Studia z Zakresu Prawa Pracy i Polityki Społecznej
Studies on Labour Law and Social Policy
2023, 30, nr 3: 201–209
https://doi.org/10.4467/25444654SPP.23.015.17896
www.ejournals.eu/sppips

Agata Ludera-Ruszel https://orcid.org/0000-0003-4433-5884
Uniwersytet Rzeszowski

Kamila Naumowicz https://orcid.org/0000-0002-0953-0708
Uniwersytet Warmińsko-Mazurski w Olsztynie

PERSONAL DIMENSION OF THE RIGHT TO DISCONNECT IN THE EU DIRECTIVE DRAFT[1]

Abstract

This paper tackles the issue of the personal scope of the right to disconnect as the right of a worker to refrain from engaging in work-related tasks and not to participate in communication with employer for a work-related purpose, in particular communication via digital tools such as email and telephone. The reference point of the analysis undertaken will be the EU directive draft regulating the right of workers to disconnect contained in the European Parliament resolution adopted on 21 January 2021. The issue addressed is part of a broader discussion on the legal model of labour provision that has long accompanied the academic debate among Polish and foreign labour law scholars. The prevailing view among those working on this topic, which is correct in principle, is that the protection of employment law should be extended to self-employed workers. There are differences of opinion as to how such protection would be implemented and, in particular, to whom it would apply and to what extent it would apply.

Słowa kluczowe: prawo do odłączenia, pracownik, zależny wykonawca, stosunek pracy, równowaga między życiem prywatnym i zawodowym, równe traktowanie

Keywords: right to disconnect, employee, dependent contractor, employment relationship, work–life balance, equal treatment

ASJC: 3308, **JEL:** K31

[1] This paper was written as a part of the project "Pojęcie pracownika. Konieczność redefinicji granic stosunku pracy" [The concept of employee. The need for redefinition of the boundaries of the employment relationship], founded by the (Polish) National Science Centre on the basis of decision number DEC-2020/39/B/HS5/00037.

Introduction

The right to disconnect has been defined by Eurofound and the European Parliament as the right of a worker to refrain from engaging in work-related tasks and not to participate in communication with employer for a work-related purpose, in particular communication via digital tools such as email and telephone.[2] The concept of "disconnection" has emerged due to the development of technologies that enable remote communication, which affect various aspects of our lives, including the way and conditions under which we deliver our work. Naturally, the right to disconnect is associated with the remote provision of work, especially with the use of digital tools utilised to communicate between employees and their employers and to send them results of their work. Although the problem of achieving a work–life balance affects workers in general (Ludera-Ruszel 2020a, pp. 10–19), it is emphasised that remote work, more often than work traditionally performed at employer's premises, is accompanied by the expectation of full availability of an employee, even at the cost of sacrificing his or her private life (Kossek 2016, pp. 258–270; Garben 2017, p. 4; Eurofound 2020, p. 5). The use of digital tools in the work process makes it significantly easier for employer to cross the already thin line of employee's work–life balance (see also Naumowicz 2022, pp. 23–30; Eurofound 2020, p. 5). In the view of this, it seems entirely reasonable to conclude that there is a positive relationship between the right to disconnect and employee's achievement of a balance between private and professional spheres. The intensification of the debate on worker's right to disconnect coincided with the COVID-19 pandemic, which forced the use of remote work on an unprecedented scale (Naumowicz 2021, p. 80), by, both, employers and employees. The move towards greater use of remote work, irrespective of the existing epidemic[3] and the use of digital tools at work makes it increasingly important to guarantee workers the right to disconnect in the context of achieving a work–life balance (see also Jaworska 2022, pp. 51–58).

