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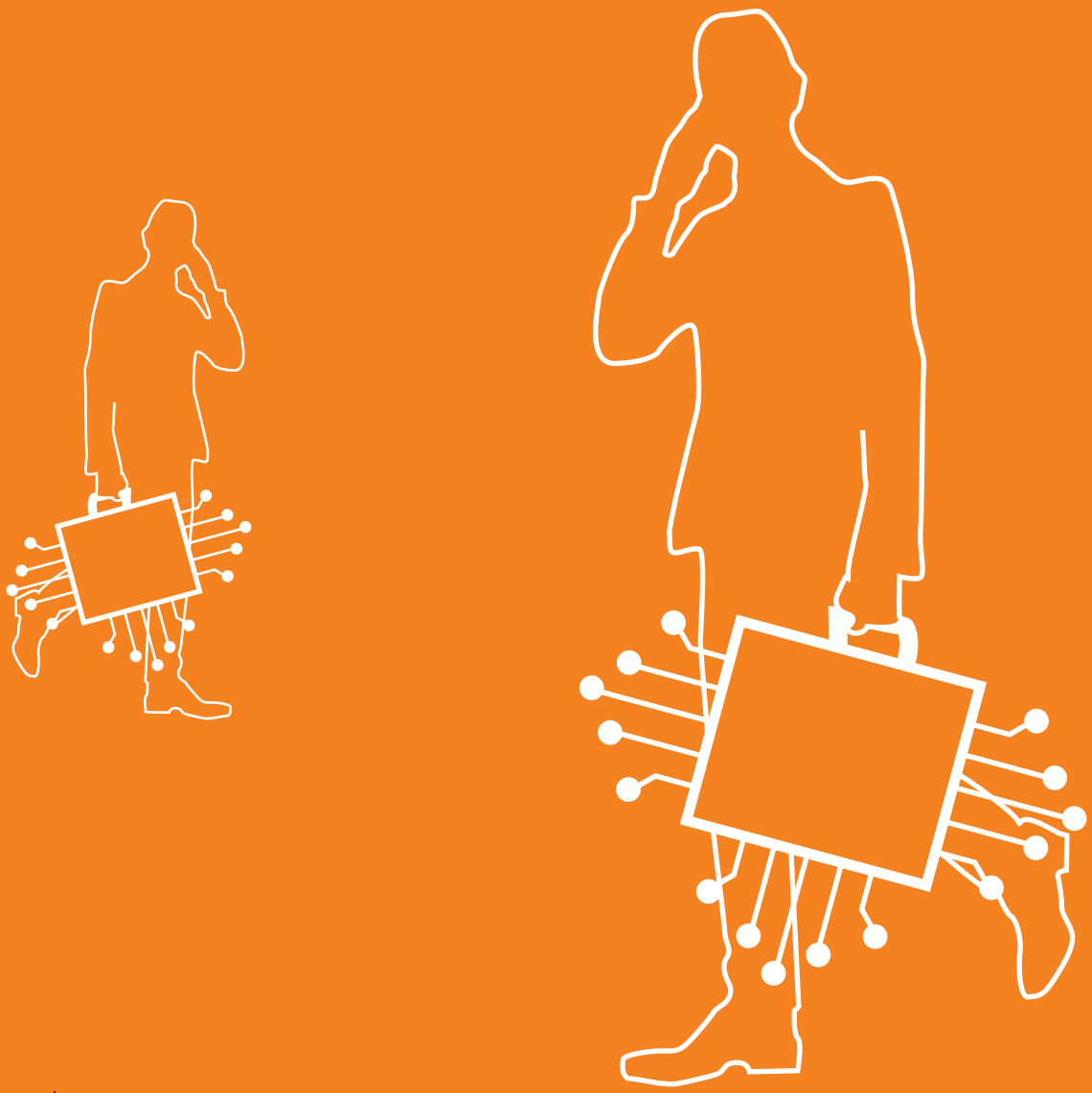

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Implementation of Platform Directive 2024/2831 into the Polish legal order – areas relevant to the entire labour law

Summary

The subject of this article is the problem of implementation of Directive of the European Parliament and of the Council (EU) 2024/2831 of 23 October 2024 on improving working conditions in platform work[1] (hereinafter: Platform Directive 2024/2831) into the Polish legal order in the context of the adoption of two regulatory areas that will be relevant not only to the platform sector, but also to the labour law as such and to all employment relations that are the subject of its regulation. The former is the introduction of measures to facilitate the determination of the correct employment status of those performing platform work (presumption of employment relationship), the latter being the promotion of transparency, fairness, human oversight, safety and accountability in algorithmic management with regard to platform work. The relevance and universal nature of the two objectives adopted in Platform Directive 2024/2831 determines that the Polish legislator, when implementing these provisions into the national legal order, will have to consider regulating them with respect to all employment relations operating in our labour market. In the beginning, the author summarises the 6th national scientific conference in the series "Atypical Employment Relations", organised on 7 December 2023 by the Centre for Atypical Employment Relations at the Faculty of Law and Administration of the University of Lodz (cnsz@wpia.uni.lodz.pl) on the subject of *The development of modern technologies on labour and social security law – challenges for the future*, which is the culmination of this volume of the journal "Z Problematyki Prawa Pracy i Polityki Socjalnej".

Keywords: platform work, presumption of an employment relationship, algorithmic management, atypical employment relationships, modern technology

[1] EU OJ L of 2024, item 2831.

1. Introduction

This volume of "Z Problematyki Prawa Pracy i Polityki Socjalnej" is the culmination of the 6th national scientific conference in the series "Atypical Employment Relations", organised on 7 December 2023 at the Faculty of Law and Administration of the University of Lodz by the Centre for Atypical Employment Relations (cnsz@wpia.uni.lodz.pl), run by me, as well as the Student Forum for Atypical Employment Relations and the District Labour Inspectorate in Lodz. The theme of the conference was the impact of modern technology on labour and social security law in the context of future challenges. The automation and development of modern technologies are having a significant impact on the transformation of the labour market both globally and in Poland. On the one hand, it leads to a reduction in employment in industries such as manufacturing and crafts, while on the other hand, it results in the rapid growth of new jobs in technology and business-related sectors. This phenomenon also has a significant impact on the development of new atypical forms of employment. Thanks to modern technology, remote work can be used on a large scale, as well as work through online platforms, where algorithms and artificial intelligence are used. Unfortunately, the law has not kept up with the development of modern technology. The subject of the conference was the most important challenges facing the Polish legislature, especially in the context of the risks for those working in an environment where modern technologies are used. Conference participants discussed how to guarantee labour contractors the right to be offline, and how to protect them from ubiquitous monitoring or the negative consequences of using automated monitoring and decision-making systems. The dynamic development of artificial intelligence presents a huge challenge for the Polish legislature. Artificial intelligence is used not only in the process of recruiting and firing employees, but also for monitoring, supervising and evaluating work, as well as for making decisions that have a significant impact on their working conditions. This is particularly evident in employment through online platforms, which is the focus of this article. The subject of the conference was also the role of trade unions in the process of algorithmic management in the work environment, as well as the challenges that the development of modern technologies brings to social security law and the law governing the protection of personal data.

The issues addressed during the conference are extremely interesting from the scientific and research perspective, giving rise to a number of problems and controversies both among legal scholars and practitioners. The multidimensionality, multifacetedness and complexity of the issues addressed deserve a separate article. This can be seen in the articles included in Volume 6 of the journal, which touch upon challenges for the future of Polish labour law that are important in the context of the development of modern technologies, such as the right to be offline, platform work against the problem of the presumption of an employment relationship of digital workers, and remote work. The articles also analyse issues concerning the impact of artificial intelligence on human labour and the risks involved, as well as the issue of using modern technology in employment in the context of data protection. The publication also contains a very interesting article on the limits of an employee's right to criticise his/her employer on the Internet.

The subject of this article is the problem of implementation of Directive of the European Parliament and of the Council (EU) 2024/2831 of 23 October 2024 on improving working conditions in platform work[2] (hereinafter: Platform Directive 2024/2831) into the Polish legal order in the context of the adoption of two regulatory areas that will be relevant not only to the platform sector, but also to the labour law as such and to all employment relations that are the subject of its regulation. The first one is the introduction of measures to facilitate the determination of the correct employment status of those performing platform work (presumption of employment relationship), the other one being the promotion of transparency, fairness, human oversight, safety and accountability in algorithmic management with regard to platform work. The relevance and universal nature of the two objectives adopted in Platform Directive 2024/2831 determines that the Polish legislator, when implementing these provisions into the national legal order, will have to consider regulating them with respect to all employment relations operating in our labour market.

[2] EU OJ L of 2024, item 2831.

2. Rationale behind the enactment of Platform Directive 2024/2831

Modern technology advances, digitisation, computerisation, as well as globalisation have contributed to the emergence of a new form of earning, which is the performance of work through digital platforms and applications[3]. Due to the far-reaching possibility of reducing the operating costs, the flexibility of shaping the organisation of work (including the organisation of working hours), as well as the opportunity to earn additional income and attract new customers and orders, work through online platforms, especially those with a global reach (such as Bolt, Glovo, Uber, Wolt) is becoming more and more common and has become a permanent part of the labour market landscape, both globally and in Poland[4]. According to EU estimates, in 2021 as many as 11% of its citizens provided work through online platforms, and for three million people this type of employment was a permanent source of earning. Revenues in the EU's online platform economy have increased by about 500% over the past few years[5]. The number of platform contractors is expected to reach 43 million in 2025.

Due to the operation of various business models of online platforms, the specifics of this type of employment are so complex and heterogeneous that it is difficult to unequivocally classify this mechanism into one of the currently used forms of gainful activity[6]. The EU

[3] See, e.g.: I. Mandl, M. Curtarelli, S. Riso, O. Vargas, E. Gerogiannis: *New Forms of Employment*. Eurofound, Luxembourg 2015, pp. 1 et seq.; V. De Stefano: *The Rise of the "Just-in-Time Workforce": On-Demand Work, Crowdwork and Labour Protection in the "Gig Economy"*. Conditions of Work and Employment Series, ILO 2016, no. 71; B. Bednarowicz: *"Uberyzacja zatrudnienia" — praca w gospodarce współdziałania w świetle prawa UE*. "Monitor Prawa Pracy" 2018, no. 2, pp. 13 et seq.; A. M. Świątkowski: *Elektroniczne platformy zatrudnienia*. "Monitor Prawa Pracy" 2019, no. 7, pp. 18 et seq.; T. Bakalarz: *Zatrudnienie za pośrednictwem platformy internetowej jako przejaw „uberyzacji" pracy*. "Przegląd Prawa i Administracji" 2019, no. 3944, pp. 9 et seq.

[4] K. Piwowarska: *Czy nowe technologie zrewolucjonizują rynek pracy?* "Studia Prawnicze. Rozprawy i Materiały" 2018, no. 2 (23), pp. 135 et seq.

[5] European Commission: Directorate-General for Employment, Social Affairs and Inclusion and CEPS: *Digital Labour Platforms in the EU – Mapping and Business Models – Final Report*. Publications Office 2021, https://data.europa.eu/doi/10.2767/224624. (Accessed: 15 February 2025).

[6] See: A. M. Świątkowski: *Elektroniczne technologie zatrudnienia ery postindustrialnej*. Wydawnictwo Naukowe Akademii Ignatianum, Kraków 2019, pp. 95 et seq.; G. Gospodarek: *Status „niezależnego" usługodawcy a trójpodmiotowy model świadczenia usług w gig economy – cz. 1*. "Praca i Zabezpieczenie Społeczne" 2019, no. 2, pp. 9 et seq.

authorities, noting the dynamic development of platform work and the high variability of its organisation, which is difficult to cover with the existing labour protection systems, noted that this has the effect of depriving those providing services through online platforms of elementary rights and adequate social protection, despite employment conditions similar to the employment relationship (manifestations of management, continuous monitoring, evaluation and discipline). According to experts, platform contractors very often provide services at low rates, they lack job safety, protection in terms of safe and healthy working conditions[7] or basic employee rights, such as paid annual leave, special leave, training and career advancement opportunities, collective rights[8]. Detailed analyses of this form of employment confirmed the frequent lack of support from the entity organising their work, the failure to provide adequate working tools (possible payment for their provision), and the unpredictability of income and working hours. In many cases, this results in a low level of satisfaction among those providing services through online platforms and precarisation of this form of employment.

The EU legislator, seeing the risks indicated above, which are associated with the dynamic development of platform employment, as well as considering the lack of detailed solutions regulating the functioning within the EU of online platforms, which very often have the status of international business entities operating in several Member States or in a cross-border manner, enacted Platform Directive 2024/2831 on 23 October 2024. Poland and the other Member States are required to implement the provisions of the Directive into their national legal orders until 2 December 2026.

[7] See: M. Dobrzyńska: *Praca platformowa. Wyzwania dla bezpieczeństwa i higieny pracy w Polsce*. "Praca i Zabezpieczenie Społeczne" 2020, no. 6, pp. 16 et seq.

[8] For more details, see: J. Unterschütz: *Praca w ramach platform i aplikacji cyfrowych – wyzwania dla zbiorowego prawa pracy, cz. 1*. "Monitor Prawa Pracy" 2017, no. 8, pp. 398 et seq.; J. Unterschütz: *Praca w ramach platform i aplikacji cyfrowych – wyzwania dla zbiorowego prawa pracy, cz. 2*. "Monitor Prawa Pracy" 2017, no. 9, pp. 461 et seq.

3. Presumption of an employment relationship – implications for Polish labour law

As per the main recitals of Platform Directive 2024/2831, the basic premise of this act is to improve the working conditions of people performing online platform work by ensuring that their employment status is correctly determined through a mechanism of presumption of an employment relationship. The Directive is the EU's response to the increasingly common practice in Member States whereby platforms, whether at the national level or in cross-border situations, in order to reduce costs and gain a competitive advantage, use contractors on a non-contractual basis or use fictitious self-employment, where a person is registered as self-employed, despite the fact that the work they perform meets the conditions characteristic of an employment relationship[9]. The European Commission estimates that as a result of such unlawful activities, up to 5.5 million people working through digital labour platforms may be at risk of having their employment status misclassified. In its view, such individuals are particularly vulnerable to poor working conditions and inadequate access to social protection.

[9] As a result of the unlawful practices of online platforms described here, courts in such countries as Spain, Italy, France and the United Kingdom have started to rule on the determination of the existence of an employment relationship between the contractor and the platform, recognising it as an employer under national law. See, e.g.: Spanish Supreme Court judgment of 25 September 2020, No. 805/2020; Palermo Court judgment of 20 November 2020, No. 3570/2020; UK Supreme Court judgment of 19 February 2021, No. 2019/0029; Paris Court of Appeals judgment of 10 January 2019, No. 18/08357; French Court of Cassation (Cour de Cassation) judgment of 28 November 2018, No. 1737; judgment of the Italian Court of Cassation (Corte di Cassazione) of 24 January 2020, No. 1663/2020; judgment of the Supreme Court of Spain (Tribunal Supremo) of 25 September 2020, No. 805/2020, judgment of the CJEU of 20 December 2017, Asociación Profesional Elite Taxi v Uber Systems Spain, C-434/15, ECLI:EU:C:2017:98. For more details, see: G. Gospodarek: *Status „niezależnego" usługodawcy a trójpodmiotowy model świadczenia usług w gig economy – cz. 2*. "Praca i Zabezpieczenie Społeczne" 2019, no. 4, pp. 21 et seq.; G. Gospodarek: *Wyrok brytyjskiego Sądu Najwyższego w sprawie Uber BV przeciwko Aslam i inni*. "Praca i Zabezpieczenie Społeczne" 2021, no. 7, pp. 12 et seq.; K. Naumowicz: *Some Remarks to the Legal Status of Platform Workers in the Light of the Latest European Jurisprudence*. "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2021, vol. 28, no. 3, pp. 177 et seq. See: C. Hießl: *The Classification of Platform Workers in Case Law: A Cross-European Comparative Analysis*. "Comparative Labour Law & Policy Journal" 2022, vol. 42, no. 2, pp. 59 et seq., https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3982738. (Accessed: 12 February 2025).

As a result of the misclassification, they cannot enjoy the rights and protections to which they would otherwise be entitled as employees.

Taking the above into account, and with a view to improving the working conditions of those performing online platform work, Platform Directive 2024/2831 introduced a presumption of an employment relationship. According to the estimates of European Commission, at the EU level, between 1.72 million and 4.1 million people would gain employee status as a result of the mechanism, allowing them to enjoy a full spectrum of statutory safeguards guaranteed under the employment relationship. In its Article 4(1), the Directive requires Member States to put in place appropriate and effective procedures to verify and ensure the determination of the correct employment status of persons performing platform work, with a view to ascertaining the existence of an employment relationship as defined by the law, collective agreements or practice in force in the Member States, with consideration to the case-law of the Court of Justice, including through the application of the legal presumption of an employment relationship. The ascertainment of the existence of an employment relationship invokes the principle of primacy of facts related to the actual performance of work, including the use of automated monitoring or decision-making systems in the organisation of platform work, irrespective of how the relationship is designated in any contractual arrangement that may have been agreed between the parties involved (Article 4(2) of Platform Directive 2024/2831). Pursuant to Article 5(1) of the Directive, the contractual relationship between a digital labour platform and a person performing platform work through that platform is legally presumed to be an employment relationship where facts indicating direction and control, in accordance with national law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice, are found. The Directive also provides for the possibility of challenging the legal presumption of an employment relationship before a court. Member States should ensure such a solution by proving, based on this definition, that the relationship in question is not an employment relationship.

When analysing the implementation of the legal presumption of an employment relationship into the Polish legal system, particularly in terms of its potential impact on the entire labour market – both the

online platform sector and other forms of gainful employment, as well as the future of labour law – it is important to note at the outset that much will depend on the approach taken by the legislator, who has considerable discretion in deciding how to introduce and apply this legal mechanism. *De lege lata* under Polish labour law, this mechanism is not applicable at all. This position is widely accepted both in the literature of labour law and in the jurisprudence[10]. In a judgment dated 27 May 2010[11], the Supreme Court (hereinafter: the Supreme Court) clearly held that Article 22 § 1[1] of the Labour Code[12] (hereinafter: the Labour Code), pursuant to which employment under the conditions characteristic of an employment relationship specified in Article 22 § 1 of the Labour Code is employment on the basis of an employment relationship, regardless of the name of the contract between the parties, does not create a legal presumption of the execution of an employment contract[13]. This means that the implementation of Platform Directive 2024/2831 in the area of the presumption of an employment relationship will be considered somewhat revolutionary in Polish labour law. There have been attempts to introduce this mechanism into our legal order in the past, but they ultimately failed altogether[14].

In my view, the implementation of the provisions of Platform Directive 2024/2831 providing for the presumption of an employment relationship into Polish law will be very difficult and problematic. This issue has a much broader context than merely the online platform sector and applies to the entire labour market. When it comes to the

[10] For further details, see T. Duraj: *Granice pomiędzy stosunkiem pracy a stosunkiem cywilnoprawnym – głos w dyskusji*. "Gdańsko-Łódzkie Roczniki Prawa Pracy i Prawa Socjalnego" 2017, no. 7, pp. 61 et seq.

[11] II PK 354/09, LEX no. 598002.

[12] Act of 26 June 1974 – Labour Code, consolidated text: Journal of Laws of 2025, item 227, as amended.

[13] The absence of a legal presumption of the execution of an employment contract is also indicated in, among others: the Supreme Court judgment of 29 June 2010, I PK 44/10, OSNP 2011, no. 23–24, item 294; the Supreme Court judgment of 7 July 2000, I PKN 727/99, Lex no. 1223707; the Supreme Court judgment of 23 September 1998, II UKN 229/98, OSNP 1999, no. 19, item 627.

[14] I am referring to the draft individual Labour Code prepared by the Codification Commission in 2018 (https://www.gov.pl/web/rodzina/bip-teksty-projektu-kodeksu-pracy-i-projektu-kodeksu-zbiorowego-prawa-pracy-opracowane-przez-komisje-kodyfikacyjna-prawa-pracy), which expressly introduced the presumption of an employment relationship (Article 47 § 1 and Article 50).

former perspective, the introduction of a presumption of an employment relationship into Polish labour law would lead to excessive interference with one of the fundamental principles of freedom of contract (Article 353[1] of the Civil Code – hereinafter: the Civil Code[15]) and freedom to choose the basis of employment, and would violate the constitutional principle of freedom of doing business (Article 22 of the Polish Constitution[16]). Besides, the mechanism adopted in Platform Directive 2024/2831 will not be effective and, in my opinion, will not significantly improve working conditions through online platforms, and the effect may be exactly the opposite. This will only be slightly improved by the obligation for Member States to establish a framework of measures to support the effective implementation of the legal presumption of an employment relationship set out in Article 6 of the Directive.

First, problems should be noted already at the stage of triggering the presumption of an employment relationship. Most often, the initiators of proceedings in this case will be platform contractors, who are generally not satisfied with their status due to the lack of minimum protective guarantees. This will result in labour courts being flooded with often unsubstantiated claims to have their employment status converted into employee status, and consequently lead to judicial paralysis[17]. Also, I am not convinced by the power of labour inspectors to initiate proceedings regarding the presumption of an employment relationship with respect to online platforms. Such a solution does not eliminate the risk of discretionary decisions in this regard, especially since the Directive makes the presumption of an employment relationship contingent on whether facts indicating control and direction are established in the contractual relationship between the digital labour platform and the contractor, in accordance with national law, collective agreements or practice in the Member States and taking into account

[15] Act of 23 April 1964 – Labour Code, consolidated text: Journal of Laws of 2024, item 1061, as amended.

[16] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws no. 78, item 483, as amended.

[17] Already, cases before Polish labour courts in two-instance proceedings have been pending for as long as three to five years (see W. Gujski: *Niesprawiedliwość w sądach pracy – odpowiedź na pozew po dwóch latach*. In: Prawo.pl dated 14 February 2023, https://www.prawo.pl/kadry/przewleklosc-prowadzenia-spraw-w-sadach-pracy,519737.html (Accessed: 27 March 2025), which, in the case of platform employment, which as a rule is short-term and occasional, undermines the sense of initiating such a procedure.

CJEU case-law. The problem is that general control is not enough to recognise a platform as an employer within the meaning of Article 3 of the Labour Code, and the criterion of management under Polish labour law is construed very differently in the literature, jurisprudence and practice[18], and it requires statutory clarification[19]. In this regard, the criteria triggering the presumption included by the Court of Justice of the EU in B v. Yodel Delivery Network Ltd. dated 22 April 2020 may prove helpful[20]. In the above-mentioned judgment concerning the classification of couriers employed under a contract for services, the Court accepted that a person cannot be classified as a "worker" where that person is afforded: (a) the right to fix his own hours of "work" within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer; (b) the absolute right to accept or not accept the various tasks offered by his putative employer and the right to unilaterally set the maximum number of those tasks; (c) the right to use subcontractors or substitutes to perform the service which he has undertaken to provide; (d) the right to provide his services to any third party, including direct competitors of the putative employer. The discretionary nature of the State Labour Inspectorate's (hereinafter: PIP) decisions in triggering the presumption of an employment relationship will result in a violation of the constitutional principle of protecting citizens' trust in the state, which gives rise to the requirement of certainty of the law in force (Article 2 of the Polish Constitution).

Second, imposing on the PIP, by way of statutory instruments, additional duties to control the legality of employment in the online platform sector and to initiate proceedings on the presumption of an

[18] The literature on the subject, as well as court decisions, presents different definitional approaches to the employer's management, from very narrow to overly broad, which is associated with autonomous subordination or economic dependence on the employing entity. For details see T. Duraj: *Podporządkowanie pracowników zajmujących stanowiska kierownicze w organizacjach*. Difin, Warszawa 2013, pp. 45 et seq.

[19] For years the author has suggested that the term "employer's management" be clarified in Article 22 § 1 of the Labour Code by indicating that it refers to management that empowers the employer to make – through binding orders – employees' duties more specific. These are duties concerning both the object of work (the type of tasks and how they are performed) and the place and time of its performance (the core of managerial authority).

[20] C-692/19, ECLI:EU:C:2020:288.

employment relationship will exacerbate the inefficiency of the Polish labour inspectorate. The EU legislator is optimistic to assume that in order for the inspection authorities to perform the tasks of enforcing the provisions of Platform Directive 2024/2831, Member States must ensure that their inspection staff are prepared in substantive aspects. This requires adequate human resources with the necessary skills and access to relevant training in the relevant national authorities, and ensuring the availability of technical expertise in the field of algorithmic management (recital 38 of the Directive). Meanwhile, the Polish labour inspectorate already has too many duties, the scope of which is being all the time extended by the legislature, which is permanently underfunded, and the current staffing level of 1,500 labour inspectors (country-wide) is grossly unsatisfactory and does not guarantee effective fulfilment of statutory tasks at this point.

Third, although the EU legislator has provided for the presumption of an employment relationship to be rebuttable, this may not be feasible in practice. A digital labour platform will have a serious problem proving that the contractual relationship that it has with a contractor is not an employment relationship under Polish law. This is primarily due to the lack of clear statutory criteria to effectively distinguish this relationship from civil-law contracts. In particular, this applies to the premise of management, which under Polish labour law is construed very differently in the literature, jurisprudence and practice.

Fourth, it is expected that the introduction of the presumption of an employment relationship in the platform sector into the Polish legal order will cause them to run away from this mechanism. Platforms with an international reach will change their existing operating models, using increasingly complex organisational structures and tools for control and evaluation of work to avoid being assigned employer status over those employed through them. The escape of platforms from the Polish labour market is also possible. Spain presents a good example of this kind of behaviour. In 2021, Spain enacted a special law called Ley Rider[21], under which a presumption of an employment relationship was introduced against delivery service industry platforms (including Glovo, Uber Eats, Stuart, Deliveroo). This has forced these entities to change their operating model to avoid the presumption, and

[21] Royal decree with the force of law 9/2021.

some entities have withdrawn from the Spanish market altogether, deeming their business unprofitable[22].

Turning to the broader perspective of the implementation of the provisions of Platform Directive 2024/2831 regulating the presumption of an employment relationship, leading to implications for labour law as a whole, the question is whether this mechanism should not be extended to other employment relationships, including those that operate outside of the work provided through the application. In my view, sooner or later the Polish legislator will have to extend the presumption of an employment relationship to the entire labour market. The mechanism would then need to be regulated in the provisions of the Labour Code. Limiting this mechanism only to the online platform sector will be incompatible with the constitutional principles of equality before the law, protection of competition and freedom of doing business. This is because entrepreneurs providing a certain type of services using online platforms will be in an incomparably worse legal and economic situation than entrepreneurs providing the same type of services in the traditional formula (e.g., transportation services or food delivery). In my view, the legal presumption of an employment relationship provided for in Platform Directive 2024/2831 will have to be extended to all sectors of the economy in the long term. Otherwise, there will be unequal treatment of entrepreneurs engaged in similar (identical) activities depending on whether or not they are recognised as a digital labour platform under national law. Representatives of the labour law literature take a similar view. According to L. Mitrus, (...)" the regulation of platform labour will have broader implications for the evolution of the legal framework of gainful employment. If a presumption of the existence of an employment relationship is established in relation to platform work, it will be difficult in the long term to justify the absence of such a mechanism in relation to other legal relationships, which in Polish realities translates especially into the question of the qualification of long-term civil-law contracts for the provision of services"[23]. In my opinion, however, such a solution requires an

[22] A. Todoli-Signes: *Spanish Riders Law and the Right to Be Informed About the Algorithm*. "European Labour Law Journal" 2021, vol. 12, no. 3, pp. 399 et seq.

[23] L. Mitrus: *Polska regulacja pracy platformowej de lege ferenda z perspektywy prawa Unii Europejskiej*. In: *Znaczenie prawa międzynarodowego i europejskiego w regulacji stosunków świadczenia pracy*. Eds. Z. Hajn, M. Kurzynoga. Folia Iuridica 2024, no. 107, pp. 147–157.

in-depth discussion within the framework of the social partners' dialogue, due to the fact that it will constitute a revolution for the entire Polish labour law, being of fundamental importance for all relations of gainful employment in Poland. The point is that extending the mechanism of presumption of employment relationship to all forms of employment will not lead to a sharp halt in the development of all atypical forms of gainful employment in our country and the flight of entrepreneurs to the so-called shadow economy.

4. Promoting transparency, fairness, human oversight, safety and accountability in algorithmic management – implications for Polish labour law

The second regulatory area of Platform Directive 2024/2831, whose implementation into the Polish legal system is important not only for the platform sector, but also for labour law as a whole and for all employment relations, is the promotion of transparency, fairness, human oversight, safety and accountability in algorithmic management with regard to platform work. Digital labour platforms make extensive use of automated monitoring and decision-making systems to manage people performing platform work. Monitoring through electronic means can be intrusive, and decisions made or supported by these systems, such as decisions related to bidding or assignment, salary, safety and health, working hours, access to training, promotion or status within the organisation, and contractual status, directly affect individuals performing platform work, while they may not have direct contact with a manager or supervisor. Such a situation generates a number of risks for these contractors, which may involve, in particular, violations of their dignity and privacy, discrimination and unequal treatment, or negative consequences for their health or general well-being[24]. To prevent this, Platform Directive 2024/2831 imposes a number of specific obligations on platforms.

