

JUDGMENT OF THE COURT (Eighth Chamber)

5 February 2015 (*)

(Reference for a preliminary ruling — Social security — Regulation (EEC) No 1408/71 — Article 71 — Concept of a ‘partially unemployed frontier worker’ — Refusal of the Member State of residence and of the competent Member State to grant unemployment benefit)

In Case C-655/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Centrale Raad van Beroep (Netherlands), made by decision of 9 December 2013, received at the Court on 12 December 2013, in the proceedings

H.J. Mertens

v

Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen,

THE COURT (Eighth Chamber),

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

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 November 2014,

after considering the observations submitted on behalf of:

- the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen, by M. Mollee, acting as Agent,
- the Netherlands Government, by B. Koopman, M. Bulterman, H. Stergiou and M. Noort, acting as Agents,
- the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,
- the German Government, by T. Henze, A. Lippstreu and A. Wiedmann, acting as Agents,

– the European Commission, by D. Martin 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 Article 71 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) ('Regulation No 1408/71').
- 2 The request has been made in proceedings between Ms Mertens and the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Management Board of the Employee Insurance Agency; 'the Uv'v') concerning the latter's refusal to grant unemployment benefit to Ms Mertens.

Legal context

- 3 Article 1 of Regulation No 1408/71, headed 'Definitions', provides:

'For the purpose of this Regulation:

...

(o) *competent institution* means:

(i) the institution with which the person concerned is insured at the time of the application for benefit;

or

(ii) the institution from which the person concerned is entitled or would be entitled to benefits if he or a member or members of his family were resident in the territory of the Member State in which the institution is situated;

or

(iii) the institution designated by the competent authority of the Member State concerned;

or

- (iv) in the case of a scheme relating to an employer's liability in respect of the benefits set out in Article 4(1), either the employer or the insurer involved or, in default thereof, a body or authority designated by the competent authority of the Member State concerned;

...

- (q) *competent State* means the Member State in whose territory the competent institution is situated;

...'

4 Article 13 of that regulation provides:

'1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

- (a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

...'

5 Article 71(1) of Regulation No 1408/71 is worded as follows:

'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) (i) a frontier worker who is partially or intermittently unemployed in the undertaking which employs him, shall receive benefits in accordance with the provisions of the legislation of the competent State as if he were residing in the territory of that State; these benefits shall be provided by the competent institution;
- (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;

...?

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

- 6 From 1 January 2003 until 28 February 2009, Ms Mertens was employed on a full-time basis by Saueressig GmbH ('Saueressig') in Vreden (Germany).
- 7 Since 1 March 2009, Ms Mertens has been employed on a part-time basis, namely for 10 hours per week, by ATG Service GmbH ('ATG') in Ahaus (Germany).
- 8 For the period between 2003 and 2009, Ms Mertens resided in Enschede (Netherlands).
- 9 Ms Mertens applied to the Uvw for a grant of benefit under the Netherlands Law on unemployment (Werkloosheidswet). The Uvw refused that application as it took the view that Ms Mertens had to be classified as a frontier worker pursuant to Regulation No 1408/71 and that, in so far as she was partially unemployed, she had to submit an application to receive unemployment benefit in the Member State of the place of her work, that is to say, Germany. The Netherlands court of first instance also took the view that Ms Mertens was subject to German legislation.
- 10 By a decision of 29 April 2009, the Bundesagentur für Arbeit (German Federal Employment Agency) turned down Ms Mertens' application for unemployment benefit in Germany. In accordance with the German Social Security Code (Sozialgesetzbuch), that agency took the view that Ms Mertens had the status of a wholly unemployed frontier worker in view of the fact that the continuation of her employment relationship on a part-time basis had taken place with another employer. Ms Mertens appealed against that decision to the Sozialgericht Münster (Social Court, Münster, Germany).
- 11 By a ruling of 18 October 2013, which has become final, the Sozialgericht Münster dismissed the appeal brought by Ms Mertens against that decision of the Bundesagentur für Arbeit.
- 12 The Centrale Raad van Beroep (Higher Social Security Court, Netherlands), dealing with an appeal brought by Ms Mertens against the decision of the Netherlands court of first instance, takes the view that, at the time when Ms Mertens was employed by Saueressig and subsequently by ATG, she was subject to German legislation. That court points out that Article 71(1)(a)(i) of Regulation No 1408/71 concerns a frontier worker 'who is partially or intermittently unemployed in the undertaking which employs him' and that Article 71(1)(a)(ii) of that regulation relates to the 'frontier worker who is wholly unemployed'. According to that court, the wording of those provisions does not make it possible to determine which Member State is responsible for paying

unemployment benefit in the situation of a frontier worker in partial unemployment who is directly employed by another employer in the same Member State.

