

JUDGMENT OF THE COURT (Eighth Chamber)

10 March 2011 (\*)

(Social security for workers – Regulation (EEC) No 1408/71 – Scope *ratione personae* – Interpretation of the term ‘employed person’ – Benefits for a dependent child – Extension of unpaid leave)

In Case C-516/09,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 24 November 2009, received at the Court on 11 December 2009, in the proceedings

**Tanja Borger**

v

**Tiroler Gebietskrankenkasse,**

THE COURT (Eighth Chamber),

composed of K. Schiemann (Rapporteur), President of the Chamber, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Ms Borger, by H. Burmann, P. Wallnöfer and R. Bacher, Rechtsanwälte,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the European Commission, by V. Kreuzschitz and M. Van Hoof, acting as Agents,

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

gives the following

**Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of the term ‘employed person’ within the meaning of Article 1(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version 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) (‘Regulation No 1408/71’).
- 2 The reference has been made in the course of proceedings between Ms Borger and the Tiroler Gebietskrankenkasse (Tyrol Regional Health Insurance Fund) concerning the latter’s

refusal to grant Ms Borger childcare allowance during the additional six months of unpaid leave which she took after the statutory two-year period following the birth of her child had expired.

## Legal context

### *European Union legislation*

3 Article 1 of Regulation No 1408/71 provides that, for the purposes of its application:

‘ ...

- (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;
  - (ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population, if such person:
    - can be identified as an employed person by virtue of the manner in which such scheme is administered or financed, or,
    - failing such criteria, is insured for some other contingency specified in Annex I under a scheme for employed or self-employed persons, or under a scheme referred to in (iii), either compulsorily or on an optional continued basis, or, where no such scheme exists in the Member State concerned, complies with the definition given in Annex I;
  - (iii) any person who is compulsorily insured for several of the contingencies covered by the branches dealt with in this Regulation, under a standard social security scheme for the whole rural population in accordance with the criteria laid down in Annex I;
  - (iv) any person who is voluntarily insured for one or more of the contingencies covered by the branches dealt with in this Regulation, under a social security scheme of a Member State for employed or self-employed persons or for all residents or for certain categories of residents:
    - if such person carries out an activity as an employed or self-employed person, or
    - if such person has previously been compulsorily insured for the same contingency under a scheme for employed or self-employed persons of the same Member State;

...’

4 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), provides as follows in Article 1 of Annex II on the coordination of social security schemes:

‘1. The contracting parties agree, with regard to the coordination of social security schemes, to apply among themselves the Community acts to which reference is made, as in force at the date of signature of the Agreement and as amended by section A of this Annex, or rules equivalent to such acts.

2. The term “Member State(s)” contained in the acts referred to in section A of this Annex shall be understood to include Switzerland in addition to the States covered by the relevant Community acts.’

5 Section A of Annex II refers to, inter alia, Regulation No 1408/71.

#### *National legislation*

6 According to Paragraph 15(1) of the 1979 Law on the protection of working mothers (Mutterschutzgesetz) (BGB1. 221/1979), an employee who so requests must be granted unpaid leave until her child reaches the age of two, on condition that the child lives with the employee.

7 Paragraph 15(3) of that law provides that the unpaid leave may be extended beyond that period by mutual agreement. Whilst that leave has the effect of maintaining the actual employment relationship, the main obligations under employment law are nevertheless suspended for the duration of that leave.

8 Under the Law on childcare allowance (Kinderbetreuungsgeldgesetz), a parent is entitled to childcare allowance if, inter alia, the parent and the child live in Austria. If only one parent claims childcare allowance, payment of that allowance is to cease at the latest when the child reaches the age of 30 months.

9 Paragraph 4(1)(1) of the Austrian General Law on social security (Allgemeines Sozialversicherungsgesetz) (‘the ASVG’) provides that employees working for one or more employers are covered by sickness, accident and retirement insurance schemes (full cover).

10 Paragraphs 7 and 8 of the ASVG list the categories of persons who are insured under only one or two branches of the social security scheme. Under Paragraph 8(1)(2) of the ASVG, thus, there is partial cover under the retirement insurance scheme for persons who, during the first 48 calendar months following the birth of their child, are actually and predominantly engaged in raising their child within the national territory, in the case where, in accordance with that law, they were covered by the retirement insurance scheme or were not yet so covered.

11 The referring court points out that, for the purpose of avoiding all discrimination, the requirement that the child in question must be raised within the national territory is also satisfied if the child is raised in Switzerland.