The first one is the obligation to inform persons performing platform work, platform workers' representatives and, upon request, national

[24] See E. Pachała-Szymczyk: *Nowe technologie a ryzyko w stosunkach zatrudnienia. Przypadek nietypowych form pracy*. In: *Prawo pracy wobec nowych technologii*. Eds. M. Gersdorf, E. Maniewska. Wolters Kluwer, Warszawa 2025, pp. 117 et seq.

competent authorities, of the use of automated monitoring systems or automated decision-making systems (Article 9 of Platform Directive 2024/2831). The national legislator must specify the type and form of information on such automated systems to be provided to those performing platform work, and when it must be presented. Platform contractors (their representatives) should receive this information in a concise, simple and intelligible form, to the extent that these systems and their functions directly affect them and, where applicable, their working conditions – so that they are effectively informed[25]. They should also have the right to request comprehensive and detailed information on all systems used by the platform. The Polish legislator, implementing Article 9 of Platform Directive 2024/2831 into our legal order should seek to limit the scope of the information provided on the automated monitoring or decision-making systems used by the digital labour platform and their features only to those that have a significant impact on those performing platform work, including their working conditions, access to tasks and the organisation of tasks, their earnings, safety and health, working time, the issuance of instructions, the evaluation of work performed, the provision of incentives or the imposition of sanctions, access to training, promotion or its equivalent, and contractual status, including the limitation, suspension or deletion of their account. Only such an approach will guarantee full transparency and clear perception of the information provided, without derailing the main purpose of Platform Directive 2024/2831. Requiring online platforms to provide overly elaborate information will be counterproductive, preventing it from being properly received by those performing platform work and their representatives.

The second obligation that Member States must impose on digital labour platforms is to ensure human oversight and regular evaluation of the impact of individual decisions taken or supported by automated monitoring or decision-making systems on those performing platform work, including, where applicable, on their working conditions and equal treatment at work. Employee representatives should also be involved in the evaluation process. Pursuant to Article 10 of Platform

[25] See A. Ziętek-Capiga: *Prawo pracowników i ich przedstawicieli do informacji o algorytmicznym zarządzaniu pracą*. In: *Prawo pracy wobec nowych technologii*. Eds. M. Gersdorf, E. Maniewska. Wolters Kluwer, Warszawa 2025, pp. 165 et seq.

Directive 2024/2831, the Polish legislator, when implementing this instrument into our legal order, must ensure that digital labour platforms oversee and, with the involvement of workers' representatives, regularly and in any event every two years, carry out an evaluation of the impact of individual decisions taken or supported by automated monitoring and decision-making systems on persons performing platform work. Given the multiplicity of such decisions (millions of outcomes), periodic evaluations should focus on evaluating individual systems rather than specific decisions made by these systems.

Third, the Polish legislator, when implementing Platform Directive 2024/2831 into our legal order, must guarantee the possibility of control and verification of decisions taken or supported by automated decision-making systems. It should be ensured that persons performing platform work have the right to obtain an oral or written explanation from the digital labour platform for such decisions without undue delay. The explanation shall be provided in a transparent and intelligible manner, using clear and plain language. Member States must ensure that digital labour platforms provide the persons performing platform work with access to a contact person designated by the digital labour platform to discuss and to clarify the facts, circumstances and reasons having led to the decision. If a person disagrees with a particular decision, they may challenge the same in accordance with the procedure and rules set forth in Article 11 of Platform Directive 2024/2831.

Fourth, given the negative impact of automated monitoring and decision-making systems on the safety and physical and mental health of platform contractors[26], the EU legislature imposes certain obligations on digital labour platforms to assess these risks (in particular, in terms of possible risks of occupational accidents and psychosocial and ergonomic risk factors), verify that the systems' safeguards are adequate to counter them, and take appropriate preventive and protective measures. In addition, in the area indicated here, digital labour platforms will be required to ensure that platform workers and their representatives are effectively informed, and consulted accordingly.

[26] Algorithmic management, constant evaluation and discipline, limited on-the-job learning and limited task influence resulting from the use of opaque algorithms, work intensification and insecurity resulting from the use of automated monitoring or decision-making systems can increase stress and anxiety among platform-based workers, leading to many illnesses and health risks.

Platforms may not use automated monitoring or decision-making systems in a way that puts undue pressure on platform workers or otherwise endangers their safety and physical and mental health. In order to ensure the safety and health of platform workers, including protecting them from violence and harassment, Member States must ensure that digital labour platforms put in place preventive measures, including providing for effective reporting channels (Article 12 of Platform Directive 2024/2831). Interestingly, the EU legislature limits the protection indicated here only to platform contractors employed on the basis of an employment relationship. However, the Polish legislator, when implementing the regulations analysed here into our legal order, will have to seriously consider whether limiting this protection only to platform workers is consistent with the requirements of the Polish Constitution and the provisions of the Labour Code. It is important to remember that health and safety is a key aspect of any work performed by a human being, regardless of the legal basis and the system under which it is performed. Automated monitoring and decision-making systems used by online platforms can have a negative impact on the safety and physical and mental health of everyone working through the apps, not only platform workers but also those employed outside of an employment relationship. Therefore, in my view, this protection should extend to all platform contractors in Poland[27].

In the context of promoting transparency, fairness, human oversight, safety and accountability in algorithmic management for platform work, Platform Directive 2024/2831 places particular emphasis on dialogue with social partners and the active participation of representatives representing the interests of platform work contractors. The EU legislature grants certain powers in the area of information and consultation to entities representing the interests of platform contractors. When it comes to the competence of platform worker representatives in the area of information and consultation, Platform Directive 2024/2831 guarantees them the following: (1) the right to be informed about the use of automated monitoring or decision-making systems by digital labour platforms (Article 9); (2) the right to a periodic evaluation of the impact of individual

[27] See, e.g. T. Wyka: *Stosowanie przepisów bhp w niepracowniczym zatrudnieniu*. In: *System prawa pracy, vol. VII: Zatrudnienie niepracownicze*. Ed. K. W. Baran. Wolters Kluwer, Warszawa 2015, pp. 650 et seq.

decisions taken or supported by automated monitoring and decision-making systems on persons performing platform work, including their working conditions and equal treatment at work (Article 10(1)); (3) the right to be informed and consulted on the assessment of risks associated with automated monitoring and decision-making systems to the safety and health of platform workers (Article 12).

I believe that the regulations of Platform Directive 2024/2831 outlined above in terms of promoting transparency, fairness, human oversight, safety and accountability in algorithmic management are universal in nature and are so important that they should be extended to all employment relationships, not limited to the online platform sector. In the era of increasing digitisation, computerisation and rapid development of modern technologies, many entrepreneurs operating in the Polish labour market who do not use Internet applications are already using automated monitoring and decision-making systems in employment, both at the stage of recruitment and dismissal, as well as to shape the essential conditions of employment and the legal situation of those performing work (in particular, remuneration, place and time of work, organisation of work, safety and health, issuance of orders or instructions, access to training and promotions, application of sanctions). Therefore, in order to effectively protect the life and health of all performers of gainful employment, their dignity and privacy, and to counteract any manifestation of discrimination and unequal treatment in employment, the Polish legislator, when implementing these provisions of Platform Directive 2024/2831 into the national legal order, will have to consider regulating them for all employment relationships operating in our labour market. This is the only right approach in the context of shaping the future of Polish labour law.

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Implementacja do polskiego porządku prawnego Dyrektywy platformowej 2024/2831 – obszary istotne dla całego prawa pracy

Streszczenie

Przedmiotem niniejszego opracowania jest problem implementacji do polskiego porządku prawnego Dyrektywy Parlamentu Europejskiego i Rady (UE) 2024/2831 z dnia 23 października 2024 r. w sprawie poprawy warunków pracy za pośrednictwem platform internetowych[28] (dalej: Dyrektywa platformowa 2024/2831) w kontekście przyjęcia dwóch obszarów regulacyjnych, które będą istotne nie tylko dla sektora platformowego, ale także dla całego prawa pracy i dla wszystkich stosunków zatrudnienia stanowiących przedmiot jego regulacji. Pierwszym z nich jest wprowadzenie środków ułatwiających określanie prawidłowego statusu zatrudnienia osób wykonujących pracę za pośrednictwem platform (domniemanie stosunku pracy), drugim zaś promowanie przejrzystości, sprawiedliwości, nadzoru ludzkiego, bezpieczeństwa i rozliczalności w zarządzaniu algorytmicznym w odniesieniu do pracy za pośrednictwem platform. Doniosłość oraz uniwersalny charakter obu celów przyjętych w Dyrektywie platformowej 2024/2831 przesądza o tym, że polski ustawodawca, implementując te przepisy do krajowego porządku prawnego, będzie musiał zastanowić się nad ich unormowaniem w odniesieniu do wszystkich stosunków zatrudnienia funkcjonujących na naszym rynku pracy. Na wstępie autor podsumowuje VI ogólnopolską konferencję naukową z cyklu „Nietypowe stosunki zatrudnienia", zorganizowaną w dniu 7 grudnia 2023 r. przez Centrum Nietypowych Stosunków Zatrudnienia WPiA UŁ (cnsz@wpia.uni.lodz.pl) nt. *Rozwój nowoczesnych technologii a prawo pracy i prawo ubezpieczeń społecznych – wyzwania na przyszłość,* której niniejszy tom czasopisma „Z Problematyki Prawa Pracy i Polityki Socjalnej" stanowi zwieńczenie.

Słowa kluczowe: praca platformowa, domniemanie stosunku pracy, zarządzanie algorytmiczne, nietypowe stosunki zatrudnienia, nowoczesne technologie

[28] EU OJ L of 2024, item 2831.

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Presumption of the employment relationship of digital workers and the protective function of labour law

Summary

This article summarises key issues related to digital platforms and their impact on the labour market. It first discusses the concept and spread of digital platforms, which can exacerbate labour market inequalities and worsen working conditions. It then looks at the European directives that address non-standard workers, particularly platform workers, focusing on the personal scope of application and the rebuttable presumption of an employment relationship. These directives have a significant impact on the coverage of digital platform workers, but raise questions about their adoption at the national level. The article also examines Polish regulations on employment relationships and the possible incorporation of a rebuttable presumption into Polish law in the context of the protective function of labour law.

Keywords: platform work, digital platforms employment relationship, rebuttable legal presumption, protective function of labour law

1. Introduction

The digital platform market is currently expanding rapidly, having experienced significant growth in a short period. According to the analyses conducted by the European Union, approximately 28.3 million individuals in EU Member States engage in platform work more frequently than sporadically[1]. Most of these individuals are formally self-employed. Reliable estimates show that platform work makes up approximately 1% to 3% of total employment. About 1.5% of the working-age population identifies platform work as their primary occupation, and an estimated 11% of adults have earned income through

[1] European Commission. Directorate General for Employment, Social Affairs and Inclusion, PPMI: *Study to Support the Impact Assessment of an EU Initiative to Improve the Working Conditions in Platform Work: Final Report.* LU 202, p. 5.

platform work at some point[2]. A similar percentage of people working through digital platforms can be observed in Poland[3]. Further analysis reveals that up to 5.51 million individuals in this group may be at risk of misclassification of employment status[4].

Such misclassification can deprive workers of appropriate labour protections, such as limits on daily and weekly working hours, paid holidays, or minimum wages. Moreover, they may not be covered by full social security, resulting in the platforms shifting the burden of contributions onto the employees. Algorithmic decisions, including account suspension or termination, are common, but there has been no established dispute resolution mechanism for workers who feel that they are treated unfairly[5]. Considering the broader context of global mega-trends in societies, economies, and the world of work, it is expected that the number of individuals opting for platform work will increase to an estimated 42.7 million by 2030[6].

In this article, I would like to focus on providing an overview of some fundamental issues related to digital platforms and how work is provided through them. I start by considering the concept of 'digital platforms' and the forms they take in global digital economy. Digital platforms, with their proliferation and expansion within the digital economy, can lead to an increase in inequalities in the labour market, as well as a degradation of the conditions of working through these platforms[7]. I then examine the solutions adopted at the level of European

[2] A. Aloisi: *Platform Work in Europe: Lessons Learned, Legal Developments and Challenges Ahead*. "European Labour Law Journal" 2022, vol. 13, no. 1, p. 7; European Commission. Directorate General for Employment, Social Affairs and Inclusion, PPMI: *Study to Support the Impact Assessment of an EU Initiative*..., p. 5.

[3] D. Owczarek, M. Pańków, M. Koziarek: *Nowe formy pracy w Polsce*. Warszawa 2019, p. 74.

[4] European Commission. Directorate General for Employment, Social Affairs and Inclusion, PPMI: *Study to support the Impact Assessment of an EU Initiative*..., p. 5.

[5] N. Potocka-Sionek: *Niewidzialni pracownicy, czyli kto stoi za sztuczną inteligencją*. "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2022, vol. 29, no. 2, p. 112.

[6] European Commission. Directorate General for Employment, Social Affairs and Inclusion, CEP: *Digital Labour Platforms in the EU: Mapping and Business Models: Final Report.* LU 2021; European Commission. Directorate General for Employment, Social Affairs and Inclusion, PPMI: *Study to Support the Impact Assessment of an EU Initiative*..., pp. 5–6; European Commission. Joint Research Centre: *European Legal Framework for "Digital Labour Platforms*." LU 2018.

[7] S. Vallas, J. B. Schor: *What Do Platforms Do? Understanding the Gig Economy*. "Annual Review of Sociology" 2020, vol. 46, no. 1, pp. 285–288.

directives on the employment conditions of non-standard workers, including platform workers. Of particular importance are the statements on the personal scope of application and the rebuttable presumption of an employment relationship, which significantly affect the coverage of digital platform workers by the directives, but also raise the question of the possibility of adopting such solutions into the Member States' legal systems. In the next part, I scrutinise the Polish regulation of the employment relationship and the possibility of introducing a rebuttable presumption of employment relationship into the Polish legal system in the context of the protective function of labour law. By the function of labour law, I mean the consequences of legal norms provided by the legislature[8]. By the protective function of labour law, I mean the consequences of legal norms aimed at strengthening the position of the employee in the employment relationship and ensuring the realisation of his/her labour rights, such as the right to safe and hygienic working conditions, respect for his/her dignity or the right to social security[9].

2. Dimensions of the digital platforms

The term 'digital platforms' does not fully capture the diversity of work forms provided through them. At this point, I would like to briefly refer to the taxonomy of digital platforms proposed by the S. Vallas and J. B. Schor[10].

[8] Compare: "the functions of labour law can be seen as the way(s) through which labour law may lead to those purposes. They can be seen as tasks which labour law receives and assumes on the basis of its foundations. When the focus moves to the question how labour law functions, an answer may be provided to the question what role labour law can play" F. Hendrickx: *Foundations and Functions of Contemporary Labour Law*. "European Labour Law Journal" 2012, vol. 3, no. 2, p. 110.

[9] Compare: "The main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship" O. Kahn-Freund: *Labour and the Law*. London 1972, p. 8; A. Sobczyk: *Prawo pracy w świetle Konstytucji RP*. Vol. 1: *Teoria publicznego i prywatnego indywidualnego prawa pracy*. Warszawa 2013, pp. 24–26.

[10] S. Vallas, J. B. Schor: *What Do Platforms Do?...*, pp. 275–277.

The first group encompasses platform architects and technologists, comprising founders, highly skilled staff, and independent contractors. Research on these contributors is limited thus far, as they are responsible for designing and upkeeping the digital infrastructures of platforms. Consequently, the outcomes of their work hold significance for the working conditions that other categories of platform workers may encounter[11].

The second form of platform work involves cloud-based consultants or freelancers utilising such platforms as UpWork or Freelancer for professional services. Unlike digital platforms' architects and technologists, these workers use platforms instead of creating them. Their work, often location-independent, requires high technical expertise in such fields as graphic design, computer programming, and journalism, with workers who are typically employed on a project–by–project basis. Thus, it can be noted that success for cloud-based consultants relies on maintaining a steady client base. A significant concern is whether platforms supporting this type of labour promote the outsourcing of tasks by traditional firms or substitute the role of temporary employment agencies in providing a digital infrastructure[12].

The third group comprises gig workers whose services are secured through platforms and are typically conducted offline, such as in transport services, food delivery, home repair, or caregiving. This sector, encompassing delivery, day labour, and miscellaneous tasks, offers providers flexibility in their work schedules and autonomy, a feature often emphasised by the companies and by the digital contractors. Nevertheless, gig workers not only bear the burden of operating expenses and risks, relinquishing employee protections, but they also must align with the timing dictated by customer demand, significantly limiting their autonomy[13].

[11] L. Irani: *Difference and Dependence among Digital Workers: The Case of Amazon Mechanical Turk*. "South Atlantic Quarterly" 2015, vol. 114, no. 1; S. Kelkar: *Engineering a Platform: The Construction of Interfaces, Users, Organizational Roles, and the Division of Labor*. "New Media & Society" 2018, vol. 20, no. 7, https://doi.org/10.1177/1461444817728682; S. Vallas, J. B. Schor: *What Do Platforms Do?...*, p. 275.

[12] A. Christin: Counting Clicks: *Quantification and Variation in Web Journalism in the United States and France*. "American Journal of Sociology" 2018, vol. 123, no. 5; A. Piasna, J. Drahokoupil: *Digital Labour in Central and Eastern Europe: Evidence from the ETUI Internet and Platform Work Survey*. "ETUI Research Paper" 2019, pp. 14–15; S. Vallas, J. B. Schor: *What Do Platforms Do?...*, p. 275.

[13] A. Aloisi: *Platform Work in Europe...*; T. Bakalarz: *Zatrudnienie za pośrednictwem platformy internetowej jako przejaw „uberyzacji" pracy*. "Przegląd Prawa i Administracji"

The fourth form of platform work is conducted exclusively online through microtasking, exemplified by workers on such platforms as Amazon Mechanical Turk (AMT) or CrowdFlower. These workers handle human intelligence tasks integral to machine learning processes that computers cannot perform. Unlike the work of cloud-based consultants and freelancers, these tasks generally demand less training and experience. Examples include describing or categorizing image content, editing computer-generated text, verifying user accounts on social media, or transcribing short audio clips. Instances are cited where microtasking has become the organisational model for companies that previously relied on in-house employment[14].

Incidentally, the last category of platform workers operates within the social media and encompasses content creators and influencers engaged in what is termed 'aspirational labour'. Typically, this form of platform work is undertaken without compensation, with individuals aspiring to attain enough visibility in the attention economy to eventually secure a steady income. This type of work involves workers willingly accepting precarious positions in the labour market, driven by their vision of desirable future[15].

As can be seen, platform workers differ in the scope of their platform work, the level of its complexity and the varying degree of dependence on the platform and its management. The first two groups are in some ways better positioned in relation to digital platforms, as their jobs require high qualifications or they are freelancers, which leads to higher earnings and greater flexibility in their work. Other forms of digital platforms, especially crowdwork and on-demand work platforms, may have characteristics of precarious work in the form of uncertainty about the frequency of opportunities for 'gig jobs', the

2019, vol. 117, p. 11, https://doi.org/10.19195/0137-1134.117.1; V. De Stefano: *The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowd Work and Labour Protection in the "Gig-Economy"*. "Conditions of Work and Employment" 2015, no. 71, https://doi.org/10.2139/ssrn.2682602; S. Vallas, J. B. Schor: *What Do Platforms Do?...*, p. 275.

[14] J. Berg: *Income Security in the on-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers*. "Comparative Labor Law and Policy Journal" 2016, vol. 3, no. 37; European Commission. Joint Research Centre: *European Legal Framework for "Digital Labour Platforms"...*, p. 10; S. Vallas, J. B. Schor: *What Do Platforms Do?...*, p. 274.

[15] B. E. Duffy: *(Not) Getting Paid to Do What You Love: Gender, Social Media, and Aspirational Work.* Yale University Press, 2017; S. Vallas, J. B. Schor: *What Do Platforms Do?...*, p. 274.

number of wages received for these jobs. The unpredictability of work particularly affects people from minority groups and those in more vulnerable economic situations. Non-transparent conditions for the performance of services using algorithmic management lead to asymmetry of information on the part of employees, and make it difficult to claim their rights in disputes with platforms. Platform workers often carry out their tasks in isolation, presenting difficulties for collective bargaining. This is especially challenging for platforms that facilitate online services, where service providers are distributed across various countries[16]. Digital platforms, due to their structure, make it difficult for workers to effectively realise their right to labour representation[17].

Researchers have been far more likely to address issues related to on-demand work platforms, apparently because of their easier embedding in a classically conceived employment relationship, as well as stronger efforts to regulate their situation through the actions of particular trade unions. As a result, there is limited information on workers in the EU who use digital platforms to carry out tasks online without any face–to–face interaction[18]. Similar observations can be made in the case law of European and UK courts, which have more often established the employment relationship for delivery workers or drivers than for crowdwork[19].

[16] European Commission. Directorate General for Employment, Social Affairs and Inclusion, CEPS: *Digital Labour Platforms in the EU...,* pp. 10–11.

[17] See: V. Lehdonvirta: *Algorithms that Divide and Unite: Delocalisation, Identity and Collective Action in 'Microwork'*. In: *Space, Place and Global Digital Work*. Ed. J. Flecker. London 2016, pp. 75–76; N. Potocka-Sionek: *Niewidzialni pracownicy...,* p. 112; J. Unterschütz: *Come Together Now! New Technologies and Collective Representation of Platform Workers*. "Acta Universitatis Lodziensis. Folia Iuridica" 2021, vol. 95, pp. 63–65.

[18] A. Aloisi: *Platform Work in Europe...*, pp. 5–6; L. Ratti: *A Long Road Towards the Regulation of Platform Work in the EU*. In: *Collective Bargaining and the Gig Economy. A Traditional Tool for New Business Models*. Eds. J. M. Miranda Boto, E. Brameshuber. Oxford, New York 2022, pp. 56–67.

[19] Compare for instance: C. Hießl: *The Classificaton of Platform Workers in Case Law: A Cross-European Comparative Analysis*. "Comparative Labor Law & Policy Journal" 2022, vol. 42, no. 2, p. 4–6.

3. The EU's approach to regulating digital platforms

The core issue with platform work is the difficulty to determine the level of control which platform companies have over workers' labour, which often makes it impossible to establish a proper legal relationship between parties, employment relationship or self-employment. This problem has also been recognised by the European Union, which adopted the European Pillar of Social Rights (EPSR) on November 17, 2017, in Gothenburg, to improve working conditions in the new socio-economic reality. For instance, principle no. 5 of EPSR states, *inter alia*, that "employment relationships leading to precarious working conditions should be prevented, including by prohibiting the abuse of atypical contracts"[20] and in EPSR Action Plan inducted in 2020 points out a "[new] emerging trend is the blurring of traditional lines between a worker and a self-employed person, and a growing heterogeneity among the self-employed. A case in point is the emergence of vulnerable self-employed working through platforms and operating under precarious conditions. The pandemic has highlighted this for delivery workers, in particular regarding their access to social protection, and health and safety risks"[21]. It is worth noting that the European Parliament, in its resolution adopting the EPSR, pointed out that "for work intermediated by digital platforms and other instances of dependent self-employment, a clear distinction – for the purpose of EU law and without prejudice to national law – between those genuinely self-employed and those in an employment relationship, taking into account ILO Recommendation No 198, according to which the fulfilment of several indicators is sufficient to determine an employment relationship"[22].

As A. Aloisi emphasises, the EPSR is more aspirational than mandatory, however it marks a new and promising step towards strengthening the EU's social dimension[23]. The adoption of the EPSR can also be seen in the context of the protective function of labour law. The Eu-

[20] Interinstitutional Proclamation on the European Pillar of Social Rights (OJ C 428, 13.12.2017).

[21] The Council, The European Economic and Social Committee and The Committee of the Regions, COM(2021) 102 final.

[22] European Parliament resolution of 19 January 2017 on a European Pillar of Social Rights (2016/2095(INI)).

[23] A. Aloisi: *Platform Work in Europe...*, p. 14.

ropean legislator has noticed, in this case with regard to platform work, a strong imbalance between digital platforms and the individuals who work through them. Analyses show that digital platforms have repeatedly given workers the status of self-employed workers, while defining themselves solely as intermediaries between clients and individuals who perform work through digital platforms[24]. The measures taken are a response to the changing labour market, but also an attempt to provide all working people with more stable and secure working conditions.

To this end, the Directive (Eu) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union[25] and Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work have been adopted[26]. Both Directive 2019/1152 and Proposal for a Directive use the same personal scope, indicating that they apply to every worker (platform worker) in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice[27]. Domestic, on-demand, intermittent, voucher-based and platform workers, but also trainees and apprentices are entitled to a set of minimum rights as long as they meet the criteria established by the CJEU, according to this Directive[28]. The Directive's 'hybrid' formula seeks to strike a balance between Member States' autonomy in defining employment relationships and compliance with ECJU case law. While re-

[24] European Commission. Directorate General for Employment, Social Affairs and Inclusion, CEPS: *Digital labour platforms in the EU...*, p. 30.

[25] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, OJ L186/105.

[26] Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work COM/2021/762 final; on 11 March 2024, the Council adopted the content of the Directive agreed during the informal trilogue on 8 February 2024. The Directive is to be adopted by the European Parliament at first reading and Member States will then be obliged to transpose it into their national law within two years.

[27] Art. 1(2) Directive (EU) 2019/1152 and art. 2(2) Proposal for a Directive on improving working conditions in platform work.

[28] A. Aloisi: *Platform Work in Europe...*, p. 15.

specting national legal frameworks, the overarching aim of this interpretation is to inclusively interpret the Directive's protective objectives. Therefore, a broad interpretation would likely bring platform workers within its scope[29]. The adoption of the proposed amendments would give the ECJU more flexibility in interpreting the Directive, potentially reducing the impact of overly strict national criteria. Without a legal presumption, digital labour platforms could take advantage of traditional national standards and ignore the nuances of platform work[30]. A broader understanding of employment relationships can help reduce this risk by acknowledging the unique nature of platform work. However, the classification of workers is still a controversial issue and presents an opportunity for dialogue between courts at various levels.

In the proposal for Directive, the European Commission showed that "Criteria indicating that a digital labour platform controls the performance of work should be included in the Directive in order to make the legal presumption operational and facilitate the enforcement of workers' rights". The EU Commission, in Article 4, displayed five criteria relating to the control by digital platforms of the conditions under which work is performed, such as imposing upper limits on remuneration, limiting the ability to build a customer base or supervising the performance of work or verifying the quality of the results of the work including by electronic means[31]. The fulfilment of two triggered the presumption of an employment relationship of the platform worker. This presumption under Article 5 could be rebutted by all parties, even if all the criteria are met. However, in the adopted and agreed version of 8 February 2024, the specification of individual criteria was dropped, instead referring to the notion of 'control' and 'direction'. The contractual relationship between a digital labour platform and a person performing platform work through that platform shall be legally presumed to be an employment relationship when facts showing

[29] Ibidem, p. 16; B. Bednarowicz: *Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union*. "Industrial Law Journal" 2019, vol. 48, no. 4, pp. 612–614.

[30] V. De Stefano: *The EU Commission's Proposal for a Directive on Platform Work: An Overview*. "Italian Labour Law e-Journal" 2022, p. 5.

[31] European Commission: Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM (2021), 762 final.

control and direction, according to national law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice, are found. In addition, the possibility of challenging this presumption has changed, so that it is the digital platform wishing to avoid employer status that will have to prove that it was a contractual relationship. There is a significant change to detail and adapt this rebuttable presumption of law to the circumstances of Member States. This development is in line with what trade unions and the European Parliament have advocated in their reports[32].

I consider the solutions adopted at the level of Directive 2019/1152 on transparent and predictable working conditions in the European Union and, if adopted as presented, the Directive on improving working conditions in platform work to be an appropriate way forward. Despite some misgivings about the 'hybrid' definition of '(platform) worker'[33], I believe it will allow the possibility to extend the scope of the Directive to more people who want to claim the existence of an employment relationship with digital platforms. This definition will also make it obligatory for national courts to be familiar with European rulings, which also generates the need for judges to be adequately prepared in order to fully rule on platform work.

The rebuttable presumption of employment relationship as adopted seems to make its provisions immune to the rapid development of digital platforms. The solutions presented in the Proposal have been repeatedly criticised as insufficient and as not reflecting at least the conditions of in crowdwork[34]. A closed catalogue of criteria raising the

[32] European Parliament, Committee on Employment and Social Affairs: *Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work*, (COM(2021)0762 – C9-0454/2021 – 2021/0414(COD)); European Trade Union Confederation: *Resolution on the Proposal of the European Commission of a Directive on Improving Working Conditions in Platform Work and Way Forward Ahead of the Ordinary Legislative Procedure*, 2022, https://www.etuc.org/en/document/etuc-resolution-proposal-european-commission-directive-improving-working-conditions (Accessed: 28 February 2024).

