to unemployment benefit depends on his fitness for work and such fitness for work has been accepted by the competent authorities of the said Member State, those authorities may not refuse the worker in question unemployment benefit on the ground that he is in receipt in another Member State of an aggregated and apportioned invalidity pension determined in accordance with Community rules.

In Case 79/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour du Travail [Labour Court], Mons, for a preliminary ruling in the action pending before that court between

MARGHERITA BACCINI

and

OFFICE NATIONAL DE L'EMPLOI [National Employment Office]

on the interpretation of Regulation No 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community and Regulation No 574/72 fixing the procedure for implementing Regulation No 1408/71 and, in the alternative, on the validity of Regulation No 1408/71 having regard to Article 51 of the Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

Mrs Baccini, an Italian national, worked in Italy and then in Belgium. As from 5 July 1973 she received an invalidity allowance in Belgium.

On 6 September 1974 the competent Belgian institution, the Institut d'Assurances Maladie-Invalidité [National Sickness and Invalidity Insurance Institution, hereinafter referred to as "the Belgian institution"] sent to the Istituto Nazionale delle Previdenza Sociale [National Social Welfare Institution, hereinafter referred to as "the Italian institution"] the coordinating forms with a view to determining Mrs Baccini's pension rights in Italy in accordance with the provisions of Chapter 3 of Title IV of Regulation No 574/72 of the Council fixing the procedure for implementing Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community.

After receiving the forms and having regard to the terms of Article 40 (3) of Regulation No 1408/71 (which has now become paragraph (4) following the amendment of that regulation by Regulation No 2595/77 of 21 November 1977 — Official Journal L 302) which states that:

"A decision taken by an institution of a Member State concerning the degree of invalidity of a claimant shall be binding on the institution of any other Member State . . ."

the Italian institution granted Mrs Baccini an apportioned Italian invalidity pension the amount of which was calculated after the Italian and Belgian insurance periods had been aggregated. That pension was paid as from 1 August 1974.

On 25 April 1975 a report of a medical examination carried out in Belgium declared that Mrs Baccini's degree of incapacity was less than 66%. Consequently Mrs Baccini was held to be fit to resume work in Belgium as from 28 April 1975. She was subsequently admitted once again to the invalidity scheme.

By a letter dated 23 June 1977 the Belgian institution informed Mrs Baccini that by virtue of Article 70 (2) of the Belgian Law of 9 August 1963 the Belgian invalidity allowance would be reduced by the amount of the Italian invalidity pension.

On 23 June 1977 the Belgian institution informed the Italian institution that Mrs Baccini's incapacity for work was not permanent and that the Belgian authorities had determined that it would end on 31 October 1977.

As, according to the Belgian doctor, her degree of incapacity had once more become less than 66% Mrs Baccini was held to be fit to resume work as from 1 September 1977. The Belgian institution advised the Italian institution of this by letter of 17 October 1977.

On 18 April 1978 Italy's consular agent at La Louvière informed the Directorate-General of the Italian institution in Rome that Mrs Baccini was no longer suffering from invalidity for the purposes of Belgian legislation and asked whether

"the apportioned Italian pension" had to be paid back.

Having become fit for work again in Belgium Mrs Baccini thus regained her right under Belgian legislation to receive unemployment benefit. The first paragraph of Article 141 of the Royal Decree of 20 December 1963 on employment (amended on 11 September 1969) provides that:

"A worker in receipt of benefits under a Belgian invalidity insurance scheme shall not be entitled to unemployment benefit for unfitness for work."

In fact Mrs Baccini received Belgian unemployment benefit from 28 April to 4 June 1975 and again as from 1 September 1977.

