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SCOPE OF REFERENCE OF EMPLOYEES' RIGHT TO DAILY AND WEEKLY REST (A DISCUSSION ARTICLE)

Abstract

The paper attempts to answer the question of whether periods of daily and weekly rest provided for in Art. 132 and 133 of the Labour Code Act of 26 June 1974 are to be accounted for with reference to the employment relationship, employer, or employee. Determinations in this respect were made by analysing various situations occurring in practice—employment of an employee with one employer on the basis of one employment relationship, simultaneous employment of an employee in several employment relationships with that employer, and parallel employment of an employee by more than one employer. This takes into account the need to ensure that the employee is afforded rest periods within strictly defined legal limits, as well as the nature of the right to daily and weekly rest and the purposes of this right.

Słowa kluczowe: prawo pracownika do odpoczynku dobowego i tygodniowego, dodatkowe zatrudnienie na podstawie stosunku pracy, czas pracy

Keywords: employee's right to daily and weekly rest, additional employment under an employment relationship, working time

ASJC: 3308, **JEL:** K31

Introduction

Daily and weekly rest, constituting an important instrument for the realization of the employee's right to rest, became a universal employee entitlement[1] as a result of the amendment of the Labour Code of 14 November 2003 (see Art. 1 (36) of the Act of 14 November 2003 amending the Labour Code and certain other acts; Dz.U. 2003, No. 213, item 2081) aimed at adjusting national law to Council Directive 93/104/EC

[1] Previously, this right was available to drivers. It was provided for in the then binding Act of 24 August 2001 on drivers' working time (Dz.U. 2001, No. 123, item 1354 as amended).

of 23 November 1993 concerning certain aspects of the organization of working time (OJ EU L 1993, No. 307/18, hereinafter referred to as: "Directive 93/104"), the predecessor of the currently binding Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 with the same title (OJ EU L 2003, No. 299/9, hereinafter referred to as: "Directive 2003/88"). Both directives require Member States to ensure that every worker is entitled to a minimum daily rest period of 11 uninterrupted hours per 24-hour period, as well as to a minimum uninterrupted weekly rest period of 24 hours and a daily rest period of 11 hours per seven-day period. In principle, the duration of these rest periods is not determined by the situational context. The fact that the right to an uninterrupted daily rest of 11 hours and an uninterrupted weekly rest of 35 hours does not depend on the situation of the worker is perfectly understandable, given the axiological reasons which lie behind the introduction of that right.

Ensuring that every worker has the right to daily and weekly rest is one element of the minimum safety and health requirements for the organization of working time (cf. Art. 1(1) of Directive 2003/88). In the context of this right, the main aim is to prevent long periods of work without rest and thus prevent excessive fatigue and overwork of the worker and enable him or her to recover. The aim of ensuring safer and more hygienic working conditions for workers and their co-workers is to reduce the risk of accidents at work and to improve the protection of workers' health or even life. In line with the jurisprudence of the Court of Justice of the European Union (CJEU), rest periods should be both effective, allowing the worker who benefits from them to overcome the fatigue caused by the work, and protective, reducing as far as possible the risks to the safety and health of workers which may be caused by the accumulation of periods of work without the requisite rest (see, e.g., judgment of the CJEU of 7 September 2006, Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland, C-484/04, LEX 226889, point 41). In addition, the relevant literature emphasizes that daily and weekly rest plays an important role in protecting an employee's privacy and family life (Wujczyk 2012, pp. 284–285; Rycak 2017, p. 316).

The Polish legislature has granted an employee the right to daily and weekly rest in Art. 132 and 133 of the Labour Code Act of 26 June 1974, Dz.U. 2020, item 1320 consolidated text, as amended, hereinafter referred to as: "the Labour Code", "l.c."). Taking into account the different configurations, this right can be considered in three aspects: firstly, in a typical situation where an employee is in a single employment relationship with a single employer, secondly, where the employee is in several employment relationships with this employer at the same time, and thirdly, in the case of parallel employment of an employee by more than one employer. In each of these situations, the fundamental question arises as to whether the right to rest relates to a particular employment relationship, the employer, or the employee. The aim of this paper is to analyse how this matter is approached in the current state of the law and, if necessary, to propose in this respect *de lege ferenda* postulates.

