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The right to be unavailable (offline) – is it time for a new principle of employment law?

Summary

This article evaluates the necessity of incorporating provisions regarding the right to be offline into the Polish Labour Code, particularly focusing on the aspect of employees' availability for communication outside of official working hours. The author underscores that the employer's expectation of communication availability from employees outside of designated working hours stems from the employee's duty of care for the welfare of the workplace. However, the current legal framework does not afford employees the necessary protection to counteract this expectation with the right to be unavailable (offline) under the Code. The article presents a proposal for regulating this new law, drawing insights from the 2021 resolution of the European Parliament and the framework agreements established by social partners in 2020 and 2022.

Keywords: the right to be offline, the right to disconnect, the duty of care for workplace welfare, rest, digital tools

1. Introduction

The widespread use of information and communication technologies (ICT) in both personal and professional settings has shaped employers' expectations of employees to be constantly available and connected. Simultaneously, occasional communication from an employee to their employer, colleagues, or clients beyond regular work hours (such as answering calls or sending emails) is not classified as overtime[1] and therefore remains unrecorded and unnoticed in the employer's expenses. The concept of the 'online employee' – always accessible *via* phone or email – is convenient for employers, but carries inher-

[1] J. Tlatlik: *Kwestia regulacji „prawa do odłączenia" w polskim porządku prawnym z perspektywy aktualnych przepisów KP*. "MoPr" 2022, no. 1, p. 18.

ent costs. Maintaining constant online presence induces stress, which over time can result in job burnout, depression, or cognitive disorders[2]. It is evident that the transformations brought about by ICT advancements in the workplace are inevitable, as similar shifts occur across various aspects of our lives. However, the magnitude of these changes necessitates, at the very least, a reassessment of existing labour laws to ensure the protection of workers' health and safety against the detrimental effects of ICT on contemporary work provisions.

The response to this emerging challenge lies in the concept of the right to be offline, termed as the right to disconnect. Various definitions exist for this novel entitlement, but they all share the core principle of granting employees the freedom to abstain from using digital tools[3] for work-related communication outside of their designated working hours without facing adverse repercussions. It is important to recognize that the right to be offline can be interpreted in two primary ways: firstly, as an employee's prerogative to refrain from utilizing digital tools beyond their working hours, and secondly, as an employer's responsibility to ensure that employees are not engaged in work activities with such tools during periods of rest and holidays[4]. In the latter variant, being offline is enforced upon employees through measures implemented by the employer, such as shutting down IT systems at specified times, automatically purging emails received during vacations, or setting the rules for message transmission to ensure they are sent and received within working hours.

[2] B. Surdykowska: *Prawo „do odłączenia" – coraz większe wyzwanie we współczesnym świecie pracy*. "MoPr" 2019, no. 12, p. 7; M. Nowak: *Wypalenie zawodowe a prawo do odpoczynku – wybrane zagadnienia*. "MoPr" 2019, no. 1, p. 16.

[3] As noted by K. Moras-Olaś: *Prawo do bycia offline jako podstawowe prawo pracownika.* "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2021, no. 4, p. 312 in the context of the terminology used in the European Parliament's Resolution of 21 January 2021 containing recommendations to the Commission on the right to be offline (2019/2182(INL)), in the nomenclature of the Polish legislator 'means of electronic communication' or 'means of direct communication at a distance'.

[4] See The Right to Disconnect in the 27 EU Member States, https://cooperante.uni.lodz.pl/wp-content/uploads/2020/08/wpef20019.pdf (accessed 10 March 2024).

2. EU efforts to regulate the right to be offline

While the right of employees to be offline has been addressed and regulated either at the national level in certain countries or within individual companies for several years[5], it has yet to be formalized under the EU law. Nonetheless, efforts have been ongoing in this domain for a considerable period, especially in the context of remote work and the increasing digitalization of employment.

