JUDGMENT OF THE COURT (Third Chamber)

18 April 2013 (*)

(Social security – Regulation (EEC) No 1408/71 – Article 1(r) – Definition of 'periods of insurance' – Article 46 – Calculation of retirement pension – Periods of insurance to be taken into consideration – Frontier workers – Period of incapacity for work – Aggregation of similar benefits paid by two Member States – No account taken of a period of incapacity for work as a period of insurance – Residence requirement – Nation rules precluding the cumulation of benefits)

In Case C-548/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Arbeidshof te Antwerpen (Belgium), made by decision of 27 October 2011, received at the Court on 31 October 2011, in the proceedings

Edgard Mulders

v

Rijksdienst voor Pensioenen,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas, A. Ó Caoimh (Rapporteur), C. Toader and C.G. Fernlund, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents,

– the European Commission, by V. Kreuschitz and M. van Beek, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 1(r) and 46 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, in the version amended and updated by Council

Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71').

2 The request was made in proceedings between Mr Mulders and the Rijksdienst voor Pensionen (National Belgian Pensions Office) ('the RVP') concerning the failure to take into account, for the purpose of calculating his retirement pension in Belgium, a period of incapacity for work in respect of which he received sickness insurance benefit in another Member State, namely the Netherlands.

Legal context

European Union legislation

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

'For the purposes of these Rules:

…

(r) "period of insurance" means periods of contribution, employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance;

…'

4 Article 13 of Regulation No 1408/71, which forms part of Title II, entitled 'Determination of the legislation applicable', lays down in paragraph 2 thereof a series of rules the purpose of which is to determine the social security legislation applicable. It is indicated that those rules are subject to the provisions of Articles 14 to 17 of the regulation, which contain various special rules.

5 Article 13(2)(a) of Regulation No 1408/71 is worded as follows:.

'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'.

6 Article 13(2)(f), inserted into Regulation No 1408/71 by Council Regulation (EEC) No 2195/91 of 25 June 1991 (OJ 1991 L 206, p. 2) with effect from 29 July 1991, provides as follows;

'a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17, shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone'.

7 The third recital in the preamble to Regulation No 2195/91 states as follows:

'[w]hereas it has proved necessary, following the judgment [in Case 302/84 *Ten Holder* [1986] ECR 1821], to insert a new subparagraph (f) in Article 13(2) of Regulation …

No 1408/71 in order to determine what legislation is applicable to persons to whom one Member State's legislation ceases to be applicable without the legislation of another Member State becoming applicable to them, in accordance with one of the rules laid down in the previous subparagraphs of the same Article 13(2) or one of the exceptions provided for in Articles 14 to 17 of the regulation in question; ...'.

8 Article 46 of Regulation No 1408/71, entitled 'Award of benefits', is in Chapter 3 of that regulation, entitled 'Old age and death (pensions)', which is, in turn, in Title III of the regulation, entitled 'Special provisions relating to various categories of benefits'. Article 46 is worded as follows:

'1. Where the conditions required by the legislation of a Member State for entitlement to benefits have been satisfied without having to apply Article 45 or Article 40(3), the following rules shall apply:

(a) the competent institution shall calculate the amount of the benefit that would be due:

(i) on the one hand, only under the provisions of the legislation which it administers;

(ii) on the other hand, pursuant to paragraph 2;

(b) the competent institution may, however, waive the calculation to be carried out in accordance with (a)(ii) if the result of this calculation, apart from differences arising from the use of round figures, is equal to or lower than the result of the calculation carried out in accordance with (a)(i), in so far as that institution does not apply any legislation containing rules against overlapping as referred to in Articles 46b and 46c or if the aforementioned institution applies a legislation containing rules against overlapping in the case referred to in Article 46c, provided that the said legislation lays down that benefits of a different kind shall be taken into consideration only on the basis of the relation of the periods of insurance or of residence completed under that legislation alone to the periods of insurance or of residence required by that legislation in order to qualify for full benefit entitlement.

…

2. Where the conditions required by the legislation of a Member State for entitlement to benefits are satisfied only after application of Article 45 and or Article 40(3), the following rules shall apply:

(a) the competent institution shall calculate the theoretical amount of the benefit to which the person concerned could lay claim provided all periods of insurance and/or of residence, which have been completed under the legislation of the Member States to which the employed person or self-employed person was subject, have been completed in the State in question under the legislation which it administers on the date of the award of the benefit. If, under this legislation, the amount of the benefit is independent of the duration of the periods completed, the amount shall be regarded as being the theoretical amount referred to in this paragraph;

(b) the competent institution shall subsequently determine the actual amount of the benefit on the basis of the theoretical amount referred to in the preceding paragraph in accordance with the ratio of the duration of the periods of insurance or of residence completed before the materialisation of the risk under the legislation which it administers to the total duration of the periods of insurance and of residence completed before the materialisation of the risk under the legislations of all the Member States concerned.

