are made available on the online tool *AR-updates* (that started in 2008) and the most frequently used magazine *Jurisprudentie Arbeidsrecht* (that started prior to the introduction of the Waga).

The cases by and large concern inbound rather than outbound posted workers.²⁷ Typically, the claimant tends to be either a trade union or a foundation under private law established by the social partners in the sector concerned, sometimes combined with a number of posted workers. Most cases focus on remuneration deriving from a universally applicable collective labour agreement. In some of these cases litigation deals with the possibility of deducting costs from the wages and/or who has to pay for the accommodation of the inbound posted workers. In a number of cases the question arose as to whether or not a posting situation was in place and if so, which form of posting (either in the context of a contract of services or through a temporary agency). A topic that may receive further attention in future case law is whether mandatory additional occupational pension schemes are part of the remuneration package of

27. In 2003 there was a case brought before court in which the Waga actually should have been applied to an outbound employee. The court, however, did not apply the Waga (leading to the applicability of German health and safety laws) and applied Dutch law. The court ruled in favour of the employee. Reference is made to *Kantonrechter Heerlen*, 24 September 2003, JAR 2003/268. In the case of the District Court 's-Hertogenbosch, 9 September 2008, ECLI:NL:RBSHE:2008:BF0793, the court noted that an intergroup company outbound posting situation would fall within the ambit of the Waga, but drew no further conclusions from that remark.

posted workers. In recent years the international road transport sector has been over-represented in the case law. Topics that received most attention in court were the applicability of the Waga/WagwEU, including the question of which form of posting is concerned, and remuneration/minimum wage. These two topics are discussed below, as is social security, as some of these cases have been brought to the ECJ.

2.1. The applicability of the Waga/WagwEU and the form of posting

There has been a fair amount of litigation on the applicability of the Waga/WagwEU. Often that litigation concerns the question of whether the employees concerned habitually work in the Netherlands or are posted to the Netherlands on a temporary basis. In the first situation, Dutch law should normally apply in full (save the exception in Article 8(4) Regulation 593/2008; Rome I), whereas the Waga/WagwEU lacks applicability.

In the high profile case between Portuguese and English subsidiaries of the Atlanco Rimec Group on the one hand and the Dutch parties to the collective labour agreement in the construction industry on the other, the ‘posted’ workers involved were, according to their employment contracts, explicitly and solely hired for a specific construction project in the Netherlands. Therefore, according to the Dutch courts, their ‘habitual’ country of work under the contract was the Netherlands. Consequently, Dutch law was deemed to be objectively applicable to the employment contracts of the workers pursuant to Article 8(2) Rome I. The Waga lacked applicability.²⁸

The same type of question is often raised in relation to the international transport sector. In many of these cases, a Dutch company retains the services of a group company situated in another EU Member State in order to perform international transport work. In other words, the Dutch company uses truck drivers employed by a foreign sister or daughter company. Usually, the Dutch company organises that work for the subsidiary and its employees. The Dutch transport collective labour agreement is a complicating factor in this regard. This collective labour agreement is often declared universally applicable, and contains a charter clause. According to this clause, the Dutch employer is obliged to stipulate in subcontracting agreements, executed in or from the employer’s company located in the Netherlands, and entered into with independent contractors who act as employers, that their employees are granted the same basic working and employment conditions of this transport collective labour agreement, *if* this results from the Posted Workers Directive, even if the law of a country other than the Netherlands is chosen. The collective labour agreement itself therefore makes the obligation to apply the basic working and employment conditions of this transport collective labour agreement to the employees hired in from another company contingent on the applicability of Dutch law on the basis of the Posted Workers Directive. Cases on these topics resulted in different outcomes:

28. Rechtbank Midden Nederland 22 July 2015, ECLI:NL:RBMNE:2015:5393 and in appeal Gerechtshof Arnhem-Leeuwarden, 27 February 2018, ECLI:NL:GHARL:2018:1942.

