


Katarzyna Jaworska  <https://orcid.org/0000-0003-0018-2775>

University of Warmia and Mazury in Olsztyn

THE RIGHT TO DISCONNECT

Abstract

This paper addresses the employee's right to disconnect, which means refraining from professional activity after working hours in the form of answering phones, checking e-mail, or replying to instant messaging. This right directly correlates with the employee's right to rest and with the employer's obligation to provide the employee with safe and hygienic working conditions. The issue of exercising this right had already been a difficult one, but it was the outbreak of the SARS-CoV-2 virus that intensified and accelerated certain processes related to employee's rest and the disruption of work-life balance. Nowadays, the right to disconnect can be inferred from the employee's right to rest. However, this requires goodwill on the part of both the employer and social partners. Finally, the author discusses the legal consequences of violating the employee's right to disconnect, the measures that the employer needs to take before legislative changes are made, and where such changes ought to be introduced.

Słowa kluczowe: czas odpoczynku, prawo do odłączenia się, czas pracy, prawo do bycia offline

Keywords: rest time, right to disconnect, working time, right to be offline

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Introduction

The SARS-CoV-2 pandemic has dramatically affected labour law and the legal situation of employees both in Poland and all over the world. Polish provisions contained in the so-called “Anti-Crisis Shields” (the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them, and some other acts, Dz.U. 2020, item 1842 consolidated text, as amended; the Act of 19 June 2020 on Subsidies on Interest on Bank Loans Granted to Entrepreneurs Affected by COVID-19 and on the Simplified Procedure for the Approval of Arrangements in Connection with COVID-19, Dz.U. 2022, item 171, consolidated text as amended), particularly those concerning the permissibility of remote work and the right to rest and leisure, have significantly

disrupted the balance between the professional and private life of the employee. Many have been forced to work from home practically overnight. For instance, it can be pointed out that in Poland in the second quarter of 2020 1,539 thousand people were working outside the workplace due to the SARS-CoV-2 pandemic (GUS 2020a, p. 3), and in the third quarter it dropped to 448 thousand people (GUS 2020b, p. 3), and the number reached 1,038 thousand people in the fourth quarter (GUS 2020c, p. 3). What is more, it is difficult to determine the number of people who work outside the workplace on a permanent basis or those who share their working time between the workplace and home.

In many cases, these employees have had to cope with venue problems (arranging a place to work with other family members either also working remotely or having to study remotely) as well as technical problems (lack of appropriate equipment, no access to broadband connection, or no Internet at all in the place of residence). Another issue added to that: the constant need to communicate with the employer and co-workers by phone, e-mail or instant messaging also outside working hours, i.e., in the employee's free time. This has become particularly evident in the case of shift work, which has been introduced in some public administration offices, for example. However, this problem has strongly affected the private sector as well.

This is not to say that the problem of violating an employee's right to rest by forcing them to be constantly connected was hardly present before the SARS-CoV-2 virus pandemic, but the pandemic has intensified the process, accentuated it, and affected more employees than ever before. This has prompted steps to protect employees from this phenomenon and to seek protection in existing regulations.

The concept of the right to disconnect

The issue of employees' right to disconnect has not been ignored by the European Parliament, which has already taken action in this regard. On 21 January 2021, the European Parliament adopted a resolution containing recommendations to the Commission regarding the right to be disconnect also calling on the European Commission to take concrete action to adopt a directive that will guarantee the right of employees to disconnect and not suffer any negative consequences if they remain unavailable to their employer outside working hours (European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)), OJ C 2021/456, pp. 161–176). Accordingly, a draft directive to this effect is annexed to the resolution.

As interpreted in the resolution, the right to disconnect is the right of employees to refrain from engaging in work-related tasks, activities and electronic communication, such as phone calls, emails and other messages, outside their working time. In contrast, for the purposes of the proposed directive, "disconnect" means not to engage in work-related activities or communications by means of digital tools, directly or indirectly, outside working time (Art. 2(1) of the proposed directive). And "working time" means working time as defined in Art. 2(1) 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 (OJ L 2003/299, pp. 9–19). According to it, “working time” means any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice.

