DET KONGELIGE
ARBEIDS- OG SOSIALDEPARTEMENT

Arbeids- og velferdsdirektoratet
Postboks 5 St. Olavs plass
0130 OSLO

Deres ref	Vår ref	Dato
13/8025	14/923-	23.09.2016

Orientering om avgjørelse fra ESA i klagesak vedrørende avslag på dagpenger for uekte grensearbeider - case no 75123

Vi viser til tidligere kontakt i saken, herunder direktoratets orientering i brev av 11. mars 2014.

Saken gjelder en klage fra en polsk borger som hadde fått avslag på dagpenger begrunnet i at han ikke oppholdt seg i Norge, men hadde vendt tilbake til Polen.

Norske myndigheter har i saken lagt til grunn at det avgjørende for hvilket land som skal utbetale dagpenger til helt ledige uekte grensearbeidere, er hvorvidt arbeidssøkeren har vendt tilbake til sitt bostedsland eller om han eller hun har blitt værede i arbeidslandet.

Klageren har påberopt seg EFTA-domstolens avgjørelse E-3/12 Jonsson, som slo fast at helt ledige uekte grensearbeidere hadde rett til å velge hvilket land de ønsket å motta dagpenger fra, og at det avgjørende for valget var i hvilket land de valgte å registrere seg som arbeidssøker.

ESA peker på at den generelle hovedregelen i artikkel 65 om at de som er helt ledige skal ha dagpenger fra sitt bostedsland, også gjelder for de uekte grensearbeiderne. En helt ledig uekte grensearbeider som *ikke returnerer* til sitt bostedsland skal likevel ha dagpenger fra arbeidslandet, jf. artikkel 65 (2) tredje setning. ESA skriver at det i artikkel 65 (2) tredje setning skilles klart mellom de som vender tilbake til bostedslandet og de som ikke gjør det, og at det dermed er dette som må være avgjørende for hvilket land som skal ha ansvaret for å utbetale dagpenger og ikke hvor vedkommende har registrert seg som arbeidssøker. ESA presiserer at det bare er de som blir værende i arbeidslandet som kan få dagpenger fra arbeidslandet, mens de som vender tilbake til bostedslandet må melde seg ledig og få dagpenger fra dette landet.

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Arbeidsmarkedsavdelingen

Saksbehandler
[redacted]

Når det gjelder betydningen av Jonsson-saken, konkluderer ESA med at denne saken gjelder tolkning av artikkel 71 i forordning 1408/71, og at denne saken ikke skal ha betydning for tolkningen av artikkel 65 i forordning 883/2004. ESA legger i den forbindelse vekt på at ordlyden i artikkel 65 og den tidligere artikkel 71 ikke er identisk. De peker på at ordlyden i artikkel 65 er mye tydeligere på at det eneste avgjørende er om søkeren har blitt værende eller vendt tilbake enn hva som var tilfelle for den tidligere artikkel 71.

ESAs konklusjon samsvarer med den tolkningen av artikkel 65 som departementet tidligere har bedt Arbeids- og velferdsdirektoratet om å legge til grunn, jf. brev 14. juni 2013 (vedlagt).

ESA har på bakgrunn av dette besluttet at det ikke er grunn til å gå videre med klagen. ESAs avgjørelse i klagesaken følger vedlagt.

Med hilsen

Solveig Lie (e.f.)
avdelingsdirektør

[redacted]
seniorrådgiver

Dokumentet er godkjent elektronisk, og har derfor ikke håndskrevet signatur

Case handler: Miek Peeters
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Brussels, 21 September 2016
Case No: 75123
Document No: 819467

EFTA SURVEILLANCE AUTHORITY

Norwegian Ministry of Labour and Social Affairs
Postboks 8019 Dep
N-0030 Oslo
Norway

Dear Sir or Madam,

Subject: Closure of a case concerning a complaint against Norway in the area of Complaint against Norway concerning the refusal to pay out unemployment benefits due to non-residence in Norway

On 25 February 2014, the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had received a complaint alleging Norway had not taken into account Regulation 883/2004 on the coordination of social security systems, in particular in the light of the recent judgment of the EFTA Court in Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* when refusing to pay unemployment benefits to a Polish worker because he was not a resident in Norway.

