JUDGMENT OF THE COURT
17 DECEMBER 1970[1]

S.à r.l. Manpower
v Caisse primaire d'assurance maladie, Strasbourg
(Reference for a preliminary ruling by the Commission de première instance du contentieux de la sécurité sociale et de la mutualité sociale agricole du Bas-Rhin)

Case 35/70

Summary

Social security for migrant workers — Legislation applicable — Criteria for determining such legislation — Employer's establishment — Place where the activity of the undertaking is normally carried on
(Regulation No 3 of the Council, Article 13 (1) (a))

Social security for migrant workers — Legislation applicable — Determination — Temporary work performed on behalf of an undertaking hiring out labour with another undertaking of another Member State
(Regulation No 3 of the Council, Article 13 (1) (a))

The reference made by Article 13(1)(a) to the establishment situated in the State where the undertaking is established and to which the worker is normally attached is meant essentially to limit the applicability of that provision to those workers engaged by undertakings normally pursuing their activity in the territory of the State in which they are established.
The provisions of Article 13(1)(a) of Regulation (EEC) No 3 of the Council on social security for migrant workers are applicable to a worker who is engaged by an undertaking pursuing its activity in a Member State, is paid by that undertaking, is answerable to it for misconduct, is able to be dismissed by it and who on behalf of the undertaking performs work temporarily in another undertaking in another Member State.

In Case 35/70

Reference to the Court under Article 177 of the EEC Treaty by the Commission de première instance du contentieux de la sécurité sociale et de la mutualité sociale agricole du Bas-Rhin for a preliminary ruling in the action pending before that court between

S.A R.L. MANPOWER, Strasbourg regional centre,

1 — Language of the Case: French.

and

CAISSE PRIMAIRE D'ASSURANCE MALADIE, Strasbourg,

on the interpretation of Article 13 (1) (a) of Regulation No 3 of the Council of the EEC of 25 September 1958 concerning social security for migrant workers, as amended by Regulation No 24/64 of 10 March 1964,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and A. Trabucchi (Rapporteur) Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore and H. Kutscher, Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts and procedure

The facts and procedure may be summarized as follows:

On 29 August 1969 Manpower, a limited liability company the object of which is to hire out labour to meet the temporary requirements of other undertakings for qualified personnel, sent Mr Francis Fehlmann to the site of a German company in Karlsruhe for three days. On the same day Mr Fehlmann suffered an accident while working on the site.

Following a request by Manpower for payment of the medical expenses incurred in Germany, the Caisse primaire d'assurance maladie, Strasbourg, (hereinafter referred to as 'the Caisse') informed the company by letter of 14 November 1969 that in its opinion the conditions under which the company's personnel was posted to work in undertakings in the Federal Republic were not sufficient under Regulation No 3 of the EEC to make them subject to the French system of social security.

By decision dated 15 January 1970 the Commission de recours gracieux de la Caisse primaire d'assurance maladie, Strasbourg, confirmed the Caisse's decision.

On appeal against this decision the Commission de premiere instance du contentieux de la sécurité sociale et de la mutualité sociale agricole du Bas-Rhin decided on 17 June 1970 to refer the following question to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

'Can an undertaking of a Member State, carrying on an activity similar to that of the limited liability company Manpower, avail itself of the provisions of Article 13(1)(a) of Regulation No 3?'

The wording of Article 13(1)(a), which the Court is asked to interpret, is as follows:

'A wage earner or assimilated worker who, being in the service of an undertaking having in the territory of a Member State an establishment to which he is normally attached, is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the former Member State as though he were still employed in its territory, provided that the anticipated duration of the work which he is to perform does not exceed 12 months and that such a worker be not sent to replace another worker who has reached the end of his term of posting.'

In its decision making the reference, which was received at the Court Registry on 20 July 1970, the abovementioned court observes that, according to the file supplied by the Caisse, Manpower put at the disposal of the German company, on whose sites the accident occurred, personnel recruited in France on the following conditions:

— the personnel is put by Manpower at the disposal of the German company at an hourly rate calculated in French currency;

— on the site, workers must obey the instructions of the site foreman, but such obedience does not affect the relationship between Manpower and the said workmen;

— Manpower's representative on the site each week submits to the site foreman for approval a note of the hours of work completed together with the names and category of the workers;

— accounts are payable net within 30 days.

