
The problem of solidarity between persons insured in sickness insurance, and the reasons for ZUS verification of the amount of remuneration for work as the basis for contribution and benefit calculation

The study presents issues related to Social Insurance Institution (ZUS) control of the amount of sickness benefits in the Polish social insurance system. The purpose of verification undertaken by the social insurer is to prevent any unauthorised overstatement of the amount of benefits. The problem has been discussed within the perspective of the principle of solidarity, which is one of the basic values for social insurance. The most important issues concern the presentation of justification for ZUS control of the basis for calculating benefits. The study also includes the characteristics of the personal and material scope of sickness insurance, the catalogue of benefits and practices for overstating their amount. One of the conclusions is that fraudulent overstatement of benefits is contrary to the principle of social solidarity.

Key words: abuse, control of benefits, sickness insurance, Social Insurance Institution (ZUS), solidarity

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Introduction

Sickness is a condition that hampers the functioning of the body. In many cases, it is a reason for a temporary or permanent inability to perform work and earn a living. The problem of a lack of funds as a result of a temporary incapacity for work due to sickness was noted in the Middle Ages. The first institutions that protected working persons against this risk were the mutual aid funds in the mining industry. However, due to the development of industry in the eighteenth and nineteenth centuries, which resulted in an increase in the number of workers, mutual aid solutions were insufficient. A lack of adequate protection in the event of incapacity for work due to sickness has been perceived as a source of social tensions. It became necessary to introduce appropriate system solutions. Therefore, the first legal instrument adopted in 1883 in Germany was the act introducing universal sickness insurance. The establishment of the social insurance system in the Second Polish Republic also began with the issuing of regulations on sickness insurance in 1919.

The problem of temporary incapacity for work due to sickness is of great social importance. The appropriate catalogue of benefits available under sickness insurance replaces the remuneration for work in certain situations. However, there are situations where some insured persons want to receive benefits higher than those due. Such activities do not comply with the principle of solidarity, which is one of the axiological foundations of social insurance. The social insurer should therefore take actions to minimise the occurrence of such situations. They will include, *inter alia*, a check on the validity of the amount of remuneration, which is the basis for calculating benefits. In this context, however, the question arises about the relevant legal basis and the extent of any possible interference by the insurer.

The purpose of this paper is to present issues related to ZUS checks and inspections over the amount of remuneration for work as the basis for the calculation of contributions and benefits. The author will discuss this issue in the light of the solidarity principle. The study uses a method of analysing literature on the subject, legal acts in force on 1 August 2018, as well as court rulings and those of the Constitutional Tribunal.

Personal and material scope of sickness insurance

The first regulations on compulsory sickness insurance in Poland were issued less than 3 months after the regaining of independence.¹ Their personal scope included persons employed under a service relationship or employment contract. In addition, it was possible to voluntarily join the insurance after meeting certain conditions. The insurance

¹ Decree of 11 January 1919 on compulsory sickness insurance (Journal of Laws of the Polish State No. 9, item 122).

did not cover nominated government officials, while persons employed in companies in managerial positions whose earnings exceeded certain limits could be released from the insurance obligation at their own request.²

In the 1930s, the systematisation of social insurance law began, which was mainly expressed in the adoption of the Consolidation Act and the establishment of the Social Insurance Institution.³ In the field of sickness insurance, the personal scope was limited. The following were excluded from compulsory protection: employees of local government unions, persons in active military service or foreigners employed in the representations of foreign states.⁴ An expansion of the group covered by compulsory sickness insurance took place after the Second World War. Insurance covered all employees and non-employee groups: barristers, craftsmen and persons cooperating with them, persons performing work on the basis of agency and commission contracts, farmers and the clergy.⁵

As a result of the social insurance reform, after 1999, employees, members of agricultural production cooperatives and agricultural cooperative circles as well as persons undergoing military service were covered by the compulsory sickness insurance.⁶ It should be noted, however, that from 2010, after the suspension of the national service, no one is insured in respect of national military service. The following groups may also voluntarily join the insured: persons engaged in non-agricultural activities or persons cooperating with them, persons performing a commission contract or services contract, out-workers, persons providing work during the period of temporary detention awaiting trial or deprivation of liberty, persons on doctoral scholarship programmes, and the clergy.⁷ Other titles have been excluded from sickness insurance because they relate to persons who are not professionally active, and thus who are not at risk of losing their income in the event of temporary incapacity for work due to sickness.⁸

Registration for the purpose of sickness insurance results in the obligation to calculate and pay the contribution in the amount of 2.45% of the contribution basis. It is deducted from the insured person's remuneration and transferred to the sickness fund, which is separately managed within the Social Insurance Fund. Contributions are transferred in monthly settlement periods together with settlement documents.⁹ In the situation of persons engaged in non-agricultural activities and persons cooperating with them as well as the clergy, failure to meet the deadline for paying the contribution results in

2 A. Kaczmarek, *Zakres podmiotowy ubezpieczenia chorobowego* [in:] *Ubezpieczenie chorobowe*, ed. B. Wagner, A. Malaka, Iwonicz Zdrój 2010, p. 34.

