SUMMARY

2014/31 How to calculate unemployment benefits in cross-border situations; ‘typical’ and ‘atypicial’ frontier workers (CZ)

<p>Where a person was employed in a state, not being that of his residence, and he does not return to his state of residence at least once a week, he has, according to Regulation 1408/71, a choice of where to apply for unemployment support: in his state of residence or in his state of work. </p>
<p>If such a ‘frontier worker’ applies for unemployment support in his state of residence, the amount of that support should be calculated based on the earnings a worker in a similar job earns in the state of residence and not on the applicant’s own previous earnings.</p>

Summary

Where a person was employed in a state, not being that of his residence, and he does not return to his state of residence at least once a week, he has, according to Regulation 1408/71, a choice of where to apply for unemployment support: in his state of residence or in his state of work.

If such a 'frontier worker' applies for unemployment support in his state of residence, the amount of that support should be calculated based on the earnings a worker in a similar job earns in the state of residence and not on the applicant's own previous earnings.

Facts

The plaintiff in this case was a Czech citizen. He worked for an employer in Austria but he continued to be registered as a resident of the Czech Republic. When his employment contract terminated, he returned to his homeland, where he registered at the labour office. For a reason that the published documents in this case do not reveal, he was not entitled to any unemployment support in Austria.

The Czech labour office provided the plaintiff with unemployment support, the amount of which was derived from the average earnings of an employee in the same position in the Czech Republic. These unemployment benefits were 60% below what they would have been had they been based on the plaintiff's last earnings in Austria.

The plaintiff considered the amount of unemployment support incorrect. In his opinion, the labour office should have calculated it based on his last earnings in Austria. He therefore filed an appeal with the Ministry of Labour and Social Affairs. The Ministry confirmed the labour office's decision. The plaintiff disagreed and filed a suit with the administrative court against the Ministry's decision.

Court of first instance

The administrative court of first instance rejected the claim and confirmed the amount of unemployment benefits awarded by the Czech labour office. The court reasoned that in this particular case the Czech labour office had correctly applied the second sentence of Article 68(1) of Regulation 1408/71 and therefore had correctly determined the amount of unemployment support by deriving the amount from the average earnings of a similar worker in the state of the unemployed person's residence.

The plaintiff filed an appeal with the Supreme Administrative Court of the Czech Republic. He claimed that the court of first instance had incorrectly applied the second sentence of Article 68(1) of Regulation 1408/71, instead of applying the first sentence. Further, the plaintiff stated that he was not a frontier worker and that therefore his case should be judged according to Article 71(1)(b)(ii) and the first sentence of Article 68(1) of Regulation 1408/71.

The Ministry of Labour and Social Affairs as defendant in this case stated that:

based on previous decisions of the European Court of Justice and wording of Articles 71 and 68 of Regulation 1408/71, the calculation of the amount of unemployment support for the plaintiff must derive from the amount of the average monthly earnings in an equivalent

employment in his place of residence;
the plaintiff could have brought the claim for unemployment support before the Austrian labour office. In that case, the amount would have been derived from his real earnings (the Ministry raised this argument despite the fact that the plaintiff had not gained entitlement for unemployment support in Austria).

Judgment

The Supreme Administrative Court agreed with the plaintiff that Article 71(1)(b)(ii) of Regulation 1408/71 applied to his case and that he should therefore be seen as an atypical frontier worker. Nevertheless, the court rejected the plaintiff's appeal and upheld the judgment of the court of first instance. It did this on the basis of the following reasoning.

The fact that the plaintiff was an atypical frontier worker was considered by the Supreme Administrative Court as crucial. The unemployment support should, according to the literal text of Article 68 of Regulation 1408/71, in the case of states where unemployment benefit derives from earnings gained in the previous employment, be provided according to the previous wage or salary in the state where the person applied for it. If there are no such earnings, the unemployment benefit derives from the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment. However, as noted above, the ECJ overruled the literal text of Article 68(1) in favour of frontier workers.

The exception ruled by the ECJ however applies according to the Supreme Administrative Court only to "typical" frontier workers not to "atypical" frontier workers. The reason for this is, according to the Supreme Administrative Court, the fact that typical frontier workers do not have a choice and must apply for unemployment support in the state of their residence and their freedom of movement of workforce would therefore be limited. By contrast, atypical frontier workers have the choice as to whether to ask for unemployment support in their state of work or state of residence. It is therefore up to the worker whether their unemployment support will be derived from their last earnings or not (without regard to the fact that the plaintiff did not have such a choice in practice because he was not entitled to receive unemployment support in Austria).

