Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 8 March 2017[1]

Case C-569/15

X
v
Staatssecretaris van Financiën

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands))

(Reference for a preliminary ruling – Regulation (EEC) No 1408/71 – Social security – Determination of the applicable legislation – Articles 13(2)(a) and 14(2)(b)(i) – Person normally employed in the territory of two Member States – Employee on three-month's unpaid leave pursuing an activity as an employed person in another Member State)

Introduction

1. This request for a preliminary ruling arises out of proceedings pending before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) between Ms X and the Staatssecretaris van Financiën (State Secretary for Finance) concerning the payment of income tax and social insurance contributions for the year 2009.

2. The referring court seeks guidance from the Court on the interpretation of conflict rules contained in Articles 13(2)(a) and 14(2)(b)(i) of Regulation (EEC) No 1408/71.[2] In particular, the referring court raises the question whether an employee who pursues an employed activity in another Member State for a period of three months during her unpaid leave must be considered to be a person normally employed in the territory of two Member States for the purpose of determining the applicable legislation.

1 Original language: English.

2 Regulation of the Council 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71'). Regulation No 1408/71 was repealed and replaced with effect from 1 May 2010 by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1). However, it remains applicable *ratione temporis* to the main proceedings.

Legal framework

3. Article 1 of Regulation No 1408/71 contains the following definition of 'employed person and self-employed person':

'(a) employed person and self-employed person mean respectively:

any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons or by a special scheme for civil servants;'

4. Article 13 of that regulation provides:

'1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to the provisions of Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;'

5. Article 14(2)(b)(i) of that regulation provides:

'2. A person normally employed in the territory of two or more Member States shall be subject to the legislation determined as follows:

…

(b) a person other than that referred to in (a) shall be subject:

(i) to the legislation of the Member State in whose territory he resides, if he pursues his activity partly in that territory or if he is attached to several undertakings or several employers who have their registered offices or places of business in the territory of different Member States;'

The facts in the main proceedings

6. Ms X is a Dutch national residing and employed in the Netherlands.

7. She agreed with her Dutch employer that between 1st December 2008 and 28 February 2009 she would take unpaid leave, under a special arrangement. It was agreed that her employment contract would remain in place and she would return to her regular duties on 1st March 2009.

8. During the period of her unpaid leave Ms X stayed in Austria and was employed as a ski instructor by an employer established in Austria. During those months she carried out no work in the Netherlands.

9. The dispute between Ms X and the Staatssecretaris van Financiën (State Secretary for Finance) in the main proceedings concerns the assessment of income tax and social insurance contributions imposed for the year 2009. In particular, the dispute focuses on whether in January and February 2009 Ms X was insured on a compulsory basis under the Dutch social security system and therefore was obliged to pay national insurance contributions.

10. The Gerechtshof Arnhem-Leeuwarden (Arnhem-Leeuwarden Court of Appeal, Netherlands), in the appeal against the judgment of the Rechtbank Gelderland (District Court, Gelderland) ruled that the employment relationship between Ms X and the Dutch employer continued during the period of unpaid leave and the Dutch legislation was also applicable during the two months at issue.

11. Ms X brought an appeal on a point of law against that judgment before the referring court.

12. The referring court observes that the appeal on a point of law raises the question of which provision of Regulation No 1408/71 designates the legislation applicable in January and February 2009. According to that court, it could be either the general conflict rule contained in Article 13(2)(a) of that regulation or the special rule in Article 14(2)(b)(i) thereof which refers to persons normally employed in the territory of two or more Member States. Since during the months in question Ms X was effectively employed exclusively in Austria, it could be argued that only the Austrian legislation applied to her. But it could also be argued, as indeed the lower court decided, that she was normally employed in the territory of two Member States, the Netherlands and Austria. This would point to the application of the Dutch legislation, in accordance with Article 14(2)(b)(i) of Regulation No 1408/71.

