Neutral Citation [2013] IEHC 260

THE HIGH COURT

JUDICIAL REVIEW

[2012 681 J.R.]

BETWEEN

LISA KELLY

APPLICANT

AND

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 29th May, 2013

1. The fact that the social security systems of the member states of the European Union have not been harmonised inevitably causes difficulties in the sphere of free movement of workers and non-discrimination on grounds of nationality. This is perhaps especially true so far as those who have frequently had occasion to exercise their free movement rights is concerned. Given these disparities, it is no surprise that the Union legislator has sought to devise a system of jurisdiction-allocating rules which seek to determine which Member State should entertain a particular social security claim.

2. The present set of rules – which, in truth, are a form of conflict of law rules operating in the sphere of social security law – are contained in Regulation 883/2004 EC ("the 2004 Regulation"). The 2004 Regulation itself replaces its predecessor Regulation 1408/71 EEC. As the 3rd Recital to the 2004 Regulation itself observes, the 1971 Regulation had itself been "amended and up-dated on numerous occasions" to take account of on-going development and a series of judgments of the Court of Justice. But, of course, as experience has shown, it is not always easy to devise rules of this kind which can seamlessly apply without difficulty to all forms of human endeavour.

3. This is especially true in the case of what has come to be known as "frontier workers" (*i.e.*, employees who are resident in Member State A but who work in Member State B), as the present case will shortly illustrate. The applicant is an Irish citizen who at all times has been resident in Ireland. She has mainly worked in this jurisdiction, but her last place of employment was in Northern Ireland. The Minister maintains that as a result her claim for illness benefit falls to be determined by the United Kingdom authorities. This in itself would not be problematic, save for the fact that she does not qualify for benefit under UK law, whereas she would if her application were held to be governed by Irish law.

4. Was the Minister accordingly correct to determine that she application for illness benefit fell to be determined by the UK authorities by reason of the fact that this happened to be the last place she was employed prior to her illness? This is the net issue which falls to be determined in these judicial review proceedings.

5. As I have indicated, the applicant, Ms. Kelly, maintains that the respondent Minister has wrongly refused to pay her illness benefit under the Social Welfare Acts. The applicant became ill at the end of October, 2010 in circumstances I will shortly describe. Illness benefit was paid to her by the Minister until August, 2011. She then received a letter on 14th September, 2011, from the Minister to the effect that the illness benefit which had been paid to her since the previous October 2010 had been paid in error and her application for illness benefit was now being transferred to the Northern Irish authorities. It is only proper to point out that from 24th November 2011 Ms. Kelly was in receipt of Supplementary Welfare Allowance from the Irish authorities. This is a social assistant payment not covered by the 2004 Regulation.

6. How, then, did this situation come about? Ms. Kelly has at all times resided in Dundalk, Co. Louth. She was previously employed from March, 2006 to June, 2008 as the Commercial Manager at Dundalk Football Club. She was next employed between January, 2010 and June, 2010 in sale and marketing and public relations at a company known as Sporttracker in Dundalk. Critically, however, from 21st June, 2010, to 30th October, 2010, she was employed as Marketing Manager with Newry City Football Club in Newry, Co. Down in Northern Ireland. It was at that point that she became ill and claimed illness benefit from the respondent Minister.

7. Ms. Kelly had been previously unemployed between July, 2008 and January, 2010 and she received unemployment benefit from the Minister during this period. She then received illness benefit from the 17th November, 2010, until 11th August, 2011 until that payment was suspended during that month.

8. Following the suspension of her payment, Ms. Kelly telephoned the Department of Social Protection. It appears that the Department realised for the first time at that point that Ms. Kelly's last place of employment was not within the State, but rather in Northern Ireland. Ms. Kelly was then informed that she was not entitled by reason of this fact to illness benefit in this State. I should add as an aside that the Minister maintains that the original series of payments from October, 2010 to August, 2011 were paid in error, as Ms. Kelly had stated in her application form in response to a specific query that she had not worked outside of the State. At one point it was suggested that these payments should be recouped from Ms. Kelly, but this issue in not now being pursued.

9. Ms. Kelly's claim was then transferred to the Northern Ireland Department of Work and Pensions for adjudication. The difficulty which then arises is that the criteria for determining illness benefit in Northern Ireland are different to those applicable for determining illness benefit in this State.