In accordance with Article 20 of the Statute of the Court of Justice of the EEC observations were submitted by the parties to the main action and the Commission of the European Communities.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided not to make any preparatory inquiry.

The parties to the main action and the Commission submitted their oral observations at the hearing on 18 November 1970.

The Advocate-General delivered his opinion at the hearing on 8 December 1970.

The plaintiff in the main action was represented by Professor Jambu-Merlin, Mr Brossollet of the Paris Bar and by Mr Elvinger of the Luxembourg Bar.

The defendant in the main action was represented by Mr Baden of the Luxembourg Bar.

The Commission of the European Communities was represented by its Legal Adviser, Mr Telchini.

II—Written observations submitted under Article 20 of the Statute

The observations submitted under Article 20 of the Statute of the Court may be summarized as follows:

1 — *Observations of Manpower*

Manpower draws attention first of all to a series of facts. The temporary workers which it sent to German companies for short periods of always less than twelve months were French citizens ordinarily working on French territory, where they lived, and registered as a result with the Caisse primaire de securité sociale du Bas-Rhin which had never raised any objection to receiving the payment of contributions.

Manpower alone employs the personnel engaged and it is only to Manpower that such personnel is bound by a contract of employment; Manpower alone is responsible for the payment of the wages and social charges and is responsible for the whole administration of its personnel.

An agreement was signed in October 1969 between Manpower France and the Confédération Générale du Travail, the latter recognizing the usefulness of the undertaking for temporary employment which

met the interests of workers as well as that of undertakings subject to the fluctuations of the market.

After stressing that workers engaged by Manpower are attached only to that undertaking, which is established on French territory, the plaintiff observes that the amendment made by the Council to the original wording of Article 13(1)(a) by Regulation No 24/64 in using the phrase 'anticipated duration of the work' relates the exception in Article 13(1)(a) to essentially uncertain and temporary posting and does this in particular to prevent subcontractors from trying by the intermediary of more or less genuine undertakings to benefit from advantageous rates of contribution by engaging workers in one State who in actual fact are intended to be used permanently in the territory of another State.

But as it appears from the agreement made by Manpower and the Confédération Générale du Travail and from the definition of the plaintiff's activity, jobs of short duration are the very essence of temporary work. The sphere of this activity is on all fours with the sphere covered by the exception in Article 13(1)(a) which for reasons of convenience allows workers to be kept under the system to which they are usually subject, when they are sent for a short period to another member country of the Community. In view of the fact that the regional centre of Manpower established at Strasbourg is very close to the German frontier, it is to be expected that the company should have hiring undertakings on German territory also.

Contrary to the argument of the Caisse that the temporary workers are not doing any work for Manpower but for the undertaking to whom they are hired, the plaintiff observes that its main object is to send workers engaged by it to hiring undertakings which have a temporary need of them. As a result all the workers who are sent on a job to customers fulfil the object of Manpower and thus do work for that undertaking within the meaning of Article 13(1)(a) which, when it speaks of doing work for an undertaking, is not contemplating an economic fact, but laying down a criterion of a legal relationship.

2. *Observations of the Caisse Primaire d'Assurance Maladie, Strasbourg*

The *Caisse* observes that workers engaged by Manpower are not sent to the Federal Republic of Germany by that company to do work for it but are hired out by it to other undertakings to do work for them. It stresses that the object of Manpower is not to do work but to engage workers for the purpose of putting them for a consideration at the disposal of undertakings needing labour and concludes that this trade cannot be equated with sending workers abroad within the meaning of Article 13(1)(a) of Regulation No 3.

The Caisse refers moreover to a pleading filed in the French court. In this pleading it observes that all the personnel working on the sites of the German company where Mr Fehlmann had been sent are subject in the performance of the work exclusively to the authority of the German company and that as a result that worker could not come under the French social security legislation nor under the Community regulations providing for the retention under the original system of workers sent abroad.

Alternatively the Caisse observes that it did not have knowledge of Mr Fehlmann's being sent to Germany until after the accident occurred on 29 August 1969. According to the provisions of Regulations Nos 3 and 4 of the EEC a request for retention under the French system of social security must be sent by the employer to the Caisse primaire d'assurance maladie under which the worker being sent abroad comes, before his departure.

