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## RIGHT TO COMPENSATION FOR OVERTIME IN THE CIVIL SERVICE CORPS IN POLAND

### Abstract

The article presents an analysis of right to compensation for overtime in the civil service in Polish law, especially under the European Social Charter. In Poland some civil servants are only entitled to time off equal to the number of overtime hours and not, as the European Committee on Social Rights has stated, to increased remuneration or additional time off in return for additional work. It is important especially in view of the motion to the Constitutional Tribunal to declare Art. 97 §§ 6–8 of the Act on Civil Service to be inconsistent with the European Social Charter. The article contains an analysis of legal regulations in the context of court rulings and literature.

**Słowa kluczowe:** rekompensata za pracę w godzinach nadliczbowych, służba cywilna, Europejska Karta Społeczna, dodatek za pracę w godzinach nadliczbowych

**Keywords:** compensation for overtime, civil service corps, European Social Charter, remuneration for overtime work

**ASJC:** 3308, **JEL:** K31

### Introductory remarks

Poland is bound by Art. 4(2) of the European Social Charter (Dz.U. 1999, No. 8, item 67, hereinafter referred to as: ESC), which provides for the right to increased remuneration for overtime. There are opinions found in the literature that Polish solutions concerning civil service corps<sup>1</sup> in this respect are inconsistent with the ESC. Some civil servants are

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<sup>1</sup> In Poland civil service corps is a general term for the legal relationships within civil service. The civil service corps operates in government administration. It should be mentioned that employees of state non-governmental administration and employees of local government offices remain outside the civil service corps. This article will only apply to the civil service corps. It should be explained that Civil service corps includes: 1. Civil service employees employed on the basis of employment contract; 2. Civil servants employed on the basis of nomination (classic bureaucrats with a lifelong tenure). The nominated civil servants as a prioritised group have some additional rights compared to the civil service employees. There

only entitled to time off equal to the number of overtime hours and not, as the European Committee on Social Rights (hereinafter referred to as: the Committee, ECSR) has stated, to increased remuneration or additional time off in return for additional work (Szewczyk 2010, p. 225). Therefore, one should consider introducing changes in legal regulations, especially in view of the motion to the Constitutional Tribunal to declare Art. 97 §§ 6–8 of the Act on Civil Service to be inconsistent with the ESC (K 20/15).<sup>2</sup>

## **Right to compensation for overtime pursuant to Art. 4(2) of the European Social Charter**

The ESC states in Art. 4(2) that, in order to ensure the effective exercise of the right to fair remuneration, the Contracting Parties undertake to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases. The assumption of the solution contained in Art. 4(2) of the ESC is that a sense of justice requires that increased (over-standard) effort be additionally remunerated (Góral 2017, p. 637). Art. 4(2) of the ESC does not however imply the way in which an increase in the remuneration of a worker is shaped and the Committee itself is quite liberal in its approach to this issue, since it accepts even a slight increase in overtime pay. The Committee accepted the Belgian regulation that the additional remuneration of civil servants for overtime work was 6.8% higher than the normal remuneration (Świątkowski 2006, p. 143).

The Committee also considers it compatible with the ESC to grant workers time off as compensation for overtime, but points out that it means an increase in the number of hours off in relation to the hours of overtime (Świątkowski 2006, p. 144; Nowak 2007, pp. 258–259). Exclusion is possible in the case of conversion of additional remuneration into leisure time, but it must also have an increased dimension (Nowak 2007, p. 267).

However, the ECSR ensures that the Member States do not make too frequent use of the power to exclude the application of Art. 4(2) of the ESC. It has accepted exclusions for employees managing the workplace and employed on high positions directly by organisational units of the government and state administration (Świątkowski 2006, p. 140). The Committee allows derogations only for “senior civil servants” and not for all public office-holders (Mazuryk 2012, p. 407). The Committee considered it compatible with Art. 4(2) of the ESC that overtime allowances should not be granted to managers on account of the normally high salaries of this category of employees (Nowak 2007, p. 262).

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are two ways of obtaining this status: a) taking so called qualification procedure (state exam); b) graduating from the Lech Kaczyński National School of Public Administration (a governmental school directly subordinated to the Prime Minister); 3. Persons occupying senior positions employed on the basis of appointment. See: KPRM (cop. 2011).

<sup>2</sup> Documents on the case available at: <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?okaz=dokumentygnatura=K%2020/15> (access: 16 October 2019).