Having examined the complaint and the information provided by the Norwegian Government, the Authority has decided not to pursue the case further. The formal decision to close the case is attached to this letter for your information (Doc No 809858).

This decision is, however, without prejudice to any decision in the future by the Authority to open a new case on this or a related issue in light of further developments.

Yours faithfully,

Gabrielle Somers
Deputy Director
Internal Market Affairs Directorate

Enclosure: Decision to close the case

Case No:75123
Document No: 809858
Decision No: 169/16/COL

EFTA SURVEILLANCE AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION

Of 21 September 2016

closing a complaint case arising from an alleged failure by Norway to comply with Article 65 of Regulation 883/2004 by refusing unemployment benefits because of non-residence

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

1 Background to the case

On 20 February 2014, the EFTA Surveillance Authority ("the Authority") received a complaint against Norway alleging that the refusal of NAV EEA Unemployment Benefits to pay unemployment benefits - because the concerned person was not a resident in Norway - was not in conformity with Regulation 883/2004, in particular in the light of the judgment of the EFTA Court in Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson*[1].

According to the complainant, he was, although he did not reside in Norway, entitled to Norwegian unemployment benefits because he registered as a job seeker in Norway. He referred to the above mentioned judgment of the EFTA Court, in which the rights of a Swedish frontier worker, having worked in Norway were at stake. Mr. Jonsson, after having become unemployed, decided to continue to reside in Sweden while remaining available to the Norwegian labour market and receiving Norwegian unemployment benefits. The Norwegian administration refused the unemployment benefits, requiring his residence/actual stay in Norway. In its judgment, the EFTA Court found that Article 71(1)(b)(i) of Regulation 1408/71 (as from 1 June 2012 replaced by Article 65 of the Regulation 883/2004) precluded a provision of national law pursuant to which entitlement to payment of unemployment benefits is conditional on actual presence in the EEA State concerned.

By letter dated 25 February 2014 (Doc No 700162), the Authority informed the Norwegian Government that it had received the complaint and requested the necessary information to assess the case. By letter of 28 March 2014 (Doc No 703994), the

[1] Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* [2013] EFTA Court Report, 136.

Norwegian Government provided the requested information. Thereafter the Authority decided to wait for the judgment in the complainant's pending appeal with the National Insurance Court (*Trygderetten*).

On 20 March 2015, the Authority sent a letter to the Norwegian Government requesting information about the pending appeal with the *Trygderetten* (Doc No 750998). On 17 April 2015, the Norwegian Government answered that the *Trygderetten* had not yet delivered its judgment (Doc No 754215). On 29 April 2015 (Doc No 755752), the Norwegian Government informed the Authority that the *Trygderetten,* by its judgment dated 10 April 2015, had dismissed the complainant's appeal.

The Authority sent a letter to the Norwegian Government on 18 June 2015 with a preliminary legal assessment (Doc No 759253). The Norwegian Government replied by letter on 3 August 2015 (Doc No 768428).

In addition, the case was discussed at the package meeting in Oslo on 12-13 November 2015. The Authority sent the follow-up letter on 1 December 2015 (Doc No 781498). The Norwegian Government replied on 21 March 2016 (Doc No 798266).

2 The position of the Norwegian authorities

The Norwegian Government took the position that the complainant was not entitled to Norwegian unemployment benefits as, at the moment he claimed unemployment benefits, he was no longer considered as being resident there. He had already returned to Poland and continued to stay there while receiving sickness benefits. Subsequently, he became unemployed.

Both NAV Appeals and the *Trygderetten* confirmed the decision of NAV EEA Unemployment Benefits and concluded that Poland was the competent State for the payment of unemployment benefits.

