

# Can daily allowance be included in posted worker's hourly rate? 3/38/23



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A while ago Riga Regional Court passed Ruling CA-1102-22/7, which deals with a former employee's right to recover outstanding wages from the employer for a period of posting and how to apply the concept of daily allowance and exercise the resulting right to include it in the worker's hourly rate. Given the common practice of paying daily allowances to workers, in this article we will look at how this ruling defines the court's vision for paying a legally reasonable daily allowance and making it part of the total remuneration.

## Background

In 2018 a worker entered into a contract of employment with a Latvian employer, stipulating his place of work at a metro station in Copenhagen, Denmark. As the employer had entered into an agreement with another company for the provision of a building electrician's services, the employee worked abroad for a long time as instructed by the employer. The employment was therefore classified as a posting, with all the implications. The employment contract prescribed an hourly rate of EUR 11, including all additional payments, compensations and daily allowances. It's also known that the employer paid the worker's travel expenses from Latvia to Denmark and provided free meals and accommodation.

On termination the former employee did not believe the employer had fully paid the base pay for the posting period at the agreed hourly rate. So the worker took the employer to court over the outstanding pay resulting from the employer's unreasonable payroll calculations.

The court accepted the worker's claim and ordered the employer to pay the outstanding amount. The employer appealed to the regional court against the ruling. The regional court upheld the ruling and dismissed the employer's appeal. The employer challenged this decision to the Supreme Court, which ordered the regional court to re-examine all the circumstances of the case.

## The court ruling

Having re-evaluated all the circumstances, the regional court took a tough stance on the question of calculating base pay and stated that most of the amount paid to the worker was in fact a daily allowance for the business trip, on which the employer had not paid labour taxes. The court stressed that from a tax perspective the base pay is the person's income that is subject to labour taxes.

The regional court said that if the defendant wished indeed to include the daily allowance in the base pay, he would actually have to increase the remuneration by adding the daily allowance, which is exempt from personal income tax and national insurance contributions, to the base pay, which is subject to these taxes.

On the grounds that the employment contract did not stipulate this, the court refuted the employer's claim that the reason for reducing the daily allowance and the hourly rate in payroll calculations was because the worker was provided with meals and accommodation. Also, the claim that the parties had to go by the employment contract even if it lays down unfavourable terms for the worker (compared to the law) was

recognised as unreasonable on the grounds that the worker cannot be subject to any contractual terms that worsen his legal position even if the parties have signed such a contract.

Finally the court dismissed the employer's claim that Denmark does not operate the concept of minimum wage and that this is a basis for ignoring the Latvian Employment Act's provisions for equal terms of employment and working conditions. In this regard, the court cited a case-law finding that the employer is required to provide the worker with a level of pay that is appropriate for the situation on the Danish labour market in the relevant industry, thereby giving the worker fair pay for work in the case of a posting.

The court ruled that the worker's hourly rate of EUR 11 did not include the daily allowance for the business trip under the employment contract and section 59 of the Employment Act. The court found that as regards base pay, the employer had inserted in this employment contract some terms that are unlawful and worsen the worker's position, so the base pay had been paid to him only in part, ignoring the agreed hourly rate of EUR 11 for all the hours worked. Accordingly, the worker's claim for recovery of the outstanding base pay was satisfied again.

## Key takeaways

An examination of the ruling makes it clear that base pay is remuneration for work payable to the worker regularly, while a daily allowance for a business trip is not remuneration, but rather compensation for expenses caused by the posting. So the daily allowance should be essentially separated from the base pay. This was also confirmed by the court stating that the fact that the daily allowance, unlike base pay, is not subject to labour taxes means it serves a different purpose.

The employer also has to clearly define each element to be included in the base pay in order to avoid similar misunderstandings in future.