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The Right to Choose or Having No Choice: Retirement or Employment. Dilemmas Related to Old Age (Remarks Based on Polish Legal Regulations)

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Abstract: In the title of this work, one may notice a nod towards Shakespearean drama. Here the tragedy of the situation relates to making a choice on whether people at the age of retirement should be left with an unequivocal choice: either work and receive remuneration for it, or retire. However, would it not also be justified to undertake such activities which support pensioners in work and thus create an opportunity for people who receive a retirement pension to work as long as possible? The discussion on this matter is significant, as the lowering of the retirement age is happening in Poland. Postponement of retirement and continuing in work after reaching retirement age may significantly increase retirement income. Therefore, this is decisive when making decisions about whether to take retirement or continue in employment. The legal regulations may considerably affect this process. Hence, the discussion about the adequacy of the legal instruments which allow a choice to be made is particularly important and topical. The presented analyses allowed this author to provide some assessments with relation to the ongoing issue of the lowering of the retirement age, determined - as politicians claim – to give people a choice. The presented topic fits into the framework of making work sustainable over a lifetime, which is a key facet of the promotion of longer and healthier working lives, as it is inextricably linked with the well-being of society.

Key words: *retirement pension, old age, retirement age, termination, flexible employment*

JEL codes: J21, J26, J48, J70, K31

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1. Introduction

There is no doubt that an ageing society causes serious challenges for societies across the world. Many will agree that living longer, having better living conditions as well as the advantages (or perhaps disadvantages) of the contemporary world entice people to stay longer in work. Nonetheless, it is also the non-material value of work that attracts people to continue in work after retirement: i.e. the feeling of being a useful member of society (Montavilou, 2015: 1-5). Unfortunately, for older people, remaining in employment does not depend only on their willingness to work. Workers may want to stay in employment longer, but there are many circumstances that are beyond their control, such as the legal regulations that impose a mandatory retirement age, economic factors, as well as their employment situation that affect their retirement decisions. This raises the question - what can be done in order to tempt older employees (workers) to stay longer in work? Research and scientific studies have been conducted on this issue (e.g. Kurz et al., 2011; Taylor et al., 2008, 2013; Blackham, 2016; Bisom-Rapp and Sergeant, 2016). It is true that many factors are important, such as age-appropriate working conditions, the state of health and financial factors, to name but three. In this, much depends on pension schemes, the statutory retirement age and other statutory regulations. Without doubt, a special role is played by the legal regulations that allow people to maintain a balance between work and home life. Taking this into account, It surely cannot be denied that there is a need for the special treatment of older workers through appropriate legal solutions.

Statistical data concerning the situation of older employees and of people at retirement age in Poland, as well as the determinants of their decision to give up employment, are not optimistic. The data set out in the report prepared for the years 2014-2050 by Central Statistical Office (CSO) are presented below. They show that almost 90% of retired people have only one source of income, and this source is not remuneration but their retirement pension. Only a small minority of old people have two sources of income: i.e. from employment and a retirement pension (CSO, 2014: 16-20). The main reason for giving up employment, according to respondents' answers obtained in a variety of research, is identified with the opportunity to receive some form of benefit. While only a minority point to the problem of finding employment as the reason for not continuing in work. What is surprising is the fact that despite the usually meagre retirement benefit, those pensioners who would not have problems with finding employment do not make a determined

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effort in this respect. Obviously, health factors are not without their influence. However, research shows that only around 18% of people who took up a retirement benefit (pension/disability pension) point to health problems as factors influencing their decision to give up employment. Research conducted by the CSO concerning the subjective assessment of one's own health, shows that the health of adult Poles is constantly improving, including people 65 and older. It was also highlighted that between 2005 and 2012, the percentage of old people who assessed their health as being poor or very poor decreased, though it is still high (CSO, 2014: 223).

The presented data is worrying, as the demographic situation in Poland is not favourable. It was highlighted that Poland is in such a moment of demographic development that even an increase in the total fertility rate to a level which guarantees a simple generational replacement will not cause, in the short term, the reversal of these processes and will not reverse the decrease of the country's population nor its progressive ageing. According to the assumptions of the demographic prognosis prepared by the CSO, a considerable decrease in the number of children and working adults will occur, while the number of old people will increase. The course of changes in the population of 65+ overlaps with the occurrence of demographic peaks and troughs of births in the 2nd half of the previous century, but between 2020 and 2035, the dynamics of this process will slow. After this period, until 2050, there will be another considerable increase in the numbers of this population group. This will be the consequence of numerous age-groups, between 1970-1985, reaching demographic senility. Moreover, it was observed that, as well as demographic peaks replenishing the population of old people, increasing life expectancy will play a major role in the growing number and percentage of people over the age of 65 (CSO, 2014: 33-36).

