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The right to be "offline" and rest in the context of a task-based working time system

Summary

The authors present how the directive on the right to be offline will be formulated by the European Parliament and the Council. They analyse the subject and scope of minimum requirements enabling employees to use digital tools in professional matters without disturbing the balance between offline work and rest. They discuss means of implementing the right to be offline and provide protection against unfavourable treatment of leisure by employers. The authors focus on the analysis of the right to be offline in the context of a task-based working time system, including practical problems of employing academic staff.

Keywords: working time, the right to "disconnect", the right to be offline, legal protection, equal treatment, working conditions, rest, academic employee

1. Introduction

The resolution of the European Parliament (EP) of 21 January 2021 contains recommendations to the EU Commission on the right to be offline[1]. The recommendation set out in Article 2(1) of the annex to the draft Directive of the European Parliament and the Council of the European Union (EU) is a continuation of earlier initiatives and is addressed to EU Member States, the social partners of these countries, as well as to employers and employees. It provides guidance for these entities

[1] European Parliament resolution of 21 January 2021 containing recommendations to the Commission on the right to be offline (2019/2181(INL, 2021/C 456/15)), hereinafter referred to as: resolution.

and professional groups, encouraging them to actively promote and uphold a work–rest balance within EU employment relations. Both the resolution and the draft directive emphasise the consistent need to incorporate into EU and national employment systems safeguards against overburdening employees with work, engaging them outside of agreed working hours to perform tasks directly or indirectly related to their employment, and requiring the use of digital tools during designated rest periods. The legal documents included in the resolution constitute an extensive continuation of the EU normative acts – directives[2], adopted and introduced into the EU labour law to focus on the phenomenon of universal compliance with the safety and health of employees. The aim is to grant employees the right to disconnect from the employer, preventing situations in which they are expected to be "constantly reachable", "always available", and "constantly ready" for employer[3]. In terms of the resolution and the right to be offline, working time means any period during which the employee works, is at the employer's disposal and carries out his activities or duties, in accordance with national law or practice (as indicated in Directive 2003/ 88/EC of 4 November 2003 concerning certain aspects of the organisation of working time).

The recently observed disposition and constant availability, particularly during the global crisis caused by COVID-19, revealed that employees working from home were often subjected by employers or colleagues to workloads that doubled the standard 48-hour weekly limit established in the EU. According to Eurofound research, more than one-third of EU employees started working from home during the lockdown caused by COVID-19. In turn, 27% of people working from home confirm that they work in their free time to cope with their workload[4]. In Poland, there is legal awareness of the defects of legal regulations or the lack of them in a comprehensive manner. For example, interpellation no. 2847 was submitted to the Minister of Family and

[2] 89/391/EEC, OJ L 183, 29/06/1989, p. 1; 91/83/EEC, OJ L 206, 29/07/1991, p. 19; 2003/88/EC OJ L 299, 18/11/2003, p. 9; 2019/1152, OJ L, p. 186, 12/07/2019, p. 105; 2019/1158 of 20/06/2019, OJ UL 188 of 12/07/2019, repealing Directive 2010/18/EU, OJ L 188, 12/07/2019, p. 79.

[3] M. Kurzynoga: *Proposals of the European Parliament to Regulate Employees' Right to "Disconnect"*. "PiZS: Work and Social Security (E&SS)" 2022, no. 5, pp. 11 et seq.

[4] K. Piwowarska: *Employee's Right to Be Offline*. CH Beck, Warsaw 2021.

Social Policy on 18 November 2021, which emphasised that, according to Eurofund research, Poles are one of the longest-working nations. Poles, next to Hungarians, work as many as 1,848 hours a year and this is the highest result in the European Union. Poland has been repeatedly warned by the European Commission about the need to comply with regulations on overtime and to ensure the enforcement of the right to be offline.

The task-based working time system has further exacerbated this phenomenon. This system may be applied in cases justified by the nature of the work, its organisation, or the place where it is performed. Of course, the employer, after consultation with the employee, determines the time necessary to perform the assigned tasks, taking into account the working time resulting from the standards specified in labour law and other acts. However, due to its flexibility and atypical nature, it gives employees the opportunity to shape their working time and perform activities and tasks within it in such a way that employees often – consciously but also unconsciously – violate their right to daily and weekly rest. This then raises the problem of liability on the part of the employer, who is obliged to ensure safe and hygienic working conditions, including the right to rest. It has been found that the daily requirement of 11 consecutive hours of rest from work was not observed by one-third of employees working outside office settings[5]. For this reason, among others, the European Parliament rightly concluded that employers should not require employees to continue working beyond their established working hours, nor expect them to remain available after the end of those hours.