3 The Act of 28 March 1933 on social insurance (Journal of Laws No. 51, item 396, hereinafter: the Consolidation Act), Regulation of the President of the Republic of Poland of 24 October 1934 amending the Act of 28 March 1933 on social insurance (Journal of Laws No. 95, item 855).

4 Art. 5 and 6 of the Consolidation Act.

5 A. Kaczmarek, *op. cit.*, p. 35–36.

6 Art. 11(1) of the Act of 13 October 1998 on the social insurance system (consolidated text: Journal of Laws 2019, item 300, as amended, hereinafter: the Social Insurance System Act).

7 Art. 11(2) of the Social Insurance System Act.

8 I. Jędrasik-Jankowska, *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*, Warszawa 2017, p. 78.

9 Art. 47 of the Social Insurance System Act.

a discontinuation of the current insurance.¹⁰ In justified cases, ZUS may, upon the insured person's request, agree to the contribution being paid after the deadline has passed.

The material scope of sickness insurance relates primarily to the risk of a temporary incapacity for work due to sickness.¹¹ It should be noted that the temporary nature of an obstacle in the performance of work means its transience, the possibility of quick cessation, not its duration.¹² Materialisation of the risk of an incapacity for work is confirmed by an authorised health care practitioner by means of a relevant certificate.¹³ As a result, the insured person has the right to certain cash benefits and their absence from work is substantiated.

Under social insurance in respect of sickness, some situations are treated on a par with an incapacity for work due to sickness. These are the cases of inability to perform work:

- as a result of a decision issued by a competent authority or an authorised entity pursuant to the provisions on the prevention and combating of infections and infectious diseases in humans;
- due to stay at a stationary addiction treatment facility for the treatment of alcohol addiction or at a stationary healthcare facility for the treatment for addiction to stupeficients or psychotropic substances;
- as a result of undergoing necessary medical examinations provided for those aiming to become donors of cells, tissues and organs.¹⁴

The scope of the sickness insurance risk also includes situations that are not related to the incapacity for work as a result of sickness or equivalent situations. The first in this respect is a break in work in connection with the birth of a child, which – according to the labour law – is called maternity leave. The insurance covers also the adoption of a child up to the age of 7, and in the case of a child for whom a decision has been issued to postpone compulsory school education, up to the age of 10, or the admission of a child for upbringing in a foster family.¹⁵

Another extension of the scope of sickness risk is the need to care for a child or other sick family member. The Benefits Act indicates in this respect situations related to the provision of care for:

- a child up to the age of 8 in the event of unforeseen closure of the nursery or educational institution that the child attends, sickness of the nanny or through childbirth, sickness or stay at an in-patient health care facility of the spouse who provides everyday care for the child;
- a sick child up to the age of 14 years;

¹⁰ Art. 14(2)(2) of the Social Insurance System Act, M. Olszewska, *Kierunki zmian ubezpieczenia chorobowego* [in:] *Ewolucja ubezpieczeń społecznych w okresie transformacji ustrojowej*, ed. B. Wagner, A. Malaka, Bydgoszcz 2011, p. 104.

¹¹ The Act of 25 June 1999 on cash social insurance benefits in respect of sickness and maternity (consolidated text: Journal of Laws of 2019, item 645, as amended, hereinafter: the Benefits Act).

¹² See I. Jędrasik-Jankowska, *op. cit.*, p. 248.

¹³ Art. 53–60 of the Benefits Act.

¹⁴ Art. 6(2) of the Benefits Act.

¹⁵ Art. 29 of the Benefits Act.

- other sick family member (spouse, parents, parents-in-law, grandparents, grandchildren, siblings and children aged 14 or over) who reside in the same household during the period of care.¹⁶

The reduced fitness for work is also protected under the sickness insurance. Regulations in this regard apply only to employees. This risk involves the reduction in the current remuneration during the period of vocational rehabilitation in order to adapt or train for a specific job.¹⁷

Solidarity of persons covered by the sickness insurance

The first European dictionary where the adjective *solidaire* was noted was a French dictionary of 1694 that referred to the legal meaning of the word.¹⁸ Socio-economic changes at the turn of the 19th century also brought an extended context to the definition of “solidarity.” From the legal application, the word came into common use as a political slogan, sociological theory, the religious idea of renewed *caritas*, as well as a social value and the principle governing some aspects of relations in the public sphere.¹⁹ Sociological research made a significant contribution to the development of the idea of solidarity.²⁰

The increase in the number of manual workers, which took place as a result of successive industrialisation, forced undertakings aimed at providing adequate living conditions in a situation where it was impossible to provide work and obtain remuneration. Excessive exploitation of workers as well as numerous accidents at work and cases of sickness, inhibited economic development. Solutions based on mutual aid and charity were inadequate in this respect. People came to believe that work should protect a person against various types of adverse random situations.

Activities aimed at creating a comprehensive workers’ protection system were initiated in Germany. Laws passed in 1881–1889 were aimed at introducing state-guaranteed benefits and meeting a wide range of needs associated with a loss of earning capacity. The solutions created were called social insurance: this term being applied for the first time.²¹ In subsequent years, social insurance developed in other countries. The main assumptions of the insurance method can be summarised as follows:

- security is provided by creating communities of people exposed to similar random events,

¹⁶ Art. 32 of the Benefits Act.