Employee in a single employment relationship

The vast majority of the provisions of the Labour Code regulate the relationship that occurs between the employee and the employer within the employment relationship. This results from the scope of reference of the Labour Code—in concord with Art. 1, the Labour Code defines the rights and obligations of employees and employers.

Also the provisions of Art. 132 and 133 l.c. regulating the right to daily and weekly rest are aimed at a bilateral relationship between the employee and the employer. It concerns a typical situation, occurring most frequently, when the employee and the employer are connected by a single employment relationship, where, on the one hand, the employee is entitled to at least 11 hours of uninterrupted rest every day and in each week to at least 35 hours of uninterrupted rest, including at least 11 hours of uninterrupted daily rest; on the other hand, the abovementioned rights correspond to the employer's obligation to provide the employee with daily and weekly rest. The right to rest is qualified in the jurisprudence as the employee's personal good, separate from health and the right to safe and hygienic working conditions (judgment of the Supreme Court of 21 June 2011, III PK 96/10, LEX 1212768), which the employee may not effectively relinquish (see judgment of the Supreme Court of 3 February 2011, III PK 32/10, LEX 1375430 and the judgment of the Supreme Court of 10 March 2011, III PK 50/10, LEX 901624), and also as a form of a specific, nonmonetary benefit from the employer arising from the employment relationship (judgment of the Supreme Court of 8 October 2009, II PK 110/09, LEX 558295).

Taking into account the quantitative parameters of rest (11 hours of uninterrupted daily rest and 35 hours of uninterrupted weekly rest), it may be concluded that in the subjective arrangement provided for in the provisions of Art. 132 and 133 l.c., the right to rest pertains both to the employer and the employee, as well as to the employment relationship between them. Regardless of the perspective adopted, an employee is entitled to 11 hours of uninterrupted daily rest and 35 hours of uninterrupted weekly rest.

Employee in more than one employment relationship

Focusing on the above-mentioned typical situation, the legislator has not explicitly resolved whether the right to rest relates to the employment relationship, the employer, or the employee in the case where the employee has more than one employment relationship at the same time, both when it comes to establishing a new employment relationship with the same employer and when simultaneously taking up employment with a new employer. However, it should not be concluded from the lack of regulations on the subject that different interpretations are in fact possible.

Employee in more than one employment relationship with the same employer

The provisions of the labour law do not explicitly provide for the possibility of an employee being in more than one employment relationship with the same employer at the same time. This does not mean, however, that such a possibility does not exist. The doctrine and judicature have long been of the opinion that it is permissible to conclude with one's own employee an additional (second) employment contract for additional remuneration, although at the same time they require that this should be done by way of exception, i.e. only in justified situations and under the condition that the second contract provides for the performance of activities of a completely different nature from the activities under the first employment contract and there is no time concurrence of the performance of work under both contracts (see e.g. Cudowski 2005, p. 87; resolution of the Supreme Court of 12 March 1969, III PZP 1/69, LEX 15183; judgment of the Supreme Court of 13 March 1997, I PKN 43/97, LEX 30702). The exceptional character of simultaneous employment of an employee in more than one employment relationship with the same employer was confirmed, inter alia, in the judgment of 14 February 2002 (I PKN 876/00, LEX 82595), in which the Supreme Court ruled that "when even several types of subordinated work are performed for the benefit of the same employer, the presumption supports the existence of a single employment relationship, even if it is characterized by an accordingly complex construction of the object of the obligation and the structure of its content," and the establishment of another employment relationship with the employer could take place "only in the event that the existence of a single relationship causes dysfunctionality of the mutual legal bond."