Employers should also refrain from fostering expectations that employees remain constantly available for work. In this respect, it seems to be particularly difficult for those employees who work during task-oriented working hours. The best example of this are scientific workers – who are often in a state of constant alertness – contemplating solutions to research problems (frequently at night – during the time theoretically intended for rest). The same applies to telephone devices or other means of electronic communication and other digital tools indicated by the employer. Of course, in this context, within the

[5] Research Report of the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND).

framework of the task-oriented working time arrangements for employees, including teaching and research workers, another problem arises. An instant messenger such as Microsoft Teams, widely used at universities to conduct remote classes and communicate with students and other staff members, often continues to generate notifications outside designated working hours – particularly if it is not set to "invisible" or "out of office" mode. After all, once the working day has ended, or in other situations where the employer has previously established contact, it cannot be assumed that the employee will remain at the employer's disposal during their free time. However, some employees themselves may be reluctant to go offline or "disconnect", as they prefer to stay constantly up to date with work matters.

Employees often have the habit of constantly refreshing their emails in order to check whether there are any new tasks to be performed. Sometimes, unaware of their faulty behaviour, they contribute to violating the law and to their gradual burnout due to not respecting the right to work–life balance. This right to be offline is the basis for balance between professional and personal life. According to WHO, over 300 million people in the world suffer from depression and typical work-related mental disorders, and 38.2% of the EU population is diagnosed with mental disorders every year. One of the reasons for this state of affairs may be the so-called "non-detachment", i.e. constant disposition[6]. The literature on the subject emphasises the importance of rights to rest for academic employees (especially women), especially since: "[...] constantly changing working conditions, including those related to the development of new technologies or intensification of work control, force a remodeling of the current work policy, life balance, which cannot be reduced only to the choice between professional and private life, putting these two spheres of life in a competitive position"[7].

[6] K. Piwowarska: *Employee's Right to Be Offline*...

[7] See E. Kumor-Jezierska, J. Czerniak-Swędzioł: *Women's Academic Careers, or Contemporary Challenges in Higher Education*. "Roczniki Administracji i Prawa" 2022, vol. 3, pp. 325–343; J. Czerniak-Swędzioł, E. Kumor-Jezierska, P. Sekuła, E. Krzaklewska, M. Warat: *Academic Teacher's Work in the Face of Contemporary Challenges – Interdisciplinary Considerations*. "PiZS: Work and Social Security" 2021, no. 10, pp. 3–13.

2. The right to be offline

Considering the above, paradoxically it can be said that COVID-19 has contributed to improving the work–life balance of professionally active people. However, COVID-19 also promoted greater flexibility in organising and performing professional duties by employees. Employers should therefore monitor the performance of work by their employees. Even the most advanced digital tools, when used by individuals who are willing but lack sufficient proficiency, may not enable them to perform their duties effectively. This applies not only to employees but also to self-employed individuals. In particular, under conditions characteristic of the modern, post-Fourth Industrial Revolution and the era of new technologies, such situations may cause significant stress among those performing tasks or activities assigned by the employer. COVID-19 did not release employees from the obligation to submit to the employer in performing work at the place and time indicated by the employer. Despite this, in many industries (especially the IT industry), where work is often performed entirely remotely, often by foreigners from outside the EU, arbitrary "disconnection" and even widespread use of the right to be offline takes place. Moreover, such employees are often literally offline, as they may be located in a different country than the one from which they are expected to work. This is particularly problematic for an employer who has signed an agreement with a given employee to the employment contract on the provision of remote work, which includes obligations to guarantee health and safety at a given location. What is more, matters become more complicated as employees often need to have visas, work permits from another country or A1 certificates. Remote employees who go abroad without applying appropriate procedures and consent from their superiors violate internal company regulations and expose the employer to liability, especially if, for example, an accident at work or other events occur at the "alleged" place of work. Of course, such practices usually end with the employees being held accountable for the order, and in the worst cases, the termination of the employment contract without notice due to a serious violation of basic employee duties.