Despite diverse activities supporting employment, including the activation of people who are within the risk groups on the labour market, which even applies to those aged 45 years old, special attention should be paid to the situation of people who become entitled to a retirement pension on reaching retirement age. According to the recommendations made to Poland by the European Commission (2016:6), there is a necessity to ensure the sustainability and adequacy of the pension system along with measures aimed at increasing participation in the labour market through reforming preferential pension arrangements. As the main problem of many western countries is a progressive demographic decline and lack of so-called "hands for work", the main direction should be actions aimed at easing the pressure on the national budget by encouraging people who can work to remain on the labour market as long as possible. Research shows a close

link between poverty, social exclusion and civilisation diseases. Therefore, the involvement of old people in work will result in material and non-material benefits, such as reduced burdens of social assistance, health and care systems, to name but a few.

The decisions taken in Poland to return to the previous, lower, retirement age are worrying, as being given the possibility to retire at a lower age also means an earlier loss from the labour market pool. Ultimately, a position on this issue may be taken only after the detailed analysis of the solutions and the assessment of the forecasted influence of the regulations on various areas of the economy. Assuming that the above scenario is realized, there will be a greater need to regulate the situation of working pensioners. This is also because of the right of pensioners to earn without limitations. The right to retire after reaching the retirement age, differentiated by gender (meaning from November 2017 the age of 60/65 respectively for women and men), requires legal instruments which take into account the right (choice) of the people involved to perform work after retirement. This will cause both: a decrease in the deficit of the Social Security Fund, from which retirement pensions are paid, and an increase in economic growth connected with budgetary receipts.

Awareness of the benefits which this change would result in, forces all actors involved to change the way they perceive work at a much earlier stage. Thus, it is important not only to introduce an age management policy at the workplace level by involving social partners (trade unions) in this process, but also to broaden its scope by adequate legal regulations supporting the employment of older workers, as well as by undertaking preventive health policies. Therefore, the fact that the object of research is now on younger age groups is not surprising, as they are the starting point for progressive old age management policies at the workplace level. Nevertheless, in this work, the discussion is focused on those older employees (workers) who are entitled to an additional source of income in the form of a retirement pension. In my opinion, this feature constitutes the basis for their special treatment in the employment sphere. It means justified differentiation in employment relationships, which is opposite to the notion of discrimination. The sphere which this can cover is wide, starting from agreeing of employment contracts, through the supporting of employment or its greater flexibility, to reduction of income and termination of contracts. Some of the above are covered by Polish legislation, though this legislation does not go far enough. This also means that older employees can be affected more than others involved in the process of the flexibilisation of employment relationships, including by using atypical forms of

employment. The need for more flexibility for some categories of actors on the labour market, particularly through the involvement of social partners, was pointed out by Florek (2015: 268).

2. The impact of retirement age on employment

Firstly, it should be briefly mentioned that apart from “retirement age” there is also the legal term of “pre-retirement age”. In various countries this period is specified separately. It is often defined by legal norms giving preferential treatment to people within this age range. Despite the fact that the main point of the discussion in this work, as I have indicated above, is related to people of retirement age, it is worth stressing that a positive attitude towards people at this age cannot be built since the pre-retirement age itself is perceived pejoratively. Taking Poland as an example, an especially unfavourable role is played in this case by the provisions which prohibit the termination of employment for people at the pre-retirement age. This situation was analysed more widely by Wrońska (2015: 154-176), who showed that the negative perception of pre-retirement people by employers was caused by the strict employment protection regulations, leading to an unwillingness to employ them.

The general retirement age, also referred to in the literature as “regular” or “usual” (this covers statutory lowered retirement age for some categories of workers) (Wagner, 2001: 20-27; Jędrasik-Jankowska, 2016: 398), till November 2017, means the age of 67, and is applied to employees of both sexes. Due to the proposed changes, this will fall, dependent on gender (60/65 for women and men respectively), to the level it occupied at the end of 2012. The raising of the retirement age took place under the provisions of the Law of 11 May 2012 on amending the law on pension benefits and disability pension benefits from the Social Security Fund and certain other laws. This law came into effect from 1 January 2013, resulting in a gradual increase in the retirement age. The calculation of the incremental monthly increases in the retirement age as well as the retirement age changes for women and men are presented by Jaśkowski (2014) and Antonów (2014a).

The impact of the retirement age on the situation of an employed person or who seeking a job is quite significant, as although the reaching of retirement age entitles the beneficiary to receive a retirement pension, in fact, this right is conditioned by employment termination. This will be analysed in the following section of the work. The reaching of retirement age is the point at which

measures supporting employment, addressed to the unemployed within the meaning of the Law on Employment Promotion and Labour Market Institutions, should be excluded. People upon reaching retirement age are excluded from the definition of an unemployed person, to whom majority of facilitations stipulated in the above-mentioned law are applied, including assistance in finding a job, retraining, subsidies, loans and other financial benefits.

