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«RIGHT TO DISCONNECT» AS ONE OF THE EMPLOYEE'S DIGITAL LABOUR RIGHT

Governments around the world have been working on new legislation and policies that would ensure employees have the right to disconnect. This would mean that employees can: not perform work or work-related activities after or outside of normal working time; employers should respect their workers' right to disconnect; in special cases, employees are entitled to receive compensation over time.

In brief, the right to disconnect has three main elements: 1) the right of an employee to not routinely perform work outside normal working hours; 2) the right to not be penalised for refusing to attend to work matters outside of normal working hours; 3) the duty to respect another person's right to disconnect (e.g., by not routinely emailing or calling outside normal working hours).

The "right to disconnect" goes beyond recognising that employees should not be contacted whatever the time. The "right to disconnect" not only removes the need for immediate response, but also protects employees against any detriment for being unreachable. Instead of management simply not expecting a response from workers outside normal working hours, workers are actively encouraged not to respond outside their regular hours.

The "right to disconnect" can benefit both individual employees and organisations as a whole. Establishing an effective work-life balance for employees is likely to reduce staff burn-out and overload, leading to a more productive workforce during working hours. The reduced pressure may have further benefits such as higher staff retention rates and increased employee morale, as well as a feeling from employees that their mental health is recognised and supported by their employer.

Employers should take care not to become too prescriptive in any new rules or policies which establish a "right to disconnect" in their workplace. In limiting employees' hours or the times during which employees are contactable, employers run the risk of curtailing the flexibility provided by remote working. This could have as negative an impact on employees as the impact of "burn-out" and failing to disconnect. Employers should approach calls for rapid, unilateral changes with care.

Key words: labour law, employee, right to disconnect, telework, working time.

***Лагутіна І. В.* «ПРАВО НА ВІДКЛЮЧЕННЯ» ЯК ОДНЕ З ЦИФРОВИХ ТРУДОВИХ ПРАВ ПРАЦІВНИКА**

Уряди в усьому світі працюють над новим законодавством і визначають політику, які забезпечать працівникам право на відключення. Це означатиме, що працівники можуть: не виконувати роботу або пов'язану з роботою діяльність після або поза межами нормальної тривалості робочого часу; роботодавці повинні поважати право своїх працівників на відключення; в особливих випадках працівники мають право на отримання компенсації залучення до роботи понаднормово.

Отже, право на відключення складається з трьох основних елементів: 1) право працівника не виконувати звичайно роботу поза нормальним робочим часом; 2) право не піддаватися стягненню за відмову відвідувати роботу поза нормальним робочим часом; 3) обов'язок поважати право іншої особи на від'єднання (наприклад, не надсилаючи регулярні електронні листи чи телефонуючи в неробочий час).

У статті підкреслюється, що нові форми роботи і зміни робочого середовища породжують нову небезпеку. Тривалість робочого часу веде до зростання соціальної напруженості і конфронтації.

Право на відключення виходить за рамки визнання того, що з працівниками не можна зв'язуватися в будь-який час. Право на відключення не тільки усуває необхідність негайної реакції, але й захищає працівників від будь-якої шкоди через те, що вони недоступні. Право на відключення може принести користь як окремим працівникам, так і організації в цілому. Встановлення ефективного балансу між роботою та особистим життям для працівників, ймовірно, зменшить вигоряння та перевантаження персоналу, що призведе до підвищення продуктивності робочої сили в робочий час. Зменшення тиску може мати додаткові переваги, такі як вищі показники утримання персоналу та підвищення морального духу працівників, а також відчуття у працівників, що їх психічне здоров'я визнається та підтримується роботодавцем.

Ключові слова: трудове право, працівник, право на відключення, дистанційна робота, робочий час.

Problem setting. Advances in Information and Communication Technologies have significantly changed the world of work. The always-on culture has become widespread in many companies and industries – and as the latest research shows, remote working has made drawing the line between work and home more complicated.

Information and communication technologies are what made the blurring of the space and time boundaries between work and private life possible in the first place, and today's Internet and mobile devices support constant reachability. This makes actual working time difficult to define and measure, especially when work emails are read and answered from home [1, p. 90].

Analysis of recent research and publications. Topical issues of legal regulation of such a kind of digital labour right as right to discon-

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nect is the subject of study of such scientists, as: D. Ahrendt, M. Avogaro, S. Gr. Carmichael, B. Dennehy, E. Dunn, C. Froger-Michon, D. Jordan, M. Gibson, O. Llave, M. Mascherini, J. Messenger, O. Picquerey, J. Ramsay, K. Renaud, C. Toumieux, S. Nivakoski, P. M. Secunda, J. Vasagar, V. Viale, V. Walt, T. Weber, etc.

The purpose of this article is to research issues of ensuring the right to disconnect, its impact on work-life balance.

Article's main body. There is no doubt that psychosocial risks and work-related stress are among the most challenging issues in occupational safety and health. They impact significantly on the health of individuals, organisations and national economies.

