Case C-713/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

24 December 2020

Referring court:

Centrale Raad van Beroep (Higher Social Security and Civil Service Court, Netherlands)

Date of the decision to refer:

17 December 2020

Appellants:

Raad van bestuur van de Sociale verzekeringsbank

Y

Respondents:

X

Raad van bestuur van de Sociale verzekeringsbank

Subject matter of the main proceedings

Accrual of social security rights of temporary agency workers residing in another Member State in the periods when no temporary agency work is performed and the employment relationship is terminated

Subject matter and legal basis of the request

Determination of the Member State whose legislation applies, under Regulation (EC) No 883/2004, during periods when no temporary agency work is performed. Article 267 TFEU.

Questions referred for a preliminary ruling

1. Must Article 11(3)(a) of [Regulation (EC) No 883/2004] be interpreted as meaning that a worker who resides in a Member State, and works in the territory of another Member State on the basis of a temporary agency contract, under which the employment relationship ends as soon as the temporary assignment ends and is then resumed again, remains subject to the legislation of the latter Member State during the intervening periods, so long as he has not temporarily ceased that work?

2. What factors are relevant for assessing whether or not there is a temporary cessation of activity in such cases?

3. How much time must elapse before a worker who is no longer in a contractual employment relationship is to be regarded as having temporarily ceased his activity in the country of employment, unless there are concrete indications to the contrary?

Provisions of European Union law relied on

Article 1, paragraphs (a) and (b), Article 11(1), (2) and (3)(a) and (b) of Regulation (EC) No 883/2004

Provisions of national law relied on

Article 6(1)(a) and (b), and (3), Article 6a(a) and (b), Article 13(1)(a) of the Algemene Ouderdomswet (General Law on Old-Age Pensions; 'AOW')

Article 6(1)(a) and (b), and (3), Article 6a(a), (b) and (c) of the Algemene Kinderbijslagwet (General Law on Child Benefits)

Article 6(a) and (b), and Article 9 of the Besluit uitbreiding en beperking kring van verzekerden volksverzekeringen 1999 (Decree of 1999 on the extension and restriction of the category of persons insured in respect of national insurance)

The case of X

Succinct presentation of the facts and procedure in the main proceedings

1 X has Netherlands nationality and moved from the Netherlands to Germany, where she has never worked. She has, however, intermittently carried out temporary agency work in the Netherlands. Under her temporary agency contract, the employment relationship ends by operation of law as soon as the assignment is terminated at the client's request. In addition, X carried out activities in the Netherlands for no remuneration or for very little remuneration.

2 By decision of 6 July 2015, the Sociale Verzekeringsbank (Netherlands Social Security Bank; 'Svb') provided a pension statement showing that X had accrued only 82% of the pension under the AOW because she was only insured under the AOW during the periods that she actually worked as a temporary agency worker in the Netherlands.

3 The Rechtbank (District Court) upheld X's appeal against that decision, finding that the periods between the various temporary work assignments should be regarded as periods of leave or of unemployment. Referring to the judgment of the Court of Justice of 23 April 2015, *Franzen and Others* (C-382/13, EU:C:2015:261), the District Court ruled that X must be deemed to have been insured under the AOW during those periods. It is not desirable for a person to be subject to the social security system of another Member State for relatively short periods at a time. The Svb lodged an appeal against the District Court's ruling.

Essential arguments of the parties in the main proceedings

4 According to the Svb, X's case cannot be compared with the *Franzen* judgment because the employment relationship in the cases that led to that judgment, unlike that in the present case, was not interrupted. The characteristic of X's temporary agency contract is precisely that this contract ends when the client no longer makes use of X's services and the temporary employment agency then no longer has any obligation whatsoever towards her. She cannot be deemed to be on leave or unemployed. On the basis of Article 11(3)(a) and (c) of Regulation No 883/2004, read in conjunction with Article 11(2) of that regulation, X does not satisfy the conditions for being deemed to be a worker, as she has not received any unemployment benefit from the Netherlands. As regards the periods during which she did not work, the applicable legislation must be determined on the basis of Article 11(3)(e) of Regulation No 883/2004.

5 X maintains that the activities she pursued were entirely focused on the Netherlands, even though she lived in Germany. She was therefore continuously insured under the AOW.

The case of Y

Succinct presentation of the facts and procedure in the main proceedings

6 Y lives with his family in Poland. He has worked in the Netherlands, with some interruptions, since 16 July 2007, on the basis of various types of employment contract with the same temporary employment agency as X.