The emphasis, both in the literature and in the body of rulings, on the exceptionality of simultaneous employment of an employee in more than one employment relationship with the same employer is intended to counteract the objective "fragmentation" of the provision of work (cf. Prusinowski 2017) and, consequently, the circumvention of the provisions on working time and the amount of remuneration for overtime hours (e.g., resolution of the Supreme Court of 12 April 1994, I PZP 13/94, LEX 11794). Otherwise, the employer would divide the employment of a given employee, and consequently his/her working time, into several employment relationships. This would probably be encouraged by the interpretation adopted *de lege lata*, according to which in the case of an employee remaining in more than one employment relationship with the same employer, working time should be calculated separately for each employment relationship (see, e.g. Cudowski 2007, p. 148; Pisarczyk 2017, thesis 2). This applies, for instance, to working time standards (see, e.g., Pisarczyk 2017, thesis 2) or overtime hours (Kulig 2015, p. 389).

In the literature on the subject, the above interpretation is sometimes extended to the employee's right to rest. This is indicated, on the one hand, by the fact that rest periods constitute one of the aspects of the regulation of working time, which is clearly confirmed by the systematics of the Labour Code (provisions on the employee's right to

rest are included in the sixth section entitled *Working time*), while, on the other hand, there is no objection within the framework of considerations on working time to the necessity of treating daily and weekly rest differently (Kulig 2015, p. 389). The principle of the freedom of work, one of whose manifestations is the possibility for the parties to simultaneously remain in more than one employment relationship, is to support the reference of various aspects of working time, including rest periods, separately to each employment relationship between an employee and the same employer (Cudowski 2005, p. 97–98). The principle of the freedom of work and its superior position justify the possible infringement of the protective function of working time provisions, as well as the admissibility of the employee's resignation from certain protective provisions (Cudowski 2005, p. 97–98).

This view is questionable. If it were to be accepted, it would mean that the total working time of an employee for one employer is not limited by his right to rest, and thus could exceed 1 and 5/8 of a full-time job. However, the employee would then at least partially use the rest period granted under one employment relationship to perform work under the other employment relationship. Consequently, he would be, to a certain extent (greater or lesser depending on the degree of exceeding 1 and 5/8 of the full-time employment), *de facto* deprived of rest, although formally he would be granted such rest, only under each employment relationship separately. Importantly, as a result of the *de facto* absence of at least 11 hours of uninterrupted daily rest, it would be impossible to achieve the purposes for which the employee was granted that right.

Bearing all this in mind, it is impossible to recognize that rest periods should be referred separately to each employment relationship between the employee and the employer. Achieving the quantitative parameters of daily and weekly rest resulting from Art. 132 and 133 l.c. is possible here only on the assumption that the right to rest relates to the employer and the employee. This means that for the purposes of quantifying rest periods, all employment relationships binding the employee and the employer together should be taken into account (Pisarczyk 2017, thesis 2; similarly Kubot 2004, pp. 13–14 and 19). As a consequence, the total working time of an employee under all employment relations between the employee and the employer may be up to a maximum of 1 and 5/8 full-time employment. Only such working time dimension ensures that the rest provided for in the Labour Code is not shortened and allows for realization of the objectives behind the right to rest. As it is rightly noted in the literature on the subject, "the regulation of (…) the mandatory rest time excludes the possibility of establishing, in two employment relationships binding an employee with the same employer, a working time dimension that would limit the rest time provided for in the Code" (Kubot 2004, p. 14; Prusinowski 2012, p. 178; similarly, as it seems, Rycak 2008, p. 172).