In this context, it is pertinent to highlight the European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL))[6]. In this resolution, the Parliament urged the Commission to evaluate the risks associated with the absence of protections of the employee's right to disconnect and to propose a draft Directive accordingly. It emphasized that although this right is fundamental and closely intertwined with evolving work patterns in the digital era, there is currently no specific EU legislation addressing an employee's entitlement to disconnect from digital tools for work-related purposes outside of official working hours. The draft Directive on the right to disconnect, which was appended to the resolution, in Article 2 defines "disconnect" as "not to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working time". This proposed legislation encompasses two key aspects: the avoidance of work-related activities outside of designated working hours and the avoidance of digital communication during that time. Furthermore, the Parliament proposed that it would be the responsibility of employers to ensure that employees can exercise the right to disconnect, with Member States overseeing fair, lawful, and transparent implementation. Specific elements pertinent to employers' implementation of this right were identified, including establishing systems for measuring daily working hours, facilitating the practical aspects of disconnecting from digital tools, conducting health and safety assessments related to the right to be offline, establishing criteria for any derogation from this requirement, and determining compensation for work performed outside of official hours in such instances. The draft Directive also stipulated that employers

[5] B. Surdykowska: *Prawo „do odłączenia"…*, pp. 7 et seq.

[6] https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A52021IP0021 (accessed 6 March 2024).

must provide written notification to employees regarding the right to disconnect and its implementation methods, ensuring that exercising this right does not lead to discrimination against any employee.

The right to be offline was a subject of discussion among social partners as well. The European Social Partners Framework Agreement on Digitisation[7], concluded on 22 June 2020, addresses various challenges arising from the use of digital tools and technologies in the workplace, particularly concerning the delineation between work and personal time. To mitigate the adverse effects of ICT use on health and safety at work, the agreement proposes several measures. These include raising awareness about the risks associated with excessive digital engagement, establishing that employees are not obligated to be contactable outside of their official working hours, and safeguarding workers from penalties ("no-blame culture") for being out of contact. Furthermore, the agreement acknowledges that addressing the issue of excessive contact outside working hours requires organizational changes within companies. To this end, proposed measures include management's commitment to fostering a culture that discourages contact outside of official work hours, restructuring work processes to ensure that achieving of organizational objectives does not necessitate contact with employees outside working hours, and fostering regular communication between management and workers regarding workload and work processes.

Another significant agreement concerning the right to be offline was reached on 8 October 2022 by the Trade Unions' National and European Administration Delegation (TUNED) and the European Public Administration Employers (Eupae). European framework agreement of European social dialogue committee for central government administrations (SDC-CGA) on digitalization[8], targeting workers and civil servants who have an employment or statutory relationship in central or federal governments and use digital technology to fulfil their work, explicitly affirms an employee's entitlement to disconnect. This right encompasses the freedom to disconnect from digital tools outside of official working hours, without facing repercussions for failing to respond

[7] https://www.etuc.org/system/files/document/file2020-06/Final%2022%2006%2020_Agreement%20on%20Digitalisation%202020.pdf (accessed 9 March 2024).

[8] https://www.epsu.org/sites/default/files/article/files/SDC%20CGA%20Agreement%20on%20digitalisation%20-%20EN%20-%20Signed.pdf (accessed 11 March 2024).

to emails, phone calls, or other forms of communication. The agreement emphasizes that the effectiveness of this right must be ensured through agreements with trade unions and adherence to regulations governing working hours, rest time and breaks, annual leave, and the promotion of work–life balance. Similar to the 2020 Framework Agreement and the 2021 European Parliament resolution, the employer is obligated to inform employees of this right. Exceptions to the right to be offline would apply only in extraordinary circumstances, determined in collaboration with trade unions and based on transparent, well-defined, and objective criteria pertaining to specific activities during particular periods.

Efforts to establish a broader framework agreement covering a wider spectrum of workers were underway as well. In the work program "Remote working and the right to disconnect", announced in June 2022, the European Trade Union Confederation (ETUC) collaborated with three employers' organizations: Business Europe, SGI Europe, and SMEunited. Their objective between 2022 and 2024 included updating the 2002 telework agreement with the aim of adopting it in the form of a directive. This initiative was intended to encompass the regulation of the right to be offline, among other aspects[9]. Regrettably, negotiations in this regard encountered obstacles, leading to a breakdown in November 2023. Consequently, the ETUC urged the European Commission to initiate work on a directive addressing both remote working and the right to disconnect[10].

