Case C-285/20

Request for a preliminary ruling

Date lodged:

29 June 2020

Referring court:

Centrale Raad van Beroep (Netherlands)

Date of the decision to refer:

25 June 2020

Applicant:

K

Defendant:

Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Uwv)

Centrale Raad van Beroep

(Higher Social Security and Civil Service Court)

Meervoudige kamer

(Full-bench Division)

Request to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU)

Parties:

K, residing in Enschede (appellant)

the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Executive Board of the Employee Insurance Agency; 'the Uwv')

…

PROCEDURE

[Procedure] …

GROUNDS

1. The Centrale Raad van Beroep (‘the Raad’) proceeds on the basis of the following facts and circumstances.

1.1. The appellant moved from Turkey to live in the Netherlands in 1979. From 2005 on, he lived with his family in [Municipality 1], Germany. Owing to relationship problems, the appellant deregistered from the population register of [Municipality 1] on 2 February 2016 and went to live with his brother in [Municipality 2], the Netherlands. On 16 February 2016 the appellant underwent surgery in a hospital in Germany, where he stayed until 19 February 2016. On 4 March 2016 the appellant registered at his brother’s address in [Municipality 2]. Since October 2016, the appellant has had his own accommodation in [Municipality 3], the Netherlands.

1.2. Since 1979, the appellant has worked for various Dutch employers in the Netherlands. On 1 May 2015 he started working for a German employer in Germany. Owing, inter alia, to eye problems, the appellant reported sick on 24 August 2015. For the first six weeks of his sickness, his salary was paid by his employer. Thereafter, from 14 October 2015 until 4 April 2016, the appellant received a German sickness benefit (‘Krankengeld’). The employer terminated the employment contract on 15 February 2016, with effect from 15 March 2016. During the period from 24 August 2015 to 15 March 2016, the appellant did not perform any more work for his employer. The competent German institution deemed the appellant fit for suitable work again with effect from 4 April 2016.

1.3. On 22 April 2016 the appellant applied to the Uwv for unemployment benefit under the Werkloosheidswet (Unemployment Insurance Act; ‘WW’), with effect from 4 April 2016. By decision of 7 July 2016, the Uwv determined that, although the appellant was entitled to a WW benefit as from 5 April 2016, that benefit would not be paid because there was culpable unemployment. On 7 July 2016 the Uwv notified the appellant of its intention not to declare itself competent to rule on the appellant’s entitlement to unemployment benefit and gave the appellant an opportunity to respond.

1.4. By decision on appeal of 14 September 2016 (‘the contested decision’), the appellant’s objection was dismissed as unfounded. The basis for this, with reference to the expressed intention of 7 July 2016, was that the Uwv did not consider itself competent to assess the application for unemployment benefit. While de facto pursuing his work activity in Germany (between 1 May and 24 August 2015), the appellant lived in Germany and was not a frontier worker.

Germany, as the last country of employment, is competent to rule on the unemployment benefit.

2. The Rechtbank (District Court) dismissed the appeal against the contested decision as unfounded. According to the Rechtbank, the Uwv was correct not to regard the appellant as a frontier worker and Article 65 of Regulation (EC) No 883/2004 moreover gives no rise to entitlement to unemployment benefit from the Netherlands.

3. Positions of the parties

Appellant

3.1. In brief, and in so far as is relevant here, the appellant has taken the view that he is entitled to unemployment benefit from the Netherlands. At the time of his move to the Netherlands on 2 February 2016, he was still employed by his German employer and, were it not for his sickness, would have pursued his activity in Germany as a frontier worker.

Uwv

3.2. On request, the Uwv further substantiated its position at the hearing of the Raad. According to the Uwv, the appellant is not entitled to unemployment benefit from the Netherlands under Article 65 of Regulation 883/2004. That article applies to unemployed persons who, during the pursuit of their last activity, resided in the territory of a Member State other than the competent Member State. Although the Uwv assumes that the appellant resided in the Netherlands as from 2 February 2016, the transfer of his residence from Germany to the Netherlands did not take place during the de facto pursuit of his last activity. After all, the appellant no longer in fact pursued any activity from when he reported being sick, on 25 August 2015, until the end of his employment, on 15 March 2016.