3. The person concerned shall be entitled to the highest amount calculated in accordance with paragraphs 1 and 2 from the competent institution of each Member State without prejudice to any application of the provisions concerning reduction, suspension or withdrawal provided for by the legislation under which this benefit is due.

Where that is the case, the comparison to be carried out shall relate to the amounts determined after the application of the said provisions.

…'

9 Article 86 of Regulation No 1408/71, which is in Title VI thereof, entitled 'Miscellaneous provisions', is worded as follows:

'Any claim, declaration or appeal which should have been submitted, in application of the legislation of one Member State, within a specified period to an authority, institution or tribunal of that Member State shall be admissible if it is submitted within the same period to a corresponding authority, institution or tribunal of another Member State. In such a case the authority, institution or tribunal receiving the claim, declaration or appeal shall forward it without delay to the competent authority, institution or tribunal of the former Member State either directly or through the competent authorities of the Member States concerned. …'.

Netherlands legislation

10 Article 6(1) of the General Law on Old-Age Pensions (Algemene Ouderdomswet) ('the Netherlands AOW'), provides as follows:

'1. Any person shall be insured in accordance with the provisions of this Law if he has not yet reached the age of 65 and …

a is resident, or

b. is not resident but is subject to income tax in respect of work carried out in the context of an employment relationship in the Netherlands or on the continental shelf.'

11 Royal Decree No 557 of 19 October 1976 and Royal Decree No 164 of 3 May 1999 preclude, for the purposes of entitlement to a pension on the basis of the Netherlands AOW, the cumulation of benefits received under the Law on insurance for unfitness for work (Wet op de arbeidsongeschiktheidsverzekering) ('the Netherlands WAO') and benefits received under foreign legislation, persons in receipt of such cumulated benefits not being deemed to be insured for the purposes of the Netherlands AOW.

The dispute in the main proceedings and the question referred

12 Mr Mulders, a Belgian national resident in Belgium, worked in that Member State from 25 January 1957.

13 As a result of an accident at work on 2 October 1962, a permanent invalidity rate of 10% was applied to Mr Mulders. The Belgian Fund for Accidents at Work awarded him a benefit with effect from 1 January 1969 on the basis of his permanent invalidity.

14 As of 14 November 1966, Mr Mulders was employed as a frontier worker in Maastricht (the Netherlands).

15 On 10 February 1982, Mr Mulders was declared incapable of work in the Netherlands and therefore received, by way of sickness insurance benefit, the benefit provided for by the Netherlands WAO, equivalent to a rate of incapacity for work of 80% to 100% ('the WAO benefit'). Contributions were deducted from that benefit, including pension contributions paid under the Netherlands AOW into the Netherlands social security scheme.

16 Mr Mulders received the WAO benefit until 25 October 1997.

17 During 1996, Mr Mulders applied for his pension, both in the Netherlands, to the Sociale Verzekeringsbank van Amstelveen (Social Insurance Office, Amstelveen) ('the Netherlands SV') and in Belgium, to the RVP.

18 By decision of 20 November 1997, the RVP granted Mr Mulders a retirement pension. However, for the purpose of calculating the pension, account was not taken of the period from 10 February 1982, the date on which he was recognized as being incapable of work in the Netherlands, to 25 October 1997. The RVP based its decision on the statement provided by the Netherlands SV setting out the periods during which Mr Mulders had been insured in the Netherlands.

19 On 13 January 1998, on examining the pension application submitted by Mr Mulders in the Netherlands, the Netherlands SV took the view that, during the period referred to above, Mr Mulders had not been insured under the Netherlands AOW because, at the same time as he had been in receipt of the WAO benefit, he had also been in receipt of a benefit in Belgium on the basis of accident at-work insurance. Such benefits could not be combined under Netherlands legislation and precluded any entitlement to the insurance cover provided by the Netherlands AOW.

20 By application of 12 February 1998, Mr Mulders challenged the RVP's decision before the Arbeidsrechtbank te Tongeren (the Labour Tribunal, Tongeren).