However the Italian invalidity pension continued to be paid to Mrs Baccini and the Belgian institution advised the Office National de l'Emploi [National Employment Office] of this. The director of the regional office of the Office National de l'Emploi at La Louvière acted on that information by decision dated 8 December 1978. He withdrew Mrs Baccini's entitlement to unemployment benefit and directed that she should repay the sums which he considered she had thus improperly received. He did so in reliance on the third paragraph of Article 141 of the Royal Decree of 20 December 1963 on employment and redundancy, as amended on 11 September 1969, which states that:

"A worker in receipt of benefit under a foreign sickness and invalidity insurance scheme owing to incapacity for work or occupational disease shall not be entitled to unemployment benefit for unfitness for work if the degree of that incapacity is 50% or more."

Mrs Baccini instituted proceedings against that decision before the Tribunal du Travail [Labour Tribunal], Charleroi, and then brought proceedings by way of appeal before the Cour du Travail [Labour Court], Mons, which, by judgment of 3 April 1981, decided to submit the following questions to the Court of Justice:

1. Must Article 51 of the Treaty of Rome and Regulations Nos 1408/71 and 574/72 be interpreted as meaning that it is in accordance with the aims of the Treaty for a migrant worker to be prohibited from receiving both unemployment benefit in a Member State of the Community (in which he fulfils the conditions of that State's legislation as to the state of incapacity denied by the authorities of that State) and an apportioned invalidity pension (type B legislation) payable by another Member State for incapacity for work accepted by the authorities of that State, when both social security benefits do not cover the same injury, the amount of the invalidity benefit is much lower than the unemployment allowance and two medical authorities of the competent institutions have adopted different attitudes as to the claimant's state of incapacity?

2. If a worker is in receipt of an allowance for incapacity for work under the legislation of Member State A (type A legislation) and invalidity benefits (type B legislation) payable by an institution in Member State B pursuant to Community regulations, and that worker then ceases to be accepted as unfit for work by the competent authority in State A, ceases

to draw benefit under the invalidity insurance legislation of that State's competent institution but signs on for unemployment benefit with State A's competent institution whilst nevertheless still drawing State B's invalidity pension (the attitude of the competent authority in State B remaining unchanged), is the competent institution of State A justified on the basis of the aims of Article 51 of the Treaty in claiming that there is incompatibility between two benefits of a different kind (unemployment benefit and invalidity pension) and in relying on national rules on overlapping to reduce the unemployment benefit to nothing? If the answer is in the affirmative is not that situation itself the result of the enjoyment of the invalidity pension under Regulation No 1408/71 so that the regulation does not provide the security required by Article 51 of the Treaty and is contrary to the objectives of the Treaty?

The judgment making the reference for a preliminary ruling was received at the Court Registry on 10 April 1981.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community written observations were lodged by Mrs Baccini, represented by D. Rossini, a member of the Associazioni christiane lavoratori italiani, Brussels, Social and Legal Department for Migrant Workers; the Office National de l'Emploi, represented by its Director-General, Mr André; the Italian Government, represented by Arnaldo Squillante, acting as Agent, and Ennio Viola, Advocate, and by the Commission of the European Communities, represented by its Legal Adviser, Jean Amphoux, and Francis Herbert of the Brussels Bar, both acting as Agents.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to undertake measures of inquiry in accordance with Article 21 of the Statute and Article 45 of the Rules of Procedure.

By a letter dated 6 October 1981 the Registrar of the Court asked the Belgian Government to produce the correspondence between the Belgian and Italian institutions so as to establish accurately:

The degree of invalidity determined by the Belgian institution and notified to the Italian institution;

The date of that notification;

The date on which the Belgian authority recognized Mrs Baccini as being again fit for work and therefore withdrew the Belgian invalidity allowance;

The terms of the letter by which the Belgian institution notified the Italian institution that the period of Mrs Baccini's incapacity for work had come to an end.

The Italian Government was requested to inform the Court of the reasons why the Italian institution considered that it had to grant Mrs Baccini a permanent invalidity pension.

The Belgian and Italian Governments were requested to submit their observations by 15 November 1981.