- The Court of Appeal Den Bosch held that the Dutch international transport company Mooy BV needed to ensure that the Polish group company, whose services it retained, applied the Dutch law to the employment agreements entered into between that Polish group company and its employees concerned. Although it is permissible to set up a group company in Poland in order to be able to compete on wages, Dutch law applied to the employment agreements of the Polish employees owing to the fact that these employees habitually work from the Netherlands. Strangely enough, the Court of Appeal ruled that the applicability of Dutch law also resulted in the applicability of the Waga.²⁹
- The Court of Appeal Arnhem-Leeuwarden had to rule on the applicability of the charter clause to international transport company Vos. The trade union argued that Vos's employees in the service of its Romanian and Lithuanian group companies, from which Vos retained the services, should fall under the Dutch transport collective labour agreement. The Court of Appeal, however, ruled that there was insufficient evidence presented in the proceedings to show that the contract concluded with these group companies was executed in or from the Netherlands, or that the Posted Workers Directive and its Enforcement Directive should be applied to the case. The trade union, in the view of the Court of Appeal, had not provided enough evidence that the foreign subsidiaries were not operating independently from the Dutch office, so that the allegation of posting had not been sufficiently substantiated.³⁰
- The Court of Appeal Den Bosch had to rule on the applicability of the charter clause as well in a case against international transport company Farm Trans. The trade union argued that Farm Trans retained the services of its Polish group company, which resulted in the applicability of the basic working and employment conditions of this transport collective labour agreement. As Farm Trans did not dispute the statements of the trade union, the Court of Appeal ruled in favour of the trade union.³¹ This also means that, according to the Court, the Posted Workers Directive applies.
- The Court of Appeal Arnhem-Leeuwarden also ruled on the applicability of the charter clause in a case where the Dutch international transport company Brinkman Trans Holland worked so closely with its group companies in Poland and Moldova, that, according to the Court, it can be concluded that their employees are assigned to the Dutch territory. The charter clause applied. The fact that most of the transport in reality takes place outside the Netherlands does not affect that conclusion.³²

29. Gerechtshof Den Bosch, 28 May 2013, ECLI:NL:GHSHE:2013:CA1457.

30. Gerechtshof Arnhem-Leeuwarden, 17 May 2016, ECLI:NL:GHARL:2016:3792. On the same matter, the Dutch Human Environment and Transport Inspectorate (*Inspectie Leefomgeving en Transport*) carried out a parallel review of Vos Transport's use of Romanian and Lithuanian drivers. This resulted in a different outcome. A part of the matter was handed to the Public Prosecution Service. The public prosecutor had accused Vos Transport of using much cheaper, often foreign drivers enabling them to operate at a much lower cost. A fine was imposed on Vos Transport BV. Cases hereon are still pending.

31. Gerechtshof Den Bosch, 24 May 2016, ECLI:NL:GHSHE:2016:2011.

32. Gerechtshof Arnhem-Leeuwarden, 31 July 2018, ECLI:NL:GHARL:2018:6962.

In December 2018, a similar case resulted in the Dutch Supreme Court putting preliminary questions to the ECJ. This case concerned the international transport company Van den Bosch, which retains the services of two of its sister companies in Germany and Hungary. The Netherlands Trade Union Confederation (FNV) claimed the applicability of the charter clause. The Court of Appeal ruled that no situation exists in which the Posted Workers Directive applies.³³ It held that the Posted Workers Directive could only apply in a situation in which the work is performed *in* the Netherlands, but not *from* the Netherlands, and that the latter situation was the case in this particular matter. Although that last criterion may apply when establishing the applicable law under the Rome I Regulation, it does not apply to the Posted Workers Directive. In this case, the Supreme Court referred prejudicial questions to the ECJ.³⁴

The Supreme Court *inter alia* asked whether the Posted Workers Directive applies to an employee working as an international truck driver and, if so, whether the Posted Workers Directive arranges for the applicability of the national implementation Act in a situation in which that driver works *from* the Netherlands as opposed to *in* the Netherlands. In a parallel case involving the same situation, but where ten individual truck drivers were claimants and which mainly concerned Rome I, the Supreme Court referred the case back to the Court of Appeal in order to establish which law applies to the employment agreements of the truck drivers involved. The Supreme Court held that the previous ruling of the Court of Appeal was either wrong or insufficiently substantiated. In this case the Court of Appeal had determined that Hungary rather than the Netherlands was the country from which the work was performed, and that the Hungarian law was also more closely connected to the employment agreements than the Dutch law. Another Court of Appeal needs to reassess the matter.³⁵