As can be seen, there are pros and cons of remote work in the context of the right to be offline, hence it is surprising that the EU legislator has not yet introduced the right to be offline into the EU labour law system,

comprehensively regulating the problems related to it. However, the EU legislator drew the attention of labour-relation parties and lawyers to the fact that the right to be offline is limited to the time and place at which the employee performs work for the employer who commissioned it. So the right to be offline should always apply when the employee had grounds to refuse to perform the work assigned to him by the employer. In the case of an order or proposal to perform any other duties that the employee is to perform in his free time, this justifies the refusal of the offer presented to him by the employer. When using the right to be offline, the employee does not have to explain to the employer why he rejects his offer. The employee is under no obligation to respond to emails, phone calls, or use any other digital tools for communication during their rest period. Their refusal to engage during this time does not entitle the employer to insist on the performance of tasks outside the agreed working hours. No employer may require his employees to perform any activities related to their work other than during previously agreed working hours. Therefore, the employer has no lawful legal basis by which he could impose a penalty on the employee for refusing to perform work that was not previously agreed upon. *De lega lata*, the legal status is not precise to the extent that the EU legislator presented recommendations regarding the content of the proposed draft directive on being offline in the annex to the Resolution. On the basis of the above-mentioned former directives, it is possible to find situations in which the Court of Justice of the European Union (CJEU) applied the previously mentioned "right to opt out", which was not regulated in the EU legal system (The right to disconnect)[8]. In the judgments listed below regarding employee on-call duties, readiness to work on call and the establishment of a system enabling the measurement of daily working time, the CJEU ruled as follows:

A. In the judgment issued on 5 October 2004 (Grand Chamber of the CJEU), Pfeiffer et al.[9] the following was ruled:
   1) Article 18(1) 1 letter (b) (i) first indent of Directive 93/104 must be interpreted as requiring the express and free will consent given by each worker individually in order to exceed the maximum 48-hour weekly working time referred to in Article 6 of the direc-

[8] PE 642.847, July 2020, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html (accessed: 22 January 2024).

[9] C-397/01 – C-403/01, ECLI:C2004:584.

tive, was valid. Therefore, it is not sufficient for the employment contract to refer only to a collective agreement permitting such an overreach.

2) Article 6(1) of Directive 93/104 must be interpreted as meaning that, in circumstances such as those in the main proceedings, that provision constitutes an obstacle to legislation which has the effect, as regards periods of on-call duty ("Arbeitsbereitschaft"), performed by rescuers in the context of the service emergency medical services of an organisation such as Deutsches Rotes Kreuz – authorisation to exceed the maximum weekly working time of 48 hours established by this provision. The provision in question meets all the conditions to have direct effect.

When considering a dispute concerning the criteria for determining working time, including on-call duty and readiness to work on call, and the importance of rest, the national court is required to take into account all the rules of national law and interpret them, as far as possible, in the light of the wording and purpose of that directive to achieve a solution consistent with the goal set by it. The court should therefore do everything within its competence to prevent exceeding the maximum weekly working time, which under Article 6 section 2 of Directive 93/104 is 48 hours.

B. In the Commission/United Kingdom case[10], in a judgment delivered on 7 September 2006, the CJEU ruled that by applying to employees whose working time is not measured and by failing to take the measures necessary to guarantee employees' right to daily and weekly rest, the United Kingdom of Great Britain and Northern Ireland has failed to fulfill its obligations under Article 17 section 1, 3 and 5 of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000.

C. In the Matzak case on 14 May 2019 the CJEU ruled as follows[11]:

1) Member States may not exclude certain categories of firefighters employed in public fire protection services from the scope of application of the obligations arising from the provisions of this

[10] C-484/04, ECLI:EU:C:2006:526.

[11] C-518/15, ECLI:EU:C:2018. Judgment of the Court (Fifth Chamber) of 21 February 2018, Case C-518/15.

Directive. In particular, Article 2 of the Directive, which defines, among others, the concepts of "working time" and "rest periods". Article 15 of that Directive does not allow Member States to maintain or adopt a less restrictive definition of the concept of "working time" than that set out in Article 2. This standard does not impose an obligation on Member States to determine the remuneration to which a worker is entitled for periods of home duty depending on his initial qualification.

2) the period of on-call duty performed by the employee at the place of residence, combined with the obligation to respond to the employer's request within eight minutes – which significantly limits the employee's ability to focus on other matters – should be treated as "working time".

D. In the last comparable case regarding the right to be online or offline – CCOO, decided by the Grand Chamber of the CJEU on 14 May 2019, the following judgment was passed[12]:

Articles 3, 5 and 6 of Directive 2003/88/EC concerning certain aspects of the organisation of working time in conjunction with Article 31 section 2 of the Charter of Fundamental Rights of the European Union, as well as Article 4 section 1, Article 11 section 3 and Article 16 section 3 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to improve safety and health employees at work must be interpreted as precluding the legislation of a Member State which, as interpreted by the national court, does not oblige employers to establish a system enabling the measurement of the daily working time of each employee.

