JUDGMENT OF THE COURT (Fifth Chamber)

4 December 2003 *

In Case C-92/02,

REFERENCE to the Court under Article 234 EC by the Arbeidsrechtbank van het Arrondissement Tongeren (Belgium) for a preliminary ruling in the proceedings pending before that court between

Nina Kristiansen

and

Rijksdienst voor Arbeisdvoorziening,

on the interpretation of Regulation (EEC) No 1408/71 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), and of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

* Language of the case: Dutch.

THE COURT (Fifth Chamber),

composed of: C.W.A. Timmermans, acting for the President of the Fifth Chamber, D.A.O. Edward and A. La Pergola (Rapporteur), Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

after considering the written observations submitted on behalf of the Commission of the European Communities by D. Martin, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 6 March 2003,

gives the following

Judgment

1 By a judgment of 11 March 2002, received at the Court on 15 March 2002, the Arbeidsrechtbank van het Arrondissement Tongeren (Tongeren District Labour Court) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Regulation (EEC) No 1408/71 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) (hereinafter 'Regulation No 1408/71'), and of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 These questions were raised in a dispute between Mrs Kristiansen and the Rijksdienst voor Arbeidsvoorziening (National Employment Office, hereinafter the 'RVA') relating to an application for unemployment benefit made by her and which had been dismissed by the RVA.

Legal background

Community legislation

3 Article 67 of Regulation No 1408/71, entitled 'Aggregation of periods of insurance or employment', provides as follows:

'1. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of insurance shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as periods of insurance had they been completed under that legislation.

2. The competent institution of a Member State whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of employment shall take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other Member State, as though they were periods of employment completed under the legislation which it administers.

3. Except in the cases referred to in Article 71(1)(a)(ii) and (b)(ii), application of the provisions of paragraphs 1 and 2 shall be subject to the condition that the person concerned should have completed lastly:

— in the case of paragraph 1, periods of insurance,

— in the case of paragraph 2, periods of employment,

in accordance with the provisions of the legislation under which the benefits are claimed.

4. Where the length of the period during which benefits may be granted depends on the length of periods of insurance or employment, the provisions of paragraph 1 or 2 shall apply, as appropriate.'

4 Article 28a of the Conditions of Employment of Other Servants of the European Communities (hereinafter 'the Conditions of Employment'), inserted by Council Regulation (ECSC, EEC, Euratom) No 2799/85 of 27 September 1985 amending the Staff Regulations of officials and the conditions of employment of other servants of the European Communities (OJ 1985 L 265, p. 1), provides as follows:

'1. A former member of the temporary staff who is unemployed when his service with an institution of the European Communities has been terminated:

— who is not in receipt of a retirement or invalidity pension from the European Communities,

— whose service is not terminated by resignation or by cancellation of the contract for disciplinary reasons,

— who has completed a minimum of six months' service,

— and who is resident in a Member State of the Communities,

shall be eligible for a monthly unemployment allowance under the conditions laid down below.

Where he is entitled to unemployment benefits under a national scheme, he shall be obliged to declare this to the institution to which he belonged, which shall immediately inform the Commission thereof. In such cases, the amount of those benefits will be deducted from the allowance paid under paragraph 3.

2. To be eligible for this unemployment allowance, a former member of the temporary staff shall:

(a) be registered, at his own request, as seeking employment with the employment authorities of the Member State in which he establishes his residence;

(b) fulfil the obligations laid down by the law of that Member State for persons in receipt of unemployment benefits under that law;

(c) forward every month to the institution to which he belonged, which shall immediately forward it to the Commission, a certificate issued by the competent national employment authority stating whether or not he has fulfilled the obligations and conditions referred to in (a) and (b).

The allowance may be granted or maintained by the Community, even where the national obligations referred to under (b) have not been fulfilled, in cases of illness, accident, maternity, invalidity or a situation recognised as being similar or where the national authority, competent to meet those obligations, has given a dispensation.

...