## Overtime work in the Civil Service Act

The issue of working time of the Civil Service Corps members is regulated by Art. 97 of the Civil Service Act (Dz.U. 2020, item 265 consolidated text, hereinafter referred to as: CSA). According to § 1 of this article, the working time of civil servants cannot exceed eight hours per day and on average 40 hours per week over a reference period of no more than eight weeks. In cases justified by the type and organisation of work working time schedules may be established, in which it is permissible to extend working time up to 12 hours a day. In these schedules, however, the working time may not exceed 40 hours per week on average over a reference period of no more than 12 weeks (see Art. 97 § 2 of the CSA).

A civil servant shall also be obliged to work overtime (in the literature we can find a discussion on terminology related to overtime work: Tomanek 2006, pp. 18 ff). Art. 97 § 5 of the CSA stipulates that if the needs of the office so require, a Civil Service Corps member shall, on the instructions of his superior, work overtime including in exceptional cases at night and on Sundays and public holidays. The employer may impose on an employee an obligation to work overtime due to the specific needs of the employer pursuant to Art. 151 § 1 point 2 of the Labour Code. Similarly, a member of the Civil Service Corps shall perform overtime work if the need of the office so requires (Art. 97 § 5 of the CSA; Szewczyk 2010, p. 222). Overtime work in the civil service may be ordered if “the needs of the service so require” or in “exceptional cases” if it is to be carried out at night, on Sundays or public holidays (Rączka 2013, p. 26). The former is about normal and foreseeable needs, not specific needs (Paroń, Wilski 2013, p. 207). The legislator modifies the rules of overtime work in order to guarantee the proper and efficient performance of the tasks of the office. However, in the event of night work, Sunday or public holiday overtime the work of a civil servant must be specifically justified (Paroń, Wilski 2013, p. 208).

As a result, both the premises for entrusting overtime work and the principles of compensating for it were regulated differently than in the Labour Code (Dz.U. 2019, item 1040 consolidated text, as amended, hereinafter referred to as: “the Labour Code,” “l.c.,” see Pisarczyk 2014, p. 418). Pursuant to Art. 151 of the l.c. overtime work may take place in case of special needs of the employer or in case of conducting rescue action in order to protect human life or health, protect property or the environment or to carry out emergency repair work. Employees are entitled to overtime compensation in the form of overtime bonus (Art. 151<sup>1</sup> of the l.c.) or time off (Art. 151<sup>2</sup> of the l.c.).

The legislator does not provide for the compensation in the form of overtime bonus in case of civil servants. The provisions of the CSA are considered exhaustive in this respect (Mitrus 2013, pp. 129–131). A civil servant working outside normal working hours shall not be entitled to the overtime bonus and also shall not be entitled to the normal wage for overtime (Rotkiewicz 2018, Art. 97).

The legislator only provides for the right to time off in exchange for overtime, but this right varies according to the status of the civil service member. A civil service employee

shall be entitled to time off in the same amount for work performed at the request of his/her superior during overtime hours (Art. 97 § 6 of the CSA). However, a civil servant shall not be entitled to time off for overtime work on weekdays during daytime. Only in two cases civil servants are entitled to time off in exchange for overtime work; this applies only to work performed at night and on Sundays or public holidays in which case a civil servant is entitled to a day off in the following week for work on a Sunday and he/she shall be entitled to another day off for work on public holidays (Art. 97 §§ 7–8 of the CSA). The granting of a day off shall be independent of the length of time during which the work has been carried out and shall not affect the remuneration to which the official is entitled (Pisarczyk 2014, p. 418). Incidentally, one may wonder about the justification for the solution according to which a civil service employee will receive the same amount of free time for overtime work on public holidays and Sundays and a civil servant will receive a day off (Paroń, Wilski 2013, p. 239).

### **Right to overtime bonus or time off for a Civil Service Corps member according to doctrine and jurisprudence**

There are divided views on compensation for overtime for members of the Civil Service Corps expressed in the literature. On the one hand, legislative solutions in the area of compensation for overtime work raise objections. First of all, it is pointed out that we are dealing here with an ill-considered differentiation in the legal situation of Civil Service employees and civil servants, which violates the principle of equal treatment and non-discrimination (Rączka 2010, pp. 292–293; 2016). Differences in the regulation of the same working time issues are considered unreasonable (Liszczyk 2010, p. 83). It is emphasised that the basic benefit to which the employee is entitled in this respect should be a financial benefit. Free time should be an alternative form of compensation and, if it is to be granted by decision of the employer, it should exceed the time worked in overtime (Mitrus 2013, p. 130). It is also expressly expected that overtime bonuses for all members of Civil Service Corps be introduced in the Act (Szewczyk 2010, p. 226).

