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The Problem of Protection of Property Rights in the Act on the Employee Holiday Fund

Keywords: Employee Holiday Fund, property rights, trade unions, expropriation

Słowa kluczowe: Fundusz Wczasów Pracowniczych, prawo własności, związki zawodowe, wywłaszczenie

Abstract

The article presents the issue of compliance of the Polish Constitution with the Act of 11 September 2015 on the entitlement to the property of the Holiday Employee Fund (Dz.U. No. 1824). The author presents the origins of the organization, and what changes have taken place in its legal status. The Act regulating the status of assets after Holiday Employee Fund was declared unconstitutional in 1997. The legislator had to regulate this issue again, which did not happen until 2015. The author estimates the new regulation based on the constitutional principles of protection of property rights, democratic rule of law, non-retroactivity and certainty of real estate transactions.

Streszczenie

Problem ochrony prawa własności w ustawie o Funduszu Wczasów Pracowniczych

Artykuł przedstawia problematykę zgodności z Konstytucją RP Ustawy z 11 września 2015 r. o uprawnieniach do mienia Funduszu Wczasów Pracowniczych (Dz.U. poz. 1824).

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Autorka przedstawia genezę i cele powstania Funduszu oraz jego przekształcenia spowodowane zmianami społeczno-gospodarczymi związanymi ze zmianą ustroju w latach osiemdziesiątych i dziewięćdziesiątych XX w. Ustawa regulująca status majątku po FWP została w 1997 roku uznana za niezgodną z Konstytucją. Zrodziło to konieczność ponownego podjęcia tego tematu przez prawodawcę, do czego doszło dopiero w roku 2015. Autorka ocenia nową regulację w oparciu o konstytucyjne zasady ochrony prawa własności, zasady demokratycznego państwa prawa, niedziałania prawa wstecz oraz pewności obrotu nieruchomościami.



The policy of the authorities of the Polish People's Republic sought to central management of the lives of citizens, both in their work and free time². The main tool for exercising workers' rights to rest was the Employee Holiday Fund of the Central Trade Union Commission³ created in 1949. The fund operated as a legal entity under public law, and its assets were treated as state property. The Fund's assets were supplied both from the State Treasury's assets and state-owned enterprises. Its value was also increased by the Fund's income and subsidies from the state budget⁴. The fund had practically a monopoly on the organization of recreation⁵, which favored the accumulation of real estate in attractive tourist locations located in the coastal and mountain regions.

The necessity to change the rules of functioning of the fund forced, *inter alia*, the judgment of the Constitutional Tribunal (hereinafter CT) of June 3, 1998⁶. The Act of 11 September 2015 on the rights to the property of the Employee Holiday Fund⁷, regulating the status of property after the FWP, raises doubts toward its compliance with the Constitution of the Republic of Poland.

² The Constitution of the Polish People's Republic adopted by the Legislative Parliament on July 22, 1952 (Dz.U. No. 33, item 232).

³ Art. 1, Act of 21 April 1988 on the FWP Employee Holiday Fund (Dz.U. No. 11, item 84 as amended).

⁴ Art. 9 *Ibidem*.

⁵ Statute of the Employee Holiday Fund of the Central Council of Trade Unions of September 2, 1949 (M.P. 1950, No. A-3 item 27).

⁶ K 34/97 OTK 1998/4/49.

⁷ Dz.U. No. 1824.

Against this background, two research problems are considered. First, is the judgment of the Constitutional Tribunal incorrectly implemented due to numerous interpretative doubts of the act? Second, are the company's claims seeking to recover the property sold by FWP after August 31, 1997 legally justified?

The aim of the analysis is to determine whether the act can function in its present form, or whether it is necessary to take legislative action correctly regulating the status of property after the FWP.

The basic research methods used in the study are the induction method with particular emphasis on a case study based on the jurisprudence of the Constitutional Tribunal.