3. The need to regulate the right to be offline in Poland

Given the circumstances outlined above, the formulation of an EU directive addressing the right to be offline appears imminent. However, from the perspective of the Polish labour law regulation, it is prudent to take legislative action independently of awaiting a directive. Indeed, the necessity for positive regulation in this regard has been highlighted in literature for several years[11].

[9] https://www.businesseurope.eu/publications/european-unions-and-employers-sign-historic-deal (accessed 11 March 2024).

[10] https://www.etuc.org/en/pressrelease/telework-legislative-action-needed-eu-commission (accessed 8 March 2024).

[11] For example K. Moras-Olaś: *Prawo do bycia offline…*, p. 320; J. Tlatlik: *Kwestia regulacji…*, p. 22 or L. Mitrus: *Pracownicze prawo do bycia offline*. "MoPr" 2022, no. 3, p. 21.

However, the Labour Law Department of the Ministry of Family and Social Policy presents a contrasting viewpoint[12]. They suggest that the existing regulations pertaining to working time, particularly those concerning overtime work, on-call duty, and daily and weekly rest, adequately safeguard the employee's right to be offline. According to their perspective, since employees are not at the employer's disposal outside of their designated working hours, overtime work, or on-call duty, they are not obligated to remain in contact with the employer to perform their duties. A similar stance is taken by some scholars, who emphasize that the issue lies not in the absence of regulations granting employees the right to disconnect, but in the insufficient enforcement of existing laws. Consequently, they propose that the solution is not to amend the law but to raise awareness of its provisions and potentially increase penalties for non-compliance[13].

It is challenging to align with such reasoning. While it may be feasible to infer certain aspects of an employee's right to be offline from existing regulations, this does not negate the significance, or even the imperative, of explicitly addressing this matter in the Labour Code. The existing regulations fall short in realistically guaranteeing an employee's right to remain undisturbed by the employer outside of official working hours.

4. The right to be offline and the regulation of the right to rest

In most studies examining the implementation of the right to be offline within the Polish legal framework, it is often associated with the right to rest as outlined in Article 14 of the Polish Labour Code[14]. This connection is logical, as the aspect of the right to be offline that

[12] Letter of 19 January 2023 (DPP-III.055.1.2023.ZR) responding to the petition of 3 January 2023 on the introduction in Poland of a solution guaranteeing the right to be offline at the statutory level, https://www.gov.pl/attachment/a1607833-146f-421f-bccb-7a2beb000320 (accessed 25 February 2024).

[13] K. Walczak, M. Chakowski: *Rozwój nowoczesnych technologii w zatrudnieniu a konieczność wprowadzenia odrębnej instytucji prawnej, jaką jest prawo do bycia offline*. "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2024, no. 3, p. 219.

[14] J. Tlatlik: *Kwestia regulacji…*, p. 18; L. Mitrus: *Pracownicze prawo…*, p. 21 even suggests to include this institution as an element of the right to rest – in addition to the provisions on working time, days off and holidays.

pertains to refraining from work-related tasks outside of official working hours naturally aligns with the right to daily, weekly, and holiday rest (vacation leave). Since the function of the right to rest is not solely about taking literal breaks from work, but also about providing employees with "a space free from work, which enables the employee to fulfil himself socially, including through rest"[15], rest periods should be regarded as a zone of privacy for employees where employer interference is not permissible[16].

However, the regulations ensuring rest for employees primarily focus on its temporal aspect (such as the number of days or hours), rather than its qualitative aspect. This makes them insufficient in addressing the risks associated with the widespread use of digital tools and technologies. A breach of these regulations would typically be seen as a failure to provide the employee with the required rest periods, rather than a disruption of rest in a broader sense. Although the regulations stipulate that an employee's rest should be uninterrupted, traditionally this concept has been interpreted to mean that rest time should not be interrupted by work, ensuring its continuity[17]. It has not typically encompassed interruptions of rest caused by contact from the employer. However, there has been a shift in this understanding due to discussions surrounding the right to be offline[18].