Secondly, in the case of certain professions, there are provisions stipulating so-called mandatory retirement once a specified age has been reached. As Jędrasik-Jankowska (2016: 398) points out, the threshold stipulated for the expiry of employment cannot be called retirement age, even if this age is higher than the norm. Recognition of an indicated age as a reason leading to automatic expiry (termination) of an employment contract has given rise to serious concerns (Mikołajczyk, 2012a: 19; Tomaszewska, 2009: 161-166). Obviously, it does only refer to specific professional groups, yet these are quite numerous. Mandatory retirement has been stipulated in the provisions of certain Polish Acts and encompasses categories of employees explicitly specified by the legislator, including, among others, teachers, judges and prosecutors. For example, Article 127 of the Law of 27 July 2005 on Higher Education specifies the cases of the expiry of an employment contract of a nominated teacher and stipulates that an employment relationship with an academic teacher employed by a public university expires at the end of the academic year in which the teacher has reached the age of 67, if the teacher has become eligible for a retirement pension. Similarly, the employment relationship of a nominated researcher employed by PAN (Polish Academy of Sciences) as an associate professor or professor, expires at the end of the year in which the employee has reached the age of 70 (from November 60/65 for women and men respectively). The Law on the System of Courts of General Jurisdiction specifies the maximum age at which judges retire. Article 69 of that Law states that judges shall retire at the age of 67 (from November 2017, 65), unless, not later than six months prior to turning 67 (from November 2017, 65), they deliver to the Minister of Justice an expression of interest in staying in office and submit a medical certificate confirming their ability to perform judicial duties. This is issued under the terms specified for candidates for judicial positions. According to Article 30 of the Supreme Court Act, Supreme Court judges retire at the age of 70 and only upon their request can retire at 67 (from November 2017, 60/65) (Wroclawska, 2015: 109-133).

Thirdly, reaching retirement age and being entitled to a pension may constitute a concurrent cause of the termination of an employment agreement (Sanetra, 1997: 21-26) or a criterion for

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being selected for collective dismissal. Recognition of the retirement age as a legitimate concurrent cause for terminating employment contracts was consistently maintained in the subsequent judgments of the Supreme Court (Wrocławska, 2015b: 99-118). In the case of collective redundancies, the retirement age can be a criterion for selecting one particular employee over another. Therefore, the right to receive a retirement pension may be a convincing argument for continuing the employment of an employee who is without such a source of income (Hajn, 1993). Court rulings accept such a situation, on the condition that when such a selection takes place, it concerns people who are protected by the opportunity to receive a retirement pension (Wrocławska, 2014: 223-239, 2015: 99-118).

With regard to the position of retired people in relation to financial benefits, it requires highlighting that working pensioners do not have a privileged position apart from allowances conditioned by the length of employment in a given workplace or by the right to earn without limitations (any income from work does not reduce or postpone the retirement pension). What is missing in the Polish legal system are special solutions addressed to people of retirement age, among these are stipulating extended leave, the possibility to limit working hours, longer breaks during work, shorter work norms or longer periods of notice. Owing to the lack of purposive support for the employment of people of retirement age, employers who act in compliance with the law do not benefit from employing workers of a pensionable age. There are a few exceptions, which will be shown in the next part of the contribution. Generally, in the performance of work, employees at retirement age are formally treated by the legislator as equal to other employees. In relation to this, the question arises: are special legal norms necessary, or should the current legal situation be considered satisfactory? The answer to this question requires a more profound study, however, in the final remarks, conclusions related to above-mentioned question will be presented. At this stage however, it may be stated with certainty that additional legal regulations in order to privilege a specific category of people without measurable benefits to employers may result in its opposite effect.

The perception of the older worker in society, including by employers, makes their position in employment relationships most unfavourable (Wrocławska, 2015c: 109-133). As a rule, retirement age results in the fact that, perceived as being protected by an appropriate benefit, people are employed on worse remuneration terms. The terms of employment offered to pensioners, often less favourable, quite significantly contribute to their lack of interest in undertaking employment.

On the other hand, as shown in the journal “Dziennik Polski” from 23 March 2016, the low remuneration of retired people also leads other employees to complain that they suffer unfairly as pensioners lower the levels of salaries paid by employers across the board, because, “since they have another source of income, they can work for less”. They are very often referred to as a “cheaper workforce” or as “unfair competition” (even if this mostly refers to those who retire at a young age in relation to the norm). As a result, their position in employment is indeed viewed with a jaundiced eye.

Obviously, the criterion of “pensionable age” ought not to lead to lower remuneration in employment. Therefore, the lowering of remuneration in such cases is not justified and may result in complaints based on anti-discrimination.

