JUDGMENT OF THE COURT (Fifth Chamber)
15 March 2001 *

In Case C-444/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Arrondissementsrechtbank te Roermond, Netherlands, for a preliminary ruling in the proceedings pending before that court between

R. J. de Laat

and

Bestuur van het Landelijk Instituut Sociale Verzekeringen,

on the interpretation of Article 71(1)(A) 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6),

* Language of the case: Dutch.

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, D.A.O. Edward, P. Jann and L. Sevón (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Bestuur van het Landelijk Instituut Sociale Verzekeringen, by A.I. van der Kris, acting as Agent,

— the Belgian Government, by A. Snoecx, acting as Agent,

— the Portuguese Government, by L.I. Fernandes and A.C. Pedroso, acting as Agents,

— the Commission of the European Communities, by P.J. Kuijper, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Bestuur van het Landelijk Instituut Sociale Verzekeringen, represented by M.M.P. Gijzen, acting as Agent; of the Belgian Government, represented by A. Snoecx; and of the Commission, represented by H.M.H. Speyart, acting as Agent, at the hearing on 5 October 2000,

after hearing the Opinion of the Advocate General at the sitting on 16 November 2000,

gives the following

Judgment

1 By order of 3 December 1998, received at the Court on 7 December 1998, the Arrondissementsrechtbank te Roermond (Roermond District Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) six questions on the interpretation of Article 71(1)(a) 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6; 'the Regulation').

2 Those questions arose in proceedings between Mr De Laat and the Bestuur van het Landelijk Instituut Sociale Verzekeringen ('the LISV') concerning unemployment benefit.

Legal background

Community law

3 Article 13 of the Regulation provides:

'1. Subject to Article 14c, 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 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;

... '.

4 Article 71(1)(a) of the Regulation provides:

'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) (i) A frontier worker who is partially or intermittently unemployed in the undertaking which employs him shall receive benefits in accordance with the provisions of the legislation of the competent State as if he were residing in the territory of that State; these benefits shall be provided by the competent institution.

(ii) A frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed; these benefits shall be provided by the institution of the place of residence at its own expense'.

National legislation

5 In the case of Belgian legislation, Article 131a(1) of the Royal Decree of 25 November 1991 laying down the unemployment regulations (*Moniteur Belge* of 31 December 1991, p. 29888) provides that part-time employees with retained rights may, for the duration of their part-time employment, receive an 'income-guarantee benefit' provided that they meet certain conditions. According to Article 29(2)(1) of that Decree, a part-time employee with retained rights is an employed person who, at the time of entering into the part-time arrangement, fulfils all the conditions necessary to qualify for benefits as a full-time employee.

6 Article 27(2)(a) of that Decree states that a worker is temporarily unemployed where he is out of work but remains bound by a contract of employment, performance of which is temporarily suspended, whether in whole or in part.

7 In the Netherlands, pursuant to Article 16(1) of the Werkloosheidswet (Law on Unemployment; 'the WW'), a worker who is unemployed is a worker who remains available on the labour market, but whose working hours per calendar week have decreased by at least five hours or by at least one half and whose wages have fallen correspondingly. In principle, a person in those circumstances has a right to a 'wage-related allowance'.

Facts and the questions referred

8 Mr De Laat, a Netherlands national, resides in the Netherlands with his family. From 1 December 1994 until 29 November 1996 inclusive, he was employed full-time in a managerial capacity with Amstelstad Belgium at Bree in Belgium. On 2 December 1996, under the terms of a new employment contract with the same employer, Mr De Laat took up duties as a window-cleaner. The new contract was for part-time employment of 13 hours per week.

9 On 30 November 1996 Mr De Laat applied to the LISV for unemployment benefit under the WW in respect of a period of unemployment commencing on 2 December 1996. By decision of 2 January 1997, the LISV found that Mr De Laat was not entitled to unemployment benefit under the WW on the ground that, since he was partially unemployed, the State of employment was the proper place in which to pursue such a claim.

10 By letter of 5 February 1997, Mr De Laat challenged the LISV's decision.

11 By decision of 23 April 1997, the LISV confirmed its refusal to grant unemployment benefit and declared that the claim was unfounded. It was against that decision that Mr De Laat appealed to the Arrondissementsrechtbank te Roermond.

12 In Belgium, Mr De Laat had applied for 'income-guarantee benefit' in respect of the period commencing on 2 December 1996. By decision of 7 May 1997, however, the competent Belgian institution refused his claim on the ground that he was not partially unemployed within the meaning of Article 71(1)(a)(i) of the Regulation or for the purposes of Belgian law. Mr De Laat did not challenge that decision.