According to the Uwv, the fiction under Article 11(2) of Regulation 883/2004, on the basis of which a person in receipt of sickness benefit is considered, for the purpose of determining the legislation applicable, to be pursuing an activity, does not apply to the interpretation of the special provisions concerning unemployment benefits in Title III of Regulation No 883/2004.

In the Uwv's view, the judgment of the Court of Justice of the European Union ('the Court of Justice') of 22 September 1988, *Bergemann* (236/87, EU:C:1988:443; 'the *Bergemann* judgment') does not lead to a different conclusion, either, since the appellant did not move to the Netherlands for family reasons.

4. Relevant European legislation

4.1.1. Article 11(2) of Regulation 883/2004 provides as follows:

‘2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors’ pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period’.

4.1.2. Article 11(3)(a) of Regulation 883/2004 provides as follows:

‘3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State’.

4.1.3. Chapter 6 of Title III of Regulation No 883/2004 lays down special rules for unemployed persons which in certain cases derogate from the general rules laid down in Title II in order to be able to determine which institution must provide the benefits referred to in the articles concerned and which legislation is applicable.

4.2. Article 65(2) and (5)(a) of Regulation 883/2004 provides as follows:

‘2. A wholly unemployed person who, during his last activity as an employed or self-employed person, resided in a Member State other than the competent Member State and who continues to reside in that Member State or returns to that Member State shall make himself available to the employment services in the Member State of residence. Without prejudice to Article 64, a wholly unemployed person may, as a supplementary step, make himself available to the employment services of the Member State in which he pursued his last activity as an employed or self-employed person.

An unemployed person, other than a frontier worker, who does not return to his Member State of residence, shall make himself available to the employment services in the Member State to whose legislation he was last subject.

…

5. (a) The unemployed person referred to in the first and second sentences of paragraph 2 shall receive benefits in accordance with the legislation of the Member State of residence as if he had been subject to that legislation during his last activity as an employed or self-employed person. Those benefits shall be provided by the institution of the place of residence’.

5. The dispute

5.1. The present dispute between the parties concerns the question of whether, pursuant to Article 65(2) and (5)(a) of Regulation No 883/2004, the appellant was entitled to unemployment benefit from the Netherlands with effect from 4 April 2016. More specifically, the question is whether the appellant resided in a

Member State other than the competent Member State while pursuing his last activity.

5.2. Competent Member State

5.2.1. It is not in dispute that, between 14 October 2015 and 4 April 2016, the appellant received a German sickness benefit. Accordingly, he must, under Article 11(2) and (3)(a) of Regulation No 883/2004, be considered during that period to be a person pursuing an activity in Germany, and German legislation is applicable. That implies that, during the period in question, Germany is the competent Member State as referred to in Article 1(q) and (s) of Regulation No 883/2004.

5.3. Place of residence

5.3.1. It is not in dispute between the parties, nor does the Raad have reason to take a different view in the present proceedings, that, as from 2 February 2016, the appellant's place of residence was the Netherlands.

5.4. Application of Article 65; interpretation of the term 'pursuit of activity'

5.4.1. On the basis of the foregoing premisses, it is established that, as from 2 February 2016, the appellant lived in a Member State other than the competent Member State. Furthermore, it is not in dispute that, as from 4 April 2016, the appellant was wholly unemployed. A special rule is laid down in Article 65 of Regulation No 883/2004 for wholly unemployed persons who, during the pursuit of their last activity, resided in a Member State other than the competent Member State. This rule applies to frontier workers and non-frontier workers.

5.4.2. Relevant to the question of whether Article 65 of Regulation No 883/2004 applies to the appellant's situation is whether he was living in the Netherlands while pursuing his last activity. The Uwv has argued that it must then be a matter of having the Netherlands as place of residence during the de facto pursuit of that activity. That is incontrovertibly not the case with the appellant, since, after reporting being sick on 24 August 2015, he in fact no longer worked in Germany.