It is clear from the above examples of CJEU jurisprudence that EU workers benefit from the right to minimum requirements in matters relating to hygiene, safety and recreation. All cases in which an employee is obliged by the employer to remain at the employer's disposal at a specific time and place are recognised by the EU jurisprudence as full-time work. It is irrelevant whether the employee is only ready to perform work or partially performs work. The case law of CJEU does not divide working time into full and partial. The problem is that the provisions of the European Parliament and EU Directive 2003/88/EC

[12] C-55/18, ECLI:EU:C:2019, CCOO (Federacion de Serviios de Comisiones Obreras), ECLI:EU:C:2019:402.

do not clearly regulate an employee's rights to be offline and online. The EU legislator also does not provide for situations in which an employee, for reasons important to the entrepreneur, could be available at the workplace where he is employed in order to provide assistance to the employer. The above-mentioned directive also does not regulate the employer's right to give an employee an order obliging him to work during his free time. The provision of Article 2(1) and (2) of this directive provides definitions of working time and rest periods. However, it does so superficially, because it does not regulate exceptional cases. According to the standard, an employee remains at work when he performs work, remains at the employer's disposal or performs duties for him or undertakes other activities on his behalf. If he fails to do so, he should be considered – with the exception of breaks at work – as a person who is professionally active but takes rest or rests. In the second chapter of this directive (Articles 3–7), the legal norms are regulated under the headings: "Minimum length of rest periods; other aspects of the organisation of working time" and presented in the following topics: "daily rest, breaks, weekly rest period, maximum weekly working time" and "annual leave". The current culture of behaviour and conduct in matters of modern employment technology begins to block employers' access to the employees they employ. It is therefore absolutely necessary to regulate the meaning and essence of the new system, which, according to CJEU, should be "objective, reliable and accessible"[13].

3. The scope and meaning of the right to be offline

In the scientific literature on labour law, the discussed Resolution and its annexes presenting recommendations regarding the content of the EU legislative proposal arouse considerable interest among specialists. This article presents cases involving unusual, electronic forms of employment[14]. These include measures to implement the right to be

[13] Ibidem, point 60.

[14] M. Kurzynoga: *Prawo „do odłączenia" jako nowa instytucja realizująca prawo do odpoczynku*. In: *Między ideowością a pragmatyzmem – tworzenie, wykładnia i stosowanie prawa. Księga Jubileuszowa dedykowana Profesor Małgorzacie Gersdorf*. Eds. B. Godlewska-Bujok, E. Maniewska, W. Ostaszewski, M. Raczkowski, K. Rączka, A. Ziętek-Capiga. Wolters Kluwer, Warszawa 2022, pp. 372 et seq.; K. Moras-Oleś: *Prawo do bycia* offline *jako pod-*

offline regulated by the provisions of Article 4 of the proposed text of the future directive. The EU Commission's legislative proposal requires EU Member States to guarantee and respect, and therefore at least ensure, the following working conditions: "(a) practical arrangements for the exclusion of digital tools used for professional purposes, including any monitored work tools; b) working time measurement system; c) assessment of occupational health and safety in relation to the right to be offline, including the assessment of psychosocial risks; d) employees' rights to be offline; (e) in the case of a derogation under point (d) of this Article, the criteria for determining the amount of compensation for work performed outside working time in accordance with Directives 89/391/EEC, 2003/88/EC, (EU) 2019/1152 and (EU) 2019/11/58; (f) awareness-raising measures, including on-the-job training, taken by employers with regard to working conditions […]". According to recitals 24 and 25 of the text of the proposed legislative proposal for the future directive, which are quoted above and are partly unclear or presented or translated in a way that is difficult to understand, working conditions should be communicated by the authorities of the EU Member States to the social partners in order to implement the proposed directive into the national system of the individual EU Member States.

Offline privileges are provided protection against any negative consequences, in particular against dismissal, preparations for dismissal or other retaliatory actions, discrimination consisting in deprivation of part of remuneration for work performed or loss of opportunities for professional promotion. Injured workers should be provided with adequate and prompt judicial and administrative protection and the right to pursue claims and initiate administrative or court proceedings,

stawowe prawo pracownika. "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2021, vol. 28, no. 4, pp. 305 et seq.; L. Mitrus: *Pracownicze prawo do bycia offline*. "Monitor Prawa Pracy" 2022, no. 3, pp. 15 et seq.; K. Gawełko-Bazan: *Prawo do bycia offline – uwagi na tle regulacji istniejących i projektowanych. Część I: rozwiązania w wybranych państwach europejskich*. "Kwartalnik Prawa Międzynarodowego" 2023, vol. 3, no. 3, pp. 45–57; A. Ludera-Ruszel: *The Right to Be Offline and Remote Work*. In: *Remote Work in the Polish Legal System*. Ed. A. Mędrala. Wolters Kluwer, Warsaw, pp. 80 et seq.; S. Kubiak, K. Magnuska: *The Right to Disconnect. Real Relief for Employees or Just Additional Obligations for Employers?* Wardyński & Partners, Warsaw 2021.

