Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

13 September 2017*

(Reference for a preliminary ruling — Application of social security schemes — Migrant workers — Determination of the applicable legislation — Regulation (EEC) No 1408/71 — Article 14(2)(b)(i) — Person normally employed in the territory of two or more Member States — Person employed in one Member State and engaged in paid employment on the territory of another Member State during a period of unpaid leave lasting three months)

In Case C-569/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 30 October 2015, received at the Court on 5 November 2015, in the proceedings

X

v

Staatssecretaris van Financiën,

THE COURT (Third Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, M. Vilaras, J. Malenovský, M. Safjan and D. Šváby, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 December 2016,

after considering the observations submitted on behalf of:

– the Netherlands Government, by M. Bulterman and M. Noort, acting as Agents,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the European Commission, by M. van Beek and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 March 2017,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 13(2)(a) and 14(2)(b)(i) 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), as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1) ('Regulation No 1408/71').

2 The request has been made in the context of proceedings between X and the Staatssecretaris van Financiën (State Secretary for Finance, the Netherlands) concerning an assessment in respect of income tax and social insurance contributions.

Legal context

3 Article 1 of Regulation No 1408/71 reads as follows:

'For the purpose of this Regulation:

(a) "employed person" and "self-employed person" mean respectively:
(i) 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 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 of that regulation states:

'Article 13(2)(a) shall apply subject to the following exceptions and circumstances:

…

(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 dispute in the main proceedings and the questions referred for a preliminary ruling

6 Since 1 March 2006, X, a Dutch national, has been residing and working in the Netherlands for an employer established in that Member State.

7 X and his employer agreed that X would take unpaid leave for three months, from December 2008 to February 2009. In a letter of 12 November 2008, his employer detailed the terms and conditions applicable to their employment relationship during that period of leave. In particular, the employer stated that the employment contract would remain in place during the period of leave and that X would resume his regular duties on 1 March 2009.

8 Between December 2008 and February 2009, X stayed in Austria where he worked as a ski instructor for another employer established in that Member State.

9 In the following years, X did not take any further periods of unpaid leave. However, it is apparent from information that the Netherlands tax authorities have obtained from the Austrian authorities that, for the financial year 2010, X was registered as a worker in the Austrian social security registers on two occasions. Similarly, for the financial years 2011 to 2013 inclusive, X was entered in those registers once per year for a period of approximately one or two weeks.

10 The dispute between X and the 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, during January and February 2009, X was insured on a compulsory basis under the Netherlands social security system and was therefore obliged to pay national insurance contributions.

11 The Gerechtshof Arnhem-Leeuwarden (Arnhem-Leeuwarden Court of Appeal, Netherlands), in the appeal against the judgment of the Rechtbank Gelderland (Gelderland District Court, Netherlands), ruled that the employment relationship between X and his employer established in the Netherlands continued during the period of unpaid leave and that Netherlands legislation continued to apply during the months of January and February 2009.

12 X appealed against that decision before the referring court.

13 In those circumstances 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?

(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?'

Consideration of the questions referred

14 By its questions, which it is appropriate to examine together, the referring court asks essentially whether Article 14(2)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that a person residing and employed in the territory of one Member State who, for a period of three months, takes unpaid leave and is employed in the territory of another Member State, is to be considered as normally employed in the territory of two Member States within the meaning of that provision.

15 In that regard, it should be noted that the provisions of Title II of Regulation No 1408/71, which includes Article 14(2), constitute, according to the settled case-law of the Court, a complete and uniform system of conflict rules, the aim of which is to ensure that workers moving within the Union 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 (judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 29 and the case-law cited).

16 To that end, Article 13(2)(a) of Regulation No 1408/71 establishes the principle that a person employed in the territory of one Member State is to be subject to the legislation of that State, even if he resides in the territory of another Member State (see, to that effect, judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 30).

17 Nevertheless, that principle is stated to be 'subject to Articles 14 to 17' of Regulation No 1408/71. In certain specific situations the unrestricted application of the rule set out in Article 13(2)(a) of that regulation might in fact create, instead of prevent, administrative complications for workers as well as for employers and social security authorities, which would place obstacles in the way of the freedom of movement of the persons covered by that regulation (judgment of 4 October 2012, *Format Urządzenia i Montaże Przemysłowe*, C-115/11, EU:C:2012:606, paragraph 31).

18 Article 14(2)(b)(i) of Regulation No 1408/71 provides that a person who is normally employed in the territory of two or more Member States is to be subject to the legislation of the Member State in whose territory he resides if he pursues his activity partly in that territory.

19 It follows from that provision, which derogates from the general rule of connection to the Member State of employment, that its application is conditional on the person concerned being normally employed in the territory of two or more Member States.

20 Accordingly, a situation such as that at issue in the main proceedings may be governed by Article 14(2)(b)(i) of Regulation No 1408/71 only if the person concerned, who is granted unpaid leave by his employer for several months whilst nevertheless maintaining that employment relationship, may be considered, during that period of leave, as an 'employed' person, within the meaning of that provision, in the Member State in whose territory that leave is taken.

21 In that regard, it should be pointed out that the Court has held, in relation to the suspension of an employment relationship during parental leave, that a person has the status of a 'worker' within the meaning of Regulation No 1408/71 where he 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 (judgment of 7 June 2005, *Dodl and Oberhollenzer*, C-543/03, EU:C:2005:364, paragraph 34).

22 Moreover, it follows from the case-law of the Court that even though the provisions of Title II of Regulation No 1408/71, unlike those in Title I, refer to 'persons who are employed' (or 'engaged in paid employment') ('personnes qui exercent une activité salariée') or who are 'self-employed' ('personnes qui exercent une activité non-salariée') rather than to 'employed' or 'self-employed persons' ('travailleurs salariés'/'non-salariés'), a logical and consistent interpretation of the scope *ratione personae* of the regulation and of the system of rules of conflict of laws which it establishes requires the terms in question of Title II to be interpreted in the light of the definitions in Article 1(a) of the regulation (see, to that effect, judgments of 30 January 1997, *de Jaeck*, C-340/94, EU:C:1997:43, paragraph 22, and 30 January 1997, *Hervein and Hervillier*, C-221/95, EU:C:1997:47, paragraph 20).

23 Accordingly, just as the description 'employed person' or 'self-employed person' for the purposes of Regulation No 1408/71 depends on the national social security scheme under which the person is insured, 'a person who is employed' (or 'engaged in paid employment') and 'a person who is self-employed' for the purposes of Title II of Regulation No 1408/71 should be understood to refer to activities deemed such by the legislation applicable in the field of social security in the Member State in whose territory those activities are pursued (see, to that effect, judgments of 30 January 1997, *de Jaeck*, C-340/94, EU:C:1997:43, paragraph 23, and 30 January 1997, *Hervein and Hervillier*, C-221/95, EU:C:1997:47, paragraph 21).

24 Similarly, in so far as a person retains the status of 'employed person' during the period of unpaid leave granted to him by his employer, it is possible to regard him as a 'person who is employed' within the meaning of Title II of Regulation No 1408/71, notwithstanding the suspension of the main obligations arising from that employment relationship during that specific period.

25 Thus, in a situation such as that at issue in the main proceedings, where, according to the referring court, national social security legislation provides that a person taking unpaid leave for several months continues to be employed during that period of leave, that person is to be regarded, during such period, as 'a person who is employed' within the meaning of Title II of Regulation No 1408/71 in the Member State in whose territory the leave is taken.

26 In such a case, if the person concerned engages in paid employment in the territory of another Member State during that period, his situation may fall within the scope of Article 14(2)(b)(i) of Regulation No 1408/71 provided that he habitually carries out significant activities in the territory of the latter Member State (see, to that effect, the judgment delivered today, *X*, C-570/15, paragraph 19).

27 In order to assess whether the activities carried out in the territory of the latter Member State during that period are habitual and significant in nature, regard must be had, in particular, to the duration of periods of activity and to the nature of the employment as defined in the contractual documents, as well as to the actual work performed, where appropriate (see, to that effect, the judgment delivered today, *X*, C-570/15, paragraph 21).

28 In those circumstances, it will be for the referring court to determine whether the paid employment activity carried out in Austria by the person concerned, during the three month period at issue in the main proceedings, was habitual and significant in nature, bearing in mind that in that regard it is irrelevant whether or not that person carried out such an activity again after that period.

29 Having regard to the foregoing considerations, the answer to the question referred is that Article 14(2)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that a person residing and employed in the territory of one Member State who, for a period of three months, takes unpaid leave and is employed in the territory of another Member State, is to be regarded as normally

employed in the territory of two Member States within the meaning of that provision, provided that, during that period of leave, he is considered as normally employed under the social security legislation of the first Member State and that the activity carried out on the territory of the second Member State is habitual and significant in nature, which it is for the referring court to determine.

Costs

30 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 14(2)(b)(i) 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, as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008, must be interpreted as meaning that a person residing and employed in the territory of one Member State who, for a period of three months, takes unpaid leave and is employed in the territory of another Member State, is to be regarded as normally employed in the territory of two Member States within the meaning of that provision, provided that, during that period of leave, he is considered as normally employed under the social security legislation of the first Member State and that the activity carried out on the territory of the second Member State is habitual and significant in nature, which it is for the referring court to determine.

[Signatures]