

ACQUISITION OF ENTITLEMENT TO PENSION BENEFITS

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Abstract: discussion of the issue of the legal mechanism of acquiring pension and disability pension rights is necessary also for the reason that the phase of acquisition in abstracto has often been denied its importance in the process of formation and realization of the right to pensions. The interpretation of some insurance laws has given rise to the controversial view that regulations preventing the realization of rights acquired on the basis of previous regulations in the new legal order do not constitute a novelty or an exception in the system of social insurance law.

Keywords: expectives, legal mechanism, pensions, benefits.

1. Introduction

The legal mechanism of acquiring the right to old-age and disability pensions is shaped in two ways, depending on the type and legal nature of the benefits defined in the Act of 17 December 1998 on Pensions from the Social Insurance Fund. On the grounds of the Pension Act, based on the criterion of the mechanism of shaping rights, two groups of pension benefits are distinguished. The dogmatic basis for determining the first group is primarily the provision of Art. 100 of the Pension Act, according to which the right to benefits set forth in the act arises *ex lege*, at the time of meeting the conditions required for their acquisition. The Pension Act also provides a basis for distinguishing pensions (Articles 82 and 83), the granting of which

depends on the discretion of certain entities. The benefits acquired pursuant to the provision of Article 100 of the Pension Act may be referred to as "ordinary" pensions, while the term "exceptional" may be used to describe the benefits granted pursuant to the provisions of Articles 82 and 83 of the Pension Act [Frieske, Przychodzaj, 2014].

In the colloquial sense, the term "acquire" ("acquire") means to achieve something, to obtain, to gain. This phrase expresses the enlargement by new elements of one's sphere of possession, talents or experience. Transferring this concept to the field of law, it is assumed that "acquisition" means a gain for the benefit of a specific entity in its legal sphere, while "acquisition of rights" consists in the enlargement of the sphere of rights of a given entity with new elements (acquisition in the strict sense).

The acquisition of the right to "ordinary" pension benefits is a long and complex legal process. It does not constitute a single event creating the legal situation of a given entity. The process of acquiring the right to "ordinary" pensions and annuities consists of three stages. Referring to the division of legal situations of pension and disability insurance subjects, made by the Constitutional Tribunal in its verdict of 11 February 1992, one can distinguish the stage of legal expectations (expectatives), acquisition in abstracto and acquisition in concreto. These stages mark the individual stages of the insured persons' legal situations. The degree of their consolidation and concretization varies. Not each of these stages corresponds to the concept of "acquisition of a right" in its strict sense. Only acquisition in abstracto means a gain within the insured's sphere of rights in the form of a right to an old-age or disability pension (acquisition *sensu stricto*). Acquisition in concreto does not lead to an increase in the sphere of rights, but makes it possible to realize the rights obtained *ex lege* [Uścińska, Berrahal, 2016].

Acquisition of the right to "exceptional" pensions and annuities occurs on the basis of a constitutive decision of an authorized entity. The mechanism of acquisition in concreto in the sense corresponding to the strict meaning of the term "acquisition of a right" is applied here.

2. The legal mechanism for acquiring pension rights

In the context of the consideration of the revocability of final pension decisions, it deserves attention for several reasons.

From the point of view of the individual legal positions of persons subject to pension and disability insurance emerges the meaning and legal nature of pension decisions. The legal mechanism of acquiring the right to an old-age or disability pension influences the model of applying the pension law, determining the content of the particular stages of taking pension

decisions. It also constitutes a decisive criterion for the choice of the appropriate legal basis for adjudicating the cases for pension benefits.

The finding of discrepancy between the content of pension rights acquired in abstracto and the legal situation of the interested parties established in concreto indicates the inconsistency of pension decisions with the binding legal order. Similarly, the revocation by the Constitutional Tribunal of the intertemporal rule applied by the pension authority, which is inconsistent with the constitutional principle of non-retroactivity of law and violates the insured's entitlement, may constitute a premise for reversal or amendment of the issued decision. The above interdependencies thus influence the understanding of the illegality of final disability benefit decisions, constituting an important criterion for the selection of prerequisites for their reviewability [Sułkowska, 2014].