[33] B. Bednarowicz: *Delivering on the European Pillar of Social Rights*, p. 613; M. Risak, T. Dullinger: *The Concept of Worker in EU Law: Status Quo and Potential for Change*. "ETUI Research Paper" 2018.

[34] For instance: V. De Stefano: *The EU Commission's Proposal for a Directive on Platform Work...*, pp. 4–5; L. Ratti: *A Long Road Towards the Regulation of Platform Work in the EU...*, pp. 58–59; M. Schlachter: *The Initiative of the European Commission for Improving Working Conditions in Platform Work*. "Miskolci Jogi Szemle" 2022, vol. 17, no. 2, pp. 388–389.

presumption of an employment relationship could quickly become out of step with the changing digital marketplace. Amending the definition of the rebuttable presumption of employment relationship and adopting control and direction as the basic categories will simplify the process of establishing the existence of an employment relationship and also allow Member States to adopt the rebuttable presumption of employment relationship in accordance with national solutions and practices already developed.

4. Presumption of employment relationship in Polish labour law

Art. 22 §1 of Polish Labour Code[35] states that by establishing an employment relationship, an employee assumes the obligation to perform specific work for the employer and under the employer's direction at a place and time specified by the employer, and the employer assumes an obligation to employ the employee against payment of remuneration. Additionally, employment on the terms referred to in §1 is taken to be based on an employment relationship, regardless of the name of the contract concluded by and between the parties. Furthermore, a contract of employment cannot be replaced with a civil-law contract based on the conditions of work referred to in §1.

In the case law of the labour courts[36], as well as in some academic papers, there are remarks suggesting the existence of the so-called 'soft presumption of an employment relationship'[37]. They point out that when the Labour Code was amended, the legislator introduced the so-called 'soft presumption of an employment relationship'. This presumption is characterised by the fact that subordination in the

[35] Act of 26 June 1974 Labour Code (Journal of Laws 2023.1465 of 2023.07.31).

[36] For instance, see: Judgment of the Supreme Court II UKN 229/98, OSNAPiUS 1999, no. 19, issue 672; Judgment of the Supreme Court I PKN 191/98, OSNAPiUS 1999, no. 14, issue 449; Judgment of the Supreme Court III PK 38/09, LEX no. 560867.

[37] Compare: A. Dral: *Powszechna ochrona trwałości stosunku pracy. Tendencje zmian*. Warszawa 2009, p. 395; G. Orłowski: *Umowa zlecenia a „miękkie domniemanie stosunku pracy*. "Monitor Prawa Pracy" 2007, no. 3, pp. 134–135; J. Unterschütz: *Ograniczenie w zakresie zawierania umów na czas określony a „miękkie" domniemanie istnienia stosunku pracy (uwagi na marginesie wyroku Sądu Najwyższego z dnia 14 czerwca 2012 r., i pk 222/11)*. "Rozprawy Naukowe i Zawodowe Państwowej Wyższej Szkoły Zawodowej w Elblągu" 2013, no. 16, p. 133.

provision of remuneration services or the replacement of an employment contract with a civil law contract while maintaining subordination is considered to be an employment relationship, regardless of the name given to the agreement by the parties. They also argue that in the Supreme Court's jurisprudence, a liberal approach dominates the interpretation of the provisions on the so-called 'soft presumption of an employment relationship'. According to this approach, in the name of freedom of contract, parties are free to choose different forms of work arrangements, including civil law contracts. If an agreement has similar characteristics to both an employment contract and a civil law contract, the actual intention of the parties should be decisive in determining its nature. Whether it is an employment contract or a civil law contract depends not only on the name, but primarily on the purpose and the common intention of the parties. There are also such statements, although in the minority, indicating the existence of a legal presumption of an employment relationship in Article 22 of the Labour Code[38]. This argument, however, is unsupportable. Although the wording of Article 22 §1^1 and §1^2 of the Labour Code might suggest otherwise, these provisions do not create a presumption of employment. Rather, they reinforce the view, well established in both legal literature[39] and case law[40], that the nature of the employment relationship is defined by the actual intentions of the parties and not by the formal title of the contract. Accordingly, this provision is considered to be purely explanatory.

A particular exception can be found in Articles 4(2) and 4(4) of the Act of 15 June 2012 on the consequences of entrusting work to foreigners residing illegally on the territory of the Republic of Poland[41] (hereinafter: u.s.p.p.c.), which implements Directive 2009/52/EC of the

[38] A. M. Świątkowski: *Cywilnoprawne zatrudnienie niepracownicze*. In: *System Prawa Pracy.* Vol. 7: *Zatrudnienie niepracownicze.* Ed. K. W. Baran. Warszawa 2015.

[39] M. Gersdorf: *Cechy konstrukcyjne umowy o pracę*. In: *Prawo zatrudnienia.* Warszawa 2013; K. Rączka: *Czy domniemanie stosunku pracy?* "Przegląd Ubezpieczeń Społecznych i Gospodarczych" 1997, no. 2, p. 12; A. Tomanek: *Ciężar dowodu w prawie pracy*. In: *System Prawa Pracy. Część ogólna.* Vol. 1. Ed. K. W. Baran. Warszawa 2017, p. 1444.

[40] Judgement of the Supreme Court I PK 60/17, LEX no. 2486218; Judgement of the Supreme Court I PK 182/07, OSNP 2009, no. 5–6, issue 60. Judgement of the Supreme Court I PKN 432/99, OSNP 2001, no. 9, issue 310.

[41] Act of 15 June 2012 concerning the effect of employing foreigners residing illegally on the territory of the Republic of Poland (Journal of Laws 2021.0.1745 of 2021.09.27).

European Parliament and of the Council of 18 June 2009 laying down minimum standards on sanctions and measures against employers of illegally staying third-country nationals[42]. Articles 4(2) and (4) of the u.s.p.p.c. introduce a presumption of an employment relationship when pursuing overdue wages and related benefits. These provisions do not automatically presume the existence of an employment relationship in situations where there is doubt as to its nature. Their sole purpose is to guarantee wages for foreigners illegally residing in Poland, regardless of the form of employment. The existence of an employment relationship is the basis for this presumption, which covers a three-month period of employment. Proof of employment on any other basis leads to a presumption of the right to compensation. These presumptions can be rebutted, for instance, by challenging their basis or by providing evidence that contradicts the presumption, such as proof of a different period of employment or a wage structure other than that established by the legislature[43]. Thus, Polish labour law does not provide for a general presumption of the existence of an employment relationship. The only exception to this rule is for foreigners residing illegally in Poland, who, in the event of non-payment of wages by the employer, can benefit from the legal presumption and thus improve their legal situation.

5. Conclusion

Recent technological innovations, such as digital platforms and their regulation, have dominated labour law discourse both nationally and globally. This is not surprising given the rapid proliferation of digital platforms in the digital economy and the often low threshold of entry for users and, above all, those providing work through them. As I have pointed out earlier, the work and the people who do this work *via* platforms are diverse and in many cases hard to clearly place into a specific category, be it employment relationship or self-employment. I believe that digital platforms will revolutionise (or have already revolutionised) the way in which work is done, not only lo-

[42] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals OJ L 168, 30.6.2009.

[43] For more: A. Tyc: *Ciężar dowodu w prawie pracy. Studium na tle prawnoporównawczym*. Warszawa 2016.

cally, but also in crowdwork, where such work becomes an opportunity for economically disadvantaged people to earn extra income. Nevertheless, the current rather residual regulation of platform work exposes some people working through digital platforms to an inappropriate framing of the situation in relation to the form of work they are undertaking. I interpret the presented ways of regulating the minimum working conditions of non-standard workers as well as the attempt to introduce a rebuttable presumption of employment relationship for platform workers as a step towards ensuring more stable and predictable working conditions, especially on digital platforms. The solution in the form of a presumption of employment relationship also implements Recommendation no. 198 of the International Labour Organisation, which expresses a double aim: firstly, developing methods to identify genuine employment relationships; and on the other hand, combating the hidden practice of disguised employment[44].

However, the European Commission's proposal to introduce a specific legal presumption for platform work in Poland would introduce a drastic change that fundamentally contradicts the apparent foundations of Polish labour law. It would introduce an unjustified distinction between traditional workers and platform workers. It would also put those not employed *via* digital platforms at a disadvantage by unjustifiably differentiating their position on the labour market. It would also consequently lead to an attempt by digital platforms to circumvent the law in order to avoid qualifying as platforms and thus not having to prove that the legal relationship in question was not an employment relationship. To avoid legal uncertainty and maintain a clear distinction between traditional and platform work, the Polish parliament should instead consider adopting a general presumption of employment status. The presumption of employment relationship would, in my opinion, realise to the fullest extent the constitutional principle of the protection of labour and also the protective function of labour law can be seen in it.

While stressing the social and protective dimension of the solutions proposed, it is important not to depart from the socio-economic system

[44] More on this topic: V. De Stefano: *The Rise of the 'Just-in-Time Workforce'...*; F. Hendrickx: *Platform Work and Beyond*. "European Labour Law Journal" 2023, vol. 14, no. 4, pp. 466–467.

of the country concerned. Therefore, a social market economy, based on freedom of economic activity and private property, cannot exist without solidarity, dialogue and cooperation of social partners, which should constitute the basis of the economic system of the Republic of Poland[45]. Thus, the state is also entitled to correct the inequalities and distortions created by the free market, acting in agreement and dialogue with social partners. I advocate the statement that the introduction of the rebuttable presumption will greatly benefit workers by providing legal clarity in determining the nature of their employment relationships. Uncertainty over classification has a significant impact on working conditions and deprives workers of their labour rights and social protection. By shifting the burden of proof to employing entitites who argue for contractual rather than employment relationships, the presumption helps to ensure fair treatment. In addition, a definitive determination of the employment status of platform workers would help trade unions in particular to defend the interests of these workers in collective bargaining. Finally, the legal presumption improves the enforcement and monitoring of labour laws by requiring that individuals who meet the criteria of the presumption be recognised as being in an employment relationship, thereby allowing a platform worker to be presumed to be in an employment relationship and, if not, to be subject to appropriate sanctions[46].

The proposed Directive on improving working conditions on platform work provides for a rebuttable presumption of an employment relationship. Presumptions of this kind impose an obligation to accept a particular conclusion if the condition formulated on the basis of the presumption is met. A party benefiting from a legal presumption is not completely relieved of the burden of proof. S/he must prove the basis of the presumption from which a particular conclusion follows. This basis can be challenged by various means of evidence, and the conclusion itself can only be rebutted by rebuttal evidence. Cases of establishing legal presumptions in Polish labour law are rare. The use of legal presumptions and the shifting of the burden of proof are justified for

[45] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997.78.483 of 1997.07.16), art. 24.

[46] In the context of digital platforms among others: M. Kullmann: *'Platformisation' of Work: An EU Perspective on Introducing a Legal Presumption*. "European Labour Law Journal" 2022, vol. 13, no. 1, pp. 70–71.

pragmatic reasons. In a few cases in labour law, the reversal of the burden of proof is used to strengthen the position of an employee claiming compensation for discriminatory practices (e.g. art. 18^{3b} § 1 *in fine* of the Labour Code)[47].

The labour law in its content is filled with a view of human labour as a special value subject to a different regulation from typical commercial relations between two equal contractors. Therefore, Article 24 of Polish Constitution states that work shall be protected by the Republic of Poland. The State shall exercise supervision over the conditions of work. The State has as its primary objective the protection of human labour and the supervision of the way in which it is carried out through its institutions. Thus, I believe that the presumption of an employment relationship will allow the fulfillment of the State's basic tasks in the field of labour relations. There is no doubt that the shape of such a presumption should serve all those who perform work of a certain kind, being in a subordinate relationship with respect to, while it should not affect those who provide their services as self-employed persons. In this case, a deeper analysis of ILO Recommendation No. 198 at the level of parliamentary work will be beneficial in order to guarantee workers their due rights.

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[47] A. Tomanek: *Ciężar dowodu w prawie pracy...*, p. 1465; A. Tomanek: *Ustawowe określenie stosunku pracy jako narzędzie delimitacji zatrudnienia pracowniczego i niepracowniczego*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej", vol. 30, no. 3, p. 198.

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Domniemanie stosunku pracy pracowników cyfrowych a ochronna funkcja prawa pracy

Streszczenie

Niniejszy artykuł zawiera przegląd kluczowych kwestii związanych z platformami cyfrowymi i ich wpływem na rynek pracy. W pierwszej kolejności omówiono koncept i rozpowszechnienie się platform cyfrowych, które mogą pogłębiać nierówności na rynku pracy i pogarszać warunki pracy. Następnie przeanalizowano dyrektywy europejskie dotyczące pracowników nietypowych, w szczególności pracowników platform cyfrowych, koncentrując się na zakresie podmiotowym i wzruszalnym domniemaniu stosunku pracy. Dyrektywy te mają znaczący wpływ na pracowników platform cyfrowych, ale budzą wątpliwości co do ich przyjęcia na szczeblu krajowym. W artykule przeanalizowano również polskie przepisy dotyczące stosunku pracy oraz możliwość wprowadzenia wzruszalnego domniemania do polskiego prawa w kontekście ochronnej funkcji prawa pracy.

Słowa kluczowe: praca platformowa, platformy cyfrowe, stosunek pracy, wzruszalne domniemanie prawne, funkcja ochronna prawa pracy

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The problem of double subordination of food-delivery platform workers in Poland as a classification challenge to the Polish labour law system

Summary

In the case of the Polish labour market, the employment model for platform workers, particularly in the food delivery sector, differs from the traditional employment relationship and usually involves a formal civil law relationship between the platform worker, the logistics partner and the platform. In this model, it is not uncommon for a platform worker to be subordinated to two entities, which has significant organisational implications and raises legitimate classification dilemmas. The purpose of the analysis is to attempt to legally classify the employment model of platform worker in the food delivery sector and to critically assess the presumption of an employment relationship, as proposed in the EU Directive on improving working conditions in platform work.

Keywords: platform work, subordination, employment relationship, presumption of employment relationship, digital labour platform, logistics partner

1. Introduction

Platform work is almost automatically associated with the delivery of goods, using popular, easy-to-use mobile applications. This dimension of platform work, which is a fundamental emanation of the gig economy, is not an alien phenomenon on the Polish labour market either. Particularly during the coronavirus pandemic, it was the growing base of couriers who were increasingly responsible for meeting the basic consumption needs of a society stuck in lockdown[1]. Today, the presence of platform workers is a permanent feature of the consumer

[1] D. Polkowska: *Przyspieszenie czy spowolnienie? Praca platformowa dostawców jedzenia w dobie pandemii Sars-Cov-2*. "Studia Socjologiczne" 2021, vol. 4, no. 243, pp. 109–133.

goods delivery sector. However, from the perspective of the legal regulation of the labour market in Poland, the presence of platform workers should not be seen as a completely new phenomenon. Rather, it is another, undoubtedly heterogeneous, variant of the well-known and relatively widespread practice of using atypical labour relations. A particularly interesting formula of employing platform workers can be observed in the food delivery sector, where the employment model deviates significantly from the classic model of employment relationship as defined by the Polish Labour Code (hereinafter: LC). In fact, the employment model of platform work in this sector is mostly based on two-way civil law relations of three entities: the platform worker, the logistics partner and the digital labour platform (hereinafter: DLP). In such a configuration, the platform worker is subordinated to not one, but two entities, each of which exercises a certain degree of managerial and organisational authority over the platform worker.

The main purpose of this study is to deconstruct and characterise the practical model of employment of platform workers in the food delivery sector in Poland and to evaluate its functioning from the perspective of the current paradigm of the employment relationship as defined under the LC. The analysis will also include a critique of the presumption of an employment relationship and its determinants, proposed in the Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work (hereinafter: the Platform Directive), which does not reflect either the specifics of the Polish labour market, including in particular the paradigm of the employment relationship as defined in the LC, nor the needs and aspirations of platform workers themselves.

I intend to achieve the research objectives by validating the following preliminary assumptions:

1. In the case of platform work in the food delivery sector in Poland, the current employment model is often based on two legal relationships linking the deliverer to the DLP and the logistics partner.
2. Under the legal relationships identified above, the platform worker is to some extent subordinate to both the DLP and the logistics partner.
3. The complex platform employment relationship in the food delivery sector in Poland is not an employment relationship *sensu stricto* under the LC.

4. The platform employment relationship in the food delivery sector in Poland has the characteristics of an atypical non-employee model of employment.
5. The preconditions for the presumption of an employment relationship proposed in the Platform Directive are not compatible with the current model of the classical employment relationship operating in the Polish legal system.

2. Characteristics of platform work in the food delivery sector in relation to the problem of double subordination of platform workers

2.1. The heteronomous nature of the platform work

Platform work as a social, economic and legal phenomenon is difficult to define clearly and narrowly. It is difficult to speak of a single model of employment, and the labour activity of platform workers itself takes on different forms and dimensions[2]. The common feature of these dimensions is undoubtedly the presence of the so-called DLPs, which at least connects potential clients with potential contractors. Importantly, work in this model can take different forms. We tend to associate platform work with the gig economy, unskilled work and low-paying contracts[3]. Here, for purely empirical and stereotypical reasons, the vast majority of the public will associate platform work precisely with the phenomenon of ordering food with delivery *via* mobile apps or online portals[4].

However, it is worth remembering that platform work also has other equally important and interesting dimensions. This is because it is a "capacious" arena that also brings together other "species" of platform workers, including those who specialise in narrow areas of digital work and are looking for well-paid assignments. It is also

[2] E. Kocher: *Digital Work Platforms at the Interface of Labour Law: Regulating Market Organisers*. Oxford, New York 2022, pp. 4–6.

[3] T. Montgomery, S. Baglioni: *Defining the Gig Economy: Platform Capitalism and the Reinvention of Precarious Work*. "International Journal of Sociology and Social Policy" 2021, vol. 41, no. 9/10, pp. 1012–1025.

[4] Ibidem.

worth remembering that platform work itself is multidimensional[5]. This work is not limited to the transport of people or the delivery of goods. We can also distinguish professional online services that are provided completely remotely and can be performed from any corner of the world, including, in particular, programming or graphic design services[6]. Equally often, the digital work platform is a source of orders for internet marketing or content creation[7]. It can also be work that is only ordered through DLPs, but that is carried out completely stationary – we are not just talking about deliveries and transport, but also other services, such as care, repairs, renovations, cleaning, etc.[8] Finally, it should not be overlooked that the operating model of DLPs is not homogeneous either. We can observe DLPs that essentially only act as a kind of link between a potential client and a potential service provider, without organising the rules of cooperation or the level of remuneration. At other times, DLPs reserve more authoritative powers for themselves, not only connecting clients with contractors, but also organising the rules of cooperation, supervising contractors and shaping the rules of their remuneration[9].

2.2. Four-subject legal relationship in the case of platform work in the food delivery sector in Poland

The model of platform work in the food delivery sector in Poland is notably interesting, as it to some extent breaks out of the commonly described patterns. Unlike the traditional model of platform work featuring three actors – the user-customer, the DLP and the user-worker, in the case of the food delivery, in the case of Poland, the leading employment model is based on the presence of at least four actors, as

[5] A. Piasna, A. Zwysen, J. Drahokoupil: *The Platform Economy in Europe: Results from the Second ETUI Internet and Platform Work Survey (IPWS)*. "ETUI Research Paper – Working Paper" 2022.05, p. 11.

[6] Ibidem, p. 34.

[7] S. Vallas, J. B. Schor: *What Do Platforms Do? Understanding the Gig Economy*. "Annual Review of Sociology" 2020, vol. 1, no. 46, pp. 274–277.

[8] J. Unterschütz: *Zatrudnienie tymczasowe a praca w ramach cyfrowych praform zatrudnienia*. In: *Zatrudnienie tymczasowe jako nietypowa forma świadczenia pracy*. Ed. T. Duraj. Łódź 2022, pp. 62–64.

[9] S. Vallas, J. B. Schor: *What Do Platforms Do?...*, pp. 277–284.

the so-called logistics or fleet partner appears here[10]. This modification is not rare, with major food platforms in Poland openly boasting that 90% of their couriers are covered by this employment model[11]. Essentially, food delivery platform workers in Poland are employed either as the solo self-employed individuals or under civil law contracts with logistics partners, with no other alternatives.

So the basic question is who the logistics partners really are? These are legal entities registered in Poland that are responsible for the direct employment of couriers within the specific model of platform employment in the analysed sector. These partners not only cooperate in economic and organising terms with the DLPs as such, but above all, from a formal point of view, they are the ones who employ the couriers, pay their wages, insure them, regulate taxes, organise training and materials necessary for their work or even help with the legalisation of employment in the case of foreign workers[12]. Notably, some partners offer their couriers the possibility to process orders from multiple DLPs simultaneously[13]. Payment flows from DLP to the logistics partner, who then distributes wages to courier after deductions of commissions, taxes and social insurance. Logistics partners are crucial in the case of analysed platform employment model, as they do not just act as simple intermediaries.

2.3. Who is the employer here? The problem of the effective double subordination of the platform workers in the food delivery sector in Poland

The presence of the logistics partners in the platform employment model is an important complication in terms of its correct legal qualification form the perspective of national labour law system. This

[10] Naturally, a model based only on direct cooperation between the platform and the worker can also be seen here. For example, the Pyszne.pl platform (the Polish version of Just Eat Takeaway.com) operates on a model that does not use logistics partners.

[11] See e.g. Glovo website: *Zarobki. Kim jest partner logistyczny?*, https://delivery.glovoapp.com/pl/faq-what-is-logistics-partner/ (Accessed: 22.02.2024).

[12] Ibidem.

[13] Some logistics partners explicitly state that they allow the platform workers they employ to work on several platforms at the same time. See e.g. website of logistics partner MP Partners https://mbpartners.pl/praca/xpressdelivery/ (Accessed: 22.02.2024).

is because, to a certain extent, logistics partners act as quasi-employers, and this is independent of the specifics of the relationship between the courier and the DLP itself. This is an important complication in the context of the discussion on the subordination of platform workers to the DLPs, as in the case under consideration, this subordination is blurred and atomised between the DLP and the logistics partner.

On the one hand, there is no doubt that the platform worker is also subject to the algorithmic subordination of the DLP[14]. In this view, the DLP exercises daily supervision over the platform workers through the app, which becomes the means of determining the platform workers' access to orders placed by consumers, and thus the factor shaping their access to work. Without downloading the app, registering and logging in, the courier will undoubtedly not be able to carry out their work. In addition, it should not be forgotten that it is the DLP that determines the wages for a given course, making them dependent on the number of active couriers, weather conditions or other elements unknown to the platform workers themselves[15]. It should also noted that the courier is constantly monitored by the DLP's app during the delivery. All of these aspects constitute organisational activities that are reserved for the employer in the classical model of employment. In addition, the degree and extent of the DLP's influence on the courier's ability to perform the work clearly indicates that a relationship of subordination and dependence is created in the described model[16].

On the other hand, in the model analysed, the platform worker also remains in at least a partially dependent legal relationship with the logistics partner. It should be remembered that the partner is the entity that formally employs the courier. Typically, the basis of the employment relationship used here is a mandate contract governed by civil law[17]. What is important, as the Polish Supreme Court points out, is that features of management and subordination are also present

[14] E. Pignot: *Who is Pulling the Strings in the Platform Economy? Accounting for the Dark and Unexpected Sides of Algorithmic Control*. "Organization" 2021, vol. 30, no. 1, pp. 140–167.

[15] Eurofound: *Employment and Working Conditions of Selected Types of Platform Work*. Publications Office of the European Union, Luxembourg 2018, pp. 23–24.

[16] Ibidem, p. 28.

[17] See e.g. Glovo website: *Zarobki. Kim jest partner logistyczny?*...

in a contract of mandate[18]. Indeed, it is not uncommon for DLPs themselves to drive out potential couriers, in a sense, to mandate contracts with logistics partners – for it is worth noting that for most major food platforms in Poland, a mandate contract concluded with a partner is the only accepted form of employment in the sector apart from the solo self-employment[19].

It is also worth noting that logistics partners are often also responsible for the organisational dimension of courier employment[20]. For example, despite the fact that the terms of remuneration for delivery are determined by the DLP, in the model under consideration it is the logistics partner who is responsible for the direct payment of remuneration, the payment of income tax advances and the payment of any social security contributions. In addition, it can be seen from the partners' own websites that they also offer couriers professional training and provide them with basic working tools, or take the trouble to legalise the employment of potential platform workers from third countries. It is also worth noting that logistics partners in Poland often run a very diversified business, allowing 'their' couriers to simultaneously provide delivery services in cooperation with various, *de facto* competing, DLPs, even creating their own applications for this purpose, combining orders from different DLPs at the same time.

3. An attempt to legally classify platform employment in the food delivery sector in Poland

A common dilemma associated with the platform work is the impossibility of fully encapsulating the phenomenon in a rigid legal framework. In virtually all countries where platform work occurs, the existing framework of the national legal system has proved insufficient to provide effective protection for platform workers[21]. The primary is-

[18] Judgment of the Supreme Court of 21.01.2021, ref. III PSKP 3/21, LEX No. 3108632.

[19] Glovo website: Zarobki. Kim jest partner logistyczny?...

[20] Ibidem. On the aforementioned website, Glovo directly provides a list of its logistics partners with an indication of the organisational areas for which they are responsible.

[21] V. De Stefano, I. Durri, C. Stylogiannis, M. Wouters: *Platform Work and the Employment Relationship*. ILO Working Paper, no. 27, International Labour Organization, Geneva 2021.

sue lies in the appropriate classification of platform work – it can be seen either as part of the traditional employment relationship, classifying the platform worker as an employee[22] and the DLP as an employer[23], or as an independent, atypical employment form outside the conventional legal boundaries[24]. This dilemma is not new to the Polish labour law system either, where the current legal measures do not address the phenomenon of platform work at all, mirroring at least a two-decade policy of neglecting protection for non-employee atypical workers.

The Polish labour law system is based on the full protection of employees who are engaged in an employment relationship in its narrow sense, based on the provisions of the LC. In other words, those who do not fit into the classic model of an employment relationship do not benefit from most of the mechanisms protecting the employee as the weaker party in the employment relationship, with some narrow exceptions. Turning to the LC, we learn that an employee is a person employed solely on the basis of an employment contract, appointment, election, nomination or cooperative employment contract (Article 2LC). However, it is also worth mentioning the structure of the employment relationship, which, according to the provision of Article 22 § 1 LC, is based on the following constitutive elements:

- the obligation of an employee to perform predetermined type work activities;
- the managerial authority of an employer and the subordination of the employee;
- the performance of work activities at a predetermined time and place;
- and the chargeability of the relationship in the form of cyclical remuneration.

Taken together, the above elements make it clear that the model configuration of an employment relationship as defined by the LC

[22] Such a perspective has been adopted, for example, in Spain. See L. Mella Méndez, M. Kurzynoga: *The Presumption of the Employment Relationship of Platform Workers as an Opportunity to Eliminate Obstacles Arising from Competition Law in the Conclusion of a Collective Agreement: The Example of Spain*. "Białostockie Studia Prawnicze" 2023, vol. 28 no. 4, pp. 197–216.

[23] V. De Stefano: *Platform Work and the Employment Relationship*...

[24] Ibidem.

consists primarily of an employment contract concluded for an indefinite period of time, on a full-time basis, provided for an extended period of time at a predetermined location and with predetermined working hours[25]. Equally important are the rules governing the issue of remuneration of employees, which, at the basic level, do not depend on the achievement of specific results, but on the willingness to work and on the diligence with which they work[26].

In the described context, platform work in the food delivery sector in Poland – generally – does not fall within the framework of a classic employment relationship, making it challenging to classify platform workers as employees under LC. The involvement of both the DLP and the logistics partner make the distinctive features of the classic employment relationship blurred or non-applicable in the case of platform couriers. This problem is highlighted by the absence of a formal employment contract, the diluted employer's managerial competence and double subordination to the DLP and the logistics partner and the non-existent work schedule, as couriers decide their working hours[27]. It is also worth mentioning that in the model under consideration wages are result-based and depend on successful deliveries[28]. Finally, it cannot be overlooked that the employment relationship is a bilateral relationship between an employee and an employer. In contrast, in the case of platform work in the sector under study, we are dealing with two entities that exercise the powers and obligations of an employer, which clearly pushes the analysed platform employment model beyond the framework of the employment relationship regulated by the Polish labour law system.

The difficulty of recognising platform work as an employment relationship under LC is also indirectly confirmed by the Polish State

[25] E. Bąk: *Nietypowe formy zatrudnienia na rynku pracy*. Warszawa 2009, pp. 9–10; A. Berezka: *Nietypowe formy zatrudnienia w Polsce na tle wybranych krajów Unii Europejskiej*. "Studia i Prace Wydziału Nauk Ekonomicznych i Zarządzenia" 2012, p. 10; M. Gersdorf: *Kodeks zatrudnienia wyzwaniem przyszłości*. In: *Zatrudnieni i zatrudniający na aktualnym rynku pracy*. Ed. M. Gersdorf. Warszawa 2012, pp. 45–50, and K. Liptak: *Is Atypical Typical? Atypical Employment in Central Eastern European Countries*. "Employment and Economy in Central and Eastern Europe" 2011, no. 1, p. 4.