7 From 20 July 2015, a fixed-term temporary agency contract was in force between Y and the temporary employment agency for a period of eight months. Under a clause in that contract, when the work for the client ended, Y had to accept

suitable substitute work. If he refused, the employment contract would end prematurely.

8 Y did not work from 1 January 2016 to 7 February 2016. The contract referred to in paragraph 7 ended on 31 December 2015. A new temporary employment contract was entered into as of 8 February 2016.

9 By decision of 29 March 2016, the Svb informed Y that he was not entitled to child benefit for January and February 2016 because he was not working in the Netherlands on the first working day of those months. As of March 2016, he again received child benefit. In response to Y's objection, the Svb replied by decision of 20 May 2016 that the temporary employment contract had lapsed during his stay in Poland because he was no longer available for work at that time.

10 The District Court dismissed Y's appeal as unfounded, primarily because he did not have an employment contract in January 2016 and the first week of February 2016. It could not be assumed that he was on paid or unpaid leave during that period. Nor was there any question of discrimination on the basis of place of residence, or of a prohibited barrier to the free movement of persons.

Essential arguments of the parties in the main proceedings

11 Y argues that his employment contract was not interrupted. He took unpaid leave between 1 January and 8 February 2016 in consultation with the employer. In the alternative, he argues that one of the objectives of Regulation No 883/2004 is that, in the event of a break in employment of less than three months, the legislation of the last country of employment remains applicable. The refusal by the Netherlands to pay child benefit constitutes, inter alia, an unlawful distinction on the basis of place of residence and type of employment, as well as an unlawful barrier to freedom of movement.

12 The Svb maintains that its decisions are correct. Like other workers, temporary agency workers are, in principle, insured for the duration of the employment contract. However, Y's temporary agency contract was effectively terminated as of 1 January 2016. He was therefore not insured until the new employment contract of 8 February 2016. Referring to settled case-law, the Svb notes that there is sufficient justification in the Netherlands insurance system applicable to residents, for example, as regards old age pensions and child benefit, for the fact that in principle only residents are insured. There is therefore no question of a prohibited distinction.

Succinct presentation of the reasoning in the request for a preliminary ruling

13 The issue in dispute is whether the Netherlands national insurance schemes continued to operate during the intervening periods in which X and Y were not working. In order to answer that question, it is necessary to determine the Member

State whose legislation was applicable to the persons concerned during those periods under Regulation No 883/2004.

14 Under Article 11(1) of Regulation No 883/2004, persons to whom the regulation applies are to be subject to the legislation of a single Member State only. Under Article 11(3) of that regulation, a person pursuing an activity as an employed or self-employed person in a Member State is to be subject to the legislation of that Member State (subparagraph (a)). Any other person to whom the provisions of subparagraphs (a) to (d) do not apply is to be subject to the legislation of the Member State of residence (subparagraph (e)).

15 The question is whether the situation of X and Y in the intervening periods falls under the 'activity as an employed or self-employed person' referred to in Article 11(3)(a) of Regulation No 883/2004. Under Article 1(a) of that regulation, that is the case where the activity or equivalent situation is treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists. What must be assessed, therefore, is whether, for the purposes of the Netherlands social security legislation, the situation of the persons concerned during the intervening periods is to be treated as an activity as an employed or self-employed person, or as equivalent to such an activity.

16 In the specific case of X, her activity during the intervening periods cannot be regarded as work for economic purposes, as required by national legislation. Such activity does not qualify for insurance under national law and therefore cannot be regarded as an activity as an employed or self-employed person under Article 1(a) and (b) of Regulation No 883/2004.

17 In the specific case of Y, the referring court proceeds on the assumption that the temporary agency contract between Y and the temporary employment agency was terminated on 1 January 2016. Consequently, there was no question of employment within the meaning of the national legislation during the period from 1 January 2016 to 7 February 2016.

18 The question then, in respect of X and Y, is whether the intervening periods are to be regarded as situations equivalent to [employment] activity, which are treated as such for the purposes of the application of the Netherlands social security legislation. Unpaid leave is leave agreed to by employer and employee for part or all of the working time. That is the case only if the employment relationship subsists and the obligation to perform work and the obligation to pay wages resume at the end of the agreed period.