5.4.3. The Raad is of the view that the question of whether Article 65 of Regulation No 883/2004 applies to the appellant's situation cannot be answered without reasonable doubt. Namely, it is not entirely clear to the Raad whether the application of that article requires residence in a Member State other than the competent Member State during the de facto pursuit of activity or whether those situations which can be equated legally with the pursuit of activity should also give entitlement to unemployment benefit in the country of residence.

5.4.4. With regard to those situations which can be equated with the pursuit of activities, one can think of situations in which the person concerned remains socially insured in the last country of employment while no longer carrying out work. For example, in the case of (unpaid) leave during the employment period or during the notice period, when the person concerned is not required to pursue an

activity until the employment relationship has been terminated. A comparison with the *Bergemann* judgment is called for here. Consideration may also be given to the situation in the case at hand, in which the appellant relocated while receiving sickness benefit and, on the basis of that benefit, is considered to be a person pursuing an activity. In the case of the appellant, there are even a combination of factors at the point at which that he became resident in the Netherlands. He was in receipt of sickness benefit and still had an employment relationship with his German employer.

5.5. Owing to a number of circumstances, the Raad doubts the correctness of the Uwv's argument that, in order for Article 65 of Regulation No 883/2004 to be applicable, the person concerned must, while de facto pursuing his last activity, have resided in a Member State other than the competent Member State. Those circumstances are dealt with below.

5.5.1. In the first place, reference is made to Article 11(2) of Regulation No 883/2004, in which, for the purpose of determining the legislation applicable, the receipt of sickness benefit is equated with – as in the present case – the pursuit of an activity. That assimilation therefore occurs in Title II without any mention of the de facto pursuit of an activity.

5.5.2. Such assimilation in relation to Title II can be found in the judgment of the Court of Justice of 13 September 2017, *X* (C-569/15, EU:C:2017:673). In paragraph 24 of that judgment, the Court considered that, in so far as a person retains the status of employed person during the period of unpaid leave granted to him by his employer, it is possible to regard him as a person who is employed within the meaning of Title II of Regulation (EEC) No 1408/71, notwithstanding the suspension of the main obligations arising from that employment relationship during that specific period. The Raad sees no reason to think otherwise in respect of the application of Regulation (EC) No 883/2004.

5.5.3. The Raad questions whether a logical and consistent interpretation of the term 'pursuit of activity' should not involve that term as it is used in Article 65 of Title III being interpreted in the light of the application of the term in Title II. For the application of Article 65, then, the only determining factor is whether the person concerned is resident in a Member State other than that to whose legislation he was subject during his last activity as referred to in Title II (see judgment of the Court of Justice of 27 January 1994, *Toosey*, C-287/92, EU:C:1994:27, paragraph 13, and judgment of 29 June 1995, *Van Gestel*, C-454/93, EU:C:1995:205, paragraph 24). In other words, that the person concerned used to reside in a Member State other than the competent Member State (*Van Gestel* judgment, paragraph 13).

5.6. In the second place, reference is made to the *Bergemann* judgment. That judgment was delivered under the aegis of Regulation No 1408/71, more specifically, of Article 71(1)(b)(ii) thereof, but, in the opinion of the Raad, it has retained its significance for the interpretation of the legal question at issue in the present case.

That judgment concerned a woman who was living and working in the Netherlands and who, in the last month of her employment – during her period of leave – moved to Germany for family reasons. She thus moved to Germany while she was still in employment but no longer actually working. The Court of Justice held that Article 71(1)(b)(ii) of Regulation No 1408/71, the predecessor of Article 65 of Regulation No 883/2004, was applicable to a situation in which a worker, while pursuing his last activity, transferred his residence to another Member State for family reasons.