10. As it happens, the detailed minutiae of these differences do not directly concern us. It is, perhaps, sufficient to state that in this State the relevant tax year for social security contributions is the second last complete tax year before the year in which the claim is made. Consequently, for claims made in 2010, the relevant tax year was 2008. If Ms. Kelly had continuously worked in the State, she would have been entitled to illness benefit as at the time of her claim she had made the requisite number of social security

contributions under the PRSI system.

11. The situation in Northern Ireland is, however, different in that insurance contributions must be paid in the three years prior to the claim. So far as Ms. Kelly's claim is concerned, that meant that she had to have contributions paid in 2007, 2008 and 2009. As UK Department of Work and Pensions made clear in a letter dated 8th October, 2012, to Ms. Linda O'Connor, the Assistant Principal attached to the Department of Social Protection:-

> "Lisa Kelly fell sick in November, 2010; however, she lastly paid contributions to the UK. To qualify for United Kingdom employment and support allowance she must have paid contributions in 2007/2008 and 2008/2009. As she has not paid contributions in the UK or Ireland in those tax years, she does not satisfy the conditions to receive ESA. Lisa's last employer was in Northern Ireland and she paid contributions in the tax year 2010, however, she has still not satisfied the contribution conditions to receive benefit from the UK. Lisa was in the right to make her sickness benefit claim to the UK as she lastly insured here."

12. It is against that general background that we may now proceed to examine the scope and application of the 2004 Regulation.

The 2004 Regulation

13. The 2004 Regulation seeks to co-ordinate the various different rules prevalent in the Member States regarding social security systems. It is, however, important to recall that the Regulation can do no more than co-ordinate, since it this rather than harmonisation of social security systems which is envisaged by Article 48 TFEU. Before considering the terms of the 2004 Regulation, it may also be observed that there is no dispute but that disparities between the social security legislation of the Member States will inevitably give rise to certain anomalies, as the "primary law of the European Union cannot guarantee to an insured person that moving to another Member State will be neutral in terms of social security": see Joined Cases C-611/10 and C-612/10 *Waldermar Hudzinski* [2012] E.C.R. I-000, para. 43.

14. As that case (amongst many others) makes clear, the mere fact that a worker who avails of free movement rights obtains a less favourable benefit in the country of destination cannot *in itself* amount to a breach of European Union law. As the Court of Justice further observed in Case C-562/10 *Commission v. Germany* [2012] E.C.R. I-000:-

> "…as Article 48 TFEU provides for the coordination, not the harmonisation, of the legislation of the Member States relating to social security, the rules of the FEU Treaty on free movement cannot guarantee an insured person that moving to another Member State will be neutral in terms of social security, in particular where sickness benefits or care-related benefits are concerned. In view of the disparities existing between the schemes and legislation of the Member States in this field, such a move may, in financial terms and depending on the case, be more or less advantageous for the person concerned…"

15. At the same time, there is a clear vein of jurisprudence to the effect that persons exercising free movement rights should not be disadvantaged in comparison with those who have completed their entire working life within one Member State. The Court of Justice has further stated in cases such as Case C-10/90 *Masgio* [1991] E.C.R. I-1134 that the objects of the free movement provisions of the TFEU (or its predecessor) would not be attained if (at para. 19):-

> "as a consequence of the exercise of their rights to freedom of movement, migrant workers were to lose the advantages in the field of social security guaranteed to them by the laws of a single Member State."

16. The Court of Justice has also stated in cases such as Case C-2/89 *van Heijningen* [1990] E.C.R. I-2821 that one object of the 1971 Regulation was to ensure that "persons covered by [it] are not left without social security cover because there is no legislation which is applicable to them." It is true that these comments were made in the context of the application of jurisdiction-allocating conflict rules designed to ensure that every case was catered for, but it is still possible to discern a concern lest the application of these rules would be to deprive an applicant entirely of benefit simply by reason of the location of his or her last place of employment.

17. It is against these general principles that the 2004 Regulation falls to be evaluated. Article 3(1)(a) of the 2004 Regulation makes it clear that the Regulation applies to illness benefit claims. Article 11(1) then seeks to allocating responsibility for the persons to whom applies "to the legislation of a single Member State only". Title II of the Regulation then seeks to prescribe the content of these jurisdiction-allocating rules.