2.1.1. Form of posting

Another subject of debate is whether posted workers work in the context of a contract of services or through a temporary agency (in other words, in the context of either Article 1.3(a) or 1.3(c) of the Posted Workers Directive). This makes a difference when determining the wages due, as the temporary agency needs to abide by most employment conditions in place of the recipient of the employees (Article 8 WAADI), whereas the undertaking posting employees in the context of a contract of services only needs to abide by the core terms of employment. In two parallel cases the Council of State held that the difference between these two forms of posting needs to be assessed along the lines presented by the ECJ in the case of *Martin Meat*.³⁶ As the burden of proof in such cases lies with the Minister, who states that the companies involved violate the applicable rules, the companies are discharged when there is sufficient doubt as to whether that posting actually takes place through a temporary agency (which was not

33. Gerechtshof Den Bosch, 2 May 2017, ECLI:NL:GHSHE:2017:1873. See also Gerechtshof Den Bosch, 2 May 2017, ECLI:NL:GHSHE:2017:1874.

34. Hoge Raad 14 December 2018, ECLI:NL:HR:2018:2322.

35. Hoge Raad 23 November 2018, ECLI:NL:HR:2018:2165.

36. ECJ 18 June 2015, C-586/13.

allowed in the case at hand) rather than on the basis of a contract of services (which was allowed). In these cases, there was sufficient doubt. Therefore, no fines were due.³⁷

The outcome may be different, however, when the trade union starts civil proceedings on the same type of question. In a case brought before the District Court of the Northern Netherlands, the trade union argued that the Dutch company retained the services from posted workers working through a temporary agency rather than from posted workers working in the context of a contract of services. The Court ruled that, in the light of the universally applicable collective labour agreement in the metal sector, the Dutch recipient of the services should prove that a contract of services was concluded. As the Dutch recipient failed to do so, although the work performed seemed to be performed under the management of the Dutch recipient, the Court regarded the work performed by the posted workers as work conducted through a temporary agency.³⁸

2.2. Remuneration/minimum wage

In cases of posting to the Netherlands, at least the Dutch minimum wage should be paid. Calculating that minimum wage can be especially complex when a universally applicable collective labour agreement applies.

2.2.1. What is minimum wage?

In the 2012 case brought before the District Court Groningen by a trade union against the Polish subcontractor Remak, such a universally applicable collective labour agreement applied.³⁹ As a consequence, the court ordered that:

- (i) the salary group and categorisation of position deriving from that collective labour agreement applies. The position level was set on the minimum 'o' because the trade union argued that it wanted to keep the claim uncomplicated. The wage paid in kind to the employees was not to be deducted from the minimum wage, the Court ruled, as this related to a contribution towards the expenses;
- (ii) the holiday allowance of 8% of the wages was also part of the minimum wage Remak needed to observe;
- (iii) the non-working days ('roster-free hours/ reduction in working hours'), as designated by the collective labour agreement were, according to the trade union, also part of the minimum wage, as wages needed to be paid over these days. The Court, however, ruled that such days were introduced in order to create employment, and were therefore not part of the minimum wage; and
- (iv) the surcharge when working outside the regular hours was, according to the Court, part of the minimum wage.

³⁷. Afdeling Bestuursrecht Raad van State 5 July 2017 inzake ECLI:NL:RVS:2017:1819 en ECLI:NL:RVS:2017:1818.

³⁸. Rechtbank Noord-Nederland, 4 March 2015, ECLI:NL:RBNNE:2015:1076.

³⁹. District Court Groningen in summary proceedings, 5 October 2012, ECLI:NL:RBGRO:2012:BX9234.