5.6.1. The Uwv is of the opinion that it clear from the *Bergemann* judgment, too, that the provisions referred to must pertain to the de facto pursuit of the last activity. In its view, while Article 71(1)(b)(ii) of Regulation No 1408/71 did not, in principle, apply to her situation, the Court of Justice nevertheless wanted to bring Bergemann within the scope of that article because of the family reasons underlying her move to Germany, as it was in that Member State that she had the best chance of resuming work. In the Uwv's view, Article 71(1)(b)(ii) of Regulation No 1408/71 and Article 65 of Regulation No 883/2004 apply only if an insured person, during the period in which he is no longer actually working, moves to another Member State for family reasons.

5.6.2. The Raad believes, however, that it could also be inferred from the *Bergemann* judgment that the phrase 'in the course of his last employment' refers not only to the de facto pursuit of that activity, but also to a situation in which, in any event, the employment relationship still exists and the person concerned is still subject to the legislation of the last State of employment during that employment relationship. The Raad is not entirely certain as to the significance which the Court of Justice attached in that regard to the reasons underlying Bergemann's move to Germany. The Raad does not rule out the possibility – referring also to the judgment of 17 February 1977, *Di Paolo* (76/76, ECLI:EU:C:1977:32) – that the Court of Justice deemed the move for family reasons decisive only for ascertaining the place of residence, in particular because it is indicative of close ties on the part of Bergemann to her new country of residence.

5.6.3. Such an interpretation would mean that if – as in the present case – it is common ground between the parties that the person concerned resides in a Member State other than the competent Member State, the reasons for the move in the course of pursuing the last activity could be considered in the abstract. It appears to the Raad that, even if the move were made for reasons other than family reasons, entitlement to unemployment benefit in the Member State of residence is justified. As the Court of Justice also considered in the *Bergemann* judgment, the link with the Member State of residence in principle accords the person concerned the best conditions for finding new employment in that Member State. That is consistent with the purpose of Article 71 of Regulation No 1408/71 (now Article 65 of Regulation No 883/2004): to ensure entitlement for the migrant worker to claim unemployment benefits under the most favourable conditions for seeking new employment (*Bergemann* judgment, paragraphs 18 and 20, *Van Gestel* judgment, paragraph 20).

5.6.4. On the basis of the case-law of the Court of Justice and in line with the objective of Article 65 of Regulation No 883/2004, the Raad does not consider it implausible that the decisive factor for the application of Article 65 of Regulation No 883/2004 is that the residence of the person concerned be in a Member State other than the competent Member State (*Toosey* judgment, paragraph 13, *Van Gestel* judgment, paragraph 24).

5.6.5. The Raad does not overlook the fact that the Court stated, inter alia in the *Di Paolo* judgment (paragraph 13), that Article 71(1)(b)(ii) must be interpreted strictly, with the aim also of preventing abuse. The Raad believes, however, that there are indications in the case-law of the Court of Justice that the purpose of such a strict interpretation is to ensure that the person concerned is not deemed too quickly to have fulfilled the requirement that he should have resided in a Member State other than the competent Member State while pursuing his last activity, in particular where the period of residence in that other Member State has been relatively short. In the present proceedings, however, it is common ground between the parties that the appellant was resident in the Netherlands as from 2 February 2016 and the interpretation of the term 'place of residence' is no longer at issue.

6. The considerations set out above lead the Raad to submit questions to the Court of Justice in relation to the interpretation of Article 65 of Regulation No 883/2004.

DECISION

The Centrale Raad van Beroep

– requests the Court of Justice, pursuant to Article 267 TFEU, to give a preliminary ruling on the following questions:

1. Must Article 65(2) and (5) of Regulation (EC) No 883/2004 be interpreted as meaning that a wholly unemployed person who has transferred his place of residence from the competent Member State to another Member State while receiving a benefit as referred to in Article 11(2) of Regulation (EC) No 883/2004, and/or before his employment relationship has been terminated, is entitled to unemployment benefit under the legislation of the Member State in which he resides?

2. Are the reasons for which the unemployed person has transferred his residence to a Member State other than the competent Member State, for example, on family grounds, relevant in that regard?

– [Stay of proceedings] …

[Closing formula and signatures] …