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THE EFFECTS OF THE UNCONTESTED RETIREMENT DECISION WITHIN THE LEGAL TERM PROVIDED BY LAW

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ABSTRACT

The principle of contribution is one of the fundamental principles of the public pension system in Romania. It assumes that the social insurance funds are established based on the contributions owed by the persons participating in the public pension system, and the social insurance rights are due based on the social insurance contributions paid.

KEYWORDS: retiremenet, decision, civil, law.

INTRODUCTION

The public pension system in Romania is currently regulated by law 263/2010, but also by some provisions of law 127/2019 which entered into force in 3 days from the date of publication in the Official Gazette of the law, following that the rest of the normative act enter into force starting January 1, 2024.

This is also the case of the issue addressed by us through the present study, regarding art. 139 of law 127/2019 which has already entered into force, since the publication in the Official Gazette of the new law, repealing the regulation contained in art. 149 of law no. 263/2010.

According to this legal text which coincides with the content of the former art. 149 of the old law:

”The decisions issued by the territorial pension houses can be appealed, within 45 days from the communication, to the competent court.

The decisions issued by the territorial pension houses in the interval between the date of entry into force of this article and the date of entry into force of this law are challenged according to the provisions of paragraph (1).

” Uncontested decisions within the term provided for in para. (1) are final.”

The object of this study is the analysis and correct interpretation of this legal text in accordance with the principles of good faith, free access to justice and the principles of contribution, equality and imprescriptibility of the right to pension, principles that support and explain our point of view that follows be further exposed.

CONSIDERATIONS REGARDING RETIREMENT NORMATIVE ACTS IN THE INTERNATIONAL AND NATIONAL LAW

The Constitution of Romania, as we have seen, enshrines, in art. 57, the principle of protecting good faith, exercising rights and freedoms in good faith. Since it is about loyalty in

contractual relations and refraining from infringing the rights and freedoms of others, it is clearly necessary for good faith to exist in the exercise of any rights, be they public or private, which is why good faith, as a principle and condition, it cannot be foreign to any branch of law, by virtue of its constitutional principle.

Free access to justice, like any fundamental right, has a legitimate character only to the extent that it is exercised in good faith, within reasonable limits, with respect for the equally protected rights and interests of other legal subjects, being enshrined both internationally and and in domestic law.

In the absence of this fundamental right, it would be illusory to speak of good justice and a fair trial which consists in the faculty of any person to introduce, at his/her own discretion, a legal action, even if it is unfounded in fact and in law, involving the correlative obligation of the State to rule on this action through the competent court.

According to the Romanian Constitution, human dignity, the rights and freedoms of citizens, the free development of the human personality represent supreme values and are guaranteed by law. The principle of equality between citizens, of the exclusion of privileges and discrimination in the exercise of fundamental rights and freedoms must be respected by any natural or legal person, the law making no distinction in the case of legal persons between their public or private nature.

Regarding the principle of non-prescription, this in turn is at the basis of the pension system in Romania, which enshrines the fact that the beneficiary's right to a pension does not expire, which can be translated into the fact that it is not affected by the passage of time.

The principle of contribution is one of the fundamental principles of the public pension system in Romania. It assumes that the social insurance funds are established on the basis of the contributions owed by the persons participating in the public pension system, and the social insurance rights are due on the basis of the social insurance contributions paid.

Precisely in order to ensure the prevalence of the principle of contribution, the legislator regulated three institutions through which the right to pension of the person in question will be respected, respectively the possibility of recalculating the pension by capitalizing on contributions periods and incomes that were not initially taken into account and the recalculation of the pension by the addition of some periods of contributions made after the retirement date, and on the other hand, the possibility of revising the pension, for the situation where errors occurred during its calculation.

The activation of the institutions mentioned above cannot be prevented by the final nature of the retirement decision, the final nature acquired as a result of not exercising the appeal within the 45-day period provided by law, as it would contravene the very purpose for which these institutions were created by the Romanian legislator, namely the observance of the right to pension.

Based on consistent jurisprudence, the European Court of Human Rights established that pension rights based on the contributions of the insured constitute an asset within the meaning of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which states that in the situation where "***the domestic law of a State does not recognize a particular interest as a 'right' or even a 'property right' does not necessarily prevent the interest in question from being regarded as a 'good'***, which is why it

does not can admit that the insured person receives a lower pension than the one due in relation to his contributions to the social insurance fund for the reason that he did not file the appeal against the pension decision within the legal term, although this was incorrectly calculated by the pension house and cannot get a fix for these errors.

In other words, it is absolutely natural that the pensioner should not be "sentenced" to bear the effects of making calculation errors or the wrong application of the law by the administrative bodies, for the rest of his life even if these errors or the wrong application of the law were confirmed by a decision that remained final, but which was not subject to judicial control.

In order for the solutions of the courts in the matter of social insurance to respect the principle of contibutivity which is the basis of the entire pension law, the definitive nature of the retirement decision should not constitute a fine for not receiving the request for revision or recalculation of pension rights.