- 13 According to the referring court, the Court of Justice ruled in its judgment in *de Laat* (C-444/98, EU:C:2001:165), with regard to a frontier worker who no longer has any link with the Member State in which he had worked and who is thus wholly unemployed for the purposes of Article 71(1)(a)(ii) of Regulation No 1408/71, that the Member State of the place of residence is competent in respect of unemployment benefit. The Centrale Raad van Beroep also refers to Decision No 205 of the Administrative Commission on social security for migrant workers of 17 October 2005 on the scope of the notion of ‘partial unemployment’ with regard to frontier workers (OJ 2006 L 130, p. 37), in which that administrative commission expressed the view that partial unemployment is linked to the maintenance or absence of any contractual link between the employee and the employer.
- 14 For that reason, the referring court takes the view that it appears to follow from the judgment in *de Laat* (EU:C:2001:165) and from that decision that, for Ms Mertens to be able to be regarded as a partially unemployed frontier worker, there would have to have been a continuous or new employment relationship with Saueressig, even on a part-time basis, but one that was directly consecutive to the one linking her to that same employer. It is only where the worker no longer has any link with the competent Member State in which he worked and is fully unemployed that he must, in that court’s view, apply to the institution of his place of residence for assistance in finding work. That court concludes that it is for the Member State which offers the person concerned the most opportunities to find additional work that is responsible for paying unemployment benefit. In this case, it is clear to the referring court that such a responsibility falls to the Federal Republic of Germany.
- 15 Nevertheless, the referring court has doubts in that regard, particularly in view of the opposite position adopted by the Bundesagentur für Arbeit. The referring court therefore does not exclude the possibility that Ms Mertens may be considered to be wholly unemployed.
- 16 In those circumstances, the Centrale Raad van Beroep decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Should Article 71(1)(a)(i) of Regulation No 1408/71 be interpreted as precluding a frontier worker, who, immediately after a full-time employment relationship with an employer in a Member State, is employed for fewer hours by another employer in the same Member State, from being classified as a partially unemployed frontier worker?’

Consideration of the question referred

- 17 By its question, the referring court is asking whether Article 71(1)(a)(i) of Regulation No 1408/71 must be interpreted as meaning that a frontier worker who, immediately after the end of a full-time employment relationship with an employer in a Member State which is not that of his residence, is employed on a part-time basis by another employer in that same Member State has the status of a partially unemployed frontier worker within the meaning of that provision.
- 18 Article 71 of Regulation No 1408/71 contains specific provisions applicable to unemployed persons who, during their last period of employment, resided in a Member State other than the competent Member State. The Court has already held that the provisions of that article are intended to ensure that migrant workers receive unemployment benefit under the conditions which are most favourable to the search for new employment (see judgment in *Miethé*, 1/85, EU:C:1986:243, paragraph 16 and the case-law cited).
- 19 Those provisions can be distinguished from the general rule provided for in Article 13(2) of that regulation, according to which a worker employed in the territory of one Member State is to be subject to the legislation of that State (see judgment in *Jeltes and Others*, C-443/11, EU:C:2013:224, paragraph 20).
- 20 Thus, under Article 71(1)(a)(ii) of Regulation No 1408/71, frontier workers who are wholly unemployed are subject to the legislation of the Member State in whose territory they reside. The Court has taken the view that that provision is based on the implicit assumption that such a worker will find in that State the conditions which are most favourable to the search for new employment (see, to that effect, judgments in *Miethé*, EU:C:1986:243, paragraph 17, and in *Jeltes and Others*, EU:C:2013:224, paragraph 21).
- 21 It follows that Article 71(1)(a)(i) of Regulation No 1408/71, which provides that a frontier worker who is partially or intermittently unemployed in the undertaking which employs him is subject to the legislation of the competent Member State, must be understood as being based also on the implicit assumption that it is in that Member State that such a worker benefits from the conditions which are most favourable to the search for new employment.
- 22 In that regard, the criteria used to determine whether a frontier worker is to be regarded as being partially unemployed or wholly unemployed within the meaning of Article 71(1)(a) of Regulation No 1408/71 must be uniform and laid down by EU law. The Court has accordingly held that that assessment may not be made on the basis of criteria drawn from national law (see judgment in *de Laat*, EU:C:2001:165, paragraph 18).