18. Article 11(3)(a) then states that "a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State". Article 11(1)(b) to (d) then prescribe specific rules for civil servants, unemployment benefit and the armed forces. Article 11(3)(e) then states that in the event that none of the specific rules apply, the claimant:

> "shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more Member States."

19. The Minister's case is that Ms. Kelly falls squarely within the scope of Article 11(3)(a), since she was at the relevant time "pursuing an activity as [an] employed…person" in the United Kingdom. It is, of course, correct to say that under the earliest versions of the 1971 Regulation a worker remained subject to the social security system of the Member State in which he or she worked until he or she had taken up employment in another Member State: see, e.g, Case 302/84 *Ten Holder* [1986] E.C.R. 1821. Only workers who have definitively ceased all professional or trade activity were held to fall outside the scope of Article 13(2)(a) of the 1971 Regulation: see, e.g., Case C-140/08 *Noij* [1991] E.C.R. I-387. The decision in *Ten Holder* was, however, effectively overruled by subsequent legislative change in 1991, as Article 2 of Regulation 2195/91 EEC inserted a new version of Article 13(2)(f):-

> "a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone."

20. This version of the Article 13(2)(f) was examined by the Court of Justice in Case C-135/99 *Elsen* [2000] E.C.R. I-10409. As this was a decision to which both parties laid some emphasis, it requires a detailed consideration.

21. In May, 1981 Ms. Elsen, a German national, moved from Germany to France, where since then she has lived with her husband and their son, born in August, 1984. She was employed in Germany up to March, 1985 and paid social insurance there, albeit that she

acquired the status of a frontier worker during this period. Her occupational activity was interrupted between July, 1984 and February, 1985 owing to maternity leave for the birth of her child. After March 1985, Ms. Elsen no longer engaged in an occupational activity subject to compulsory insurance in either Germany or France.

22. In September 1994, Ms. Elsen requested the German authorites to take into consideration, as periods of insurance for the purpose of an old-age pension, the periods spent rearing her son, but this request was refused on the ground that the child-rearing had taken place abroad. This issue was ultimately referred to the Court of Justice by the German society security court (Bundessozialgericht). The Court of Justice first stated:-

> "Before answering that question, it is necessary to ascertain whether, under Regulation No 1408/71, the German legislation is actually applicable to the situation of a worker who has ceased all occupational activity in Germany and resides in another Member State, for the purpose of taking into account periods devoted to rearing a child born while the parent was still working in Germany as a frontier worker."

23. The Court then continued thus:-

> "The Commission submits that, during the periods at issue in the main proceedings, immediately after the birth of the child, Mrs. Elsen was subject to the social security legislation of the French Republic, where she was living, since during those periods she was not working in Germany and there was not a sufficiently close link with the German social security system for a derogation from the principle of territoriality characteristic of that system to be justified in the interest of equal treatment.
>
> In response to that submission, the Court observes that, pursuant to Article 13(2)(a) and (b) of Regulation No 1408/71, a person employed or self-employed in the territory of one Member State is subject to the social security legislation of that Member State even if he resides in the territory of another Member State.
>
> Admittedly, in the present case, although the plaintiff had a gainful occupation in Germany until March 1985, when she resided with her family in France, she has not worked since that date. However, it must be pointed out that, as regards the taking into account, for the purposes of old-age insurance, of unbroken periods of child-rearing following the birth of her child, Mrs. Elsen worked exclusively in Germany and was subject, as a frontier worker, to the German legislation when the child was born. *Thus a close link can be established between the periods of child-rearing concerned and the periods of insurance completed in Germany by virtue of her occupational activity in that State*. It is precisely because she had completed the latter periods that Mrs. Elsen requested the German institution to take into account the subsequent periods devoted to rearing her child.
>
> Consequently, it must be held - and the German Government has not disputed this point - that the German legislation is applicable in the plaintiff's situation. In those circumstances, as regards the attribution of those periods of child-rearing for the purposes of old-age insurance, Mrs. Elsen cannot be regarded under Article 13(2)(f) of Regulation No 1408/71 as having ceased all occupational activity and subject for that reason to the legislation of the State in which she resided. That provision specifically provides for the legislation of the State of residence to apply only where 'the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs. As regards the attribution of periods devoted to rearing a child born at a time when, as here, the parent pursued an occupation in a Member State and was therefore subject to the social security legislation of that State, that legislation remains applicable, in accordance with Article 13(2)(a) of Regulation No 1408/71."