[15] A. Sobczyk: *Commentary to Article 14 of the Labour Code*. In: *Kodeks pracy. Komentarz*. Ed. A. Sobczyk. Warszawa 2023, Legalis.

[16] Z. Góral: *Zasada prawa do wypoczynku*. In: *System Prawa Pracy. Tom I. Część ogólna*. Ed. K. W. Baran. Warszawa 2017, Lex.

[17] So, for example, in the context of annual leave Ł. Pisarczyk in: *Kodeks pracy. Komentarz*. Ed. L. Florek. Warszawa 2017, art. 152., Lex, or A. Kosut in: *Kodeks Pracy. Komentarz. Tom II. Art. 94-304(5)*. Ed. K. W. Baran. Warszawa 2022, Lex, while indicating the number of exceptions to this rule provided for in the Labour Code.

[18] For example, M. Nowak: *Zasada urlopu nieprzerwanego.* In: *System Prawa pracy. Tom III. Indywidualne prawo pracy. Część szczegółowa*. Eds. K. W. Baran, M. Gersdorf, K. Rączka. Warszawa 2021, Lex, recognizes that it may be a violation of the principle of uninterrupted leave to hold business talks with an employee during his/her leave of absence, unless it is sporadic and short-lived. On the other hand, L. Mitrus: *Pracownicze prawo*…, p. 20 notes that, from the perspective of the right to be offline, an injunction not to be contacted by superiors during leave can also be derived from this principle.

5. The problem of the employer's right to recall an employee from holiday

The possibility of undisturbed use of vacation leave to rejuvenate both physically and mentally, derived from the purpose of leave, is intended to be ensured by the concept of holiday peace[19] or through the right to undisturbed rest[20]. The employer's right to recall an employee from holiday, as outlined in Article 167 of the Labour Code, significantly curtails the meaningful scope of holiday peace. While cancellation of holiday leave is permissible only if the employee's presence at the workplace is deemed necessary due to unforeseen circumstances at the time the leave commenced, the determination of required presence or unforeseen circumstances is subjective. Consequently, an employee recalled from leave is compelled to return to work regardless of their own assessment of the situation. Furthermore, according to the Labour Code, a recall from leave does not necessitate extraordinary circumstances; it is sufficient that the circumstances are unforeseen. This stands in stark contrast to the criteria outlined by the European Parliament or social partners for derogations from the right to be offline.

The employer's authority to recall an employee on leave entails certain implications, as the employer must possess the means to contact the employee who is on leave in order to effectively exercise this right. This necessitates access to the employee's private contact information, such as a personal mobile phone number or email address[21]. However, the legality of requesting such data from the employee remains unregulated. The potential obligation of the employee to provide this information is occasionally justified by the necessity to enable the employer to recall the employee from leave[22] or by the responsibility to care for

[19] A. Bigaj: *Prawo do urlopu wypoczynkowego*. Warszawa 2015, Lex, although the author bases this holiday peace of mind on the guarantee of payment of holiday pay, protection against termination and grounds for recall from leave, without addressing the issue of contact from the employer.

[20] K. Płaczek: *Prawo pracownika do niezakłóconego wypoczynku*. "MoPr" 2017, no. 7, pp. 357 et seq.

[21] Employers frequently retain such data from the recruitment phase, as it is not always deleted after the employment relationship is established. However, there is no legal foundation for processing these data during the employment phase, as emphasized by J. Tlatlik: *Kwestia regulacji…*, p. 22, referring to the stance articulated by the President of the Office for Personal Data Protection of 17 August 2020.

[22] K. Płaczek: *Prawo pracownika…*, p. 359.

the interests of the workplace (Article 100 par. 2 point 4 of the Labour Code). In the latter scenario, this obligation may be restricted to employees occupying positions with specific rights or qualifications[23].