[26] See Supreme Corut Decision of 27.09.2023, ref. II USK 317/22, LEX No 3620616.

[27] Eurofound: *Employment and Working Conditions...*, p. 25.

[28] Ibidem.

Labour Inspectorate itself[29]. There have already been inspections of such DLPs as Uber Eats in Poland, and as the Chief Labour Inspector admits, from a legal perspective, DLPs in the food delivery sector in Poland do not carry out activities that would allow them to be legally recognised as employers of couriers, as the contracts that serve as the basis for employment are only concluded between logistics partners and platform workers[30].

From a conceptual point of view it seems that platform work in the food delivery sector in Poland is an example of atypical non-employee employment. In this model, the element common to basically all forms of the atypical non-employee employment is primarily the widespread use of the contract of mandate or comparable civil law contracts. The specific feature, however, is the presence of not one, but two quasi-employers – a DLP and a logistics partner. Platform work classified in this way is not covered by the relevant provisions of the Polish labour law system, with the exception of the provisions on OHS and on equal treatment and non-discrimination in employment.

4. The presumption of employment relationship in the Platform Directive in the light of the identified characteristics of the model of platform employment in the food delivery sector in Poland

De lege lata, platform workers in the food delivery sector in Poland remain outside the full range of legal protection guaranteed by the national labour law system, which is reserved exclusively for employees. *De facto*, at present, the only way for a platform worker to benefit from full legal protection is to obtain the status of an employee under the LC. From a legal point of view, this is not possible under the current model of employment in the food delivery sector, as the reconstructed model does not have the constitutional characteristics of an employment relationship within the meaning of the LC. In such a case,

[29] *Jak kurierzy Uber Eats obchodzą obowiązek zezwolenia na pracę w Polsce*, https://www.rp.pl/praca-emerytury-irenty/art1252671-jak-kurierzy-uber-eats-obchodza-obowiazek-zezwolenia-na-prace-w-polsce (Accessed: 22.02.2024).

[30] Ibidem.

the only available gateway to legal protection remains an action to establish the employment relationship, which will also require the platform worker to prove the actual presence of the constitutive features of an employment relationship in their relation. This is a difficult – if not impossible – task in a model where the powers and obligations of the employer are blurred between the DLP and the logistics partner.

The current situation may change with the implementation of the mechanisms proposed in the Platform Directive, which entered into force on 1 December 2024 and should be transposed at national level by 2 December 2026. The Article 5 of the Platform Directive obliges Member States to introduce a rebuttable presumption of an employment relationship between a DLP and a platform worker. Unlike previous versions of the document, the final text of the Platform Directive does not base the presumption in question on specific indicia, but on facts showing that the platform worker is controlled and directed by the DLP. As a result, the current simplified form of presumption in the Directive does not lead to an automatic reclassification of the employment relationship, but is rather a streamlined procedural mechanism (a procedural facilitation) for the correct classification of a given legal relationship as an employment relationship in accordance with the national law, collective agreements or practice in force in the Member States, taking into account the relevant case law of the Court of Justice[31].

Taking into account Article 3 of the Platform Directive, it is also worth noting that the presumption is not weakened by the presence of domestic intermediaries (implicitly logistics partners) in the practice of employing platform workers, which in a sense positions logistics partners (and other quasi-intermediaries) as irrelevant in the process of classifying platform work. It is hard not to get the impression that the Platform Directive overlooks the involvement of logistics partners, treating them mainly as a subjective tool to dilute the managerial and organisational competences of the DLPs themselves, in order to hinder the process of recognition of DLPs as employers.

The presumption contained in the Platform Directive in its current form does not impose ready-made solutions and is not based on

[31] A. Aloisi, V. De Stefano: *'Gig' Workers in Europe: the New Platform of Rights*. 16 March 2024. https://www.socialeurope.eu/gig-workers-in-europe-the-new-platform-of-rights?utm_content=buffer23e8a&utm_medium=social&utm_source=linkedin.com&utm_campaign=buffer (Accessed: 24.03.2024).

concrete indices, which has undoubtedly made the process of correctly classifying platform workers more difficult for platform workers. This 'soft' formulation of the presumption is, on the one hand, less precise and unambiguous, but on the other hand, it is general and flexible enough to make it more difficult for DLPs to manipulate their employment models in order to avoid classifying a given relationship as an employment relationship[32]. The fact that the Platform Directive ultimately does not contain a closed catalogue of conditions for the presumption of an employment relationship means that it will ultimately be up to the Member States to decide on the effectiveness of the procedure for reclassifying platform work. In the case of the Polish legal system, everything will depend on political will and agreements between the government and the social partners. However, we should not expect a revolution with this text of the Directive, but rather a conservative solution, which will probably refer to the rule already in force in Articles 22 § 1^1 and 1^2 LC, according to which the employment relationship is determined by the existence of emblematic conditions, regardless of the name of the formally concluded contract or the attempt to replace the employment relationship with a civil law contract.

5. Concluding remarks

The analysis has led me to come to the following conclusions:

1. Platform work in the food delivery sector in Poland has complex nature, consisting of a blurring of supervisory, managerial and organisational powers (classically reserved for the employer) between the DLP and the logistics partner. In this model, there are elements of *de facto* subordination of the platform worker both to the DLP itself and to the logistics partner. *De lege lata*, these features make it impossible to classify the employment model analysed as an employment relationship in the sense of the Polish labour law system.
2. The implementation of the Platform Directive will allow platform workers to be brought within the full regulatory scope of the national labour law system. Given the current incompatibility of the indices of the legally defined model of the employment relationship, it will be necessary to adopt a new, broader paradigm of the em-

[32] Ibidem.

ployment relationship. A side effect of this necessity will be a significant extension of the subjective scope of labour law, not only to platform workers, but also to other categories of non-employee atypical workers, who, according to the principle of equality, should also be covered by similar protection.

3. There is no doubt that platform workers should enjoy greater legal protection than is currently the case. This is indeed the purpose of the Platform Directive. A potentially important element of the solutions promoted at European level is the presumption of an employment relationship in the case of platform workers, which in the final text of the Platform Directive is no longer based on specific indicators, but on individual facts relating to the control and direction exercised by a DLP over a platform worker. The unspecified presumption of an employment relationship makes it clear that, with this wording of the Platform Directive, it will be the Member States who will ultimately decide on the actual effectiveness of the solution under consideration, which, with strong lobbying by DLPs, may significantly weaken the ultimate potential of the legal changes being promoted and may make the legal protection of platform workers in this dimension superficial in individual jurisdictions.

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Problem podwójnego podporządkowania pracowników platform gastronomicznych w Polsce jako wyzwanie klasyfikacyjne dla polskiego systemu prawa pracy

Streszczenie

W przypadku polskiego rynku pracy model zatrudnienia pracowników platformowych, szczególnie w sektorze dostawy jedzenia, różni się od tradycyjnego stosunku pracy, zazwyczaj obejmując formalnie cywilnoprawne relacje między pracownikiem platformowym, partnerem logistycznym i cyfrową platformą pracy. W modelu tym, nierzadko pracownik platformowy jest podporządkowany dwóm podmiotom, co ma istotne konsekwencje organizacyjne i rodzi zasadne rozterki klasyfikacyjne. Celem analizy jest próba prawnego sklasyfikowania modelu zatrudnienia pracowników platformowych w sektorze dostawy jedzenia, a także krytyczna ocena domniemania istnienia stosunku pracy forsowanego w projektowanej dyrektywie UE w sprawie poprawy warunków pracy za pośrednictwem platform internetowych.

Słowa kluczowe: praca platformowa, podporządkowanie, stosunek pracy, domniemanie istnienia stosunku pracy, cyfrowa platforma pracy, partner logistyczny

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Criminal sanctions for infringement of provisions implementing the Platform Directive?

Summary

The paper discusses the effectiveness of introducing criminal sanctions for violations of provisions implementing the Directive on improving working conditions in platform work. The analysis includes the obligation to establish "effective, proportionate, and dissuasive" penalties, provided in this and other labour law directives and the possibility to choose criminal sanctions to this end. The paper also examines the current practice of implementing criminal sanctions in Poland, highlighting such issues as low fines and limited deterrence. Challenges related to the place of committing a crime and the criminal liability of AI in algorithmic management systems are discussed. The conclusion suggests that the perspective of introducing criminal liability for breaches of the Platform Directive is a complex issue, requiring a comprehensive discussion on the system of criminal labour law in Poland.

Keywords: criminal labour law, enforcement of EU labour law, platform directive, AI liability

1. Opening remarks

Digital platforms have revolutionised how we interact, transact, and work. However, their rapid proliferation has also given rise to challenges related to rights of people employed by these platforms. The European Commission, in its communication on "A Strong Social Europe for Just Transitions"[1], has emphasised the need for a regulatory framework that addresses the unique dynamics of the gig economy while safeguarding the rights of workers. The EU Directive on improv-

[1] European Commission: *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Strong Social Europe for Just Transitions*, COM(2020) 14 final, https://ec.europa.eu/commission/presscorner/detail/en/fs_20_49.

ing working conditions in platform work[2] is designed to address these concerns comprehensively. One of the primary objectives is to establish a fair and transparent environment for both workers and digital platforms. At the domestic level, the enforcement of workers' rights can be achieved through wide array of measures: civil, administrative and also criminal ones. The degree to which national criminal law addresses offenses against workers' rights varies among Member States. Some jurisdictions, such as Belgium or France, possess well-established criminal labour law systems, while others impose criminal sanctions primarily in severe cases, such as forced labour or human trafficking[3].

The aim of this paper is to present current challenges in applying criminal penalties (mainly fines) for breach of provisions implementing the EU directives. First of them is the current practice of establishing and executing these sanctions reflected in the statistics of the Police and Labour Inspection, which show the limited extent of the actual severity of the criminal sanctions. The other two include the place where an offence is committed and the liability for the use of AI in algorithmic management systems.

Before presenting any detailed considerations, it is imperative to recognise that the establishment of criminal sanctions should not be an end in itself, and as long as alternative measures (civil or administrative) prove sufficient, criminal sanctions should remain the *ultima ratio* solution.

2. Obligation to establish "effective, proportionate, and dissuasive" penalties

The majority of labour law directives incorporate a general mandate to establish a redress mechanism in case of a violation of their standards. In the Platform Directive, Article 25.5 introduces the obligation to "lay down the rules on penalties, applicable to infringements of national provisions adopted pursuant to provisions of this Directive or of the relevant provisions already in force concerning the rights

[2] Directive (EU) 2024/2831 of the European Parliament and of the Council of 23 October 2024 on improving working conditions in platform work (Text with EEA relevance), PE/89/2024/REV/1, OJ L, 2024/2831, 11.11.2024 (hereafter: the Platform Directive).

[3] J. Unterschütz: *Enforcement by Means of Criminal Law*. In: *Effective Enforcement of EU Labour Law*. Eds. Z. Rasnača, A. Koukiadaki, N. Bruun, K. Lörcher. Bloomsbury Publishing 2022, p. 116.

which are within the scope of this Directive. The penalties shall be effective, dissuasive and proportionate to the nature, gravity and duration of the undertaking's infringement and to the number of workers affected".

The formulations applied in other EU labour directives vary, some compel Member States to prescribe provisions on sanctions for non-compliance with laws implementing the directive. Some of them (Directive 2014/67/EU, Directive 2008/104/EC, Directive 2006/54/EC) apply the terms "penalties" or "rules on penalties", indicating a potential distinction from "sanctions". However, this nuance is absent in other language versions consistently using the national equivalent, often derived from Latin, of "sanctions". The terms "penalties" and "sanctions" are to be considered synonymous, with neither delineating the character of the sanctions – whether civil, administrative, or criminal[4]. The directives generally emphasise the necessity for sanctions to be "effective, proportionate, and dissuasive" (Directive 2014/67/EU, Directive 2008/104/EC, Council Directive 2000/78/EC, Directive 2006/54/EC, Council Directive 2000/43/EC), except for Directive 2004/38/EC, which refers to "effective and proportionate" sanctions.

A Member State is therefore free to choose between civil, administrative and criminal penalties, or any combination of these. The EU usually does not oblige MS to impose procedural rules for workers who wish to pursue claims arising from the EU law in order to ensure the application of its provisions[5]. Still, in the case 68/88, the Commission v Greece[6] CJEU specified that the sanctions introduced must be effective, proportionate and dissuasive, and applied on the basis of the principle of equivalence with regard to infringements of national law. This also applies to criminal labour law provision, which should not be more lenient than other norms protecting comparable values. In subsequent rulings, CJEU added that Member States are entitled to introduce criminal sanctions, based on the principle of sincere cooperation[7].

[4] J. Unterschütz: *Enforcement by Means of Criminal Law…*, p. 107.

[5] See CJEU Judgement of 10 April 1984, Case 14/83. Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, ECLI identifier: ECLI:EU:C:1984:153.

[6] CJEU Judgment of 21 September 1989, Commission of the European Communities v Hellenic Republic, Case 68/88, ECLI:EU:C:1989:339.

[7] CJEU Judgment of 8 July 1999, Case C-186/98 Nunes and de Matos, ECLI:EU:C:1999:376.

It is possible that the Polish legislator will decide to apply criminal sanctions, probably fines, for breach of the laws implementing the Platform Directive. It is also very likely that the criminal conduct will be classified as offenses, similarly to these included in the Labour Code, or the Act on the Employment of Temporary Workers[8].

One of the key factors in effective enforcement of the law are the relevant competent bodies. In the case of labour law the enforcement is often entrusted to labour inspectors. The role of labour inspection in criminal proceedings differs across Member States, depending on the nature and role of labour inspection, as well as the characteristics of criminal procedure. While labour inspectors possess expertise in employment conditions across various companies and sectors, their competence to prosecute misdemeanours may be limited[9]. In Poland the labour inspectors can apply various measures, including imposing fines or filing a motion to the court for a penalty in case of misdemeanours or notify the prosecutor's office of an offence. The fines are applied in a little less than 1/4 of the audited companies, which makes it rather a common sanction[10].

3. Current (mal)practice of implementing criminal sanctions for infringement of provisions implementing the directives

In order to consider to what extent criminal sanctions, such as fines, constitute effective penalties for infringement of labour law directives, let us take an example of the laws implementing other di-

[8] Act on the Employment of Temporary Agency Workers of 9 July 2003 (Journal of Laws No. 166, item 1608).

[9] J. Unterschütz: *Enforcing UE Labour Law by Means of Administrative Law*. In: *Effective Enforcement of EU Labour Law*. Eds. Z. Rasnača, A. Koukiadaki, N. Bruun, K. Lörcher. Bloomsbury Publishing 2022, p. 95.

[10] State Labour Inspection, Report on the activity of the State Labour Inspection in 2021. Warsaw 2022, https://orka.sejm.gov.pl/Druki9ka.nsf/0/83817DDCD5B7398EC12589E200495956/%24File/3435.pdf (22.02.2024); State Labour Inspection, Report on the activity of the State Labour Inspection in 2022. Warsaw 2023, https://orka.sejm.gov.pl/Druki9ka.nsf/0/83817DDCD5B7398EC12589E200495956/%24File/3435.pdf (22.02.2024); State Labour Inspection, Report on the activity of the State Labour Inspection in 2023. Warsaw 2024, https://www.pip.gov.pl/o-nas/sprawozdania/sprawozdanie-z-dzialalnosci-pip-za-2023 (30.11.2024).

rectives regulating atypical work, such as the Directive 2008/104/EC on temporary agency work and the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. Both of them require adoption of the "effective, proportionate and dissuasive penalties". The Directive 2008/104/EC is implemented by the act on employment of temporary workers[11]. It contains three articles, each with several types of offenses, and all of them are sanctioned by the fine of 1,000 to 30,000 PLN. The law on posting of workers[12] also encompasses three articles with a larger number of types of offenses prohibited under a fine of 1,000 to 30,000 PLN.

Offense cases are dealt with by the district courts. The function of the public prosecutor in the cases of offences under Section XIII of the Labour Code, offences under the act on employment of temporary workers and other offences against employee rights is performed by the labour inspectors. These bodies can also apply fine procedure in any offence falling within the sphere of their prosecution – and this also after full inquiry activities have been carried out, if, as a result of them, they decide that the penalty imposed by a fine is a sufficient legal reaction to the offence (Article 95 § 3 of the Code of Criminal Procedure). The amount of the fine imposed under the fine procedure by the labour inspector may not exceed 2,000 PLN. Such a penalty is not severe, nor does it act as a deterrent in many cases. The labour inspector may also submit a request for a penalty to the court, in which case the court may impose a fine within the limits of the statutory threat.

Reports on the activities of the State Labour Inspection cover also their role in prosecution offences. As mentioned above, imposing a fine or referring a case to court are among many legal instruments available to the inspectors. Table 1 below illustrates the number of fines, educational measures (e.g. instruction) and motions to the criminal court in the last six years since the publication of the last report, as well as the average amount of the fine.

[11] Act of 9 July 2003 on the employment of temporary workers (i.e. Journal of Laws 2023, item 1110).

[12] Act of 10 June 2003 on the posting of workers in the framework of the provision of services (i.e. Journal of Laws 2024, item 73).

Table 1. Sanctions applied for offences found 2018–2023

Year/number / Sanction	2018		2019		2020		2021		2022		2023	
	Number	%	Number	%	Number	%	Number	%	Number	%	Number	%
Fines in PLN	14,805	47.3	16,192	54.4	9,723	51.3	12,047	53.4	15,793	62.1	17,197	65.4
Educational measures	13,903	44.4	12,369	41.6	8,636	45.1	9,699	43.0	8,469	33.4	8,043	30.6
Motions to the court	2,573	8.2	1,188	4.0	707	3.7	827	3.6	1,151	4.5	1,063	4.0

Source: State Labour Inspection reports of 2021, 2022 and 2023.

It is clear that, while inspectors are increasingly turning to fines, attention should be paid to the level of fines themselves. It is striking that the average amount of fines imposed by the labour inspectors has remained practically at the same level for many years, despite the increase in prices of goods and services, as well as in the minimum wage. While in 2018 it accounted for 57% of the minimum wage (PLN 2,100), in 2022 it is already only 40% (PLN 3,010). Currently (November 2024, minimum wage PLN 4,300), it is merely 28% of the minimum wage.

Table 2. Fines imposed by the labour inspectors and the courts 2018–2023

Fines / Year		2018	2019	2020	2021	2022	2023
Amount of fines imposed by labour inspectors	**Total in millions of PLN**	17.9	19.3	11.7	14.4	19.7	22.1
	Average fine in PLN	1,200	1,200	1,200	1,200	1,200	1,300
Amount of fines imposed by the courts	**Total in millions of PLN**	4.6	2.1	1.0	1.7	2.5	2.3
	Average fine in PLN	2,300	2,200	2,200	2,400	2,600	2,600

Source: State Labour Inspection reports of 2021, 2022 and 2023.

Even more telling is the average amount of fines applied by the courts, given that in this case the maximum statutory threat is 30,000 PLN (or more, depending on the type of offence). The average fine was 109% of the minimum wage in 2018, and in 2023 this proportion already dropped to 60.4%, making it ever more lenient. The courts also refrain from imposing the fines at their upper limit. Thus,

even if the legislator raises fines for certain offences against employee rights, in practice such punishment turns to be far from being severe, nor is it deterrent[13]. Introducing new offences in a law implementing the Platform Directive is not very likely to influence this trend, especially that in the past years several new laws were enacted, some of them with very high upper limit of the fines[14].

What is more, even in the cases where the conduct of individuals acting on behalf of employers constitutes a crime, they will not be subject to strict and inevitable punishment. The number of convictions for offenses under Chapter XXVIII of the Criminal Code (Crimes against the rights of persons performing paid work) amounted to 269 in the year 2020. In the majority of cases, the offenders were penalised with fines (182 cases, with only 25 of them exceeding 5,000 PLN). In 24 cases, a sentence of restricted liberty was imposed, and in 63 cases, imprisonment. Among the latter group, six cases resulted in an absolute prison sentence, while the rest received suspended imprisonment (in one-third of the cases for a period of six months)[15]. This means that even in most severe cases of infringement of labour law that fulfil the elements of crime, the fines were exceptionally lenient and application of other penalties – rare.

Assuming that the EU law should not be a *lex imperfecta*, and measures for breaches of the EU law are necessary, the national legislator should consider methods that have historically ensured the effectiveness of national law concerning similar institutions when establishing sanctions. The statistics presented above clearly indicate that criminal measures might be proportionate, but not necessarily effective, and certainly not dissuasive.

[13] Penalties imposed for offences under laws other than the Labour Code account for only a small percentage. In the case of the act on minimum wage for work, it is 1.9%, the act on promotion of employment (establishing offences consisting, *inter alia*, in illegal employment, also of foreigners) 1.9% and the remaining 6% of all penalties for offences. State Labour Inspection, Report on the activities of the State Labour Inspection in 2022, p. 284.

[14] The Act of 10 January 2018 r. on limitation of trade on Sundays, Holidays and some other days (Journal of Laws 2023, item 158, as amended), art. 10 introduced an offence punishable with a fine of 1,000–100,000 PLN.

[15] Police, Crimes against the rights of persons engaged in gainful employment (218–221), https://statystyka.policja.pl/st/kodeks-karny/przestepstwa-przeciwko-9 (22.02.2024).

The Platform Directive also requires to create penalties which will be "proportionate to the nature, gravity and duration of the undertaking's infringement and to the number of workers affected". The existing system of fines for misdemeanours in Poland allows the Court (or the labour inspector) to take into account various circumstances of the perpetrator's action, but none of the legal acts in the area of employment law explicitly indicates such factors as these quoted above, especially the number of workers affected, as an element of offenses or the circumstances to be considered by the enforcing body.

The Labour Inspection also recommends to consider raising the upper limit of fines for committing offenses and increasing the upper limit of fines imposed by labour inspectors, and to make the amount of those fines dependent on the individual parameters of the employer, such as turnover or employment status[16]. They also indicate that fines (including the upper limit of the maximum amount) for most employers are rather lenient and inadequate to the scale of the violations committed. This leads some employers to simply find it worthwhile to pay the fines and continue violating the regulations[17]. This shows that failure to align fines with these parameters may render nominal penalties ostensibly ineffective, thereby undermining the integrity of the system.

4. Place of committing a crime

There are also other challenges to the criminal law as far as employment platforms are concerned. One of them is the place where the crime is committed. According to Article 5 of the Criminal Code, Polish criminal law applies to the perpetrator who committed an offense on the territory of the Republic of Poland, as well as on a Polish vessel or aircraft. The place of the criminal offense is determined by Article 6 § 2 of the Criminal Code, which states that the forbidden act is committed where the perpetrator acted or failed to act as required, or where the effect constituting the element of the crime occurred or was intended to occur according to the perpetrator's intent. Therefore,

[16] State Labour Inspection, Report on the activities of the State Labour Inspection in 2023. Warsaw 2024, p. 137, https://www.pip.gov.pl/o-nas/sprawozdania/sprawozdanie-z-dzialalnosci-pip-za-2023 (30.11.2024).

[17] Ibidem.

while defining the place of committing the criminal offense it is crucial to determine first whether it has a formal or material character, i.e. whether the effect constitutes an element of the crime. In the case of formal offenses, the place of the offense is where the perpetrator acted or failed to act. This would be the place where an unlawful decision was made by a person acting on behalf of the employer (e.g., the place where the document or decision was issued) and delivered to its recipient (as without this we only have an attempt). However, for offenses of a material nature, the place of the offense is considered both where the perpetrator acted or failed to act and where the effect occurred or was intended to occur according to the perpetrator's intent. This includes both the place of decision-making by a person acting on behalf of the employer and the place where the employee is present. In the case of employment platforms and automated decision-making systems the main difficulty is to establish whether the relevant place is the one where the effect takes place (e.g. the worker is deactivated, the amount of remuneration is paid), or perhaps the one where the automated system was designed or activated in the platform.

The principle of territoriality is formulated in Article 3 § 1 and Article 4 § 2 of the Offenses Code. However, for this category of offences there are no norms similar to Article 109 and Article 11 § 1 of the Criminal Code concerning the commission of offenses abroad, so the perpetrator who commits an offense abroad is not liable under Polish criminal law. This may create difficulties in the case of digital employment platforms that are not registered in Poland and their activities are mainly carried out online or from another country.

5. Criminal liability of AI

Another problem that can only be vaguely outlined due to the limited scope of this paper is the criminal liability of Artificial Intelligence, or liability for the actions of Artificial Intelligence[18]. This is important because a significant number of employment platforms use AI in algo-

[18] At present there is no legal basis for criminal liability of AI itself in the Polish legal system. W. Filipkowski: Rozdział IX. *Prawo karne wobec sztucznej inteligencji*. In: *Prawo sztucznej inteligencji*. Eds. L. Lai, M. Swierczyński. CH Beck, Warszawa 2020; This issue has been the focus of criminal law and new technology law for many years. See e.g. G. Hallevy: *Liability for Crimes Involving Artificial Intelligence Systems*. SpringerLink, 2015.

rithmic management systems, and decisions made through or with the help of this tool may violate employee rights, such as the right to rest, the right to safe and healthy working conditions or the right to fair remuneration.

A fundamental issue here is the degree of the autonomy of AI systems. The scales adopted in the literature range from systems used as a tool, but it is the human who makes all decisions or approves them before execution, through intermediate solutions, to those where the system operates fully autonomously without human involvement[19]. Articles 7 of the Platform Directive imposes limitations on the processing of personal data by means of automated monitoring systems or automated decision-making systems, and Article 10 requires that digital labour platforms ensure sufficient human resources for the effective oversight and evaluation of the impact of individual decisions taken or supported by automated monitoring systems or automated decision-making systems. This means that even if the AI system works independently, a human supervises it and can stop the execution of a decision, take over the control or even shut down the system. Such a situation is problematic from the perspective of the attribution of criminal liability, as the harm (violation of workers' rights) can occur without human involvement[20]. In such cases the theory of criminal law proposes that the creator of the system should be held responsible for its operation. In doing so, the basic problem may be the demonstration of a causal link between the creator's action and its effect, especially if the system continues to learn from the data provided by the user[21].

Obviously, if the violation occurred due to an erroneous decision of the person who had the duty to verify and finally approve the decision made on the basis of AI actions, this person should bear criminal liability. It is also possible that a person acting on behalf of the employer, whose responsibilities included monitoring the system and identifying threats, will be held responsible. Such an individual may be considered a "guarantor" within the meaning of Article 2 of the

[19] See R. Rejmaniak: *Autonomiczność systemów sztucznej inteligencji jako wyzwanie dla prawa karnego*. "Roczniki Nauk Prawnych" 2021, vol. XXXI, no. 3, pp. 98–99.

[20] R. Rejmaniak: *Autonomiczność systemów sztucznej inteligencji*…, p. 103.

[21] R. Rejmaniak: *Autonomiczność systemów sztucznej inteligencji*…, p. 104.

Criminal Code, i.e. a person who was obliged (usually by the law) to prevent the unlawful effect to happen. A guarantor is not liable for causing it, but for not preventing it. Therefore, "criminal liability for an effect crime committed by omission is justified when the failure to act by the guarantor could have prevented the consequence, with simultaneous recognition that refraining significantly facilitated the occurrence of this result"[22]. Certainly, the key factor here is establishing the objective possibility of preventing the consequence, i.e., whether the individual was able to identify the threat and could have averted it[23].

6. Conclusion

The considerations presented above lead to the conclusion that criminal liability for the breach of provisions of the law implementing the platform Directive is a complex issue, given especially the specific features of employment platforms, such as the use of AI systems in the automated decision-making process and the fact that one enterprise may operate in many countries and only on the Polish territory. Efficiency of these provisions depends also on the level of co-ordination of criminal law throughout the EU. Another challenge is a very limited effectiveness of criminal provisions introduced in the laws implementing comparable directives. The review of the amounts of fines provided by the law, and the practice of the Labour Inspection and the criminal courts leads to a conclusion that the sanctions are neither effective, proportionate, nor dissuasive. Obviously, some of the existing crimes and offenses against worker's rights could be applied also for platform workers, e.g. these sanctioning the breach of H&S provisions or concluding civil contract instead of employment contract. Yet, to some extent, criminal provisions sanctioning the breach of the Platform Directive should deviate from the current practice and prompt a complex discussion on the system of criminal labour law in Poland.

[22] D. Tokarczyk: *Obowiązek gwaranta w prawie karnym*. "RPEiS" 2014, vol. 74, no. 4, p. 211.

[23] R. Rejmaniak: *Autonomiczność systemów sztucznej inteligencji...*, p. 106.

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Sankcje karne za naruszenie przepisów wdrażających dyrektywę platformową?