¹⁷ Art. 23 of the Benefits Act.

¹⁸ D. Dobrzański, *Nowożytna idea solidarności* [in:] *Idea solidarności w kontekstach filozoficzno-historycznych*, ed. D. Dobrzański, A. Wawrzynowicz, Poznań 2006, p. 13.

¹⁹ J. Radzińska, *Solidarności: definicja i konteksty*, “Eryka” 2014, No. 48, p. 60.

²⁰ In this regard, Auguste Comte should be, in particular, mentioned, who was the first to use solidarity in this context, and Émile Durkheim, who has developed the idea in the work *O podziale pracy społecznej*, Warszawa 2011, p. 65 *et seq.*

²¹ W. Szubert, *Ubezpieczenie społeczne. Zarys systemu*, Warszawa 1987, p. 13.

- the fund for the benefits is accumulated from contributions adjusted to the size of the risk,
- benefits are differentiated according to participation in the joint fund creation,
- the right to the benefit and its amount are guaranteed by law,
- insurance coverage is compulsory in order to counteract the lack of precaution of employees and the negligence of employers, as well as to reduce insurance costs,
- the right to the benefit is a subjective right, which means that the benefit is due after the insured event has been identified, if the conditions set out in the Act are met irrespective of the insured person's financial status,
- social insurance is provided by special public institutions.²²

These assumptions are based on the principle of solidarity. Its content refers to the adoption by the community, as a result of the existing interdependence, of certain burdens and obligations that lead to social equalisation within this community.²³ This is expressed primarily through the joint creation of social funds to cover lost income and the cost of social risk, under the same rules for all.²⁴ Implementation of this principle is possible through financing based on a contribution, the amount of which is not differentiated individually for each insured person, *i.e.*, on the basis of individual risk.²⁵ As a result of this approach, everyone creates a fund together, even when the situation of some community members does not indicate the need for resources to be used in the near future, while only those affected by social risk receive assistance. In the subject literature, this is referred to as horizontal solidarity.²⁶

Lack of contribution diversification based on individual risk does not mean the same amount of contribution for everyone. This is due to the fact that the contribution is expressed as a percentage of the remuneration, which means that higher wage earners pay higher contributions. Therefore, it is claimed that solidarity in social insurance must also serve, to some extent, the purpose of levelling out differences in income and the social situation of the insured persons (vertical solidarity).²⁷ We are also talking about generational solidarity in social insurance, which is characteristic of old-age and disability pension insurance, and consists in financing current benefits from current contributions.²⁸

The solidarity of the insured persons in sickness insurance is expressed primarily through the risk community in the event of random events that result in an incapacity for work. Events resulting in the inability to carry out the work performed so far may result from the insured person's sickness or an equivalent situation, maternity, the need to provide care for a child or

22 I. Jędrasik-Jankowska, *op. cit.*, p. 27.

23 D.E. Lach, *O solidarności społecznej w "ubezpieczeniu zdrowotnym"*, Poznań 2013, https://prawo.amu.edu.pl/_data/assets/pdf_file/0011/176168/dr-hab.-Lach.pdf (31.7.2018), p. 16.

24 S. Golinowska, *Polityka społeczne w gospodarce rynkowej. Studium ekonomiczne*, Warszawa 1994, p. 62.

25 W. Szubert, *op. cit.*, p. 15.

26 See M. Rymśza, *Solidaryzm w ubezpieczeniach społecznych* [in:] *Społeczne aspekty ubezpieczenia*, ed. T. Szumlicz, Warszawa 2005, pp. 46–52.

27 W. Sanetra, *Aksjologiczne podstawy prawa ubezpieczeń społecznych* [in:] *Ubezpieczenia społeczne w procesie zmian. 80 lat Zakładu Ubezpieczeń Społecznych*, ed. K. Frieske, E. Przychodaj, Warszawa 2014, p. 36.

28 M. Rymśza, *op. cit.*, p. 47.

other family member, or reduced fitness resulting in the need for rehabilitation and retraining. This relationship is mainly reflected in the transfer of the 2.45% contribution to the sickness fund, managed separately under the Social Insurance Fund. The resources accumulated in this way are the basis for financing benefits if a social risk materialises.

The risk community in sickness insurance covers a relatively narrow range of compulsory and voluntary titles. However, these titles cover almost 90% of those insured persons.²⁹ It should be noted that the voluntary insurance available for some titles creates an opportunity to decide when to join or leave the community. In this way one can create more favourable insurance circumstances than in the case of a compulsorily insured person. Although the legislator has introduced a longer waiting period for persons insured voluntarily, this is still only 3 months and concerns sickness allowance. Thus, it can be claimed that the possibility of joining sickness insurance on a voluntary basis is a kind of derogation from the principle of solidarity due to the lack of the universal obligatory nature to pay contributions by members of the risk community.