Current regulations do not offer a definitive answer regarding the possibility of compelling an employee, formally or informally (through psychological pressure), to be communicatively available to the employer (e.g., *via* telephone or email) during their holiday. It is rightfully highlighted that such a scenario would impede the employee's ability to genuinely enjoy their holiday, essentially imposing a form of readiness to accept work orders, akin to being on-call at their place of residence[24]. However, it is challenging to expect ordinary employees to understand that they have the right, without risking negative consequences, to refrain from answering workplace calls while on leave, despite explicit expectations from the employer. Such a right is not explicitly derived from regulations but must be inferred from the purpose of taking leave. The absence of regulation in this regard may also lead to unreasonable expectations from the employer regarding the extent of the employee's obligation to care for the welfare of the workplace while on leave.

Lastly, there is the question of whether Article 167 of the Labour Code can be applied in the cases where, despite unforeseen circumstances arising during leave that the employer deems justified ordering the employee to work, the employee's physical presence at the workplace is not necessary[25]. This scenario is becoming increasingly relevant in professions where remote work has proven to be a viable

[23] So, for example, A. Kosut in: *Kodeks pracy*…, art. 167.

[24] So, for example, A. Kosut: *Kodeks pracy. Komentarz*…; M. Nowak: *Zasada urlopu nieprzerwanego....*, or K. Płaczek: *Prawo pracownika*…, p. 358. So, too, the Supreme Court in the justification of the judgment of 23 March 2017, I PK 130/16, OSNP 2018, no. 5, pos. 57, Lex, emphasizing that the employer's obligation of the employee to remain on standby for work or forcing the employee to provide work during the leave of absence constitutes a denial of the essence of the leave of absence.

[25] K. Płaczek: *Prawo pracownika*…, p. 360 against the admissibility of the application of the institution in this respect; A. Kosut: *Kodeks Pracy. Komentarz*…, noting the inadmissibility of the application of this institution due to the literal wording of Article 167 of the Labour Code, points, however, to the desirability of a broader understanding of the notion of "establishment", by which, in the era of remote work, it could be understood simply as the place where the employee performs his/her duty of work, suggesting an appropriate modification of Article 167 of the Labour Code by the legislator.

method of organizing tasks. With employees equipped with laptops and internet access, they can potentially perform certain duties from anywhere, including during their holidays. If it were to be accepted that an employer could effectively "freeze" an employee's holiday for the few hours required to complete a task remotely, the risk of violating the employee's right to uninterrupted holiday rest would significantly escalate, because it essentially comes at no cost to the employer, while greatly intrudes upon the employee's intended rest period.

6. Daily and weekly rest, on-call duty, and the right to be offline

The considerations outlined above are applicable analogously to the issue of daily (11 hours) and weekly (35 hours) rest periods. It is important to note that while employees are entitled to daily and weekly rest, the employer retains the right to infringe upon this rest and summon the employee to work in cases of emergency actions necessary to safeguard human life or health, protect property or the environment, or rectify an accident. As a result, pertinent questions arise regarding whether, in light of such employer rights, employees may be compelled to provide their employer with contact information enabling communication during rest periods (such as a personal phone number), and whether the employer may anticipate the employee's availability for communication during these periods of rest.

Linked to the preservation of daily and weekly rest is the concept of the employee's actual on-call duty. Article 151(5) of the Labour Code permits employers to require employees to remain on call outside regular working hours to fulfill their contractual duties. However, the legislature mandates that such on-call duty must not encroach upon the employee's entitlement to daily and weekly rest. To circumvent this obligation, employers often refrain from using the term "on-call" and instead designate the employee's obligation as "availability time", "standby time", or similar[26]. Consequently, while the employee may not formally be on-call, they are effectively on standby for work, impacting the quality of their rest.

[26] G. Orłowski: *Pod telefonem*. "MoPr" 2018, no. 1, p. 5.