24. The Court then went on to hold that the free movement and non-discrimination provisions of the EC Treaty (as it then was) precluded the German authorities from rejecting the claim of such a frontier worker merely because the child in question was raised in *France*. The significance of *Elsen*, however, is that the approach presaged in *Ten Holder* did not prevail. Thus, the Court did not simply look to the last place of employment, but rather whether a "close link" could be established between the gainful insurable activity and the social security payment in question.

25. A very similar view was taken by the Court of Justice in Case C-522/10 *Reichel-Albert* [2012] E.C.R. I-000. In this case a German national worked in Germany until 1980 before moving to Belgium with her husband. Her children were born in Belgium and she never worked there. The Court of Justice nevertheless held that there was a sufficiently close link between her employment in Germany and the subsequent child-raising periods for these latter periods to be evaluated and taken into account for social security purposes:-

> "The fact that a person like Mrs. Reichel-Albert worked and contributed in only one Member State, both before and after temporarily transferring her place of residence, solely on family-related grounds, to another Member State where she never worked or contributed, allows a sufficiently close link to be established between those child-raising periods and the periods of insurance completed by virtue of the pursuit of a gainful occupation in the first Member State under consideration (see, to that effect, *Elsen,* paragraphs 25 to 28, and Kauer, paragraph 32). It was indeed on account of completion of those latter periods that Mrs. Reichel-Albert requested the DRN [German pensions authority for Northern Bavaria] to take account of periods spent in raising her children during a break in her working career."

26. This brings us to the nub of the question at issue here. There are a number of possible options which now be considered.

Possible options considered

27. The first option is, in effect, to follow the *Ten Holder* approach (or, to the extent that that decision has been overtaken by subsequent legislative developments, a variant of that approach) and to conclude that as Ms. Kelly's last place of employment was in the United Kingdom, it is the law of that jurisdiction which automatically applies. The difficulty presented here is not only that Ms. Kelly would get no illness benefit at all, but also that she is entirely disadvantaged by reason of the fact that she happened to work in another Member State. If this were indeed the position, it would seem to act as a conscious disincentive to avail of free movement rights. Yet this would be entirely contrary to the objectives of the 1971 Regulation (and, by extension, both the 2004 Regulation and the free movement rules protected by the TFEU) proclaimed by the Court of Justice in cases such as *Masgio*.

28. The alternative approach is to follow the "sufficiently close links" approach adumbrated by the Court of Justice in cases such as *Elsen* and *Reichel-Albert*. It must be recalled that both of those cases involved a question of a link between periods of insurable employment on the one hand and periods of child-rearing on the other. It would not appear that the Court of Justice has given any firm guidance on how this criterion might be applied in the context of a case such as the present one.

29. Counsel for the Minister, Mr. Collins S.C., has argued that the fact that Ms. Kelly spent the last six months of her insurable employment working in that jurisdiction shows the extent of her sufficiently close links with Northern Ireland. Counsel for the applicant, Mr. Shortall, takes a different view and urges that the much longer periods of employment in this State, coupled with her residence here, shows the sufficiently close link with this jurisdiction.

Conclusions

30. For my part, I do not think that the issue presented in this case with its stark facts is one which has previously directly confronted the Court of Justice, at least subsequent to the 1991 legislative amendment in consequence of the earlier decision in *Ten Holder*. Given the complexity and relative novelty of this issue, coupled with the fact that it involves an inter-action of the social security laws of two Member States, it seems to me appropriate that the proceedings should be stayed and the following issues should be referred to the Court of Justice for a preliminary ruling pursuant to Article 267 TFEU:-

"Question 1

> Where an employee resident in Member State A and who has been in insurable employment in that State for just short of three years spends the last six months of her insurable employment in Member State B, should that person's subsequent claim for social security payments on account of illness be governed by (i) the law of Member State B for the purposes of Article 11(3)(a) of Regulation 883/2004/EC? or, (ii) by the law of the Member State A where she is resident for the purposes of Article 11(3)(e)?

Question 2

> Is it relevant to a consideration of Question 1 that if the law of Member State B is held to be the governing law, then the employee in question is ineligible for any social security payments, whereas this would not be the case if the law of the Member State where she is resident (Member State A) were held to apply?

31. I will now hear counsel as to the form of the orders proposed.