This case showed that it is not always easy to pinpoint which elements from the universally applicable collective labour agreement should be taken into account when determining the minimum wage. The SER called on the Dutch legislator to give further guidance. In response to this request, the Cabinet gave such guidance in 2015, listing the elements that should be qualified as minimum wage in a universally applicable collective labour agreement.⁴⁰ At present, this is clarified in Article 2(6) WAVV. (See 2.1).⁴¹ There is yet room for debate, however, as to whether the wage elements of Article 2(6) WAVV include more elements than allowed under the Posted Workers Directive.⁴²

2.2.2 Are set offs/deductions from the minimum wage allowed?

As mentioned above, the District Court Groningen ruled that contributions towards the expenses of employees do not count as part of the minimum wage. But is it allowed, if the minimum wage is paid, for certain costs to be deducted from that minimum wage by the employer? In practice, after all, some transnational service providers deduct certain costs from the wages paid to the posted workers, by setting off these costs against the wages. Pursuant to a 2011 enforcement policy of the Minister of Social Affairs, such deductions are permissible, provided they are 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 the case at hand, a Dutch temporary agency deducted more from the minimum wage payable to two of its Polish posted employees than was allowed under that policy. As a consequence, the *Inspectie SZW* fined the employer for this alleged violation of the WML. The employer opposed this fine and argued that Dutch law simply allows these set offs from the wage due, and that therefore the enforcement policy had no legal basis. The *Inspectie SZW* asserted that the employer did not pay the actual minimum wage because it deducted (set off) various costs against the wages due and was therefore in violation of the WML. The Court subscribed to the employer's point of view, holding that the WML makes no reference to set offs. As a consequence, the general rules of set offs should be applied. Set off is a method by which an obligation to pay money is satisfied other than by payment. The WML 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 for the employer to pay, but this can be satisfied by the set off. The WML 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 Council of State upheld this decision on appeal.⁴³ In response, the Dutch legislator changed the law. As of 1 January 2018, Article 13 WML prohibits (most⁴⁴) set offs from the wage where the actual wage paid to the employee drops below the minimum wage level.

40. The Cabinet's response to the *Arbeidsmigratie* recommendation issued by the Social and Economic Council, 16 June 2015.

41. Note that, in contrast to the District Court Groningen in summary proceedings, 5 October 2012, ECLI:NL:RBGRO:2012:BX9234, the legislator deemed non-working days as part of the minimum wage.

42. Reference is made to Advocate General Drijber in the case Hoge Raad 14 December 2018, ECLI:NL:HR:2018:2322. He doubts whether Article 2(6) is allowable prior to the revised Posted Workers Directive coming into effect.

43. Raad van State, 12 November 2014, ECLI:NL:RVS:2014:4062.

44. There are certain statutory exceptions.

A similar question is whether the service provider should pay housing for the posted workers when this is arranged in general in a universally applicable collective labour agreement. The Supreme Court needed to answer this question regarding the universally applicable collective labour agreement in the construction sector. That collective labour agreement arranged, in short, that the employer should pay the temporary housing costs for the employee working on a construction site if it is so remote from his house that it cannot be reasonably expected that the employee commute between his house and the construction site. The question was whether this clause also applied to posted workers, who had to pay for their own temporary housing in the Netherlands.⁴⁵ The Supreme Court interpreted this clause using Dutch interpretation techniques. It ruled that the clause concerned does not apply to the *actual* house abroad of the posted workers, and that their *temporary* housing should be considered the house from which they commute as referred to in the collective labour agreement. As a result, the posted workers, who rented temporary dwellings near to the construction site, were not eligible to compensation for their temporary housing in the Netherlands.⁴⁶

2.2.3. What about additional occupational pension schemes?

Another issue receiving some attention in Dutch case law is whether service providers should abide by the rules of the Act on additional occupational pension schemes 2000 (*Wet Bedrijfstakpensioenfondsen 2000*) (Bpf 2000). This Act arranges the possibility of a second pillar supplementary pension, which serves to top up the statutory basic pension granted by the State. The Act allows social partners to enter a sector-wide pension scheme through a sectoral pension fund, which applies in a mandatory fashion to all employers and employees active in that sector, provided that the Minister approves. Article 15 Bpf 2000 arranges that the Minister can exempt individuals who temporarily perform work in the Netherlands from the applicability of this Act. But that does not answer the question of whether, as a matter of principle, service providers and their posted workers can be obliged to participate in the mandatory occupational pension under Bpf 2000. Although this topic has been touched on in several cases, there is only one in which the question has been answered. In that case the District Court Leeuwarden ruled that the Bpf 2000 and the sectoral pension fund declared universally applicable are to be regarded as provisions of mandatory law as referred to in Article 9 Rome I.⁴⁷ The service provider who falls within the scope of the pension fund concerned is therefore obliged to pay pension contributions for the posted workers. It must be noted that this ruling is subject to legal debate.