Streszczenie

Artykuł omawia skuteczność wprowadzenia sankcji karnych za naruszenia przepisów wdrażających dyrektywę dotyczącą poprawy warunków pracy w pracy platformowej. Analiza obejmuje obowiązek ustanowienia „skutecznych, proporcjonalnych i odstraszających" kar, przewidziany w tej oraz innych dyrektywach prawa pracy, a także możliwość wyboru sankcji karnych w tym celu. Artykuł bada również dotychczasową praktykę stosowania sankcji karnych w Polsce, zwracając uwagę na takie kwestie, jak niskie grzywny i ograniczona siła odstraszająca. Omówione zostały także wyzwania związane z miejscem popełnienia przestępstwa oraz odpowiedzialnością karną sztucznej inteligencji w systemach zarządzania algorytmicznego. W konkluzji zasugerowano, że perspektywa wprowadzenia odpowiedzialności karnej za naruszenia dyrektywy platformowej stanowi złożony problem, wymagający kompleksowej dyskusji na temat systemu karnego prawa pracy w Polsce.

Słowa kluczowe: karne prawo pracy, egzekwowanie unijnego prawa pracy, dyrektywa platformowa, odpowiedzialność SI

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The impact of Artificial Intelligence in the European Union on human work (view of the European Economic and Social Committee EU)

Summary

The author presents the conditions for the development of Artificial Intelligence in the European Union, directly related to work performed by humans together with "learning" automatic devices, and discusses legal issues regulating the functioning of this intelligence under direct human supervision.

Keywords: labour market, Artificial Intelligence, European Union.

1. The fourth industrial revolution

Artificial Intelligence (AI) is currently the subject of numerous analyses in terms of its impact on various areas of human life. Undoubtedly, the development of AI has and will have a major impact on the situation on the labour market. One of the most important entities commenting on this matter is EESE. In the article, the author presents the opinion of the Committee on the conditions for the development of Artificial Intelligence in the European Union, directly related to work performed by humans together with "learning" automatic devices. Analyzing the documents published by EESE, he points out that the activities have focused so far on legal regulations necessary to organize possible and predictable effects in this area, already called the "fourth industrial revolution".

AI, which is developing intensively and systematically on a global scale, is exercising an increasing impact on employment, economy and society[1]. In the middle of the last century, the seeds of Artificial Intelli-

[1] See A. M. Świątkowski: *Szanse, zagrożenia i niewiadome zatrudnienia w stadium „czwartej rewolucji przemysłowej"*. "Polityka Społeczna" 2018, no. 4, pp. 1–9.

gence were devices that functioned as work tools used by humans. Currently, with electronic progress, automatic devices equipped with the ability to learn independently are beginning to take over some of the activities and tasks previously performed by employees, employed or self-employed. It is estimated that the Artificial Intelligence market will reach USD 38.8 billion in the first quarter of this century[2]. Compared to 2017, when the institutions of the European Union (EU) decided to monitor the development, there has been an unimaginable increase in the value of AI on a global scale. Therefore, the European Commission (EC) rightly believes that AI is changing our world. For this reason, the European Economic and Social Committee (EESC) has undertaken to monitor the situation and progress of AI not only in the spheres of production and technology, but also in security, ethical and social matters. AI poses a challenge in eleven areas of socio-economic life[3]. Since the publication of the above opinion, the EESC has become the representative of organized EU civil society. It is the responsibility of the EESC to initiate and shape social debates on the role of AI, taking actions to centralize it and appropriately stimulate it so that it develops in line with the interests of the EU and its Member States. All interested parties and entities were invited to participate in discussions on AI: politicians and policy-makers, industry representatives, social partners, consumers, non-governmental organizations, educational institutions, scientific institutions, healthcare facilities, experts and academics from various fields of knowledge, such as AI, security, ethics, economics, labour sciences, legal sciences, behavioural sciences, psychology, philosophy[4].

[2] Opinions of the European Economic and Social Committee (EESC), 526th EESC Plenary Session, 31 May 2017 – 1 June 2017; EESC: *Opinion Artificial Intelligence: The Impact of Artificial Intelligence on the Single Market (Digital), Production, Consumption and Societ*y (EESC own-initiative opinion). Rapporteur C. Muller, point 1.1. Journal of Laws EU C 288/1, 31 August 2017, hereinafter referred to as "EESC Opinion"; *Annex to the Communication from the Commission to the European Parliament, the Council, the EESC and the Committee of the Regions. Coordinated Plan on Artificial Intelligence*. Brussels, 7 December 2018, COM(2018) 795 final Annex.

[3] Security, ethics, privacy, transparency, work, education and professional skills, (in)equality and inclusion, legal and regulatory frameworks, governance and democracy, warfare, super intelligence. EESC opinion, point 1.5.

[4] Ibidem, point 1.2.

2. Artificial Intelligence and work

The EESC has no doubt that AI will impact employment levels and the type and nature of many jobs[5]. The impact will be comparable to that of previous industrial revolutions. AI is a general-purpose technology that simultaneously affects all economic and social departments of modern countries and their societies. But that does not mean that our civilization is finished, even if the technological progress is so fast and surprising that it is not just humans who cannot keep up. It is imperative that we understand these phenomena, consider their consequences and are able to develop appropriate strategies, which will allow people to face the challenge of high unemployment and other negative consequences of the race with machines. AI can and should be used to perform specific tasks and specific activities, particularly in roles that demand strenuous, dangerous, burdensome, unpleasant, unhygienic and monotonous work. It can bring significant benefits to employees who have previously performed such jobs.

AI may also constitute a stimulus for entrepreneurs to establish a new social relationship in labour relations[6]. Workers currently employed in this type of professional activities will have the opportunity to transition to less physically demanding and more intellectually stimulating jobs, provided that they possess the necessary professional skills, which, however, will be generally within the reach of a significant proportion of the workforce. Therefore, AI will contribute to raising the intellectual level not only of the less educated part of individual societies.

It is rightly assumed that AI, in addition to routine tasks, will also take over activities requiring the ability to process large databases and obligations defined by the parties to employment relations. It is believed that machines will continue to increase their capabilities. They will work by anticipating the development of specific socio-economic situations and processes, based on descriptions of collected information and experience. AI, as a modern technology that influences employment, will also apply to work performed by highly qualified

[5] P. Nowik: *Definicja sztucznej inteligencji w nauce prawa pracy*. "Praca i Zabezpieczenie Społeczne" 2023, no. 9, pp. 7 et seq.

[6] A. M. Świątkowski: *Digitalizacja prawa pracy*. "Praca i Zabezpieczenie Społeczne" 2019, no. 3, pp. 15–16.

people. It will continue to manage not only automatic but also autonomous machines trained by humans. However, AI will not replace people in key activities[7].

In consequence, the existing, generally applicable daily and weekly working time standards will be reduced, sometimes significantly beyond the current daily and weekly norms. They will be replaced by even longer rest periods than before. AI and the consequences resulting from its development should significantly contribute to the cooperation of representatives of state interests and social partners in shaping the socio-economic policy in labour relations that is most beneficial to all interested parties. AI will have a significant impact on the creation of new, previously unknown jobs. It will influence the types of work and the ways in which it is performed. Applications, algorithms used by AI and other electronic technologies will enable machines to assign tasks and activities to be performed. They will allow workers to manage their working time, and therefore enable the management of other factors that constitute the content of employment relations. They will also allow machines to constantly and accurately monitor the work progress of employees, including those who work – *via* modern employment platforms[8] – on their own account. In the literature on labour law, the question is increasingly being asked who supervises whom in employment relations – employees with automated devices or vice versa?[9] According to the current state of affairs, AI cannot independently take over supervision of employees. There is no reason to consider whether machines can, for their own good and benefit, take over the supervision of work performed by humans and employers employing workers.

[7] J. Oster: *Code Is Code and Law Is Law – The Law of Digitalization and the Digitalization of Law*. "International Journal of Law and Information Technology" 2021, no. 29, p. 116.

[8] A. M. Świątkowski: *Elektroniczne technologie zatrudnienia ery postindustrialne*j. Kraków 2019, pp. 77 et seq.

[9] M. Ivanowa, J. Bronowicka, E. Kocher, A. Degner: *The App as a Boss? Control and Authonomy in Application-Based Management, Arbeit/Grenze/Fluss – Work in Progress*. "Interdiszipliärer Arbeitsforschung" no. 2, Franfurt (Oder), *passim*.

3. Supervision and responsibility over AI

AI is not yet taking control of people[10]. However, it is not certain, due to the pace of learning of machines, that in the uncontrolled process of development of this technology, people will still be able to supervise the development of AI. The supervision is therefore particularly important in the case of augmented intelligence. Automatic machines created by humans may not limit their own intellectual potential to what humans have "instilled" in them. For this reason, supervision over AI should take on one common legal and organizational form. It must be based on common ethical foundations accepted by the EU. They should be based on the values defined in the EU Charter of Fundamental Rights[11]. The EU institutions are moving in this direction. They call on Member States to "develop and establish a uniform code of ethics for the development, implementation and use of artificial intelligence"[12]. Such a plan should address the following issues, problems and concerns: a) internal and external security; b) issues of transparency, understandability, and the ability to explain the functionality of AI systems; c) the possibility of controlling them; d) education and development of skills in using AI; e) equal availability and distribution of opportunities offered by AI to the EU citizens. Assuming that AI may lead to effects inconsistent with established legal regulations, it is necessary to take a position on matters relating to the material and legal liability of "learning" machines that independently undertake actions that are unfavourable or harmful to people and their property[13]. In matters relating to the construction of civil law instruments of liability for damage caused by robots, recommendations were formulated on the possibility of introducing a separate legal concept of E-personality[14]. The EESC expressed skepticism towards

[10] Opinion prepared in 2017 by the EESC.

[11] Official Journal of the EU C No. 83, p. 389.

[12] EESC opinion, point 3.6.

[13] J. Mazur: *The European Union Towards the Development of Artificial Intelligence: Proposed Regulatory Strategies and Building a Single Digital Market*. "European Judicial Review" 2020, no. 9, pp. 13–18.

[14] European Parliament (EP) resolution of 12 January 2017 with recommendations to the Commission on civil law provisions relating to robotics (2015/2103(INL)) and the Report of the Global Commission on the Ethics of Scientific Knowledge and Technology (COMEST) on the ethics of robotics. See P. Stylec-Szromek: *Artificial Intelligence – Law,*

this idea and the proposals for its legal regulation. It was not without reason that the Committee found that the transfer of financial liability for damage caused by machines would directly lead to the exclusion of civil and legal liability of natural and legal persons acting as creators of devices having the ability to "learn". Inventors and manufacturers should be responsible for the operation of all types of automatic machines and devices. Such liability should also be borne by negligent or faulty users of these devices, who do not follow the instructions developed by the manufacturers when using them. However, in this opinion the EESC did not formulate any strong recommendations to reject the idea of equipping AI and other machines with an electronic personality. The final conclusion on this issue was made dependent on a thorough analysis of the state of legal acts in force in the Member States and the EU, the jurisprudence of national courts adjudicating on civil and commercial matters in the Member States and the case law of the Court of Justice of the EU. *De lege lata*, the legal systems of the Member States do not resolve the dilemma regarding direct, civil law liability for damage caused by devices without legal personality.

4. Opportunities for modern development

At this stage of considerations, it is impossible to assess the chances of individual societies for the development of AI in the world. The assessment of a new, previously unknown phenomenon, which is AI, has been classified as a very important current problem requiring assessment "from a broad perspective" and immediate responses to "important and breakthrough changes, both technological and social, in the field of artificial intelligence and spheres related to it"[15]. The most significant technological changes were considered to be "striking or significant leaps" in the development of AI skills. They precede not only the real, but even inevitable and most likely imminent probability of the materialization of general control over work by AI. In the social sphere, "a significant reduction in work with no prospects for

Responsibility, Ethics. "Scientific Journals of the Silesian University of Technology" 2018, Series: Organization and Management, issue 123, pp. 501 et seq.

[15] EESC opinion, point 5.2.

new jobs" has already been mentioned[16]. Social partners were mentioned directly, after political decision-makers, as people and entities with a vested interest in regulating these problems and participating in work aimed at agreeing on the conditions for the development of AI within the EU and on a global scale. However, the last statement is too optimistic for the EU. The EU's influence on the development of AI on other continents – in North America and Asia – is undoubted. It has been admitted that "Europe is lagging behind in private investment in AI"[17]. Our continent therefore has very strong competitors in the international arena in matters related to AI. The topic of AI has become one of several key issues in the European politics[18]. Without examining the attitude of the most important EU Member States (France and Germany) towards the issue of AI, it is impossible to take a responsible position towards the views of the EC towards AI presented in the article. It may seem paradoxical, but the most advanced activities related to the use of AI in Europe were undertaken twenty – not three – years ago. This situation occurred in Estonia. Modern Estonia is considered the most digitized society in the world. As much as 99% of public services in this country are made available in digital form. The basis for the success of electronic administration in Estonia is the cooperation of state authorities, the public sector and the private sphere. Therefore, the success of the AI development desired by society results from the proper management of electronic technologies. The EU is only in the early stages of managing the conditions for AI growth. The first stage of the pro-EU AI development policy took the legal and organizational form of cooperation. The aim of such an EU policy towards AI is the need to unify activities aimed at convincing advanced countries, the USA and China, of the basic condition for the development of the phenomenon of digitalization. It is absolutely necessary to constantly have human supervision over AI. Nowadays, it can only be guaranteed and fully implemented in Europe.

[16] Ibidem.

[17] Communication from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions, "Artificial Intelligence for Europe", 237 final, Brussels, 24 April 2018 [SWD(2018) 137 final], COM(2018).

[18] *Iloraz Sztucznej Inteligencji. Potencjał Sztucznej Inteligencji w sektorze publicznym*. Ed. 3. THINK-TANKT, Warszawa 2020, pp. 35 et seq.

5. Conclusion

AI, as an electronic technology of the future, should be trustworthy and guarantee the safety of its users. The EU has a chance to convince its Member States of the necessary need to use modern electronic technologies in practice by all interested parties and at the same time respect European values, principles and human rights. This common goal unites EU Member States, especially those with the ambition to become leaders in the use of AI for economic and social development. The EU is competing to become a world leader, while its two largest Member States, Germany and France, have the ambition to become the AI leaders on the European continent. It is therefore possible and very likely that ambitious EU projects on the conditions for the development of AI in the EU will be implemented.

It is worth noting, however, that in addition to extremely valuable general reflections on projects introducing AI in the EU countries, common sense in predicting its effects also requires us to notice the possible socially negative sides of this innovation and check them in specific research. Already today, there are analyses of changes in the labour market situation for professions such as lawyers, IT specialists, etc., which will certainly be surprising for "white collar" workers.

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Wpływ sztucznej inteligencji w Unii Europejskiej na pracę człowieka (W świetle opinii Ekonomicznego i Społecznego Komitetu UE)

Streszczenie

Autor przedstawia warunki rozwoju Sztucznej Inteligencji w Unii Europejskiej bezpośrednio dotyczące pracy świadczonej przez człowieka wspólnie z „uczącymi się" urządzeniami automatycznymi oraz omawia kwestie dotyczące zagadnień prawnych regulujących funkcjonowanie tej inteligencji pod bezpośrednim nadzorem człowieka.

Słowa kluczowe: rynek pracy, sztuczna inteligencja, Unia Europejska

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The use of modern technologies in employment and the protection of personal data – selected issues

Summary

Modern technology and artificial intelligence are increasingly being used in labour relations. Technological solutions support employers in managing the organisation, reduce the cost of supervising the work process, and enable easier and faster control of employees' work. However, the use of technology, especially without sufficient human supervision, raises risks in the area of employees' right to privacy and data protection. Not only can it risk violating data protection laws and lead to violations of employee privacy, discrimination or even dehumanising working conditions. The article aims to identify the potential risks to the protection of employees' personal data in connection with the use of high-tech solutions and artificial intelligence in labour relations, and the obligations of the employer of data processing, in accordance with the principles set forth by the RODO.

Keywords: new technologies, artificial intelligence, personal data, processing of employees' personal data, principles of personal data processing, modern technologies in employment

1. Introduction

Employers are increasingly turning to digital tools to help them modernise and streamline their organization's management model. The implementation of new technologies makes it possible to automate business processes, streamline, accelerate and increase the quality of activities performed by the employees. Used properly, the tools allow to improve the efficiency of operations, optimise costs, and thus increase the competitiveness of companies. However, new technologies also create new tasks for employees. New occupations and job titles, new specialised activities and jobs are being created, in which la-

bour has a relative competitive advantage in relation to capital[1]. Thus, it should be emphasised that the development of technology and artificial intelligence is extremely important, and its use can bring significant benefits to its creators, employees and employers themselves.

At the same time, the use of new technologies may involve certain risks and challenges for employers, such as violation of labour laws, liability to employees and third parties when their rights and freedoms are threatened. Employees, in turn, do not have sufficient knowledge about the proper use of new technologies and the responsibilities for their misuse[2]. Taking into account the ever-increasing processing capabilities, the ever-faster and cheaper flow of data, the possibilities of combining them, the ease of manipulation and the asymmetries of information, it becomes increasingly important to protect personal data. This is because the introduction of advanced technologies may involve threats to the organization's cyber security and the risk of data loss.

2. Modern technologies in employment

A variety of technological solutions are being used in labour relations: process automation, Internet of Things (IoT), Cloud Computing, Big Data, biotechnology, robotics, augmented and virtual reality[3]. Artificial intelligence is also growing in importance in labour relations. It has a growing range of applications, from relatively simple Chatbot used for customer service to more complex analytical solutions based on deep learning[4]. An extremely important element of high-tech, system-based artificial intelligence is the use of data processing technology (including personal data), the ability of systems to make decisions or perform specific tasks with at least a partial representation of human intelligence, as well as the ability to learn and improve on

[1] Ł. Arendt, E. Kwiatkowski: *Kontrowersje wokół wpływu nowoczesnych technologii na zatrudnienie i bezrobocie*. "Ekonomista" 2023, no. 2, p. 199.

[2] N. Bender: *Prywatność pracowników vs. nowoczesne technologie*. "Monitor Prawa Pracy" 2020, no. 4, p. 24.

[3] K. Piwowarska: *Czy nowe technologie zrewolucjonizują rynek pracy?* "Studia Prawnicze. Rozprawy i Materiały" 2018, no. 2(23), pp. 36–147.

[4] J. Vrbka, E. Nica, I. Podhorská: "Equilibrium" 2019, vol. 14, no. 4, p. 739.

the basis of collected information, generate results and provide predictions related to labour relations tasks[5].

Technology is used throughout the hiring cycle and at every stage. In the recruitment process, employers use systems and tools that automate recruitment activities and improve its efficiency. The systems and applications allow to control every stage of the process, from the preparation and publication of an ad in multiple portals simultaneously, and facilitate contact with applicants. Voicebot and Chatbot, which are used during recruitment, make it possible to ask candidates questions (about language skills, education) and verify this information in real time. With the use of artificial intelligence, employers will be able to use video platforms equipped with software to analyse the facial expressions and behaviour of a job candidate and, based on this, create further data determining the suitability of a person for the employer[6]. Technology and algorithms are used when assigning tasks to an employee, evaluating performance, and making decisions about continued employment or its termination[7].

Modern technologies also help in organising and conducting training, developing criteria for selecting employees for layoffs, establishing criteria for acquiring key – from the employer's point of view – skills, calculating salaries, talent acquisition and management. They are also used for evaluating employees, forecasting work performance and determining employee involvement in work processes, employee productivity and their suitability for the employer.

The literature indicates that the changes in labour relations associated with the use of modern technology will be manifold – both in the area of health and safety, the right to privacy (for example, in the context of monitoring the workplace and monitoring the activities of the employee), the organisation of working time and many other areas[8].

[5] P. Nowik: *Definicja sztucznej inteligencji w nauce prawa pracy*. "Praca i Zabezpieczenie Społeczne" 2023, no. 9, p. 7.

[6] *Nowe technologie w HR. Raport*, https://mycompanypolska.pl/artykul/nowe-technologie-w-hr-raport/10919 (Accessed: 12.02.2024).

[7] Ł. Pisarczyk: *Stosunek pracy wobec zmian technologicznych*. In: *Prawo pracy i prawo socjalne: teraźniejszość i przyszłość. Księga jubileuszowa dedykowana Profesorowi Herbertowi Szurgaczowi*. Eds. R. Babińska-Górecka, A. Przybyłowicz, K. Stopka, A. Tomanek. Wrocław 2021, p. 155.

[8] See: M. Madej-Kaleta: *Nowoczesne technologie w gospodarce a ochrona pracowników w prawie pracy*. In: *Prawo pracy. Między gospodarką a ochrona pracy. Księga Jubileuszowa*

The management of the work process and the control or supervision of the work and the worker are carried out through the use of digital tools that can be managed by different entities and, increasingly, through automated systems that are even beyond the control of the employer.

With the development of new technologies, one of the most important challenges facing employers is the protection and security of personal data, processed by the employer (data controller), especially with the use of such technologies as background screening, acquisition and use of biometric data, data from various forms of monitoring, radio-frequency identification (RFID), streamlining organisational processes or employee control by implanting subcutaneous microchips.

Indeed, these solutions can be based on technologies that collect and store data, but also on algorithmic solutions that allow their collation, modification, transmission, i.e. technologies that "feed on data" and can create new personal data, often without human involvement. The methods of analysis can be more (complex biometric technologies) or less intrusive (such as simple counting algorithms). An example of this is employee monitoring. It allows to ensure the safety and security of property (premises and equipment) or detect any kind of violation of the obligation to keep confidential information that is part of the employer's capital[9], and for this purpose it records and stores the record, but at the same time it can offer many additional "amenities", such as the ability to locate the whereabouts of the employee, to control and monitor his activity or business mail[10]. Software that is used, for example, to identify, recognise and analyse faces works differently depending on the age, gender and ethnicity of the person being identified. Algorithms operate based on varying demographics, so facial recognition biases risk exacerbating prejudice among the public[11].

Profesora Ludwika Florka. Eds. M. Latos-Miłkowska, Ł. Pisarczyk. Warszawa 2016, pp. 252–262.

[9] M. Barański, M. Giermak: *Przetwarzanie danych osobowych w kontekście zatrudnienia pracowniczego (uwagi de lege ferenda)*. "Państwo i Prawo" 2017, no. 9, pp. 90–91.

[10] D. Dörre-Kolasa: *Monitoring w miejscu pracy a prawo do prywatności*. "Praca i Zabezpieczenie Społeczne" 2004, no. 9, pp. 10–12.

[11] *Guidelines 3/2019 on the processing of personal data by video devices Version 2.0,* adopted on January 29, 2020, pp. 5–6.

3. The concept of personal data

From the point of view of the issue under analysis, the concept of personal data is of key importance. The legal definition of personal data is contained in Article 4 § 1 of the General Data Protection Regulation (GDPR)[12]. According to it, personal data is any information about an identified or identifiable natural person ("data subject"). Personal data is information of a personal nature, which includes data with characteristics that directly or indirectly identify a person, related to the identifier used, such as name, identification number, but also e.g. date of birth, address of residence and other factors such as gender, eye colour, weight, height or other biometric data indicating biological characteristics. These are, thus, factors of a physical and physiological nature, but also information regarding views, beliefs, statements, information regarding the genetic, psychological, cultural, social, as well as economic identity of the natural person[13]. These factors, therefore, include not only information of a personal nature, but also property, content strictly of a person's private and family life, as well as information about any activity, professional relationship or economic or social behaviour, regardless of the position taken, the characteristics of objectivity or truthfulness, as long as they make it possible to meet the premise of connection and identify person, but also information about any activity, professional relationship, or economic or social behaviour, regardless of position, the characteristics of objectivity or truthfulness, as long as they make it possible to meet the condition of relationship and identifiability of the natural person to whom they relate[14].

The phrase "any information" indicates that this concept is open-ended. It can also include hitherto unknown categories of data[15], any

[12] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Official Journal of the European Union, L 119/1.

[13] D. Lubasz: *Komentarz do art. 4 RODO*. In: *Ogólne rozporządzenie o ochronie danych osobowych. Komentarz*. Eds. E. Bielak-Jomaa, D. Lubasz. Wolters Kluwer 2018, p. 171.

[14] Ibidem, pp. 171–172, CJEU, Judgement of 20 December 2017, No. C-434/16, Peter Nowak vs. Data Protection Commissioner, ECLI:EU:C:2017:994.

[15] P. Fajgielski: *Ogólne rozporządzenie o ochronie danych. Ustawa o ochronie danych osobowych. Komentarz*. Warszawa 2022, p. 106; CJEU, 9 November 2010, Joined cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert vs. Land Hessen, ECLI:EU:C:2010:662.

statements about a person, including subjective opinions and assessments, and even false or unverified information, regardless of the form in which it is presented, which concerns an identified or identifiable person (that is, not necessarily identifying data), if it relates to the identity, characteristics or behaviour of a person, or if the information determines or influences the treatment or evaluation of a person[16]. It is also information about a particular employee that is the result of modifying, observing, inferring about him, including if these operations are carried out in information systems, using technological tools and artificial intelligence solutions. The information must only relate to a specific person, so it must be information about that person[17].

The use of modern technology makes it possible to base personal data processing operations on automated decision-making, including in the form of profiling[18]. Profiling is the collection of information about an individual (or a group of individuals) and the assessment of their characteristics or behavioural patterns in order to place them in a specific category or group, in particular to analyse and/or predict about, for example, their ability to perform a task, interests, or possible behaviour[19].

4. Risks of using new technologies in the context of employee data protection

The development of new technologies is not only an opportunity to optimise employees' working time and reduce employers' operating costs, but also risks in the context of data protection regulations. This is particularly relevant in the context of using artificial intelligence sys-

[16] Article 29 Data Protection Working Party: *Paper on Data Protection Issues Related to RFID Technology*, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2007/wp136_pl.pdf (Accessed: 12.02.2024).

[17] Article 29 Data Protection Working Party: *Opinion 4/2007 on the Concept of Personal Data*, WP 136, 20 June 2007, p. 26.

[18] Profiling, under Article 4(4) of the GDPR, means any form of automated processing of personal data that involves the use of personal data to evaluate certain personal factors of an individual, in particular to analyse or predict aspects relating to that individual's performance, economic situation, health, personal preferences, interests, reliability, behavior, location or movement.

[19] Article 29 Data Protection Working Party: *Guidelines on Automated Decision-Making in Individual Cases and Profiling for the Purposes of Regulation 2016/679*, https://www.uodo.gov.pl/data/filemanager_pl/908.pdf (Accessed: 12.02.2024).

tems, such as ChatGPT, which are based on large language models. This is because they learn from huge amounts of data that are publicly available on the Internet and include personal data.

Technologies that process personal data may change the conditions of the work environment, which may manifest itself in the creation of certain risks for employees and data subjects. Among them, the following are pointed out: profiling of employees and others; risk of discrimination; invasion of privacy; lack of transparency in the processing of personal data by Chatbot, lack of knowledge of employees regarding data processing both at the stage of "training" and use of artificial intelligence models on which they are based.

Technologies based on complex mathematical algorithms that collect information about an employee from various sources (the employer's IT systems, intranet resources, the Internet, the employer's social media, or the employee's private social profiles), then collate and analyse it based on opaque algorithms and employees' lack of knowledge of what sources and what data about them are collected and processed, can lead to employee profiling. Consequently, a person can be permanently associated with a specific category and assigned specific preferences, which can lead to discrimination against the employee. Even more questionable is profiling based on systems that make decisions on their own (the so-called automated decision-making). This is because in systems based on algorithms, learning systems and artificial intelligence, the decision is not subject to any human control. According to Article 22(3) of the GDPR, the data subject (employee) has at least the right to obtain human intervention from the controller (employer). Human intervention is a key element of data protection under the GDPR, and any review of decisions made by artificial intelligence must be carried out by a person with the authority and ability to change the decision[20].

The increase in the amount of data generated in the work environment, coupled with new techniques for analysing and collating data, can create the risk of further non-compliant processing. An exam-

[20] Article 29 Data Protection Working Party: *Guidelines on Automated Individual Decision-Making and Profiling for the Purposes of Regulation 2016/679*, adopted on 3 October 2017, as last revised and adopted on 6 February 2018, https://www.uodo.gov.pl/data/filemanager_pl/908.pdf (Accessed: 12.02.2024).

ple of this is the use of systems that are legally installed to protect the employer's property, and are used to monitor the availability and performance of employees or to continuously track employee movements and behaviour[21]. New forms of data processing, such as those indicating the use of online services or location data from a smart device, are much less visible to employees than other more traditional forms, such as overt video surveillance. As a result, employees are often unaware of the use of these technologies, and employers may unlawfully process the data without notifying the employees[22]. Artificial intelligence and monitoring technologies, such as wearable devices, combined with the Internet and large data sets can lead to the loss of employee control over their own data, to ethical issues, and pressure on employee productivity.

The rapid adoption of new information technologies in the workplace in the form of infrastructure, applications and smart devices allows for new types of systematic and potentially invasive data processing. Algorithms not only aggregate data, but also take it to the "next", more complex level, which can lead to employee profiling[23], and this, in turn, can lead to discrimination against employees, especially in labour relations. This is because it relates directly to the assessment of employee performance, health, personal preferences, behaviour, location, reliability. Meanwhile, the operation of the algorithm is not fully objectified, as the result depends on the assumptions made and the data provided. If the former are flawed (discriminatory) and the latter inaccurate, there may be a violation of the principle of equal treatment and even discrimination against employees[24].