The Belgian Government sent the documents requested on 11 November 1981. The Italian Government did not furnish the information requested. Mrs Baccini's representative undertook to provide a partial answer to the questions put by the Court. On the advice of the Judge-Rapporteur and the Advocate General the President of the Court decided to accept the documents submitted by Mrs Baccini.

The answers to the questions put by the Court have been incorporated in the foregoing account of the facts and written procedure.

The documents contained in the file on the case which were submitted to the Court following those additional measures of inquiry also show that the Italian invalidity pension was withdrawn, with effect from 1 February 1981, by a decision of the Italian authorities of 22 May 1981. It should also be noted that Regulation No 2793/81 of 17 September 1981 (Official Journal L 275) terminated the concordance between Italian and Belgian legislation on conditions relating to the degree of invalidity.

In accordance with Article 54 of the Rules of Procedure the date for the opening of the oral procedure was fixed for the date by which the questions put by the Court were to be answered.

II — Summary of the written observations submitted to the Court

Mrs Baccini, the appellant in the main action, considers that the legal problems as set out in the judgment making the reference raise the question whether, in order to determine an unemployed person's incapacity for work, it is necessary to have regard to the legislation of the State to which the worker was subject at the time when the risk materialized or to the legislation of the State which is responsible for paying the invalidity benefit the grant of which annuls the worker's right to unemployment benefit due under the legislation of the first State.

She claims that it is necessary to resolve that legal problem because the Belgian institution withdrew her unemployment benefit not for the reason that she received an Italian pension but because that pension had been awarded to her for a degree of incapacity for work which exceeded 50%.

In her opinion, by analogy with Article 39 (1) of Regulation No 1408/71, according to which incapacity for work followed by invalidity must be determined by the institution of the Member State whose legislation was applicable at the time when incapacity for work followed by invalidity occurred, her degree of incapacity for work should be determined under Belgian legislation because it was in Belgium that she fell ill, was recognized as suffering from invalidity and then as being again fit for work and that she signed on for unemployment benefit. The fact that the Italian authorities considered Mrs Baccini's invalidity to be permanent simply proves that those authorities considered themselves bound by the concordance of the criteria of invalidity provided for by Article 40 (4) of Regulation No 1408/71 only as regards positive effects (grant of the pension) and not as regards negative effects (withdrawal of the pension).

Mrs Baccini considers moreover that by virtue of its structure and nature the Italian invalidity pension may be

assimilated to an anticipatory retirement pension and thus overlaps with the Belgian unemployment benefit within the limits set by the first paragraph of Article 141 and Articles 145 and 146 of the Royal Decree of 20 December 1963.

She observes that if the application of the provision at issue, the third paragraph of Article 141 of the Royal Decree of 20 December 1963, is made possible by the very terms of Regulation No 1408/71, which provides in Article 12 (2) that:

"The provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits or other income may be invoked even though the right to such benefits was acquired under the legislation of another Member State or such income arises in the territory of another Member State",

then the strict application of the third paragraph of Article 141 has had the effect of depriving her, as a migrant worker, of entitlement to unemployment benefit under Belgian legislation alone. That result is contrary not only to Articles 48 to 51 of the Treaty but also to Article 1 of the Protocol to the European Convention on Human Rights which provides that every natural person is entitled to the peaceful enjoyment of his possessions and therefore of his only source of income. The protection of fundamental rights is an integral part of the general principles of law which the Court has the task to safeguard wherever they are adversely affected by a rule of Community law.

Mrs Baccini emphasizes that she is in the position of which she complains because of the effect of a measure adopted by the Community, Regulation No 1408/71 of the Council. If the Belgian and Italian periods of insurance had not been aggregated, and thus if the Community regulations had not been applied, she would not have received the apportioned invalidity pension payable by Italy and would have continued to receive Belgian unemployment benefit which is greater than the amount of the Italian invalidity pension.