Sickness insurance benefits and practices of overstating their amount

The scope of sickness insurance benefits in the Polish system has changed. Initially, in addition to cash benefits, the sickness insurance also included medical assistance.³⁰ In the 1950s, as a result of healthcare organisational reform, which incorporated healthcare into the state health care administration, the scope of benefits was reduced only to cash benefits in respect of an incapacity for work. The catalogue of benefits after the 1999 reform, specified in the Benefits Act, was defined as follows:

- sickness allowance – granted in respect of temporary incapacity for work due to sickness, isolation due to an infectious disease, treatment for addiction or undergoing necessary examinations for candidates for donors of cells, tissues and organs. The maximum period for its receipt is 182 days or 270 days if the incapacity is caused by tuberculosis or occurs during pregnancy;
- rehabilitation benefit – payable after cessation of the sickness allowance period, if the insured person is still incapable of work and there is a good prognosis as to restoration of their earning capacity as a result of further medical treatment or rehabilitation. Award of the benefit depends on the decision of the ZUS certifying doctor, and the maximum period for its receipt is 12 months;
- compensatory allowance – granted only to insured employees and aimed to supplement the remuneration reduced as a result of any vocational rehabilitation;

29 As at 30 June 2018, 14.1 million persons were covered by sickness insurance, of which: 11.5 million were employees, 1.3 million were persons engaged in non-agricultural activities and persons cooperating with them, 0.4 million were freelancers/contractors, see: psz.zus.pl (31.8.2018).

30 Cf.: D. Jakubiec, *Pierwsze polskie instytucje ubezpieczeń społecznych. Zarys historii i ustroju*, Warszawa 2007, p. 27 *et seq.*

- maternity allowance – payable in connection with childbirth or adoption of a child for upbringing. The period of its receipt is associated with maternity leave and leave of absence under the principles of maternity leave, additional maternity leave, paternity leave and parental leave defined in labour law;
- care allowance – granted due to the need to take care of a sick or healthy child or other family member in different situations. The maximum allowance periods are 60 days or 14 days depending on the person taken care of.³¹

ZUS and contribution payers, registering more than 20 persons for the purpose of sickness insurance, are authorised to establish the entitlements and pay out the benefits.³² As part of the proceedings related to benefits payment, the right to benefits is verified and the amount of benefits is calculated. A determination in this regard does not take the form of a decision but of factual findings.³³ The insured person may challenge the findings established by the contribution payer. In such a situation, a decision is issued by the Social Insurance Institution.

The basis for benefits assessment is determined under separate rules for employees and insured non-employees. In the first case, as a rule, the assessment is based on the average monthly remuneration paid for the period of 12 calendar months preceding the month in which the incapacity for work occurred.³⁴ When calculating the benefit assessment basis, wage components that are not reduced during the period of benefits receipt are not taken into account. On the other hand, as regards the benefits for insured non-employees, their average income for the period of 12 calendar months preceding the month in which the incapacity for work occurred serves as the assessment basis.³⁵ The rules for determining the basis for allowances assessment are slightly different when the contribution was assessed based on the declared amount and the insurance lasted less than a year.³⁶ The calculated benefits assessment basis is not recalculated if the break between successive cases of incapacity for work was not longer than three calendar months.³⁷

In practice, attempts are being made to obtain benefits at an amount higher than that due.³⁸ Examples of such conduct can be found, among others, in

31 S. Kasprowski, *Kontrola zasadności pobierania świadczeń w razie choroby i macierzyństwa w polskim systemie ubezpieczeń społecznych w latach 2005–2013*, "Prace Naukowe UE we Wrocławiu" 2015, No. 395, pp. 119–120.

32 Art. 61 of the Benefits Act, which indicates that the number of insured persons is determined as at 30 November of the preceding calendar year.

33 T. Bińczycka-Majewska, *Organizacja i funkcjonowanie ubezpieczeń społecznych* [in:] *Ubezpieczenie społeczne dawniej i dziś. W 80-lecie uchwalenia ustawy o ubezpieczeniu społecznym*, Wrocław 2013, p. 84.

34 Art. 36–47 of the Benefits Act.

35 Art. 48(1) of the Benefits Act; it should be noted, however, that in the case of insured persons for whom the assessment of the sickness insurance contribution is based on the declared amount, such amount is the basis for calculating the amount of benefits (and not actual income achieved *e.g.* as part of business activity).

36 Cf.: I. Jędrasik-Jankowska, *op. cit.*, pp. 269–270.

37 Art. 43 of the Benefits Act.

38 In the context of sickness insurance benefits, in addition to the practices of overstating the amount of benefits, some other adverse phenomena are observed, such as an ostensible basis for applying for insurance to obtain benefits incompatible with the purpose of using sick leaves or to be granted such sick leave despite the lack of reasons. However, due to the limits set by the topic of this study, they are not examined here.

case law.³⁹ Based on the presented facts, it can be concluded that as regards persons with a relatively short employment period, the remuneration which is to be the basis for calculation is set at an excessive level, diverging from the normal practice of a given contribution payer. However, in the case of people who have several years of service, the wage/salary ceiling can be increased through a fictitious change of position to one with a higher remuneration or through lump-sum payments of abnormally high rewards. As a result of such actions a relatively high benefit is being paid. The mentioned methods of fraudulent activity are characterised by: the remuneration not adequate to the qualifications and type of work performed, a significant, and sometimes glaring disproportion in the amount of remuneration as compared to other persons employed by the entrepreneur, a lack of economic justification for such a level of remuneration.