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

12 Following the birth of her son on 7 January 2006, Ms Borger, an Austrian national living in Austria, took unpaid leave until 7 January 2008. With her employer’s agreement, she subsequently extended her unpaid leave for a further six months up to 6 July 2008.

13 In March 2007, Ms Borger moved with her son to Switzerland, where her husband had been working since 2006.

14 The Tiroler Gebietskrankenkasse paid Ms Borger childcare allowance for the period from 5 March 2006 to 28 February 2007, and a compensatory benefit for the period from 1 March 2007 to 6 January 2008. Ms Borger’s application for childcare allowance and the maintenance of entitlement to social security for a further six months was, however, refused.

15 By decision of 18 January 2008, the Tiroler Gebietskrankenkasse revoked, with effect from 7 January 2008, entitlement to the benefit in compensation for childcare allowance on the ground that, since Ms Borger was not in a *de facto* employment relationship in Austria, responsibility for paying family benefits lay with the Swiss Confederation, where Ms Borger’s husband was working and where all members of the family were living.

- 16 The referring court observes that, according to the statements of the Tiroler Gebietskrankenkasse, the employment relationship between Ms Borger and her Austrian employer came to an end immediately after the additional six-month period of unpaid leave.
- 17 In her claim of 15 February 2008, Ms Borger maintained that the Tiroler Gebietskrankenkasse was under an obligation to pay her a benefit in compensation for childcare allowance for the period from 7 January to 6 July 2008. She submits that, although she was on unpaid leave during that period, she should still have been regarded as being in a *de facto* employment relationship and, therefore, as being a worker for the purposes of Regulation No 1408/71. She points out that, throughout the period during which she was bringing up her child, she was partially covered under the Austrian retirement insurance scheme.
- 18 The first-instance court granted Ms Borger's application and ordered the Tiroler Gebietskrankenkasse to pay her childcare allowance for the period from 7 January to 6 July 2008.
- 19 The appellate court dismissed the appeal brought by the Tiroler Gebietskrankenkasse. That court took the view that a person bringing up her child during the first 48 months following its birth is partially covered by the compulsory retirement insurance scheme. It held that, where a person was so partially covered, the Republic of Austria was liable for family benefits, irrespective of whether the employment relationship still existed after the statutory period of unpaid leave.
- 20 The Tiroler Gebietskrankenkasse lodged an extraordinary appeal on a point of law against that decision, repeating its argument that, during the period from 7 January to 6 July 2008, Ms Borger could not be regarded as an employed person working in Austria. It argues before the referring court that Ms Borger applied for additional unpaid leave, after the expiry of the statutory period, with the sole aim of claiming family benefits. It submits, further, that partial cover under the retirement insurance scheme is not part of a social insurance scheme for workers and that a person raising a child cannot be recognised as having the status of worker in the absence of any employment relationship.
- 21 Ms Borger, for her part, contends that the fact of simply being covered by a branch of social security, in her case the retirement insurance or health insurance scheme linked to child benefits, is sufficient to confer the status of 'worker' for the purposes of Regulation No 1408/71.
- 22 In the reference for a preliminary ruling, the Oberster Gerichtshof refers to the Court's case-law (Case C-85/96 *Martínez Sala* [1998] ECR I-2691, Case C-262/96 *Sürül* [1999] ECR I-2685, and Case C-543/03 *DodlandOberhollenzer* [2005] ECR I-5049), which, according to that court, shows that, in order for a person to be regarded as being a worker for the purposes of Regulation No 1408/71, the determining factor is the fact of being insured under a social security scheme for workers, irrespective of whether or not that person has a professional activity, and that merely taking unpaid leave for a given period of time cannot deprive that person of his or her status as a 'worker' for the purposes of Regulation No 1408/71.
- 23 In the view of the Oberster Gerichtshof, certain factors argue in favour of the conclusion that partial cover under a retirement insurance scheme, which for a person in Ms Borger's situation is provided for under Paragraph 8(1)(2)(g) of the ASVG, does not constitute insurance under a social security scheme within the meaning of Regulation No 1408/71. It points out that a person will be partially covered under that scheme irrespective of whether he or she currently has a professional activity, or had in the past, as an employed or self-employed person.
- 24 In those circumstances, the Oberster Gerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) Is Article 1(a) of Regulation ... No 1408/71 to be interpreted as meaning that it also covers – for a period of six months – a person who, following the end of the two-year statutory

suspension of her employment relationship following the birth of a child, agrees a further six-month period of unpaid leave with her employer in order to draw childcare allowance or a corresponding compensatory benefit for the maximum statutory period, and then terminates the employment relationship?