I. Privatization of the Employee Holiday Fund (FWP)

Socio-economic changes at the turn of the 1990s related to the change in the system forced changes in the organization of the Fund. In 1988, the FWP was transformed by law into an "independent organizational unit of a national inter-union organization"⁸. The Act, although it does not specify which organization it is about, however the only unit of this type legally operating at that time was the National Trade Union Agreement (OPZZ)⁹. OPZZ did not become the owner of the property, however, the act only gave organizational rights. The legal status of the assets was changed only by the Act of May 9, 1997 amending the Act on Trade Unions¹⁰, under which the entire assets of FWP were taken free of charge as an in-kind contribution by a company formed by OPZZ, i.e. FWP Co. LTD. The act omitted other trade unions operating at that time in determining the rights to property.

"Solidarity" submitted a request to the Constitutional Tribunal to examine the compliance of this Act with the constitutional provisions in force at that time¹¹. The applicant accused the provisions of the Act of non-compliance

⁸ Art. 1, Act of 21 April 1988 on the FWP Employee Holiday Fund op.cit.

⁹ Pursuant to the Act of 8 October 1982 on trade unions (Dz.U. No. 32, item 216), registration of existing organizations, including NSZZ "Solidarność" and NSZZ Rolników Indywidualnych, was annulled.

¹⁰ Dz.U. No. 82, item 518.

¹¹ Art. 7 of the Act of 9 May 1997 amending the Act on trade unions and amending certain other acts from Art. 1, Art. 84 and Art. 85 constitutional provisions maintained pursu-

with the constitutional principle of social justice¹² and the resulting principle of equality before the law, as well as the principle of freedom of association in trade unions and trade union pluralism. “Solidarity” also pointed out that OPZZ is not a legal successor after the Union of Trade Unions, which managed the property during the Polish People’s Republic.

FWP’s assets were treated as state property and therefore subject to communalization¹³. Pursuant to the Act of 25 October 1990 on the return of property lost by trade unions and social organizations as a result of the imposition of martial law¹⁴ and the Act of 23 May 1991 on trade unions¹⁵, the property of the Union of Trade Unions should be divided into two largest centers according with the law trade unions: OPZZ and NSZZ “Solidarity”.

The Constitutional Tribunal (CT)¹⁶ stated that according with the principle of a democratic state ruled by the principle of social justice, trade unions should be treated fairly, according with their position and importance. The Constitutional Tribunal indicates that it is correct to separate “representative” trade unions and give them a stronger position than other unions¹⁷. The transfer of assets to only one organization was a violation of the principle of social justice. In the CT’s opinion, one association favored and privileged over another with a similar position and significance¹⁸. This also contradicts the purpose of the Fund’s assets, which was to meet the needs of all employees.

ant to Art. 77 of the Constitutional Act of October 17, 1992 on mutual relations between the legislative and executive authority of the Republic of Poland and on local government (Dz.U. No. 84, item 426, as amended).

¹² Introduced in Art. 1 of the Act of 29 December 1989 amending the Constitution of the Polish People’s Republic (Dz.U. No. 75, item 444).

¹³ Based on the Art. 5 para. 1 of the Act of 10 May 1990 – Provisions introducing the Act on Local Government and the Act on Local Government Workers (Dz.U. No. 32, item 191).

¹⁴ Dz.U. 1991, No. 4, item 17.

¹⁵ Dz.U. No. 55, item 234.

¹⁶ Judgment of the Constitutional Tribunal of 11 December 1996, K. 11/96 (OTK ZU No. 6/1996 p. 524), and the judgment of the Constitutional Tribunal of 3 December 1997, K. 1/97 (OTK ZU No. 5–6 / 1997, p. 478 et seq.).

¹⁷ According to the jurisprudence of the Constitutional Tribunal expressed in K. 11/96 (OTK ZU No. 6/1996 p. 524), and K. 1/97 (OTK ZU No. 5–6 / 1997, p. 478 et seq.).

¹⁸ Judgment of the Constitutional Tribunal of 3 September 1998, reference number K. 10/96 (OTK ZU No. 4/1996, item 33).

The judgment of the Constitutional Tribunal becomes effective on January 12, 1999, and the legal basis enabling OPZZ to transfer FWP's assets to FWP Co. Ltd., and to distribute shares in this company among authorized employees of the fund. Despite the awareness of the unlawful takeover of assets by FWP Co. Ltd. The company continues to operate based on the disputed assets. As demonstrated by the audit report of the Supreme Audit Office of 2015¹⁹ during the eighteen years of economic activity of FWP Co. Ltd. there was a significant reduction in the amount of resources that make up her assets. 65% of land was sold, including 85% of hotel facilities. Funds obtained from the sale of real estate were intended mainly as dividends.

