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Brussels, 16 February 2016
Case No: 79313
Document No: 821834

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 refusal of unemployment benefits**

On 4 July 2016, 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 when refusing to pay unemployment benefits to a Lithuanian 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 821824).

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.

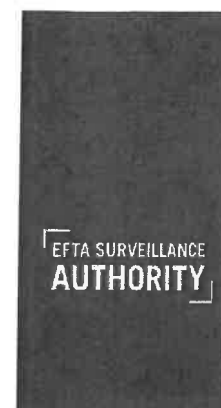
Yours faithfully,



Gabrielle Somers
Deputy Director
Internal Market Affairs Directorate

Enclosure: College Decision 229/16/COL to close the case (Document No 821824)

Case No:79313
Document No: 821824
Decision No: 229/16/COL



EFTA SURVEILLANCE AUTHORITY DECISION

of 12 December 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 on the grounds of non-residence

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement on the European Economic Area, in particular Article 109 thereof,

Whereas:

1 Background to the case

On 30 June 2016, the EFTA Surveillance Authority (“the Authority”) received a complaint against Norway alleging that the refusal of Norway to pay unemployment benefits - because the person concerned was not a resident in Norway - was not in conformity with *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 (“Regulation 883/2004”).

According to the complainant, he was, although he did not reside in Norway, entitled to make a choice between Norwegian unemployment benefits and unemployment benefits of Lithuania, his home country and country of residence. Without mentioning it explicitly, the complaint seemed to refer to the EFTA Court judgment in Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson*².

By letter dated 4 July 2016 (Doc No 810892), the Authority informed the Norwegian Government that it had received the complaint. By letter of 26 July 2016 (Doc No 810736), the Authority sent a letter of acknowledgement to the complainant.

¹ The act referred to at point 1 of Annex VI to the EEA Agreement.

² Case E-3/12 *Staten v/Arbeidsdepartementet v Stig Arne Jonsson* [2013] EFTA Court Report, 136.

2 The Authority's assessment

It is undisputed that the complainant is an “*unemployed person, other than a frontier worker*” or “*unreal*” frontier worker, as referred to in Article 65(2) second subparagraph 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.³

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.

However, unemployed “*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) second subparagraph of Regulation 883/2004 states: “*An unemployed 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, under Article 71 of Regulation 1408/71,⁴ were indeed 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 State was not relevant. The unemployed person, however, must comply with the conditions to be met in order to receive unemployment benefits from 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 Article 71(1) of Regulation 1408/71, which was applicable *rationae temporis* in that case. However, Article 71(1) of Regulation 1408/71 was subsequently replaced by Article 65 of Regulation 883/2004.

Article 65(2) second subparagraph 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 second subparagraph of that Article, 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.

³ See definition of “frontier worker” in Article 1(f) of Regulation 883/2004.

⁴ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

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 71(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*”.

The interpretation of Regulation 1408/71 is not always transferrable to a corresponding reformulated provision in Regulation 883/2004, especially in a case where 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 (“CJEU”).⁵

Contrary to the *Jonsson* case, Article 65 of Regulation 883/2004 is applicable to the case of the complainant. The complainant, thus, is not correct in claiming that, although he did not reside in Norway, he was entitled to make a choice between Norwegian unemployment benefits and unemployment benefits from his home country and country of residence, Lithuania.

In view of the above, the conclusion of the Authority is that the interpretation of the EFTA Court in *Jonsson*⁶ of Article 71 of Regulation 1408/71 cannot be applied when it comes to interpreting its successor, Article 65 of Regulation 883/2004. This was the conclusion of the Authority in Decision 169/16/COL.

By letter of 1 July 2016 (Doc No 810736), 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 9 September 2016.

The complainant did not reply to that letter.

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

⁵ In *Miethe* (C-1/85 *Miethe*, ECLI:EU:C:1986:243, paragraphs 13-20), the CJEU 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 CJEU 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).

⁶ Case E-3/12 *Jonsson*, cited above.

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

Frank J. Büchel
College Member

Carsten Zatschler
Director

This document has been electronically signed by Frank J. Buechel, Carsten Zatschler on 12/12/2016

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Brussels, 4 July 2016
Case No: 79313
Document No: 810892

EFTA SURVEILLANCE
AUTHORITY

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

Dear Sir/Madam,

Subject: Complaint against Norway concerning the refusal of unemployment benefits

On 30 June 2016, the EFTA Surveillance Authority ("the Authority") received a complaint against Norway concerning the refusal of unemployment benefits to an "unreal" frontier worker, having worked in Norway but residing in Lithuania. He claims this refusal does not comply with Regulation 883/2004 as he should have been offered the choice between Norwegian and Lithuanian unemployment benefits.

The Authority's Internal Market Affairs Directorate ("the Directorate") is presently considering the merits of the complaint. After a preliminary assessment has been undertaken, the Directorate may, where appropriate, ask the Norwegian Government to provide further information as well as its observations on the complaint.

Yours faithfully,



Gabrielle Somers
Deputy Director
Internal Market Affairs Directorate