Mrs Baccini proposes that the questions submitted to the Court should be answered as follows:

"Any provision contained in Regulations Nos 1408/71 or 574/72 of the Council whose application has the effect of reducing to nothing the benefits acquired by a migrant worker under the legislation of the State to which he was subject when the relevant risk materialized is incompatible with the Treaty."

"If benefits of a different kind are incompatible, the worker concerned must in any event receive an amount by way of benefits at least equal to that due under the legislation of the State on whose territory the risk entitling him to the benefits materialized."

The Office National de l'Emploi, the repondent in the main action, considers that, although the Court has no jurisdiction in proceedings for a preliminary ruling to decide whether rules of national and Community law are compatible, it should nevertheless be observed that the third paragraph of Article 141 of the Royal Decree of 20 December 1963 does not at all contradict the provisions of Community law. The prohibition of the overlapping of unemployment benefit with an invalidity

pension is one of the cases governed by Article 12 (2) of Regulation No 1408/71.

It adds that in distinguishing between Belgian and foreign benefits the Belgian Royal Decree is very favourable to the migrant worker: the payment of benefits under foreign sickness and invalidity insurance schemes entails withdrawal of Belgian unemployment benefit only in so far as the degree of incapacity for work is recognized as being 50% or more (third paragraph of Article 141) whereas receipt of a benefit under the Belgian sickness and invalidity insurance scheme constitutes an absolute bar to entitlement to Belgian unemployment benefit (first paragraph of Article 141).

The Office National de l'Emploi believes that the legal issues raised by this case stem from the fact that the Italian authorities did not apply Article 40 (4) of Regulation No 1408/71 correctly.

Neither Article 40 (4) nor the rules of concordance contained in Annex IV to Regulation No 1408/71 make any distinction between decisions producing a positive effect (acquisition of a right to a pension) and decisions producing a negative effect (withdrawal of the pension). Consequently the Italian institution should have considered itself bound by each decision of the Belgian institution and in particular should have withdrawn the invalidity pension awarded to Mrs Baccini when the Belgian institution declared that she was fit to resume work.

The Office National de l'Emploi believes that it is not for the Belgian courts or the Court of Justice but for the Italian State to specify the designation of the benefits which it awards and consequently to indicate whether the invalidity pension which it grants is a benefit awarded under a sickness and invalidity insurance scheme or an anticipatory old-age pension.

The *Commission* analyses the various provisions applicable: the provisions of Belgian law on unemployment and invalidity benefits, the Italian legislation on invalidity pensions, the Community rules referred to in the judgment making the reference and the provisions of Belgian and Community law for the prevention of overlapping benefits.

It stresses that the issues raised by this case are important in two respects:

First, the financial consequences of the contested decision of the Director of the regional office of the Office National de l'Emploi at La Louvière: by virtue of that decision Mrs Baccini is not only disentitled to unemployment benefit but also to cash benefits under the Belgian sickness and invalidity insurance scheme if she falls ill (she remains entitled to benefits in kind under Italian legislation because she receives an Italian pension — Article 28 of Regulation No 1408/71) and to Belgian family allowances. She remains entitled only to the much smaller Italian family allowances (Article 77 (1) (a) of Regulation No 1408/71). The Commission also points out that Mrs Baccini is faced with repaying unemployment benefits considered to have been improperly received when her only means of subsistence is the insignificant amount of the Italian invalidity pension

Secondly, the large number of similar disputes in Belgium which have been decided differently: the Commission, which has entered into discussions with the Belgian authorities in order to resolve such situations in a uniform manner, considers that the solution to these problems really amounts to a question of interpreting national law which does not fall within the jurisdiction of the Court in so far as it is for the Belgian authorities to take account of the real nature of the Italian invalidity pension.