Consequently, the employee should be able to switch off working tools and not respond to instructions from the employer outside of working time without risking negative consequences such as dismissal or other punitive measures. At the same time, the employer should not require the employee to perform work-related activities outside of working time. Nor should the employer promote the “always available” working culture, which implies that employees who waive their right to disconnect are clearly favoured over those who do not. Additionally, employees who report non-compliance with the right to disconnect in the workplace must not be penalized, or treated less favourably when it comes to setting working and pay conditions including access to trainings.

Attention should be paid to the fact that the European Parliament used the phrase “right to disconnect” and not “right to be offline” in the title of the resolution. Even though the official Polish translation of the resolution equals “being disconnect” with “being offline”, this difference is important. The term offline (off-line) refers to the lack of access to the Internet and communication tools that use the Internet. As such, it is a state in which the employer does not contact the employee via the Internet (email, instant messaging). In contrast, the term “disconnect” is much broader; in addition to access to the Internet, it also applies to telephone conversations, short text messages (SMS) and all activities that would absorb the employee in work-related matters while the employee is enjoying their spare time. This action of the European Parliament deserves recognition and emphasizes the clearly drawn line in European law between spare time and working time.

The right to disconnect as the implementation of the right to rest

Unquestionably, the employee’s right to disconnect is a specific way of implementing the employee’s right to rest. Moreover, the employee’s right to rest is one of the fundamental rights under labour law, which is treated as part of the civil right to protection of life arising directly from the Constitution of the Republic of Poland of 2 April 1997 (Dz.U. 1997, No. 78, item 483 as amended; Liszcz 2018, p. 147). The axiological basis of this right lies clearly in preventing biological, psychological and social degradation of the employees (Góral 2011, p. 184). Extending the working time of an employee, even in the short term, will entail both physical and intellectual exhaustion, and at the same time will significantly reduce the time required for adequate regeneration of energy spent at work (Kulig 2015, pp. 381–393). What is also significant is the imbalance between the employee’s professional and private life, which adversely affects their well-being.

Under European law, the issue of the employee’s right to rest is regulated in Directive 2003/88/EC. According to Art. 2(2) of this directive, rest period is any period that is not working time. It is impossible to miss this dichotomous division between rest time and working

time, which has considerable consequences. Furthermore, not only does the directive give workers the right to rest, but also grants the right to “adequate rest” (Art. 2(9)). According to the European legislator, adequate rest means that workers have regular rest periods, the duration of which is expressed in units of time. In addition, rest is to be sufficiently long and continuous to ensure that, as a result of fatigue or other irregular working patterns, they do not cause accident and that they do not damage their health, either in the short term or in the longer term.

Following what has been stated so far, it should be recognized that the rest period cannot include any activity for the benefit of the employer, which would limit, even to a minimum extent, the employee’s ability to control their own spare time (Stefański 2020, p. 1081).

There is no doubt that such activity, in the classic sense, is time spent on business trips, participation in training to raise professional qualifications, or on-call duty. Currently, communicating with the employee remotely and absorbing him/her with business matters also counts as unacceptable activity during the employee’s spare time and it does not matter that the employee is at home, at the beach or in the woods during this time. The employer is disturbing the rest.

In this context, national regulations related to counteracting the SARS-CoV-2 pandemic should be taken into account. In Art. 15x, the so-called “Anti-Crisis Shield” (the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them, and some other acts) in force in Poland significantly expanded the rights of the employer to limit the freedom of the employee to use their spare time. Pursuant to this regulation, the employer may oblige the employee to be ready to perform work in the workplace or in another place designated by the employer outside regular working hours. At the same time, this obligation may infringe upon the employee’s right to a minimum daily or weekly rest. Moreover, the employer may order the employee to exercise the right to rest in a place designated by the employer, and the employer is obliged to guarantee the employee accommodation and board. These regulations do not apply to all employees, though. They may be applied only in the case of employees in enumerated sectors, e.g., employed in the agricultural and food sector related to production or supply of foodstuffs, engaged in the business of providing banking services, employed in the business of ensuring operation of liquid fuel stations or ensuring operation of critical infrastructure systems and facilities. The intentions of the legislator in this regard are understandable. Nevertheless, such a far-reaching limitation of fundamental employee rights is unacceptable and evokes well-founded connotations of modern labour camps.