21 By judgment of 9 June 1999, that court declared the action unfounded. However, it referred to the competent Netherlands court, in accordance with Article 86 of Regulation No 1408/71, Mr Mulders' claim for recognition of the period from 10 February 1982 to 25 October 1997 as a period of insurance for the purposes of his retirement pension.

22 On 8 July 1999, Mr Mulders lodged an appeal before the Arbeidshof te Antwerpen (Higher Labour Court, Antwerp) against the decision of the Arbeidsrechtbank te Tongeren of 9 June 1999. He argued that the failure to take account of the period of incapacity for work following the definitive cessation of his activities as an employed person in the Netherlands was liable to affect the right of freedom of movement conferred by European Union law, by depriving him of benefits guaranteed by the legislation of a Member State.

23 On 24 November 1999, on the basis of the documents forwarded by the Arbeidsrechtbank te Tongeren, the Netherlands SV concluded that Mr Mulders had not been insured during the period in question under the Netherlands AOW. According to that authority, since Mr Mulders had definitively ceased working in the Netherlands on 10 February 1982, his old-age insurance position had to be assessed as of that date solely on the basis of Netherlands legislation, since the rules for determining the applicable legislation laid down in Regulation No 1408/71 no longer had any effect in his regard. Moreover, the Netherlands SV also stated that, as regards the period from 10 February 1982 to 25 October 1997, Mr Mulders did not comply either with Article 6(1)(b) of the Netherlands AOW – which provides that, for AOW insurance purposes, a person who does not reside in the Netherlands is required to have worked in that Member State in a position that is subject to income tax – or with Netherlands

legislation which precludes the cumulation of the WAO benefit with benefits received under foreign legislation.

24 It is apparent from the European Commission's observations, which refer to information provided by the RVP in the main proceedings, that Mr Mulders has not appealed against the Netherlands SV's decision.

25 In those circumstances, the Arbeidshof te Antwerpen decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 46 of … Regulation … No 1408/71 … infringed in cases where, in the calculation of the pension of a migrant worker, a period of incapacity for work during which a work incapacity benefit was awarded and contributions under the [Netherlands AOW] were paid is not regarded as a "period of insurance" within the meaning of Article 1(r) of that regulation?'

The question referred for a preliminary ruling

Admissibility

26 The Belgian Government considers that the request for a preliminary ruling should be dismissed as inadmissible, since the order for reference does not set out with sufficient clarity either the factual background or the Belgian and Netherlands legislation on the basis of which the RVP decision was adopted and nor does it state the reasons which led the referring court to the view that it was necessary to refer a question for a preliminary ruling.

27 It is settled case-law that questions on the interpretation of European Union law referred by a national court in the factual and legal context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a request made by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] I-5667, paragraph 27 and the case-law cited).

28 It is also settled case-law that the need to provide an interpretation of European Union law which will be of use to the national court makes it necessary for that court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of European Union law and considers it necessary to refer a question to the Court for a preliminary ruling (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International*[2009] ECR I-7633, paragraph 40).

29 The question referred by the Arbeidshof te Antwerpen concerns the interpretation of the provisions of Regulation No 1408/71 in an actual dispute in which, as is apparent in particular from paragraph 22 above, Mr Mulders maintains that the failure to take into account, for the purpose of calculating his retirement pension in Belgium, the period during which he was in receipt of the WAO benefit is liable to undermine the principle of freedom of movement for workers enshrined in European Union law. It is apparent from the order for reference, which sets out the factual and legal context of the main proceedings, that the national court is unsure whether the refusal to take account of that period is consistent with Regulation No 1408/71.

30 In those circumstances, the request for a preliminary ruling is admissible.

Substance

31 By its question, the referring court asks, in essence, whether Articles 1(r) and 46 of Regulation No 1408/71 are to be interpreted, for the purpose of calculating a retirement pension in one Member State, as precluding the legislation of another Member State under which a period of incapacity for work during which sickness insurance benefit – from which contributions were deducted by way of old-age insurance – was paid in that other Member State to a migrant worker is not regarded as a 'period of insurance' within the meaning of those provisions, on the ground that the person concerned is not resident in the latter State and/or was in receipt of a similar benefit under the legislation of the first Member State, which could not be cumulated with the sickness insurance benefit.