The Norwegian Government stated that it had provided the complainant with the necessary information to obtain a PD U1 form. With this form, the complainant could prove in Poland the periods of earning rights to unemployment benefits in Norway.

3 The Authority's assessment

It is undisputed, *first*, that Regulation 883/2004, and in particular Article 65 thereof, is *rationae temporis* applicable in the case of the complainant, *second*, that, as also confirmed by both NAV Appeals and the *Trygderetten*, the complainant was a so-called "*worker other than a frontier worker*" or "*unreal*" frontier worker, as referred to in Article 65(2), third sentence of Regulation 883/2004. An "*unreal*" frontier worker is a worker who commutes between his State of employment and his State of residence at irregular intervals i.e. less frequently than once a week.[2]

The general rule in Article 65(5)(a) of Regulation 883/2004, according to which the EEA State of residence is the competent State for unemployment benefits, is also applicable for "*unreal*" frontier workers.

[2] Article 1(f) of Regulation 883/2004.

However, "*unreal*" frontier workers, who do not return to their EEA State of residence shall
instead make themselves available to the employment services of the EEA State of employment. In particular, Article 65(2), third sentence of Regulation 883/2004 states: "*An employed person, other than a frontier worker, who does not return to his Member State of residence, shall make himself available to the employment services in the Member State to whose legislation he was last subject.*"

According to Article 65(5)(b), the "*unreal*" frontier worker who has received benefits at the
expense of the competent institution of the EEA State to whose legislation he was last subject, can export unemployment benefits on his return to the EEA State of residence.

The EFTA Court, in its judgment in Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson*, found that "*unreal*" frontier workers are, under Article 71 of Regulation 1408/71, entitled to make a choice between the benefits offered by the State in which they were last
employed and those offered by the State in which they reside solely by making themselves available either to the employment services of the State of residence or the State of last employment. The fact that the person resided outside the latter country was not relevant. The unemployed person, however, must comply with the conditions to be met in order to receive unemployment benefits of that State. According to the EFTA Court, Article 71(1)(b)
of Regulation 1408/71 was intended to guarantee that migrant workers receive unemployment benefits under the most favourable conditions for seeking new employment.

The EFTA Court based its judgment on the Article 71(1) of Regulation 1408/71, which was *rationae temporis* applicable in that case. However, Article 71(1) of Regulation 1408/71 was subsequently replaced by Article 65 of Regulation 883/2004. Article 65(2), third sentence of Regulation 883/2004 operates a clear distinction between persons who return to their EEA State of residence and those who do not. It is only those who do not return to their EEA State of residence who, under the third sentence of that provision, are obliged to make themselves available to the employment services in the State of last employment, in which case they can claim unemployment benefits there. Persons who return to their EEA State of residence, on the other hand, are obliged to make themselves available to the employment services of that State and, by way of extension, fall within the unemployment benefits scheme of that same State.

In the wording of Article 71 of Regulation 1408/71, this distinction was less clear. Although Article 71(1)(b)(ii) thereof stated that the "*unreal*" frontier worker who makes himself available for work to the employment services in the territory of the EEA State in which he resides, "*or who returns to that territory*", shall receive benefits of the latter State, Article 7l(1)(b)(i) seemed to provide another possibility by stating that an "*unreal*" frontier worker who "*remained available to his employer or to the employment services in the last State of employment*", was entitled to benefits "*as though he was residing in its territory*".

Contrary to the *Jonsson* case, Regulation 883/2004 is applicable to the case at hand. The interpretation of Regulation 1408/71 is not always transferrable to a corresponding reformulated provision in Regulation 883/2004, especially in case the provisions in the two Regulations differ in wording, as is the case here. This is illustrated as regards other

elements of Article 65 of Regulation 883/2004 in relation to Article 71 of Regulation 1408/71 in the case law of the Court of Justice of the European Union ("*CoJ*").[3]

In view of the above, the conclusion of the Authority is that the interpretation of the EFTA Court in *Jonsson*[4] of Article 71 of Regulation 1408/71 is no longer valid when it comes to interpreting its successor, Article 65 of Regulation 883/2004.