One issue that deserves attention in the context of the right of disconnection is the personal scope of this right. This issue is part of a broader discussion on the legal model of labour provision. This issue has long been a part of the academic debate among Polish and foreign labour law scholars. The prevailing view among those working on this topic, which is correct in principle, is that the protection of employment law should be extended to self-employed workers. There are differences of opinion as to how such protection would be implemented and, in particular, to whom it would apply and to what extent it would apply. With this in mind, this study focuses on the personal scope of the right to be disconnected and the reference point of the analysis undertaken will be the EU directive

[2] Eurofound, *The Right to Switch off*, 2019, https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect (access: 20 July 2023). Article 2(1) of the Directive draft indicated in footnote 8.

[3] This is also the aim of the Polish legislator in the amendment act to the Labour Code concerning remote work. See Act of 1 December 2022 amending the Labour Code Act and certain other acts, Dz.U. 2023, item 240. Explanatory memorandum to the bill draft available at: https://legislacja.rcl.gov.pl/projekt/12346911/katalog/12789138#12789138 (access: 6 June 2023).

draft regulating the right of workers to disconnect contained in the European Parliament resolution adopted on 21 January 2021.[4]

1. Two aspects of the same law

The draft on the right to disconnect highlights two aspects of the right to disconnection, which can be described as the "equality" aspect and the "protection" aspect. In terms of "equality," the right of disconnection can be seen as an instrument to facilitate access to work on an equal basis with workers who have family responsibilities, understood as caring responsibilities for children and other dependants.[5] In this context, the right to disconnection facilitates the combination of family responsibilities and work, when the work culture of the "always available," "constantly reachable," "on call" employee can have, as indicated in the resolution, a negative impact on the work–life balance and thus on the equality of workers (p. 10). In other words, the right of disconnection serves to implement the right of employees to equal treatment and non-discrimination on the basis of family responsibilities. Protection against unequal treatment and discrimination is then based on the assumption that family responsibilities, more often than other non-work responsibilities, limit the employee's ability to prepare for, start and participate in work activities (Ludera-Ruszel 2021b, p. 210). At the same time, as the resolution goes on to point out, the right of disconnection indirectly serves to protect against unequal treatment and discrimination on grounds of sex, if one takes into account the fact that work–family conflict is more likely to affect women, due to the prevailing attitude in society towards the fulfilment of family responsibilities, which are still perceived as being the domain of women (Freeman, Soete 1994, p. 109). As a result, as noted, in work–family conflict, women are more likely than men to choose to give up employment or to take a job that, although not decent, facilitates the combination of work and family responsibilities. Commitment to family responsibilities prevents women from realising their right to work on an equal basis with men (Ludera-Ruszel 2021a, p. 514). The concept of work–life balance for equal treatment of women and men in employment is underpinned by the EU Directive on work–life balance for parents and carers, which points out that work–life balance continues to be a major challenge for many parents and workers with caring responsibilities, particularly due to the increasing prevalence of long working hours and fluctuating work schedules, which have a negative impact on women's employment (p. 10). This directive was referred to by the European Parliament in the

[4] Resolution of the European Parliament containing a recommendation to the Commission on the right to disconnect, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html (access: 6 June 2023)—hereafter: the directive draft on the right to disconnect.

[5] This (broad) understanding of family responsibilities is adopted in Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work–life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 2019/188, pp. 79–93, and in ILO Convention No. 156 of 1981 on workers with family responsibilities, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C156 (access: 6 June 2023).

preamble recitals of the directive draft on the right to disconnect adopted in the European Parliament resolution.