32 It should be noted at the outset that, contrary to what the Netherlands authorities claim in the main proceedings, the fact that Mr Mulders definitively ceased working in the Netherlands on 10 February 1982 does not in any way mean that his old-age insurance position must be assessed, as of that date, solely on the basis of the relevant Netherlands legislation, on the ground that the rules for determining the applicable legislation laid down in Article 13(2) of Regulation No 1408/71 no longer have any effect as regards Mr Mulders.

33 It is true that, at the time when Mr Mulders definitively ceased working, that is, on 10 February 1982, Article 13(2)(f) of Regulation No 1408/71, which determines inter alia the legislation applicable to persons who have definitively ceased all activity (Case C-345/09 *van Delft and Others* [2010] ECR I-9879, paragraph 46 and the case-law cited), was not yet in force, as that provision was inserted in that regulation with effect from 29 July 1991, as a result of the adoption of Regulation No 2195/91.

34 However, before that date, the Court had already held, as is apparent from the third recital in the preamble to Regulation No 2195/91, that even though Article 13(2)(a) of Regulation No 1408/71 did not expressly refer to the case of a worker who was not employed when he applied for sickness insurance benefit, that provision referred, where necessary, to the legislation of the State in whose territory the worker was last employed, so that a worker who ceased to be employed in the territory of one Member State and did not go to work in the territory of another Member State continued to be subject to the legislation of the Member State in which he was last employed (see, to that effect, Case 150/82 *Coppola* [1983] ECR 43, paragraph 11, and *Ten Holder*, paragraphs 13 to 15).

35 It follows that a person such as Mr Mulders, who, in the action in the main proceedings, definitively ceased work before 29 July 1991 and did not take up employment subsequently, falls within the scope of the provisions of Article 13(2)(a) of Regulation No 1408/71, which, as the last employment position held by Mr Mulders was in the Netherlands, designate Netherlands legislation as the legislation applicable.

36 In the present case, it is apparent from the order for reference that, under Netherlands legislation, in order for a period of incapacity for work – in respect of which sickness insurance benefit has been paid – to qualify as a period of insurance, the person concerned must reside in the national territory if he has ceased, as is the case in the main proceedings, all paid employment subject to income tax in the Netherlands, and that person cannot combine that benefit with a similar benefit granted under foreign legislation, since entitlement to the insurance cover provided by the Netherlands AOW is precluded if one or other of those conditions is not fulfilled.

37 It should be recalled that Article 1(r) of Regulation No 1408/71 provides that the conditions governing the constitution of periods of insurance are defined exclusively by the legislation of the Member State under which the periods in question were completed (see, inter alia, Case C-322/95 *Iurlaro* [1997] ECR I-4881, paragraph 28, and Case C-440/09 *Tomaszewska* [2011] ECR I-1033, paragraph 26).

38 However, it is established case-law that, in establishing those conditions, Member States are required to comply with European Union law, in particular the objective pursued by Regulation No 1408/71 and the principles on which that regulation is based (*Tomaszewska*, paragraph 27), as well as Articles 45 TFEU and 48 TFEU enshrining the principle of freedom of movement for workers (see, to that effect, *Iurlaro*, paragraph 28, and Case C-347/00 *Barreira Pérez* [2002] ECR I-8191, paragraph 23).

39 It should be recalled in that connection that it is settled case-law that the purpose of the provisions of Regulation No 1408/71 determining the legislation applicable, which include Article 13 thereof, is not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by Regulation No 1408/71 are not left without social security cover because there is no legislation which is applicable to them (Case C-275/*96 Kuusijärvi* [1998] ECR I-3419, paragraph 28; Case C-227/03 *van Pommeren-Bourgondiën* [2005] ECR I-6101, paragraph 34; and Case C-619/11 *Dumont de Chassart* [2013] ECR I-0000, paragraph 38).

40 Those provisions of Regulation No 1408/71 thus form a complete system of conflict rules, the effect of which is to divest the national legislatures of the power to determine the ambit and the conditions for the application of their national legislation on the subject so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned (*van Delft and Others*, paragraph 51).

41 It follows that the conditions to which Member States subject the constitution of periods of insurance may not in any case have the effect of excluding from the scope of national legislation persons to whom that legislation applies under Regulation No 1408/71 (see, to that effect, Case C-347/10 *Salemink* [2012] ECR I-0000, paragraph 40 and the case-law cited).

42 As the Commission correctly observed, that is the effect of the national legislation at issue in the main proceedings, in that it makes entitlement to the insurance cover provided by the Netherlands AOW subject to a residence requirement, which means that account cannot be taken, for the purpose of calculating a retirement pension, of a non-resident's period of incapacity for work.