13 According to the Arrondissementsrechtbank te Roermond, it must be established whether Mr De Laat is entitled to a benefit under the WW on the basis of Article 71(1)(a) of the Regulation. In view of its uncertainty as to the interpretation of the terms 'wholly unemployed' and 'partially unemployed' within the meaning of that provision, the national court stayed proceedings in order to refer the following questions to the Court for a preliminary ruling:

'1. When determining whether a frontier worker is partially unemployed and therefore on the basis of Article 71(1)(a)(i) of Regulation No 1408/71 may claim benefit from the competent Member State, or is wholly unemployed and therefore on the basis of Article 71(1)(a)(ii) of Regulation No 1408/71 may claim benefit from the Member State in which he resides, is it relevant whether under the national legislation of the competent Member State or of the Member State in which he resides the worker in question is to be regarded as partially or wholly unemployed or should "partially unemployed" and "wholly unemployed" be given a univocal — Community — construction?

2. If the classification under national law is relevant, which classification should prevail where the view adopted under the law of the competent Member

State and that under the law of the Member State in which the worker resides lead to different results?

3. If the classification under national law is irrelevant and "partially unemployed" or "wholly unemployed" must be given a univocal — Community — construction, what criterion should then be applied?

4. Is it of decisive importance in that regard whether or not there is a continuing link with the State of employment, and if so, what conditions must be satisfied for there to be such a link? Is there such a link if:

   (a) there is a concrete prospect that the employee may be re-employed by the former employer or

   (b) the employee continues to work in the same State, even though to a lesser extent?

5. Alternatively, when determining whether the criterion referred to in Question 3 above is fulfilled, should a more formal test be applied, such as, for example, whether or not there is a continuing employment relationship for the purposes of labour law?

6. Having regard to the answers to the above questions, is a frontier worker who, immediately following termination of his full-time employment,

commences work with the same employer under a part-time contract of employment to be regarded as a partially unemployed frontier worker within the meaning of Article 71(1)(a)(i) of the Regulation or as a wholly unemployed frontier worker within the meaning of Article 71(1)(a)(ii) of the Regulation?'

Questions 1 and 2

14 By its first question, the national court is essentially asking whether uniform Community criteria are to be applied in order to determine whether a frontier worker is to be regarded as partially unemployed or wholly unemployed within the meaning of Article 71(1)(a) of the Regulation.

15 The LISV, the Belgian and Portuguese Governments and the Commission maintain that this question should be answered in the affirmative.

16 According to established case-law, the essential aim of the Regulation is to ensure that social security schemes governing workers in each Member State who move within the Community are applied in accordance with uniform Community criteria (see, in particular, Case 69/79 *Jordens-Vosters* [1980] ECR 75, paragraph 11).

17 Moreover, according to the Court, it follows from the provisions of Title II of the Regulation that the application of national social security legislation to a particular situation is determined by reference to criteria drawn from the rules of Community law. Although it is for the legislature of each Member State to lay

down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch of such a scheme, that does not mean that the Member States are entitled to determine the extent to which their own legislation or that of another Member State is applicable (see Case 276/81 *Kuijpers* [1982] ECR 3027, paragraph 14).

18 The answer to the first question must therefore be that in order to determine whether a frontier worker is to be regarded as partially unemployed or wholly unemployed within the meaning of Article 71(1)(a) of the Regulation, uniform Community criteria must be applied. That assessment may not be made on the basis of criteria drawn from national law.

19 In view of the reply to the first question, there is no need to address the second question.

Questions 3, 4, 5 and 6

20 By its third, fourth and fifth questions, the national court is essentially asking what criteria can be applied in order to determine, under Community law, whether a worker is partially unemployed or wholly unemployed within the meaning of Article 71(1)(a) of the Regulation.

21 By its sixth question, the national court is asking whether a person in Mr De Laat's circumstances is to be regarded as a frontier worker who is partially unemployed within the meaning of Article 71(1)(a)(i) of the Regulation or as a

frontier worker who is wholly unemployed within the meaning of Article 71(1)(a)(ii) thereof.

22 Those questions should be examined together.

Observations of the parties

23 As regards the interpretation of the terms 'partially unemployed' and 'wholly unemployed' as used in the Regulation, the LISV refers to the case-law of the Centrale Raad van Beroep (Higher Social Security Court), the court of last instance in the Netherlands with regard to matters of this kind. According to that case-law, a person is wholly unemployed where, at the time when unemployment arises, a link can no longer be deemed to exist between employee and employer in the form of a concrete prospect that the person may be re-employed. On the other hand, where there is a continuing link between the worker and the employer, it means that the worker is partially or intermittently unemployed and that he must apply to the competent Member State for unemployment benefit.

24 The Belgian Government maintains that the terms 'partially unemployed' and 'intermittently unemployed' in Article 71(1)(a)(i) of the Regulation broadly cover the same cases as Belgian law.

25 According to the Portuguese Government, an important factor is the maintenance of an employment relationship in the Member State in which the worker was previously in full-time employment. In its view, a frontier worker who, on termination of a full-time contract of employment with a particular employer, commences work with the same employer on a part-time basis must be regarded as a frontier worker who is partially unemployed within the meaning of Article 71(1)(a)(i) of the Regulation.

