

JUDGMENT OF THE COURT
3 June 1992 *

In Case C-45/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Arbeitsgericht Lörrach (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

Alberto Paletta,

Vittorio Paletta,

Raffael Paletta,

Carmela Paletta

and

Brennet AG

on the interpretation of Article 18(1) and (5) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1972 (I), p. 159),

THE COURT,

composed of: O. Due, President, R. Joliet, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn, Presidents of Chambers, G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco and M. Zuleeg, Judges,

Advocate General: C. Gulmann,
Registrar: J. A. Pompe, Deputy Registrar,

* Language of the case: German.

after considering the written observations submitted on behalf of:

- the German Government, by Ernst Röder and Joachim Karl, acting as Agents,
- the Netherlands Government, by B. R. Bot, Secretary General of the Ministry of Foreign Affairs, acting as Agent,
- the Commission of the European Communities, by Karen Banks and Bernd Langeheine, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the applicants in the main proceedings, represented by Klaus Lörcher, Rechtssekretär (Legal Secretary) of the Deutscher Gewerkschaftsbund (German Trade Union Federation), Baden Württemberg District, the defendant in the main proceedings, represented by Emil Schelb, Assessor of the Verband der Baden-Württembergischen Textilindustrie e. V. (Confederation of the Baden Württemberg Textile Industry), the German Government, and the Commission, at the hearing on 17 October 1991,

after hearing the Opinion of the Advocate General at the sitting on 21 November 1991,

gives the following

Judgment

1 By order of 31 January 1990, received at the Court on 21 February 1990, the Arbeitsgericht (Labour Court) Lörrach (Federal Republic of Germany) referred to the Court under Article 177 of the EEC Treaty a number of questions on the interpretation of Article 18 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1972 (I), p. 159).

- 2 The questions were raised in the course of proceedings between Vittorio Paletta, his wife Raffaella, and their two children, Carmela and Alberto, all Italian nationals, and their employer, Brennet AG, established in the Federal Republic of Germany, concerning that company's refusal to maintain payment of the wages of those concerned in accordance with the Lohnfortzahlungsgesetz (Law on the continued payment of wages, hereinafter referred to as 'the LFZG') of 27 July 1969 BGBl I, p. 946).
- 3 Under the LFZG the employer must continue to pay wages for a period of up to six weeks to any employee who, after the commencement of his employment and through no fault of his own, becomes incapable of working.
- 4 It is apparent from the order for reference that the applicants in the main proceedings reported themselves as sick during leave granted to them by Brennet AG for the period from 17 July to 12 August 1989, and that Brennet AG refused to pay them their wages during the first six weeks following the onset of their illness on the ground that it did not consider itself bound by the medical findings made abroad whose veracity it had serious reasons to doubt.
- 5 The applicants in the main proceedings challenged those decisions before the Arbeitsgericht Lörrach, claiming that since Brennet AG had not availed itself of the possibility provided for in Article 18(5) of Regulation No 574/72, of having the person concerned examined by a doctor of its choice, it was bound in fact and in law by the medical findings made by the institution of the place of residence as regards the commencement and duration of their incapacity for work. In that connection they relied on the judgment of the Court in Case 22/86 *Rindone v Allgemeine Ortskrankenkasse Bad Urach-Münsingen* [1987] ECR 1339, which, although it concerned a case in which the competent institution was a social security institution, was in their view, also applicable when the competent institution is the employer.
- 6 In order to resolve the dispute the Arbeitsgericht Lörrach decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling

- (1) Can the principles contained in the judgment of the Third Chamber of the Court of Justice of 12 March 1987 in Case 22/86 *Rindone* regarding the interpretation of Article 18(1) and (5) of Council Regulation (EEC) No 574/72 be applied in whole or in part to cases in which payment of cash benefits in the event of illness is made by the employer and not by the social security institution, as for example under Paragraph 1 et seq. of the German Lohnfortzahlungsgesetz of 27 July 1969 (BGBl I, p. 946, as amended most recently by the Law of 20 December 1988, BGBl I, p. 2477)?

