Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

23 January 2020*

(Reference for a preliminary ruling — Social security — Migrant workers — Regulation (EC) No 883/2004 — Unemployment benefits — Calculation — Failure to take account of the final salary received in the Member State of residence — Reference period not of sufficient duration — Salary received following the employment relationship coming to an end — Person having previously been active as an employed person in Switzerland)

In Case C-29/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundessozialgericht (Federal Social Court, Germany), made by decision of 23 October 2018, received at the Court on 16 January 2019, in the proceedings

ZP

v

Bundesagentur für Arbeit

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, F. Biltgen (Rapporteur) and N. Wahl, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of

– ZP, by M. Hanke, Rechtsanwalt,

– the Bundesagentur für Arbeit, by B. Klug, acting as Agent,

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

– the European Commission, by M. Van Hoof and B.-R. Killmann, acting as Agents,

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

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 62(1) and (2) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1).

2 The request has been made in proceedings between ZP and the Bundesagentur für Arbeit (Federal Employment Agency, Germany, 'the Agency') concerning the amount of unemployment benefits paid to him by the Agency under national law.

Legal context

European Union law

The Agreement on the free movement of persons

3 Article 8 of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6; 'the AFMP') provides as follows:

'The Contracting Parties shall make provision, in accordance with Annex II, for the coordination of social security systems …'

4 Under Article 1 of Annex II to the AFMP, as amended by Decision No 1/2012 of the Joint Committee established under the AFMP of 31 March 2012 (OJ 2012 L 103, p. 51):

'1. The contracting parties agree, with regard to the coordination of social security schemes, to apply among themselves the legal acts of the European Union to which reference is made in, and as amended by, section A of this Annex, or rules equivalent to such acts.

2. The term "Member State(s)" contained in the legal acts referred to in section A of this Annex shall be understood to include Switzerland in addition to the States covered by the relevant legal acts of the European Union.'

5 Section A of Annex II to that agreement refers, inter alia, to Regulation No 883/2004.

Regulation No 883/2004

6 Recitals 4, 32 and 45 of Regulation No 883/2004 state as follows:

'(4) It is necessary to respect the special characteristics of national social security legislation and to draw up only a system of coordination.

…

(32) In order to foster mobility of workers, it is particularly appropriate to facilitate the search for employment in the various Member States; it is therefore necessary to ensure closer and more effective coordination between the unemployment insurance schemes and the employment services of all the Member States.

…

(45) Since the objective of the proposed action, namely the coordination measures to guarantee that the right to free movement of persons can be exercised effectively, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of that action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that article, this Regulation does not go beyond what is necessary, in order to achieve that objective.'

7 Article 2(1) of that regulation provides as follows:

'This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.'

8 Chapter 6 of Title III of Regulation No 883/2004 contains, in Articles 61 to 65, the specific provisions of that regulation applicable to unemployment benefits.

9 Article 61(1) of that regulation states as follows:

'The competent institution of a Member State whose legislation makes the acquisition, retention, recovery or duration of the right to benefits conditional upon the completion of either periods of insurance, employment or self-employment shall, to the extent necessary, take into account periods of insurance, employment or self-employment completed under the legislation of any other Member State as though they were completed under the legislation it applies.

…'

10 Article 62(1) and (2) of that regulation is worded as follows:

'1. The competent institution of a Member State whose legislation provides for the calculation of benefits on the basis of the amount of the previous salary or professional income shall take into account exclusively the salary or professional income received by the person concerned in respect of his last activity as an employed or self-employed person under the said legislation.

2. Paragraph 1 shall also apply where the legislation administered by the competent institution provides for a specific reference period for the determination of the salary which serves as a basis for the calculation of benefits and where, for all or part of that period, the person concerned was subject to the legislation of another Member State.'

German law

11 Under the heading 'Principle', Paragraph 149 of the Drittes Buch Sozialgesetzbuch (Social Security Code, Third Book, version of 20 December 2011 (BGBl. 2011 I, p. 2854, 'the SGB III'), provides as follows:

'Unemployment benefit shall be

…

2. for the remaining unemployed persons, 60 per cent (general benefit rate)

of the flat-rate net pay (remuneration) which results from the gross pay earned by the unemployed person in the assessment period (reference pay).'

12 Paragraph 150 of the SGB III, entitled 'Assessment period and assessment framework', states:

'(1) The assessment period shall cover the accounting periods for salaries in respect of employment subject to compulsory contributions within the assessment framework which are calculated when the respective employment relationship comes to an end. The assessment framework shall cover one year; it shall end on the last day of the last relationship subject to compulsory contributions before the claim arises.