The Labour Code contains numerous provisions with regard to the prohibition of discrimination. The Law on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment of the 1 of January 2011, widens the scope of protection against age discrimination. Accordingly, both permanent employees and persons employed under civil law contracts are covered. Therefore, in general, there are no categories of workers who are excluded from protection against age discrimination, as prohibition of age discrimination covers employees (including agency workers), job applicants, the self-employed and those working on the basis of civil law contracts. Polish legislation prohibits “any discrimination” in the field of employment on the grounds of age. Incitement to discriminate and harassment (including sexual) are also a form of discrimination. The prohibition of discrimination also covers different stages of the employment relationship, including: the stage before signing an employment contract, the rights and obligations exercised both during employment, or termination or dismissal procedures when employment relations come to an end. According to the Labour Code, discrimination occurs when employees are treated differently on the grounds of prohibited criteria unless provision, criterion or practice are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 18 3a § 4 of LC *in fine*). A similar regulation, Article 18 3b § 1 of LC, states that different treatment could be justified by a legitimate aim demonstrated by the employer. Despite these safeguards, non-discrimination principles on the grounds of age do not prohibit justified differentiation of older workers based on objective criteria. The possible differentiation according to old age (in particular, taking into account so called mandatory retirement) were analyzed by Wrocławska in her work (2015d: 108-109).

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How to prevent the illegal practices which occur in employment relationships and are not objectively justified? What can be done in this situation? The provisions that state the non-discrimination principle, give “age” as a prohibited criterion only as a general term, without connecting it with the old or young. Therefore, there are strong arguments, pointed out by Mikolajczyk (2012b: VII), related to the need to separate discrimination on the basis of age from the general provisions and enforce it by enacting new legal regulations at the national level. Is old age the core argument for such a reform? In my opinion, the answer is yes. The increasing average life expectancy of the population on the one hand, and the demographic slump on the other, necessitate the application of solutions at various employment levels, adequately diversified to suit the older age bracket. However, it is doubtless that legal regulations intended to protect sustainable work and the non-discrimination of older people, even if they are compatible with the interests of older employees, may collide with the interests of employers and the would-be employed, in particular the young. This is why it is important to provide these safeguards in such a manner which will be compatible with the aims of current social policy.

3. The impact of the retirement pension on both employment and income from work

In Polish legal regulations, granting a pension is conditioned by reaching retirement age. Many studies and commentaries have been conducted on this issue, most of which were cited by Wroclawska (2015b: 105). In brief, in the law which is in force till November 2017, the legislator refers to the retirement age of insured people who were born before 1 January 1949 in Art. 27 of the Law on Retirement Pensions and Disability Benefits. Pursuant to this, the condition for qualifying for the right to a retirement pension is not only reaching the retirement age, but also having the appropriate contributory and non-contributory periods. While insured people born after 31 December 1948 are entitled to a retirement pension once they have reached the retirement age, specified in Art. 24 (1a) (1b) of the Retirement Pensions Act. According to the new law, from November 2017, in general, the right to a retirement pension will be conditioned by the retirement age of 60/65 (for women and men respectively), with a contributory period of 20/25, depending on the gender of the entitled person, being required from those born before 1.01.1949.

The retirement pension, as a social insurance, is granted in return for an individual employee’s contributions and is dependent on the amount paid. It is generally understood as a

benefit for people who, having reached the retirement age, may stop working. Retirement pension regulations are characterised by norms which encourage people of retirement age to remain on the employment market for as long as possible. This refers mainly to the dependence of the amount of the benefit on the insurance periods: the longer the payment periods, the higher the benefit. Unfortunately, in spite of the stimulant mechanisms, there are other regulations which may deter continued employment, such as situations where the payment of retirement benefit is suspended or lowered (Dzienisiuk, 2015: 309-310).

When discussing the impact of retirement benefit on employment relationships or income from work, two situations should be distinguished. Firstly, this includes situations connected with being entitled to a retirement pension as a result of fulfilling the statutory prerequisites during employment. An employee who reaches retirement age during the employment period, should terminate their employment contract in order to receive a pension. A choice must be made - either continuing in employment, or retirement. I would like to stress that, as much as, in its social perception, the duty to terminate the employment contract in order to receive retirement benefit may be considered controversial, from the legal point of view it would be very difficult to find strong counter-arguments. The aim of legal regulation is illustrated by the ruling of the Constitutional Court of 7 February 2006, in which the Court held that a retirement pension is intended to be a benefit which replaces, not complements, remuneration from an employment relationship. "Suspension of retirement pension payment undoubtedly constitutes an instrument to influence the behaviour of an individual and forces one to make a choice between professional work with a current employer and receiving a retirement pension. The Court argues that it does not constitute a form of interference in the freedom to practice a profession and choose an employer. In fact, an individual retains the opportunity to continue work with the current employer. The object of interference is restricted to the right to a retirement pension. A pension cannot be received jointly with remuneration without previous employment termination. In the Court's opinion, the legislator's interference consists neither in repealing the acquired right to a pension nor in narrowing its scope, but in introducing additional conditions for its enforcement. In this context, the opportunity to receive retirement benefit without interrupting one's professional activity (employment) for the current employer constitutes a privilege which exceeds the commonly accepted concept of social insurance. An insured person must take into account that the legislator may limit the scope of this privilege, having the public's interest in mind. Thereby the regulation

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does not violate an individual's justified expectations connected with the enforcement of a constitutional right to a retirement pension".