The interpretation adopted above is confirmed by the case law of the CJEU. In the judgment of 17 March 2021, Academia de Studii Economice din București v. Organismul Intermediar pentru Programul Operațional Capital Uman – Ministerul Educației Naționale (C-585/19, LEX 3147631) the Court stated that the fact that an employee works for a given employer under several employment contracts means that the minimum daily rest period

applies to all of these contracts taken together, and not to each of them individually. In the justification of the above ruling, the Court pointed out that when interpreting a provision of EU law, it is necessary to take into account both the wording of the provision and the context in which it appears as well as the objectives of the legislation of which it forms part (point 38). Beginning with an analysis of the content of Art. 3 of Directive 2003/88, it noted that by assuming that "every worker" is entitled to a minimum daily rest of 11 uninterrupted hours in a 24-hour period, this provision "places the emphasis on the worker as such, whether or not he has several contracts with his employer" (point 41). If rest periods were considered separately for each contract binding the worker to his employer, then it would be impossible to ensure that each worker gets at least 11 uninterrupted hours of rest every day. In such a situation, hours considered as rest periods under one contract could constitute working time under another contract and, consequently, the same period would be qualified as both working time and rest period, which is precluded by the definitions of both concepts in Art. 2 of Directive 2003/88 (points 43 and 45 and the judgments of the CJEU cited therein, including the judgment of 10 September 2015, Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v. Tyco Integrated Security SL, Tyco Integrated Fire & Security Corporation Servicios SA, C-266/14, LEX 1785718, point 25 and 26). Therefore, in order for a period classified as daily rest to meet the definition of a rest period under the Directive 2003/88, i.e. not to constitute working time, a worker's employment contracts with the same employer must be considered cumulatively (point 46). According to the CJEU, such an interpretation arising from the wording and context of Art. 2 (1) and (2) and Art. 3 of Directive 2003/88 is also supported by the purpose of that Directive (point 47). The application of the minimum requirements laid down in Art. 3 of the Directive to each individual contract concluded by a worker with his employer would be tantamount to weakening the guarantee of greater protection for that worker, since the accumulation of working time stipulated separately in each of the contracts concluded with the employer would make it impossible to guarantee a rest period of 11 uninterrupted hours in a 24-hour period, even though the European Union legislature has regarded that period as the minimum necessary to ensure that workers can take a rest following an activity which is intrinsically linked to their work (point 50). In the CJEU's view, this would also mean that the worker would be exposed to pressure from the employer to divide the worker's working time between several contracts, which could render the rest provisions ineffective (point 53). It appears, therefore, that the CJEU has also recognized the danger of the said "fragmentation" of the provision of work which could occur if, for the purposes of calculating rest periods, each employment contract between the employee and the employer were to be considered separately.

Regardless of the adopted interpretation, it is worth considering the implementation of the postulates presented in the literature on the subject. For example, the doctrine proposes that "a limitation should be introduced in the form of an obligation to observe the provisions on daily and weekly rest or a limitation of the permissible total employment with one employer" (Cudowski 2005, p. 98) or to provide explicitly "that

for the purposes of accounting for working time, remaining in different employment relationships should be treated jointly" (Pisarczyk 2017, thesis 2). Implementation of the first of these proposals would not change the current legal situation—the rules on daily and weekly rest must already be complied with and the total working time of an employee for a single employer must not exceed, as indicated above, 1 and 5/8 full-time employment—but it would dispel any doubts on the subject in accordance with the principle that a clear regulation is always better than the most convincing interpretation. On the other hand, the meeting of the second of the postulates raised, referring—importantly—to the accountability of the entire working time and not only the rest periods, would make it possible to avoid the problem that appears *de lege lata* in practice on the basis of the adopted interpretation. It concerns, namely, the difficulty of determining when exactly the 11-hour uninterrupted daily rest of an employee is to fall, since under each employment relationship the employee starts the working day at a different hour (Pisarczyk 2017, thesis 2).

Simultaneous employment of an employee by several employers

Pursuant to the principle of freedom of employment, it is possible for an employee to take up additional employment also with other employer(s) without any hindrance, unless the employee belongs to one of the categories of employees who are subject to limitations or prohibitions in this respect provided for in specific provisions (for more details see Cudowski 2007), or has concluded a non-competition agreement.