The insured persons for whom the assessment of contributions is based on the declared amount, *e.g.*, persons engaged in business activity, can also influence the benefits calculation basis.⁴⁰ The motive for calculating contributions based on the maximum foreseen amount is the desire to obtain the maximum amount of benefits.⁴¹

Control of the remuneration amount as the basis for calculating sickness insurance benefits

ZUS as a state organisational unit has the right to issue decisions in individual cases. The scope of decisions includes, specifically, issues related to registration for social insurance purposes and the course of insurance, determining the amount of contributions and their receipt, as well as establishing the entitlements to and assessment of social insurance benefits.⁴² The social insurer may also claim reimbursement of unduly received benefits.⁴³ ZUS powers are also used in the context of care for funds entrusted by the insured persons and by the state budget. As settled in case law, the pension body has

39 See the judgement of the Supreme Court of 1 June, I UK 253/16, LEX No. 2342187; the judgement of the Supreme Court of 19 May 2009, III UK 7/09, LEX No. 509047; the judgement of the Administrative Court in Gdańsk of 9 July 2014, III AUa 1814/13, LEX No. 1498872.

40 See the resolution of the Supreme Court of 21 April 2010, II PPO 1/10; the judgement of the Administrative Court of 18 May 2016, III AUa 1312/15; it should be noted that in accordance with the resolution of the Supreme Court, ZUS is not entitled to question the amount declared by a person engaged in business activity if it falls within the statutory limits.

41 It should be noted that the possibilities in this regard have been limited as a result of changes introduced by Art. 1(10) of the Act of 15 May 2015 on the amendment of the Act on cash social insurance benefits in respect of sickness and maternity and certain other acts (Journal of Laws of 2015, item 1066).

42 G. Szpor, *System ubezpieczeń społecznych. Zagadnienia podstawowe*, Warszawa 2016, p. 82.

43 Art. 84(2) of the Social Insurance System Act.

the right to examine and decide whether the contract being the basis for registration for social insurance purposes was actually conducted under the conditions specified therein and whether it was concluded for convenience or to circumvent legal provisions.⁴⁴

As a separate issue related to the establishment of the right to sickness insurance benefits, is the issue of ZUS's power to assess only the amount of remuneration which is the basis for calculating benefits. In this case, it was also confirmed that in some cases the insurer is entitled to question the amount of remuneration which is the basis for calculating sickness insurance contributions.⁴⁵ This applies to situations where the existence of an employment relationship does not raise doubts, but provisions on the amount of remuneration are contrary to law, to principles of social coexistence or are intended to circumvent the law. Such arrangements may not be covered by protection under the principle of the free formulation of contractual provisions. In addition, it should be noted that the parties to the contract are required not only to respect their own individual interests, but also the public interest.⁴⁶

Payment of remuneration under an employment relationship has specific effects in the field of social insurance. In this context, it should be borne in mind that these effects do not only apply to the employee and the employer concerned. As a result of the principle of solidarity, they also affect indirectly other insured persons. And it should be noted that this impact will assume the nature of various relationships between the insured persons themselves, the insured persons and the beneficiaries, the insured persons and the contribution payers, the beneficiaries themselves and the state and the beneficiaries.⁴⁷ Therefore, setting abnormally high remuneration for work may be considered null and void, if the unjustified advantages from the social insurance system are deliberately obtained at the expense of other system participants.⁴⁸ In addition, the maintenance-based nature of sickness insurance benefits and the principle of solidarity require that the remuneration should not be set above the fair wage limit, *i.e.*, it should not grossly exceed the labour input.⁴⁹

ZUS's power to control and the possibility of questioning the amount of remuneration are not widely accepted. In one of the presented opposing positions, the absence of a substantive and formal basis for such an action was raised.⁵⁰ References to the public interest were not considered sufficient, since such an approach could lead to interference by the social insurer in other areas, *e.g.*, too low earnings in the context of contributions

44 See *inter alia* the judgement of the Supreme Court of 22 November 2012, I UK 246/12; the judgement of the Supreme Court of 13 July 2005, I UK 296/04; the judgement of the Administrative Court in Katowice of 27 November 2012, III AUa 230/12.

45 See the resolution of the Supreme Court of 27 April 2005, II PPO 2/05, OSNP 2005/21/338.

46 See the judgement of the Administrative Court in Kraków of 16 October 2013, III AUa 294/13, LEX 1388831.

47 Cf.: K. Ślęzak, *Zasada solidarności w ubezpieczeniu społecznym* [in:] *Z zagadnień prawa pracy i prawa socjalnego. Księga jubileuszowa Profesora Szurgacza*, ed. Z. Kubot, T. Kuczyński, Warszawa 2011, p. 538.