guaranteeing employers' compliance with the provisions of Articles 5–6 of the future directive. The sanctions introduced should be effective, proportionate and dissuasive. It would seem that the entire burden of proof of protection against unfavourable treatment of employees has been fully transferred to employers. This is how the above issue was included in recital 29 of the proposal for a directive. However, in Article 5(3) of the future directive, injured workers were obliged to demonstrate to a court or other competent authority factual circumstances that could constitute a reasonable basis for presuming dismissal or other unfavourable treatment. Other modern human rights protection documents, such as the Revised European Social Charter of 1996, list six reasons that cannot be considered reasonable grounds for terminating an employment relationship[15]. The provision of the future directive under discussion did not take care to include in the protection against unfavourable treatment clearly prohibited activities and behaviors that are *de lege* referendums would not exclude commonly accepted reasons for unfavorable treatment of an employee.

4. Task-based working time system and the right to be *offline*

Another case concerns employees employed in the task-based working time system, which turns out to be problematic in the context of the interpretation of the proposed right to be offline. The provision of Article 140 of the Labour Code[16] authorises the employer to determine the working time of employees in terms of the number of tasks assigned to them during an eight-hour working day and a 40-hour weekly working time standard[17]. If the employer fulfills the above, overtime hours will not be incurred. However, if this does not happen, the employee acquires the right to payment. Therefore, if the employee "does not disconnect" and remains ready and online, in practice he will be entitled to additional remuneration.

The initial implementation of the right to be offline depends, to a large extent, on the employer's behaviour by setting working

[15] A. M. Świątkowski: *Charter of Social Rights of the Council of Europe*. Kluwer Law International, Warsaw 2006, pp. 243 et seq.

[16] Act of June 26, 1974, Labour Code (i.e. Journal of Laws of 2023, item 1465, hereinafter referred to as: KP).

[17] A. M. Świątkowski: *Kodeks Pracy. Komentarz*. C.H. Beck, Warszawa 2019, p. 833.

hours. However, qualification in this respect does not take place by measuring the number of actually completed working hours against the pattern indicated in Article 129 § 1 of the Labour Code. What matters is whether the employee, with due diligence and efficiency, could perform the assigned tasks for eight hours a day and on average 40 hours a week. As emphasised in the latest case law of Supreme Court, as a result, an employee employed during task-based working hours does not perform overtime work (even though he works overtime exceeding the norms set out in Article 129 § 1 of the Labour Code) in a situation where the overtime is caused by reasons attributable only to the employee[18]. Therefore, if the employee "does not disconnect" and does not go offline, even though the employer obliged him to do so by setting working time standards, he will not be able to effectively claim additional remuneration.

Task-based working time means that the employee organises his own work, i.e. determines the beginning and end of the working day, and working hours exceeding statutory working time standards is not dependent on the employer's consent and is not generally remunerated as overtime work. Therefore, the lack of agreement referred to in Article 140 of the Labour Code, included even implicitly, excludes the possibility of assuming that the employee performed work under the task-based working time system. This is because the task-based working time system can only be used to a narrow extent. When does this happen? When the type of work, its organisation or the place of its performance make it impossible or significantly difficult for the employer to control the employee during the performance of work. This type of working time is used primarily when the employee performs work outside the employer's premises and outside the direct supervision of superiors. There is no doubt that this, in itself, creates a genuine opportunity to flexibly organise working time – regardless of any arrangements with the employer – and to carry out many tasks during periods that should be reserved for being offline. The mere determination by the parties of working time as task-based is not a basis for the

[18] See K. Piwowarska: *Zadaniowy czas pracy 2024*, https://kadry.infor.pl/kadry/individual_prawo_pracy/czas_pracy/6420133,zadaniowy-czas-pracy-2024.html (accessed: 21 February 2024); See Judgment of the Supreme Court – Chamber of Labour and Social Insurance of 12 January 2022, ref. no. I PSKP 45/21, Legalis.

application of Article 140 of the Labour Code, if it is not justified by the type of work and its organisation. Task-based working time does not mean that an employee comes to work when he wants, works as many hours as he wants, and leaves work when he wants. Although he does not have strict working hours, he is bound by the tasks assigned to him, which he should complete during the settlement period. If an employee is employed full-time, the tasks should be set in such a way that the employee, with due diligence and conscientiousness (Article 100 § 1 of the Labor Code), can perform them within eight hours a day and on average 40 hours a week on an average five-day working week in the adopted settlement period, as already emphasised above[19].