By letter of 3 May 2016 (Doc No 800284), the Internal Market Affairs Directorate informed the complainant of its intention to propose to the Authority that the case be closed. The complainant was invited to submit any observations on the Internal Market Affairs Directorate's assessment of the complaint or present any new information by 3 June 2016.

The complainant did not reply to that letter.

There are, therefore, no grounds for pursuing this case further.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Norway to comply with Article 65 of Regulation 883/2004, is hereby closed.

For the EFTA Surveillance Authority

For Sven Erik Svedman
President

Frank J. Büchel
College Member

This document has been electronically signed by Helga Jonsdottir, Frank J. Buechel on 21/09/2016

[3] In *Miethe* (C-1/85 *Miethe*, ECLI:EU:C:1986:243, paragraphs 13-20), the CoJ created the notion of the so-called "*atypical*" frontier worker, a frontier worker that maintains personal and business links with the State of employment of such a nature as to give him a better chance of finding new employment there. The Court stated that the specific situation of these type of frontier worker, grants him the right of claiming unemployment benefits in the State of employment; although Regulation 1408/71 foresaw that the competent State for (all) "*frontier workers*" was the State of residence.
In *Jeltes* (C-443/11 Jeltes, ECLI:EU:C:2013:224), Regulation 883/2004 had come into force and the Court of Justice was faced with the question whether the principle laid down in *Miethe* was still good law. In this judgment, the Court concluded that the European legislator had a chance to integrate the case law of *Miethe* fully and clearly in the new Regulation but apparently did not do so (Case C-443/11 *Jeltes*, cited above, paragraph 32). Consequently, the Court of Justice concluded that for "*atypical*" frontier workers it was no longer possible to claim unemployment benefits in the State of employment. The Court emphasised also that Regulation 883/2004 aimed at modernising and simplifying the provisions of Regulation 1408/71 (See Case C-443/11 *Jeltes*, cited above, paragraph 24).

[4] Case E-3/12 *Jonsson,* cited above.

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Brussels, 25 February 2014
Case No: 75123
Event No: 700162

EFTA SURVEILLANCE AUTHORITY

Ministry of Labour and Social Affairs
Postboks 8019 Dep
N-0030 Oslo
Norway

Dear Sir or Madam,

Subject: Complaint against Norway concerning the refusal to pay unemployment benefits

On 20 February 2014, the EFTA Surveillance Authority ("the Authority") received a complaint against Norway concerning the refusal to pay unemployment benefits to a Polish worker because he is not resident in Norway.

According to the complainant, [redacted] NAV Klage nr. 2103/0160250), this decision does not take into account Regulation 883/2004 *on the coordination of social security systems*, in particular in the light of the recent judgment of the EFTA Court in Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson.*

In this case the rights of a Swedish frontier worker having worked in Norway were at stake who, after having become unemployed, decided to continue to reside in Sweden while remaining available to the Norwegian labour market and receiving Norwegian unemployment benefits. This was denied by the Norwegian administration which insisted on his residence in Norway. In the judgment, the EFTA Court declared that Article 71(1)(b)(i) of Regulation 1408/71 (as from 1 June 2012 Article 65 of the Regulation 883/2004) precludes a provision of national law pursuant to which entitlement to payment of unemployment benefits is conditional on actual presence in the EEA State concerned.

In order for the Authority to examine and assess the complaint, the Norwegian Government is invited to comment on the refusal of the benefit in the individual case of [redacted] who would seem to be in the same position as the plaintiff in the *Jonsson* case.

Moreover, it is invited to provide information about whether the above mentioned judgment of the EFTA Court entailed any changes on more general level in Norwegian law or administrative practice.

The Norwegian Government is invited to submit the above information, as well as any other information it deems relevant to the case, so that it reaches the Authority by *28*

March 2014. Please enclose copies of relevant national legislation, including English translations if available.

Yours faithfully,

Ólafur Jóhannes Einarsson
Director
Internal Market Affairs Directorate