On the other hand, it is noted that in the case of civil servants the decision of the legislator is deliberate and takes into account the specific nature of employment of this group of members of the Civil Service Corps as well as the fact that they exercise other rights which compensate for the overtime work. Examples of such rights include a rank bonus for civil service and additional annual leave; separate compensation for overtime performed by officials is rare (Pisarczyk 2014, pp. 417–418).

It is also argued that the employment relationship of nominated civil servants is characterised by availability which justifies the legal arrangements in force. In addition, the financial factor is also not negligible, since officials whose salary consists, *inter alia*, of a civil service bonus are in fact granted a flat-rate financial bonus for any overtime work (Mazuryk 2012, pp. 406–407).

Finally, it is noted that the differentiation in the forms of compensation for overtime depends on the degree of intensity of the service element in the employment relationship of a public service member. Civil servants are in the least favourable situation (Szmit 2016, p. 223). In the employment relations of civil servants, the service element is the most intense, and the lack of compensation for overtime is compensated for by other rights (Latos-Miłkowska 2016, p. 217).

The Supreme Court also commented on this issue, recognising that both the CSA of 2006 and of 2008, introduce, as a rule, the absence of additional financial compensation for overtime work. At the same time, these acts regulate the issue of overtime therefore it is not possible to refer in this respect to the Art. 5 of the l.c. According to the Supreme Court, the absence of additional financial compensation for overtime work should be accepted as a rule (see the explanatory memorandum to the Supreme Court judgment of 3 August 2011, I PK 40/11, LEX 1102989).

The Constitutional Tribunal, while dealing with the right to overtime bonus for local government employees, found that traditionally pragmatics of public services provide for the obligation of state officials to perform, if necessary, overtime work in principle without the right to additional remuneration. Performing work for the state involves a public service mission. In justifying its position, the Court also referred to Art. 27 of the Act of 17 February 1922 on the State Civil Service (Dz.U. 1949, No. 11, item 72; in force until 31 December 1974), which had provided that a State employee must carry out the activities entrusted to him as quickly and deliberately as possible and comply with the prescribed working hours and, if necessary, on important grounds at the discretion of the authorities, carry out his activities outside the regular working hours. The Act of 1922 did not contain a provision that would introduce compensation for a state employee for the performance of duties outside normal office hours (statement of reasons for the judgment of the Constitutional Court of 21 January 2014, P 26/12, OTK-ZU 2014, No. 1A, item 3). In the opinion of the Constitutional Tribunal, local government employees managing the workplace on behalf of the employer organize their own work and the work of subordinates and are not supervised on an ongoing basis, so they can devote part of their official working time to activities not related to the employment relationship. As a rule, their remuneration is also relatively high, which makes it possible to assume that at least in part it compensates for possible overtime. The Court therefore concludes that the exclusion in respect of that category of workers is compatible with Art. 4(2) of the ESC.

### ***Comments de lege ferenda***

The issue of compensation for overtime in the civil service may raise doubts. There is no doubt that the current legal regulations concerning Civil Service Corps members need to be put in order. Out of all public administration employees civil servants are in the most unfavourable situation with respect to compensation for overtime work. Civil servants

are granted time off for overtime work in the amount corresponding to the number of overtime hours. At the same time employees of state offices (Art. 30 § 2 of the Act on public office employees) and local government employees may choose whether to receive free time or remuneration for overtime work. It should also be noted that employees of the Environmental Protection Inspection (added Art. 8f of the Act of 20 July 1991 on the Inspection of Environmental Protection, Dz.U. 2019, item 1355 consolidated text; see also added Art. 77a of the Act of 6 September 2001 on road transport, Dz.U. 2019, item 58 consolidated text) and the Road Transport Inspection recently became entitled to one and a half the time off or 50% of the overtime bonus. Amendments to the CSA are also announced as coming. (In the future it is announced that a uniform standard for public service employment will be introduced; see Radwan 2019).

It is necessary to introduce a uniform legal regulation. The Head of the Civil Service proposed in the latest report the introduction of uniform rules for the compensation of overtime in the entire civil service, including the introduction of an overtime bonus for all members of the civil service.<sup>3</sup> It is noted that salaries in the civil service are not competitive with those in the private sector despite additional wage rights. The Head of the Civil Service indicates that salaries, especially in many local administration offices, differ significantly from the average salary in the national economy. He also points out that the growth rate of salaries in the Civil Service Corps in 2018 was lower than in the national economy and the industrial sector.<sup>4</sup>

The current regulatory framework needs to be put in order to comply with the ESC. The opinion of the ECSR indicates that the granted time off should be higher than overtime. It is not compulsory to pay overtime bonus. It is also worth noting that in his motion, the Commissioner of Human Rights objects the incompatibility of Art. 97(6) to (8) of the CSA only as it concerns the lack of increased free time for overtime work. A possible ruling of the Constitutional Tribunal shall apply to compensation for overtime in the form of free time. One should therefore consider the form of the right to compensation for overtime for civil servants. The legislator has already broken the principle of no financial compensation for overtime work in the civil service by introducing an overtime bonus for some members of the Civil Service Corps.