Sometimes when amending the pension law and formulating the conditions for acquiring the right to pensions in a less favorable way than the previous legal regime, the legislator does not specify the intertemporal rules. In such cases, precise definition of criteria for distinguishing expectives from other social and legal positions of the insured becomes particularly important. It is also important that the Constitutional Tribunal and the doctrine clarify the prerequisites for the protection of expectives and the permissibility of its withdrawal.

3. Aspects of the right to pension and disability benefits pension and disability benefits

Persons who are subject to pension and disability insurance are accompanied by the conviction that with the lapse of the period of being insured and paying contributions, their rights to benefits set forth in the Pension Act gradually increase. The legal effects, which are connected with the gradual fulfillment of the individual conditions for acquiring rights, determine the content of the social (legal) position of the insured, called a temporary subjective right (ekspektatywa). The feature of the expectives is the temporariness of the legal situation of the insured, which is characterized by the fulfillment of certain conditions for the acquisition of the right and the related legal guarantee that the subjective right will arise if the last condition is fulfilled [Sułkowska, 2014]. The construction of expectives of the right to pension and disability benefits is part of the motivational function of social insurance in its positive form. The insured, remaining in a legal relationship with an insurance institution and taking decisions concerning the activity constituting the title of insurance, strives to obtain the most favourable benefits. The point of reference for these actions of the insured remains the current legal status.

Hence, the construction of derivative is the expression of respect for the position of the insured who, participating in the process of acquiring the right to pension and disability benefits, assumes the invariability of the regime of conditions from the moment of establishing the insurance relationship until the moment of acquiring the rights in abstract.

Legal regulation of social insurance, especially pension and disability pensions, is exposed to a strong influence of socio-economic factors. Therefore, changes in the structure of benefits and the conditions of their acquisition in the situation of socio-political transformations and economic crisis in the country are not rare. The justification for limiting the expectives may be the constitutionally protected value in the form of the balance of public finances, the effort to reform the social insurance system to adapt it to the new socio-economic principles of the state system and the need to overcome the economic crisis. Amendments to the pension law, shaping to the disadvantage of the insured the conditions for acquiring rights, may cancel the legal effects associated with the realization by the insured of individual elements of the facts, set out in the previous law. Precise determination of the moment from which the expiry date arises is important for ensuring protection of temporary social positions of the insured. For this purpose it is also necessary to interpret the principle of non-retroactivity of pension law and to establish the appropriate intertemporal rules, which would apply in the case of making changes in pension law to the disadvantage of the insured [4].

The judgments of the Constitutional Tribunal prove that the Tribunal recognizes the need and legitimacy of protecting transitional social positions of the insured, which immediately precede the acquisition of the right in abstract. According to the Tribunal, the positions of the insured corresponding to the concept of maximally formed expectives should be protected from the negative impact of changes in the law. According to the Court, this concept should refer to insureds' situations which are characterized by "fulfillment of all essentially all statutory prerequisites for acquiring a right under a given law, regardless of the relation to them of a later law." The quoted definition of the expectives is characterized by a high degree of generality [Żukowski 1997]. Moreover, it blurs the boundary between the stage of acquisition in abstracto and the expectation subject to legal protection. Nonetheless, the distinction in the cited judgment of the Court of Justice of the three stages of acquisition of a right to retirement and pension benefits creates grounds for the conclusion that an existing right, the realization of which requires only the issuance of a declaratory decision, is not an anticipatory right.

4. The current legal status of pension rights

In the current legal situation, due to the way in which the conditions for acquiring pension rights are formulated, a significant group of insured persons may find themselves in a situation of expectation deserving legal protection. Extending the legal guarantee to such situations requires clarification of the criteria according to which it would be possible to classify the position of the insured in categories of purely factual expectations and anticipatory expectations. The concept of maximally formed expectations formulated by the Constitutional Tribunal does not explain the essence of the construction in question. Instead, it introduces a certain terminological confusion. Since the term "prospective" defines the legal position of the insured, which creates a guarantee of acquiring the right in accordance with the binding regime of conditions, any differentiation of the stages of forming the prospective does not find any rational or legal justification. The moment when the legal expectation arises determines at the same time the maximum dimension of the derivative. Until that time, the position of the insured is characterized by a factual expectation (hope), for which the term "expectativa" is not used [Żułkowski, 1997].