Against that background the Commission points out that the Belgian and Italian concepts of invalidity are fundamentally different. The Italian legislation makes provision for the grant of *pensions* which presuppose that invalidity is permanent, although they do not rule out all work, and their acquistion and amount depend on the length of insurance periods (type B legislation: see Section 2 of Chapter 2 of Title III of Regulation No 1408/71). The Belgian law, however, which is based on risk, makes provision for the payment of invalidity *allowances* the amount of which is independent of the length of insurance periods and which only require continuing invalidity of a degree of more than 66% in order to be maintained (Section 1 of Chapter 2 of Title III of Regulation No 1408/71). Thus the Italian invalidity rules amount to an "anticipatory retirement pension" scheme whereas the Belgian rules are akin to a sickness benefit scheme.

According to the Commission, which agrees with Mrs Baccini on this point, it would have been desirable for the Italian invalidity pension to be assimilated not to the Belgian invalidity allowance but to more comparable benefits such as an anticipatory old-age pension or a miner's invalidity pension which do not entail withdrawal of unemployment benefits but simply reduce them (Articles 146 and 146 bis of the Royal Decree of 20 December 1963).

The Commission agrees that the question whether the third paragraph of Article 141 of the Belgian Royal Decree of 20 December 1963 is compatible with the Community regulations does not arise in so far as:

First, it constitutes a provision for the prevention of overlapping benefits as defined in Article 12 (2) of Regulation No 1408/71. That must be the conclusion if Belgian unemployment benefits and the Italian invalidity pension may not in any event be considered to be "benefits of the same kind in respect of invalidity, old age, death or occupational disease" within the meaning of Article 12 (1) of Regulation No 1408/71 which permits benefits of the same kind to overlap;

Secondly, it follows from the judgment in Case 37/77 *Mura* [1977] ECR 1699 that when rights are granted pursuant to the application of national law alone, that national law applies in its entirety, including its provisions against the overlapping of benefits which expressly apply to benefits granted under foreign legislation.

The Commission observes however that, having bound the Italian institutions under Article 40 (4) of Regulation No 1408/71 by determining the degree of Mrs Baccini's invalidity, the Belgian institutions then rely on the grant of the apportioned Italian invalidity pension in order to deduce from this that, in accordance with the provisions of Belgian law for the prevention of overlapping benefits and Article 12 (2) of Regulation No 1408/71, Mrs Baccini may draw unemployment benefit in Belgium. The Commission considers that "the apparently absurd result of the application of the national provision against the overlapping of benefits in its entirety and exclusively is caused by the fact that the effects of Article 40 (4) of Regulation No 1408/71 are more extensive than the draftsmen of that provision had imagined" in so far as that regulation in no way contemplates the coordination of benefits coming under different branches of social security.

In the Commission's view Mrs Baccini's fitness to resume work in Belgium and, as the case may be, her entitlement to draw unemployment benefit in that country cannot be contested on the ground that the Italian invalidity pension continues to be paid to her. Under Italian legislation the degree of invalidity is determined once and for all on the date of acquisition of the right to the pension and is not re-assessed.

The Commission considers that in so far as, on the one hand, the Court has never been asked to consider the question of the effects of a national provision against overlapping where it applies to benefits of a different kind and, on the other hand, it has nevertheless held that the scope of such a provision may be limited by the regard which should be had to the aims of Article 51 of the Treaty, the questions put by the national court should be answered on the basis of the objectives of the Treaty and secondary Community law.

The first aim of the Community regulations is to ensure that workers may indeed move freely.

As the Court stated many times, the aim of Article 51 of the Treaty and the regulations adopted for its implementation is to prevent a migrant worker from losing the benefit of his periods of employment because he moves from one Member State to another so that he is no worse off than if he had worked all his life in one Member State (judgment in Case 22/77 *Greco* [1977] ECR 1978 — Opinion of Mr Advocate General Warner).