Legal background: Regulation 1408/71

In order to explain the judgment in this case it is necessary to say something about the provisions in Regulation 1408/71 that deal with unemployment benefits. Although that regulation was replaced on

1 May 2010 (by Regulation 883/2004), it applied to this dispute because the plaintiff's unemployment occurred before that date.

Article 13(2)(a) gives the main rule: a person employed in a Member State is subject to that state's legislation even if he resides elsewhere.

As regards unemployment benefits, the most common situation is where a person lives and works in one country and then, when he loses his job, moves to another country with a view to finding a new job there. This situation is dealt with in Section 2 of Chapter 6 (Articles 69 and 70). Basically, what these provisions say is that the unemployed person shall receive unemployment benefits under the legislation of the country in which he worked, with certain restrictions and provided he satisfies certain requirements.

Section 3 (Article 71) deals with the less common situation where a person lived and worked in different countries. It distinguishes between frontier workers and others. A frontier worker, as defined in Article 1(b), is an employee who works in Member State A and resides in Member State B, to which he returns, as a rule, at least once a week.

Article 71(1)(a) deals with unemployed frontier workers. Subparagraph (ii) provides:

"A frontier worker who is wholly unemployed shall receive benefits in accordance with the provisions of the legislation of the Member State in whose territory he resides as though he had been subject to that legislation while last employed; these benefits shall be provided by the institution of the place of residence at its own expense."

Article 71(1)(b) deals with unemployed persons who lived and worked in different countries but who are **not** frontier workers. Subparagraph (ii) provides:

"An employed person, other than a frontier worker, who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides, or who returns to that territory, shall receive benefits in accordance with the legislation of that State as if he had last been employed there; the institution of the place of residence shall provide such benefits at its own expense. However, if such an employed person has become entitled to benefits at the expense of the competent institution of the Member State to whose legislation he was last subject, he shall receive benefits under the provisions of Article 69. […]".

Technically, the plaintiff was not a typical frontier worker, given that he worked in Austria, lived in the Czech Republic but did not return to his place of residence at least once a week. Therefore, even though he had been subject to Austrian social insurance legislation and even though Austrian social insurance contributions had been deducted from his salary, he was

eligible, not for Austrian unemployment benefits, but for Czech unemployment benefits, in accordance with Article 71(1)(b)(ii).

Section 1 of Chapter 6 of Regulation 1408/71 comprises two provisions that are common to all unemployment benefits: Articles 67 and 68. Article 68(1) consists of two sentences:

"The competent institution of a Member State whose legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary shall take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that State. However, if the person concerned had been in his last employment in that territory for less than four weeks, the benefits shall be calculated on the basis of the normal wage or salary corresponding, in the place where the unemployed person is residing or staying, to an equivalent or similar employment to his last employment in the territory of another Member State."

The 'Member State' referred to in this provision, in the plaintiff's case, was the Czech Republic. That was the Member State that was responsible for paying him unemployment benefits. Given that he had not been employed in the Czech Republic (and had therefore, by definition, been employed there "for less than four weeks"), the second sentence of Article 68(1) applied. Hence, his benefits were calculated using the lower Czech (comparator's salary) rather than the higher Austrian (last-earned salary) criteria.

However, the ECJ has had occasion to rule before on this type of situation. In 1980, in the *Fellinger* case (C-67/79), it held as follows with regard to the provisions of Article 68(1):

"These provisions occur amongst the 'common provisions' of Chapter 6 of Title III of the regulation, relating to 'unemployment', and are of general application and do not relate to particular situations peculiar to certain categories of worker. They clearly refer to the ordinary case of the worker who is normally employed in the territory of the competent State in which he is residing or staying and they provide, in the second sentence, the special rule there laid down only for the exceptional case in which that worker has been in his last employment in the territory of the said State 'for less than four weeks'. In the form in which they are drawn up these provisions do not therefore allow of a definition of the criteria of calculation applicable to unemployment benefit due to a frontier worker who, since he resides in a Member State different from that in which he is employed, can never, by very reason of his status as a frontier worker, be employed in the territory of the State which provides his unemployment benefit. The application of the said provisions to such a worker would produce the result that, since by definition he is in the position contemplated by the second sentence of Article 68(1), the rules which that provision lays down by way of an exception would normally be applied to him and he would never be able to receive unemployment benefit based on

the wage or salary actually received in his last employment. Such treatment in regard to unemployment benefit would place him in an unfavourable situation compared with workers in general, for whom the State of employment where they reside or stay is normally the competent State and would, moreover, conflict with the requirements of the free movement of workers. Since daily movements often take place from countries with low wages to countries with higher wages the fact that unemployment benefit paid to frontier workers could never be calculated on the basis of the higher wages would in fact be such as to discourage those movements and thus the mobility of workers within the Community."

