

DECISION No F1

of 12 June 2009

concerning the interpretation of Article 68 of Regulation (EC) No 883/2004 of the European Parliament and of the Council relating to priority rules in the event of overlapping of family benefits

(Text of relevance to the EEA and to the EC/Switzerland Agreement)

(2010/C 106/04)

THE ADMINISTRATIVE COMMISSION FOR THE COORDINATION OF SOCIAL SECURITY SYSTEMS,

Having regard to Article 72(a) 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 ⁽¹⁾, under which the Administrative Commission is responsible for dealing with all administrative questions or questions of interpretation arising from the provisions of Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems ⁽²⁾,

Having regard to Article 68 of Regulation (EC) No 883/2004,

Having regard to Article 1(a) and (b) of Regulation (EC) No 883/2004,

Whereas:

- (1) Where family benefits are payable by more than one Member State, entitlement to family benefits of a Member State where rights are available on the basis of receipt of a pension or on the basis of residence shall be suspended up to the amount of family benefits provided for by a Member State where rights are available on the basis of an activity as an employed or self-employed person. Therefore it is important to know what other periods count as an activity as an employed or self-employed person in order to establish the order of priority in the event of overlapping.
- (2) The legislations of certain Member States provide that periods of suspension or interruption of the actual activity as an employed or self-employed person by reason of holidays, unemployment, temporary incapacity for work, strikes or lock-outs, shall be treated either as periods of an activity as an employed or self-employed person for the acquisition of entitlement to family benefits or shall be regarded as periods of inactivity giving rise, where appropriate, either per se or as the result of a preceding activity as an employed or self-employed person, to the payment of family benefits.

- (3) Article 1(a) and (b) of Regulation (EC) No 883/2004 provide for definitions of 'activity as an employed or self-employed person' by referring to 'any activity or equivalent situation treated as such for the purposes of the social security legislation of the Member State in which such activity or equivalent situation exists'.
- (4) It is essential to know the scope of 'rights available on the basis of an activity as an employed or self-employed person' found in Article 68 of Regulation (EC) No 883/2004 in order to avoid any uncertainties or differences in interpretation.
- (5) In a case where a worker's status of active employment was suspended due to this person's unpaid leave following the birth of a child and for the purpose of bringing up this child, the Court of Justice of the European Communities ⁽³⁾ referred to Article 73 of Council Regulation (EEC) No 1408/71 ⁽⁴⁾ in conjunction with Article 13(2)(a) of Regulation (EEC) No 1408/71 ⁽⁵⁾. Such unpaid leave must therefore also be qualified as an activity as an employed or self-employed person for the purposes of Article 68 of Regulation (EC) No 883/2004. In this context the Court reiterated that the above mentioned provisions can only apply for as long as the person concerned has the status of an employed or self-employed person within the meaning of Article 1(a) of Regulation (EEC) No 1408/71 ⁽⁶⁾ which requires that the person concerned is covered in at least one branch of social security. This excludes persons on unpaid leave who are no longer covered by any social security scheme of the relevant Member State.
- (6) There can only be a non-exhaustive list of cases where during a period of leave a person is deemed to be in an activity as an employed or self-employed person, due to the variety of systems for unpaid leave in Member States and ongoing changes in national legislation. Therefore it is not appropriate to define all the cases in which such unpaid leave is equivalent to an activity as an employed or self-employed person and those where the necessary close link to the gainful activity does not exist.

Acting in accordance with the conditions laid down in Article 71(2) of Regulation (EC) No 883/2004,

⁽¹⁾ OJ L 166, 30.4.2004, p. 1.

⁽²⁾ OJ L 284, 30.10.2009, p. 1.

⁽³⁾ Judgment of 7 June 2005 in case C-543/03, *Dodl and Oberhollenzer v. Tiroler Gebietskrankenkasse*.

⁽⁴⁾ OJ L 149, 5.7.1971, p. 2.

⁽⁵⁾ Now Articles 67 and 11(3)(a) of Regulation (EC) No 883/2004.

⁽⁶⁾ Now Article 1(c) of Regulation (EC) No 883/2004.

HAS DECIDED AS FOLLOWS:

1. For the purposes of Article 68 of Regulation (EC) No 883/2004, family benefits shall be regarded as 'available on the basis of an activity as an employed or self-employed person' in particular:

(a) by the actual activity as an employed or self-employed person; and also

(b) in the course of any period of temporary suspension of such an activity as an employed or self-employed person

(i) as a result of sickness, maternity, accident at work, occupational disease or unemployment, as long as wages or benefits, excluding pensions, are payable in respect of these contingencies; or

(ii) during paid leave, strike or lock-out; or

(iii) during unpaid leave for the purpose of child-raising, as long as this leave is deemed equivalent to such an activity as an employed or self-employed person in accordance with the relevant legislation.

2. This Decision shall be published in the *Official Journal of the European Union*. It shall apply from the date of entry into force of Regulation (EC) No 987/2009.

The Chair of the Administrative Commission
Gabriela PIKOROVÁ