The second fundamental principle of the Community rules was affirmed in particular in the judgments in Case 24/75 *Petroni* [1975] ECR 1149 and Case 34/69 *Duffy* [1969] ECR 597. It is that the rights which workers have in a Member State from the application of national legislation alone must not be diminished by the effect of provisions of Community law. Consequently a migrant worker may not be entirely deprived of a national benefit, acquired without the aid of Community law, by the effect of a provision of national law against the overlapping of benefits which was applied as the result of the grant of an apportioned pension in another Member State.

The principle of restricting the effect of provisions of national law against the

overlapping of benefits was repeated in the *Brouwer-Kaune* judgment in Case 181/78 [1979] ECR 2111.

In the Commission's view a third fundamental principle is that a migrant worker may not suffer a disadvantage because of a system which, in the absence of a common social security scheme, exists merely to coordinate national legislation which is not yet harmonized (judgment in Case 50/75 *Massonet* [1975] ECR 1473).

In view of the principles set forth above the Commission proposes that the questions should be answered as follows:

1. So long as a migrant worker receives a social security benefit under national legislation alone Regulation No 1408/71 does not prevent the national legislation from being applied to him in its entirety, including national rules against the overlapping of benefits.

2. However, Regulation No 1408/71 and Article 51 of the EEC Treaty on which it is based do not permit a national provision against the overlapping of benefits to create a situation in which, owing to the total withdrawal of unemployment benefit to which a migrant worker was entitled under national legislation, that worker receives in the aggregate less than he would have in fact received if he had never worked anywhere else than in that Member State.

According to the *Italian Government*, the prohibition of overlapping to which the Cour du Travail, Mons, refers comes within the scope of the first sentence of Article 12 (2) of Regulation No 1408/71 of the Council.

Article 12 (2) confirms in Community law the rule against overlapping contained in the third paragraph of Article 141 of the Belgian Royal Decree of 20 December 1963.

However, the Italian Government considers that Article 12 (2) of Regulation No 1408/71 is not compatible with the aims of the Treaty as stated in Articles 48 to 51 and reaffirmed by the Court in a consistent line of decisions. Article 12 (2) constitutes a hindrance to freedom of movement for workers or at any rate restricts their freedom to choose their place of work in so far as it adversely affects rights which they have under national legislation alone and thus deprives them of benefits to which they would be entitled if they had spent their working life in one Member State.

In the view of the Italian Government the non-conformity of Article 12 (2) with the provisions of Articles 48 and 51 of the Treaty cannot be cured by reason of the fact that if Mrs Baccini is allowed to receive both the Italian invalidity pension and Belgian unemployment benefit her situation as a migrant worker will be more favourable than that of a national worker and will cause discrimination between workers in the same Member State.

III — Oral procedure

The parties to the main action, the Italian Government and the Commission presented oral argument at the sitting on 9 December 1981.

The Advocate General delivered his opinion at the sitting on 10 February 1982.

Decision

1 By judgment dated 3 April 1981 which was received at the Court on 10 April 1981 the Cour du Travail [Labour Court], Mons, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions concerning, on the one hand, the interpretation of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416) and Regulation No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (Official Journal, English Special Edition 1972 (I), p. 159) and, on the other hand, and secondarily, the validity of Regulation No 1408/71 in regard to the aims of the Treaty in general and the terms of Article 51 thereof in particular.

2 Those questions were raised in the context of a dispute between Mrs Baccini and the Office National de l'Emploi [National Employment Office] of Belgium.

3 Mrs Baccini, an Italian national, worked in Italy and then in Belgium. She received an invalidity allowance in Belgium as from 5 July 1973.

