Anonymised version

Case C-135/19

Request for a preliminary ruling

Date lodged:

20 February 2019

Referring court:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

19 December 2018

Appellant on a point of law:

Pensionsversicherungsanstalt

Respondent in the appeal on a point of law:

CW

[...]

The Oberster Gerichtshof (Supreme Court, Austria), sitting as the court dealing with appeals on points of law (‘*Revision*’) in matters of employment and welfare law [...], in the welfare law dispute between the applicant, CW [...] Germany, [...] and the defendant, the Pensionsversicherungsanstalt (Pension Insurance Institution), 1021 Vienna, [...] regarding the rehabilitation allowance (‘Rehabilitationsgeld’), subsequent to the appeal on a point of law brought by the defendant against the judgment of 17 January 2018 [...] of the Oberlandesgericht Linz (Higher Regional Court, Linz), sitting as the court dealing with appeals in matters of employment and welfare law, by which the judgment of the Landesgericht Salzburg (Salzburg Regional Court), sitting as a court in matters of employment and welfare law, of 29 September 2017 [...] was confirmed, has made the following **[Or. 2]**

Order:

A. The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Pursuant to the provisions of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, is the Austrian rehabilitation allowance to be regarded

– as a sickness benefit pursuant to Article 3(1)(a) of the regulation, or

– as an invalidity benefit pursuant to Article 3(1)(c) of the regulation, or

– as an unemployment benefit pursuant to Article 3(1)(h) of the regulation?

2. In the light of primary law, is Regulation (EC) No 883/2004 to be interpreted as meaning that, as the former State of residence and State of employment, a Member State is obliged to pay benefits such as the Austrian rehabilitation allowance to a person who is resident in another Member State if that person completed the majority of the periods of insurance from the sickness and pension branches as an employee in that other Member State (after the transfer of residence to that country years previously) and has not since then received benefits from the health and pension insurance scheme of the former State of residence and employment?

B. [...] **[Or. 3]** [...] [stay of proceedings]

Grounds:

I. Facts

The Austrian citizen CW (applicant), who was born on 28 October 1965, learned the profession of office assistant and worked in Austria until 1990. In around 1990, she moved to Germany as a result of her marriage to a German citizen, and has since then been living in Germany. After emigrating, she was in employment solely in Germany, most recently as an office assistant in 2013. She completed 59 months for which there were insurance periods in Austria (27 paid contribution months and 32 credited contribution months) and 235 months for which there were insurance periods in Germany. Since the end of 1990, she has no longer been subject to the Austrian statutory social security system and has not received any benefits from Austria.

In the proceedings pending before the Supreme Court, the dispute concerns the question of whether the Austrian rehabilitation allowance can be ‘exported’ to Germany to the benefit of the applicant.

II. Legal basis in EU law

1. Regulation (EC) No 883/2004 applies to sickness benefits (Article 3(1)(a)), invalidity benefits (Article 3(1)(c)) and unemployment benefits (Article 3(1)(h)).

2. Pursuant to Article 11(3)(a) of the regulation, a person pursuing an activity as an employed or self-employed person in a Member State is subject to the legislation of that Member State. **[Or. 4]**

3. Alternatively, pursuant to Article 11(3)(e) of the regulation, the legal system of the Member State of residence is applicable if the person is not pursuing an activity as an employed person.

III. National law:

1. By way of the Law of 2012 amending social legislation (Sozialrechts-Änderungsgesetz 2012, SRÄG 2012 — *Federal Law Gazette* [BGBl.] I 2013/3), which came into force on 1 January 2014, the 'temporary invalidity pension' was abolished for insured persons born after 31 December 1963. This benefit had been intended for cases of temporary invalidity. Since 1 January 2014, the invalidity pension has essentially been restricted to those who are longer employable on the labour market, in particular because the invalidity is expected to be permanent.

2. As from 1 January 2014, for cases of temporary invalidity, new benefits replaced the temporary invalidity pension, namely the rehabilitation allowance and the retraining allowance. The retraining allowance pursuant to Paragraph 39b of the Arbeitslosenversicherungsgesetz (Law on unemployment insurance, 'the AlVG') is payable to the insured person by the Arbeitsmarktservice (Austrian Public Employment Service) during occupational rehabilitation: the rehabilitation allowance pursuant to Paragraph 143a of the Allgemeines Sozialversicherungsgesetz (General Law on social security, 'the ASVG') must be provided by the competent sickness insurance institution during the medical rehabilitation. Recipients of the rehabilitation allowance are subject to partial compulsory insurance (Teilversicherung) in the sickness insurance scheme (Paragraph 8(1)(1)(d) ASVG).

3. The priority of restoring the capacity for work before pension benefits are granted is also procedurally ensured by the fact that an application for a pension based on the insured event of reduced capacity for employment is to be interpreted primarily as an application for the granting of rehabilitation benefits, including **[Or. 5]** the rehabilitation allowance (Paragraph 361(1) ASVG). There is no provision for the insured person to make a separate application for the granting of the rehabilitation allowance.