7. The issue of employee communication availability outside working hours

The regulations cited above primarily address the permissible interruption of an employee's rest with a work order, addressing only one facet of the right to be offline. They do not directly tackle the question of an employee's right to abstain from participating in communication *via* digital tools regarding work-related matters after working hours, particularly if such communication does not pertain to immediate work requirements. However, the fulfillment of the purpose of daily and weekly rest necessitates that the employee's rejuvenation is not impeded by employer or coworker communication *via* telephone or email.

Further challenges in this area arise in the context of task-based working time systems (Article 140 of the Polish Labour Code). In this system, the employer and employee agree only on the time necessary to complete assigned tasks, taking into account working time norms. The specific timing of task completion is generally determined by the employee, who schedules their periods of work and daily and weekly rest. The employer is not required to plan the employee's work schedule or record their actual working hours. However, awareness of the periods during which the employee remains at the employer's disposal and is communicatively available is crucial to enabling the employee to genuinely remain offline outside the time they have allocated for task completion. Additionally, the draft Directive on the right to disconnect imposes an obligation on Member States to ensure that employers introduce daily working time measurement systems for all employees. This may lead to changes in how the task-based working time system is regulated in the Labour Code, requiring amendments not only to Article 149(2)[27] but also to Article 129(4)(2) (e.g., by introducing an obligation for the employee to inform the employer about their planned work schedule).

It is essential to recognize that the issue of non-interference during non-working hours may extend to other periods when the employee is not actively working, such as during illness, leaves related to parenthood, or other personal circumstances. Although the employer cannot instruct the employee to perform work during these periods, it re-

[27] As indicated by K. Walczak and M. Chakowski in: *Rozwój nowoczesnych technologii w zatrudnieniu…*, p. 215.

mains unclear whether the employer can expect the employee to be on call, potentially deriving such an obligation from the employee's duty of care for the welfare of the workplace. In practice, it is not uncommon for employees on sick leave or parental leave to feel compelled to answer business calls and check emails, driven by a sense of responsibility for projects, tasks, or their team. Moreover, this engagement in communication is often not essential; it may simply be more convenient for the employer than other means of obtaining desired information. Ensuring an employee's right to be offline transcends mere considerations of working time or leisure. Instead, it seeks to establish a work–life balance that respects employees' personal time and well-being.

Finally, employees often struggle to resist the expectations of excessive communication accessibility imposed by employers due to a lack of awareness regarding their entitlements and the health consequences of constant accessibility. This lack of awareness exists on both sides of the employment relationship. This issue becomes increasingly critical, considering the rising prevalence of occupational burnout, a condition resulting from prolonged stress and the inability to disconnect from work. In 2021, the World Health Organization recognized occupational burnout as a work-related condition through the introduction of the new ICD-11 classification of diseases[28]. There exists a clear correlation between the requirement for out-of-hours communication accessibility and the long-term stress induced by work. This manner of organizing work should thus be viewed within the context of the employer's obligation to provide employees with safe and healthy working conditions, which is currently not adequately addressed.

8. The purpose of introducing a new labour law principle

As correctly highlighted by Kinga Moras-Olaś, the existence of regulations regarding the right to rest or safe working conditions has not effectively prevented the emergence of the issue of the constantly available employee. This indicates that these regulations are inadequate in addressing the challenges posed by the evolving working environment. The advancement of work facilitated by digital tools has introduced new risks and hazards, necessitating the establishment

[28] https://icd.who.int/browse/2024-01/mms/en#129180281 (accessed 11 March 2024).

of a new legal institution – namely, the right to be offline[29]. It is imperative to provide this right with a clear legal foundation, especially considering that current laws lack a definitive counterbalance to the employee's duty of care for the welfare of the workplace. This duty may entail specific obligations for the employee even outside of working hours. Therefore, there is a pressing need for robust legislation that empowers employees to safeguard their own welfare, health, rest, and well-being outside of working hours without fear of repercussions.