43 At the date on which the person concerned ceased to work, Article 13(2)(a) of Regulation No 1408/71 imposed the rule that such a person continued to be subject to the legislation of the Member State in which he was last employed, even though he resided in the territory of another Member State.

44 That provision would not be complied with if the residence condition laid down by the legislation of the Member State on whose territory the person concerned ceased all employment for affiliation to the retirement pension insurance scheme provided for by that legislation could be relied on against the persons referred to in Article 13(2)(a) of Regulation No 1408/71. With regard to those persons, the effect of that provision is to replace the residence condition with a condition based on employment in the territory of the Member State concerned (*Salemink*, paragraph 41).

45 Moreover, it should be noted that, while European Union primary law can offer no guarantee to an insured person that moving to another Member State will be neutral in terms of social security, in particular where sickness and old-age pension insurance are concerned, since, given the disparities between the Member States' social security schemes and legislation, such a move may be to the advantage of the person concerned in terms of social security, or not, depending on the circumstances, it is settled case-law that, where its application is less favourable, national legislation is consistent with European Union law only to the extent that, in particular, such legislation does not place the worker at a disadvantage compared to those who pursue all their activities in the Member State where it applies and does not purely and simply result in the payment of social security contributions on which there is no return (see, to that effect, Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraph 51; Case C-493/04*Piatkowski* [2006] ECR I-2369, paragraph 34; *van Delft and Others*, paragraphs 100 and 101; and Case C-388/09 *da Silva Martins* [2011] ECR I-0000, paragraphs 72 and 73).

46 As the Court has repeatedly held, the aim of Articles 45 TFEU and 48 TFEU would not be achieved if, as a consequence of the exercise of their right to freedom of movement, migrant workers were to lose the social security advantages afforded them by the legislation of one Member State, especially where those advantages represent the counterpart of contributions which they have paid (see, inter alia, case 24/75*Petroni* [1975] ECR 1149, paragraph 13, and *da Silva Martins*, paragraph 74 and the case-law cited).

47 It is clear that those requirements are not met if, as in the main proceedings, for the purpose of calculating the retirement pension of a migrant worker, the legislation of a Member State precludes as a period of insurance an entire period during which contributions were paid by the worker by way of old-age insurance, where it is common ground that account would have been taken of that period if the person concerned had resided in that Member State.

48 It is irrelevant in that regard that, due to the existence of a national rule precluding the cumulation of benefits, it was not possible for the sickness insurance benefit from which contributions had been withheld to be combined with a similar benefit which, in the main proceedings, was paid to the person concerned during the period in question under the legislation of another Member State. Indeed, in addition to the fact that the national rule precluding the cumulation of benefits was not applied by the competent national authorities when the benefits concerned by that rule were paid, since it was relied on only *a posteriori* for the purpose of calculating a separate benefit, namely a retirement pension, the fact also remains that, as contributions were in fact withheld by way of old-age insurance from the sickness insurance benefit paid to the person concerned by those authorities, there would be no return on those contributions if it were possible to rely on that rule against that person.

49 In the light of all the foregoing considerations, the answer to the question referred is that Articles 1(r) and 46 of Regulation No 1408/71, read in the light of Article 13(2)(a) of that regulation and Articles 45 TFEU and 48 TFEU, are to be interpreted, for the purpose of calculating a retirement pension in one Member State, as precluding the legislation of another Member State under which a period of incapacity for work during which sickness insurance benefit – from which contributions were deducted by way of old-age insurance – was paid in that other Member State to a migrant worker is not regarded as a 'period of insurance' within the meaning of those provisions, on the ground that the person concerned is not resident in the latter State and/or was in receipt of a similar benefit under the legislation of the first Member State, which could not be combined with the sickness insurance benefit.

Costs

50 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:

Articles 1(r) and 46 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, read in the light of Article 13(2)(a) of that regulation and Articles 45 TFEU and 48 TFEU, are to be interpreted, for the purpose of calculating a retirement pension in one Member State, as precluding the legislation of another Member State under which a period of incapacity for work during which sickness insurance benefit – from which contributions were deducted by way of old-age insurance – was paid in that other Member State to a migrant worker is not regarded as a 'period of insurance' within the meaning of those provisions, on the ground that the person concerned is not resident in the latter State and/or was in receipt of a similar benefit under the legislation of the first Member State, which could not be combined with the sickness insurance benefit.

[Signatures]

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* Language of the case: Dutch.