As in the case of another employment relationship with the same employer, also in the case of a parallel employment relationship with a different employer (different employers), the way in which rest periods are calculated remains outside the scope of the law. In the absence of regulations on this issue, the prevailing interpretation in the workplace practice is that the reference point for calculating the rest periods of such an employee is the employment with the employer in question. This means that it cannot be ruled out that an employee may use a rest period granted by one employer to perform work for another employer rather than to rest. Such a situation is possible all the more so because the employee is not obliged to use the rest time actually granted to him/her for rest (however, we should agree with the view expressed in the literature that the employee's freedom to use the rest time is limited by the obligation to come to work in a state of physical and mental readiness to perform work; Jaśkowski 2021, thesis 2). As a result, an employee working for several employers may in fact be deprived of rest.

The interpretation indicated above contradicts the essence of the right to daily and weekly rest and the purposes for which this right was introduced (Piątkowski 2017, p. 92). This inconsistency is also justified here by the "primacy of the principle of freedom of work" (Cudowski 2007, p. 148), but it may be doubted whether this principle really occupies a higher position than the right to daily and weekly rest constituting one of the instruments for the implementation of the principle of the

right to rest expressed in Art. 14 l.c. (similarly Wiącek 2015, p. 119). This is because the goods that this right protects should be taken into account, i.e., as pointed out above, safety, as well as the health and life of the employee and his/her co-workers. The literature on the subject, not without merit, observes that the increasingly popular multi-jobbing "undermines the sense of protective maximum working time standards and minimum rest standards, settled separately in each of the 'parallel' employment relationships" and thus constitutes a source of great danger to the health and life of employees (Liszcz 2018, p. 146).

In view of the aforementioned discrepancy that may exist between the right to rest in normative terms and how this right is implemented in practice in relation to an employee employed by several employers (Piątkowski 2017, p. 92), the question arises as to whether, on the basis of the currently applicable law, a different interpretation of the issue in question is permissible, i.e. assuming that rest periods should be accounted for in relation to the employee, i.e. treating the employee's employment with several employers jointly. It is beyond dispute that only this interpretation ensures that the employee is granted rest periods within the statutory limits (11 hours of uninterrupted daily rest and 35 hours of uninterrupted weekly rest), thus complying with the will of both the EU and Polish legislators and remaining in line with the essence and objectives of the right to daily and weekly rest. The above interpretation takes into account the rule of harmonizing contexts, according to which, when determining the literal meaning of a provision, other legal regulations, the will of the legislature and the purpose of the legal regulation should be taken into account (Morawski 2008, p. 145). It is also important to note that any other interpretation would deprive the right to rest of its normative value.

On the other hand, however, it would seem that simply adopting a different interpretation—while correct—is not sufficient. Even if it is accepted that the right to rest relates to the employee and that the various employment relationships in which the employee remains are to be considered together for the purposes of calculating rest periods, there is no regulation providing for the acquisition by the employer of information about the employee's remaining in another employment relationship(s).

It is worth noting in this context the European Commission's reports on implementation by the Member States of Directives 93/104 and 2003/88. Already in its 2000 Report on Directive 93/104, the Commission pointed out, *inter alia*, that, given the need to ensure that the health and safety objective of the Working Time Directive is met, Member State legislation should provide for appropriate measures to ensure that the limits to average weekly working time and daily and weekly rest are complied with as far as possible in the case of workers who work simultaneously in two or more employment relationships falling within the scope of the Directive (see Report from the Commission, State of Implementation of Council Directive 93/104/EC of 23 November 1993 Concerning certain aspects of the organization of working time ("the Working Time Directive")—COM(2000) 787 final, point 14.2.). Also in its 2010 and 2017 reports, the Commission stressed that, although not explicitly stated in

Directive 2003/88, limits to daily and weekly rest should, as far as possible, apply on a per-worker basis and, given the need to ensure that the health and safety objective of the Directive is fully met, Member State legislation should include appropriate monitoring and enforcement mechanisms (see Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on implementation by Member States of Directive 2003/88/EC ("the Working Time Directive"), COM(2010) 802 final, point 3.6. and Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organization of working time, COM(2017) 254 final, point III B). Thus, it can be seen that it is advisable that the legislator intervenes and should change the law and introduce a regulation concerning the acquisition by the employer of information about the employment relationship in which the employee remains at a given moment.

