JUDGMENT OF THE COURT
2 May 1996 *

In Case C-206/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesarbeitsgericht for a preliminary ruling in the proceedings pending before that court between

Brennet AG

and

Vittorio Paletta

on the interpretation of Article 22(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971(II), p. 416), as amended by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), and on the interpretation and validity of Article 18(1) to (5) of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972(I), p. 159),

* Language of the case: German.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida (Rapporteur), P. J. G. Kapteyn, J. L. Murray, P. Jann, H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

Advocate General: G. Cosmas,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Brennet AG, by Jobst-Hubertus Bauer, Rechtsanwalt, Stuttgart,

— Mr Paletta, by Horst Thon, Rechtsanwalt, Offenbach,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,

— the Council of the European Union, by Sophia Kyriakopoulou and Guus Houttuin, of its Legal Service, acting as Agents,

— the Commission of the European Communities, by Maria Patakia, of its Legal Service, and Horstpeter Kreppel, a civil servant on secondment to that service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Brennet AG, represented by Jobst-Hubertus Bauer and Martin Diller, Rechtsanwälte, Stuttgart, the German Government, represented by Ernst Röder, the Council, represented by Sophia Kyriakopoulou and Guus Houttuin, and the Commission, represented by Maria Patakia and Horstpeter Kreppel, at the hearing on 14 November 1995,

after hearing the Opinion of the Advocate General at the sitting on 30 January 1996,

gives the following

Judgment

1 By order of 27 April 1994, received at the Court on 14 July 1994, the Bundesarbeitsgericht (Federal Labour Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Article 22(1) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971(II), p. 416), as amended by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), and on the interpretation and validity of Article 18(1) to (5) of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (OJ, English Special Edition 1972(I), p. 159).

2 Those questions were raised in proceedings between Mr Paletta, an Italian national, and his employer, Brennet AG, established in Germany, concerning that company's refusal to maintain payment of Mr Paletta's wages in accordance with the Lohnfortzahlungsgesetz (German Law on the continued payment of wages) of 27 July 1969 (BGBl. I, p. 946; 'the LFZG').

3 Under the LFZG, where, after the commencement of his employment, an employee is unable to do his job because, through no fault of his own, he is unfit for work, the employer must continue to pay his wages for a period of up to six weeks.

4 According to the documents before the Court, Mr Paletta, together with his wife and two children, reported sick during leave granted to them by Brennet for the period from 17 July 1989 to 12 August 1989, and Brennet refused to pay their wages during the first six weeks following the onset of the illness, on the ground that, in the company's view, it was not bound by the medical findings made abroad, the veracity of which it had good reason to doubt.

5 Those are the circumstances in which the Arbeitsgericht Lörrach, the court hearing the case, referred to the Court for a preliminary ruling a number of questions concerning the interpretation of Article 18 of Regulation No 574/72.

6 By judgment of 3 June 1992 in Case C-45/90 *Paletta* v *Brennet* [1992] ECR I-3423, the Court ruled that Article 18(1) to (4) of the regulation is to be interpreted as meaning that the competent institution, even where this is the employer and not a social security institution, is bound in fact and in law by the medical findings made by the institution of the place of residence or temporary residence concerning commencement and duration of the incapacity for work, when it does not have the person concerned examined by a doctor of its choice, as it may do under Article 18(5).

7 In view of that ruling, the Arbeitsgericht found in favour of Mr Paletta and his family. On appeal, its decision was upheld by the Landesarbeitsgericht.

Brennet thereupon applied for review on a point of law to the Bundesarbeitsgericht, which has expressed doubts on several points concerning the scope of the ruling in *Paletta*.

9 First of all, the Bundesarbeitsgericht asks whether Mr Paletta may usefully rely on Article 22(1)(a) of Regulation No 1408/71 in order to obtain payment of his wages for all or part of the period of incapacity for work at issue. Under Article 22(1)(a), entitlement to cash benefits — including the right to continued payment of wages in accordance with the LFZG — is conferred only where the worker's condition necessitates the immediate grant of benefits. The applicable German legislation, however, which provides for wages to be paid only at the end of each month, appears to preclude immediate payment of the benefits at issue.

10 Secondly, the Bundesarbeitsgericht observes that, in practice, certificates attesting incapacity for work do not always reflect the true state of affairs, particularly where they have been wrongfully issued or obtained. With that in mind, the Bundesarbeitsgericht has consistently held that, in cases of abuse, employers may contest the veracity of medical certificates. To do so, they must argue, on the basis of adequate supporting evidence, that there are serious grounds for doubting the existence of incapacity for work. It is then for the worker to provide additional evidence that the incapacity for work is genuine.