From this perspective, the right to disconnect is merely an additional element to allow employees to fully enjoy their time off work. As the Polish example shows, however, the employee’s right to rest has been restricted to an unprecedented extent during the pandemic. Despite this, given the development of technology, ways of remote communication and the scale of remote work due to the SARS-CoV-2 virus pandemic, this regulation is downright necessary.

Consequences of violating the employee's right to disconnect

As it has already been mentioned, Directive 2003/88/EC introduced a dichotomous division of time into working time and rest time. Hence, working time means the period during which an employee works, is at the employer's disposal and performs their activities or duties in accordance with national legislation or practice. This corresponds to the Polish definition of the working time contained in art. 128 § 1 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."), which states that working time is any time during which an employee remains at the disposal of an employer in an establishment or in any other place where work is performed. This means that in order to discuss the working time, it is crucial that two conditions are met jointly. Firstly, the employee must be available to the employer (performance of work, performance of the employee's duties, waiting for the employer's order). Secondly, the employee must be at a certain place, which is the workplace or another place where the employee has to perform work for the employer.

In opposition to the working time defined in accordance with Directive 2003/88/EC there is rest time, which is perceived as any period that is not working time. The employee's right to disconnect can already be inferred from this regulation. If the employee is outside working time, it means that they are exercising their right to rest. Interfering with this rest by means of telephone, e-mail or instant messaging makes the employee available to the employer. Naturally, this entails particular consequences in terms of the employee's working time and tracking it. Exceeding the working time standard by communicating with the employer outside of working hours should be treated as doing overtime work with all its implications.

On the grounds of Polish regulations, work performed by an employee that exceeds the working time standards agreed for that employee, as well as work that exceeds the extended daily working time that results from the employee's working time system and patterns, is considered overtime work (Art. 151 § 1 l.c.). Moreover, overtime work is allowed only on two occasions. Firstly, in cases when a rescue operation is necessary to save human life or health, to protect property or the environment, or to recover from a breakdown. Secondly, to satisfy special needs of the employer. The phrase "special needs" used by the legislator means that the employer may order the employee to work overtime only in exceptional situations, which do not appear under the standard conditions of provision of work. Therefore, "a normal, constant increase in demand for work should not constitute a justification for assigning overtime work" (Pisarczyk 2017, p. 728).

From the point of view of the employee's right to disconnect and the consequences of its violation, only the latter situation permitting overtime is relevant. In this context, it must be stated that engaging the employee in any work-related task by communicating via digital means constitutes an order to perform overtime work. Engaging the employee for even a few minutes, more so regularly disrupting the employee's rest by communicating work-related information, does not exclude this.

Furthermore, violating the right to disconnect, may violate the right to a minimum daily (11 hours; Art. 132 l.c.) or minimum weekly uninterrupted rest period (35 hours; Art. 133 l.c.). Consequently, the employer would be obliged to provide the employee with this rest, even if

it involves changing the employee's starting time. The employer cannot pay the employee the cash equivalent as compensation for the lost rest. Note that, in principle, any violation of the right to rest will be unlawful and will constitute a culpable violation of the right to rest (daily or weekly). This constitutes grounds for the employee to seek compensation on general terms under Art. 448 of the Civil Code Act of 23 April 1964 (Dz.U. 2020, item 1740 consolidated text, as amended, hereinafter referred to as: "c.c.") for infringement of personal interests listed in Art. 23 c.c. (Prusinowski 2019, pp. 40–44). This applies not only to situations where the employee's personal good has been violated, but also where it is merely at risk (judgment of the Supreme Court of 18 August 2010, II PK 228/09, LEX 599822). Taking disciplinary measures against employees who wish to exercise their right to disconnect under the current legislation may also result in the employer being liable for damages for breach of the principles of equal treatment in employment (Szablowska-Juckiewicz 2019, pp. 131 *et seq.*).