4. The unemployment allowance shall be paid to the former member of the temporary staff for a maximum of 24 months from the date of termination of service. If, however, during that period the former member of the temporary staff ceases to fulfil the conditions laid down in paragraphs 1 and 2, payment of the unemployment allowance shall be suspended. Payment shall be resumed if before the expiry of that period the former member of the temporary staff again fulfils the said conditions and has not acquired the right to national unemployment benefit.

...

8. The unemployment allowances paid to a former member of the temporary staff who is unemployed shall be subject to Regulation (EEC, Euratom, ECSC) No 260/68 laying down the conditions and procedure for applying the tax for the benefit of the European Communities.

9. The national departments with responsibility for employment and unemployment, acting in accordance with their national legislation, and the Commission shall cooperate with each other in an effective manner in order to ensure that this Article is properly applied.'

5 Article 7(4) of Regulation No 1612/68 provides that:

'Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.'

National legislation

6 Article 30 of the Royal Decree of 25 November 1991 concerning rules on unemployment (*Belgisch Staatsblad* of 31 December 1991, hereinafter the 'Royal Decree') provides as follows:

'In order to be eligible for unemployment benefit, a full-time worker must have completed a waiting period comprising the following number of working days:

...

2. 468 during the 27 months preceding the claim, if the worker is more than 36 and less than 50 years of age,

...

The reference period referred to in the first paragraph is extended by the number of days included in the period:

...

3. of at least six months in which the person concerned carries on an occupation in the course of which the person concerned does not come under the social security system in respect of unemployment; the extension may not be for more than nine years.'

7 Article 37(1) of the Royal Decree provides as follows:

'In the application of this section, periods of employment are to be taken into account in an occupation or undertaking subject to social security in respect of unemployment, and for which simultaneously:

1. payment of at least the minimum wage has been made

...

2. deductions for social security, including those in respect of unemployment, have been made.'

8 Article 44 of the Royal Decree states that:

'In order to be eligible for unemployment benefit, the unemployed person must have ceased to be in work and in receipt of remuneration for reasons beyond his control.'

9 Article 46(1) of the Royal Decree is worded as follows:

'The following in particular are regarded as remuneration within the meaning of Article 44:

...

5. payment to which the employee is entitled on termination of his employment, with the exception of compensation for non-material damage and payment which is awarded in addition to unemployment benefit;

...

For the purposes of the first subparagraph of Article 46(1)(5), payment or part of the payment which a person who is involuntarily unemployed receives as a consequence of the termination of an employment relationship is deemed to be payment awarded in addition to unemployment benefit, if the following conditions are fulfilled:

— the payment was not regarded by the parties as representing payment in lieu of notice;

— the payment or part of the payment must not have been paid in substitution for the benefits normally awarded under arrangements relating to the termination of employment, in so far as such benefits have in fact been paid.'

10 Article 14 of the Ministerial Decree of 26 November 1991 relative to the application of the rules relating to unemployment (*Belgisch Staatsblad* of 25 January 1992, hereinafter 'the Ministerial Decree') provides as follows:

'When calculating the necessary days of work, services are not to be taken into account which have been performed in an occupation or in an undertaking not subject to social security in respect of unemployment, even if deductions were made.'

The main proceedings and the questions referred

11 Mrs Kristiansen was born on 17 November 1961 and is a Norwegian national. From 1 June 1988 to 1 November 1994 she carried on an occupational activity in Norway, having completed her university studies there. During this period of occupational activity, she was subject to the Norwegian social security system.

12 From 1 November 1994 to 31 October 1996, Mrs Kristiansen worked for the Institute for Reference Materials and Measurements (hereinafter 'the IRMM') in Geel, Belgium, under an 'Individual Fellowship Contract' with the Commission of the European Communities (hereinafter 'the Fellowship Contract'). The primary objective of this contract was to enhance the professional qualifications of young workers. Towards that end, Mrs Kristiansen took part in a research training project, and the conditions relating to the project were set out in an annex to her contract. Those conditions provided that she was not to receive a salary, but she was paid a monthly amount to cover her travel and subsistence costs. Furthermore, payment of social security contributions and taxes was her responsibility. She was not subject to the Belgian social security system.

