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Judgment of the Court (Sixth Chamber) of 29 June 1995. - Rijksdienst voor Arbeidsvoorziening v Joop van Gestel. - Reference for a preliminary ruling: Arbeidshof Brussel - Belgium. - Social security for migrant workers - Designation of the competent State in accordance with Article 17 of Regulation (EEC) Nº 1408/71 - Residence and employment in a Member State other than the competent State - Unemployment benefits provided pursuant to Article 71 (1)(b)(ii). - Case C-454/93.

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Keywords

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1. Social security for migrant workers ° Unemployment ° Employed person insured, pursuant to an agreement between the competent authorities, in a Member State other than the Member State of employment and residence ° Applicability of Article 71(1)(b)(ii) of Regulation No 1408/71

(Council Regulation No 1408/71, Arts 17 and 71(1)(b)(ii))

2. Social security for migrant workers ° Legislation applicable ° Determination by agreement between Member States ° Retroactive effect ° Whether permissible

(Council Regulation No 1408/71, Arts 17 and 71(1)(b)(ii))

Summary

1. The factor which determines whether Article 71 applies at all is the residence of the person concerned in a Member State other than that to whose legislation he was subject during his last employment. It follows that Article 71(1)(b)(ii) also applies to an unemployed person, other than a frontier worker, who during his last employment resided in the Member State in which he worked, even where, in derogation from Article 13(2)(a) of that Regulation, and pursuant to Article 17 thereof, the competent authorities of two Member States were in agreement that the employed person was to remain subject to the social security legislation of one of those Member States, not

being the one in whose territory he was employed.

2. Article 71(1)(b)(ii) of Regulation No 1408/71 applies to a person other than a frontier worker who is unemployed and who, during his last employment, while residing in the Member State in which he worked was, under an agreement between the competent authorities pursuant to Article 17 of the Regulation, subject to the legislation of another Member State, even where the said agreement came into being when the employed person was already working and residing in the territory of one and the same Member State.

There is nothing in the wording of Article 17 to indicate that recourse to the derogation made available to the Member States by that provision is possible only as regards the future. On the contrary, it follows from the spirit and scheme of Article 17 that an agreement within the meaning of that provision must also be capable, in the interests of the worker or workers concerned, of covering past periods

Parties

In Case C-454/93,

REFERENCE to the Court under Article 177 of the EC Treaty by the Arbeidshof, Brussels, for a preliminary ruling in the proceedings pending before that court between

Rijksdienst voor Arbeidsvoorziening

and

Joop Van Gestel

on the interpretation of Articles 17 and 71(1)(b)(ii) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

THE COURT (Sixth Chamber),

composed of: F.A. Schockweiler, President of the Chamber, G.F. Mancini, C.N. Kakouris (Rapporteur), J.L. Murray and G. Hirsch, Judges,

Advocate General: G. Cosmas,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

having regard to the Report for the Hearing,

after hearing the oral observations of the French Government, represented by C. Chavance, the Italian Government, represented by D. Del Gaizo, and the Commission of the European Communities, represented by P. van Nuffel, at the hearing on 9 February 1995,

after hearing the Opinion of the Advocate General at the sitting on 6 April 1995,

gives the following

Judgment

Grounds

1 By judgment of 18 November 1993, received at the Court on 29 November 1993, the Arbeidshof (Higher Labour Court), Brussels, referred to the Court for a preliminary ruling pursuant to Article 177 of the EC Treaty questions relating to the interpretation of Articles 17 and 71(1)(b)(ii) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), hereinafter "the Regulation".

2 The questions were raised in proceedings between the Rijksdienst voor Arbeidsvoorziening (National Employment Office, hereinafter "RVA") and J.T.M. Van Gestel, who has Netherlands nationality, concerning the refusal by the RVA to grant him unemployment benefits pursuant to Article 71(1)(b)(ii) of the Regulation.

3 Mr Van Gestel worked from 1 June 1980 for Smithkline Beecham BV, a company whose seat is in the Netherlands, where he himself resided.

4 With a view to his temporary transfer to an affiliated company, SA Norden Europe (hereinafter "Norden"), whose seat is at Louvain-la-Neuve (Belgium), he moved to Belgium at the end of October 1988. He began working there from 1 December 1988.

5 Since Mr Van Gestel wished to remain subject to Netherlands social security, the Belgian Ministry of Social Welfare and the Netherlands State Secretary for Social Affairs and Employment reached an agreement that Netherlands social security legislation should continue to be applied to him for the duration of his employment in Belgium and at the latest until 30 November 1991. That agreement, concluded when Mr Van Gestel was already resident and working in Belgium, was based on Article 17 of the Regulation, which introduces an exception to Article 13(2)(a) of the Regulation, according to which a person employed on the territory of a Member State is to be subject to the legislation of that State.