In addition, it is possible to use personal data beyond its original purpose of collection to explore or apply new employer purposes and opportunities. Data analytics includes methods and patterns of use that neither the data collector nor the data subject considered or could even

[21] Article 29 Data Protection Working Party: *Opinion 2/2017 on Data Processing at Work*, https://iod.uj.edu.pl/documents/138774264/138805617/Opinia_na_temat_przetwarzania_danych_w_miejscu_pracy.pdf/88fef283-2478-4a1a-9e15-28f0c53ef944 (Accessed: 12.02.2024).

[22] Ibidem.

[23] M. T. Bodie, M. A. Cherry, M. L. McCormick, J. Tang: *The Law and Policy of People Analytics*. "Colorado Law Review" 2017, vol. 88, no. 4, pp. 999–1000.

[24] Ł. Pisarczyk: *Stosunek pracy…*, p. 157; D. Dzienisiuk: *Dyskryminacja w cyfrowym świecie pracy*. In: *Prawo pracy i prawo socjalne*..., pp. 72–74.

have imagined at the time of data collection. It should be added that in the context of personnel analytics, the risk may relate to the accuracy of personal data, as employers may use algorithms that will make assessments of employees resulting from the combination of data sets, including personal data, and their processing[25].

Employers who implement new technologies that characterise, evaluate, specify, place employees on a scale of suitability, punish, define standards which, if not met, lead to dismissal, must be aware of the risks associated with the possibility of dehumanisation, evaluating employees solely by machine, reinforcing social inequality, as well as violating the dignity of the employee[26].

5. Personal data processing rules and standards vs. advanced technologies in the workplace

In the era of the growing role of modern technology and artificial intelligence in the workplace, it is important to ensure compliance with data protection regulations. The processing of personal data by technology and artificial intelligence must comply with the principles relating to the processing of personal data indicated in Article 5 of the GDPR: legality, transparency, minimisation of information collected, data retention and security of processing. The principles set forth in this provision are general standards expressing the basic ideas and values of personal data protection policy[27].

In any situation of data processing within the framework of modern technologies and artificial intelligence systems, it is necessary to determine the legal basis for the processing. The basis for the processing of data should be determined for both the training stage and the use of these systems. Meanwhile, their processing by operators of artifi-

[25] EDPS: *Opinion on Online Manipulation and Personal Data*, Opinion 3/2018, https://www.edps.europa.eu/sites/default/files/publication/18-03-19_online_manipulation_en.pdf (Accessed: 12.02.2024).

[26] M. Bąba: *Logika algorytmów w świecie pracy ery technologicznej – nowe możliwości i nowe ograniczenia*. "Praca i Zabezpieczenie Społeczne" 2022, no. 8, p. 10; Policy Strategy Working Group 2: *Digital Economy*, Report – adopted October 2020, https://globalprivacyassembly.org/wp-content/uploads/2020/10/GPA-PSWG2_Digital_Economy_Working_Group_Report_public.pdf (Accessed: 12.02.2024).

[27] A. Nerka: *Komentarz do art. 5 RODO*. In: *Ogólne rozporządzenie o ochronie danych osobowych. Komentarz*. Ed. M. Sakowska-Baryła. C. H. Beck 2018, p. 142.

cial intelligence technologies (in systems implemented by the employer) is often carried out without indicating the basis and with the lack of correctness of personal data processed and provided by mathematical algorithms. The employer should take care of the correctness of the data with regard to the information created or inferred by the artificial intelligence system (e.g., classification of emails as spam). Artificial intelligence systems that would enable employees using them to make informed decisions should meet transparency requirements, as employees should be aware that they are interacting with artificial intelligence.

Employers collecting personal data (including employee data) are required to specify the purpose for which the data are collected and the retention period. After its expiration, the information should either be deleted or anonymised. This principle is aimed at reducing the collection and storage of personal data and shortening the processing period. In the case of technological solutions, such as ChatGPT, whose algorithms "learn" from the data provided by their users, it will not be possible to implement this principle. The same applies to the principle of data minimisation, according to which personal data should be limited to what is necessary to achieve the purpose of processing.

The GDPR introduces the requirement to maintain an adequate level of protection of personal data and minimise potential threats to the confidentiality, integrity and availability of this information. As a result of this principle, data processors are required to implement appropriate security measures, such as data encryption, limiting access to authorised users (employees) only, regular security reviews and risk management. If advanced technologies and artificial intelligence are used, it can be difficult and sometimes impossible to carry out these responsibilities, especially for an employer who is implementing solutions that expand the level of scalability of information systems and software in an environment of ever-increasing numbers of users or increasing volumes of processed data. The possibility of an unauthorised third-party access to confidential information is also increasing. Consequently, the lack of adequate security may result in the use of artificial intelligence models to extract personal data or, for example, to circumvent privacy safeguards by means of appropriately prepared prompts by artificial intelligence solutions (ChatGPT)[28].

[28] On March 31, 2023, the Italian data protection authority blocked ChatGPT for raising privacy concerns, stressing that there was no legal basis to justify the "massive

The implementation of mechanisms based on modern technologies that affect an employee's right to privacy and the protection of his personal data requires an analysis of potential risks to the rights and freedoms of employees and other persons whose data will be processed[29]. In addition, in accordance with Article 35(1) of the GDPR, if a particular type of processing – in particular using new technologies – by its nature, scope, context and purposes is likely to result in a high risk of infringement of the rights or freedoms of individuals, the controller (employer) shall assess the effects of the planned processing operations on the protection of personal data before starting the processing. In the communication of the President of the Office for Personal Data Protection of June 17, 2019 on the list of types of personal data processing operations requiring an assessment of the effects of processing on the protection of personal data[30], it is indicated that an impact assessment is required for operations involving, among other things, large-scale systematic monitoring of publicly accessible places using elements of recognition of features or characteristics of objects that will be in the monitored space. The examples of such operations are systems for monitoring the working time of employees and the flow of information in the tools they use (e-mail, Internet); collection and use of data by applications installed in mobile devices, including those integrated into a uniform, helmet or otherwise connected to the person acquiring the data; vehicle monitoring systems that establish connections with the environment, including other vehicles, i.e. machine–to–machine communication systems in which the car informs the environment of its behaviour (movement) and, in the event of an emerging danger, receives warning messages from this environment (road infrastructure, other cars).

collection and storage of personal data to 'train' the algorithms underlying the platform." After Open AI made the appropriate changes, in April 2023. the supervisory authority allowed the tool to be offered again in Italy. Among the measures taken by Open AI were detailed descriptions of the artificial intelligence "training and development" process included in privacy policies and other documentation, including what categories of personal data, and for what purposes, are processed.

[29] Case C-131/12, Google Spain vs. Agencia Española de Protección de Datos (AEPD), Judgement of 13 May 2014, ECLI:EU:C:2014:317.

[30] M.P. poz. 666.

The employer's obligation to conduct a risk assessment is in line with one of the fundamental principles under Article 25 of the GDPR – privacy by design and privacy by default, in light of which, taking into account the state of technical knowledge, the cost of implementation and the nature, scope, context and purposes of the processing and the risk of violation of the rights or freedoms of individuals with different probability of occurrence and severity of the risk resulting from the processing, the controller (employer) – both in determining the means of processing and at the time of the processing itself – shall implement appropriate technical and organisational measures designed to effectively implement the principles of data protection and that, by default, only those personal data are processed that are necessary to achieve each specific purpose of the processing. This principle is characterised by the obligation to take proactive measures – it anticipates and prevents the loss of privacy and personal data before they occur. Data protection incorporated into technology should not be treated as an add-on, but as an essential and integral part of the system, without the effect of reducing its functionality[31].

6. Concluding remarks

Modern technologies that process personal data will certainly change the conditions of the work environment, which will manifest itself in the occurrence of risks caused by the complexity of new technologies and work processes. There will be challenges in involving employees in the implementation of digitisation in the workplace. It seems that a tailored system of education and training for employees, as well as the introduction of guidelines and standards to ensure responsible and compliant use of technology in the workplace, will be fundamental to the proper, non-infringing use of technological tools and artificial intelligence solutions. With the increasing power of algorithms, there is a risk of these systems being used to manipulate or exploit personal data, hence the need for clear rules for the ethical use of artificial intelligence.

[31] A. Magiera, J. Wyczik: *Akt o AI w kontekście ochrony danych*. "ABI Expert" 2023, no. 1, p. 15.

Considering the risks and threats to the protection of personal data and privacy of employees and others, employers should include in the organisation's management model the approach of proper design of technical systems, organisation and procedures for the use of advanced technologies. Indeed, the employer may implement and apply solutions for the supervision and control of the employee's work, in order to properly carry out the employee's tasks and duties, but at the same time is obliged to assess the balance between the employer's legitimate interest in protecting its business and the legitimate expectations of protecting the privacy of data subjects, i.e., employees.

It should be noted that technology, especially artificial intelligence, is not a typical work tool that an employee uses to do his job. Rather, it is a solution that forces the employees to cooperate with each other. An employee using such technology not only improves his competence and skills, but also develops the capabilities of this tool, improving it for the tasks he performs.

However, in order for the use of technology and artificial intelligence as a labour tool to serve these purposes, there should be closer cooperation between the employer and employees in research and innovation in the development of digital technologies for the needs of the specific employer. After all, the creation, implementation and use of modern technologies in labour relations should be ethical, safe and convenient, and based on respect for workers' rights.

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Wykorzystanie nowoczesnych technologii w zatrudnieniu a ochrona danych osobowych – wybrane zagadnienia

Streszczenie

Nowoczesne technologie i sztuczna inteligencja są coraz częściej wykorzystywane w stosunkach pracy. Rozwiązania technologiczne wspierają pracodawców w zarządzaniu organizacją, obniżają koszty nadzoru nad przebiegiem pracy oraz umożliwiają łatwiejszą i szybszą kontrolę pracy personelu. Wykorzystanie technologii, zwłaszcza bez wystarczającego nadzoru ze strony człowieka, rodzi jednak ryzyko w obszarze prawa pracowników do prywatności i ochrony danych. Może to nie tylko grozić naruszeniem przepisów o ochronie danych osobowych, ale również prowadzić do naruszenia prywatności pracowników, dyskryminacji, a nawet odczłowieczenia warunków pracy. Artykuł ma na celu wskazanie potencjalnych zagrożeń dla ochrony danych osobowych pracowników w związku z wykorzystaniem zaawansowanych technologicznie rozwiązań i sztucznej inteligencji w stosunkach pracy oraz obowiązków pracodawcy w zakresie przetwarzania danych, zgodnie z zasadami określonymi w RODO.

Słowa kluczowe: nowe technologie, sztuczna inteligencja, dane osobowe, przetwarzanie danych osobowych pracowników, zasady przetwarzania danych osobowych, nowoczesne technologie w zatrudnieniu

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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

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The right to disconnect in the context of the constitutional right to rest and leisure

Summary

Employees' problems with maintaining a balance between personal and professional life, resulting from the increasing popularity of remote work, are the starting point for the need for clear separation between working time and free time. The purpose of this study is to refer to the so-called right to disconnect to the provisions of the Constitution of the Republic of Poland and the provisions of the Labour Code, and to assess the need to introduce detailed regulations in this regard.

Keywords: right to disconnect, working time, right to rest and leisure

1. Introduction

The COVID-19 pandemic and the development of remote work have resulted in an increase in the number of complaints from employees about the blurring of the boundaries between work and private time, the unpredictability of working hours, the need to work overtime, the negative impact on their physical and mental health and their privacy[1]. In addition, it has become standard to expect an employee to respond to a business phone call or email promptly, or within 24 hours at the latest. "More accessible" and responsive individuals are seen as more engaged at work and even favoured over employees who, for family or health reasons, cannot always answer the phone or email after hours[2].

[1] J. Tlatlik: *Kwestia regulacji "prawa do odłączenia" w polskim porządku prawnym z perspektywy aktualnych przepisów KP*. "Monitor Prawa Pracy" 2022, no 1, p. 17.

[2] K. Naumowicz: *Prawo pracowników zdalnych do bycia offline – rozważania prawnoporównawcze*. "Roczniki Administracji i Prawa" 2021, no 21, p. 541.

In response to these challenges, the European Parliament adopted a resolution on 21 January 2021[3] with recommendations to the Commission on the right to disconnect. A key objective of the new EU directive is to set minimum standards of protection for all workers in the EU who use digital tools for professional purposes. The acceleration of work on the introduction of the right of employees to disconnect is dictated by the growing problem of increasing stress in the workplace and the need to implement the postulate of work–life balance.

The Constitution of the Republic of Poland grants the right to rest and leisure, safe and hygienic working conditions and the protection of private and family life, therefore it is a reference point for detailed regulations on the right to disconnect. The aim of this article is to analyse the possibility and necessity of introducing a separate right of employees to be offline into the Polish legal system, and to attempt to relate this right to constitutional regulation.

2. The right to rest and leisure in the Constitution of the Republic of Poland

The right to rest and leisure, as articulated in Article 66 para. 2 of the Constitution of the Republic of Poland, includes a guarantee of statutory holidays and paid annual leave, as well as maximum standards of working time[4]. This is a reference to the protection of private and family life guaranteed by Article 47 of the Constitution. The above-mentioned constitutional provisions provide specific rights that may be asserted within the limits specified in the statute, and therefore they cannot be treated only as an expression of one of the principles of state policy or a norm of a purely programmatic nature[5]. It is worth noting that it is inadmissible for employees to make positive claims

[3] European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)).

[4] Art. 31 para. 2 of the Charter of Fundamental Rights of the EU (Journal of Laws UE. C. 2012 no. 326, p. 391) also contains a formula similar to art. 66 para. 2, which provides that every worker has the right to a reduction in maximum working hours, to daily and weekly rest periods and to paid annual leave.

[5] L. Garlicki, S. Jarosz-Żukowska: *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II*. Ed. M. Zubik. Warszawa 2016, art. 66, LEX/el.

based solely on Article 66 of the Constitution, and going further than those provided for in the relevant acts[6].

The dichotomy between the concepts of "rest time" and "working time" is emphasised both in the case law of the Court of Justice of the European Union and in the legal framework of the International Labour Organization. The criterion for distinguishing these concepts is the employee's dependence on the employer – working time is the period during which the employee is obliged to be at the employer's disposal, whereas rest time is the period that the employee can freely manage. It should be noted that national law does not allow for the introduction of an intermediate category of time between working time and rest time[7].

The guarantee of the right to days off from work is an expression of the protection of private life, while the guarantee of the right to rest is motivated by the need for physical and mental recovery, increased efficiency and productivity at work, improvement of occupational health and safety conditions, and the reduction of potential hazards and workplace accidents. Rest also contributes to the proper development of interpersonal relationships, particularly family bonds. Both the right to rest and its integral component – the right to days off – are subjective rights under the Constitution. Therefore, they cannot be understood as a mandate not to work on days off or an obligation to rest[8].

Article 66 para. 2 of the Constitution is intended to serve as a real guarantee of workers' rights by restricting the freedom to shape working conditions in contracts or sub-statutory acts. In order to fulfil this obligation, the law must define the content of the concept of working time itself and any exceptions to this concept[9]. According to the judgment of the Constitutional Tribunal, time which has not been recognised by law as working time is – in constitutional terms – non-working

[6] Judgement of the Constitutional Tribunal of 24 October 2000, K 12/00, OTK 2000, no. 7, pos. 255; Judgment of the Constitutional Tribunal of 2 October 2012, K 27/11, OTK-A 2012, no. 9, pos. 102; Judgement of the Constitutional Tribunal of 5 October 2015, SK 39/14, OTK-A 2015, no. 9, pos. 140.

[7] A. Bigaj: *Prawo do urlopu wypoczynkowego*. Warszawa 2015, p. 48.

[8] J. Rumian: *Praca w niedzielę i święta*. Warszawa 2024, pp. 124–128.

[9] M. Florczak-Wątor: *Konstytucja Rzeczypospolitej Polskiej. Komentarz*. Ed. P. Tuleja. Warszawa 2023, art. 66, LEX/el.

time[10]. Working time is defined in labour law as the time during which an employee is at the employer's disposal in the workplace or other place designated for the performance of work[11]. Thus, the concept of working time also includes on-call duty performed in the system of attendance at the workplace, regardless of whether and to what extent the employee actually performed work, since in this case the employee is not able to freely dispose of his time and carry out activities belonging to his private sphere[12].

The determination of the maximum working time consists in setting a limit on a daily, weekly and monthly basis, which the working time may not exceed. Especially with regard to remote employees, there is the problem of their excessive availability, involvement in the work process and contact with the workplace. Thus, the question arises as to the classification of time during which the employee does not perform his or her duties in the strict sense, but is available to the employer and remains in contact with him[13].

As far as the right to rest and leisure is concerned, the 1997 Constitution refers only to two specific entitlements exercising the right to rest and leisure: days off from work and annual paid leave, and the legislator is also obliged to set maximum standards of working time.

3. The concept and scope of the right to disconnect in the European Union

On the right to disconnect, the discussion at EU level was launched by the European Parliament with the adoption of a resolution on the matter in 2021, in which a draft directive was presented. The directive would set minimum requirements to enable workers who use digital tools for professional purposes to exercise their right to disconnect and to ensure that employers respect this right. The right to disconnect means not to engage in work-related tasks outside of working hours and not participating in communication through digital tools, directly

[10] Judgement of the Constitutional Tribunal of 23 February 2010, K 1/08, OTK-A 2010, no. 2, pos. 14.

[11] M. Barzycka-Banaszczyk: *Prawo pracy*. Warszawa 2001, p. 186.

[12] P. Kuczma: *Prawa pracownicze*. In: *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*. Ed. M. Jabłoński. Wrocław 2014, p. 569.

[13] J. Tlatlik: *Kwestia regulacji "prawa do odłączenia"*…, p. 19.

or indirectly. Such a definition of the right to disconnect is intended to guarantee employees in particular the possibility of real rest – by ensuring freedom from thinking about working[14]. In practice, this would mean that an employee would be able to ignore e-mails, text messages and phone calls that come to them outside of working hours, during vacation or sick leave without fear of the employer's reaction, even if they do not require the employee to take further action, but only, for example, confirm a given fact, provide information, indicate the contact details of another person. It is worth noting that in the implementation of the right to be offline, not only the employer but also colleagues should refrain from contacting one another for work-related matters outside of working hours[15].

In the light of the regulations in the EU, especially in the context of the provisions of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time[16], it is worth noting that there is no intermediate category between working time and rest period. Therefore, it seems that compliance with the provisions indicating the separation of working time and rest time would result in the lack of need to create a new law, i.e. the right to disconnect[17].

Since right to disconnect means not engaging in telephone and electronic communications related to work duties outside of working hours, the question arises whether this right would apply to all employees or only to those working remotely. International research shows that remote employees often work much longer hours than those who perform their duties in the workplace[18]. With this in mind, it seems reasonable to grant protection only to this group of employees. The intention of the European Parliament is that the right to disconnect

[14] I. Miernicka: *Prawo do odłączenia się w świetle Rezolucji Parlamentu Europejskiego z dnia 21 stycznia 2021 roku zawierającej zalecenia dla Komisji w sprawie prawa do bycia offline*. "Przegląd Prawa i Administracji" 2022, vol. 129, p. 129.

[15] K. Naumowicz: *Prawo do bycia offline a praca zdalna*. In: *Praca zdalna w polskim systemie prawnym*. Ed. M. Mędrala. Warszawa 2021, p. 85.

[16] Journal of Laws 299 of 18 November 2003, p. 9.

[17] E. Pachała-Szymczyk: *Prawo do bycia offline odpowiedzią na upowszechnienie narzędzi cyfrowych w zatrudnieniu*. "Transformacje Prawa Prywatnego" 2022, no. 4, p. 11.

[18] Eurofound: *Living, working and COVID-19*. COVID-19 series, Luxembourg: Publications Office of the European Union. https://www.eurofound.europa.eu/system/files/2020-10/ef20059en.pdf (accessed 12 February 2024).

should be available to all employees who use digital tools for professional purposes, regardless of their status, form of work organisation, industry and private or public sector. Therefore, the draft directive does not provide for any subjective exemptions, e.g. due to the size of the enterprise or the position of the employee. In particular, the directive does not explicitly introduce exceptions for sectors where the lack of contact with an employee may have particularly significant consequences, e.g. in critical infrastructure enterprises or healthcare entities, or for management staff[19]. The only exceptions would be allowed only in extraordinary circumstances, such as force majeure or other special circumstances, and any use of such a derogation would have to be justified to the employee in writing. It is worth considering whether the introduction of the requirement for a written justification is not too far-reaching and will not simply become another dead provision. It should be assumed that in most emergency situations, it will be crucial to contact the employee as soon as possible. In practice, therefore, such a written justification will be prepared subsequently, *de facto* after the employee has been involved in professional activities after working hours.

It should be emphasised that the employee's right will be matched by the employer's obligation to take action to ensure that subordinates can exercise this right. This obligation of the employer will consist of a number of specific obligations set out in the proposed directive, including the establishment of objective, reliable and accessible systems for measuring working time that do not infringe on the employee's right to privacy; adopting fair, lawful and transparent procedures for the exercise of employee's right to disconnect; carrying out a health and safety assessment in relation to the right to disconnect, taking into account psychosocial risks; taking a variety of measures to make employees aware of the possibility of exercising their right to disconnect, including the organisation of training in this area.

It seems problematic to impose specific organisational or technical solutions in this field, so it would be rational to leave employers relatively free to shape their internal policies, as this will allow them

[19] M. Kurzynoga: *Propozycje Parlamentu Europejskiego unormowania prawa pracowników „do odłączenia" (the right to disconect)*. "Praca i Zabezpieczenie Społeczne" 2022, no. 5, p. 7.

to adapt the procedures to the specifics of a given company[20]. The most important issue seems to be the employer's obligation to inform each employee in writing of his or her rights and of the arrangements made to ensure the exercise of those rights. This is a key point, because one of the obstacles to exercise the right to disconnect is, among other things, the lack of awareness on the part of both supervisors and employees themselves that the employee is not obliged to respond to phone calls and emails outside of working hours. Supervisors often do not seem to remember that contacting subordinates after working hours can violate employees' right to rest and leisure. On the one hand, employees do not know their rights, and on the other hand, they are convinced, not always justifiably, that they are expected to respond immediately. Unambiguous information from the employer that employees have the right to "switch off" will allow for the development of new rules of communication with employees.

Member States will be required to compensate the employees for breaches of his or her rights. It is highly probable that Member States will decide to require the employer to provide the employee with an equivalent rest period in lieu of the right to recuse infringed, and only when it is objectively impossible to grant such a period of recuse will it be able to provide them with adequate monetary compensation.

Another solution to ensure the proper exercise of the right to disconnect is to protect employees against discrimination based on availability, less favourable treatment, dismissal or other unfavourable treatment in retaliation for exercising or wishing to exercise the right to disconnect. Not only will employees have the right to switch off, but also, and this may be even more important in practice, they will be protected from sanctions for their lack of availability. On the other hand, the employer will also not be able to reward or promote subordinates for staying in constant contact with the company. In view of the actual difficulties in proving that an employee has been the victim of unfavourable treatment for the exercise of his or her rights, the Directive shifts to the employer the burden of proving that the difference in treatment of the employee was based on other grounds, in the

[20] B. Surdykowska: *Prawo „do odłączenia" – coraz większe wyzwanie we współczesnym świecie pracy*. "Monitor Prawa Pracy" 2019, no. 12, p. 6.

same way as in the case of discrimination based on criteria other than the availability of the employee.

The last of the solutions adopted in the draft directive is the obligation for Member States to establish effective, proportionate and dissuasive sanctions for breaches of the employer's obligations related to the employee's right to recuse. The Polish legislature may treat a breach of obligations related to the implementation and observance of the right to disconnect in the same way as any other breach of working time regulations. In addition, the exercise of the right to disconnect by an employee may be regarded as a discriminatory criterion. In the event of discrimination on this ground, the employee would be entitled to compensation in an amount not lower than the applicable minimum wage. Harassing employees with after-hours emails and expecting constant availability can even be considered as mobbing.

When analysing the proposed changes in the draft directive, it is important to consider the concerns raised by legal scholars regarding the purposefulness and accuracy of these solutions in their practical application. Specifically, the question arises whether they will provide a genuine benefit and relief for employees or merely impose additional obligations on employers[21].

4. Normative basis of the right to disconnect in the Polish law

In Poland, there is no separate right of an employee to disconnect, but such a right can be inferred both from the general provisions on working time and from the decisions of labour courts and the Supreme Court. Polish Labour law currently contains regulations that give employees respect for their free time. An employee remains at the employer's disposal only during working hours. Therefore, the employee is obliged to be at the employer's disposal within the working time and working time schedule determined in accordance with Article 130 of the Labour Code. After this time, the employee is no longer at this

[21] See: A. M. Świątkowski: *Prawo do bycia „offline"*. "Monitor Prawa Pracy" 2024, no. 3, p. 20; S. Kubiak, A. Magnuska: *Prawo do bycia offline. Realna ulga dla pracowników czy tylko dodatkowe obowiązki dla pracodawców?* Warszawa 2021, *passim*.

disposal. As a general rule, an employee is not required to answer the phone or respond to emails after working hours or while on vacation[22].

Outside of such working hours, the employer may order the employee to work only overtime or oblige the employee to be on call, i.e. to be on standby outside normal working hours. It should be emphasised that both overtime work and on-call duty cannot, as a rule, violate the minimum periods of daily and weekly rest of an employee. Rests are periods intended for the employee's rest and are to be free from the performance of professional duties. In addition, overtime work is compensated by a salary supplement or time off. The on-call work is compensated by time off or remuneration in accordance with the rules set out in the Labour Code. Thus, the regulations concerning the definition of working time and rest periods outline the basic principles of employee availability.

Unfortunately, the law often misses the practice. Most employees report that they feel pressure from their supervisors to answer phone calls after work and be available at all times. An employee who receives an email in the evening may feel like they are expected to respond immediately. In terms of labour law, this means nothing more than work in excess of the employee's working time standards, for which the employee must be paid or given additional time off. On the other hand, the employer should have the tools to call on the employee to work overtime in case of special needs.

Even if there are no specific laws on the right to disconnect, employers can still regulate their own rules internally, as long as they are beneficial to employees. The implementation of the right to disconnect can take place at the level of enterprises by introducing internal policies on contacts after working hours, specifying the appropriate rules of communication, but also the rules of contact with the employee, if the employer actually needs to order the employee to work overtime, due to special needs or breakdowns.

The key issue in this context is not the law, but the issue related to the management culture and employees' awareness of their rights, so this should be more widely addressed at the level of companies by promoting good practices. Training is necessary not only for employees,

[22] Judgement of the Supreme Court of 8 March 2017, II PK 26/16, OSNP 2018, no. 4, pos. 43.

but also for management. It is a matter of a specific work culture, because the definition of working time and rest periods sets the framework for cooperation between the employer and employees, and the indicated areas have already been regulated at the national and EU level. The challenge will be to frame the right to disconnect within the framework of a legal norm that will not limit the employer's right to order overtime work or recall an employee from leave[23].

Then the question arises whether further, detailed regulations are needed and whether they will not cause the problem of overregulation. The final assessment of the introduced regulations depends, of course, on the degree of concretisation of the proposed regulations. However, there is no doubt that, in any case, they would lead to even more bureaucracy, which in turn would increase labour costs. What's more, a total ban on answering emails or phone calls from employers outside of working hours can cause chaos in many industries and increase costs[24].

An employee who is not at the employer's disposal during the working hours resulting from his or her working time schedule, overtime or on-call duty, is not obliged to remain in contact with the employer in order to perform work. Therefore, taking into account also the provisions of the Labour Code in the field of working time and rest time, in my opinion, there is currently no need to create a new right to disconnect, and the undertaking of any work on the basis of national law concerning the right to disconnect will depend on the course of the above-mentioned negotiations between the social partners at the European level[25].

5. Conclusion

The analysis of the scope of the so-called right to disconnect leads to the conclusion that this right is not a new, separate entitlement, but is in fact a specific element on the border of broader issues such as

[23] K. Moras-Olaś: *Prawo do bycia offline jako podstawowe prawo pracownika*. "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2021, no. 4, p. 316.

[24] J. Tlatlik: *Kwestia regulacji „prawa do odłączenia"*…, p. 20.

[25] Reply of the Labour Law Department to the petition of 3 January 2023, on the introduction in Poland of a a legislative solution guaranteeing the right to be offline, 19 January 2023, https://www.gov.pl/attachment/a1607833-146f-421f-bccb-7a2beb000320 (accessed 01 January 2024); Cf. B. Surdykowska: *Prawo "do odłączenia"*…, p. 7.

the right to rest and the right to safe and healthy working conditions. While the Constitution itself does not provide grounds for employee claims, the provisions of the Labour Code concerning working time and leisure time would, in my opinion, be sufficient to enforce the right to disconnect, under the condition that an appropriate work culture is applied. If, in justified situations, an employer may allow an employee to finish work earlier due to personal matters, then the employee should also be open to engaging in urgent and unforeseen workplace needs even outside of regular working hours. In my view, this does not constitute a violation of the right to rest but rather reflects the fulfilment of the duty to care for the well-being of the workplace, as stipulated in Article 100 § 2 point 4 of the Labour Code. Some legal scholars justify the need to regulate the right to be offline by referencing the recently promoted culture of the "constantly available employee" and the expectation that employees remain perpetually ready to engage in work-related matters[26]. In my opinion, emphasis should be placed on soft measures, such as informing employees about their working time rights, and a significant role should be given to employers in the introduction of internal legislation on the right to disconnect.