So that the principles derived from the Decision in the Rotaru v. Romania case must also be taken into account, but also those derived from the decisions pronounced in the Buzescu v. Romania and Albina v. Romania cases, in the sense that the settlement of a request addressed to the court involves not only the pronouncement of a solution, but also the effective, real analysis of the claims, the arguments of the parties and the means of defense, to the extent that they are relevant, even if this does not necessarily require the distinct and detailed analysis of all the arguments subsumed under the same reason.

By way of example, we recall that in a case before the courts, with the object of recalculating pension rights, the court rejected the claim of the insured citing the legal provisions provided in art. 149 para. 4 of Law no. 263/2010.

By applying this provision, citing the fact that the insured does not have the right to repeat a request for pension recalculation based on a certificate on which the Pension House would have given a definitive ruling, as this would constitute an impermissible way of evading the mandatory legal provisions regarding the finality of an uncontested pension decision.

In our opinion, by restricting the insured's right to request the recalculation of the pension, a violation of both the provisions of art. 22 para. (1), art. 44 para. (1) and art. 47 para. (2) from the Constitution of Romania, as well as the provisions of art. 1 of Protocol 1 of the ECHR.

CONCLUSIONS

Examining the jurisprudence in this matter, we noticed that some courts consider that the exercise of the insured's right to petition must be qualified as an abuse of right, claims that we consider to be expressed in a gratuitous and tendentious manner, in the conditions in which no we can accept the idea of depriving the insured person of his right to have access to the public service of justice in the examination of the conformity of the pension rights calculated by the Pension House, with the income actually achieved and for which he paid contributions to the State budget.

In another way, if this reasoning of the courts were accepted, it would be equivalent to the "***life sentence***" of the pension beneficiary, who failed to contest an administrative

retirement decision within the legal term and would give a perpetual nature of an administrative decision, which cannot be assimilated to a final judicial decision.

As a consequence, it must be analyzed to what extent the effects of a final administrative decision can extend, in our opinion, this producing effects only until it is reformed by a final judicial decision. Regarding the constitutional right to request a public institution to capitalize on a certificate in order to recalculate pension rights, we consider that this right exists without being considered an abuse of right, as long as the response of the public institution refusing to capitalize on the certificate does not is subject to judicial review and no final decision has been made in the case.

In support of the above arguments, we also mention the jurisprudence of the Timișoara Court of Appeal, which by Decision no. 815 of 03.07.2018 stated the following:

„The Court finds that the plaintiff has formulated a request for review, as he expressly mentioned in the second petition of the action, requesting the defendant Casa Judeteana de Pensii Timis to proceed with the review of pension rights by taking into account the monthly, annual score and the annual average score of the salary monetary rights that he benefited from within the remuneration system in the global design agreement.

In the sense of art. 107 para. (1) and (2) from Law no. 263/2010, the revision constitutes the operation of correcting the amount of the pension, as a result of the discovery of some calculation errors, which are the consequence of either the wrong taking of the data relating to the contribution period and the basis for calculating the social insurance contribution, or the application wrong of the law. Indeed, the pension that is subject to review is established by a final decision, but the final nature of the decision does not constitute a fine for not receiving the request for review, since the institution itself was thought by the legislator as a remedy for respecting the right to pension, even in the conditions where the decisions have remained final and can no longer be contested.

Practically, in matters of revision, but also of recalculation, the definitive character of the decisions is irrelevant, so it does not have to be proven, but it also does not constitute an impediment for the activation of these institutions, which the legislator created precisely to ensure that compliance the right to pension does not essentially depend on the exercise of the appeal provided for in art. 149-151 of Law no. 263/2010

On the other hand, it is absolutely natural that the effects of making some calculation errors or of the wrong application of the law by the administrative bodies should not propagate throughout the exercise of the right to pension, throughout the rest of the pensioner's life, even if these errors or the application wrong of the law were confirmed by a decision that remained final, but which was not the subject of judicial control. *”*

Please note that, examining the constitutionality of art. 107 para. (1) and (2) from Law no. 263/2010, the Constitutional Court found that "*the revision appears as a way of agreeing the amount of the pension with the legal provisions in force at the time the pension is established*." Therefore, we cannot talk about the retroactive impact of a "*right won*" definitively, since, as the Constitutional Court stated in decision no. 874 of June 25, 2010, published in the Official Gazette no. 433 of June 28, 2010, this attribute is enjoyed only by

"*the amount of the pension established according to the principle of contribution*", and not the amount of the pension in payment, but established in violation of the legal provisions.

Lastly, the right to pension, thanks to the patrimonial character of social benefits, was assimilated by the European Court of Human Rights, under certain conditions, to a property right (a process called "*socialization of the notion of assets*"), and, consequently , the protection of the right to pension provided by art. 47 para. 2 of the Constitution, is "*seasoned*" with the protection offered by art. 1 of Protocol 1 of the ECHR."

REFERENCES

1. Law 263/2010 (RO), https://legislatie.just.ro/Public/DetaliiDocumentAfis/124530
2. Law 127/2019 (RO), https://legislatie.just.ro/Public/DetaliiDocumentAfis/215973
3. Romanian Constitution, art. 57, https://www.cdep.ro/pls/dic/site2015.page?den=act2_1&par1=2#t2c3s0sba57
4. Convention for the Protection of Human Rights and Fundamental Freedoms, https://www.echr.coe.int/documents/d/echr/convention_eng