II. Legal Regulation of Assets of the Former FWP in the Act of 2015

It was not until 2011, that is after more than fifteen years, that work began on regulation, thus making the judgment in the discussed case the longest unenforceable decision of the Constitutional Tribunal²⁰. Identical projects were introduced – governmental and deputy (by a group of deputies of the then ruling Civic Platform). The latter is still under investigation. The procedure of submitting a bill not as a governmental one but as a parliamentary one makes it possible to bypass inter-ministerial arrangements, public consultations and preparation of regulatory impact assessments²¹. The bill enters its first reading on July 23, 2015, just at the end of the Parliament's term of office. On September 11, 2015²², the project receives the favor of all parties²³.

¹⁹ Actions regarding the regulation of the entitlements to the property of the former Employee Holiday Fund and the management of its property, Information on the results of the inspection, KGP.411.001.01.2015 Reg. No. 4/2016 / S / 15/001 / KGP.

²⁰ K. Działocha, *Komentarz do art. 8 Konstytucji RP*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. I, eds. L. Garlicki, M. Zubik, Warsaw 2006.

²¹ Art. 34 Resolution of the Parliament of the Republic of Poland of July 30, 1992, Regulations of the Parliament of the Republic of Poland (M.P. 2019, item 1028).

²² Act of 11 September 2015 on entitlement to the property of the Employee Holiday Fund 2015 item 1824.

²³ Voting No. 94 at the 99th sitting of the Parliament on 11.09.2015 at 12:05:58, <http://www.sejm.gov.pl/Sejm7.nsf/agent.xsp?symbol=glosowania&nrkadencji=7&nroposiedzenia=99&nrglosowania=94> (01.11.2019).

Pursuant to the new provisions, the Fund's property becomes the property of the Company and representative trade union organizations acquire shares in the Company on joint ownership²⁴. According to the agreement of the trade unions, we have three shareholders in the form of nationwide trade union centers of NSZZ "Solidarity", OPZZ and Forum Związków Zawodowych.

The regulation opens a new chapter of problems resulting from determining the status of former FWP assets. In Art. 2 point 1 of the Act it is stipulated that "enterprise [...] belonging to the Fund as of August 31, 1997" shall be regarded as "the property of the Fund". Thus, the Fund's assets are returned to it on 31 August 1997, and all properties sold after that date become the property of the Company again. The current owners are expropriated by law.

Restrictions on rights and freedoms, including property rights, should meet the criteria set out in the Art. 31 section 3 of the Constitution. This article indicates the formal and material prerequisites for restrictions, without leaving the legislator free to limit the rights of citizens. As Leszek Garlicki points out²⁵, the compliance of a restriction with the Constitution always depends on the answer to three questions:

1. whether the restrictions put in place serve a specific purpose (suitability),
2. whether it is necessary to achieve it (necessity),
3. whether it is too high a cost to achieve the assumed goal, and therefore whether the sacrificed good remains in the right proportion to the effect achieved (proportionality²⁶).

Special constitutional protection is granted to property rights, which is one of the main constitutional principles of the constitution²⁷. The legislator has a negative obligation to abstain from "regulations that could deprive or restrict such protection"²⁸. In the Polish legal system, expropriation may oc-

²⁴ Art. 4 of the Act of 11 September 2015 on entitlements...

²⁵ L. Garlicki, *Orzecznictwo Trybunału Konstytucyjnego w 2000 r.*, "Przegląd Sejmowy" 2001, No. 9, p. 97.

²⁶ M. Wyrzykowski, *Granice praw i wolności – granice władzy*, [in:] *Obywatel – jego wolności i prawa*, Warsaw 1998, pp. 45–59.

²⁷ P. Tuleja, *Konstytucyjne podstawy zwrotu nieruchomości*, "Gdańskie Studia Prawnicze" 2018, vol. XL, p. 337.