In this case, the receiving of a retirement pension is conditioned by the termination of an employment contract by the employee. This legal norm has been binding since 2000, despite an attempt to repeal it in the years 2009-2010. Under Article 103 (a) of the Law on Retirement Pensions and Disability Benefits, receiving the benefit depends on the prior termination of the employment relationship. This provision, however, does not concern people who are entitled to the so-called partial retirement pension, granted in the amount of 50%, or the retirement pension under the terms stipulated in Art. 26 (b) of the mentioned law. Thereby the legislator imposes a condition on a future pensioner either to continue employment, or to terminate it definitively and receive a retirement pension. It is underlined in the literature that this is a more appropriate understanding of retirement risk (Antonów, 2014b). The point here is the right to choose, which is left at the discretion of the employed person. On the other hand, having received a retirement pension, a retired person may undertake new employment and earn additional money without limitations. Nonetheless, if an employee who wants to receive a retirement pension decides to terminate an employment relationship, his return to the labour market, despite the willingness and need to work, may be difficult. Return to the former employer, in most cases, will take place only on the principle of freedom of contract and mutual agreement. In fact, the employer will then dictate the terms of work and payment conditions. This is not surprising, as the employer will be motivated by the desire to reduce previously-incurred costs. An additional problem here is the guarantees of employment protection for people at pre-retirement age, and the prohibition to terminate their employment contract, which covers a four-year period. The duty of an employer to provide retirement severance pay because of the transition to retirement should also be mentioned. Such factors are discouraging for employers.

The second distinguishing situation is related to the impact of income from work on receiving a retirement benefit. An issue here is the limitation of income from work because of the possibility to suspend or reduce payment of the retirement pension. This concerns cases linked to the payment of benefits to people who have not reached the general ("usual") statutory retirement age. It is worth noting that the so called "usual" retirement age also covers the lower age applied to certain workers as their statutory retirement age. As an example for the above limitations, we can mention the early retirement pension or pre-retirement benefit. Thus, in the case of people who

receive a pension before reaching the general retirement age, its payment in full will only be possible on the condition that any income from work does not exceed 70% of the average monthly salary (decided by the President of the Central Statistical Office (In 2017, it was 2953.30 zł)). If income from work exceeds 70% but is lower than 130% of the above-mentioned amount, the pension will be paid at a reduced rate, and if the income from work exceeds 130% (5484.60 zł.) of the average monthly salary, payment of the retirement pension will be suspended. The presented mechanism is aimed at encouraging older workers to postpone the decision to receive a retirement pension before the general retirement age. These restrictions no longer apply in the case of reaching the general statutory retirement age. Pensioners at statutory retirement age (from November 2017 60/65, for women and men respectively) can work without such income limitations. Their choice to become working retirees is not conditioned. In this way, they can benefit from both employment and pension.

In the above discussion, differentiation between cohorts of retired people should not be forgotten. Accordingly, we can distinguish the so-called privileged groups, who may retire at the lower statutory retirement age. It sometimes occurs that quite young people receive high pensions, which can also lead to the growth of conflict between generations. Therefore, bearing in mind the changes related to the return to the previous retirement age, the question arises of whether certain categories of retired people should be limited in their right to earn money by imposing a strict condition on them: either work or receive a retirement pension. The differentiation between the rights of particular cohorts of retirees should be the subject of careful analysis.

Summing up, public policies related to the social security system may have a major influence on the decisions taken by people involved. Nevertheless, in reaching conclusions, we need to distinguish between the people who are about to receive entitlement to the retirement pension and those who are already recipients of this benefit. In the first stage, the people entitled to postpone their decision about retirement should be the main target group. Depending on the legal regulations, their right to choose between work or retirement may be perceived as illusory. The meagre pension may force people to work longer. Despite these paradoxes, the truth is that legal regulations aimed at providing the efficiency of the social security system through the social solidarity principle cannot be treated as being at the expense of the guaranteed right to work. The lowered retirement age is also a key argument for providing appropriate legal restrictions, even if it encounters social resistance and requires greater determination. The once-in-a-life retirement

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regulation was not approved by Polish legislator. The introduced conditions related to the termination of an employment contract in order to receive a pension corresponds with the true understanding of retirement risk, reflecting, to a certain degree, the idea that the retirement pension should replace, not complement, the income from work. If the postponement of receiving a pension is to be an incentive to work longer, it necessitates a worthwhile increase of the retirement pension when finally taken. This direction is right, but not sufficient. Bearing in mind that society is ageing, and there is a paucity of people at a productive age, it emphasizes the imperative to focus on encouraging those who are receiving retirement pension or will do in the nearest future to return or stay in work. This may cause the need to rethink their right to work without a reduction of the retirement pension, which currently exists.