11 According to the order for reference, the Court's ruling in *Paletta* does not enable a sufficiently clear answer to be given to the question whether, or to what extent, the national courts may, in applying Article 18 of Regulation No 574/72, take account of an abuse on the part of the worker concerned.

12 On that point, the Bundesarbeitsgericht observes that the fact that employers may adduce evidence to show, either conclusively or with a sufficient degree of probability, that incapacity for work did not exist is not incompatible with the objectives

of the regulations at issue. On the contrary, if employers were barred from availing themselves of that possibility, employees who fall ill when abroad would have an advantage by comparison with those who fall ill in Germany, a situation open to legal challenge, since, as stated in its preamble, the aim of Regulation No 1408/71 is to ensure equality of treatment for all nationals of Member States under the various national legislative provisions and to guarantee social security benefits for workers and their dependants regardless of their place of employment or residence.

13 Thirdly, the Bundesarbeitsgericht asks whether, if Article 18 of Regulation No 574/72 were to be interpreted as precluding employers from pleading abuse in proceedings before the national courts, that provision would still be consonant with the principle of proportionality. The aim pursued by Article 18 does not require that employers should be denied any opportunity to adduce evidence of abuse. Nor does proof of abuse in any way compromise freedom of movement for workers; rather, it is a means of preventing claimants from fraudulently obtaining benefits to which they are not entitled.

14 In view of those doubts, the Bundesarbeitsgericht decided to stay the proceedings in order to seek a preliminary ruling from the Court on the following questions:

'(1) In the light of the requirement concerning the immediate grant of benefits, does Regulation (EEC) No 1408/71 cease to apply to the continuation of wage payments by the employer pursuant to Article 22(1) if, under the relevant German legislation, the benefits are not payable until a given period (three weeks) has elapsed since the commencement of the incapacity for work?

(2) Does the Court's interpretation of Article 18(1) to (4) and Article 18(5) of Council Regulation (EEC) No 574/72 in its judgment of 3 June 1992 in Case C-45/90 mean that an employer is barred from adducing evidence of abuse

which shows conclusively or with a sufficient degree of probability that incapacity for work did not exist?

(3) If Question 2 is answered in the affirmative, is Article 18 of Council Regulation (EEC) No 574/72 of 21 March 1972 contrary to the principle of proportionality (third paragraph of Article 3b of the EC Treaty)?'

Question 1

15 By this question, the national court asks whether Article 22(1)(a)(ii) of Regulation No 1408/71 is to be interpreted as covering national legislation under which an employee is entitled, on becoming incapacitated for work, to continued payment of his wages for a certain period, even where those wages are not payable until a given period has elapsed since the incapacity commenced.

16 Under Article 22(1) of Regulation No 1408/71, a worker who satisfies the conditions laid down by the legislation of the competent State for entitlement to sickness or maternity benefits, and:

'(a) whose condition necessitates immediate benefits during a stay in the territory of another Member State

...

shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent State;

(ii) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. However, by agreement between the competent institution and the institution of the place of stay or residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent State.'

17 According to Brennet, Article 18 of Regulation No 574/72, applicable where incapacity for work arises while the worker concerned is staying in a Member State other than the competent Member State under Article 24 of that regulation, can be relied on only if the conditions laid down by Article 22(1)(a)(ii) of Regulation No 1408/71 are satisfied. Otherwise, the award of benefits is governed solely by the laws of the competent Member State, in this case Germany.

18 In that regard, Brennet argues that, by inserting the clause 'whose condition necessitates immediate benefits' in Article 22, the Community legislature intended to limit the operation of the procedure provided for therein to situations of urgency. Under German legislation, entitlement to the continued payment of wages arises, not at the onset of incapacity for work, but at the date when the wages are payable under the terms of employment, namely at the end of each month. Consequently, Mr Paletta had no immediate need of cash benefits, since he could not claim his wages until 31 August 1989, that is to say, 24 days after the incapacity commenced.

19 That interpretation of Article 22(1)(a)(ii) of Regulation No 1408/71 cannot be accepted.

20 As the Commission has rightly pointed out, by laying down that the sick worker's state of health must 'necessitate immediate benefits', the provision in question requires confirmation of a pressing medical need for such benefits. That condition indisputably encompasses 'benefits in kind' needed forthwith, but it further implies that, in urgent situations of that type, the worker concerned must also be entitled to any corresponding 'cash benefits' which, as the Court has consistently held (Case 61/65 *Vaassen-Göbbels* v *Beambtenfonds Mijnbedrijf* [1966] ECR 261), are essentially designed to compensate for the sick worker's loss of earnings and are therefore intended to cover his maintenance, which might otherwise be jeopardized.