- 23 Likewise, the Court has also held that the protection of workers, which is the aim pursued by Article 71 of Regulation No 1408/71, would not be attained if the worker concerned, who, in a Member State other than the State of residence, remains employed by the same undertaking, but on a part-time basis, while remaining available for work on a full-time basis, were obliged to apply to an institution of the Member State of his place of residence for assistance in finding work additional to that which he already carries out. The fact that he has passed from full-time employment to part-time employment by virtue of a new contract is in this respect irrelevant (see, to that effect, judgment in *de Laat*, EU:C:2001:165, paragraph 34).
- 24 This conclusion stems from the fact that the institution of the Member State of the place of residence of the worker concerned would be considerably less well placed, in comparison with its counterpart in the competent Member State, to assist him in finding additional employment on terms and conditions compatible with his part-time work, that is to say, in all likelihood, additional employment to be carried out in the territory of the competent Member State (see, to that effect, judgment in *de Laat*, EU:C:2001:165, paragraph 35).
- 25 For that reason, it is only when a worker no longer has any link with the competent Member State and is wholly unemployed that he must apply to the institution of the Member State of his place of residence for assistance in finding employment (see, to that effect, judgment in *de Laat*, EU:C:2001:165, paragraph 36).
- 26 It follows that, contrary to what the German Government maintains, a situation of being wholly unemployed necessarily means that the worker concerned has completely stopped working.
- 27 Accordingly, in the case in the main proceedings, no relevance attaches to the fact that the undertaking that employed Ms Mertens under a full-time contract is not the one that subsequently employed her under a part-time contract. Any interpretation of Article 71(1)(a)(i) of Regulation No 1408/71 which would make the application of that provision subject to the requirement that the undertaking in which the worker holds part-time employment must be the same as that in which the worker previously held full-time employment would reduce the scope of that provision in a manner that would undermine its effectiveness.
- 28 Similarly, no relevance attaches to the fact that the employment contract at issue in the main proceedings provides for a working week of 10 hours, as the Court has already held that there is nothing in Article 1(a) or Article 2(1) of Regulation No 1408/71 which would allow certain categories of persons to be excluded from the scope of that regulation on the basis of the amount of time that they devote to their activities (see, by analogy, judgment in *Kits van Heijningen*, C-2/89, EU:C:1990:183, paragraph 10).

- 29 This interpretation of Article 71(1)(a)(i) of Regulation No 1408/71 is thus the only one which is capable of ensuring that frontier workers are regarded as being partially employed in the Member State in which they benefit from the conditions which are most favourable to the search for full-time employment.
- 30 Consequently, Article 71(1)(a)(i) of Regulation No 1408/71 cannot be interpreted as excluding from its scope a frontier worker who has maintained an employment relationship in the competent Member State, even if that employment is on a part-time basis.
- 31 Having regard to all of the foregoing considerations, the answer to the question referred is that Article 71(1)(a)(i) of Regulation No 1408/71 must be interpreted as meaning that a frontier worker who, immediately after the end of a full-time employment relationship with an employer in a Member State, is employed on a part-time basis by another employer in that same Member State has the status of a partially unemployed frontier worker within the meaning of that provision.

Costs

- 32 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:

Article 71(1)(a)(i) 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, must be interpreted as meaning that a frontier worker who, immediately after the end of a full-time employment relationship with an employer in a Member State, is employed on a part-time basis by another employer in that same Member State has the status of a partially unemployed frontier worker within the meaning of that provision.

[Signatures]

* Language of the case: Dutch.