4. Working when retired - retired people's opportunities

Referring to the remarks made earlier, the following categories within the subjective scope may be distinguished:

- people who have reached retirement age and need to terminate their employment contract in order to receive retirement benefit,
- people who after retirement want to combine professional and family obligations,
- retirees in poor health.

Taking these considerations into account, the following is clear: some will be unable to perform their previous duties, others will not be able to perform them within the previous timescale or scope or, in some cases, perform the work without adaptation of the workplace. It seems that one remedy for most of the illustrated problems may be both flexible working arrangements and flexible forms of employment. Dzienisiuk (2015: 311) argues that flexible working arrangements would be an ideal solution. The flexibilisation of labour law through the participation of social partners by concluding of autonomous labour agreements should become the key goal for the nearest future (Florek, 2015: 269).

It should be highlighted that the legal regulations concerning flexible working arrangements and flexible forms of employment do not provide separate norms compared to previous ones. Therefore, the general provisions will still be applicable. This refers also to the types of employment contracts and limitations within the scope of their application. After the amendment

to the Employment Code of 22 February 2016, new solutions in this respect are in force. The Labour Code limits fixed-term employment contract to three and specifies the situations in which the multiple signing of employment contracts for a definite period of time is permissible. The legislator provides the cases excluded from the abovementioned restrictions, but did not foresee among them the possibility of unlimited signing of fixed-term contracts with older employees, including the retired. Unfortunately, this has led to the negative perception of these contracts, which is already rooted in Polish society. As research shows, retirees still prefer employment for on a permanent basis. In my opinion, fixed-term employment contracts could be particularly profitable for those who have an additional source of income and are seeking employment due to the fact that employers are interested in employment on the such a basis. The choice to work after retirement may be facilitated by removing the barriers for concluding of fixed-term employment contracts. Thus, to my mind, what was wasted was the chance to reverse this situation in relation to people who have a secure source of income in the form of a retirement pension. The justification of the above should be seen in the fact that job security is not such an important feature for people with a pension. An additional argument is that, at present, the periods of notice for fixed-term contracts are the same as for permanent ones. Moreover, there are provisions concerning the prohibition of discrimination on the grounds of age and on the grounds of employment for a definite period of time. These should constitute significant protection from losing one's job caused exclusively by old age.

The provisions of the Polish Labour Code, despite the latest changes to the legal regulations, did not take into account the position of older employees in relation to flexible working hours, individual working schedules or the curbing of working hours. What is also missing is the legal basis for the application of such solutions upon the request of an older employee or because of an employer's need when employees retire. In addition, in this case, there are only general provisions addressed to all employees. In the Polish legal system there are no provisions justifying part-time employment upon the request of an employee-pensioner, despite the fact that this solution exists in relation to other groups of employees. Obviously, this does not mean that performance of work in flexible arrangements, taking into account the above solution, is out of the question. As highlighted earlier, this is about applying general solutions – the provisions addressed to all employees. In fact, the decision to apply them or not will ultimately belong to the employer. Part-time work, as a flexible working arrangement, could be the form preferred by older employees. Health problems

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or the willingness to curtail previous working hours could be accommodated by specifying fewer hours of work or by job sharing with another employee. This reflects the need to take into consideration not only the interests of people who receive a retirement pension, yet want to earn extra money, but also young employees who can then undertake such employment, thereby taking advantage of the support of a more experienced employee. The so-called mentoring institution, which allows the reconciliation of the above interests is not regulated by Polish law.

Remote working (called as “telework”) as the flexible form of employment may provide a certain incentive to employ retired people. Flexible working hours and lower costs of employment should encourage its broader application. It is also an easier way to employ people with disabilities or those with chronic diseases brought on by old age, as well as those with caregiving responsibilities. Remote working, therefore, may suit an employee in these situations, which may be an additional argument for the employment of older people. Other atypical forms of employment, which include temporary work, working on the basis of civil law contracts or self-employment, may be a chance for older people to gain employment. Something that may contribute to the wider usage of civil law contracts among retirees is also the abovementioned necessity to terminate an employment contract in order to receive a retirement pension. In such cases, after termination, employers tend to favour civil law contracts. The benefits for workers here is connected with the recently introduced provisions stipulating the minimum hourly remuneration rate for those who work on the bases of civil law contracts. With relation to self-employment, based on signing of civil law contacts, personally, I see little increase in the significance of this form for people who receive pensions. It is due to the degree of risk and involvement necessary, which older people usually try to avoid.