…

(3) The assessment framework shall be extended to two years if

1. the assessment period includes fewer than 150 days of entitlement to remuneration,

…'

13 Paragraph 151 of the SGB III, entitled 'Reference pay', provides in subparagraph 1 thereof as follows:

'Reference pay is the average daily remuneration subject to compulsory contributions which the employed person earned in the assessment period …'

14 Under Paragraph 152 of the SGB III, entitled 'Notional assessment':

'(1) If an assessment period of at least 150 days giving rise to entitlement to remuneration cannot be established within the assessment framework extended to two years, notional remuneration shall be used as a basis for reference pay. …

(2) For the determination of the notional remuneration, the unemployed person is to be assigned to the qualification group corresponding to the occupational qualification required for the employment activity in respect of which the Bundesagentur für Arbeit [Federal Employment Agency, Germany] has primarily to seek a placement for the unemployed person. …'

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

15 The applicant in the main proceedings is a German national residing in Germany. Between 1 July 1990 and 31 October 2014, he worked as a frontier worker for a company located in Switzerland. From 1 November 2014, he was active as an employed person in Germany. That activity was terminated by his employer with effect from 24 November 2014. The salary to be paid to the applicant in the main proceedings in respect of the month of November 2014 was calculated and paid on 11 December 2014.

16 By decision of 2 January 2015, the Agency granted the applicant in the main proceedings, from 25 November 2014 and for a period of 2 years, unemployment benefit amounting to EUR 29.48 per day, calculated on the basis of notional reference pay of EUR 73.73 per day. Since the remuneration received by the applicant in the main proceedings in respect of his activity as an employed person in Switzerland was not used as the basis for calculating that unemployment benefit, the applicant lodged a complaint with the Agency, which was rejected by decision of 16 January 2015.

17 In reaching the conclusion that the applicant in the main proceedings had acquired the right to unemployment benefit, the Agency took account of the periods of employment completed under Swiss legislation, in accordance with Article 61(1) of Regulation No 883/2004, read in conjunction with the AFMP. As regards the calculation of the amount of that unemployment benefit, the Agency, pursuant to subparagraph 1 of Paragraph 152 of the SGB III, used a notional remuneration as its reference pay,

taking the view that the applicant in the main proceedings could not rely on an 'assessment period' within the meaning of the applicable national law, namely a period of employment subject to compulsory contributions under Paragraph 150(1) of the SGB III of at least 150 days entitling him to remuneration in Germany. In addition, the Agency considered that the remuneration received in December 2014 in respect of the activity carried out as an employed person in Germany in November 2014 could not be taken into account on the grounds that that provision referred only to remuneration that had already been calculated at the end of the employment relationship.

18 By judgment of 19 January 2016, the Sozialgericht Konstanz (Social Court, Constance, Germany) upheld in part the action brought by the applicant in the main proceedings against those decisions of the Agency and ordered the Agency to calculate the amount of unemployment benefit on the basis of a reference pay of EUR 93.03.

19 The Landessozialgericht Baden-Württemberg (Higher Social Court, Baden-Württemberg, Germany) dismissed the appeals lodged by the applicant in the main proceedings and by the Agency against that judgment. According to that court, the calculation of the amount of unemployment benefit must be based, pursuant to Article 62 of Regulation No 883/2004, only on the amount of the remuneration received by the applicant in the main proceedings in respect of his last employment activity in Germany, not on notional remuneration such as that calculated pursuant to the provisions of national law, since that regulation takes precedence over those national provisions.

20 The Bundessozialgericht (Federal Social Court, Germany), hearing an appeal on a point of law brought by the Agency against the judgment of the Landessozialgericht Baden-Württemberg (Higher Social Court, Baden-Württemberg), considers that a strict interpretation of the wording of Article 62(1) of Regulation No 883/2004 is consistent with that adopted in the present case by the lower national courts. The referring court notes, however, that both Article 48 TFEU and that regulation provide only for coordination, rather than harmonisation, of the social security laws of the Member States, which remain competent to lay down the conditions to which social security benefits are subject under national law. Consequently, the referring court questions whether the reference in Article 62 of that regulation to the salary received for the last activity is simply a standard connection for the purposes of social law coordination, which does not affect the rules for calculating social benefits applied by the Member States.