²⁸ Judgment of the Constitutional Tribunal of 31 January 2001, P 4/99 OTK ZU No. 1/2001, item 5.

cur only for legitimate public purposes and for just compensation²⁹. It is difficult to find any of the conditions set out in the Art. 31 section 3 and Art. 64 of the Constitution. The Act does not specify any system of compensation payments for owners deprived of ownership.

The public purpose should be clearly and precisely defined allowing verification of the correctness of the procedure. In this matter, we can only presume. It is obvious that the direct reason for regulation is to provide assets to a company managed by trade unions. Therefore, the benefits of the Act are not universal, beneficiaries of the regulation are persons who are members of the management bodies of three trade unions. Even if it were to extend this group to all employees associated in the indicated trade unions, it does not meet the requirements for expropriations, in which it should not be the individual interest or the sum of the individual interests of many private persons, but the supra-individual and collective goal³⁰. The constitutional concept of expropriation does not include a situation in which there is a forced transfer of private property to another private entity³¹, which in this case clearly occurred.

In this case, there is no legitimate public purpose (because it is difficult to consider such a purpose for citizens to give their property to the company) and compensation. This is an incredible case of the property rights being removed by law. The expropriation should relate to the ownership of a specific property for the benefit of a specific entity, carried out by the means of an individual act – an administrative decision³² by the means of

²⁹ Art. 21 para. 2 of Constitution of the Republic of Poland of April 2, 1997 (Dz.U. No. 78, item 483); A. Zasadzka, *W kwestii przedmiotu i zakresu wywłaszczenia*, "Przegląd Prawa Publicznego" 2010, No. 2, pp. 39–51; A. Cebera, *Charakter prawny odszkodowania za wywłaszczenie nieruchomości*, "Przegląd Prawa Publicznego" 2013, No. 9, pp. 7–20; J. Kornaszewska, *Zasada „lex retro non agit”. Czy prawo nie działa wstecz?*, "Przegląd Prawa Konstytucyjnego" 2018, No. 2, pp. 171–183.

³⁰ Judgment of the Constitutional Tribunal of 13 December 2012, P 12/11 (OTK ZU 2012, No. 11A, item 135).

³¹ Judgment of the Constitutional Tribunal of 29 May 2001, K 5/01 (OTK ZU 2001, No. 4, item 87).

³² Judgment of the Constitutional Tribunal of 24 November 2001, SK 22/01 (OTK ZU No. 2001, item 216) and the judgment of the Constitutional Tribunal of 12 December 2017, reference number (OTK ZU A / 2017, item 86).

a strictly formalized administrative procedure combined with the simultaneous payment of expropriated compensation determined by expropriation regulations³³.

The restoration of FWP's assets as of 1997 is a retroactive act. Thus, it violates the principle of *lex retro non agit* expressed in the Art. 2 of the Constitution³⁴. Again, it is difficult to invoke any constitutional value in this case that would justify such an action. It also contradicts the idea of changes in the political and economic system of the 1980s and 1990s, in which the abandonment of privileged treatment of social property was an important task necessary for the success of reforms implemented after 1989³⁵.

III. The Legal Situation of Property Owners after the Former FWP

Currently, the Company applies to several hundred current owners to recover the property. The Ombudsman clearly states that even those who acquired FWP property in good faith³⁶ will most likely lose their property. The Polish system knows cases of expropriation carried out by law, which, according to E. Łętowska appears in this case³⁷. Negative opinions as to compliance with the Constitution, already at the stage of proceedings, were drawn by the National Council of the Judiciary³⁸ and the Office of Judicial Analysis³⁹.

³³ Judgment of the Constitutional Tribunal of 23 September 2014, SK 7/13 (OTK ZU No. 8 / A / 2014, item 93).

³⁴ M. Florczak-Wątor, *Art. 2 Zasada demokratycznego państwa prawnego*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, Warsaw 2019, pp. 30–32; S. Wronkowska, *Zasada demokratycznego państwa prawnego w Konstytucji RP*, Warsaw 2006, p. 166.

³⁵ D. Pokitko, *Własność w Konstytucji III Rzeczypospolitej*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2002, No. 2.