13 After the Fellowship Contract expired, Mrs Kristiansen was unemployed for one month.

14 From 1 December 1996 to 30 November 1999, she worked under a contract as a temporary member of staff with the Commission, where she was subject to the social security scheme applying to officials and servants of the European Communities.

15 After that contract expired, Mrs Kristiansen applied for unemployment benefit in Belgium. By decision of 23 June 2000, the RVA dismissed that application on the

ground that she did not fulfil the conditions laid down by Belgian legislation, which required her to have completed 468 working days or equivalent days during the relevant reference period, which comprised the 27 months preceding her application.

16 In its decision, the RVA refused to take into account the services performed by Mrs Kristiansen as an employee of the Commission during the period from 1 December 1996 to 30 November 1999. It based its decision on the fact that these services were performed in an occupation or an undertaking not subject to social security in respect of unemployment, and could accordingly not be taken into account by virtue of Article 37(1) of the Royal Decree and Article 14 of the Ministerial Decree. However, the RVA took the view that the occupational activity concerned extended the reference period for eligibility under the Belgian national system of unemployment benefits, by virtue of Article 30(3) of the Royal Decree.

17 By contrast, the RVA held that, as the activities carried on by Mrs Kristiansen with the IRMM between 1 November 1994 and 31 October 1996 constituted a training period, which had been undertaken by Mrs Kristiansen as a trainee fellowship student, this period did not extend the reference period under Article 30(3) of the Royal Decree.

18 In those circumstances, Mrs Kristiansen had failed to show that she had completed a sufficient number of working days to be entitled to unemployment benefits under Belgian legislation.

19 Mrs Kristiansen challenged the decision of the RVA before the Arbeidsrechtbank van het Arrondissement Tongeren.

20 Mrs Kristiansen argued before the national court that the activities carried out by her with the IRMM under the Fellowship Contract constituted an occupational activity. She submitted in that regard that such a period of training with the IRMM was subject to a special status under international law, arising under the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3, hereinafter 'the EEA Agreement'). She pointed out that in certain Member States which are parties to the EEA Agreement, a post-graduate position with the IRMM is treated as constituting an occupational activity, whether or not subject to the social security system, whereas in Belgium it is treated as a training period for fellowship students. In that Member State, a fellowship student is not entitled to participate on a voluntary basis in the social security system which governs occupational activities. Mrs Kristiansen claimed that an inequality of this nature in the social security status of a person carrying on post-graduate activities was contrary to Article 7(4) of Regulation No 1612/68.

21 The RVA argued that the activity undertaken by Mrs Kristiansen with the IRMM was not an occupational activity, but constituted a training period for fellowship students. It was clear from Article 7 of the annex to the Fellowship Contract, which set out the general conditions applying under the contract, that the person concerned had received no salary, but had been paid a monthly amount to cover her travel and subsistence costs, and that she was not subject to the social security system. It followed that the activity carried on by Mrs Kristiansen with the IRMM could also not be taken into account for the purposes of extending the reference period for entitlement to unemployment benefits.

22 The national court is of the view that there are two issues which require to be resolved. The first raises the question of whether former members of the temporary staff of the Commission residing in Belgium may be entitled to unemployment benefits under Belgian legislation after the termination of their occupational activity with that institution, even though no deductions for social security have been made and those concerned may be entitled to unemployment benefits paid by the Commission. The second issue raises the question of whether the decision of the RVA that a post-graduate student taken on by the IRMM

under the Fellowship Contract is deemed to be a trainee fellowship student is contrary to Community legislation in that it is in breach of the principle of non-discrimination, or even of the principle of the free movement of workers.

23 Those were the circumstances in which the Arbeidsrechtbank van het Arrondissement Tongeren decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. In respect of members of the temporary staff of the EC who, after the end of their period of service with the EC, reside in Belgium, and in respect of whom no contributions were deducted in favour of the social security system, and who are entitled to unemployment benefits paid by the EC, do the provisions of Regulation (EEC) No 1408/71 preclude national legislation from being fully applied to them, including the national rule against the overlapping of benefits under which, in accordance with the conditions governing the award of unemployment benefit, the employee must be out of work and not in receipt of remuneration, the latter term being defined to include in particular: payment in lieu of notice or any compensation payable to the employee in respect of termination of his contract of employment, with the exception of compensation for non-material damage?