6 As a result of the reorganization of Norden, Mr Van Gestel was dismissed on 31 October 1990. Compensation for severance was paid to him in the Netherlands. Subsequently he applied to the Belgian Hulpkas voor Werkloosheidsuitkeringen (Unemployment Benefit Branch Office) for unemployment benefits from 1 November 1990. He specified that in view of the severance compensation paid in the Netherlands, he was provisionally postponing his claim for payment of benefits but wished to be covered by the Rijksdienst voor Sociale Zekerheid (Belgian National Social Security Office) insurance.

7 That application was rejected on 7 February 1991 by a decision of the Provincial Unemployment Inspector for Vilvoorde, on the ground that Mr Van Gestel did not satisfy the conditions laid down in Belgian law which applied, according to that decision, pursuant to Article 67 of the Regulation.

8 Mr Van Gestel appealed against that administrative decision to the Arbeidsrechtbank (Labour Court), Brussels, which, in a judgment of 2 December 1991, annulled the decision and held that he was entitled to unemployment benefits from 1 November 1990. It was held in that judgment that the "competent institution" within the meaning of the Regulation was the Netherlands institution and that, during the entire period of his employment in Belgium, Mr Van Gestel had resided there,

so that his situation was governed by Article 71(1)(b)(ii) and not Articles 67 and 69 of the Regulation.

9 The RVA appealed against that judgment to the Arbeidshof, Brussels, which found it to be established that "during his last employment" Mr Van Gestel had resided and worked in Belgium.

10 The Arbeidshof noted that in its judgment in Case C-128/83 Caisse Primaire d' Assurance Maladie de Rouen v Guyot [1984] ECR 3507, the Court held that Article 71 of the Regulation did not apply to an unemployed person who, during his last employment, was residing in the Member State in which he was employed. It was uncertain whether that interpretation concerning the scope of Article 71 also applied to a situation such as that which gave rise to the main proceedings.

11 The Arbeidshof, Brussels, considered that the outcome of the dispute depended on the interpretation of the Regulation and therefore decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

"Must Article 71(1) of Regulation (EEC) No 1408/71 be interpreted as meaning that it does not apply to unemployed persons who during their last employment resided in the Member State in which they worked, even where, in derogation from Article 13(2)(a) of that Regulation, and pursuant to Article 17, therein referred to, the competent authorities of two Member States are in agreement that the employed person is to remain subject to the social security legislation of one of those Member States, not being the one in whose territory the unemployed (sic) person was employed?

As a secondary point, and should the Court of Justice be of the opinion that in such a case the State designated in the derogating agreement, which is not the one in which the unemployed person last worked, is the competent State, as provided in Article 71(1), is that also the case, and can the provisions of Article 71(1)(b)(ii) apply, where that agreement came into being when the employed person resided and worked in the territory of one and the same Member State and during that last employment resided and worked without interruption in that same Member State, in which his employer was also established, and that Member State is not the one to whose social security legislation the agreement made him subject during that employment?"

First question

12 With regard to the situation where a worker other than a frontier worker is wholly unemployed, which is the situation described in the national court' s judgment, Article 71(1) of the Regulation provides:

"1. An unemployed person who was formerly employed and who, during his last employment, was residing in the territory of a Member State other than the competent State shall receive benefits in accordance with the following provisions:

(a) (...)

(b) (i) (...)

(ii) An employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. Receipt of benefits under the legislation of the State in which he resides shall be suspended for any period

during which the unemployed person may, under the provisions of Article 69, make a claim for benefits under the legislation to which he was last subject."

13 That provision refers to the situation in which the State competent to provide unemployment benefits is not the State in which the unemployed person resides. It does not make a distinction according to whether the competent State is designated as such on the ground that the person concerned was employed there or for another reason. The question that arises is which State is competent in a case such as that in the main proceedings.

14 The answer to that question is provided by Article 13 et seq. of the Regulation.

15 Although, in accordance with Article 13(2)(a) of the Regulation, the State competent to provide unemployment benefits is in principle the State in which the worker is employed, that rule is, however, subject to the exceptions provided for, in particular, in Article 17 of the Regulation.

16 In application of the latter article, two or more Member States, the competent authorities of those States or the bodies designated by those authorities may, by common agreement, choose a competent State other than that of the place of employment. Such an agreement was concluded in the case in point in the main proceedings, designating the Kingdom of the Netherlands instead of the Kingdom of Belgium, which was in principle, according to Article 13, competent by reason of the place of employment.

17 Consequently, Article 71(1)(b) is applicable where, in derogation from the provisions of Article 13, the competent State has been designated pursuant to an agreement concluded in accordance with Article 17 of the Regulation.

18 It is true that in its judgment in Guyot cited above (at paragraph 8), the Court pointed out that Article 71(1) of the Regulation concerned only employed persons who were residing in a Member State other than that in which they were last employed and thus appears to distinguish between the State of employment and the State of residence and not between the competent State and the State of residence. Nevertheless, that judgment does not contradict the above interpretation of Article 71(1)(b) of the Regulation. It simply refers to the usual situation to which that provision applies, namely where the competent State is the State where the employed person has worked. It does not preclude the possibility of the competent State being the State designated by common agreement, in accordance with Article 17 of the Regulation.

19 In a case such as that in point in the main proceedings, the fact that the State of last employment of the person concerned is the State of his residence does not therefore preclude application of Article 71(1) of the Regulation where the competent State is not the State of residence.

20 That interpretation is corroborated by the purpose of Article 71(1)(b)(ii), the provisions of which are intended to guarantee to migrant workers unemployment benefits under the most favourable conditions for seeking new employment (see the judgment in Case 236/87 Bergemann v Bundesanstalt fuer Arbeit [1988] ECR 5125, at paragraph 18).

21 Those provisions are designed to enable the migrant worker to receive unemployment benefits in his State of residence.

22 That possibility is justified for certain categories of workers who retain close ties, in particular of a personal and vocational nature, with the country where they have settled and habitually reside. It is reasonable that workers who have such links with the State in which they reside should be accorded the best conditions in that State for finding new employment (see, for example, the judgment in Bergemann, cited above, at paragraph 20).

23 In order to attain that objective the provisions offer a choice to the worker, who is in the best position to know what are the possibilities of finding new employment. He may apply to the unemployment benefit scheme in the State in which he was last employed, or claim benefit in the State where he resides. In the case of a wholly unemployed worker who elects to be governed by the legislation of the State where he resides, that choice is made essentially ° indeed exclusively ° by the worker' s making himself available to the employment office of the State from which he is claiming the benefits. The worker may not, however, either aggregate the unemployment benefit from both States or, if he has made himself available only to the employment office in the territory of the Member State where he resides, claim unemployment benefits from the State in which he was last employed (see the judgment in Case 227/81 Aubin v Unedic and Assedic [1982] ECR 1991, at paragraph 19).

24 Moreover, according to the Court' s case-law, the factor which determines whether Article 71 applies at all is the residence of the person concerned in a Member State other than that to whose legislation he was subject during his last employment (see, most recently, the judgment in Case C-287/92 Maitland Toosey [1994] ECR I-279, at paragraph 13).

25 That determining factor implies that Article 71 is applicable even when, during his last employment, the worker resided and worked, either continuously or not, in the territory of the Member State in which his employer was also established.

26 It is true that application of the provision thus interpreted allows workers to receive unemployment benefits from a Member State in which they had not paid contributions during their last employment. However that is a consequence intended by the Community legislature, which meant to ensure that workers were given the best chance of finding new employment.

27 The reply to the first question must therefore be that Article 71(1)(b)(ii) of the Regulation should be interpreted as also applying to unemployed persons who during their last employment resided in the Member State in which they worked, even where, in derogation from Article 13(2)(a) of that regulation, and pursuant to Article 17, therein referred to, the competent authorities of two Member States are in agreement that the employed person is to remain subject to the social security legislation of one of those Member States, not being the one in whose territory the unemployed person was employed.

The second question

28 In its second question the national court asks whether Article 71(1)(b)(ii) applies even where the agreement pursuant to Article 17 of the Regulation came into being when the employed person was already working and residing in the territory of one and the same Member State.

29 As is made clear in the judgment in Case 101/83 Raad van Arbeid v Brusse [1984] ECR 2223, at paragraph 20, there is nothing in the wording of Article 17 to indicate that recourse to the derogation made available to the Member States by that provision is possible only as regards the future. On the contrary, it follows from the spirit and scheme of Article 17 that an agreement within the meaning of that provision must also be capable, in the interests of the worker or workers concerned, of covering past periods (same judgment, at paragraph 21).

30 The reply to the second question must therefore be that Article 71(1)(b)(ii) applies, even where the agreement pursuant to Article 17 of the Regulation came into being when the employed person was already working and residing in the territory of one and the same Member State.

Decision on costs

Costs

31 The costs incurred by French, German, and Italian Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Arbeidshof, Brussels, by judgment of 18 November 1993, hereby rules:

1. Article 71(1)(b)(ii) of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 must be interpreted as also applying to unemployed persons who during their last employment resided in the Member State in which they worked, even where, in derogation from Article 13(2)(a) of that Regulation, and pursuant to Article 17, therein referred to, the competent authorities of two Member States are in agreement that the employed person is to remain subject to the social security legislation of one of those Member States, not being the one in whose territory the unemployed person was employed.

2. That article applies even where the agreement pursuant to Article 17 of the Regulation came into being when the employed person was already working and residing in the territory of one and the same Member State.