21 Furthermore, the interpretation proposed by Brennet would lead to a situation where only those workers who fall ill on or around the date when their wages are payable would be able to benefit under Article 22. Such an interpretation, which disregards the sick worker's needs, is incompatible with the objectives pursued by the provision in question.

22 The answer to Question 1 must therefore be that Article 22(1)(a)(ii)) of Regulation No 1408/71 is to be interpreted as covering national legislation under which an employee is entitled, on becoming incapacitated for work, to continued payment of his wages for a certain period, even where those wages are not payable until a given period has elapsed since the incapacity commenced.

Question 2

23 In its judgment in *Paletta*, the Court gave a ruling solely on the interpretation of Article 18(1) to (4) of Regulation No 574/72, and did not specifically consider the possibility of its abuse or fraudulent use.

24 As to whether the national courts may, where there has been an abuse by the worker concerned, query the certification of incapacity for work issued in accordance with Article 18 of Regulation No 574/72, the Court has consistently held that Community law cannot be relied on for the purposes of abuse or fraud (see, in particular, regarding freedom to provide services, Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, paragraph 13, and Case C-23/93 *TV10* v *Commissariaat voor de Media* [1994] ECR I-4795, paragraph 21; regarding the free movement of goods, Case 229/83 *Leclerc and Others* v *'Au Blé Vert' and Others* [1985] ECR 1, paragraph 27; regarding freedom of movement for workers, Case 39/86 *Lair* v *Universität Hannover* [1988] ECR 3161, paragraph 43; regarding the Common Agricultural Policy, Case C-8/92 *General Milk Products* v *Hauptzollamt Hamburg-Jonas* [1993] ECR I-779, paragraph 21).

25 Although the national courts may, therefore, take account — on the basis of objective evidence — of abuse or fraudulent conduct on the part of the worker concerned in order, where appropriate, to deny him the benefit of the provisions of Community law on which he seeks to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions.

26 However, the case-law referred to by the Bundesarbeitsgericht, according to which the worker must produce additional evidence that the medically certified incapacity for work is genuine, in cases where the employer argues on the basis of adequate supporting evidence that there are serious grounds for doubting the existence of the alleged incapacity, is not compatible with the objectives pursued by Article 18 of Regulation No 574/72. A worker whose incapacity for work arises in a Member State other than the competent Member State would, as a result, be confronted with difficulties involved in obtaining evidence which the Community rules in fact seek to eliminate.

27 On the other hand, that provision does not preclude employers from adducing evidence to support, where appropriate, a finding by the national court of abuse or fraudulent conduct on the part of the worker concerned, in that, although he may claim to have become incapacitated for work, such incapacity having been certified in accordance with Article 18 of Regulation No 574/72, he was not sick at all.

28 The answer to Question 2 must therefore be that the interpretation of Article 18(1) to (5) of Regulation No 574/72 given by the Court in its judgment in *Paletta*, cited above, does not imply that employers are barred from adducing evidence to support, where appropriate, a finding by the national court of abuse or fraudulent conduct on the part of the worker concerned, in that, although he may claim to have become incapacitated for work, such incapacity having been certified in accordance with Article 18 of that regulation, he was not sick at all.

29 In view of the answer given to Question 2, there is no need to reply to Question 3.

Costs

30 The costs incurred by the German Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Bundesarbeitsgericht by order of 27 April 1994, hereby rules:

1. Article 22(1)(a)(ii)) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and

their families moving within the Community, as amended by Council Regulation (EEC) No 2001/83 of 2 June 1983, is to be interpreted as covering national legislation under which an employee is entitled, on becoming incapacitated for work, to continued payment of his wages for a certain period, even where those wages are not payable until a given period has elapsed since the incapacity commenced.

2. **The interpretation of Article 18(1) to (5) of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71, given by the Court in its judgment in Case C-45/90 *Paletta v Brennet* [1992] ECR I-3423, does not imply that employers are barred from adducing evidence to support, where appropriate, a finding by the national court of abuse or fraudulent conduct on the part of the worker concerned in that, although he may claim to have become incapacitated for work, such incapacity having been certified in accordance with Article 18 of that regulation, he was not sick at all.**

Rodríguez Iglesias Kakouris Puissochet Hirsch

Mancini Schockweiler Moitinho de Almeida

Kapteyn Murray Jann

Ragnemelm Sevón Wathelet

Delivered in open court in Luxembourg on 2 May 1996.

R. Grass G. C. Rodríguez Iglesias

Registrar President