48 See the judgement of the Supreme Court of 9 August 2005, III UK 89/05, LEX 182780.

49 See the resolution of the Supreme Court of 27 April 2005, II PPO 2/05, OSNP 2005/21/338.

50 Cf.: D.E. Lach, *Glosa do uchwały SN z dnia 27 kwietnia 2005 r.* [Commentary to the Supreme Court's resolution of 27 April 2005] II UZP 2/05, OSNP 2005/21/338, "Gdańskie Studia Prawnicze – Przegląd Orzecznictwa" 2006.

for pension insurance. It was also alleged that the establishment of the remuneration by the social insurer was somewhat arbitrary. As regards the decisions on the assessment basis for contributions and benefits, it was also considered unauthorised to refer to the rules of social insurance law, which result from axiological principles and not the legislation in force.⁵¹ In the context of the solidarity principle it was also pointed out that it is not possible to determine on its basis the amount of remuneration, due to the fact that currently social insurance covers a much broader group than just employees.⁵²

The legal basis for the verification of the amount of remuneration by ZUS in the context of sickness insurance benefits was also assessed in terms of constitutionality. The doubts underlying the referral of the case to the Constitutional Tribunal concerned, *inter alia*, the lack of legal instructions for verifying the amount of the insurance contributions assessment basis.⁵³ The use of fairness criteria or rules of social coexistence was considered insufficient in this respect. This action was assessed as a manifestation of legal uncertainty and unpredictability. Besides, it was also pointed out that ZUS was unable to change the basis for assessing the contributions for insured persons who declare the amount of such basis.⁵⁴

The Polish Constitutional Tribunal has ruled that the Social Insurance System Act⁵⁵ allows the social insurer to set a different level of the basis for assessing sickness insurance contributions than the one resulting from the employment contract.⁵⁶ Such actions, taken to prevent fraud in obtaining excessive benefits under false pretences, do not violate constitutional standards. The insured persons, sometimes in consultation with the contribution payer, undertake various actions to obtain undue benefits from sickness insurance under false pretences or to overstate the amount of benefits due. Therefore, the following can be considered as arguments for recognising ZUS's power to control and potentially change the basis for assessing the contribution, and thus the amount of the benefit from sickness insurance:⁵⁷

- the social insurance relationship is public, and that is why ZUS represents the legal interest of the state, which aims to prevent various attempts to obtain undue or excessive benefits under false pretences;
- verification of the equivalence of the contractual remuneration may not be carried out at the stage of contribution collection, because all necessary data can only be determined during explanatory proceedings or inspection with the participation of the contribution payer and the insured person;

51 K. Ślebza, *Kontrola przez ZUS ważności umów o pracę stanowiących tytuł do ubezpieczenia społecznego – wybrane zagadnienia*, "Prawo i Zabezpieczenie Społeczne" 2017, No. 2, p. 40.

52 D.E. Lach, *Glosa...*, *op. cit.*, p. 2 *et seq.*

53 Cf.: Order of the District Court in Częstochowa of 12 November 2014, IV U 515/14 C.

54 See the resolution of the Supreme Court of 21 April 2010, II PPO 1/05, OSNP 2005/21/10.

55 Art. 83(1)(3) in conjunction with Art. 41(12) and (13), Art. 68(1)(c) and Art. 86(2)(2) of the Social Insurance System Act.

56 The judgement of the Constitutional Tribunal of 29 November 2017, P 9/15.

57 Based on the judgement of the Constitutional Tribunal of 29 November 2017, P 9/15.

- the remuneration received by the employee is not determined by ZUS in an arbitrary manner but in the course of explanatory proceedings or inspection, as a result of which an administrative decision is issued on the basis of the evidence collected. It should be noted that such actions are an exception and are taken when there is a risk of unlawful undertakings aimed to maximise sickness insurance benefits;
- the correctness of decisions issued by ZUS is subject to verification by courts, where no findings are automatically accepted. In many cases, the position that the high remuneration resulting from the employment contract is “not fair” and is intended solely to obtain higher allowances, has not been shared by the courts themselves;
- it is not possible to specify in law the rules for determining the remuneration to be received by a specific employee (except for the regulation of the minimum wage/salary). The labour law provisions regarding fair remuneration and adequacy of remuneration to the type of work, qualifications, quantity and quality should be considered as sufficient in this respect;⁵⁸
- employees and those who declare the basis for assessment of social insurance contributions are entities without a relevant characteristic. So, the interference of the social insurer in the employees' basis for assessment does not violate any principle of equality.

Assessment of the legitimacy of checking the amount of remuneration as the basis for calculating sickness insurance benefits and development trends

The existence of control mechanisms within specific systems always provides a basis for considerations on their legitimacy and validity. The situation is not different in the case of the control of the base amount for sickness benefits assessment in the context of preventing their unauthorised overstatement. It should be categorically stated that ZUS has appropriate legal grounds to undertake proceedings aimed at determining the proper amount of benefits financed by the sickness fund.

When considering the legitimacy of actions in this area, it should be first mentioned that ZUS is the administrator of funds entrusted by individual insured persons. Accepting insurance contributions under individual types of insurance obliges the social insurer to provide adequate protection for the entrusted funds. On the one hand, this

⁵⁸ Art. 13, Art. 78(1) of the Labour Code; the judgement of the Supreme Court of 23 January 2014, I UK 302/13 indicated that the fair pay pattern will take into account, *inter alia*, such factors as: the wage scale in force in the workplace, the average level of pay for the work of the same or similar nature in industry, the education, scope of duties, material responsibility and availability.

protection should include the implementation of appropriate mechanisms within the institution, which will prevent misappropriation of resources or their unreasonable spending. On the other hand, an appropriate system is needed to verify applications filed by the insured persons.