21 In those circumstances, the Bundessozialgericht (Federal Social Court, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 62(1), in conjunction with Article 62(2), of Regulation No 883/2004 to be interpreted as meaning that, when a worker becomes unemployed, the competent institution of the Member State of residence must base the calculation of benefits on the "salary" that the person concerned "received" in respect of his or her last activity as an employed person in the territory of that institution even in the case where, under the national legislation on unemployment benefits administered by the competent institution, that salary cannot be taken into account as the person concerned has not been in receipt of it for a sufficiently long period and a notional assessment of the benefits is provided for as an alternative?

(2) Is Article 62(1), in conjunction with Article 62(2), of Regulation No 883/2004 to be interpreted as meaning that, when a worker becomes unemployed, the competent institution of the Member State of residence must base the calculation of benefits on the "salary" that the person concerned "received" in respect of his or her last activity as an employed person in the territory of that institution even in the case where, under the national legislation administered by the competent institution, that salary may not be included as a basis for calculating the benefits in the reference period because it was not processed timeously and a notional assessment of the benefits is provided for as an alternative?'

Consideration of the questions referred

Preliminary observations

22 It should be recalled that Regulation No 883/2004 applies, in accordance with Article 2(1) of that regulation, to nationals of a Member State who are or have been subject to the legislation of one or more Member States.

23 Article 8 of the AFMP provides that the contracting parties are to make provision, in accordance with Annex II to that agreement, for the coordination of social security systems with the aim in particular of determining the legislation applicable and paying benefits to persons residing in the territory of the contracting parties. Section A, point 1, of that Annex II provides for the application, between the contracting parties, of Regulation No 883/2004. Therefore, and since, according to Article 1(2) of that Annex II, 'the term "Member State(s)" contained in the legal acts referred to in section A of that annex shall be understood to include Switzerland in addition to the States covered by the relevant legal acts of the European Union', the provisions of that regulation also cover the Swiss Confederation (judgment of 14 March 2019, *Dreyer*, C-372/18, EU:C:2019:206, paragraph 29 and the case-law cited).

24 In the present case, it is apparent from the file submitted to the Court that the applicant in the main proceedings is a German national who, prior to the pursuit of an occupation in Germany at the end of which he received unemployment benefit under the legislation of that Member State, was subject to the legislation of the Swiss Confederation.

25 In those circumstances, the situation of the applicant in the main proceedings falls within the scope of Regulation No 883/2004.

The first question

26 By its first question the referring court asks, in essence, whether Article 62(1) and (2) of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State which, while providing that the calculation of unemployment benefits is to be based on the amount of the previous salary, does not allow — where the period during which the person concerned was in receipt of a salary in respect of his or her last activity as an employed person pursued under that legislation is shorter than the reference period laid down by that legislation for determining the salary to be used as the basis for calculating unemployment benefits — for account to be taken of the salary received by the person concerned in respect of that activity.

27 It is clear from Article 62(1) of Regulation No 883/2004 that, where the legislation of a Member State provides that the calculation of unemployment benefits is to be based on the amount of the previous salary, account must be taken exclusively of the salary received by the person concerned for the last activity pursued as an employed person under that legislation.

28 It should be noted that there is no derogation from the requirement referred to in that provision. In that respect, the exception contained in the corresponding provision 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 in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), namely Article 68(1) of that regulation, which provided an alternative basis for calculating unemployment benefits where the person concerned had been in his or her last employment for less than 4 weeks in the territory of the Member State whose legislation was applicable for the purposes of those benefits, was not included in Article 62(1) of Regulation No 883/2004.

29 In addition, in accordance with Article 62(2) of that regulation, the requirement to take account exclusively of the salary relating to the last activity pursued by the person concerned as an employed person under the legislation of that Member State is to apply also where that legislation provides for a specific reference period for determining the salary to be used as the basis for calculating benefits and where, during all or part of that period, the person concerned was subject to the legislation of another Member State.

30 It follows from Article 62(2) of that regulation that, if the legislation of a Member State establishes a reference period for determining the salary to be used as the basis for calculating benefits, the periods during which the person concerned was subject to the legislation of another Member State must be taken into account for the purposes of that reference period.

31 It follows that that provision precludes legislation of a Member State under which, in order to determine whether the reference period prescribed by that legislation has been completed, only periods of employment in that Member State are taken into account, those periods of employment completed under the legislation of another Member State being excluded or, as is the case in the main proceedings, of the Swiss Confederation under the AFMP.

32 Therefore, it follows from Article 62(1) and (2) of Regulation No 883/2004 that, first, where the legislation of a Member State provides that the calculation of benefits is based on the amount of the previous salary, account must be taken exclusively of the salary received by the person concerned for his or her last employment activity under that legislation and, second, if that legislation provides for and fixes a reference period for the purpose of determining the salary to be used as the basis for calculating benefits, that reference period must include periods of employment completed both under that legislation and under the legislation of other Member States.

