

JUDGEMENT OF 23rd OCTOBER 2007, P 10/07
ENTITLEMENT TO EARLY RETIREMENT FOR MEN

(OTK ZU z 2007 r., No. 9, item 107)

Type of proceedings: Question of law referred by a court Initiator: Regional Court in Łódź	Composition of Tribunal: 5-judge panel	Dissenting opinions: 0
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Legal provisions under review	Basis of review
Failure to guarantee the entitlement to early retirement for men who have attained 60 years of age and present a 35-year-long length of employment without the need to be declared incapacitated for work. [Act of 17 th December 1998 on retirement and disability pensions from Social Insurance Fund: Article 29 paragraph 1]	Principle of equality Principle of equal rights of women and men [Constitution: Article 32 and Article 33]

Pursuant to the provision being the subject of the question of law, the entitlement to early retirement is granted to women in two cases: once a woman has attained 55 years of age and has presented at least a 30-year-long contributory and non-contributory period (without the need to be declared completely incapacitated for work) or once a woman has attained 55 years of age, has presented at least a 20-year-long contributory and non-contributory period and has been declared completely incapacitated for work. Men, however, are eligible to take early retirement solely in case when they have attained 60 years of age, have presented at least a 25-year-long contributory and non-contributory period and have been declared completely incapacitated for work.

The subject of review in the present case was a legislative omission: the norm under review did not envisage a possibility for early retirement for men who have attained 60 years of age and have presented a 35-year-long employment period, and have retained full capacity for work.

Doubts arose for the court referring the question of law as to whether the differentiation between the legal situation of men and women, as envisaged by the provision under review, does not have the nature of discrimination on the grounds of gender. The court pointed out that such differentiation is not warranted by public interest, contradicts the principle of reciprocity and does not conform to Community law.

RULING

I

Article 29 paragraph 1 of the Act of 17th December 1998 on retirement and disability pensions from Social Insurance Fund (Journal of Laws – Dz. U. of 2004: No. 39, item 353, No. 64, item 593, No. 99, item 1001, No. 120, item 1252, No. 121, item 1264, No. 144, item 1530, No. 191, item 1954, No. 210, item 2135 as well as No. 236, item 2355, of 2005: No. 167, item 1397 and No. 169, item 1412 and 1421, of 2006: No. 104, item 708 and 711 as well as No. 208, item 1534, and of 2007: No. 17, item 95 as well as No. 82, item 558), **insofar as it does not grant the entitlement to early retirement for a man who -**

similarly to a woman who acquires the entitlement once she has attained 55 years of age and has presented at least a 30-year-long contributory and non-contributory period – has attained 60 years of age and has presented at least a 35-year long contributory and non-contributory period, does not conform to Article 32 and Article 33 of the Constitution of the Republic of Poland.

II

The Tribunal delayed the loss of binding force of the provision under review for 12 months following the day on which the judgement was published in the Journal of Laws.

PRINCIPAL REASONS FOR THE RULING

1. The right to social security is guaranteed by the Constitution (Article 67). The legislator specifies the content and form of the right, yet, the freedom in shaping of the regulation is limited by constitutional principles (of proportionality, of social justice and of equality).
2. Retirement pension is a benefit connected with work that has the nature of a claim and is based on the principle of reciprocity. The source of the benefit comprises contributions of the insured persons who, in this manner, collect money for their future subsistence in the event of termination of their professional activity. The amount of the benefit depends on the amount paid in the form of contributions. A person who decides to take early retirement makes a conscious choice of a lower benefit, when compared to a benefit the person would have received after the attainment of a common retirement age.
3. The principle of equality requires that all entities characterised to an equal degree by a certain significant (relevant) feature be treated identically, that is, according to the same measure and without differentiation that could amount to discrimination or favouritism.
4. Compensatory measures serve to ensure actual equality of rights for subjects who would otherwise have been in a worse position. The actual inequalities existing between men and women (the biological and social ones) justify the introduction of a different retirement age and the required insurance period for the two sexes: lower and shorter for women and higher and longer for men (the insurance period for men is 5 years longer than that for women). The general principle, applying to both men and women, states that similar legal subjects shall be treated. A common feature of both groups, in the case of early retirement, is – taking into account the compensatory measures – the long insurance period. The challenged provision excessively favoured women, discriminating against men, as the latter had to be in each case declared incapacitated for work in order to become eligible for early retirement.
5. According to the principle of reciprocity, the entitlement to early retirement is connected with the participation of the future pensioner in the creation of the insurance fund (by way of paying contributions). The principles of reciprocity and social justice

require that the collection of money for the future retirement pension enable the use of these financial resources, and, additionally, that the period of time of receiving the benefit be proportional to the period, in which contributions were being paid. Failure to grant entitlement to early retirement for men, who have an appropriately longer insurance period than women, in light of a higher than average mortality in men and a considerably shorter average lifespan in men than in women, infringes the indicated principles.

6. The three fundamental prerequisites that condition the issuing of a judgement by the Constitutional Tribunal, comprising an answer to the referred question of law, include: the subjective (a question of law may be referred by “any court”), the objective (a question of law concerns the conformity of a given provision to the Constitution, ratified international agreements or a statute), and the functional prerequisite (a question of law may concern a provision whose elimination from the legal order by the Constitutional Tribunal will influence the decision in a case, in connection with which the court referred a question of law).
7. The competence of the Constitutional Tribunal as regards the review of a legislative omission consists in the examination of whether the incomplete regulation conforms to higher ranking acts (to the Constitution, ratified international agreements or a statute). However, under no circumstances may the Tribunal review the omission of the law-maker, i.e. its failure to issue a normative act.

Provisions of the Constitution

Art. 32. 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Art. 33. 1. Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland.
2. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations.

Art. 67. 1. A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute.
2. A citizen who is involuntarily without work and has no other means of support, shall have the right to social security, the scope of which shall be specified by statute.