³⁶ Summary of Report on the Activity of the Commissioner for Human Rights in 2018, Commissioner for Human Rights Bulletin 2019, No. 3, p. 62, https://www.rpo.gov.pl/sites/default/files/INTERNET_2-synteza-2018.pdf (1.7.2020).

³⁷ E. Łętowska, *Szacunek dla prawa i jego wrogowie*, "Pismo. Magazyn opinii" 2018, No. 7.

³⁸ Opinion of the National Council of the Judiciary of 15 September 2011 on the MP's draft act on rights to property of the former Employee Holiday Fund, WOK ref. 020–89/11, <http://www.krs.pl/admin/files/200951.pdf> (26.07.2020).

³⁹ Legal and substantive opinion of 28 August 2012 on the MP's draft act on rights to property of the former Employee Holiday Fund (Sejm print No. 571).

The Ombudsman in June 2018 asked the President of the Council of Ministers⁴⁰ for urgent action of the Council of Ministers to amend the Act. In response, the Chancellery of the Prime Minister⁴¹ confirmed that the interpretation of regulations may indeed raise constitutional doubts. It indicates that there is also the possibility of a pro-constitutional interpretation of Art. 4 clause 1 item 1 of the Act on the FWP, which provides that the legislator's purpose was not to "expropriate" buyers of property components, but only to indicate the moment from which representative trade union organizations have the rights arising from Art. 3 clause 1 of the Act on FWP and claims provided for in Art. 4 clause 5 of the Act on the FWP. He also believes that the addressee of these claims, according with the Act, are not third parties, but only entities exercising rights from shares in the company. Therefore, the Council of Ministers considers the legislator's intervention as premature and will be limited to monitoring the issue of establishing in the court case-law the interpretation of the provisions of the Act on the FWP.

Court decisions in which the courts directly applying the Constitution refused to make an entry for the FWP indicate the incompatibility of the provisions of the Act with the Constitution⁴². The analysis of these judgments shows that this case undoubtedly becomes unconstitutional – the compared provisions of the Act and the Constitution concern the same matter and are contradictory to each of them⁴³. It should be pointed out that Polish courts use the direct application of the Constitution with great moderation and very rarely⁴⁴. The constitutional norms in the field of property rights are specified to the ex-

⁴⁰ Ombudsman Adam Bodnar, IV.7000.99.2018.MC, Warsaw, 4.06.2018, <https://www.rpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20do%20Prezesa%20Rady%20Ministr%C3%B3w%20w%20sprawie%20regulacji%20mienia%20FWP%204%20czerwca%202018.pdf> (28.10.2019).

⁴¹ Chancellery of the Prime Minister, 10.10.2018, BPRM.181.2.2.2018, <https://www.rpo.gov.pl/sites/default/files/Odpowied%C5%BA%20rz%C4%85du%20ws.%20maj%C4%85tku%20FWP%2010.10.2018.pdf> (28.07.2020).

⁴² Decision of the District Court in Nowy Sącz from 27.6.2020, III Ca 328/19, LEX No. 2739123; Decision of the District Court in Nowy Sącz from 27.06.2019, III Ca 298/19, LEX No. 2739122.

⁴³ R. Hauser, J. Trzciński, *Prawotwórcze znaczenie orzeczeń Trybunału Konstytucyjnego w orzecznictwie Naczelnego Sądu Administracyjnego*, Warsaw 2010, p. 32.

⁴⁴ A. Pułło, *Badanie konstytucyjności aktów prawnych przez sądy powszechne*, [in:] *Prawo i kontrola jego zgodności z Konstytucją*, ed. E. Zwierzchowski, Warsaw 1997, pp. 70–71.

tent that they can be applied independently. However, due to the security of legal transactions, also shaped by individual acts of law application, such as court judgments, the refusal to apply a provision of the act should be exceptional, not systemic, as it is in this case. Unconstitutional legal acts should be eliminated from the system (either through CT rulings or amendments). The very existence of such a norm undermines citizens' trust to the state and the law it enacts, and creates a feeling of legal uncertainty and the need for conducting court proceedings (often lasting many years) to defend their rights.