The employer does not keep records of the working hours of employees to whom the task-based working time system applies (Article 149(2) of the Labour Code). However, the name of an employee employed during scheduled working hours may appear on the attendance list and the employer has the right to check whether such an employee is present at work[20]. In this respect and on the basis of the task-based working time system and the right to be offline and the provisions of Article 149, analysed above Article 5 section 3 of the resolution, in the context of the burden of proof in the event of a dispute, it turns out to be problematic that in the event of a dispute regarding task-based working time, the employer should demonstrate that he entrusted the employee with tasks that could be performed during working time resulting from the standards specified in Article 129 of Labour Code. Pursuant to the resolution, employees who believe that they were dismissed or suffered other unfavourable treatment due to the fact that they exercised or wanted to exercise their right to be offline should demonstrate to a court or other competent authority the factual circumstances that may constitute grounds for presumption that they had been dismissed or suffered other unfavourable treatment on that basis, it was for the employer to prove that the dismissal or other

[19] Z. Góral, ed., K. Stefański: *Czas Pracy*. Wolters Kluwer, Warszawa 2013, pp. 75–80; See Judgment of the Supreme Court – Chamber of Labour and Social Insurance of 22 September 2020, I PK 126/19, Legalis.

[20] However, one should always record, in particular, periods of annual leave, unpaid leave, inability to work due to illness and care for a sick family member, also in the case of employees for whom the obligation to record working hours has been excluded.

unfavourable treatment was for other reasons. Therefore, if an employment contract were to be terminated with an employee who did not perform the tasks assigned to him because he felt that it was not possible to do so within the established standards, and in this respect he remained offline, it would not be obvious who bears the burden of proof. *De lege ferenda*, with regard to the provisions of Article 18 of the Labour Code and the principle of employee privilege, it can be argued that the burden of proof would rest with the employer, despite the fact that generally the burden of proof rests with the person who derives specific legal consequences from a given fact, especially since the resolution clearly states that it does not prevent Member States from introducing evidence rules that are more favourable to workers.

5. The work of academic teachers within the task-based working time system and the exercise of the right to opt out

Academic teachers are employed in one of three categories: teaching, research, or research and teaching. Regardless of their primary role, they are also expected to engage in organisational duties for the university and continuously develop their professional competences. Depending on their position, they may additionally be responsible for educating and mentoring students, supervising doctoral candidates, and conducting scientific research. As a result, academic teachers often face challenges in exercising their right to disconnect from work. Especially since the working time applicable to academic teachers is task-oriented working time and especially since, since the COVID-19 pandemic, many universities have been educating students in a remote or hybrid form. Digital tools, including ICT, have increased flexibility in terms of when, where, and how work is performed, often enabling contact with employees outside regular working hours. When used appropriately, such tools can benefit both employers and employees by providing greater autonomy, independence, and flexibility. This can support more effective organization of work tasks and schedules, reduce commuting time, and make it easier to balance personal and family responsibilities, thereby contributing to an improved work–life balance. However, these tools should be used carefully, especially in the case of a task-based working time system.

Pursuant to Article 127, section 1 of the Act of 20 July 2018[21] applies a task-based working time system. Each time, the university authorities and work regulations specify the rules for determining the scope of duties of academic teachers for particular groups of employees and types of positions, including the types of teaching activities covered by the scope of these duties, such as the number of teaching hours and other duties for particular positions, and the rules for calculating teaching hours:

In its assumptions, the task-based working time system tries to take into account the interests of the employer who, due to the nature or place of the work performed, is unable to effectively control the employee's working time and the degree of his involvement in the process of providing work, or where it is possible to control the way work is performed, but it would be excessively difficult or economically irrational. The essence of this system is to treat as working time only the period that is necessary for the employee to perform specific tasks, leaving him a significant margin of freedom as to the organisation of his working time[22].