The literature proposes that the employee should be obliged to provide the new employer with information on whether he or she remains in another employment relationship and the extent of that relationship. The idea is that the "additional employer" should be aware of the need to ensure the right to rest taking into account the working time with the "first employer" (Kulig 2015, p. 388).

It is worth noting that a similar solution is already in force with respect to juveniles and drivers. Art. 200^2 § 4 sentence 2 l.c. states that before establishing an employment relationship, the employer is obliged to obtain from the juvenile a declaration of employment or of not being employed by another employer. In turn, the Act of 16 April 2004 on drivers' working time (Dz.U. 2019, item 1412 consolidated text) stipulates in Art. 24(2a) that the employer is obliged to obtain from the driver a written statement on the extent of employment or on not being employed by another employer.

In the context of the cited norms, one may notice a certain inconsistency of the legislature, which, within the framework of the general regulation of the right to daily and weekly rest, did not take into account the possibility of an employee being employed by several employers, but took this circumstance into account in the provisions concerning juveniles and drivers. This circumstance was also taken into account when regulating holiday leave (Art. 154^1 § 2 l.c.). In this area, the indicated differentiation of approach is all the more incomprehensible, as ensuring the right to daily and weekly rest to a greater extent than the holiday leave serves the safety and protection of health and life of the employee.

Not only the inconsistency of the legislature, but also the lack of exhaustive standardization of the employee's right to daily and weekly rest deserves a critical opinion. It seems that the regulation currently in force should be supplemented, *inter alia*, with provisions directly defining the scope of reference of the right to rest of an employee employed on the basis of several employment relationships at the same time, as well as with provisions providing for the employer to obtain information on the fact that the employee remains in another employment relationship(s).

Conclusion

In the light of the above considerations, one may come to several conclusions. The EU and Polish legislators have unequivocally indicated a strictly specified duration of rest periods (11 hours of uninterrupted daily rest and 35 hours of uninterrupted weekly rest), making every employee the addressee of this right. Such an indication sets out the correct and only interpretation of the provisions on the right to rest. That entitlement is independent of the situational context, including the number of concurrent employment relationships of the employee and the multiplicity of employers. When an employee is employed by a single employer on the basis of a single employment relationship, the right to rest relates to both the employer and the employee and the employment relationship between them. Regardless of the perspective adopted, the employee still has the right to 11 hours of uninterrupted daily rest and 35 hours of uninterrupted weekly rest. On the other hand, a mathematical approach to the issue unambiguously assumes that in the case where an employee has several employment relationships with the same employer, it is possible to achieve the indicated quantitative parameters of daily and weekly rest only by assuming that the rest period refers to the employee and the employer. This is confirmed by the CJEU jurisprudence. Another situation arises in the case of concurrent employment of an employee with several employers. In such cases, the rest periods must be calculated exclusively for the employee, which means that the total working time of the employee in such parallel employment cannot reduce the 11 hours of uninterrupted daily rest and the 35 hours of uninterrupted weekly rest. Only under this interpretation is the employee afforded rest within the statutory limits and thereby it complies with the will of both the EU and Polish legislators and remains in line with the nature and objectives of the right to daily and weekly rest, taking into account the interpretative rule of harmonizing contexts. Any other interpretation would deprive that right of its normative value.

In view of the lack of solutions providing for disclosure to the employer of information on the fact that the employee remains in another employment relationship (other employment relationships), it is necessary for the legislature to intervene by amending the law and introducing appropriate legal instruments in this respect. In this context, we may consider imposing an obligation on the employee to provide the new employer with information on whether he or she has another employment relationship and to what extent, so that the additional employer takes into account the time spent working for the first employer when granting rest periods.

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