19 In the case of X and Y, no employment relationship existed in the intervening periods. Indeed, they were not regarded as workers during those periods, nor was there any question of temporary interruptions of employment. Consequently, Netherlands legislation was not declared applicable pursuant to Article 1(a) in conjunction with Article 11(3)(a) of Regulation No 883/2004.

20 However, according to the referring court, that does not mean that the legislation applicable during the intervening periods must then be determined by reference to Article 11(3)(e) of Regulation No 883/2004 (legislation of the country of residence). According to the Svb, Article 11(3)(e) of Regulation No 883/2004 must be applied, however, because X and Y temporarily stopped working during the intervening periods. The duration of those periods is not relevant.

21 In X's case, the parties and the District Court referred to the *Franzen* judgment (C-382/13, EU:C:2015:261). The District Court infers from the last sentence of paragraph 50 of that judgment that a person who pursues an activity in only one Member State, even though there is no ongoing employment relationship between the employer and the worker, nevertheless remains subject to the legislation of that Member State.

22 The Svb, on the other hand, refers to the deliberation of the Court of Justice in paragraphs 51 and 52 of the *Franzen* judgment (C-382/13, EU:C:2015:261) on the application of the legislation of the country of residence.

23 Furthermore, the provisions of Title II of Regulation No 883/204 constitute a complete and uniform system of conflict rules which are intended not only to prevent the simultaneous application of a number of national legislative systems, but also to ensure that the persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them (judgment of 8 May 2019, *SF*, C-631/17, EU:C:2019:381, paragraph 33). Article 11(3)(e) of Regulation No 883/2004 applies to all persons not referred to in subparagraphs (a) to (d) of that provision, and not only to those who are economically inactive.

24 The referring court believes that it can infer from that case-law that persons who normally work in a Member State are covered by Article 11(3)(a) of Regulation No 883/2004, so long as they have not definitively or temporarily ceased their activity. Whether an employment relationship still exists does not even appear to be a decisive factor. The fact that Article 11(3)(e) of Regulation No 883/2004 provides for a separate conflict rule for situations not envisaged in subparagraphs (a) to (d) of that provision does not alter that conclusion. If, however, the activity ceases, even temporarily, the legislation of the country of residence becomes applicable.

25 The referring court further deduces from the judgment of the Court of Justice of 19 September 2019, *Van den Berg and Others* (C-95/18 and C-96/18, EU:C:2019:76), that the Netherlands, as the country of employment, is not obliged to include in its insurance scheme a worker resident in another Member State for periods during which, by virtue of Title II of Regulation No 883/2004, the legislation of the country of residence is applicable to that worker.

26 It is not immediately clear to the referring court how those principles should be interpreted and applied in cases involving intermittent temporary agency work. In

particular, a question arises as to which factors may be relevant when assessing, in the case of intermittent temporary agency work, whether or not there has been a temporary cessation of activity. Perhaps a general guideline could be provided on the question of how much time has to elapse before a worker who no longer has a contractual employment relationship should be regarded as having temporarily ceased his activity in the country of employment, in the absence of indications to the contrary.

27 In X's case, it is relevant that she has always focused on the Netherlands labour market. In the light, inter alia, of paragraph 50 of the *Franzen* judgment (C-382/13), that could be a reason for assuming that X was continuously subject to Netherlands legislation, since she did not actually terminate her professional activities in the Netherlands. It could also be relevant that, apparently, X did not voluntarily interrupt the temporary agency work.

28 Nevertheless, the question arises whether, even in the circumstances of X's case, at some time a situation might arise where there is a temporary cessation of activity, as a result of which the legislation of the country of residence would become applicable to the person concerned.

29 Another conceivable approach, which is followed by the Svb, is that, in the light of paragraph 51 of the *Franzen* judgment (C-382/13), during a period in which a person does not perform any work from which he derives an income and is not in an employment relationship, he is subject from the outset to the legislation of the country of residence, even if the activity in the Netherlands has not definitively ceased. The only exception is if the person concerned is receiving a cash benefit as referred to in Article 11(2) of Regulation No 883/2004.

30 The advantage of this approach is that the applicable legislation can be determined in real time, rather than by an assessment after the event. Such an assessment leads by definition to uncertainty, especially when the employment relationship no longer exists.

31 A disadvantage of this approach is that the applicable legislation can often change, which can be a barrier to workers performing cross-border temporary agency work.

32 Y's situation is typical of the situation of many workers migrating to the Netherlands. The question is what effect this has on the designation of the legislation applicable to them.