In particular:

- (2) Is the body responsible for continued payment of remuneration in the event of illness under the law of the Federal Republic of Germany in accordance with Paragraph 1 et seq. of the Lohnfortzahlungsgesetz required to base its decision, in fact and in law, concerning the claim for cash benefits on the findings made by the social security institution of the employee's place of residence concerning the commencement and duration of the incapacity for work?
- (3) If the answer to Question 1 is in the affirmative, is the answer the same if the employer, who under Paragraph 1 of the LFZG bears responsibility for continued payment of wages, has no way of checking, in fact or in law, the findings concerning the commencement of the incapacity for work other than to call upon the competent sickness insurance fund, which in this case is not primarily liable to pay the benefit, to have the employee examined by a doctor of its own choice (or its medical officer) pursuant to Article 18(5) of Regulation (EEC) No 574/72?

7 Reference is made to the Report for the Hearing for a more detailed account of the facts of the case, the relevant provisions, the procedure and the written observations submitted to the Court, which are mentioned or discussed below only in so far as is necessary for the reasoning of the Court.

8 By the questions submitted for a preliminary ruling the national court is essentially seeking to ascertain whether Article 18(1) to (4) of Regulation

No 574/72 are 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 the 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).

- 9 Article 18(1) to (4) lays down a procedure whereby it is for the institution of the place of residence to establish the commencement and duration of the incapacity for work of workers applying for the cash benefits referred to in that article. Nevertheless, the competent institution retains the possibility of having the person concerned examined by a doctor of its choice (Article 18(5)).
- 10 Article 18, which concerns the situation of workers residing in a Member State other than the competent State, is by virtue of Article 24 of the same regulation, also applicable to workers who fall ill whilst staying in another Member State.
- 11 At paragraph 15 of the abovementioned judgment in the *Rindone* case, the Court held that 'Article 18(1) to (4) of Regulation No 574/72 must be interpreted as meaning that if the competent institution does not exercise the option provided for in paragraph (5) of having the person concerned examined by a doctor of its choice, it is bound, in fact and in law, by the findings made by the institution at the place of residence as regards the commencement and duration of incapacity for work.'
- 12 In order that a reply may be given to the questions submitted, it is first necessary to determine whether the benefits provided by the employer by way of maintenance of wages, as provided for in Paragraph 1 of the LFZK constitute sickness benefits within the meaning Council Regulation (EEC) No 1408/71 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).

- 13 It should be recalled that, according to Article 4(2) of Regulation No 1408/71, that regulation applies to schemes concerning the liability of the employer in respect of the benefits referred to in paragraph (1), which include sickness benefits (Article 4(1)(a)).
- 14 According to the German and Netherlands Governments, the benefits in question do not constitute social security benefits within the meaning of Article 4 of Regulation No 1408/71; consequently, that regulation, and therefore Regulation No 574/72 too, are not applicable to them.
- 15 Whilst it is true that at paragraph 7 of its judgment in Case 171/88 *Rinner-Kühn v Spezial-Gebäudereinigung* [1989] ECR 2743 the Court held that continued payment of wages to an employee in the event of illness, as provided for by the LFZG, fell within the concept of 'pay' within the meaning of Article 119 of the Treaty, it still does not follow that the benefits provided by the employer in that connection may not at the same time constitute sickness benefits within the meaning of Regulation No 1408/71.
- 16 The reply to the question whether a benefit falls within the scope of Regulation No 1408/71 essentially depends on the fundamental characteristics of the benefit, in particular its purpose and the conditions for its grant, and not on whether or not the national legislation describes the benefit as a social security benefit (see, *inter alia*, the judgment in Case 249/83 *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmthout*, [1985] ECR 973, paragraph 11).
- 17 It should be pointed out here that the benefits in question are granted to the worker only in the event of illness and that their payment for a period of up to six weeks suspends payment of the daily sickness benefits provided for in the Sozialgesetzbuch (German social security code) which are incontestably sickness benefits.
- 18 Contrary to the what the German and Netherlands Governments argue, the fact that the financial burden of those benefits rests on the employer cannot,