To emphasize the significance of the right to disconnect, recognized by the European Parliament as a fundamental right, I believe it is fitting to establish it as a new fundamental principle of labour law, separate from the rights to rest or safe and healthy working conditions. Despite the critical stance of legal doctrine towards formulating new principles of labour law[30], the relevance of the right to be offline in today's employment landscape appears to be just as crucial as principles such as equal treatment, fair pay, or safe working conditions. By enshrining the right to be offline as a normative principle of labour law[31], its importance is elevated, particularly in the event of potential conflicts between norms or in fostering awareness among parties in the employment relationship. Moreover, principles of labour law serve as interpretative guides for the application of other labour law provisions. This aspect is significant in imparting new meaning to existing regulations governing e.g. working time, annual leave, or on-call duty through interpretation.

9. Proposal for regulating the right to be offline in the Polish Labour Code

Regarding the terminology for regulating this new institution, the phrase "right to be offline" ("prawo do bycia offline") has gained significant recognition and clarity within the legal-employee context over recent years. It conveys a clear understanding of its scope and

[29] K. Moras-Olaś: *Prawo do bycia offline…*, p. 316.

[30] E. Maniewska: *Obowiązki informacyjne pracodawcy wobec pracownika w umownych stosunku pracy*. "LEX" 2013, p. 250 with the literature cited therein.

[31] In the meaning given by T. Zieliński: *Zarys wykładu prawa pracy. Część I Ogólna.* Katowice 1977, pp. 196–205, i.e. "certain general rules of conduct (norms) of major importance for the regulation of social relations".

meaning compared to the phrase "right to be disconnected" ("prawo do bycia odłączonym"), which may raise more ambiguity[32]. However, I believe the essence of this right is best captured by the phrase "right to be unavailable" ("prawo do bycia nieosiągalnym") as denoted by the German term "Recht auf Nichterreichtbarkeit". This terminology highlights the employee's lack of required or expected availability to the employer outside defined working hours, shifting focus from mere access or lack of access to the internet or digital technologies. Therefore, considering this perspective, the new legal principle could be formulated as follows: "The employee has the right to be unreachable by digital tools outside of working hours. This right encompasses both refraining from performing work during this period and abstaining from engaging in work-related communications".

I concur with the notion that it is advisable to construct a definition of the new right without elements that imply the employee's willingness or openness to be available after working hours[33]. This approach is necessary, because if the infringement of the right to be offline were contingent solely on unwanted contact by the employee, it would pose challenges in verifying the employee's openness to contact and the credibility of any declaration of voluntariness. Employees may feel pressured to declare openness to contact, succumbing to the prevailing culture of accessibility in the workplace, without being fully aware of the associated risks[34]. Therefore, it is crucial to formulate the defini-

[32] *Disconnection* (*odłączenie*), according to the definition of the Dictionary of Polish Language, https://sjp.pwn.pl/doroszewski/odlaczenie;5463870.html (accessed 7 March 2024), is the noun form of the verb *to disconnect* (*odłączyć*), which means "to separate that which was connected to something", "to interrupt the inflow of something, to exclude someone from some group". Literally, therefore, it refers to the issue of a technical, physical interruption of a connection (here between a worker and his job), rather than issues of communicative engagement through digital tools.

[33] I refer to the perspective proposed by J. Tlatlik: *Kwestia regulacji…*, p. 22, regarding the understanding of the right to be offline as a protection against the employee's unwanted involvement in professional matters outside of working hours.

[34] The issue is highlighted by the Eurofund research report on working conditions and sustainable work, *Right to Disconnect: Implementation and Impact at Company Level*, https://www.eurofound.europa.eu/en/publications/2023/right-disconnect-implementation-and-impact-company-level (accessed 11 March 2024), that reveals that even in workplaces where regulations on the right to be offline have been adopted, this has been insufficient to change the culture of expecting or promoting a worker's continued availability outside working hours and to change workers' awareness of the risks

tion of the right to be offline in a manner that focuses on protecting the employee's boundaries and ensuring a healthy work–life balance, irrespective of their willingness to be reachable outside of working hours.