Course of action pending legislative changes

Undeniably, the continuing outbreak of the Sars-CoV-2 virus and the associated ongoing remote work requires that the employee's right to disconnect be regulated as soon as possible. However, the time needed for the directive to arrive and its implementation may be fairly long. Nevertheless, it is necessary to introduce appropriate solutions by employers and social partners immediately.

First of all, it is imperative to conduct educational activities focused on the development and promotion of positive patterns of communication based on respect and understanding, which is directly related to the unconditional respect for the dignity of the employee (Sobczyk 2014, p. 37). Counterintuitively, the problem of interrupting time off and violating the employee's right to disconnect is not just an employer-employee concern. This issue affects both the direct supervisor-employee relations as well as the employee-employee relationship. Therefore, education regarding the right to disconnect should not only apply to employers or human resources managers, but should also include regular, non-executive employees at all levels. The outcome thereof should be respect for the rest and leisure time of both co-workers and managers. The idea is to make the staff aware that even a short conversation on a professional matter can occupy an employee for up to several hours or days, not just for a moment.

In addition, it is necessary to define the rules under which the employer may contact the employee outside of working hours in line with current legislation. Such rules ought to address what expectations the employer may have in terms of the employee undertaking a particular activity. Another essential aspect is to define clear conditions under which the employee is not obliged to answer the phone, check his e-mail account or reply to a message. It is also vital to introduce safeguards to protect employees who exercise their right to disconnect. Exercising this right cannot justify termination of the employment agreement or non-renewal of the agreement. Nor can it constitute the reason for limiting the employee's right to participate in training to improve professional qualifications or be promoted.

Such provisions can be found, for example, in work regulations. An agreement with the social partners is also possible (Giedrewicz-Niewińska, Piszcz 2019, pp. 33 *et seq.*). Such

efforts do not require any legislative changes. However, they do require initiative on the part of the employer and on the part of social partners, e.g., trade unions.

Conclusion

Essentially, exercising the employee's right to disconnect as of today does not require changes in legal regulations. It primarily calls for mutual respect between the employer and employees and understanding that under Polish law the employee is at the disposal of the employer 40 hours a week, five days a week, 8 hours a day. This is followed by the application of current legal regulations and the implementation of mechanisms protecting the employee from the negative consequences for exercising the right to disconnect.

Still, such a stance may seem simply naive. Even a brief analysis of Polish legal regulations in the field of working time, makes it evident that the legislator agrees to the exploitation of employees. Such provisions include the employee's right to a 15-minute break at work if the working day lasts at least 6 hours (Art. 134 l.c.). Needless to say, it is irrelevant whether the employee works 6 or 12 hours, the break to which they are entitled is always 15 minutes. The grounds for introducing the equivalent working time, under which a working day may be extended to 12 hours, are also rather vague (Art. 135 l.c.; Stefański 2016, pp. 136–137). The possibility of “exchanging” the employee's overtime work for time off on a one-to-one basis (Art. 151² l.c.) also raises concerns. On top of that, it is possible to perform work on the grounds of a civil law contract, under which the contractor has no right to rest and holiday leave at all. These are only selected examples. As a result, it can be assumed that not every employer will be willing to conduct an educational campaign among employees or to introduce the guarantees referred to above into the work regulations or into an arrangement with trade unions.

That is why specific legislative changes need to be introduced so that the employee's right to disconnect becomes a fact. The proper place to include these regulations in the Polish Labour Code is Section Six—Working Time, Chapter III—Rest Periods. In order to emphasize the significance of this regulation, it may be repeated in the catalogue of essential employer's duties included in Art. 94 l.c.

While waiting for the intervention of European and national legislators there is nothing else but to promote the right of an employee to disconnect in every workplace.

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