remove those benefits from the scope of Regulation No 1408/71 since, according to the Court's case-law (see the judgment in Joined Cases 379 to 381/85 and 93/86 *Cram Rhône-Alpes v Giletti* [1987] ECR 955), the classification of an allowance as a social security benefit covered by the regulation does not depend upon the manner in which it is financed.

- 19 Benefits such as those paid by the employer by way of maintenance of salary pursuant to Paragraph 1 of the LFZG therefore constitute sickness benefits within the meaning of Article 4(1) of Regulation No 1408/71.
- 20 The next question to be determined is whether Article 18 of Regulation No 574/72 is applicable when the sickness benefits are paid by the employer.
- 21 It should be pointed out here that Article 1(o)(iv) of Regulation No 1408/71 provides that the employer may be regarded as the 'competent institution' within the meaning of the Regulation 'in the case of a scheme relating to an employer's liability in respect of the benefits set out in Article 4(1).'
- 22 Since the definitions contained in Article 1 are reproduced in Regulation No 574/72 (Article 1(c)), the term of 'competent institution' in Article 18 of Regulation No 574/72 has the same meaning in the two regulations.
- 23 Therefore, Article 18 is also applicable to a case in which the competent institution is the employer.
- 24 That interpretation is called for *a fortiori* since it is in conformity with the purpose of Article 18, which is in particular to eliminate difficulties in producing the necessary proof for a worker who in the meantime has become fit for work and, consequently, to promote the greatest possible freedom of movement for workers, which is one of the fundamental principles of the Community (judgment in *Rindone*, cited above, paragraph 13).

- 25 Lastly, in order for a reply to be given to the national court, it is necessary to determine whether the interpretation of Article 18 given at paragraph 15 of the judgment in the *Rindone* case is also valid when the employer has no other means of establishing the incapacity for work than to request the sickness fund to have the worker examined by a doctor of its choice in accordance with Article 18(5).
- 26 Brennet AG, the German and Netherlands Governments, and the Commission, submit that the employer is not able to make good use of the possibility offered by Article 18(5) in any case. They say that the certificate of incapacity issued by the institution of the place of residence is not sent directly to the employer but reaches him only through the intermediary of the sickness fund which involves delay and which often prevents him from learning of the incapacity whilst it still lasts. Furthermore, the employer very often does not know exactly where the worker is on leave and in any event knows no consultant doctors practising at the place of residence. The only possibility left therefore is to request the competent sickness fund to have such an examination carried out, but it cannot, however, oblige it to do so.
- 27 It must be stated that difficulties of the kind mentioned above cannot call in question the interpretation of one of the provisions of this regulation, as it follows from its wording and purpose. Moreover, such practical problems can be resolved by the adoption of national or Community measures to improve the information available to employers and to facilitate recourse to the procedure laid down in Article 18(5) of Regulation No 574/72.
- 28 The reply to be given to the questions submitted by the national court must therefore be that Article 18(1) to (4) of Regulation No 574/72 are 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 the 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).
- 29 The costs incurred by the German and Netherlands Governments, and by 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.

Costs

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On those grounds,

THE COURT,

in answer to the questions referred to it by the Arbeitsgericht Lörrach, by order of 31 January 1990, hereby rules:

Article 18(1) to (4) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community are 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).

Due	Joliet	Schockweiler	Grévisse
	Kapteyn	Mancini	Kakouris
Moitinho de Almeida	Rodríguez Iglesias	Diez de Velasco	Zuleeg

Delivered in open court in Luxembourg on 3 June 1992.

J.-G. Giraud	O. Due
Registrar	President