Despite formulating the right to be offline as a principle of labour law, it would require further concretization within the Labour Code. Both the European Parliament and social partners have proposed assigning employers the duty to provide employees with the right to be unavailable. General regulations would establish the minimum scope of intra-company regulation. Therefore, implementing the right to be offline at the company level should be addressed in the regulation of work regulations, as it is closely tied to the organization of work[35]. For employers lacking formalized work regulations due to the size, provisions can be outlined in a separate document akin to an announcement on working time schedules. These documents should primarily establish communication guidelines using modern technologies outside working hours and define exceptional situations entitling the employer to contact employees[36]. However, such exceptional situations should be subject to agreement with company trade unions, employees' representatives, or at least notification to the district labour inspector. It is crucial to ensure that derogations from being offline outside working hours are exceptional and verifiable by objective criteria. The employer's obligation to inform employees about the new right could be fulfilled within the framework of providing information on employment conditions, as stipulated in Article 29(3) of the Labour Code, which pertains to working conditions. This ensures that employees are aware of their rights and obligations regarding the right to be offline.

I believe it is expedient to obligate the employer to prevent violations of the right to be offline, similar to the responsibilities in place for preventing bullying. On the one hand, this involves ensuring the effective implementation of the regulation on the right to be offline in the workplace, with measures such as employee training to raise awareness of its existence and importance, as well as familiarization with procedures for disconnecting digital tools or making contact in exceptional

to workers' health and well-being associated with this very availability. Importantly, the studies whose results are described in the report were also conducted in countries where regulations at a national level had been in place for several years.

[35] So also L. Mitrus: *Pracownicze prawo…*, p. 21; J. Tlatlik: *Kwestia regulacji…*, pp. 22–23.

[36] J. Tlatlik: *Kwestia regulacji…*

cases. This responsibility shall extend beyond merely implementing policies or regulations; it also involves organizing work in a manner that minimizes the need for contact outside of working hours, except in truly exceptional circumstances. However, if an employee chooses not to exercise their right to be offline (e.g. by browsing business emails or completing tasks *via* digital tools during their free time) despite solutions implemented at the company level, the employer would not be held liable.

10. Summary

The necessity of explicitly regulating an employee's right to be offline (unavailable) within the Labour Code should be unequivocal. Current labour law provisions are not only marked by ambiguity but also fail to afford adequate protection to employees who may face employer expectations of constant communication availability and preparedness to respond to electronic communications beyond official working hours, based on the employer's duty of care for workplace welfare. Establishing a clear legislative framework for the right to be offline, devoid of dependence on the interpretation of existing regulations, is imperative to provide employees with genuine autonomy to disconnect without facing adverse repercussions. A well-defined and codified right to be offline would empower employees to effectively exercise their entitlement to undisturbed and uninterrupted rest. Furthermore, regulations governing communication *via* modern technologies outside of official working hours would enable employees to better realize their rights to safe and healthy working conditions and to achieve a satisfactory work–life balance.

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Prawo do bycia nieosiągalnym (offline) – czy nadszedł czas na nową zasadę prawa pracy?

Streszczenie

Przedmiotem artykułu jest ocena potrzeby wprowadzenia do polskiego Kodeksu pracy regulacji prawa do bycia offline, szczególnie w aspekcie dostępności pracownika dla komunikacji poza czasem pracy. Autorka zauważa, że oczekiwanie przez pracodawcę dostępności komunikacyjnej pracownika poza czasem pracy oparte jest na obowiązku dbałości o dobro zakładu pracy, któremu pracownik obecnie nie może się przeciwstawić, wynikającego z ustawy prawa do bycia nieosiągalnym (offline). W artykule autorka przedstawia propozycję sposobu uregulowania nowego prawa, uwzględniając treść rezolucji Parlamentu Europejskiego z 2021 roku oraz porozumień ramowych zawartych przez partnerów społecznych w 2020 oraz 2022 roku.

Słowa kluczowe: prawo do bycia offline, prawo do bycia odłączonym, obowiązek dbałości o dobro zakładu pracy, wypoczynek, narzędzia cyfrowe