What the ECJ did in *Fellinger* was to hold that a typical frontier worker, despite the wording of Article 71(1)(a)(ii) and Article 68(1) of Regulation 1408/71 to the contrary, must receive unemployment benefit calculated from the last earnings received by the worker in the last employment held by him in the Member State in which he was engaged immediately prior to his becoming unemployed, not from earnings the worker would receive in a similar job in the state of his residence. In effect, the ECJ overruled the text of the Regulation.

Could the plaintiff in the case reported here benefit from *Fellinger* even though he was not a typical frontier worker (because he did not return to his homeland at least once a week)? That was the issue in this case.

Commentary

Generally the court decides in conformity with Regulation 1408/71. However, the court in this particular case did not take into consideration the fact that the plaintiff did not have a choice as to where to ask for unemployment support because he was not entitled to the unemployment support in Austria. The position of the plaintiff was therefore very similar to typical frontier workers and the same case law should be applied to his case. This decision however placed him without a good reason into a less favourable position than typical frontier workers.

The court decision also did not take into account the new Regulation 883/2004 which was, at the whole time of this case, enacted but yet not in force. This Regulation reflected the decisions of the ECJ and according to Article 62, only the last earnings by the individual should be taken into account when calculating unemployment support in countries where this is calculated based on the last earnings of the former employee. This should have been an indicator for the court as to which interpretation should be applied.

In my opinion the court also reached the incorrect conclusion that Article 68 of the Regulation 1408/71 applies to an atypical worker in accordance with the principle free movement of people because it enshrines inequality between countries and employees - given that it is

obvious that most individuals will ask for unemployment support in a state where it will be calculated from real earnings.

For the reasons given above, in my view, the plaintiff's unemployment support should have been derived from his real earnings in Austria and not from the average earnings of a similar employee in the Czech Republic.

Comments from other jurisdictions

Austria (Manuel Schallar): On 5 May 2012, the Austrian Administrative Court (Verwaltungsgerichtshof) decided a similar case regarding the amount of unemployment compensation to which a frontier worker was entitled (case number 2010/08/117). If an unemployed worker is registered as a resident of Austria, but formerly worked abroad, the amount of his unemployment compensation must be adapted to his former income in the foreign country. On the other hand, if the unemployed worker worked for at least four weeks in Austria before his application, the amount of the unemployment compensation must be adapted to the local customary income (at his residence) for the job that he did in the foreign country.

The Netherlands (Peter Vas Nunes): There seems to be confusion with the use of the expressions "typical frontier worker" and "atypical frontier worker". My understanding of this case report is that in Czech theory a typical FW is someone who lives in his home country A, works across the border in country B and returns to his home country at least once a week. There are probably tens of thousands of such workers across the EU. An atypical FW, within the meaning that seems to be used in Czech theory, is a FW who lives in his home country A, works in country B and does not return to his home country often. There must also be tens of thousands of such workers. Take, for example, Polish workers in the UK, who return to Poland twice a year.

My own understanding is that the expressions "typical" and "atypical" FW are used differently by the ECJ. An atypical FW within that meaning is a FW who does not live in his home country but does work there. An example would be a Dutchman who lives just across the border in Belgium (most likely for tax reasons; there are many thousands of such workers) but works in his home country, The Netherlands. The EU legislator in 1971 did not take the existence of this rather special species of FW into consideration. In *Miethe* (ECJ 12 June 1986, case C-1/85), the ECJ held - more or less contrary to the wording of Regulation 1408/71 - that such an "atypical" FW should not be considered to be a FW. An atypical worker, as the ECJ put it, is a worker who, although he is a frontier worker within the meaning of Article 1(b) of Regulation 1408/71, "has in exceptional circumstances maintained in the Member State in which he was last

employed personal and business links of such a nature as to give him a better chance of finding new employment there". To take the example of the Dutchman working in his home country The Netherlands but living just across the border in Belgium, such a worker, upon losing his job, is not likely to seek new employment in Belgium (as Regulation 1408/71 supposes to be the most likely event) but in The Netherlands. For this reason, the ECJ, in *Miethe*, introduced a new, previously non-existent category of FW, namely an "atypical" FW who, although technically being a FW, is deemed not to be a FW for social insurance purposes. This distinction disappeared under Regulation 883/2004, which replaced Regulation 1408/71 in 2009: see ECJ 11 April 2013, case C-443/11 (*Jeltes*).

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