13. As a consequence, the referring court entertains a doubt whether the Netherlands can be considered to be a Member State where Ms X was normally employed during her unpaid leave, in conjunction with her employment in Austria. Under national law, she was employed by the Dutch employer during the relevant period, although she was on unpaid leave and in fact performed no work in the Netherlands. But the question arises whether Ms X must be considered as having been 'normally' employed in two Member States for the purposes of Article 14(2) of Regulation No 1408/71. An additional question is whether the place of the employment should be examined over a longer period, for instance, per calendar year. The referring court observes that a shorter time horizon would result in a frequent reassessment of the insurance situation and, potentially, frequent changes of the applicable legislation, with the associated administrative burden for the person concerned.

The question referred for a preliminary ruling and the proceedings before the Court of Justice

14. It is in the above circumstances that the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Title II of Regulation No 1408/71 be interpreted as meaning that a worker residing in the Netherlands who normally works in the Netherlands and who takes unpaid leave for three months is deemed to continue to be (also) employed in the Netherlands during that period if (i) the employment relationship continues during that period and (ii) for purposes of the application of the Dutch Werkloosheidswet (Law on unemployment) that period is considered to be a period of employment?

(2) (a) What legislation does Regulation No 1408/71 designate as applicable if during the unpaid leave that worker is employed in another Member State?

(2) (b) Is it still important in that regard that the person concerned was employed in the same other Member State twice in the following year and for periods of approximately one to two weeks during the subsequent three years, without any mention in the Netherlands of unpaid leave?'

15. The order for reference of 30 October 2015 was received at the Court Registry on 5 November 2015. Written observations were submitted by the Dutch and the Czech Governments as well as the European Commission. The Dutch Government and the Commission presented oral argument at the hearing on 14 December 2016.

Analysis

16. By its first question, the referring court is essentially asking, for the purposes of determining the applicable legislation, whether Article 14(2) of Regulation No 1408/71 must be interpreted as meaning that a person residing and employed in one Member State (the Netherlands) who takes unpaid leave for three months in order to pursue an employed activity in another Member State (Austria) is considered as normally employed in two Member States during that period.

17. By its second question the referring court essentially seeks to determine what legislation is designated as applicable to such a person by the provisions contained in Title II of Regulation No 1408/71.

18. In my view, the two questions are intertwined. If the answer to the first question were affirmative and Ms X were considered to be normally employed in two Member States, she would be subject to the legislation of the Member State in whose territory she resides, the Netherlands, in accordance with the conflict rule contained in Article 14(2)(b)(i) of Regulation No 1408/71. If, on the contrary, Ms X were to be considered as having not been employed in the Netherlands during her unpaid leave, the Austrian legislation would be applicable during the months in question.

19. The issue turns on the question whether Ms X's situation with regard to her Dutch employer, during the period of her unpaid leave, qualifies as a period of (normal) employment for the purposes of applying the conflict rules contained in Title II of Regulation No 1408/71.

20. The positions submitted to the Court by the interested parties differ on this point.

21. The Dutch Government and the Commission propose, albeit by slightly different reasoning, that Ms X continued to be employed in the Netherlands during the period of her unpaid leave. The Dutch Government points to the fact that her employment contract was maintained during that period and that she continued to be insured as a worker on the basis of the Dutch social security legislation. The Dutch legislation allows for such treatment for a maximum of 78 weeks of unpaid leave.

22. The Commission observes that a mere suspension of an employment relationship during a limited period of time cannot deprive the person concerned of her status as 'employed person'. The decisive factor is that, despite that suspension, the person remains covered against risks under a social security scheme mentioned in Article 1(a) of Regulation No 1408/71.[3]

23. The Czech Government holds an opposing view and argues that a period of unpaid leave during which the person concerned does not pursue any activity whatsoever for her Dutch employer and does not receive any payment cannot be considered as a period of employment activity for the purpose of designating applicable legislation. The Czech Government further observes that the classification of that period under national law, as a period of employment, should not influence that conclusion.