3. *Observations of the Commission of the European Communities*

The *Commission* considers that, although the wording of the question raised by the French court is closely related to the present case, it raises a question of principle under Article 177 of the EEC Treaty. In accordance with the opinion which it expressed in Case 19/67 the Commission thinks that in order to establish whether, in the case of the hiring out of labour, the exception provided for in Article 13(1)(a)

remains applicable the decisive criterion is constituted by the existence of an organic link between the undertaking which has engaged the worker and the worker himself at the time when the work is being done.

In the abovementioned opinion the Commission proposed a negative reply in so far as the worker was not attached to the undertaking which had engaged him while doing the work.

On the other hand, in the present case Mr Fehlmann was paid by Manpower which in turn paid the social security contributions on his account in France where he had worked up to the time of his short stay in Germany. Although the worker had been subject to the authority of the German undertaking as regards the performance of the work, the organic link between Manpower and the worker was maintained, in particular as regards disciplinary measures capable of affecting the worker by reason of the activity which he had carried out during his posting. In view of the fact that French legislation authorizes the pursuit of an activity such as that of Manpower, in those circumstances it must be admitted that Article 13(1)(a) of Regulation No 3 applies to cases of the kind referred to in the request by the French court, although the Community legislature did not contemplate such situations when drafting that provision.

The possibility of the benefit's being paid by the German institution conflicts with the fundamental objective referred to in Article 51 of the EEC Treaty. It is in the interest of workers who go from one country to another for short periods to remain subject to the legislation of the same country. The necessity of coming under the legislative systems of several countries for short periods could be regarded as an obstacle to the freedom of movement referred to in Articles 48 to 51 of the Treaty.

The solution proposed would involve no abuse within the meaning of the circular of the French Government of 5 May 1964 (annexed to the Commission's pleading) and is not contrary to the object pursued by the amendment made to the original wording of Article 13(1)(a) by Regulation No 24/64 of the Council.

Grounds of judgment

1 By order dated 17 June 1970, received at the Registry on 20 July 1970, the Commission de première instance du contentieux de la sécurité sociale et de la mutualité sociale agricole du Bas-Rhin referred to the Court for a preliminary ruling under Article 177 of the Treaty establishing the EEC the question whether an undertaking of a Member State, pursuing an activity similar to that of Sàrl Manpower, can take advantage of the provisions of Article 13 (1) (a) of Regulation No 3 of the Council of the EEC of 25 September 1958 as amended by Regulation No 24/64 of the Council of the EEC of 10 March 1964.

2 The object of this question is to determine whether the French Caisse d'assurance maladie is responsible for reimbursing the medical expenses arising from an accident involving a worker engaged by Manpower when he was working on a site in Germany where he had been sent by the said company.

3 It appears from the file submitted to the Court that the question raised relates to an undertaking having its normal activity in a Member State which according to the general conditions of its contracts engages workers to 'post' them to other undertakings in order to provide for temporary needs for qualified personnel.

4 For this purpose it stipulates, with the personnel in question, a contract of employment providing reciprocal rights and obligations between it and its temporary workers for work to be done by the latter in the hiring undertakings.

5 Although under the contract each temporary worker is required to comply with the working conditions and discipline laid down by the internal rules of the establishment to which he is sent, it appears from an examination of the file that this fact does not affect the maintenance of the worker's relationship with the undertaking which has engaged him.

6 It is thus the latter undertaking which is at the centre of the different legal relationships, because it is at the same time a party to the contract with the worker and to the contract with the hiring undertaking.

7 It is within the legal framework so defined that the question asked must be answered.

8 Article 13 (1) (a) of Regulation No 3, the interpretation of which is requested, provides for the case of the 'wage-earner or assimilated worker who, being in the service of an undertaking having in the territory of a Member State an establishment to which he is normally attached, is posted by that undertaking to the territory of another Member State to perform work there for that undertaking'.

9 This provision lays down that the worker shall continue to be 'subject to the legislation of the former Member State as though he were still employed in its territory, provided that the anticipated duration of the work which he had to perform does not exceed 12 months and that such worker be not sent to replace another worker who has reached the end of his term of posting'.