2. Does it run counter to Regulation (EEC) No 1612/68 of the Council (Article 7(4) of Title II), which provides that uniformity in social security matters must be pursued and that there may be no discrimination, that (in the applicant's view) there is inequality in the social security status of post-graduate students within the EEA in that in various Member States of the EEA a post-graduate student is deemed to carry on an occupational activity, whether or not subject to social security, and in Belgium a post-graduate

student (in the applicant's view unjustly) is deemed to be a trainee fellowship student, who must arrange for his own social security cover under the Belgian national system although that is not possible on a voluntary basis (at any rate in regard to unemployment insurance)?'

The questions referred

24 It must be stated at the outset that under Articles 28 and 29 of and Annexes V and VI to the EEA Agreement, Regulations No 1612/88 and No 1408/71 apply to Norwegian nationals. As it is clear from the order for reference that Mrs Kristiansen, who resides in Belgium, is a Norwegian national, she is entitled to rely on the provisions of those regulations.

The first question

25 The first question referred by the national court asks in essence whether Regulation No 1408/71 precludes a national system of unemployment benefits, and, more specifically, a national rule against the overlapping of benefits under that system, from being applied to a former temporary member of the Commission staff who resides in a Member State and is entitled to unemployment benefits paid by the Commission.

26 In that regard, it is evident from the order for reference that Mrs Kristiansen carried on the activity of a temporary member of the Commission staff between 1 December 1996 and 30 November 1999 and that she subsequently received unemployment benefits under the Conditions of Employment in her capacity as a former temporary member of the Commission staff.

27 It follows, first, as the Commission has rightly pointed out in its observations, that the first question concerns the Conditions of Employment and, more specifically, the relationship between the provisions of those conditions which apply to former members of the temporary staff and the rules against overlapping under the Belgian unemployment benefits system.

28 Secondly, it is clear from settled case-law that, in order to provide a satisfactory answer to the national court which has referred a question to it, the Court of Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in its question (Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9; Case C-315/88 *Bagli Pennacchiotti* [1990] ECR I-1323, paragraph 10, and Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 39).

29 As regards the conditions applying to former members of the temporary staff, Article 28a of the Conditions of Employment lays down a special rule concerning the relationship between Community unemployment benefits and those payable under national schemes.

30 That being so, in order to provide an interpretation of Community law that will be useful to the national court, it is the relevant provisions of the Conditions of Employment that require to be interpreted and not those of Regulation No 1408/71.

31 It should first be noted in this regard that, as the Advocate General has mentioned at point 33 of his Opinion, the Court has consistently held that Community law does not detract from the power of the Member States to organise their social

security systems and that, in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine both the conditions concerning the right or duty to be insured with a social security scheme and the conditions for entitlement to benefits. Nevertheless, the Member States must comply with Community law when exercising that power (Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473, paragraphs 44 to 46).

32 Secondly, as the Commission stated in its observations, the Conditions of Employment were adopted by means of a Council regulation which, by virtue of the second paragraph of Article 249 EC, has general application, is binding in its entirety and is directly applicable in all Member States. It follows that, in addition to having effects within the Community administration, the Conditions of Employment are binding on Member States in so far as their cooperation is necessary in order to give effect to those measures (Case 186/85 *Commission* v *Belgium* [1987] ECR 2029, paragraph 21).

33 Against that background, it should be noted that the second subparagraph of Article 28a(1) of the Conditions of Employment states that, where a former member of the temporary staff is entitled to unemployment benefits under a national scheme, 'the amount of those benefits will be deducted from the allowance paid under the [Community system]'. This provision therefore means that the relationship between the Community system of unemployment benefits and the systems of the Member States is a complementary one.