In its "protective" aspect, the right to disconnect should be seen as a means of countering the threat that working with digital tools—including those provided remotely—poses to fundamental human rights, such as life, health, respect for one's private and family life. This refers to cases where work permeates the worker's private life, which is linked to the emergence of a work culture in which an employee is constantly available to an employer, not so much physically but, above all, virtually, through digital technologies. As noted in the resolution, the use of digital tools at work promotes work intensification and longer working hours, which can have a negative impact on worker's overall physical and mental well-being. In this aspect, the right of disconnection respects the labour rights contained in the protective directives, which serve to guarantee workers' right to fair and equitable working conditions that respect their health, safety and dignity.[6]

2. EU concept of an employee

The definition of a worker that has been created for the purposes of EU legislation can be considered in two, interrelated, dimensions, that is, the social dimension, where it contributes to the social objectives of the European Union uniformly in the Member States by helping to raise the standards of protection in those States; and the economic dimension, where it prevents the distortion of competition between the Member States that occurs when, by applying own national definition of a worker, a Member State may, by avoiding obligations under minimum standards of protection, gain a competitive advantage in the common market.

Just as the European Union was originally purely a community of economic objectives, the same way economic dimension of worker in EU legislation originally took priority. Explicit reference is made to the economic context by the definition of worker developed by the Court of Justice of the European Union (CJEU) in *Levin* case (C-53/81, ECLI:EU:C:1982:105), and further developed in *Lawrie-Blum* case (C-66/85, ECLI:EU:C:1986:284) for the purpose of implementing the principle of free movement of workers within the Community. Reference to the economic dimension of European integration can also be found in later judgements in which the CJEU extended the application of the definition of worker based on the so-called Lawrie-Blum formula to other areas of social rights protection based on the same economic arguments.

There can now no longer be any doubt about the social dimension of the definition of worker in EU legislation. This is demonstrated, firstly, by the use of a definition of worker

[6] In particular, these include: Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 1989/183, pp. 1–8; Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ L 1991/206, pp. 19–21; 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, OJ L 2003/299, pp. 9–19.

based on the Lawrie-Blum formula for the application of socially-oriented EU directives, which neither contain their own definition of worker nor refer to the national definitions of the Member States.[7] Secondly, limiting the freedom of the Member States to shape their own definition of a worker for the purpose of implementing those EU directives which, with regard to their personal scope, refer to the legislation, collective agreements or practice of the Member States.[8] This is reflected in the CJEU judgement in the O'Brien case (C-393/10, ECLI:EU:C:2012:110), in which the Court referred to the principle of effectiveness of EU law in achieving the social objectives of the Directive. Recently enacted directives contain an injunction to the Member States to take into account the case law of the CJEU when constructing a definition of worker in the implementation of a directive, even if the directive, with regard to its personal scope, refers to the legislation, collective agreements or practice of the Member States.[9]

The injunction to the Member States to take into account the jurisprudence of the CJEU when determining their own definition of worker for the implementation of EU directives is intended to ensure that the objectives of the directive, which are binding on the Member State, are fully achieved. The limitation of the Member States in shaping the national definition of worker here is based on arguments of a teleological nature — a guarantee of effective implementation of the objectives of the implemented directive. Any reference to *ratio legis* of the directive has the effect that: 1) the EU definition of worker may differ depending on the area in which it would apply (this was pointed out by the CJEU in *Martinez Sala* case, C-85/96, ECLI:EU:C:1998:217; see Ludera-Ruszel 2020b, pp. 170–171); 2) the same *ratio legis* of different directives justifies the same definition of worker; 3) the definition of worker delimiting the personal scope of the directive, based on its *ratio legis*, may have a broader scope than the definition of worker adopted in national legislation (see also Menegatti 2019, pp. 71–83, and the CJEU case law cited therein).

[7] For example: Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Art. 16 (1) of Directive 89/391/EEC), OJ L 1992/348, pp. 1–7; Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 1998/225, pp. 16–21; 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, OJ L 2003/299, pp. 9–19.

[8] For example: Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work, OJ L 1998/14, pp. 9–14; Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 1999/175, pp. 43–48; Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 2008/327, pp. 9–14.

[9] This concerns: 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 L 2019/186, pp. 105–121; Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work–life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 2019/188, pp. 79–93.

3. Concept of an employee in the directive draft on the right to disconnect

With regard to the scope of application of the right to disconnect, the proposed directive refers to the CJEU case law with regard to the criteria for determining the status of a worker (recital 15). These criteria, as indicated above, should be interpreted in such a way as to ensure that the directive is fully effective in achieving its objectives. The fundamental aim of the proposed directive is to improve the quality of work in the digital age. As can be seen from recitals 11 and 20, the improvement of working conditions is relevant to the realisation of fundamental rights such as the right to the protection of workers' health and safety and to equal treatment on grounds of gender, by achieving a work–life balance. In this respect, the proposed directive clarifies and supplements the provisions of the relevant directives on health and safety at work, working time and work–life balance for parents and carers.

The purpose of the directive thus defined leads to the conclusion that the right of disconnection set out in the directive is of particular importance for employees who are in the most vulnerable position with regard to the effective exercise of their right not to engage in work-related tasks during their free time, including communication with their employer for work-related purposes. The problem of refraining from working during leisure time concerns those working in an employment relationship, due to the managerial powers of the employer, which are expressed in the employer's right to decide on the time of work provision and to have greater control over the employee in this respect. The problem seems to concern not so much those jobs where an employee performs work in the workplace and remains subordinate to an employer in the traditional sense of the term, but more so those jobs characterised by the so-called autonomous subordination. Such work is more likely to be delivered remotely, using modern technology to deliver the work and communicate with employer. In this case, the autonomy of employee with regard to deciding upon the time of work provision may be apparent and may more often than not be accompanied by a violation of the boundary between working time and employee's private time by employer.

The literature notes that autonomous subordination blurs the line between the employment relationship and the civil-law employment relationship, assuming some level of subordination in the case of work under civil-law contracts (Judgement of the Supreme Court of 11 September 2013, II PK 372/12, OSNP 2014, No. 6, item 80). The extension of remote workers who are in a relation of autonomous subordination, is followed by a proliferation of the categories of workers that are in a relationship of dependence entirely or mostly to a specific client. These workers are usually not categorised as employees, since they are not in a position of subordination. This is in the case of subordination in its traditional meaning, but not necessarily in case of autonomous subordination which made difficult to grasp the distinction between this category of workers and employees. Since then, these are often the parties, in reality the employer, that ultimately determine the legal form of the work relationship that may be provided within employee or non-employee relationships. The economic, psychological and social dependence of such workers on their clients makes their position comparable to the position of employee

in an employment relationship, who therefore share the same vulnerabilities. In both cases, the parties to the contract are not in an equal position to each other. The predominance of an employer over an employee is fostered by a de facto work compulsion linked to the absence on the part of the employee of alternative sources of satisfaction of his or her needs related to the employment relationship, mainly of an economic nature, but also of a social and psychological nature (Davidov 2016, pp. 43–48). It is thus indicated that such workers—who are in a relation of dependency—need protection from labour law to help them oppose their vulnerability to non-decent work arising from the sense of dependency. This is not the case for genuine independent contractors, who are not in a relationship of dependence with one client for economic, social and psychological purposes, thus maintaining the ability to spread risk in the market and not having to take it themselves (Davidov 2016, p. 45).

Conclusions

The idea that the definition of the concept of "worker" adopted in national legislation for the purposes of applying the directive to be implemented must take into account the purpose of the directive creates scope for the personal scope of the right of disconnection to be extended to employees who, without having the status of a worker according to the criteria applicable under national legislation and practice, are in a comparable situation to workers. These are ostensibly self-employed persons in a relationship of economic, social and psychological dependence on an employing entity. This category of workers has already been set in between employees and independent contractors called "employee-like" workers, "parasubordinated" or "dependent contractors." Polish law does not recognise the existence of this category, which is only perceived in academic discourse. Such workers are considered to be independent contractors, and thus operate on the free market subject to the same rules of private law, while in reality their situation is similar to that of workers that share the same vulnerabilities. Consequently, such workers need a comparable protection, because in their case—as in the case of employees—the application of the principle of freedom of contract, based on the assumption of independence and equality of the parties in relation to each other, may lead to socially unacceptable results that do not correspond to the requirements of equity.

References

Davidov G. (2016) *A Purposive Approach to Labour Law*, Oxford University Press.

Freeman Ch., Soete L. (1994) *Work for all of Mass Unemployment? Computerised Technical Change into the Twenty-First Century*, London.

Garben S. (2017) *Protecting Workers in the Online Platform Economy: An Overview of regulatory and policy developments in the EU*, Luxembourg.

Jaworska K. (2022) *The Right to Disconnect*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej," Vol. 29, No. 1.

Kossek E. (2016) *Managing work–life boundaries in the digital age*, "Organizational Dynamics," Vol. 45, No. 3.

Ludera-Ruszel A. (2020a) *EU work–life Balance Directive – the challenges for Poland*, "Praca i Zabezpieczenie Społeczne," No. 12.

Ludera-Ruszel A. (2020b) *The concept of "worker" under the principle of free movement of workers and its implications for the protection of workers in the European Union*, "Studia z Zakresu Prawa Pracy i Polityki Społecznej," Vol. 27, No. 3.

Ludera-Ruszel A. (2021a) *Równowaga między życiem zawodowym i prywatnym pracownika świadczącego pracę zdalnie – stan polskich regulacji kodeksu pracy* [The balance between professional and private life of an employee providing work remotely—the state of Polish labour code regulations], "Roczniki Administracji i Prawa," No. 21, Special Volume 1.

Ludera-Ruszel A. (2021b) *Ochrona pracowników mających obowiązki rodzinne – wybrane zagadnienia* [Protection of employees with family responsibilities—selected issues], "Roczniki Administracji i Prawa," No. 21, Special volume 2.

Menegatti E. (2019) *The Evolving Concept of "worker" in EU law*, "Italian Labour Law e-Journal," Vol. 12, Issue 1.

Naumowicz K. (2021) *Prawo do bycia offline a praca zdalna* [The right to to disconnect and remote work] [in:] M. Mędrala (ed.) *Praca zdalna w polskim systemie prawnym* [Remote work in the Polish legal system], Warszawa.

Naumowicz K. (2022) *The impact of remote work regulations during Covid-19 pandemic on work–life balance in Poland*, "Praca i Zabezpieczenie Społeczne," No. 1.

Court sentences

Judgment of the CJEU of 23 March 1982, C-53/81, Levin, ECLI:EU:C:1982:105.

Judgment of the CJEU of 3 July 1986, C-66/85, Lawrie-Blum, ECLI:EU:C:1986:284.

Judgment of the CJEU of 12 May 1998, C-85/96, Martinez Sala, ECLI:EU:C:1998:217.

Judgment of the CJEU of 1 March 2012, C-393/10, O'Brien, ECLI:EU:C:2012:110.

Judgement of the Supreme Court of 11 September 2013, II PK 372/12, OSNP 2014, No. 6, item 80.

Legal acts

ILO Convention No. 156 of 1981 on workers with family responsibilities, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C156 (access: 6 June 2023).

Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 1989/183, pp. 1–8.

Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship, OJ L 1991/206, pp. 19–21.

Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently

given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC), OJ L 1992/348, pp. 1–7.
Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work, OJ L 1998/14, pp. 9–14.
Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 1998/225, pp. 16–21.
Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 1999/175, pp. 43–48.
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, OJ L 2003/299, pp. 9–19.
Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 2008/327, pp. 9–14.
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 L 2019/186, pp. 105–121.
Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work–life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 2019/188, pp. 79–93.
Act of 1 December 2022 amending the Labour Code Act and certain other acts, Dz.U. 2023, item 240.

Documents

Eurofound (2020) *Regulations to address work–life balance in digital flexible working arrangements*, Luxembourg.
European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html (access: 6 June 2023).