Uncritical acceptance of every claim for sickness insurance benefits, even in the case of obvious indications of the ostensibility of an insurance title or overstatement of the requested amount, would result in a loss of confidence in the insurer. If such proceedings took place in insurances offered by commercial companies, it would lead to losses or even to the collapse of the insurer. In the case of social insurance, the burden of financing undue benefits would be borne by society, as state budget subsidies are transferred for the payment of benefits.

Generally speaking, striving to obtain the benefit in spite of a lack of eligibility can be described as abuse.⁵⁹ One cannot agree with the thesis that the social insurer lacks substantive and formal grounds for verifying the amount of benefits paid. As proved in previous parts of the study, such foundations exist and are not contrary to the constitutional order. Claiming that interference in the amount of the basis for benefit assessment could lead to interference in other areas, such as too low earnings, seems too simplistic in the context of pension contributions. ZUS implements laws adopted by the legislative authority and may act only within this framework. However, it must react to pathological situations or situations demonstrating criminal features. Failure to act would be contrary to the public interest and the principle of solidarity.

It is also not possible to accept allegations that in the course of proceedings conducted by the insurer, the basis for the benefit is in some measure arbitrarily determined. The proceedings end with a decision. As part of the legal and factual justification of such a decision, the insurer presents their motives for determining the assessment basis. Besides, any decision may be appealed against in court. Being aware of potential judicial review, the insurer provides adequate reasoning for its decisions. It should also be noted that as a result of losing a court case, ZUS must bear certain costs, on the one hand related to its image, while on the other hand quite concrete fiscal ones, in the form of the costs for legal representation.

Nevertheless, it is reasonable to consider supplementing the social insurance legislation. First of all, a prohibition on exercising one's right in a manner contrary to its socio-economic purpose or to the principles of social coexistence could be introduced to social insurance legislation, similar to the regulations existing in the Civil Code and the Labour Code. As a result, the basis for actions taken by the social insurer to prevent abuse would be unambiguous. Legal regulations could also indicate that the Polish social insurance system is based on the principle of solidarity. The principle of solidarity is invoked in many court rulings in the context of counteracting situations where one can speak of the abuse of subjective rights at the expense of other participants' rights. Hence,

59 Cf.: S. Kasprowski, *Solidarność ubezpieczonych w ubezpieczeniu chorobowym a problem nadużyć w prawie do świadczeń*, "Ubezpieczenia Społeczne. Teoria i praktyka" 2018, No. 4, pp. 47–62.

the introduction of appropriate provisions would allow one to avoid the need to refer to social insurance principles arising from their axiological foundations.

Besides, provision should be made for demotivating future fraud attempts. A possible solution could be the maximum limit of sickness insurance benefits. The amendment should be also made to the provision indicating that the benefits assessment basis should not be recalculated if 3 calendar months have not passed.⁶⁰ The current structure may encourage attempts at obtaining benefits calculated according to a higher, more favourable assessment basis.

The amendment of legal regulations should not be made too late after the identification of phenomena indicating the use of legislation in a way that is harmful to the social insurance system. In 2010, the Supreme Court pointed out that ZUS had no right to question the assessment basis for contributions of persons engaged in business activity if its amount did not exceed the amount resulting from the legal provisions. A dynamic increase in the number of persons who, after an insurance period of no more than 4 months, received sickness insurance benefits calculated from the assessment basis exceeding PLN 6,000, was observed in the years 2011–2013.⁶¹ Regulations concerning the method of determining the basis for benefits assessment for persons engaged in business activity have been amended since 2016.

The prohibition of verifying the amount of contributions of persons insured in respect of business activity, in the context of determining the right to sickness insurance benefits, requires a reference to subsequent rulings of the Supreme Court. The Supreme Court pointed out in its rulings that the resolution of 2010 could not constitute a basis for the categorical formulation of such prohibition. It does not apply if business activity is commenced and the main intention to register and conduct it is to indicate immediately a high basis for assessing contributions with the intention of obtaining high benefits, although the income obtained is much lower than the insurance contributions and only for this reason are the operating costs significantly higher than the revenues obtained. In this situation, ZUS has the right to control the title itself and, as a consequence, also the basis for contributions assessment in the event of initial registration for social insurance and any unjustified disproportion between revenues and the reported basis of contributions assessment.⁶²

Counteracting adverse phenomena also requires measures aimed at properly assessing the risk of fraud. The social insurer cannot treat everyone who claims a benefit as a potentially dishonest person. It should properly use its resources where the probability of

⁶⁰ Art. 43 of the Benefits Act.

⁶¹ The explanatory statement to the draft Act of 15 May on the amendment of the Act on cash benefits from social insurance in the event of sickness and maternity and certain other acts, print 2832; according to the data provided in the explanatory statement, in 2011, in 1670 cases benefits were paid from sickness insurance lasting up to 120 days and calculated from the contribution assessment basis exceeding PLN 6,000, in 2012 there were 4,150 such cases, and in 2013 – 8,826 cases.