4. Paragraph 143a ASVG ('Rehabilitation Allowance'), in the version here applicable, reads, in extract:

‘(1) Persons in respect of whom, upon application, it has been established via official decision that the requirements for entitlement … [to the rehabilitation allowance] … are met shall be entitled to the rehabilitation allowance for the duration of the temporary invalidity (incapacity for work) with effect from the relevant date. The continued existence of the temporary invalidity (incapacity for work) is to be checked by the sickness insurance institution in the context of case management whenever required, but in any event at the end of a period of one year of the rehabilitation allowance being granted by the last appraisal, specifically via the ‘Kompetenzzentrum Begutachtung’ (Competence Centre for appraisals). The determination as to whether there is entitlement to the rehabilitation allowance and as to its withdrawal is made by decision of the pension insurance institution.

(2) The rehabilitation allowance is payable in the amount of the sickness benefit … and, from the 43rd day, in the amount of the increased sickness benefit …, which would have been payable on the basis of the last [activity as an employed person substantiating] compulsory insurance in the sickness insurance scheme, ….’

5. Paragraph 143b ASVG (‘Case Management’) reads, in extract:

‘The sickness insurance institutions must fully support the … [recipients of the rehabilitation allowance] … in order to guarantee a medically state-of-the-art treatment process for the transition period between medical treatment and rehabilitation for restoring capacity for work and to ensure that the necessary steps of providing care are executed in an optimal manner. In this context, during the medical treatment and rehabilitation for restoring capacity to work, the insured person must be supported in the coordination of the further steps to be taken and monitored in such a way that an individual care plan is created following an appropriate assessment of needs and implemented by the individual service providers. In the context of the case **[Or. 6]** management, consideration should be given to the fact that the insured persons are subject to regular appraisals in the Competence Centre …’

IV. Arguments of the parties and forms of order sought

1. On 18 June 2015, the applicant sought to be granted an invalidity pension, or, in the alternative, medical rehabilitation measures as well as a rehabilitation allowance from the sickness insurance scheme, or, in the alternative, occupational rehabilitation measures. The applicant claims that she is unable to work. She has a close connection with Austria, being an Austrian citizen, and had completed months for which there were insurance periods in Austria, for which she could expect appropriate benefits in return. She lives near Austria and is in close contact with her parents and two siblings, who live in Austria.

2. The defendant Pension Insurance Institution contests the existence of invalidity and — if temporary invalidity were to exist — the obligation to pay the

rehabilitation allowance to the applicant, who resides in Germany. The rehabilitation allowance is a sickness benefit under EU law. 'Exporting' it would not lead to appropriate solutions. A low number of insurance months completed in Austria would lead to unreasonably large benefits — owing to the lack of a reduction factor according to the respective proportions of the periods of insurance completed in the individual Member States. It is not possible for the Pension Insurance Institution to provide medical rehabilitation measures abroad within the meaning of the national provisions on the rehabilitation allowance. The applicant, it is argued, does not have close ties with the Austrian social security system.

V. **Proceedings to date** [Or. 7]

1. The court of first instance (Salzburg Regional Court, sitting as a court in matters of employment and welfare law) dismissed the form of order sought in relation to the grant of the invalidity pension. It stated that, as from 18 June 2015, there was temporary invalidity that was expected to last for at least six months, and there was a right to medical rehabilitation measures as from that date. Occupational rehabilitation measures were not appropriate. The applicant was entitled, as from that date, to the rehabilitation allowance from the sickness insurance scheme at the statutory level for the remainder of her temporary invalidity.

2. The court of second instance (Higher Regional Court, Linz, sitting as the court dealing with appeals in matters of employment and welfare law) did not allow the appeal brought by the Pension Insurance Institution solely in relation to the granting of the rehabilitation allowance.

3. The Pension Insurance Institution has lodged an appeal on a point of law ('Revision') against that decision with the Supreme Court. It requests that the form of order sought be dismissed in full. In her response to the appeal on a point of law, the applicant requests that the appeal on a point of law be dismissed.

VI. **Grounds for the questions referred**

1. The applicant was in employment in Germany from 1990 until, most recently, 2013. Since emigrating to Germany, she was no longer subject to Austrian sickness or pension insurance. She did not receive any sickness or pension insurance benefits in Austria (such as a temporary invalidity pension or sickness benefit, for example).