In this sense, the literature on the subject notes the problem of the lack of control due to the specific nature of the tasks performed. Among all the responsibilities of an academic teacher, teaching is the only duty that is truly measurable. Given this, it becomes challenging to accurately account for the actual working time of academic teachers or to fit it within the framework of task-based working time. It is not entirely clear what the legislator's goal was when he adopted task-based working time as appropriate to the nature of the activities performed by an academic teacher[23]. Consequently, it must be recognised that this type of legislative uniformity is a structure clearly different from the mechanism provided for in Article 140 of the Labour Code, which stipulates that in cases justified by the type of work, its organisation or the place of work, the task-based working time system may be used. As the District Court stated in its justification for the judgment: the defined scope of tasks of academic teachers is not exhaustive. The duties

[21] Act of 20 July 2018 – Law on higher education and science (i.e. Journal of Laws of 2023, item 742).

[22] A. Sobczyk, ed.: *Kodeks Pracy. Komentarz*. Legalis, Warszawa 2020.

[23] A. Bocheńska: *Komentarz do art. 127*. In: *Prawo o szkolnictwie wyższym i nauce. Komentarz*. Ed. A. Jakubowski. Legalis/el, Warszawa 2023.

legally assigned to the work of an academic teacher are not of a general nature, but of a professional nature, because they constitute the content of the abstract and specific employment relationship of this category of employees[24]. If so, how should we treat the right of academic teachers not to engage in work-related tasks outside of working time and not to participate in communication using digital tools, directly or indirectly? This seems difficult to implement.

The teaching load established for an academic teacher is not the standard of his working time and does not constitute the maximum working time[25]. Including the mechanism for defining the duties of academic teachers within the scope of the university's work regulations – thus giving it an abstract character, linked solely to employee groups and positions – constitutes an autonomous structure, distinct from the provisions of the Labour Code. The doctrine also emphasises the connection of this mechanism with the wide scope of university autonomy. Given the nature of an academic teacher's duties, it is difficult to refer to the actual working time of an academic teacher and include it in the definition of task-based working time while maintaining the working time standards specified in the code. Activity other than teaching, especially scientific activity, does not escape any regulation. It should be emphasised that the provisions on working time are important in terms of the right to rest, regulated in Article 66 section 2 the Constitution of the Republic of Poland and the right to rest reflected in the Labour Code, which also applies to academic teachers, on a daily and weekly basis. The right to rest was recognised by the Supreme Court as a good that ensures that employees can reconcile their functioning in the working sphere with fulfilling other social roles[26].

In the area of higher education, the working time of an academic teacher can also be analysed in terms of the quality of the education offered, because too much activity on one day or period may significantly reduce the quality of education, which in turn may be noticed by the relevant accreditation entities[27]. Therefore, the question must

[24] Judgment of the District Court in Łódź – 8th Department of Labour and Social Insurance of 3 August 2023, VIII Pa 3/23.

[25] Judgment of the Supreme Court of 29 July 2003, I PK 294/02, Legalis.

[26] Judgment of the Supreme Court of 21 June 2011, III PK 96/10, Legalis.

[27] A. Bocheńska: *Komentarz do art. 127*. In: *Prawo o szkolnictwie wyższym i nauce. Komentarz*. Ed. A. Jakubowski. Legalis/el, Warszawa 2023.

again be asked how to treat the right of academic teachers not to engage in work-related tasks outside of working time and not to participate in communication using digital tools, directly or indirectly. The answer is that employers should not require employees to be directly or indirectly available or available outside working hours, and that colleagues should refrain from contacting each other outside agreed working hours for work-related purposes; they should remind the employees that the time during which the employee is available or reachable to the employer is working time. However, the above is very difficult to implement in the working conditions at a university, because co-workers often do not know what hours and days (other than those indicated in the teaching schedule) a given employee is available. Therefore, situations of contact by phone, e-mail or *via* applications are inevitable. However, it is up to the employee to decide whether he will answer the phone, reply to an e-mail or connect to a remote meeting if it is outside his normal working hours.

6. Summary

The scope of an employee's responsibilities is determined not only by the type of work performed, but also by the size of the resulting tasks or activities. They should be defined in such a way that their execution during normal working hours is objectively possible. Working time in the task-result system is important at the stage of proper task setting, because the employee is obliged to remain at the employer's disposal. This must be an instruction which – in the employer's opinion – should be performed during normal working time[28]. This must be shaped in such a way that it gives the employee a guarantee to exercise the right to be offline. Therefore, the task-based working time system is neither more nor less beneficial for the employee. *De lege lata* it is not subject to assessment in the light of the principle of employee privilege[29]. It remains unclear whether this will be classified as a derogation permitted only in exceptional circumstances, such as

[28] Judgment of the Supreme Court of 5 July 2017, II PK 202/16, "Monitor Prawa Pracy" 2017, no. 12, p. 618.