33 That interpretation is also consistent with the objectives of Regulation 883/2004, the purpose of which, as follows from recitals 4 and 45, is to coordinate Member States' social security systems in order to guarantee that the right to free movement of persons can be exercised effectively (judgment of 21 March 2018, *Klein Schiphorst*, C-551/16, EU:C:2018:200, paragraph 31). Accordingly, that regulation seeks to prevent the situation in which a worker who, having exercised his right of free movement, has worked in more than one Member State is treated, without objective justification, less favourably than a worker who has completed his entire career in only one Member State (see, to that effect, judgment of 19 September 2019, *van den Berg and Others*, C-95/18 and C-96/18, EU:C:2019:767, paragraph 75 and the case-law cited).

34 In that context, the Court has held, in respect of the AFMP, that the freedom of movement of persons guaranteed by that agreement would be impeded if a national of a contracting party were to be placed at a disadvantage in his State of origin solely for having exercised his right of free movement (judgment of 26 February 2019, *Wächtler*, C-581/17, EU:C:2019:138, paragraph 53 and the case-law cited).

35 As regards, in particular, the calculation of unemployment benefits provided for in Article 62(1) of Regulation No 883/2004, it is apparent from the Court's case-law that the corresponding provision of Regulation No 1408/71 was intended to facilitate the mobility of workers by ensuring that the persons concerned received benefits which took into account, as far as possible, the conditions of employment and, in particular, of the remuneration which they enjoyed under the legislation of the Member State in which they were last employed (see, to that effect, judgment of 28 February 1980, *Fellinger*, 67/79, EU:C:1980:59, paragraph 7).

36 First, taking account exclusively of the last salary received by the person concerned under that legislation for the purpose of calculating the amount of unemployment benefit to which that person is entitled under that legislation is intended to guarantee that the right to free movement for workers can be exercised effectively, inter alia, as stated in recital 32 of Regulation No 883/2004, by facilitating the search for employment in that Member State.

37 Secondly, the failure to take account of that salary on the ground that, during part of the reference period provided for by the Member State concerned for the purpose of calculating the amount of unemployment benefit, the person concerned was subject to the legislation of other Member States means that a worker who has exercised his right to free movement is treated less favourably than a worker who has spent his entire career in that one Member State.

38 The Agency's argument, that since Regulation No 883/2004 seeks to coordinate, and not to harmonise, Member States' social security systems, the requirement to take account exclusively of the last salary received under the relevant national legislation laid down in Article 62(1) of that regulation is merely a rule of principle which allows the specific provisions of national legislation to remain in force, such as the provision under which the calculation of the amount of unemployment benefit is to be based on the basis of a notional salary provided for in Paragraph 152 of the SGB III, cannot be accepted

39 In that regard, it should, admittedly, be borne in mind that that regulation does not establish a common scheme of social security, but allows different national social schemes to exist and its sole objective is to ensure the coordination of those schemes in order to guarantee that the right to free movement of persons can be exercised effectively. Therefore, according to the Court's settled case-law, Member States retain the power to organise their own social security schemes (judgment of 28 June 2018, *Crespo Rey*, C-2/17, EU:C:2018:511, paragraph 45 and the case-law cited).

40 However, it follows from the very wording of Article 62(1) and (2) of Regulation No 883/2004 that, while certain aspects of the calculation of unemployment benefit, in particular the choice of requiring that that calculation be based on the amount of the previous salary, do in fact fall within Member States' competence, the fact remains that, where a Member State has made such a choice in its legislation, those provisions ensure that account is taken exclusively of the salary received by the person concerned for the last activity engaged in as an employed person under that legislation (see, by analogy, judgment of 21 March 2018 *Klein Schiphorst*, C-551/16, EU:C:2018:200, paragraph 46).

41 Moreover, it is settled case-law that, in exercising their power to organise their social security systems, Member States must comply with EU law and, in particular, the provisions of the FEU Treaty giving every citizen of the European Union the right to move and reside within the territory of the Member States (judgment of 7 December 2017, *Zaniewicz-Dybeck*, C-189/16, EU:C:2017:946, paragraph 40 and the case-law cited).

42 Legislation of a Member State which provides that the calculation of the amount of unemployment benefit must, in situations such as that in the main proceedings, be based on a notional salary is liable, for the reasons set out in paragraph 37 above, to hinder the free movement of persons subject to that legislation.