2. In accordance with the criteria developed by the Court of Justice of the European Union for distinguishing **[Or. 8]** between sickness benefits and invalidity benefits (Court of Justice, 21 July 2011, C-503/09, *Stewart*, ECLI:EU:2011:500, paragraph 37 et seq.; see also Court of Justice, 10 January 1980, 69/79, *Jordens-Vosters*, ECLI:EU:C:1980:7), the prevailing view in Austria

classifies the rehabilitation allowance as a sickness benefit (Article 3(1)(a) of Regulation [EC] No 883/2004), because it does not cover the risk of disability, where it is probable that such disability will be permanent or long-term. The rehabilitation allowance is closely connected with medical rehabilitation activation measures. Its purpose is to provide compensation for the loss of income caused by sickness for the period in which the person concerned has to undergo medical rehabilitation measures. The calculation is based on the calculation of the sickness benefit.

3. If the Austrian rehabilitation allowance is a cash sickness benefit pursuant to Article 3(1)(a) of Regulation (EC) No 883/2004, the referring court takes the view that, pursuant to Article 11(3)(e) of the regulation, the State of residence — Germany — is responsible for sickness insurance benefits. Article 7 of the regulation only prohibits the social security institution obliged to pay benefits from reducing or withdrawing benefits because the claimant resides in another Member State.

4. However, the rehabilitation allowance is structured in such a way that it also displays characteristics of an invalidity benefit. It requires that compulsory insurance (sickness and pension insurance) contributions have been paid, meaning that it is not granted until a certain qualifying period has been fulfilled. The **[Or. 9]** rehabilitation allowance can be claimed only by submitting an invalidity pension application to the pension insurance institution. Although the rehabilitation allowance can be granted only if the invalidity is not permanent, the invalidity must exist for longer than six months, which is generally not the case with sickness.

5. In the decision of 30 June 2011, C-388/09, *da Silva Martins*, ECLI:EU:C:2011:439, the Court of Justice did indeed equate the German care allowance with sickness benefits (Article 4(1)(a) of Regulation [EEC] No 1408/71). It stressed, however, that, unlike sickness benefits, care allowance benefits are not in principle intended to be paid on a short-term basis, and they may, as regards the details of their application, display characteristics which resemble the invalidity and old-age branches (paragraph 48). The Court of Justice found that Germany, as the former State of employment, was obliged to continue paying the German care allowance to a Portuguese agricultural worker after he had returned to his country of origin. It regarded (at least in cases where voluntary insurance contributions continue to be paid to the care insurance scheme) the discontinuation of the care allowance on account of having returned to the country of origin despite the continued payment of contributions as being inconsistent with Article 48 TFEU and as placing the former migrant worker at a disadvantage in comparison with persons entitled to a retirement pension in a single Member State who have spent their entire working life in a single Member State before transferring their residence to another Member State on their retirement (paragraphs 77 to 79). ‘Exportation’ requires that the State of origin does not make provision for cash benefits such as the care allowance. **[Or. 10]**

6. The referring court assumes that there is no sickness insurance cash benefit in Germany that is comparable to the Austrian rehabilitation allowance.

7. Although the Austrian rehabilitation allowance requires that compulsory insurance contributions have been paid, it actually differs significantly from a pension benefit or care allowance benefit in terms of structure and purpose. Entitlement to the rehabilitation allowance exists only if it has been established, upon application, that the temporary invalidity is expected to last for a period of at least six months and occupational rehabilitation measures are not appropriate. It is not a permanent benefit for probable disability. The medical rehabilitation measures that the sickness insurance institution organises in the context of case management and that the insured person undergoes are intended to bring about the person's reintegration into the national labour market in the foreseeable future and thus avoid permanent incapacity for work. Thus, the rehabilitation allowance is not to be regarded as a mere preliminary step towards a permanent invalidity pension. The amount of the rehabilitation allowance is calculated and paid out by the sickness insurance institution pursuant to Paragraph 143a(2) to (4) ASVG. It is based on the amount of the sickness benefit. There is no pro-rata calculation based on the insurance periods completed under the pension insurance scheme. The rehabilitation allowance is therefore calculated independently of the amount paid in contributions. Unlike in the *da Silva Martins* case, no contributions are paid in respect of a separate care insurance scheme relating, not **[Or. 11]** to the risk of sickness in the strict sense, but rather to that of the special nature of a benefit such as that of the care allowance.

8. As the purpose of medical rehabilitation and of the — directly connected — granting of the rehabilitation allowance consists in enabling persons with impaired performance to return to the labour market, it would also be conceivable for the rehabilitation allowance to be classified as an unemployment benefit pursuant to Article 3(1)(h) of Regulation (EC) No 883/2004 (Court of Justice, 4 June 1987, 375/85, *Campana*, ECLI:EU:C: 1987:253). However, regarding entitlement to the rehabilitation allowance, the ASVG does not establish a connection with the threat of unemployment or with existing unemployment.

9. The referring court takes the view that it is not clear that non-exportation of the rehabilitation allowance in the case of the applicant, who had not received (or applied for) any Austrian benefits such as a temporary invalidity pension since emigrating to Germany over 20 years ago, would have the effect of restricting freedom of movement.

VII. Stay of proceedings

[...]

Supreme Court,

Vienna, 19 December 2018