4 In accordance with the provisions of Regulation Nos 1408/71 and 574/72 of the Council the Institut National d'Assurance Maladie-Invalidité of Belgium [hereinafter referred to as "the Belgian institution"] informed the Istituto Nazionale della Previdenza Sociale [hereinafter called "the Italian institution"] of Italy of Mrs Baccini's invalidity. According to paragraph (3) (which has since become paragraph (4)) of Article 40 of Regulation No 1408/71, "a decision taken by an institution of a Member State concerning the degree of invalidity of a claimant shall be binding on the institution of any other Member State concerned, provided that the concordance between the legislations of these States on conditions relating to the degree of invalidity is acknowledged in Annex IV". Before Council Regulation No 2793/81 (Official Journal L 275, p. 1), which amended Regulation No 1408/71, came into effect on 18 September 1981, Annex IV accepted the concordance between the Belgian and Italian legislation on conditions relating to the degree of invalidity.

5 In view of the information which it had received from the Belgian institution on Mrs Baccini's condition and which was binding upon it by virtue of the provisions of Regulation No 1408/71 cited above and Annex IV thereto, the Italian institution awarded her as from 1 August 1974 an invalidity pension which, having regard to the fact that Mrs Baccini had worked in Italy and Belgium, was aggregated and apportioned in accordance with the procedure laid down by Regulation Nos 1408/71 and 574/72.

6 The medical officer of the competent Belgian institution subsequently found that Mrs Baccini's unfitness for work had come to an end and the Belgian invalidity benefits ceased to be paid to her. The first paragraph of Article 141 of the Belgian Royal Decree of 20 December 1963 on employment and redundancy, as amended on 11 September 1969, provides that "a worker in receipt of benefits under a Belgian sickness and invalidity insurance scheme shall not be entitled to unemployment benefit for unfitness for work" and Mrs Baccini, who was no longer in receipt of a Belgian invalidity benefit, was granted Belgian unemployment benefit which she drew from 28 April 1975 to 4 June 1975 and then again from 1 September 1977.

7 As amended, the third paragraph of Article 141 of the Belgian Royal Decree of 20 December 1963 provides that "a worker in receipt of benefits under a foreign sickness and invalidity insurance scheme for incapacity for work not caused by an accident at work or by occupational disease shall not be entitled to unemployment benefit for unfitness for work if the degree of that incapacity is 50% or more". On the basis of those provisions on 8 December 1978 the director of the regional office of the Office National de l'Emploi at La Louvière, relying on the fact that Mrs Baccini was receiving an invalidity pension which the Italian institution had granted to her, refused her Belgian unemployment benefit from 28 April to 4 June 1975 and then from 1 September 1977 and required her to repay the benefits which she had received during those periods.

8 Mrs Baccini instituted proceedings against that decision before the Tribunal du Travail [Labour Tribunal], Charleroi, and then brought proceedings by way of appeal before the Cour du Travail, Mons, which asks in substance:

First, whether Article 51 of the EEC Treaty and Regulations Nos 1408/71 and 574/72 must be interpreted in such a way that it is in accordance with

the aims of the Treaty to refuse a migrant worker unemployment benefit pursuant to rules of national law against the overlapping of benefits in a State in which he is no longer recognized as unfit for work on the ground that he is in receipt of an apportioned invalidity pension from another Member State which has been determined with regard to the Community regulations;

Secondly, if the answer to that question is affirmative, whether that situation is "not itself the result of the enjoyment of the invalidity pension under Regulation No 1408/71 so that the regulation does not provide the security specified by Article 51 of the Treaty and is contrary to the objectives of the Treaty".

9 Both the wording of the first question put by the Mons court and the grounds of its judgment indicate that the grant of unemployment benefit to the migrant worker whose case is before that court depends on her fitness for work and that her fitness for work is accepted by the authorities of the State from which the benefit is claimed.

10 Simply because Mrs Baccini receives an invalidity pension fixed in the manner prescribed by Regulations Nos 1408/71 and 574/72 from another Member State the competent authorities of the State required to pay unemployment benefit to her refused to do so on the basis of a provision of their own national legislation.