In a judgment of 30 November 1988, the Constitutional Tribunal declared unconstitutional a provision under which the required period of employment for applicants for disability benefits was extended in comparison to the previous regulations. This provision was applicable to cases in which applications had been filed as of the date the new law entered into force, as well as pursuant to the adopted intertemporal rule (Article 115 Section 2 of the law) to applications filed before the date of its entry into force if one of the conditions required to obtain the right had been met after this date. In the Court's view, the position of insured persons who until the date of entry into force of the new act had a period of employment as required by the hitherto binding legal regime deserved protection. Thus, if the insured had fulfilled the requirement of a five-year period of employment under the old law and had filed applications for benefits, at the moment the new regulation entered into force they already had a formed derivative right. Establishing that the disability arose after the change in the law should not lead to an assessment of the insured's entitlement to disability benefits from the standpoint of fulfilling the requirement of seniority under the new, unfavorable legal regime. Therefore, the Tribunal found unconstitutional the provisions establishing new conditions for acquiring the right to disability benefits with respect to the length of the required period of employment [2].

The cited judgment of the Constitutional Tribunal creates a basis for defining the criteria distinguishing, on the one hand, a purely factual expectation of the insured from an

expectiveness, and, on the other hand, an expectiveness from an acquired right to pension benefits. We are dealing with a legally protected expectation of the insured already when the transformation of this item into a subjective right depends only and exclusively on the occurrence of an insurance event. The German doctrine, referring to the jurisprudence of the Federal Constitutional Court, defines the "expectation" in pension insurance in a similar way. According to the prevailing position of the German doctrine the expectiveness is a legal situation of the insured which is separated from the occurrence of the subjective right by the occurrence of an insurance event or circumstance the fulfilment of which depends only on the will of the insured [7].

5. Conclusion

In relation to the Polish pension law it is worth considering the legitimacy of differentiating the expectives according to the criterion of conditions depending only on the will of the insured. From the point of view of the expectives of the right to old-age pension and disability pension benefits the most important are those regulations which refer to the conditions of acquiring rights connected with the passage of time (e.g. length of service, age). In the doctrine and jurisprudence of the Constitutional Tribunal these regulations are referred to as provisions shaping the expectives. Unrelated to the passage of time are the conditions for the creation of the right in the form of the occurrence of an insurance event and circumstances whose occurrence depends solely on the will of the insured. The condition for obtaining the right to pension benefits, the fulfillment of which remains within the scope of the insured's free decision, is a legal action consisting, for example, in the termination of the employment relationship. Therefore, in Art. 184 (1) of the Pension Act, taking into account the situation of insured persons born after 31 December 1948, who under the previous act fulfilled certain conditions for acquiring pension rights (age, length of service, length of contribution and non-contribution periods), the legislator provided for the possibility for them to acquire pension rights according to the previous regime of the so-called "conditions shaping the expectiveness" (age, length of service), if they terminate their employment relationship (employees) and do not join an open pension fund. Thus the legislator granted legal protection to the positions of the insured understood as legal situations which are separated from the creation of subjective right by the occurrence of an insurance event and conditions whose fulfillment depends on the will of the insured (the "expectiva") [3].

In connection with the issue of expectives is the question of observing the *lex retro non agit* principle and the application of appropriate intertemporal rules. The principle of non-retroactivity in social insurance is understood as a "prohibition of establishing intertemporal rules, which are to determine the content of legal relations created under the old norms and lasting during the period of entry into force of the newly established norms, if these rules cause negative legal consequences (...)". In connection with this issue C. Jackowiak put forward a postulate, positively referred to by the Constitutional Tribunal, "that in the future changes of regulations shaping the expectives should come into force after the expiry of periods allowing to fulfil the increased or worsened conditions of the right to benefits".

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