To conclude, I would like to stress that the increase and significance of flexible/non-standard forms of employment for older workers (retirees) will become more important in the nearest future. Their broader usage will rise owing to the acceptance of their application for both employers and employees. In short, the upsides for employers might be the reduced legal framework, allowing the permissibility of applying such solutions without being exposed to the accusation of discrimination. In turn, for employers it would mean the possibility for older workers (retirees) to take up such forms of employment at their own request, supported by an effective age management policy. Additionally, one cannot forget about other stimuli which will increase the motivation of both parties. What is meaningful here is obviously the financial benefits. For

employers: lower employment costs when employing older (retired) workers; while for employed older (retired) workers, the supplementing of their retirement pension will be an incentive.

5. Conclusion

1. The right to work, guaranteed in Article 65 of the Constitution of the Republic of Poland of 2 April 1997, with regard to the context discussed, should be understood as providing the guarantee of choice. In reality, however, for a retired person, most often there is only a willingness to work, whereas an employer has the power to choose the person to be employed. Therefore, in fact, the notion “choice” mentioned in the title of this work often belongs solely to the employer, resulting in the fact that the choice on the part of retirees means either retirement or combining it with work, but on the terms dictated by an employer. The freedom of contract becomes illusory, as they work for a lower remuneration and in worse working conditions, sometimes having the possibility to work only on the bases of civil law contracts. The new legal regulations, which lays down the minimum hourly rate, to some extent, counteract any abuses. Nevertheless, the legal system is still far from encouraging employers to retain older employees in employment or to recruit them. In Poland, when it comes to employing retired people, general legal provisions (with some minor exceptions) are applied. Currently, there is no effective legal mechanism leading to a gradual departure from the labour market for people approaching retirement age. Measures that are intended to supply the employment of people at pre-retirement age by active labour market measures may significantly influence it, but seem to be insufficient.

2. Statistical research shows that a very low percentage of retired people work, despite their willingness to, after retirement. This means that even when work is available, employment in such cases is inhibited for older workers by discouraging factors, which include worse contract conditions in comparison with other employees and failure to implement an appropriate age management policy which takes into account the gradual deterioration of the body. Since medical and psychological examinations show the influence of old age on efficiency and the ability to perform work, it also seems essential to treat such people differently with regard to their working conditions. Additionally, another option would be regarding the situation of people at retirement age in a similar way to those for whom support is provided due to their reduced physical capacity – namely disability.

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3. The importance of legal regulations to encourage both parties of an employment relationship cannot be denied. As Taylor (2008: 214) points out, the attention should be focused on employers. Regulations that allow retirees to earn without a reduction in or suspension of their pension are common and provide the possibility to get an additional source of income. The prolongation of employment should also lead to increased pensions. It needs highlighting that provisions that encourage older workers who reach retirement age to postpone retirement by continuing work are paramount. Moreover, from the employer's point of view, regulations that provide legal instruments for active labour market policy are also meaningful. There are a number of factors that can make employing older workers attractive: reduced unemployment insurance, taxes; funding training or funds for job creation, as well as subsidising the employment of older employees. Recently, these have mostly been addressed only to workers at preretirement age. The rethinking of the provided measures in order to encourage employers to take on retirees should be considered.

4. The participation of older members of the labour force on the labour market is determined by a variety of factors: biological age, gender, existing health conditions and financial considerations, to name but the few. Their right to choose between retirement and employment is also conditioned by the legal regulations that are the part of social policy. Social security regulations, active labour market policies and those that relate to a healthy and safe working environment all play a role. The promotion of active ageing, as well as the encouragement of older people to stay longer in work is possible by giving them the opportunity to maintain a work-life balance. Taking this into account, the following question arises: if there is the need to provide special treatment of older workers, which direction will be most appropriate?

- providing legal regulations that will allow specific solutions based on the age of the employee,
- providing exceptions from the general legal provisions, taking into account the age of the employed person,
- differentiating the status of employees according to their employer's size (small, medium or large employers) or by the purpose of the employment,
- encouraging employers and older employees to choose a flexible form of employment thereby reducing public burdens.