Since we are talking about the right to disconnect, the question arises: can we speak of the category of "disconnection time"? The right to disconnect is, in my view, merely an emphasis of enforcement of the employee's right to rest and leisure and not a separate category of time. Thus, since this matter is exhaustively regulated both at the EU and national level, there is no need to introduce additional, detailed regulations.

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[26] L. Mitrus: *Pracownicze prawo od bycia offline*. "Monitor Prawa Pracy" 2022, no. 3, p. 19.

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Prawo do odłączenia w kontekście konstytucyjnego prawa do wypoczynku

Streszczenie

Problemy pracowników z utrzymaniem równowagi pomiędzy życiem osobistym a zawodowym, wynikające ze wzrostu popularności pracy zdalnej, stanowią punkt wyjścia dla konieczności wyraźnego rozgraniczenia czasu pracy i czasu wolnego. Celem niniejszego opracowania jest odniesienie tzw. prawa do odłączenia do przepisów Konstytucji Rzeczpospolitej Polskiej i do przepisów Kodeksu pracy oraz dokonanie oceny konieczności wprowadzenia szczegółowych regulacji w tym zakresie.

Słowa kluczowe: prawo do odłączenia, czas pracy, prawo do wypoczynku

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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

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Legal definition of remote work in Polish labour law

Summary

Legal regulation of remote work was introduced to the Polish Labour Code by the Act of 1 December 2022 amending the Labour Code and certain other acts, which entered into force on 7 April 2023. The new legislation includes a legal definition of remote work. Remote work is a broader concept than the previously existing definitions of telework and teleworker. The essence of remote work is that it is carried out at a place indicated by the employee and agreed in each case with the employer, this place being outside the employer's premises.

Keywords: remote work, occasional remote work, telework, teleworker, means of direct communication over a distance

1. Introduction

The concept of remote work was introduced to Polish law during the COVID-19 pandemic by the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them[1]. Subsequently, by the Act of 1 December 2022 amending the Labour Code and certain other acts[2], which entered into force on 7 April 2023, Chapter II C regulating remote work was introduced in Section II of the Act of 26 June 1974 – the Labour Code[3] (Articles from 67^{18} to 67^{34} of the Labour Code, hereinafter interchangeably referred to as 'LC' or 'the Labour Code'). By virtue of the same law, the regulation of telework was repealed (Articles 67^{5}–67^{17} in the version of the Act of 26 June 1974 – the Labour Code before 7 April 2023[4] hereinafter referred to as

[1] Unified text, Journal of Laws from 2023, item 1327 as amended.
[2] Journal of Laws from 2023, item 240.
[3] Unified text, Journal of Laws from 2023, item 1465 as amended.
[4] Unified texts, Journal of Laws from 2022, item 1510.

'the repealed Labour Code'). The purpose of this article is to analyse the statutory definition of the remote work, in particular to compare this concept with the definitions of telework and teleworker. Additionally, I will discuss types of remote work and types of work that can be rendered in a remote form.

2. Legal definitions of telework and teleworker

The telework regulation provided two definitions: of telework and teleworker. According to Article 67^5 § 1 of the repealed Labour Code, telework was the work performed regularly outside the employer's premises, using means of electronic communication within the meaning of the regulations on the provision of services by electronic means. A teleworker was an employee who performs work under the conditions set out in § 1 and communicates the results of work to the employer, in particular by means of electronic communication (Article 67^5 § 2 of the repealed Labour Code). The above-mentioned provisions have raised major questions of interpretation. First of all, there is a doubt in the literature about the scope of the definition of telework. Namely, whether it covers only the elements indicated in Article 67^5 § 1 of the repealed Labour Code, i.e. the performance of work outside employer's premises, on a regular basis, using electronic means of communication[5], or whether an additional element of the definition of telework is the communication of work results to the employer[6]. In my opinion, the clear separation of the two definitions and their construction indicates that these are two separate concepts. Article 67^5 § 1 of the repealed Labour Code characterised the process of performance of work in the form of telework and focused on conducting work regularly outside the employer's premises and communication between the employer and the teleworker, whereas Article 67^5 § 2 of the repealed Labour Code (definition of the teleworker) empha-

[5] L. Mitrus: *Podporządkowanie pracownika zatrudnionego w formie telepracy.* In: *Z zagadnień współczesnego prawa pracy, Księga jubileuszowa Profesora Henryka Lewandowskiego*. Ed. Z. Góral. Wydawnictwo Oficyna, Warszawa 2009, p. 162; J. Wiśniewski: *Zatrudnianie pracowników w formie telepracy*. Wydawnictwo TNOIK, Toruń 2007, p. 44.

[6] A. Sobczyk: *Telepraca w prawie polskim*. Wydawnictwo Oficyna Wolters Kluwer business, Warszawa 2009, p. 24; W. Muszalski: *Kodeks pracy. Komentarz*. Wydawnictwo CH Beck, Warszawa 2009, p. 238.

sised the transfer of work results. It should be noted that the wording formulated in Article 67^5 § 2 of the repealed Labour Code such that a teleworker is an employee who performs work under the conditions set out in Article 67^5 § 1 of the repealed Labour Code and communicates the results of the work to the employer, in particular by means of electronic communication, leads to the conclusion that the legislator allowed for the possibility of communicating the results of the work also by other means. Therefore, it must be assumed that a teleworker is an employee who performs telework in the meaning of the repealed Article 67^5 § 1 of the repealed Labour Code[7].

The definition of telework is similarly understood in case law. The courts emphasise that telework requires three elements: 1. the regularity of the work, 2. its performance outside the workplace, 3. the use in its performance of means of electronic communication and transmission of its results in particular. These three conditions must be met together[8].

It should be pointed out that the solution adopted in Article 67^5 of the repealed Labour Code was too complicated and raised numerous interpretative questions, particularly with regard to the relationship between the concepts of telework and teleworker. The reference to the definition of electronic means of communication, which is not regulated in the Labour Code, made the definition of telework less uniform, as it required an analysis of the provisions of several regulations that use complicated terminology.

3. Elements of the legal definition of remote work

In contrast to the repealed telework regulation, at present there is only one legal definition – the remote work. According to Ar-

[7] E. Pietrzak: *W kwestii ustawowej definicji telepracy i telepracownika*. "Monitor Prawa Pracy" 2011, no. 11, p. 566.

[8] The judgement of the Court of Appeal in Łódź, III Labour and Social Insurance Division, from 11 June 2015, III AUa 981/14; The judgement of the Court of Appeal in Białystok, III Labour and Social Insurance Division, from 9 July 2013, III AUa 59/13; The judgement of the Court of Appeal in Lublin, III Labour and Social Insurance Division, from 11 July 2017, III AUa 1383/16; The judgement of the Court of Appeal in Gdańsk, III Labour and Social Insurance Division, from 27 April 2016, III AUa 1748/15; judgements available at the Portal of Judgments of the Common Courts (Portal Orzeczeń Sądów Powszechnych), https://orzeczenia.ms.gov.pl.

ticle 67^{18} LC, remote work may be performed, in full or in part, at a place indicated by the employee and each time agreed upon with the employer, which in particular may be the employee's home address, in particular with the use of the means of direct communication over a distance (the remote work). A significant novelty compared to the regulation of telework is the introduction of occasional remote work (Article 67^{33} LC).

Legal definition of remote work is significantly different from the definition of telework and teleworker. A comparison of the wording of Article 67^{5} of the repealed Labour Code and Article 67^{18} LC shows that remote work is a broader concept than telework. Namely, the essence of telework was that it was carried out by means of electronic communication, whereas the definition of remote work refers to means of direct communication over a distance, whereby work can be carried out in particular by such means. It should be noted that the use of the phrase 'in particular' means that the use of these means is not a necessary condition for considering the work in question as the remote work. Thus, the legislator allows for the possibility of performing remote work without the use of means of direct communication over a distance[9]. Moreover, in contrast to the definition of teleworker, which emphasises the communication of work results to the employer, the definition of remote work does not refer to the communication of work results[10].

The definitions of telework and teleworker used different wording regarding the place of work than the current definition of the remote work. Article 67^{5} of the repealed Labour Code stipulated that the place of work should be situated outside the employer's premises, whereas according to Article 67^{18} LC, remote work is performed at a place indicated by the employee and each time agreed upon with the employer. As an example, the aforementioned provision indicates the employee's home address. Accordingly, it should be assumed that the place of the remote work is any place outside the employer's premises (i.e. outside the employer's registered office or other place of business) that is idi-

[9] L. Mitrus: *Pojęcie i rodzaje pracy zdalnej w świetle nowelizacji kodeksu pracy z dnia 1 grudnia 2022 r.* "Praca i Zabezpieczenie Społeczne" 2023, no. 11, p. 42.

[10] D. Makowski: *Pojęcie i dopuszczalność pracy zdalnej w świetle przygotowywanych zmian Kodeksu pracy*. "Monitor Prawa Pracy" 2022, no. 4, p. 14.

cated by the employee and agreed to by the employer[11]. Article 67^{18} LC, in contrast to Article 67^{5} § 1 of the repealed Labour Code, does not contain a reference to the performance of work outside the employer's premises, nevertheless, this is an obvious circumstance[12]. It is difficult to imagine a situation in which an employee would indicate the employer's premises as the place of work – this would contradict the idea of the form of employment in question. Moreover, it has been rightly argued in the literature that remote work is not the work carried out in workplaces hired by the employer in remote work centres[13]. Therefore, it should be assumed that the qualification of work as remote work is determined by its performance outside the employer's premises at a location chosen by the employee.

It should be noted that, in accordance with Article 29 § 1 point 2 of LC, the substantive component of any employment contract is the place of work. In the case of remote work, this element acquires particular importance as its characteristic feature is the performance of work in the place indicated by the employee and each time agreed upon with the employer. What is more, in the case of remote work, the performance of work at the location different than the employer's premises does not result from the need to perform a specific activity outside the employer's premises (as, for example, in the work of drivers, postmen or sales representatives), but is a characteristic feature of this form of conducting work. The factor of distance does not in any way affect the possibility of qualifying a given manner of providing work as remote work. Indeed, an employee may perform the tasks in the form of remote work when the employee works near the employer premises (e.g. his/her flat is located in the same street) as well as when the place of performing remote work is further away, e.g. in another voivodship. At the same time, performing the same activities at the

[11] Ł. Prasołek: *Praca zdalna. Aspekty prawa pracy, BHP, IT, RODO i HR*. Warszawa 2023. Legalis; Ł. Prasołek: *Praca zdalna po zmianach w Kodeksie pracy*. Warszawa 2023. Legalis.

[12] E. Suknarowska-Drzewiecka: *Komentarz do art. 67^{18} Kodeksu pracy.* In: *Kodeks pracy. Komentarz.* Ed. K. Walczak. Wyd. 33. Warszawa 2023. Legalis; M. Gładoch: *Praca zdalna. Kontrola trzeźwości. Nowelizacja Kodeksu pracy. Komentarz*. Wydawnictwo CH Beck, Warszawa 2023. Legalis.

[13] A. Sobczyk: *Komentarz do art. 67^{18} Kodeksu pracy*. In: *Kodeks pracy. Komentarz*. Ed. A. Sobczyk, Wyd. 6. Warszawa 2023. Legalis.

employer's premises means that the work in question ceases to have the characteristics of remote work.

The specificity of remote work creates difficulties in determining the place of work, which raises issues concerning, in particular, the control of the employee at the workplace, health and safety, or the protection of equipment entrusted to the employee. The imprecise indication of the place of work may cause difficulties in the implementation of the employer's powers and obligations, such as in terms of health and safety and control of the employee. In this regard, it should be noted that there are no provisions in Section II Chapter II C of the Labour Code regulating workplace issues. It only follows from Article 67^{18} of the Labour Code that the place of work should be designated by the employee and accepted by the employer, and that it may be at the employee's place of residence.

The statutory definition of the remote work emphasises the autonomy of the employee's decision to choose the place of work. Indeed, it is the employee who indicates the place where the work will be provided. A feature of remote work is therefore that it is not possible for the employer to impose the place of work on the employee. However, the employee's autonomy in this respect is not unlimited – the employer must always agree to the location indicated by the employee. The absence of the employer's consent excludes the possibility to provide remote work in the location chosen by the employee. At the same time, it is not excluded that the employee specifies several locations for the provision of remote work (e.g. a flat, which is the employee's centre of life, and a summer house used by the employee during the summer period)[14]. However, such an arrangement must be in each case agreed with the employer.

The place where remote work is performed does not need to be necessarily the employee's home. Nevertheless, it should be such a place to which the employee has the legal title. This may be premises which

[14] M. Gładoch: *Praca zdalna.* In: *Prawo pracy dla sędziów i pełnomocników*. Eds. K. Walczak, M. Wojewódka. Wydawnictwo CH Beck, Warszawa 2023. Legalis; M. Mędrala: *Praca zdalna. Komentarz do nowelizacji Kodeksu pracy*. Warszawa 2023. LEX; M. Mędrala: *Nowe zasady pracy zdalnej – nowelizacja kodeksu pracy*. 2022. LEX; D. Makowski: *Pojęcie i dopuszczalność pracy zdalnej…*, p. 14; L. Mitrus: *Pojęcie i rodzaje pracy zdalnej…*, p. 42; Ł. Prasołek: *Praca zdalna. Aspekty prawa pracy, BHP, IT, RODO i HR…*; A. Sobczyk: *Komentarz do art. 67^{18} Kodeksu pracy…*

the employee owns or rents. The provisions of the Labour Code do not require it to be a housing apartment. It is therefore not excluded that an employee rents an office (business premises) for the purposes of performing remote work. What is more, the location in which remote work is performed must provide safe and hygienic working conditions. It should be indicated that according to Article 67^{31} § 7 LC, an employee may be admitted to perform remote work on condition that the employee makes a statement, in paper or electronic form, in which he/she confirms that the conditions of work at the remote working post at the place indicated by the employee and agreed upon with the employer are safe and hygienic. What is more, an employee shall organise his/her remote working post guided by the principles of ergonomics (art. 67^{31} § 8 LC).

The place of performance of remote work has a crucial impact on determining when an employee performing work in this form is on a business travel. According to Article 775 § 1 of the Labour Code, business travel is the performance, at the employer's direction, of a work assignment away from the place where the employer's registered office is located or away from the permanent place of work. In the case of remote work, a business travel will be, in accordance with Article 77^{5} § 1 of the Labour Code, the performance of work outside the fixed place of work, i.e. outside the employee's home address or other place indicated by the employee and accepted by the employer. There are no grounds for taking the locality in which the employer's registered office is located as the reference point for determining the employee business travel, unless it is situated in the same location as the employee home address or other place of work.

Article 67^{18} LC, in contrast to Article 67^{5} § 1 of the repealed Labour Code, does not contain reference to the regularity of remote work. This means that regularity is not a feature of remote work. Nonetheless, the introduction of a definition of occasional remote work indicates that the remote work referred to in Article 67^{18} LC cannot occur episodically. Since, pursuant to Article 67^{33} LC, occasional remote work is work performed for up to 24 days in a calendar year, then the remote work referred to in Article 67^{18} LC should be performed for at least 25 days in the calendar year.

4. Types of remote work and types of work that can be rendered in the remote form

Different types of remote work are distinguished in the literature. Ł. Prasołek indicates three types of remote work: total, partial and occasional[15], E. Suknarowska-Drzewiecka uses the term hybrid work[16] and M. Tomaszewska – the term organisation of work in hybrid form (hybrid system)[17], M. Rycak distinguishes regular and hybrid remote work[18], M. Gładoch indicates permanent remote work, occasional remote work and *ad hoc* remote work, as well as typical, compulsory and incidental remote work[19], L. Mitrus refers to standard remote work, remote work in exceptional circumstances and occasional remote work[20].

The Labour Code refers to remote work (Article 67^{18} LC) and occasional remote work (Article 67^{33} § 1 LC). Consequently, these are assumed to be the two main types of remote work. In addition, Article 67^{18} LC indicates that remote work can be performed, in full or in part, at a place indicated by the employee. Therefore, it is reasonable to divide remote work into full remote work (i.e. provided exclusively at the place indicated by the employee) and partial remote work (i.e. provided partly at the employer's premises and partly at the place indicated by the employee).

As a general rule, the provisions of the Labour Code provide for the voluntary nature of remote work. According to Article 67^{19} § 1 LC, the arrangement between the parties to an employment agreement concerning the performance of remote work by an employee may be made upon concluding an employment agreement or during the employment. This provision emphasises the fact that the performance of remote work must always be an element agreed upon by the employee and the employer, and therefore the consent of both parties to the employment relationship to the introduction of remote work is necessary. Also, according to Article 67^{33} § 1 LC, occasional remote work can be

[15] Ł. Prasołek: *Praca zdalna po zmianach w Kodeksie pracy…*

[16] E. Suknarowska-Drzewiecka: *Komentarz do art. 67[18] Kodeksu pracy…*

[17] M. Tomaszewska: *Elementy konstytutywne pracy zdalnej*. "Studia z Zakresu Prawa Pracy i Polityki Społecznej" 2023, no. 3, p. 213.

[18] M. Rycak: *Nowe regulacje dotyczące pracy zdalnej*. "Edukacja Prawnicza" 2023, no. 2, p. 5.

[19] M. Gładoch: *Praca zdalna. Kontrola trzeźwości…*; M. Gładoch: *Praca zdalna…*

[20] L. Mitrus: *Pojęcie i rodzaje pracy zdalnej…*, pp. 40–44.

performed only upon an employee's application. In addition, in certain situations, an employer may instruct an employee to perform remote work (in the period of the state of emergency, the epidemic crisis situation or the state of epidemic being in force and during three months following their cancellation or in the period where it is temporarily impossible for the employer to ensure safe and hygienic working conditions at the employee's existing workplace due to a force majeure operation – Article 67^{19} § 3 LC). On the other hand, the condition for the employer to issue such an order is that the employee declares that he or she has the premises and technical conditions to perform remote work. On this basis, we can distinguish between voluntary remote work (agreed upon by both parties to the employment relationship) and remote work at the employer's instruction. It should be noted that the telework regulations did not provide for the possibility of issuing such an instruction to an employee.

Remote work can be applied to various types of work that can be carried out away from the employer's premises, at a place designated by the employee. The only restriction in this respect is the catalogue of work that cannot be provided remotely foreseen in Article 67^{31} § 4 LC. Namely, remote work does not cover the following: the works which are particularly hazardous; as a result of which the admissible standards of physical agents fixed for living premises become exceeded; with hazard-causing chemical agents referred to in the provisions on safety and hygiene of work involving the existence of chemical agents at the workplace; which involve the use or emission of harmful biological agents, radioactive substances and other substances or mixtures emitting onerous odours; which cause heavy dirtying. It should be noted that such a catalogue was not included in the repealed telework provisions. What is more, remote work does not include work that by its nature is carried out outside the employer's premises, e.g. driving or work carried out in the course of a business trip[21]. In the case of the above work, the employee does not decide where the work is performed, as the performance of tasks away from the employer's premises is either inherent in the type of work in question or is a consequence of the employer's instructions (e.g. business travel).

[21] A. Sobczyk: *Komentarz do art. 67^{18} Kodeksu pracy…*

As already indicated above, the use of means of direct communication over a distance is not a prerequisite for remote work. Accordingly, it should be assumed that there are two basic categories of work within the framework of remote work, namely work for which means of direct communication over a distance are used and work for which the employee does not use these means. It is indicated in the literature that the means of direct communication over a distance are tools that, in voice, video, written and graphic form, allow the interested party to express his or her position on an issue (e.g. by conducting a video or teleconference). Therefore, performing remote work by means of direct communication over a distance involves not only electronic means of communication (including e-mail), but also, for example, telephone, fax, instant messaging[22]. It should be pointed out that, in practice, remote work largely applies to work carried out by means of direct communication over a distance[23]. This is because these means make it possible to be in contact with the employer's premises, e.g. in order to receive instructions from the employer or to cooperate with other employees.

5. Conclusions

The legal definition of remote work introduced in the Labour Code should be assessed positively. A favourable legislative move was the abandonment of two definitions, i.e. telework and teleworker, and replacing them with a single concept of remote work. This removed the interpretation doubts arising under the previous regulation of telework. The abandonment of the element of the definition, i.e. "performance of work by means of electronic communication within the meaning of the regulations on the provision of services by electronic means", which was an immanent feature of telework, also deserves approval. Thus, the definition of remote work is broader than the concept of telework. It should be noted that not only work provided by means of direct communication over a distance can be performed in this form,

[22] M. Gładoch: *Praca zdalna. Kontrola trzeźwości*…; E. Suknarowska-Drzewiecka: *Komentarz do art. 67*[18] *Kodeksu pracy*…

[23] M. Mędrala: *Praca zdalna*…; M. Mędrala: *Nowe zasady pracy zdalnej*…; M. Tomaszewska: *Elementy konstytutywne pracy zdalnej*…, p. 217.

which makes it more universal[24]. Summing up the above considerations, it should be stated that the definition of remote work introduced into the Labour Code is simpler and clearer than the previous concepts of telework and teleworker. The above may be an important factor favouring the popularisation of the use of remote work not only in times of epidemic emergency.

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[24] L. Florek: *Prawne ramy pracy zdalnej*. "Z Problematyki Prawa Pracy i Polityki Socjalnej" 2021, no. 2, pp. 1–14.

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Definicja prawna pracy zdalnej w polskim prawie pracy

Streszczenie

Regulacja pracy zdalnej została wprowadzona do Kodeksu pracy ustawą z dnia 1 grudnia 2022 r. o zmianie ustawy – Kodeks pracy oraz niektórych innych ustaw, która weszła w życie w dniu 7 kwietnia 2023 r. Nowe przepisy zawierają m.in. prawną definicję pracy zdalnej. Praca zdalna jest pojęciem szerszym niż obowiązujące dotychczas definicje telepracy i telepracownika. Istotą pracy zdalnej jest jej wykonywanie w miejscu wskazanym przez pracownika i każdorazowo uzgodnionym z pracodawcą, przy czym jest to miejsce znajdujące się poza zakładem pracy.

Słowa kluczowe: praca zdalna, okazjonalna praca zdalna, telepraca, telepracownik, środki bezpośredniego porozumiewania się na odległość

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The employee's right to criticise the employer on the internet: how to set legal boundaries?

Summary

The issue of the limits of acceptable criticism of an employer by an employee has been considered in case law and literature for a long time. However, with the widespread access to the internet, in particular to social media, there are new challenges in this area. The paper addresses the problem of permitted criticism of an employer posted by employees on the internet. The author seeks an answer to the question of whether the existing criteria developed in the doctrine and jurisprudence, which are used to determine the limits of criticism, are also appropriate in the case of an employee's statements published in a virtual space, which is characterised by its public nature, the lack of control over the audience and the persistence of the content.

Keywords: criticism, employee, employer, internet, social media, limits

1. Introductory remarks

The impact of new technologies on labour law is reflected, among other things, in the creation of new challenges with which the existing institutions of this branch of law must deal. One such challenge is the issue of online criticism of the employer by the employee. The issue of the limits of criticism expressed by an employee is not a new one[1]. Jurisprudence and doctrine have developed criteria that should be

[1] See e.g.: S. W. Ciupa: *Niedozwolona krytyka pracodawcy ze strony pracownika jako przyczyna wypowiedzenia umowy o pracę*. "MOP" 2002, issue 20; E. Suknarowska-Drzewiecka: *Wypowiedzenie z powodu niekorzystnych wypowiedzi o pracodawcy umieszczanych na serwisach społecznościowych lub stronach internetowych*. "MOPR" 2017, issue 7; M. Bosak: *Zjawisko krytyki w stosunkach pracy – wybrane aspekty*. "Annales Universitatis Mariae Curie-Skłodowska. Sectio G (Ius)" 2015, vol. LXII, no. 2; M. Brodecki: *Granice krytyki pracodawcy przez pracownika. Odpowiedzialność za niedozwoloną krytykę pracodawcy*. In: *Demokracja w zakładzie pracy. Zagadnienia prawne*. Eds. Z. Hajn, M. Kurzynoga. Warszawa 2017.

taken into account when assessing the admissibility of such criticism. However, the development of modern technology has also meant the spread of social media, to which any employee can have access. As a result, criticism directed at the employer can now have a different character and – more importantly – a much wider reach.

The purpose of the paper is to consider whether – and under what conditions – the criteria developed in doctrine and case law for permitted criticism of an employer apply to the criticism published by an employee on the internet. It seems that most of the criteria developed both in case law and in the doctrine, which determine the limitations of such criticism, can also be applied in the case of internet activity. However, certain nuances related to the specific nature of this medium should be taken into account – first and foremost, the widespread availability of statements posted there, which means that such criticism is, as a rule, of a public nature. The very broad scope of the criticism may therefore result in the need to broaden the catalogue of the criteria according to which unfavourable statements made by an employee about the employer are assessed. This topic is all the more relevant because, as pointed out in the literature, online statements by employees disparaging their employers have become ubiquitous[2].

The doctrine distinguishes three main types of employee social media activity that occur outside working hours and without the use of the employer's tools or technology (e.g. a computer). Firstly, there are disparaging remarks about the employer or employment itself. The second type of behaviour is bullying, harassing or intimidating other co-workers on social media. Thirdly, these are behaviours that, although not directly related to the employment, may damage the interests or reputation of the employer[3]. To outline the framework of this study, it should be emphasised that only the first mentioned type of expression, i.e. critical statements about the employer, will be its subject. Due to the limited volume of the paper, excluded from its scope will be such issues as the general freedom of expression on the internet by employees (not related to criticism) and the employer's

[2] See: P. Sanchez Abril, A. Levin, A. Del Riego: *Blurred Boundaries: Social Media Privacy and the Twenty-first-century Employee*. "American Business Law Journal" 2012, 49(1) pp. 68–69.

[3] S. Hook, S. Noakes: *Employer Control of Employee Behaviour Through Social Media*. "Law, Technology and Humans" 2019, vol. 1(1), p. 142.

control over their social media accounts, the possibility of termination of the employment relationship with or without notice and the civil law and criminal law consequences of exceeding the limits of freedom of expression, as well as the detailed description of the phenomenon of whistleblowing, which is regarded as a particular form of criticism of the employer by the employee[4]. For the same reasons, the views of the judicature on the issue of criticism of the employer will be narrowed down to Polish jurisprudence[5].

The paper is divided into three parts. The first part focuses on answering the question of what criteria constitute acceptable criticism of the employer. The second part is devoted to the analysis of specific character of criticism posted on the Internet (e.g. on social media). The final part offers some suggestions on how the criteria for permitted criticism should be adapted to the development of new technologies.

2. Acceptable criticism of the employer

The employee's right to criticise the employer is based primarily on Article 10 of the European Convention on Human Rights[6] (freedom of expression), and Article 54 of the Polish Constitution[7] (freedom to express one's opinions and to obtain and disseminate information). Indeed, freedom of criticism is part of the freedom of expression[8]. The labour law provisions do not contain a definition of criticism and it is therefore necessary to refer to the jurisprudence and doctrine in this regard. The Supreme Court in its resolution of 17 December

[4] See: M. Bosak: *Zjawisko krytyki w stosunkach pracy...*, p. 34. On whistleblowing see e.g. H. Szewczyk: *Whistleblowing. Zgłaszanie nieprawidłowości w stosunkach zatrudnienia*. Warsaw 2020; M. Kozak-Maśnicka: *Dyrektywa w sprawie ochrony osób zgłaszających naruszenia prawa Unii jako wyzwanie dla polskiego ustawodawcy*. "MOPR" 2020, issue 4.

[5] With regard to the ECtHR case law on this issue, reference should be made, for example, to an article extensively discussing it, i.e. A. Rutkowska: *Granice wolności słowa w środowisku pracy – standardy w orzecznictwie Europejskiego Trybunału Praw Człowieka*. "MOP" 2014, issue 8.

[6] Convention for the Protection of Human Rights and Fundamental Freedoms, Journal of Laws 1993, No 61, item 284 as amended.

[7] Constitution of the Republic of Poland, 2.04.1997, Journal of Laws 1997, No 78, item 483 as amended.

[8] Cf. judgement of the Supreme Court, 15.01.2014, V KK 178/13, OSNKW 2014/8/62.

1965[9] noted that "criticism consists in communicating to a person or third parties an evaluation of the work, activity or conduct of another person, institution or association", while "the critic pronounces a positive or negative judgment according to a basic measure adopted by him". This definition is developed in the doctrine[10]. The literature draws attention to three levels of critical expression: 1. descriptive statements relating to facts; 2. evaluations and generalisations of these facts; 3. the external form of their expression[11].