As far as the time off for overtime hours is concerned, it must be concluded that the civil service employee must be given increased time off for overtime work. In the case of a civil servant, it should be considered whether this category of workers falls within the scope of the exemptions referred to in Art. 4(2) of the ESC as specific case. In my opinion, civil servants should not be deprived of their right to time off for overtime. The premise of overtime work is quite liberal, and such a solution may lead to weakening of

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<sup>3</sup> The 2018 report is available on the website: [https://dsc.kprm.gov.pl/sites/default/files/sprawozdanie\\_szefa\\_sluzby\\_cywilnej\\_za\\_2018\\_rok\\_0.pdf](https://dsc.kprm.gov.pl/sites/default/files/sprawozdanie_szefa_sluzby_cywilnej_za_2018_rok_0.pdf) (access: 16 October 2019), p. 15.

<sup>4</sup> The average total remuneration in the civil service amounts to PLN 5863 gross. Below this average remuneration we have, among others, in voivodeship, voivodeship and powiat offices of combined administration (see attachment No. 2 to the report). In 1,149 offices, employing about 23 thousand members of the civil service corps (20% of the corps), salaries are lower than in the national economy. See the 2018 report, p. 45.



protective mechanisms of the regulations on working time in relation to this occupational group (Paroń, Wilski, 2013, p. 241). Work dependent on the “needs of the office” can in practice lead to a situation in which this work can become the ordinary part of the process of work organisation when it should be extraordinary (Rączka 2016).

Both employees and civil servants currently have an employment status and their status cannot be compared to that of civil servants covered by the Act of 17 February 1922 on the State Civil Service, because the employment of the latter group was regulated by administrative law and not labour law. The construction of the civil service model includes public law elements (nomination, civil and legal liability), as well as regulations of the general labour law (Chochowski 2013, p. 46). Of course, the employment relationship of a nominated civil servant shows the characteristics of service relationship, for example through availability, which, together with an extensive catalogue of civil servant duties, gives the employment relationship the character of a service (Dubowik 2017, p. 525). However, these are still labour relations subject to the protection of labour law.

It is also worth looking at the range of exemptions permitted by the ECSR. It is undoubtedly possible to exclude persons managing the workplace as regards overtime compensation. There is therefore no doubt about the exclusion of senior civil servants. One should also consider the judgment of the Constitutional Tribunal concerning the right to compensation for overtime for an employee holding a managerial position (justification for the judgment of the Constitutional Tribunal of 21 January 2014, P 26/12, OTK-ZU 2014, No. 1A, item 3). The Court found that Art. 42(4) of the Act of 21 November 2008 on local government employees (OJ C 2011/318, p. 1; No. 223, item 1458; of 2009, No. 157, item 1241; of 2010, No. 229, item 1494; of 2011, No. 134, item 777 and No. 201, item 1183; of 2013, item 645), as far as it concerns local government employees managing a workplace on behalf of an employer, is consistent with Art. 32(1) of the Constitution of the Republic of Poland and with Art. 4(2) of the ESC. Art. 42 § 4 of the local government employees Act entitles a local government employee to remuneration or time off for overtime work.

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## Court sentences

- The judgment of the Supreme Court of 3 August 2011, I PK 40/11, LEX 1102989.
- The judgment of the Constitutional Court of 21 January 2014, P 26/12, OTK-ZU 2014, No. 1A, item 3.

## Legal acts

- The Act of 17 February 1922 on the State Civil Service, Dz.U. 1949, No. 11, item 72.
- European Social Charter, adopted in Turin on 18 October 1961, Dz.U. 1999, No. 8, item 67.
- The Labour Code Act of 26 June 1974, Dz.U. 2019, item 1040 consolidated text, as amended.
- The Act of 20 July 1991 on the Inspection of Environmental Protection, Dz.U. 2019, item 1355 consolidated text.
- The Act of 6 September 2001 on road transport, Dz.U. 2019, item 58 consolidated text.
- The Civil Service Act of 21 November 2008, Dz.U. 2020, item 265 consolidated text.