All of the abovementioned ideas have benefits and drawbacks. The main disadvantage is related to the number of legal regulations, as well as the bases for such regulations (requests, statutory

regulations, employment contracts, collective agreements, or agreements made by employee representatives). Should particular solutions be applied at the request of the employee involved, or perhaps at the request of the employee's representatives? Should the bases be included in an employment contract, in a collective labour agreement or even in the statutory provisions? The answer to these questions requires a more profound study. Despite this, it is necessary to highlight that the role of social partners and collective agreements in the future of labour law cannot be underestimated (Swiątkowski, 2015: 304, 305). Florek (2013: 6) emphasizes the achieving of the EU Directive's aims in a way of appropriate to collective agreement's provisions. Without doubts this possibility is conditioned by the legal character of collective labour agreements, which can become legally binding for the employed. Recently, this has been the main barrier for the Polish legal system (Włodarczyk, 2015: 487). These could also be an appropriate means of implementing social policies when implementation through legal channels faces many difficulties (Florek, 2015: 269-270). This will be possible if the statutory regulations entitle the social partners to choose appropriate legal standards (Sobczyk, 2015: 316). The introduction of such legal provisions will help to achieve the above goals by creating measurable benefits for both parties to the employment relationship, as well as reducing the budgetary pressures and encouraging gradual generational replacement.

5. Taking into consideration the impending changes to the retirement age, it is noticeable that politicians contend that the lowering of the retirement age was driven by the wish to provide a choice for people: retirement or employment. Accordingly, after reaching the lowered retirement age retirees become entitled to refuse to perform work. However, after receiving the retirement pension they are entitled to work without limitations and collect both the retirement pension and remuneration from employment. This is contrary to the main underlying principle, according to which, the retirement pension should replace remuneration from work. Giving the choice to people aged 60/65 (women or men respectively) may therefore result in the breaching of intergenerational social justice and solidarity between the age groups, if this is provided at the expense of younger generations. The consequences of lowering the retirement age and its economic impact with relation to extended burdens on younger generations are widely explained by Pacud (2016: 2-9). Fewer negative consequences may be achieved by rethinking the legal regulations which allow retirees at the new lowered age to benefit doubly - without limitations - from both a pension and workplace remuneration. The replacing of remuneration by a retirement pension should be in

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accordance with an “old age” determined by life expectancy. Therefore, the lowered retirement age should result in postponement of retirement pension for those who work on, e.g. 67 or 70 (SC, 2015: 5-6). Even if the presented solutions do constitute some kind of remedy for the inherent problems, I cannot agree that it will be satisfactory. As the mentioned right to choose is in close correlation with the right to cease work, the rights of those who can no longer work due to health problems should be protected by measures based on disability assessment. This issue requires more discussion and definite steps (SC, 2015: 7-8). That is why, in my opinion, the arguments for lowering the retirement age thereby giving people the right to choose, when, in fact, our lifespan continues to rise, are debatable.

The presented paper is written in an attempt to provide conclusions that will be used in a final monograph, which will include the results of scientific research. The scientific research project is: The model of legal instruments taken to combat unemployment among older people – a legal analysis. The contribution is financed by the National Center of Science (Poland), DEC-2013/09/B/HS5/04137.

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Prawo wyboru, czy jego brak. Dylematy wieku starszego (rozważania oparte na polskich unormowaniach prawnych)

Streszczenie

W ramach niniejszego opracowania Autorka podjęła próbę analizy prawnej sytuacji osób osiągających wiek emerytalny w kontekście kontynuowania pracy zarobkowej. Głównym celem, leżącym u podstaw opracowania naukowego była odpowiedź na pytanie dotyczące prawa wyboru ze strony osób w tym przedziale wiekowym. W celu jej udzielenia przeanalizowano wpływ wieku emerytalnego na kontynuowanie zatrudnienia, jak i wpływ otrzymywanej emerytury na decyzję o podjęciu pracy. Aktualność analizowanej problematyki zasługuje na szczególne podkreślenie ze względu na zmiany w zakresie wieku emerytalnego, prowadzące do jego obniżenia od 1.10.2017 r. W wielu komentarzach dotyczących wprowadzenia powyższej reformy pojawiały się wypowiedzi podkreślające potrzebę zapewnienia obywatelom prawa wyboru: pozostawania w pracy albo przejścia na emeryturę. Posłużyło to także do sformułowania przez Autorkę wniosków odnośnie do kształtu regulacji prawnej oraz uwag *de lege ferenda*. Nie ulega bowiem wątpliwości, że zasadniczy wpływ na realizację prawa wyboru ze strony obywateli mają regulacje prawne. Kształtują one zakres powyższego prawa. Prowadzić też mogą do sytuacji, kiedy pomimo patetycznych oraz donośnych haseł o prawie wyboru, w rzeczywistości będzie ono tylko pewną iluzją, prowadzącą do pogłębienia się niesprawiedliwego oraz nieakceptowanego międzypokoleniowego podziału ciężarów oraz korzyści. Prowadzone rozważania wpisują się także w liczne programy, agendy oraz badania bazujące na promowaniu jak najdłuższego pozostawania w zatrudnieniu.

Słowa kluczowe: emerytura, wiek starszy, wiek emerytalny, rozwiązanie umowy, elastyczne formy zatrudnienia.

Kody JEL: J21, J26, J48, J70, K31

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