11 Therefore the answer to the first question raised by the Cour du Travail, Mons, turns on whether, having regard to the aims of the Treaty, the grant to a migrant worker by a Member State, other than that in which he works, of an invalidity pension awarded and calculated on the basis and under the conditions prescribed by the Community regulations in question may have the effect of withdrawing from that worker the right to a different kind of benefit which the legislaiton of the State of employment alone would give him if he had not benefited from application of the Community regulations.

12 Article 48 to 51 of the Treaty seek to ensure that workers may move freely within the Community. Regulations Nos 1408/71 and 574/72, adopted pursuant to Article 51 of the Treaty, give practical effect to the principles enunciated in that article in the field of social security.

13 Although according to the case-law of the Court restrictions may be placed on migrant workers as a counterpart to the social security advantages which they derive under the Community regulations and which they could not obtain without them, the aim of Articles 48 to 51 of the Treaty would not be achieved if the effect of the application of those regulations were to withdraw or reduce the social security advantages which a worker enjoys under the legislation of a Member State alone.

14 It would be contrary to the objectives of Articles 48 to 51 of the Treaty if provisions designed to facilitate the movement of migrant workers in reality made it more difficult for them by depriving them of advantages which they could have enjoyed if it were not for those articles of the Treaty and the provisions adopted by the Council to implement them.

15 It is true that Article 12 (2) of Regulation No 1408/71 provides that: "The provisions of the legislation of a Member State for reduction, suspension or withdrawal of benefit in cases of overlapping with other social security benefits or other income may be invoked even though the right to such benefits was acquired under the legislation of another Member State or such income arises in the territory of another Member State". However, having regard to the objectives of Articles 48 to 51 which have just been mentioned, the provisions of that paragraph may not be construed as applying to the provisions of the national legislation of a Member State which, for the purpose of granting unemployment benefit the amount of which depends upon a claimant's fitness for work, do not take account of the actual physical condition of the worker on the date on which he becomes unemployed but take as evidence that a migrant worker is not fit for work the fact that he has previously been granted an invalidity pension in another Member State pursuant to rules of Community law and on the basis of information provided by the first Member State.

16 As a result of the foregoing the answer to the first question raised by the Cour du Travail, Mons, must be that Article 51 of the Treaty and Regulations Nos 1408/71 and 574/72 of the Council must be interpreted as meaning that where, under the national legislation of a Member State, the right of a migrant worker to unemployment benefit depends on his fitness for work and such fitness for work has been accepted by the competent authorities of the said Member State, those authorities may not refuse the worker in question unemployment benefit on the ground that he is in receipt in another Member State of an aggregated and apportioned invalidity pension determined in accordance with Community rules.

17 In view of the answer which has just been given to the first question asked by the Cour du Travail, Mons, there is no need to answer the second question raised by that court which concerns the validity of Regulation No 1408/71 in regard to the objectives of the Treaty and appears to have been put in the alternative.

Costs

18 The costs incurred by the Italian Government, the Belgian Government and the Commission which have submitted observations to the Court are not recoverable.

19 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Cour du Travail, Mons, by judgment of 3 April 1981, hereby rules:

Article 51 of the EEC Treaty, Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed

persons and their families moving within the Community and Regulation No 574/72 fixing the procedures for implementing that regulation must be interpreted as meaning that where, under the national legislation of a Member State, the right of a migrant worker to unemployment benefit depends on his fitness to work and such fitness for work has been accepted by the competent authorities of the said Member State, those authorities may not refuse the worker in question unemployment benefit on the ground that he is in receipt in another Member State of an aggregated and apportioned invalidity pension determined in accordance with Community rules.

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 23 March 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 10 FEBRUARY 1982 [1]

Mr President,
Members of the Court,

1. Introduction

The case of Mrs Baccini shows that the measures to coordinate or link national social security schemes prescribed by Article 51 of the EEC Treaty to help workers move freely and which are now mainly contained in Regulation No 1408/71 (codified version, Official Journal 1980, C 138, p. 1) do not always lead to the desired result in national

1 — Translated from the Dutch