2.3. Social security

The SVB is responsible for *inter alia* the issuance of A1 certificates and has issued its own guidelines in that respect (based on EU law). The SVB arranges that any posting

45. The discussed Atlanco Rimec case proves that this can be very expensive. In that case, Atlanco deducted almost EUR 1,000 a month per worker for a small room.

46. Hoge Raad 4 May 2018, ECLI:NL:HR:2018:678.

47. Rechtbank Noord-Nederland, 15 November 2016, ECLI:NL:RBNNE:2016:4935.

from the Netherlands under Article 12 Regulation 883/2004 is, as a general rule, only possible when the person involved is already insured under the Dutch social security law on a statutory basis. Employees should normally perform their work in the Netherlands in order to be eligible for an A1 certificate. The posted workers must also maintain a connection with the employer that posts them. The SVB will assess this on the basis of a number of criteria. In case of replacement or ‘posting through’, the SVB will usually not issue an A1 certificate.

There have been some questions on the A1 certificate involving the Dutch authorities. One of these questions led to a recent ruling of the CJEU in the case of *Holiday on Ice*.⁴⁸ The *Holiday on Ice* employees are third-country nationals who train for some weeks in the Netherlands for their shows. Some of these shows are performed in the Netherlands, but most are performed elsewhere in the EU. The employees used to be eligible for an A1 certificate from the SVB. The SVB, however, refused new applications. The question arose as to whether third-country nationals, such as those at issue in the main proceedings who temporarily reside and work in different EU Member States in the service of an employer established in the Netherlands, may rely on the co-ordination rules laid down by Regulations 883/2004 and 987/2009 in order to determine the social security legislation to which they are subject. The CJEU ruled that these regulations indeed apply to such third-country nationals, provided they are legally staying and working in the territory of the Netherlands.

Another case on social security involving posted workers resulted in prejudicial questions being put to CJEU. This case concerns international truck drivers who live in the Netherlands. A company situated in Cyprus allegedly employs them. The employees are posted to Dutch companies. Some of the companies are the former employers of the employees involved. The employees do not perform most of their work in the Netherlands. The SVB regards this as a bogus employment arrangement and argues that Dutch social security law should apply. The employer states that the legal and factual arrangement is genuine. Cypriot social security law should therefore, according to the employer, govern the employees. The question therefore arises as to whether Dutch or Cypriot social security should apply in the case at hand. The Central Appeals Tribunal has referred prejudicial questions to the ECJ; at the time of writing (May 2019), the ruling on the case has not yet been issued.⁴⁹

Summary and conclusions

The topic of transnational posting of workers receives a lot of attention in the Dutch media. The SER even warned that the fear of international labour among Dutch citizens might stoke nationalistic and xenophobic sentiments. It is therefore undoubtedly an important topic in the Netherlands. Still, research shows that the Dutch labour market has not as a whole been significantly affected by labour migration to the Netherlands; in

48. ECJ 24 January 2019, C-477/17.

49. Centrale Raad van Beroep, 20 September 2018, ECLI:NL:CRVB:2018:2878.

particular, labour migration and posting have to date not resulted in the displacement of native employees.

In relation to posting, the legislator focused in particular on bogus employment arrangements. In response to litigation results, rules prohibiting (most possibilities of) deductions from the wage to an extent that the actual wage paid to the employee drops below the minimum wage level were introduced. The legislator also introduced a statutory provision setting out in detail all components deriving from a collective labour agreement made universally applicable that constitute the minimum wage. Here, there is clearly a link between the case law and the legislative process. The high-profile cases, such as the discussed Rimec and Remak cases, also played a role in the political debate: they seemed to strengthen the determination of the politicians to counter the abuse of labour migration. The same kind of determination can be seen in the case law. Litigation tends to go ‘all the way’. There are currently two cases in which prejudicial questions are referred to the ECJ.

In the meantime, it is likely that many cases never make it to court. According to the third monitoring report of the WAS, for instance, the trade unions noted that the chain of liability provisions have a strong preventive effect.⁵⁰ Simply threatening with starting litigation on chain liability often solves the matter. This, of course, is a more efficient way of enforcing rules than going to court.

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For the list of cases please refer to Annex VI.