10 The exception to Article 12 of the same regulation thus provided in Article 13 (1) (a) aims at overcoming the obstacles likely to impede freedom of movement of workers and at encouraging economic interpenetration whilst avoiding administrative complications for workers, undertakings and social security organizations.

11 But for this exception, an undertaking established in the territory of a Member State would be required to register its workers, normally subject to the social security legislation of that State, with the social security system of other Member States where they were sent to perform work of short duration.

12 Moreover, the worker would suffer more often than not because national legislative systems generally exclude short periods from certain social benefits.

13 It is maintained that, since the object of the undertaking is not to do work but to engage workers to put them for a consideration at the disposal of other undertakings, the sending of workers to undertakings in other Member States cannot be equated with the posting of workers abroad provided for in Article 13 (1) (a) of Regulation No 3.

14 The sole fact that a worker has been engaged to work in the territory of a Member State other than that in which the undertaking which engages him is established cannot of itself rule out the application to such worker of the provisions of the abovementioned Article 13 (1) (a).

15 Since the activity of the undertaking which engages the worker takes place in the Member State where it has its establishment, Article 13 (1) (a) applies by reason of the fact that the worker is attached to that undertaking and there is no necessity to enquire whether the object of the undertaking is to do work or not.

16 The reference made by Article 13 (1) (a) to the establishment situated in the State where the undertaking is established and to which the worker is attached is meant essentially to limit the applicability of that provision to those workers engaged by undertakings normally pursuing their activity in the territory of the State in which they are established.

17 In the legal framework of the present case, the undertaking which has engaged the workers remains their sole employer.

18 The maintenance of the worker's relationship with such an employer for the entire duration of the employment arises in particular from the fact that it is the employer who pays the salary and can dismiss him for any misconduct by him in the performance of his work with the hiring undertaking.

19 Further the hiring undertaking is indebted not to the worker but only to his employer.

20 In consequence it must be recognized that the worker has performed work within the meaning of the abovementioned Article 13 (1) (a) with the hiring undertaking for the undertaking which engaged him.

21 This interpretation is moreover in accordance with the abovementioned objectives.

Costs

22 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable and as these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, it is for that court to make a decision as to costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 48, 51 and 177;
Having regard to Regulation No 3 of the Council concerning social security for migrant workers, as amended by Regulation No 24/64 of 10 March 1964, especially Articles 12 and 13 (1) (a);
Having regard to the Protocol on the Statute of the Court of Justice of the EEC;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the question referred to it by the Commission de première instance du

contentieux de la sécurité sociale et de la mutualité sociale agricole du Bas-Rhin by order of that court dated 17 June 1970, hereby rules:

The provisions of Article 13 (1) (a) of Regulation No 3 of the Council of the EEC on social security for migrant workers are applicable to a worker who is engaged by an undertaking pursuing its activity in a Member State, is paid by that undertaking, is answerable to it for misconduct, is able to be dismissed by it and who on behalf of that undertaking performs work temporarily in another undertaking in another Member State.

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 17 December 1970.

A. Van Houtte R. Lecourt

Registrar President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 8 DECEMBER 1970[1]

Mr President,
Members of the Court,

This is the first case, it appears, which is going to involve the Court in relating the activity of undertakings providing 'temporary labour' or providing for 'temporary work' to the Community provisions on migrant workers.

This is the reason why you wished to have some information on such undertakings and on the importance of their activity in the five Member States in which they are permitted to carry on business.

The Commission has unfortunately not been able to supply you with a general picture.

For my part I have been able only to assemble some statistics relating solely to France and, thanks to a work published in 1968 by l'Institut de sociologie of the Free University of Brussels, some information on comparative law.

In spite of its fragmentary and imprecise nature, I do not think I shall be wasting the Court's time by briefly summarizing the information which I have been able to collect.

Undertakings providing for temporary work, it appears, originated in the United Kingdom and developed between the two world wars in particular in the United States.

Certain undertakings of this nature appeared in certain European countries at the same time, in particular in France, where the first, 'Business Aid', was founded in 1926, but they were only of a very limited importance and their activity was mainly devoted to satisfying the temporary require-

1 — Translated from the French.