26 The Commission points out that Article 13(1) of the Regulation lays down the principle that persons to whom the Regulation applies are to be subject to the social security legislation of a single Member State only. According to the case-law of the Court, the Regulation must be interpreted in such a way as to avoid not only positive but also negative conflict as between the social security schemes of the Member States.

27 The second principle to be taken into account, which is laid down in Article 13(2)(a) of the Regulation, is that of *lex loci laboris*, under which the worker is covered by the social security scheme of the Member State where he works.

28 In the context of Article 71 of the Regulation, which provides for an exception to that principle, the Community legislature has started from the premiss that in the case of a frontier worker who becomes unemployed, the institution best placed to assist him and from which he can most easily receive the benefits to which he is entitled is the competent institution of the State of residence.

29 If, on the other hand, links with the State of employment have not been completely severed, notably because the person concerned still has employment there, even if only part-time, then the logic of that exception to the principle of *lex loci laboris* no longer holds good, and the principle reasserts itself.

30 According to the Commission, a frontier worker is therefore 'partially unemployed' if he continues in part-time employment in the territory of the State of employment, so that he remains subject to the social security scheme of that State under Article 13(2)(a) of the Regulation. In contrast, a frontier worker

who is 'wholly unemployed' is a person who has lost any employment or social security link with the State in which he was formerly employed.

Findings of the Court

31 It should be noted at the outset that the provisions of Title II of the Regulation, which include Article 13, constitute, as the Court has consistently held, a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Community are subject to the social security scheme of only one Member State, in order to prevent the national legislation of more than one Member State from being applicable and to avoid the attendant complications of such a situation (see, in particular, Case C-202/97 *FTS* [2000] ECR I-883, paragraph 20, and Case C-404/98 *Plum* [2000] ECR I-9379, paragraph 18).

32 Also, as the Court has already stated (see Case 39/76 *Mouthaan* [1976] ECR 1901, paragraph 13; Case 227/81 *Aubin* [1982] ECR 1991, paragraph 12; and Case 1/85 *Miethe* [1986] ECR 1837, paragraph 16), Article 71 of the Regulation is intended to ensure that migrant workers receive unemployment benefit on the conditions most favourable to the search for new employment.

33 That being so, it must be acknowledged that, by laying down the rule that a wholly unemployed frontier worker coming within the definition set out in Article 1(b) of the Regulation is entitled to benefits solely in the Member State in which he resides, Article 71(1)(a)(ii) was based on the assumption that such a

worker would find in that State the conditions most favourable to the search for new employment (see *Miethe*, cited above, paragraph 17).

34 However, the protection of workers — which is the aim pursued by Article 71 of the Regulation — would be enfeebled if a worker who, in a Member State other than the State of residence, remains employed by the same undertaking, but part-time, while remaining available for work on a full-time basis, were obliged to apply to an institution in his place of residence for help in finding additional work. The fact that he has passed from full-time employment to part-time employment by virtue of a new contract is in this respect irrelevant.

35 More specifically, the institution of the place of residence would be considerably less well placed — as compared with its counterpart in the competent Member State — to assist the worker in finding additional employment on terms and conditions compatible with his part-time job since, in all likelihood, such employment would have to be in the territory of the competent Member State.

36 It is only when a worker no longer has any link with the competent Member State and is wholly unemployed that he must apply to the institution of his place of residence for assistance in finding employment.

37 The answers to the third, fourth, fifth and sixth questions must therefore be that if, in a Member State other than that in whose territory he resides, a worker remains in employment with the same undertaking, but part-time, while remaining available for work on a full-time basis, he is partially unemployed and the related benefits are to be provided by the competent institution of that State. On the other hand, if a frontier worker no longer has any link with that State and is wholly unemployed, those benefits are to be provided by the

institution of the place of residence at its own expense. It is for the national court to determine on the basis of those criteria, in the case pending before it, the category to which the worker in question belongs.

Costs

38 The costs incurred by the Belgian and Portuguese Governments and by the Commission, 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Arrondissementsrechtbank te Roermond by order of 3 December 1998, hereby rules:

1. **In order to determine whether a frontier worker is to be regarded as partially unemployed or wholly unemployed within the meaning of Article 71(1)(a) 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 (EEC) No 2001/83 of 2 June 1983, uniform Community criteria must be applied. That assessment may not be made on the basis of criteria drawn from national law.

2. If, in a Member State other than that in whose territory he resides, a worker remains in employment with the same undertaking, but part-time, while remaining available for work on a full-time basis, he is partially unemployed and the related benefits are to be provided by the competent institution of that State. On the other hand, if a frontier worker no longer has any link with that State and is wholly unemployed, those benefits are to be provided by the institution of the place of residence at its own expense. It is for the national court to determine on the basis of those criteria, in the case pending before it, the category to which the worker in question belongs.

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 15 March 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber