JUDGMENT OF THE COURT (Fourth Chamber)

20 January 2005 *

In Case C-101/04,

REFERENCE for a preliminary ruling under Article 234 EC made by the Arbeidsrechtbank Gent (Belgium), made by decision of 17 February 2004, received at the Court on 26 February 2004, in the proceedings

Roger Noteboom

v

Rijksdienst voor Pensioenen,

THE COURT (Fourth Chamber),

composed of N. Colneric (Rapporteur), acting for the President of the Fourth Chamber, J.N. Cunha Rodrigues and E. Levits, Judges,

* Language of the case: Dutch.

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Commission of the European Communities, by D. Martin, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The reference for a preliminary ruling relates to the interpretation of provisions of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1) (hereinafter 'Regulation No 1408/71').

2 That reference was made in proceedings between Mr Noteboom and the Rijksdienst voor Pensioenen (hereinafter 'the Rijksdienst'), the Belgian social security body, regarding holiday pay granted to pensioners.

Legal background

Community legislation

3 Article 1 of Regulation No 1408/71 provides:

'For the purpose of this regulation:

...

(t) "benefits" and "pensions" mean all benefits and pensions, including all elements thereof payable out of public funds, revalorisation increases and supplementary allowances, subject to the provisions of Title III, as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions;

...'

4 Article 4(1) of that regulation states:

'This regulation shall apply to all legislation concerning the following branches of social security:

...

(c) old-age benefits;

...'

5 Article 45 of Regulation No 1408/71, which is part of Chapter 3, entitled 'Old age and death (pensions)', of Title III of that regulation, lays down the principle of the aggregation of periods of insurance completed under the legislation of any Member State for the acquisition, retention or recovery of the right to benefits.

6 Under Article 45(1) and (6):

'1. Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme

within the meaning of paragraph 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence completed under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or a self-employed person. For that purpose, it shall take account of these periods as if they had [been] completed under its own legislation.

...

6. A period of full [un]employment of a worker to whom Article [71](1)(a)(ii) or (b)(ii), first sentence, applies shall be taken into account by the competent institution of the Member State in whose territory the worker concerned resides in accordance with the legislation administered by that institution, as if that legislation applied to him during his last employment.

...

If the period of full unemployment in the country of residence of the person concerned can be taken into account only if contribution periods have been completed in that country, this condition shall be deemed to be fulfilled if the contribution periods have been completed in another Member State.'

7 Article 71(1), which forms part of Section 3 of Title III, Chapter 6, of Regulation No 1408/71, entitled 'Unemployed persons who, during their last employment, were residing in a Member State other than the competent State', 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) ...

(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

8 Under Article 22 of Royal Decree No 50 of 24 October 1967 concerning retirement and survivor's pensions for employed persons (*Moniteur belge*, 27 October 1967,

p. 11258), as amended by the Law of 30 March 1994 (*Moniteur belge*, 31 March 1994, p. 8866) (hereinafter 'the Royal Decree of 24 October 1967'):

'Holiday pay and a holiday pay supplement may be granted each year to persons entitled to a pension granted under the present scheme.

...

The pay referred to in the present article shall not be taken into consideration in the application of the rules relating to the overlapping of social benefits or in the calculation of resources which precedes the grant of certain benefits.'

9 Article 56(1) of the Royal Decree of 21 December 1967 concerning general rules for the scheme of retirement and survivor's pensions for employed persons (*Moniteur belge*, 16 January 1968, p. 441), as amended by the Royal Decree of 27 January 1998 (*Moniteur belge*, 20 February 1998, p. 4793) and by the Royal Decree of 4 March 2002 (*Moniteur belge*, 29 March 2002, p. 13236) (hereinafter 'the Royal Decree of 21 December 1967'), provides:

'Each year holiday pay and a holiday pay supplement shall be granted to persons entitled to a retirement and/or survivor's pension.

However, holiday pay and the holiday pay supplement shall not be granted during the year in which the pension commences in fact and for the first time. In the following year holiday pay and the holiday pay supplement shall be awarded in proportion to the number of months in which the person entitled received the pension during the year in which it commenced. They shall be awarded in full in the following years.

...

In derogation from the second subparagraph ... and without prejudice to paragraph 2 of this article, holiday pay and the holiday pay supplement shall be awarded in full as from the year in which the pension commenced in fact and for the first time:

(a) where a retirement pension is concerned, where the recipient was entitled to a pre-retirement pension or received allowances for sickness, invalidity, or involuntary unemployment consequent on an activity subject to the Law of 27 June 1969 amending the Decree-Law of 28 December 1944 on social security for employed persons, the Law of 7 February 1945 on social security for merchant seamen, or the Law of 10 January 1945 on social security for miners and persons treated as such, throughout the calendar year preceding the year during which the retirement pension commences;

(b) ...

The allowances for involuntary unemployment consequent on an activity referred to in Article 5(7) of the Royal Decree of 23 December 1996 are to be treated, in applying the preceding paragraph, in the same way as the allowances for involuntary unemployment referred to in that paragraph.'

The main proceedings and the questions referred for a preliminary ruling

10 Mr Noteboom is a Belgian national who worked in the Netherlands whilst retaining his residence in Belgium.

11 Shortly before retiring, he became unemployed. During the year preceding that in which he became entitled to a retirement pension Mr Noteboom received unemployment benefit continuously. Pursuant to Article 71(1)(a)(ii) of Regulation No 1408/71, the unemployment benefit was calculated and paid in accordance with the Belgian legislation on the subject.

12 Since 1 January 1999 Mr Noteboom has been entitled to a retirement pension under the Belgian scheme for employed persons. In addition to that pension, the Rijksdienst paid him an amount of BEF 23 069, or EUR 571.87, by way of holiday pay in 1999.

13 The Rijksdienst subsequently considered that it had been wrong to pay that amount to Mr Noteboom and claimed it back by decision notified on 18 August 1999.

14 On 14 September 1999 Mr Noteboom challenged that decision before the national court.

15 Before the national court, Mr Noteboom claimed that he was entitled to holiday pay since he had received unemployment benefit continuously during the year preceding that in which he became entitled to a retirement pension.

16 The Rijksdienst contended, however, that Mr Noteboom did not fulfil the conditions laid down in Article 56 of the Royal Decree of 21 December 1967. His unemployment was not consequent 'on an activity by virtue of which the person concerned was subject to the Belgian social security scheme'. The Rijksdienst considers that although the unemployment benefit was in fact paid by the Belgian State, the actual debtor is the Member State in which he was employed and in which the unemployment arose, in this case the Kingdom of the Netherlands.

17 The Rijksdienst also submitted that holiday pay is clearly 'not a pension but an ad hoc benefit' and that it does not fall within the *ratione materiae* of Regulation No 1408/71.

18 The national court refers to the case-law of the Court in this domain, in particular the judgment in Case 171/82 *Valentini* [1983] ECR 2157, and argues in particular, with regard to the type of benefit at issue, as follows:

— the scope *ratione personae* of Article 22 of the Royal Decree of 24 October 1967 coincides with that of the right to the retirement and survivor's pension: holiday pay is granted to all pensioners but also only to pensioners;

— pensioners' holiday pay is financed by precisely the same resources that are used to finance the retirement and survivor's pensions themselves;

— in the same way as the retirement pension, the holiday pay linked to that pension is granted to persons who, because of their age, no longer have to remain available for work. The benefits provide them with means of subsistence;

— however, holiday pay is a flat-rate amount which bears no relation at all to the wage earned or the insurance periods completed.

19 In those circumstances the Arbeidsrechtbank Gent (Labour Court, Ghent) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does holiday pay within the meaning of Article 22 of Royal Decree No 50 of 24 October 1967 and Article 56 of the Royal Decree of 21 December 1967 fall within the scope *ratione materiae* of Regulation No 1408/71 and more specifically does it constitute an "old-age benefit" within the meaning of Article 4(1)(c) thereof?

2. Is Article 45(1) and (6) of Regulation No 1408/71 to be interpreted as meaning that the Rijksdienst voor Pensioenen must, as the competent institution, take account of insurance periods completed in another Member State in determining entitlement to holiday pay?

3. If the second question is answered in the negative, does the requirement in Article 71(1)(a)(ii) of Regulation No 1408/71 that the benefit is to be determined in accordance with the provisions of the legislation of the Member State in whose territory the frontier worker resides "as though he had been subject to that legislation while last employed" apply only to unemployment benefit or also to other benefits such as, in particular, holiday pay as referred to in Article 22 of Royal Decree No 50 of 24 October 1967 and Article 56 of the Royal Decree of 21 December 1967?'

On the questions referred for a preliminary ruling

The first question

20 In its first question, which concerns the scope *ratione materiae* of Regulation No 1408/71, the national court essentially asks whether a benefit such as the holiday pay referred to in Article 22 of the Royal Decree of 24 October 1967 and Article 56 of the Royal Decree of 21 December 1967 constitutes an old-age benefit within the meaning of Article 4(1)(c) of Regulation No 1408/71.

21 The Court has consistently held that a benefit can be regarded as a social security benefit only if, firstly, it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and, secondly, it relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, in particular, Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 15; Case C-85/99 *Offermanns* [2001] ECR I-2261, paragraph 28; and Case C-333/00 *Maaheimo* [2002] ECR I-10087, paragraph 22).

22 A benefit such as the holiday pay in question in the present case fulfils those conditions.

23 With regard to the first condition, it should be noted that the provisions relating to the grant of that holiday pay, in particular Article 56(1) of the Royal Decree of 21 December 1967, confer on recipients a right defined by legislation and that this right is granted automatically to the persons who meet certain objective criteria, without any individual and discretionary assessment of their personal needs.

24 With regard to the second condition, the Court has repeatedly held that the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of each particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation (see, in particular, the judgment in *Hughes*, cited above, paragraph 14, and Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 17).

25 Thus, as regards the legal nature of a benefit such as that in question in the main proceedings, the classification as holiday pay is not decisive in assessing whether that benefit may be regarded as an old-age benefit within the meaning of Article 4(1)(c) of Regulation No 1408/71.

26 On the contrary, it should be noted that the constituent elements of the holiday pay in question show that it may be considered an old-age benefit within the meaning of Article 4(1)(c) of Regulation No 1408/71, paid as a supplementary allowance within the meaning of Article 1(t) of Regulation No 1408/71.

27 Firstly, it is clear from the provisions relating to the grant of the holiday pay that it is paid exclusively to persons entitled to a retirement and/or survivor's pension. Moreover, the national court has observed that the pensioners' holiday pay is financed by the same resources that are used to finance the retirement and survivor's pensions.

28 Secondly, as the national court has pointed out, the holiday pay linked to the retirement pension provides the recipients with means of subsistence. As the Commission has observed, the aim of that pay is, more exactly, to ensure that pensioners receive a financial supplement so that they may take a holiday.

29 The fact, mentioned by the national court, that the holiday pay is a flat-rate amount which bears no relation at all to the wage earned or the insurance periods completed does not bring into question its legal classification as an old-age benefit within the meaning of Article 4(1)(c) of Regulation No 1408/71. It is true that the Court has observed that such benefits are normally financed and acquired on the basis of the recipient's own contributions and calculated by reference to the length of time during which he has been affiliated to the insurance scheme (see the judgment in *Valentini*, cited above, paragraph 14). However, the circumstances of the present case, examined in paragraphs 27 and 28 of this judgment, show that it concerns an old-age benefit within the meaning of Article 4(1)(c) of Regulation No 1408/71.

30 The answer to the first question must therefore be that a benefit such as the holiday pay referred to in Article 22 of the Royal Decree of 24 October 1967 and in Article 56 of the Royal Decree of 21 December 1967 constitutes an old-age benefit within the meaning of Article 4(1)(c) of Regulation No 1408/71.

The second question

31 In its second question, the national court essentially asks whether Article 45(1) and (6) of Regulation No 1408/71 is to be interpreted as meaning that the competent institution of the Member State of residence is to take account, for the purposes of the grant of a benefit such as that in question in the main proceedings, of a period of full unemployment during which the formerly employed person received benefits under Article 71(1)(a)(ii) of that regulation, despite the fact that the unemployment was not consequent on an activity by virtue of which that person was subject to the legislation administered by that institution.

32 That problem is covered in Article 45(6) of Regulation No 1408/71, which must therefore be interpreted first.

33 It follows from the first subparagraph of Article 45(6) that a period of full unemployment during which the formerly employed person receives benefits under Article 71(1)(a)(ii) of Regulation No 1408/71 is to be taken into account by the competent institution of the Member State in whose territory the worker resides, in accordance with the legislation administered by that institution, as if that legislation applied to him during his last employment.

34 Accordingly, a frontier worker's periods of full unemployment which gave rise to the grant of unemployment benefits under Article 71(1)(a)(ii) of Regulation No 1408/71 must be taken into account in determining entitlement to a benefit such as that at issue in the main proceedings, as if the legislation of the Member State of his residence applied to the worker during his last employment.

35 It follows that it is not necessary to interpret Article 45(1) of Regulation No 1408/71.

36 In view of the above considerations, the answer to the second question must be that Article 45(6) of Regulation No 1408/71 must be interpreted as meaning that the competent institution of the Member State of residence is to take account, for the purposes of the grant of a benefit such as that in question in the main proceedings, of a period of full unemployment during which the formerly employed person received benefits under Article 71(1)(a)(ii) of that regulation, as if the legislation administered by that institution applied to that worker during his last employment.

The third question

37 In view of the answer to the second question, it is not necessary to reply to the third question.

Costs

38 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 (Fourth Chamber) rules as follows:

1. **A benefit such as the holiday pay referred to in Article 22 of Royal Decree No 50 of 24 October 1967 concerning retirement and survivor's pensions for employed persons, as amended by the Law of 30 March 1994, and in Article 56 of the Royal Decree of 21 December 1967 concerning general rules for the scheme of retirement and survivor's pensions for employed persons, as amended by the Royal Decree of 27 January 1998 and by the Royal Decree of 4 March 2002, constitutes an old-age benefit within the meaning of Article 4(1)(c) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Council Regulation (EC) No 1606/98 of 29 June 1998.**

2. **Article 45(6) of Regulation No 1408/71, as amended and updated by Regulation No 118/97, as amended by Regulation No 1606/98, must be interpreted as meaning that the competent institution of the Member State of residence is to take account, for the purposes of the grant of a benefit such as that in question in the main proceedings, of a period of full unemployment during which the formerly employed person received benefits under Article 71(1)(a)(ii) of that regulation, as if the legislation administered by that institution applied to that worker during his last employment.**

[Signatures]