[29] Judgment of the Supreme Court of 17 February 2004, I PK 377, "Monitor Prawa Pracy" 2004, no. 4, p. 4.

force majeure or other extraordinary situations. If that is the case, the employer would be required to provide written notification to each employee affected by the derogation from the right to disconnect. Such situations must be justified by reasons that warrant exceptions to the right to disconnect. As a result, academic teachers may be effectively prevented from exercising the universal right to be offline. The provision of Article 127 § 1 of the Act on Higher Education and Science[30] obliges academic teachers to work during task-oriented working time. Practically speaking, however, this is not entirely possible due to the specific nature of this profession. Only teaching time could be included in the list of task-oriented working time in higher education and science[31]. Under the provisions on working time in science that are still in force, the Supreme Court ruled that in any situation in which the employer's control over the working time of a research employee is difficult or impossible, each party to the employment relationship should try to demonstrate the standards of work performed[32]. It may turn out that some academics have voluntarily submitted to their own obligation to work in their free time. Others, however, will be obliged to submit claims to the employer for additional remuneration for work during rest time[33]. It is therefore difficult to assess whether the right to be offline will be a real relief for all employees or only additional obligations for employers[34]. Experienced practicing lawyers should be prepared for any circumstance.

Consequently, the grounds for introducing legislation that shows that "digital nomadism" is taking place, as a result of which employees often become unable to disconnect from work, which over time leads to physical and mental health problems such such as stress, anxiety, depression and burnout, and has a negative impact on employees' work–life balance. As the explanatory memorandum to the resolution emphasises: the aim of the draft directive on the right to be

[30] Journal of Laws 2018, Act of 20 July 2018, vol. of 2023, items 742, 1088, 1234, 1672, 1872, 2005.

[31] A. Bocheńska: *Komentarz do art. 127*...

[32] Judgment of the Supreme Court of 4 September 2019, II PK 172/18. See A. Balicki, M. Pyter: *Prawo oświatowe. Komentarz*. Legalis/el, Warszawa 2017.

[33] Decision of the Supreme Court of 20 October 2015, I PK 9.15, Legalis.

[34] S. Kubiak, K. Magnuska: *The Right to Disconnect. Real Relief for Employees or Just Additional Obligations for Employers?* Wardyński & Partners, Warsaw 202.

offline is to confirm the right not to receive professional requests outside working time, while fully respecting working time legislation and the provisions relating to working time set out in collective agreements and contractual arrangements. The right to be offline should be broadly described as the right of employees to turn off their digital tools, including means of communication used for professional purposes, outside their working hours without penalty for not replying to emails, not answering phone calls or not replying to text messages. As is commonly known, ignorance of the law is harmful. Employees working in a task-based working time system (especially those who are exposed to burnout, e.g. academic teachers) should be aware of their rights and should use them, otherwise they will not respect their right to rest and, consequently, their lives and health.

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Prawo do bycia „offline" i odpoczynku w kontekście zadaniowego systemu czasu pracy

Streszczenie

Autorzy przedstawiają, w jaki sposób dyrektywa dotycząca prawa do bycia offline będzie formułowana przez Parlament Europejski i Radę UE. Analizują przedmiot i zakres minimalnych wymagań umożliwiających pracownikom korzystanie z narzędzi cyfrowych w sprawach zawodowych, bez zakłócania równowagi pomiędzy pracą offline i odpoczynkiem. Omawiają sposoby realizacji prawa do bycia offline i zapewnienia ochrony przed niekorzystnym traktowaniem czasu wolnego przez pracodawców. Autorzy skupiają się na analizie prawa do bycia offline w kontekście zadaniowego systemu czasu pracy, z uwzględnieniem praktycznych problemów zatrudniania pracowników akademickich. Autorzy przedstawiają, w jaki sposób dyrektywa dotycząca prawa do bycia offline będzie formułowana przez Parlament Europejski i/lub Radę. Analizują przedmiot i zakres minimalnych wymagań umożliwiających pracownikom korzystanie z narzędzi cyfrowych w sprawach zawodowych, bez zakłócania równowagi pomiędzy pracą offline i odpoczynkiem. Omawiają sposoby realizacji prawa do bycia offline i zapewnienia ochrony przed niekorzystnym traktowaniem czasu wolnego przez pracodawców. Autorzy skupiają się na analizie prawa do bycia offline w kontekście zadaniowego systemu czasu pracy, uwzględniając praktyczne problemy zatrudniania kadry akademickiej.

Słowa kluczowe: czas pracy, prawo do „odłączenia się", prawo do bycia offline, ochrona prawna, równe traktowanie, warunki pracy, odpoczynek, pracownik naukowy