⁶² See the judgement of the Supreme Court of 5 September 2018, I UK 208/17; the judgement of the Supreme Court of 17 October 2018, II UK 301/17; the judgement of the Supreme Court of 17 October 2018, II UK 302/17; the judgement of the Supreme Court of 30 October 2018, I UK 277/17.

payment of undue benefit is high enough and the effect will be significant. It is justified to carry out data analysis for this purpose. As part of ZUS activities, there are significant possibilities to create analysis models for data recorded on accounts of insured persons and contribution payers.⁶³

Conclusion

Solidarity is associated with brotherhood, community, unity and harmony. In social insurance, the principle of solidarity is underpinning the creation of a fund to pay benefits to people who need them. In practice, however, it happens that insured persons undertake to overstate the amount of benefits. Such cases should be negatively assessed in terms of sickness fund functioning, because they increase its operating costs. Such actions are unfair to other participants of the insurance system due to the deliberate taking of unjustified advantages at others' expense. This is contrary to the principle of social solidarity. Therefore, it is necessary to take appropriate actions to minimise the possibility of such situations.

In this context, it is understandable that ZUS undertakes check and inspection activities concerning the amount of the contribution assessment basis, which is the basis for assessing benefits. Failure to react would encourage other insured persons in this type of practice. This would result in the intensification of adverse phenomena. The economic consequences of such a situation would affect all citizens, because the deficit in the fund's resources is covered by state budget subsidies, *i.e.* by taxes paid by the Polish population as a whole.

The law empowers ZUS to take actions to prevent fraudulent practices in benefits overstatement. Checking the legitimacy of the amount of the benefit assessment basis is justified, first of all due to the public nature of the insurance relationship. The insurer's conduct in verifying at the time how the benefit calculated is not contrary to constitutional standards. In the context of solidarity, one can conclude that this approach is in its favour. Minimised are situations that could weaken the operation of this principle as a result of obviously contradictory cases. It cannot be considered that an individual interest in the form of maximising benefits based on the fictitious overstatement of the calculation basis will have a neutral effect on other insured persons. The payment of such a benefit will be at their expense. Failure to act will weaken the insured persons' confidence in the entire insurance system.

However, the ongoing discussions show that it would be reasonable to consider possible amendments to the social insurance law. For example, legal regulations do not directly

63 Cf.: S. Kasprowski, *Wykorzystanie eksploracji danych w planowaniu kontroli płatników składek przez Zakład Ubezpieczeń Społecznych*, "Annales Universitatis Mariae Curie-Skłodowska. Sectio H – Oeconomia" 2016, Vol. L, No. 4, pp. 183–191.

indicate that the Polish social insurance system is based on the principle of solidarity. Whereas such reference can be found in health insurance regulations.

Consideration should also be given to the introduction to the social insurance legislation of a prohibition in exercising one's right in a manner contrary to its socio-economic purpose or to the principles of social coexistence. This would clearly determine ZUS's competence for checking whether there are any abuses in obtaining benefits, but also its powers in the context of optimising the calculation of insurance contributions. Besides, it is necessary to introduce provisions that will discourage actions taken to the detriment of social insurance funds. With reference to the subject of this study, following the solutions functioning in France, Germany or Ireland, a limit on the amount of the benefit paid could be introduced, irrespective of the basis for calculation.

The pace of change is an important aspect of counteracting adverse phenomena. Swift response to emerging pathologies allows one to minimise losses in this respect. Therefore, legal changes in the context of social insurance should be introduced as quickly as possible.

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Problem solidarności między ubezpieczonymi w ubezpieczeniu chorobowym a uzasadnienie kontroli przez ZUS wysokości wynagrodzenia za pracę jako podstawy wymiaru składki i świadczenia

Opracowanie przedstawia zagadnienia związane z prowadzoną przez Zakład Ubezpieczeń Społecznych (ZUS) kontrolą wysokości świadczeń z ubezpieczenia chorobowego w polskim systemie ubezpieczeń społecznych. Celem podejmowanej przez ubezpieczyciela społecznego weryfikacji jest przeciwdziałanie nieuprawnionemu zawyżaniu kwoty świadczeń. Rozpatrywanie problemu zostało przedstawione w perspektywie zasady solidarności, która jest jedną z podstawowych wartości dla ubezpieczeń społecznych. Najważniejsze kwestie dotyczą przedstawienia uzasadnienia dla podejmowania przez ZUS kontroli wysokości podstawy naliczenia świadczeń. Zawarto również charakterystykę zakresu podmiotowego oraz przedmiotowego ubezpieczenia chorobowego, katalogu świadczeń i praktyk zawyżania ich wysokości. Jednym z wniosków jest stwierdzenie, że nieuczciwe zawyżanie świadczeń stoi w sprzeczności z zasadą solidarności społecznej.

Słowa kluczowe: nadużycia, kontrola wysokości zasiłków, ubezpieczenie chorobowe, Zakład Ubezpieczeń Społecznych (ZUS), solidarność