43 In the light of the above, the answer to the first question is that Article 62(1) and (2) of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State which, while providing that the calculation of unemployment benefits is to be based on the amount of the previous salary, does not allow — where the period during which the person concerned was in receipt of a salary in respect of his or her last activity as an employed person pursued under that legislation is shorter than the reference period laid down by that legislation for determining the salary to be used as the basis for calculating unemployment benefits — for account to be taken of the salary received by the person concerned in respect of that activity.

The second question

44 By its second question, the referring court asks, in essence, whether Article 62(1) and (2) of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State which, while providing that the calculation of unemployment benefits is to be based on the amount of the previous salary,

does not allow — where the salary received by the person concerned in respect of the last activity pursued as an employed person under that legislation was not calculated or paid until after his or her employment relationship came to an end — for account to be taken of the salary received by the person concerned for that activity.

45 In that respect, it is apparent from the order for reference that subparagraph 1 of Paragraph 150 of the SGB III provides that the assessment period for determining the calculation of unemployment benefits 'shall cover the accounting periods for salaries in respect of employment … which are calculated when the respective employment relationship comes to an end'. Pursuant to that provision, the Agency did not take into account the salary relating to the employment of the applicant in the main proceedings in Germany for the month of November 2014, since that salary had been calculated and paid to the applicant only the following month, that is to say, after his employment relationship came to an end.

46 As follows from the answer provided to the first question, Article 62(1) of Regulation No 883/2004 precludes legislation of a Member State under which, for the purpose of calculating unemployment benefits, the salary received by the person concerned for the last activity pursued as an employed person under that legislation is not taken into account.

47 It is true that the German version of that Article 62(1) provides, unlike the other language versions of that Article, that only the salary received by the person concerned 'during' the last activity pursued as an employed person under that legislation is to be taken into account ('*… berücksichtigt ausschließlich das Entgelt …, das die betreffende Person während ihrer letzten Beschäftigung … nach diesen Rechtsvorschriften erhalten hat*'), as the Agency notes in support of its argument that failure to take account of the salary calculated and paid to the person concerned after his or her last activity has come to an end complies with that provision.

48 In that regard, it must be noted that according to the Court's settled case-law, the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision or be made to override the other language versions. Provisions of EU law must be interpreted and applied uniformly in the light of the versions existing in all languages of the European Union. Where there is divergence between the various language versions of an EU legislative text, the provision in question must be interpreted by reference to the general scheme and the purpose of the rules of which it forms part (judgment of 12 September 2019, *A and Others*, C-347/17, EU:C:2019:720, paragraph 38 and the case-law cited).

49 In view of the objectives of Regulation No 883/2004 and, in particular, Article 62(1) of that regulation, as noted in paragraphs 33 and 35 above, it cannot be held that that provision makes taking account of the salary relating to the last activity pursued by the person concerned as an employed person subject to the fact that that salary was calculated and received by the person concerned no later than the last day on which that activity was pursued.

50 The date on which the salary is paid to the person concerned has no bearing on the pursuit of the objective of ensuring that that person receives benefits which take account, in so far as it is at all possible, of the conditions of employment, in particular remuneration, which he enjoyed under the legislation of the Member State of his or her last employment. On the other hand, making the right guaranteed by Article 62(1) of Regulation 883/2004 dependent on the date on which the salary was calculated and paid is liable to hinder the free movement of workers within the European Union.

51 Consequently, the answer to the second question is that Article 62(1) and (2) of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State which, while providing that the calculation of unemployment benefits is to be based on the amount of the previous salary, does not allow — where the salary received by the person concerned in respect of the last activity

pursued as an employed person under that legislation was not calculated or paid until after his or her employment relationship came to an end — for account to be taken of the salary received by the person concerned for that activity.

Costs

52 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 (Eighth Chamber) hereby rules:

1. **Article 62(1) and (2) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems must be interpreted as precluding legislation of a Member State which, while providing that the calculation of unemployment benefits is to be based on the amount of the previous salary, does not allow — where the period during which the person concerned was in receipt of a salary in respect of his or her last activity as an employed person pursued under that legislation is shorter than the reference period laid down by that legislation for determining the salary to be used as the basis for calculating unemployment benefits — for account to be taken of the salary received by the person concerned in respect of that activity.**

2. **Article 62(1) and (2) of Regulation (EC) No 883/2004 must be interpreted as precluding legislation of a Member State which, while providing that the calculation of unemployment benefits is to be based on the amount of the previous salary, does not allow — where the salary received by the person concerned in respect of the last activity pursued as an employed person under that legislation was not calculated or paid until after his or her employment relationship came to an end — for account to be taken of the salary received by the person concerned for that activity.**

[Signatures]