34 Since it is based on the second subparagraph of Article 28a(1) of the Conditions of Employment, the complementary effect of the Community unemployment benefit system is binding on the Member States and cannot be disregarded by national legislation (*Commission* v *Belgium*, cited above, paragraph 23).

35 In the light of the above, the answer to the first question must be that the second subparagraph of Article 28a(1) of the Conditions of Employment means that the relationship between the Community system of unemployment benefits and those of the Member States is a complementary one, which cannot be disregarded by a Member State in the application of its system of unemployment benefits and, specifically, of a rule against the overlapping of benefits under that system, to a former member of the temporary staff who resides in that Member State and is entitled to unemployment benefits paid under the Conditions of Employment.

The second question

36 The second question referred by the national court asks in essence whether it is contrary to the principle of non-discrimination laid down by Article 7(4) of Regulation No 1612/68 for a person carrying on an activity as a post-graduate student, in the manner envisaged by the Fellowship Contract, to be deemed, in a Member State, to be a trainee fellowship student who is not entitled to any rights under the national system of unemployment benefits, even though in other Member States a person carrying on similar activities is deemed to be carrying on an occupational activity and is entitled to benefits under such an unemployment benefits system.

37 In that regard, suffice it to note, first, that, as was mentioned at paragraph 31 of this judgment, Community law does not detract from the power of the Member States to organise their social security systems and that, in the absence of harmonisation at Community level, it is for the legislation of each Member State

to determine both the conditions concerning the right or duty to be insured with a social security scheme and the conditions for entitlement to benefits (*Geraets-Smits and Peerbooms*, cited above, paragraphs 44 and 45).

38 Secondly, while prohibiting each Member State, within the scope of the EC Treaty, from applying its national law in a manner which produces a different result depending on the nationality of the persons concerned, the principle of non-discrimination, which is laid down in both Article 39(2) EC and Article 7 of Regulation No 1612/68, does not apply to any variations in treatment which there may be among the Member States, and which arise from differences between national laws, so long as these variations affect in the same way those to whom the laws apply, according to objective criteria and without regard to their nationality.

39 Against that background, and with specific regard to the Belgian legislation relating to social security, that legislation cannot be considered to be contrary to Community law on the ground only that it deems the post-graduate activities carried on by Mrs Kristiansen with the IRMM to be those of a trainee fellowship student who is not entitled to any rights under the national system of unemployment benefits, so long as a Belgian national who has carried on the same activity is treated in the same way.

40 In the light of the above, the answer to the second question must be that the principle of non-discrimination laid down by Article 7(4) of Regulation No 1612/68 does not preclude a person carrying on an activity as a post-graduate student, such as the person in the main proceedings, from being deemed, in a Member State, to be a trainee fellowship student who is not entitled to any rights under the national system of unemployment benefits, even though in other Member States a person carrying on similar activities is deemed to be carrying on

an occupational activity and is entitled to benefits under the unemployment benefits system.

Costs

41 The costs incurred by the Commission, which has 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 Arbeidsrechtbank van het Arrondissement Tongeren by judgment of 11 March 2002, hereby rules:

1. **The second subparagraph of Article 28a(1) of the Conditions of Employment of Other Servants of the European Communities means that the relationship between the Community system of unemployment benefits and those of the**

Member States is a complementary one, which cannot be disregarded by a Member State in the application of its system of unemployment benefits and, specifically, of a rule against the overlapping of benefits under that system, to a former member of the temporary staff who resides in that Member State and is entitled to unemployment benefits paid under the Conditions of Employment of Other Servants of the European Communities.

2. The principle of non-discrimination laid down by Article 7(4) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community does not preclude a person carrying on an activity as a post-graduate student, such as the person in the main proceedings, from being deemed, in a Member State, to be a trainee fellowship student who is not entitled to any rights under the national system of unemployment benefits, even though in other Member States a person carrying on similar activities is deemed to be carrying on an occupational activity and is entitled to benefits under the unemployment benefits system.

Timmermans Edward La Pergola

Delivered in open court in Luxembourg on 4 December 2003.

R. Grass V. Skouris

Registrar President