3 Referring to judgment of 7 June 2005, *Dodl and Oberhollenzer* (C-543/03, EU:C:2005:364, paragraphs 31 and 34).

24. I observe that the provisions of Title II of Regulation No 1408/71, of which Articles 13 and 14 form part, constitute a complete and uniform system of conflict rules, the aim of which is to ensure that workers moving within the Union are to be subject to the social security scheme of only one Member State, in order to prevent more than one legislative system from being applicable and to avoid the complications which may result from that situation. [4]

25. The present case calls for a determination whether the situation at hand falls under the general conflict rule contained in Article 13(2) of Regulation No 1408/71 (*lex loci laboris*) or under the special rule of Article 14(2)(b)(i) (*lex domicilii*) which is applicable to a person normally employed in the territory of two or more Member States.

26. In that regard, it is necessary to ascertain whether Ms X was normally employed both in Austria and in the Netherlands within the meaning of the latter provision.

27. First, as regards her activity in Austria, I do not see any substantive reasons that could preclude that activity from being taken into account for the purpose of determining whether she was normally employed in two Member States. In particular, as the Commission rightly observes, employment which lasts three consecutive months can by no means be considered as purely marginal activity, which would have to be disregarded for the purpose of determination of the applicable legislation. It appears from the facts of the present case that during the three months of her unpaid leave Ms X has actually pursued an economic activity exclusively in Austria. This activity cannot clearly be disregarded in the course of application of the conflict rules of Regulation No 1408/71.

28. Secondly, the matter is less clear when it comes to deciding whether Ms X maintained an activity as an employed person in the Netherlands during her unpaid leave, whereas in reality she did not pursue any activity in that Member State during that period.

29. It should be noted that Article 1 of the regulation, concerning its scope of application *ratione personae*, defines the notions of 'employed person' and 'self-employed person', in the first place, by making reference to 'any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a [relevant social security scheme]'.

30. A person has the status of an 'employed person' within the meaning of the regulation provided that that person is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme mentioned in Article 1(a) of that regulation, irrespective of the existence of an employment relationship. [5]

31. In judgment *Dodl and Oberhollenzer*, [6] the Court observed that it is not the status of the employment relationship which determines whether or not a person continues to fall within the scope *ratione personae* of Regulation No 1408/71, but the fact that he or she is covered against risks under a social security scheme mentioned in its Article 1(a). The mere suspension of the main obligations of an employment relationship for a given period of time cannot deprive the employee of his or her status as an 'employed person'. [7]

32. I consider that this case law – as suggested by the Commission – is also relevant to the present situation.

4 See, in particular, judgment of 24 March 1994, *Van Poucke* (C-71/93, EU:C:1994:120, paragraph 22).

5 Judgments of 12 May 1998, *Martínez Sala* (C-85/96, EU:C:1998:217, paragraph 36), and of 11 June 1998, *Kuusijärvi* (C-275/96, EU:C:1998:279, paragraph 21).

6 Judgment of 7 June 2005 (C-543/03, EU:C:2005:364).

7 Judgment of 7 June 2005, *Dodl and Oberhollenzer* (C-543/03, EU:C:2005:364, paragraph 31). See also point 12 of Opinion of Advocate General Geelhoed in *Dodl and Oberhollenzer* (C-543/03, EU:C:2005:112).

33. Certainly, the fact that a person is covered by the social security scheme is not sufficient in itself to conclude that that person normally pursues activity within the territory of a Member State. The wording of Article 14(2) also requires the existence of an employment relationship.[8] Thus, in the present case, in order to determine whether Ms X has maintained her activity in the Netherlands during her unpaid leave, while simultaneously pursuing a separate activity in Austria, one has to take into account, first, whether her employment relationship remained in place, for instance, if the performance of her employment contract was only temporarily suspended and, second, whether she maintained her employee status in the Netherlands within the meaning of Article 1(a) of Regulation No 1408/71.

34. As regards the first element, it appears from the order for reference that the employment relationship between Ms X and the Dutch employer continued during the period of unpaid leave – both in fact and according to the Dutch law – which is the law applicable to the employment relationship in question. As regards the second element, in so far as Ms X belonged to a branch of the social security system in the Netherlands during the relevant period, she also maintained her status in the Netherlands as 'employed person' within the meaning of Article 1(a) of Regulation No 1408/71, regardless of whether she in fact pursued any economic activity during that limited time period. It follows that Ms X has to be considered as normally employed in two Member States for the purposes of applying Title II of Regulation No 1408/71, despite the temporary suspension of her employment relationship in one of those Member States.

35. As explained by the referring court, the doubts arising in the present case stem from the fact that Ms X was granted a special, unpaid leave, different from the usual interruptions of employment activity, such as limited working time or vacation leave, in that the temporary non-performance of work does not flow directly from the employment contract but from a special agreement which is envisaged by the Dutch labour law. However, I consider that, provided that the interruption of activity under the special agreement remains temporary and the person concerned retains her social security coverage in the Netherlands, the situation is comparable to other, more typical examples of the exercise of two simultaneous activities in two Member States, for instance, during paid leave or over the weekend.[9] If Ms X had taken paid leave to pursue her additional activity as a ski instructor in Austria during the period in question, this would most certainly qualify as employment in two Member States. I consider that the same conclusion should be reached in the present situation, where Ms X was on unpaid leave, given that her employment contract was only temporarily suspended and that she remained covered by the Dutch social security scheme.

36. In my opinion, the proposed interpretation is consistent with the purpose of the rules in Title II of Regulation No 1408/71, which are aimed at facilitating freedom of movement for workers and freedom to provide services and, thus, also at encouraging economic interpenetration whilst avoiding administrative complications, in particular for workers and undertakings.[10]

37. In the present case, the application of the general rule of conflict, (*lex loci laboris*) would imply that Ms X's situation was subject to the Dutch legislation, except for one month in 2008 and two months in 2009, when she would be subject to the Austrian legislation. In my view, that outcome would not be consistent with the purpose of the conflict of law rules contained in Title II of Regulation No 1408/71.

8 See, with regard to similar expression in Article 13 of Regulation 883/2004, Fuchs M./Cornelissen R., EU social security law: a commentary on EU Regulations 883/2004 and 987/2009, Oxford Hart 2015, p. 177.

9 See, with regard to analogous provisions contained in Articles 11 and 13 of Regulation No 883/2004, Practical guide on the applicable legislation in the European Union, the European Economic Area (EEA) and in Switzerland (European Commission, 2013), p. 24-25. It should be noted that, according to the disclaimer, the Practical guide was prepared by the Administrative Commission for the Coordination of Social Security Systems, comprised of Member States' representatives, and is intended to provide a practical instrument to assist the determination of applicable social security legislation, but it does not necessarily reflect the official position of the Commission.

10 Judgments of 17 December 1970, *Manpower* (35/70, EU:C:1970:120, paragraph 10), and of 9 November 2000, *Plum* (C-404/98, EU:C:2000:607, paragraph 19). See also, with reference to the case-law of the Polish Supreme Court, Ślebzak, K., *Koordynacja systemów zabezpieczenia społecznego*, LEX Wolters Kluwer, Warsaw, 2012, p. 242.

38. Frequent changes of applicable legislation imply additional administrative burdens. Thus, even though in the present case Ms X has chosen to question the applicability of the Dutch legislation during her unpaid leave, I believe that, in most situations, it would be preferable for a migrant worker, given the extra administrative steps involved, to remain subject to the legislation of one Member State. This is also the view strongly advocated by the Dutch Government and the Commission.

39. Finally, as a purely subsidiary consideration, I observe that that interpretation also fits with the definition of a person who 'normally pursues an activity as an employed person in two or more Member States' introduced in Regulation No 883/2004, which, although inapplicable *ratione temporis* to the present case, is instructive in so far as it attempts to consolidate the pre-existing practice. In particular, that definition refers to a person 'who simultaneously, or in alternation, for the same undertaking or employer or for various undertakings or employers, exercises one or more separate activities in two or more Member States'.[11]

40. In the light of all those reasons, I consider that, given that the unpaid leave implied merely a temporary suspension of performance of the employment contract in the Netherlands, and that Ms X remained covered by the Dutch social security system, she should be considered as having maintained her status as an employed person in the Netherlands. Her situation from 1st December 2008 to 28 February 2009 would therefore be governed by Article 14(2)(b)(i) of Regulation No 1408/71, pointing to the application of *lex domicilii*, in this case, the Dutch legislation.

41. In order to reply to the question 2(b) formulated by the referring court, I would point out that since Ms X is clearly to be considered as having been normally employed in Austria during the period in question, it is irrelevant for the purposes of determining the applicable legislation in the present case whether or not she was also employed in Austria during the subsequent years.

42. In contrast to the situations considered in the case law quoted by the referring court[12], Ms X was simultaneously employed in two Member States by two separate employers. It is therefore not necessary to take into account a temporal limit of 12 months in relation to the temporary posting of employees, nor discuss whether her employment in Austria was 'temporary'.

43. I would like to introduce one final caveat.

44. The conflict rules contained in Title II of Regulation No 1408/71 are not only aimed at enabling the single State principle, but also at ensuring that the migrant worker remains fully covered by a social security system while exercising an activity in two or more Member States.

45. In this regard, as I have already underlined on the occasion of an earlier case,[13] in borderline situations – such as the present case –account should be taken of the level of benefits granted by the legislation of the relevant Member State, in order to ensure that the legislation in question does not exclude the person concerned from the protection offered by the fundamental branches of social security. If the level of protection available under that legislation were manifestly inadequate, this consideration would have to be taken into account in determining the applicable legislation. In particular, it could be appropriate to temporarily suspend application of the legislation determined according to the conflict rules and to apply the legislation of another Member State, which provides for adequate protection.

11 See Article 14(5) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 (OJ 2009 L 284, p. 1), as amended by Regulation (EU) No 465/2012 (OJ L 149, p. 4) provides: '5. For the purposes of the application of Article 13(1) of the basic Regulation, a person who "normally pursues an activity as an employed person in two or more Member States" shall refer to a person who simultaneously, or in alternation, for the same undertaking or employer or for various undertakings or employers, exercises one or more separate activities in two or more Member States'.

12 Judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe* (C-115/11, EU:C:2012:606, paragraphs 35-37).

13 See my Opinion in *Franzen and Others* (C-382/13, EU:C:2014:2190, points 89-90).

46. However, those final considerations do not appear to be applicable to the present case, since the Dutch Government has confirmed at the hearing that Ms X remained covered by all relevant branches of the Dutch social security system during her unpaid leave.

47. In the light of all the above considerations, I consider that Article 14(2)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that, in circumstances such as those of the main proceedings, a person residing and employed in one Member State who takes unpaid leave for three months in order to pursue an employed activity in another Member State for another employer is considered as normally employed in two Member States during that period for the purposes of determining the applicable legislation. Such person is, in accordance with that provision, subject to the legislation of the State of residence.

Conclusion

48. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) as follows:

Article 14(2)(b)(i) 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, must be interpreted as meaning that, in circumstances such as those in the main proceedings, a person residing and employed in one Member State who takes unpaid leave for three months in order to pursue an employed activity in another Member State for another employer is considered as normally employed in two Member States during that period for the purposes of determining the applicable legislation. Such person is, in accordance with that provision, subject to the legislation of the State of residence.