The company sends summons to settle and to land and mortgage register courts to enter the Fund as the owner. Currently, these applications are dismissed by the courts, which, however, does not cause the Fund to cease operations, and therefore does not reduce the uncertainty of real estate buyers. It should also be noted that when undertaking measures to recover real estate, the Company does not propose any compensation. As emphasized by the Constitutional Tribunal deprived of the right to property, compensation should be just. Compensation should be equivalent so as not to affect the essence of compensation for the seized property⁴⁵. The Act stipulates that the State Treasury is not responsible for claims related to the Fund's property (Art. 8 of this Act). The transfer of the necessity to defend one's property rights onto the owners differs from the accepted standards of the rule of law due to the incorrect provision of the act. In the case of large enterprises and developers, legal services in this area are offered by law agencies that specialize in protection against the recovery of property by FWP⁴⁶. However, many owners may be unaware of the law and sign a settlement termination of their ownership.

Owners whose ownership is being questioned are not only in a position to feel the threat of being able to take their property away. This can negatively affect their investment decisions. In addition, it is worth highlighting possible problems when trading these properties. A claim for removal of non-compliance may be revealed by a warning in the land and mortgage register⁴⁷, which

⁴⁵ Judgment of the Constitutional Tribunal of 8 May 1990, K 1/90 (OTK 1990, No. 1, item 2).

⁴⁶ Like Kancelaria Radców Prawnych Smagała Strzelczyk or Kancelaria Adwokacka Waldemar Juszczyk.

⁴⁷ Art. 10 the Act of July 6, 1982 about land and mortgage registers and mortgage (Dz.U. No. 19, item 147).

deprives it of the guarantee of public faith and, as a consequence, discourages the purchase of such property. Inheritance issues can also complicate matters.

It is worth noting that the disputed properties have already been sold once by the managers of FWP's assets. To sum up, first FWP's assets were sold by the company. Then the profits were divided (through dividends) for the members of the company, and now all these sold properties are to return to FWP to continue to benefit from them.

IV. Summary

The unconstitutionality of the discussed provisions is evident. It is also confirmed by the practice arising from the background of the Act in the form of the commencement of the process of property recovery by the Company, court decisions and numerous opinions of specialists.

The conducted analysis allows for the conclusion that the judgment of the Constitutional Tribunal, in the matter of regulating the legal situation of the property after the FWP, was improperly implemented. A number of provisions raise justified interpretation doubts. This situation has caused discomfort for property owners who have to defend their property rights in court proceedings. This has a negative impact on the sense of legal certainty and citizens' trust to the state.

Secondly, the company's claims seeking to recover the property sold by the FWP after August 31, 1997 are groundless due to the non-compliant expropriation of the rightful owners.

FWP does not work uniformly to recover property. One of the methods used is calls for settlement. It cannot be ruled out that a citizen who is not aware of the unlawfulness of FWP's operations will hand over his property in this mode. The case-law of the courts may also be different in the light of these cases. In case that the FWP sells the properties recovered in this way, the guarantee of public faith in the land and mortgage register will prevent citizens from re-establishing their property.

The conducted analysis allows for the conclusion that the solution to the problem should be systemic, not individual. The Act requires amendment, bringing the provisions to the state of compliance with the principles of reli-

able legislation, i.e. precise, understandable, transparent and consistent with the applicable legal principles⁴⁸.

Since the awareness of the unconstitutionality of the act is evident, it is pointless to wait each time for a court decision. Litigation can last for years and bring different results. The negative effects of the act can be difficult to reverse. Compliance with the law-making rules, both formal and substantive, allows for the creation of a coherent legal system in the Republic of Poland⁴⁹. The current situation is unquestionably not conducive to building citizens' trust to the state and its law, and negatively affects the sense of regularity and security of the real estate market.

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⁴⁸ S. Wronkowska, *Zasada demokratycznego państwa...*, pp. 173–174.

⁴⁹ *Proces prawotwórczy w świetle orzecznictwa Trybunału Konstytucyjnego Wypowiedzi Try­bunału Konstytucyjnego dotyczące zagadnień związanych z procesem legislacyjnym*, ed. 14, Study by the Office of the Constitutional Tribunal, Warsaw 2015, p. 6.

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