- (2) If Question 1 is answered in the negative: is Article 1(a) of Regulation ... No 1408/71 to be interpreted as meaning that it also covers – for a period of six months – a person who, following the end of the two-year statutory suspension of her employment relationship, agrees a further six-month period of unpaid leave with her employer, if she draws childcare allowance or a corresponding compensatory benefit during that period?’

### **The questions referred for a preliminary ruling**

- 25 By its questions, the referring court asks, in essence, whether a person in a situation such as that of Ms Borger must, during the six-month period of extension of her unpaid leave following the birth of her child, be recognised as having the status of an ‘employed person’ within the meaning of Article 1(a) of Regulation No 1408/71.
- 26 According to the Court’s case-law, a person has the status of ‘worker’, within the meaning of Regulation No 1408/71, where he or she 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 referred to in Article 1(a) of that regulation, irrespective of the existence of an employment relationship (*Dodl and Oberhollenzer*, paragraph 34).
- 27 The referring court, however, points out, firstly, that Ms Borger is covered by a social security scheme that is unrelated to any past or current professional activity. Secondly, it notes that Ms Borger deliberately extended her unpaid leave, with her employer’s agreement, solely in order to be able to continue to receive childcare allowance. Thirdly, the referring court asks whether the fact that Ms Borger is covered by the retirement insurance scheme in Austria is in fact relevant, given that, if the country of residence, in this case the Swiss Confederation, is responsible for Ms Borger’s pension payments, the period of child rearing which entitles Ms Borger to partial cover under that scheme may never be taken into account under the Austrian social security system.
- 28 As regards the first of those points, suffice it to note that, according to *Dodl and Oberhollenzer*, in the determination of whether or not a person comes within the scope *ratione personae* of Regulation No 1408/71, the existence of an employment relationship is irrelevant, as the determining factor in this regard is the fact that that person is insured, compulsorily or on an optional basis, for one or more of the contingencies covered by a general or special social security scheme mentioned in Article 1(a) of that regulation (*Dodland Oberhollenzer*, paragraph 31).
- 29 As regards the second point raised by the referring court, it must be stated that personal reasons for extending unpaid leave are irrelevant since the status as an employed person, within the meaning of Article 1(a) of Regulation No 1408/71, is based on an objective criterion, namely the fact of having insurance cover, even if only in respect of a single risk, on a compulsory or optional basis, under a general or special social security scheme mentioned in that provision.
- 30 Lastly, as regards the fact that, when Ms Borger actually comes to claim her retirement pension, the periods of cover under the retirement insurance scheme in Austria may be taken into account, not in that State, but in Switzerland, it must be held that, as the European Commission submitted in its written observations, that circumstance does not preclude a person from being recognised as having the status of a worker. Whether or not a person comes within the scope *ratione personae* of Regulation No 1408/71 depends, not on the materialisation of the contingency covered, and thus on the issue of determining in which of the two States those periods will be taken into account at the time of retirement, but rather on the fact of being actually 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.

- 31 The three factors indicated by the referring court do not, therefore, as such, preclude a person from having the status of a 'worker' for the purposes of Regulation No 1408/71.
- 32 In the present case, the referring court states that, under Paragraph 8(1)(2) of the ASVG, persons who, during the first 48 calendar months following the birth of their child, are actually and predominantly engaged in raising their child within the national territory are partially covered under the retirement insurance scheme. It is, in any event, for the referring court to make the necessary enquiries in order to determine whether, under Austrian law, a person remains, during an extended period of unpaid leave, such as that in the main proceedings, covered under such a retirement insurance scheme and whether the fact of being so insured means that that person 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 Regulation No 1408/71.
- 33 In the light of the foregoing, the answer to the questions referred is that the status of an 'employed person', within the meaning of Article 1(a) of Regulation No 1408/71, must be attributed to a person in a situation such as that of the claimant in the main proceedings during the six-month period of extended unpaid leave following the birth of her child, on condition that, during that period, that person 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. It is for the national court to determine whether that condition is satisfied in the dispute before it.

### **Costs**

- 34 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:

**The status of an 'employed person', within the meaning of Article 1(a) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version 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, must be attributed to a person in a situation such as that of the claimant in the main proceedings during the six-month period of extended unpaid leave following the birth of her child, on condition that, during that period, that person 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. It is for the national court to determine whether that condition is satisfied in the dispute before it.**

[Signatures]