The admissibility of criticism of an employer by an employee has not been questioned in case law for many years[12]. This is by no means to imply that this right is absolute in nature[13]. Hence, both in jurisprudence and in the doctrine, there has been a long-standing search for criteria to determine the limits of acceptable criticism. Moreover, the problem is broader, since the question of the boundaries of such criticism is essentially an attempt to resolve the natural conflict between the interests of the employer and the employee's freedom of expression[14]. Attention is drawn to the difficulty of formulating a general, universal catalogue of such criteria that would apply to all employees, since, as a general rule, each case should be individually assessed in this regard[15]. The vagueness of the boundaries of acceptable criticism is also influenced by the need to take into account such issues as the type of criticism, the conditions in which it takes place, the value

[9] Resolution of the Supreme Court of 7 judges - legal principle, 17.12.1965, VI KO 14/59, LEX No 113915.

[10] See more on the definition of criticism: S. W. Ciupa: *Niedozwolona krytyka pracodawcy ze strony pracownika...* pp. 925–926.

[11] Ibidem, p. 925 and literature quoted therein.

[12] See e.g. judgement of the Supreme Court, 11.12.1952, C 2556/52, PiP 1953/7/128; judgement of the Supreme Court, 7.12.2006, I PK 123/06, OSNP 2008/1-2/14; judgement of the Supreme Court, 7.09.2000, I PKN 11/00, OSNP 2002/6/139; judgement of the Supreme Court, 11.04.1984, I PR 34/84, LEX No 13554; judgement of the Supreme Court, 16.11.2006, II PK 76/06, OSNP 2007/21-22/312; judgement of the Supreme Court 25.11.2014, I PK 98/14, OSNP 2016/6/67.

[13] M. Bosak-Sojka, W. Wilczak: *Konsekwencje przekroczenia granic dozwolonej krytyki pracodawcy w ujęciu prawa karnego materialnego*. "MOPR" 2019, issue 2, p. 9 and literature quoted therein; see also: judgement of the District Court in Świdnica, 7.04.2017, I C 2237/16, LEX No 2344118.

[14] See: P. Sanchez Abril, A. Levin, A. Del Riego: *Blurred Boundaries...*, p. 69.

[15] M. Brodecki: *Granice krytyki pracodawcy przez pracownika...*, p. 448.

of the purpose for which it is undertaken, as well as the customs of the environment and the personal characteristics of the individuals[16].

In addition, depending on the perspective adopted – employment law, civil law or criminal law – these criteria may differ[17]. In the context of labour law, the assessment of the admissibility of criticism should be carried out first and foremost in relation to the fundamental duties of employees, such as taking care of the interests of the workplace (pol. *dbałość o dobro zakładu pracy* – Art. 100 § 2 sec. 4 of the Labour Code[18]), as well as compliance with the principles of social coexistence[19], the breach of which may lead to potential consequences, such as notice of termination of the employment contract or disciplinary dismissal, as well as organisational liability and material liability of the employee[20]. With regard to civil law, the admissibility of criticism should, in turn, be assessed mainly through the prism of a possible infringement of the employer's moral rights (Articles 23–24 of the Civil Code[21]), especially its reputation. In the area of criminal law, on the other hand, it would be appropriate to refer to the prerequisites of the offence of defamation (Article 212 of the Penal Code[22]) and insult (Article 216 of the Penal Code).

As can be seen from the above, it is difficult to establish a definite catalogue of criteria that would determine the admissibility of criticism of the employer in each case. Yet, such attempts are made, and not without success. The jurisprudence accepts that the following should be taken into account: the content, the form of the statement, the cir-

[16] Judgement of the District Court in Poznań, 28.08.2017, XVIII C 530/17, LEX No 2413720.

[17] Boundaries of acceptable criticism may be different for e.g. defamation, infringement of moral rights, etc. See more: M. Brodecki: *Granice krytyki pracodawcy przez pracownika...,* pp. 442–448; S. W. Ciupa: *Niedozwolona krytyka pracodawcy ze strony pracownika...*

[18] Labour Code, 26.06.1974, consolidated text: Journal of Laws 2023, item: 1465.

[19] See: judgement of the Supreme Court, 28.08.2013, I PK 48/13, LEX No 1448689.

[20] However, the assessment of the employee's liability should take into account the principles of protection of moral rights and criminal liability – M. Bosak: *Zjawisko krytyki w stosunkach pracy...,* p. 35. Also, the Supreme Court instructs that the criminal law perspective be taken into account – see: judgement of the Supreme Court, 28.08.2013, I PK 48/13, LEX No 1448689.

[21] Civil Code, 23.04.1964, Journal of Laws 2023, item 1610 as amended.

[22] Penal Code, 6.06.1997, Journal of Laws 2024, item 17.

cumstances of its articulation, as well as the motives of the critic[23]. The Supreme Court emphasises that the basic feature of permissible criticism is the employee's good faith, i.e. "her subjective conviction that she is basing the criticism on facts that are truthful (while exercising due diligence in verifying them) and is acting in the justified interest of the employer"[24]. The jurisprudence also points out that these boundaries are determined by i.a. the social purpose of the criticism[25], and the public interest in which it is undertaken[26]. Criticism must also be proportionate to the scale of the negative phenomenon it targets[27] and shall not disorganise the work[28]. The Supreme Court further states that criticism must respect the moral rights of the employer or of persons acting on its behalf and must not lead to a breach of the employee's duties, i.e. to take care of the interests of the workplace and to keep secret the information whose disclosure could expose the employer to damage[29]. Permitted criticism must not be "dictated by personal considerations" and take the form of "offensive personal assault"[30]. What is noteworthy is that, in the opinion of the Supreme Court, acceptable and constructive criticism expressed by an employee not only does not violate the duty of care for the interests of the workplace, but actually demonstrates such care on the part of the employee[31].

It is not only in jurisprudence that attempts are made to define the limits of the employee's right to criticism. S. W. Ciupa, also taking into account the court jurisprudence, has undertaken to determine a cata-

[23] Judgement of the Supreme Court, 3.08.2016, I PK 227/15, LEX No 2135803.

[24] See: judgement of the Supreme Court, 28.08.2013, I PK 48/13, LEX No 1448689.

[25] Judgement of the Court of Appeal in Białystok, 30.01.2019, I ACa 647/18, LEX No 2635142; judgement of the District Court in Poznań, 28.08.2017, XVIII C 530/17, LEX No 2413720.

[26] Judgement of the Supreme Court, 11.12.1952, C 2556/52, PiP 1953/7/128.

[27] Judgement of the District Court in Poznań, 28.08.2017, XVIII C 530/17, LEX No 2413720; with regard to journalistic criticism: judgement of the Supreme Court, 15.01.2014, V KK 178/13, OSNKW 2014/8/62.

[28] Judgement of the Supreme Court, 28.07.1976, I PRN 54/76, LEX No 14319.

[29] Judgement of the Supreme Court, 28.08.2013, I PK 48/13, LEX No 1448689; judgement of the Supreme Court, 3.08.2016, I PK 227/15, LEX No 2135803; judgement of the Supreme Court, 18.07.2012, I PK 44/12, LEX No 1226441; see also: judgement of the Supreme Court, 28.03.2017, II PK 18/16, LEX No 2281254; judgement of the Supreme Court, 16.11.2006, II PK 76/06, OSNP 2007/21-22/312.

[30] Judgement of the Supreme Court, 11.12.1952, C 2556/52, PiP 1953/7/128.

[31] Judgement of the Supreme Court, 7.12.2006, I PK 123/06, OSNP 2008/1-2/14.

logue of basic criteria of acceptable criticism. According to this author, such criticism should be characterised by legitimacy (understood as an objectively existing more general or individual interest deserving legal protection), substantiality (factuality and reference to relevant facts), fairness (based on verified facts), relevance to specific circumstances (not aimed only at judging, but enabling its addressee to draw conclusions for the future), and appropriate form (cultural and in line with the principles of social coexistence)[32]. M. Brodecki refers to analogous criteria, additionally developing the connection between the criticism and the breach of the duty of care for the interests of the workplace – this scholar emphasises that the criticism expressed by the employee may result, for example, in a loss of trust in the employer by its contractors, loss of reputation, negative perception in public opinion, which may consequently result in financial losses[33]. Based on the above criteria and court case law, the literature discusses examples of exceeding the limits of acceptable criticism[34].

It is worth noting that the doctrine postulates the valuation of particular groups of premises for acceptable criticism. According to M. Brodecki, when assessing the admissibility of criticism of an employer, priority should be given to substantive premises, i.e. those relating to the criteria of legitimacy, substantiality and fairness. Secondly, what matters is the content and form of such criticism[35].

3. Characteristics of criticism posted on the internet

Nowadays, almost every person – and therefore every employee – has the possibility to post their statements and opinions online. As pointed out in the literature, the advent of social media has resulted in blurring the line between people's behaviour as employees and citizens[36]. ECtHR indicated that "user-generated expressive activity on the Internet provides an unprecedented platform for the exercise

[32] S. W. Ciupa: *Niedozwolona krytyka pracodawcy ze strony pracownika...*, p. 925.

[33] M. Brodecki: *Granice krytyki pracodawcy przez pracownika...*, pp. 435–438.

[34] See e.g. ibidem, pp. 441–442; S.W. Ciupa: *Niedozwolona krytyka pracodawcy ze strony pracownika...*

[35] M. Brodecki: *Granice krytyki pracodawcy przez pracownika...*, p. 441.

[36] S. Hook, S. Noakes: *Employer Control of Employee Behaviour...*, p. 141.

of freedom of expression"[37]. The employee can choose from a variety of platforms, such as websites, forums, blogs, etc., of which social media seem to be the most accessible. Within this last category, we can also note a great diversity: the employee may therefore use sites such as LinkedIn, Facebook, Twitter, as well as TikTok or Youtube. Each of these social media has its own characteristics. In order to analyse the application of the general criteria of acceptable criticism of the employer to statements made in online space, it is first necessary to try to characterise the latter and to point out the differences with criticism made in other forums, such as in a conversation with colleagues.

Despite the aforementioned diversity within online space, there is a consensus that the feature that distinguishes the internet is its public nature. This view has been shared by the Supreme Court, which, on the basis of a misdemeanour case, indicated that "the internet, although a virtual space, has the character of a public place"[38]. The judicature acknowledges that this space "remains accessible to its general public, without any restriction, as long as access to the posted content is not password-protected"[39]. The Internet – unsurprisingly – is also qualified by the courts as a means of mass communication[40].

The public nature of the internet and its widespread accessibility has important consequences with regard to the reach of statements published there, including critical opinions expressed by an employee about her employer. Unlike other types of expression, in the case of messages sent over the internet, there is limited or no control by the author over who reads them, as well as their dissemination[41]. Even if it was addressed to a limited audience, the message can be forwarded, reposted[42] or shared; it is also possible to take a print screen; data leakage cannot be excluded either. Messages published on the internet can

[37] Judgement of the European Court of Human Rights, Cengiz v Turkey, 12.12.2015, 48226/10 and 14027/11.

[38] Decision of the Supreme Court, 17.04.2018, IV KK 296/17, OSP 2019/2/15.

[39] Decision of the Court of Appeal in Szczecin, 17.09.2020, II AKz 524/20, OSASz 2020/3/15-21.

[40] E.g. judgement of the Supreme Court, 9.05.2013, IV KK 403/12, LEX No 1312369.

[41] See: P. M. Wragg: *Free Speech Rights at Work: Resolving the Differences Between Practice and Liberal Principle*. "Industrial Law Journal" 2015, vol. 44(1), P. 3; J. H. Rowbottom: *To Rant, Vent and Converse: Protecting Low Level Digital Speech*. "Cambridge Law Journal" 2012, vol. 71(2), p. 10.

[42] J. H. Rowbottom: *To Rant, Vent and Converse...*, pp. 9–10.

therefore reach a much wider range of people than intended by the author of such a statement[43].

The implication is that virtual statements are said to leave a "permanent record"[44] or are referred to as "more persistent" because they are saved in an online space – thus, they are searchable by a very wide range of web users long after they have been published[45]. However, that is not all. In the case of social media, it is not uncommon for an employee to be – *via* their profile and the content they post there – linked to their workplace[46].

Social and cultural conditions are not insignificant – social media favour the publication of "frequent, impetuous and sometimes brutal observations", which are considered "normal"[47], as well as e.g. rapid spread of gossip, bullying and hate speech[48]. Everyone, including employees, can speak out in the public domain "with great speed and ease"[49], which is certainly not conducive to thoughtful and balanced comments[50]. As acknowledged in the case law, statements published on the internet are generally anonymous and written "in the heat of the moment"; they are therefore characterised by harsher language and are often exaggerated[51]. Usually, Internet contributions are also not subject to verification, e.g. by a moderator[52]. The mass character of the opinions posted in the virtual space means that they are also characterised by a much higher degree of social harm[53].

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[43] Ibid., p. 9.

[44] V. Mantouvalou: *'I Lost my Job Over a Facebook Post – Was that Fair?'. Discipline and Dismissal for Social Media Activity*. "International Journal of Comparative Labour Law and Industrial Relations" 2019, p. 4.

[45] J. H. Rowbottom: *To Rant, Vent and Converse...,* p. 9.

[46] V. Mantouvalou: *'I Lost my Job Over a Facebook Post - Was that Fair?'...,* p 4.

[47] P. M. Wragg: *Free Speech Rights at Work...,* p. 3.

[48] J. H. Rowbottom: *To Rant, Vent and Converse...,* p. 1.

[49] V. Mantouvalou: *'I Lost my Job Over a Facebook Post - Was that Fair?'...,* p. 4.

[50] See: ibidem, p. 12; see also: judgement of the Court of Appeal in Poznań, 23.11.2017, III APa 23/17, LEX No 2447646; E. Suknarowska-Drzewiecka: *Wypowiedzenie z powodu niekorzystnych wypowiedzi...,* p. 362.

[51] Judgement of the Court of Appeal in Poznań, 23.11.2017, III APa 23/17, LEX No 2447646.

[52] M. Bosak-Sojka, W. Wilczak: *Konsekwencje przekroczenia granic dozwolonej krytyki pracodawcy...,* p. 11.

[53] In relation to the offense of defamation (Article 212 § 2 of the Penal Code) – ibidem, p. 11.

With reference to the above-mentioned three levels of criticism, it follows from the above considerations that, given the characteristics of statements made on the internet, the phenomenon of criticism of an employer by an employee in an online space stands out primarily at the level of the form[54]. This form – characterised by a public nature, a wide, not entirely controlled audience and permanence – can be reflected in the "potential impact on business reputation" of the employer[55]. As the Supreme Court accepts in its jurisprudence, "an employee may openly and critically express himself on labour matters", but "he should do so in an appropriate form, since even legitimate criticism of the relations existing in the workplace must be within the limits of the legal order"[56]. It seems that this potential damage to an employer's reputation resulting from the very broad reach of online content is the reason why criticism made in virtual space should be treated differently from other forms of such criticism.

4. How to set boundaries of admitted criticism in an online environment?

The labour law literature lacks a uniform approach to the issue of acceptable criticism of an employer published on the internet. For example, M. Bosak considers that posting negative remarks about an employer in a publicly accessible online space is an example of an inappropriate form of criticism[57]. This author argues that "even criticism that is permitted, but expressed in inappropriate form or addressed to a random audience, can result in real harm not only or not necessarily on the part of the employer, but also extend to other colleagues and their potential customers"[58]. In support of her position, the author

[54] D. Mangan: *Online Speech and the Workplace: Public Right, Private Regulation*. "Comparative Labor Law and Policy Journal" 2018, vol. 39(2), p. 2, cf. M. Bosak: *Zjawisko krytyki w stosunkach pracy...,* p. 34.

[55] See: D. Mangan: *Online Speech and the Workplace...,* p. 2.

[56] Judgement of the Supreme Court, 28.08.2013, I PK 48/13, LEX No 1448689; judgement of the Supreme Court, 7.09.2000, I PKN 11/00, OSNP 2002/6/139; judgement of the Supreme Court, 28.07.1976, I PRN 54/76, LEX No 14319.

[57] M. Bosak: *Zjawisko krytyki w stosunkach pracy...,* p. 34; M. Bosak, D. Habrat: *Granice dozwolonej krytyki w stosunkach pracy*. In *40 lat Kodeksu pracy*. Eds. Z. Góral, M. A. Mielczarek. Warsaw 2015, p. 337.

[58] M. Bosak: *Zjawisko krytyki w stosunkach pracy...,* p. 34.

cites two main arguments. Firstly, in the case of negative opinions about an employer published online (especially on websites dedicated to discussions about employers), there is a serious risk of exceeding the limits of acceptable criticism. Secondly, the recipients of such statements are also people who are not connected to the employer in question[59]. Furthermore, Bosak remarks that critical opinions posted on the internet are always "dictated by the subjective considerations of the employee, and their form is offensive and in the shape of a personal attack"[60]. However, this author emphasises that the internet can be a tool for both mass and interpersonal communication, with, in principle, the user deciding[61]. She acknowledges that not every position expressed in a virtual space will be in breach of the law, as it is necessary to demarcate statements that do not lead to a breach of the employee's duties of care for the interests of the workplace, maintaining the confidentiality of certain information and respecting the rules of social coexistence[62].

Other authors take the view that, as long as the statement posted by an employee is fact-based, fair, substantive and cultural (thus – roughly speaking – meets the general requirements of acceptable criticism), such an employee should not face negative consequences, as this would violate her constitutional right to express opinions[63]. It would seem that in principle the latter view should be favoured. The proposed approach is in line with the already cited opinion that substantive premises, such as fairness, substantiality, etc., are of primary importance when assessing a possible exceeding of the limits of acceptable criticism. It is only then that the form in which the criticism was expressed should be taken into account[64]. Following this line of reasoning, with regard to online criticism, it would therefore be necessary to first of all pay attention to whether the critical statement is characterised by the general features of acceptable criticism and only

[59] Ibidem, pp. 34–35.

[60] Ibidem, p. 35.

[61] Ibidem.

[62] M. Bosak-Sojka: *Granice dopuszczalnej krytyki pracodawcy.* "Annales Universitatis Mariae Curie-Skłodowska. Sectio G (Ius)" 2018, vol. LXV, no. 2, p. 66 and literature quoted therein.

[63] M. Brodecki: *Granice krytyki pracodawcy przez pracownika...,* p. 436.

[64] Ibidem, p. 441.

finally to assess whether the fact that it has been posted online is relevant in the case in question (taking into account the already mentioned public character and the permanence of such publications).

How do the courts approach criticism formulated by an employee in public, not necessarily in an online space? The Supreme Court points out that "an employee has the right to authorised public criticism of his/her superior (...) whistleblowing (...) when this does not lead to a breach of her employment duties consisting, in particular, in taking care of the interest of the workplace and maintaining the confidentiality of information the disclosure of which could expose the employer to damage (...), as well as in observing the company rules of social coexistence"[65]. The Supreme Court did not consider giving a press interview critical of a member of the employer's board of directors as serious violation of employee's basic duties, as long as she kept to the correct form of expression and there was no "considerable ill-will" on her part and no "conscious action endangering the employer's interests or exposing her to damage"[66]. In another case, the court held that the mere fact of speaking in the media (here: giving an interview to a TV journalist) does not necessarily imply disloyalty to the employer[67]. On the other hand, making public allegations that are partly unconfirmed later on may constitute exceeding the limits of acceptable criticism and justify termination of the employment contract due to the loss of trust (although not necessarily disciplinary dismissal)[68].

Particularly noteworthy is the case settled by the District Court in Poznań[69], as it concerned criticism against an employer posted on GoWork.pl, i.e. a website dedicated to the exchange of opinions about employers. The judgment may therefore provide an indication of how the jurisprudence approaches opinions posted on this type of site by former or current employees. The defendant posted an opinion about the company – his former employer and one of its board members –

[65] Judgement of the Supreme Court, 28.08.2013, I PK 48/13, LEX No 1448689; see also: judgement of the Supreme Court, 25.11.2014, I PK 98/14, OSNP 2016/6/67.

[66] Judgement of the Supreme Court, 16.11.2006, II PK 76/06, OSNP 2007/21-22/312.

[67] Judgement of the Supreme Court, 3.08.2016, I PK 227/15, LEX No 2135803.

[68] See: judgement of the Supreme Court, 16.11.2006, II PK 76/06, OSNP 2007/21-22/312.

[69] Judgement of the District Court in Poznań, 28.08.2017, XVIII C 530/17, LEX No 2413720.

on the said website. The plaintiffs argued that the information in the comment damaged the company's good name (reputation), causing it to lose its good image as an employer and negatively affecting the perception of the company as a local business. The defendant argued that the entry did not infringe the plaintiffs' moral rights, as it was only the defendant's opinion, posted in the intended place and constituting so-called permitted criticism and evaluation of the work provided to the plaintiffs. The court found that the entry in question did not violate the company's good name and its good image as an employer. When assessing such an infringement, the average opinions of reasonable people in the environment to which the entity seeking protection belongs are decisive – the crucial factor is therefore the reaction a critical statement evokes in society, how it is received by third parties, and not the subjective feeling of the person seeking legal protection. The court emphasised that the former employee had expressed his subjective opinion about the working conditions and the employer. The company had not shown that the former employee's critical opinion had negatively affected the perception of the company as a business. It also failed to show that it was specifically the defendant's opinion that may have negatively affected the recruitment process, as there were also many other unflattering opinions about the company on GoWork.pl. It is also important to note that the court found that the critical statement in question had been posted on an internet portal designed to exchange opinions about employers – and therefore in the right place. Referring to the criteria of acceptable criticism, the court found that the indicated opinion did not exceed its limits.

It seems that posting critical opinions about an employer on the internet does not automatically result in exceeding the limits of admissible criticism, but additional criteria should be applied when assessing their acceptability, as, due to the public nature and the limited control over the audience, the risk of violations has to be assessed as higher than when the criticism is addressed only to one or a few strictly defined persons. In this context, it should be stressed that all the above-discussed general criteria of acceptable criticism of the employer are valid also with regard to virtual criticism, but in this case it would be advisable to include additional criteria – more specific and relating to the peculiarities of online publications, i.e. strictly to the aspect

of public nature. Such criteria seem advisable in order to assess the severity of the "public" aspect, since it is mainly this that distinguishes online negative opinions from other types of criticism.

When assessing the admissibility of online criticism, foreign literature, referring to case law, proposes to take into account the following factors: whether the employer is identifiable in the statement in question, whether the statement concerns personal matters and has only an indirect connection to the workplace, and whether the comments relate directly to the employer or refer to the terms and conditions of employment[70]. It seems that especially the latter criterion may be relevant (although in practice the two situations may often be difficult to distinguish), notably when it comes to a possible assessment of whether the employer's reputation has been damaged. This is – among others – because it is accepted in the case law that an employee has the right to speak openly and critically about issues concerning the organisation of work[71].

It appears that in addition to the factors mentioned above, one could also take into account, for example, the type of medium (website) on which the employee's critical opinion was posted. For example, whether these are forums intended for the exchange of opinions about employers (in the kind of GoWork.pl); or whether the employee publishes negative comments on a professional account on a platform such as LinkedIn, which has a specific, professional nature and purpose (maintaining a professional network); or whether the employee expresses unflattering opinions on a private profile on Facebook. The situation is even slightly different when it comes to statements posted on the company intranet[72]. The importance of the criterion of the place of publication can be indirectly deduced from the already cited ruling on the opinion posted on GoWork.pl, in which the court emphasised that the criticism was posted in the place intended for this purpose.

[70] S. Hook, S. Noakes: *Employer Control of Employee Behaviour Through Social Media...*, p. 146.

[71] Judgement of the Supreme Court, 7.09.2000, I PKN 11/00, OSNP 2002/6/139.

[72] See also a judgement concerning this type of statements: judgement of the District Court in Poznań, 1.06.2017, VIII P 44/15 and the judgement of the second instance in this case: judgement of the Court of Appeal in Poznań, 23.11.2017, III APa 23/17, LEX No 2447646.

Another criterion could be the reach of the opinion in question, which is reflected in the user's privacy settings, i.e. the visibility of the activity (including posts and comments published by the user). For example, in foreign case law, a distinction can be noted between "ordinary" blogs and comments posted on Facebook, as in the case of the latter, the author of the comment can limit its audience (although such settings cannot justify all comments)[73]. On the other hand, social media often give users little control over who their content goes to, e.g. by often revising privacy settings complicated rules[74]. This fact, together with the often complicated system of these settings, can make users, when publishing certain content and information, not fully aware of whether it is private or public and to whom it is actually visible[75]. The possible fact of securing the content with a login and password may also play an important role, making it not entirely public (as the Supreme Court points out, when access is thus restricted by the owner of a website, "such a place loses its public status, as it remains accessible only to a limited number of users"[76]). The size of the audience of the statement in question therefore plays an important role, as also confirmed by ECtHR case law[77].

Context has an important place in assessing the harm caused by an opinion. This includes such factors as the length of time the statement has been online, whether the author intended it to be widely distributed, the level of preparation, and "how seriously it was likely to be taken"[78]. It should be stressed that the courts note the peculiarities of internet postings, which are often made "in the heat of the moment" and without further reflection, but in doing so they emphasise that, even taking these factors into account, internet entries must not exceed certain permitted and accepted norms[79]. The jurisprudence accepts that permissible criticism cannot be based merely "on the expression of an emotional attitude towards a certain subject and in such a way

[73] See: D. Mangan: *Online Speech and the Workplace...*, p. 16.

[74] V. Mantouvalou: *'I Lost my Job Over a Facebook Post - Was that Fair?'...*, p. 5.

[75] See: ibid., p. 5.

[76] Cf. decision of the Supreme Court, 17.04.2018, IV KK 296/17, OSP 2019/2/15.

[77] See also in relation to high-level and low-level communication: J. H. Rowbottom: *To Rant, Vent and Converse...* pp. 13–15.

[78] In relation to low-level speech: ibidem, p. 18.

[79] Judgement of the Court of Appeal in Poznań, 23.11.2017, III APa 23/17, LEX No 2447646.

that it violates moral rights"[80]. The assessment of such speech may also be affected by "opportunities to prepare the content", including the eventual possibility of withdrawing, reformulating or amending it before it is placed in the public domain[81]. Some authors therefore advocate that communications "made with an expectation of a limited audience, amateur, cheap and spontaneous are reasons for limiting the level of responsibility demanded of the speaker by law"[82].

5. Concluding remarks

As the above reflections show, despite attempts to define the criteria that should determine the admissibility of criticism of an employer posted on the internet, it is difficult to draw up their universal catalogue. These difficulties are already evident in the case of general criteria for acceptable criticism, let alone when the virtual space with its specificities is involved. It should be stressed that, depending on the type of potential liability (civil law, labour law or criminal law), the boundaries of acceptable criticism on the internet may be drawn somewhat differently[83]. In assessing whether unflattering online statements exceed the limits of permitted criticism, it would be necessary – in the light of the circumstances suggested above – to weigh proportionately, on the one hand, the interests of the employer, its reputation and the employee's duty of care for the interests of the workplace, and, on the other hand, the right to free speech, as expressed in the employee's right to criticise the employer online[84]. The aim should be to grant protection to the employer in those cases that require it, without depriving the employee of the right to culturally express her dissatisfaction with her work, including in virtual space.

[80] Judgement of the Court of Appeal in Białystok, 30.01.2019, I ACa 647/18, LEX No 2635142.

[81] J. H. Rowbottom: *To Rant, Vent and Converse...*, p. 15 and jurisprudence of ECtHR quoted therein.

[82] Ibidem, p. 16.

[83] See more about the consequences of unlawful criticism on the internet in labour law, criminal and civil law: M. Brodecki: *Granice krytyki pracodawcy przez pracownika...*, pp. 442–448; E. Suknarowska-Drzewiecka: *Wypowiedzenie z powodu niekorzystnych wypowiedzi...*, pp. 362–363.

[84] On the test of proportionality see more: V. Mantouvalou: *'I Lost my Job Over a Facebook Post - Was that Fair?'...*, p. 19 and P. M. Wragg: *Free Speech Rights at Work...*, pp. 10–14.

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Prawo pracownika do krytyki pracodawcy w internecie: jak wyznaczyć granice prawne?

Streszczenie

Kwestia granic dopuszczalnej krytyki pracodawcy przez pracownika jest rozważana w orzecznictwie i literaturze od dawna. Wraz z powszechnym dostępem do Internetu, w szczególności do mediów społecznościowych, pojawiły się jednak nowe wyzwania w tym obszarze. Artykuł porusza problem dozwolonej krytyki pracodawcy zamieszczanej przez pracowników w Internecie. Autor poszukuje odpowiedzi na pytanie, czy dotychczasowe kryteria wypracowane w doktrynie i orzecznictwie, służące do wyznaczania granic krytyki, są adekwatne również w przypadku wypowiedzi pracownika publikowanych w przestrzeni wirtualnej, która charakteryzuje się publicznym charakterem, brakiem kontroli nad odbiorcami oraz trwałością treści.

Słowa kluczowe: krytyka, pracownik, pracodawca, Internet, media społecznościowe, granice

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