It should be noted that in February 2022, the World Health Organization and the International Labour Organisation published a joint technical brief on healthy and safe teleworking which said that enterprises and governments should place clear limits on invasive workplace surveillance and support employees' "right to disconnect" to reduce the negative physical and mental health impacts of digitally enabled remote working practices.

Although the briefing did not explicitly call for governments to implement a right to disconnect, it said: "It is important to organise telework to meet the needs of both workers and the organisation. This requires a focus on outputs or outcomes, rather than process." It stressed that employers should actively avoid contacting workers outside scheduled work hours [2].

A common misconception is that longer work means more output. The result of long working hours is clear: working significantly longer decreases productivity. In fact, an increasing body of evidence underlines that the effects of a reduction of regular long working hours include positive impacts on employees' physical and mental health, improved workplace safety and increased labour productivity due to reduced fatigue and stress, higher levels of employee job satisfaction and motivation and lower rates of absenteeism. Appropriate government policies to limit excessively long working hours are an important feature of any legal framework on working time and these also exist in most European countries at both the country level and at the supranational level in the form of the EU Working Time Directive [3, p. 301].

Burnout among tech and IT security staff has also become more acute, placing employers in a difficult situation as they attempt to plug skills gaps, stem staff churn, and face down a growing cybersecurity threat [4].

Furthermore, the right to disconnect is related to attaining a better work–life balance, an objective that has been at the core of recent European initiatives – for example, Principle 9 ("Work–life balance") and Principle 10 ("Healthy, safe and well-adapted work environment and data protection") of the European Pillar of Social Rights, as well as the Work–Life Balance Directive – although they do not refer specifically to the right to disconnect.

On 21 January 2021, the European Parliament passed a resolution in favour of the right to disconnect, calling on the Commission to prepare a directive "that enables those who work digitally to disconnect outside their working hours". This directive "should also establish minimum requirements for remote working and clarify working conditions, hours and rest periods". MEPs believe that right to disconnect is vital to protecting their physical and mental health and well-being and to protecting them from psychological risks [5].

Thus, the European Parliament claims that the right-to-disconnect should be a fundamental right of the European Union. At the national level, this right is included in article 88 of Organic Law 3/2018 on Data Protection and Guarantee of Digital Rights, in article 20 bis of the Workers' Statute, and also in article 18 of Royal Decree-Law 28/2020 on remote work.

It is worth remembering that remote employees have the same rights as on-site employees, and that the businesses' working hours and flexibility may depend on what is established in collective bargaining, although this regulation is designed so that we are not obliged to respond to work-related emails, calls or instant messaging during our rest time or holiday period. On the other hand, businesses have the obligation to keep a record of worked hours, regardless of their size, and to guarantee the exercise of this right through an internal policy and protocols that establish the guidelines to be followed by the entire workforce [6].

Across the world, countries have been trying to figure out how to enact effective right-to-disconnect legislation for years. These laws and regulations manifest in different ways – some putting a cap on the workday or workweek, some limiting communication after hours.

The first legislation related to the right to disconnect appeared in France in 2016, then Italy in 2017 and Spain in 2018. Although different in detail, all of these fairly light-touch rules protect a employee's right not to respond to communications from work outside the business's core hours, and not to be penalised for this (for example, by being denied a promotion if you refuse to work weekends). Over the past two decades, Germany has also made moves to protect employees' ability to log off, though not through the law; instead, negotiations were held among company stakeholders. Several German multinationals took a tougher stance, putting company agreements in place that secure employees' right to disconnect, including Volkswagen, Daimler and Siemens, often using technology to underpin policies [7].

Belgium has followed a trend set in Europe by Volkswagen in Germany, which decided in 2012 to ban certain employees from accessing emails after hours in order to avoid burnout.

In France, the sense that a different work-life balance needed to be struck was turned into action in 2017, when organisations with more than 50 employees were required to start negotiations to define the rights of employees to ignore their company smartphones and laptops.

Portugal went further last year by approving legislation under which employers with more than 10 staff can be liable to fines if they text message, phone or email workers who are off the clock. Companies must help pay for expenses incurred by remote working. However, the Portuguese parliament rejected a proposal to include a legal right to switch off work-related messages and devices outside office hours [8].

On June 3, 2022, Ontario's right to disconnect law went into effect. In Canada, Ontario was first to enact legislation that provides employees with the right to disconnect. The law requires employers who employ 25 employees or more, to have a written policy on disconnecting from work for all employees. There are no explicit requirements for what this policy must contain, and the next few months will show us how well it is socialized into the Ontario workplace [9].

There are multiple ways to implement and enforce a right to disconnect. In some cases, disconnection is encouraged but not monitored by the employer, in others it is monitored through regular status checks and employee questionnaires, and in yet others employers have opted for technical solutions to prevent employees from connecting to work after hours, including shutting down the company email servers at the end of the formal working day.

When embarking on a process to introduce a right to disconnect in a workplace, it is important to establish a common understanding of what the right to disconnect entails. In short, it has three main elements. The first two, the right of an employee to not perform work outside normal working hours and the right to not suffer any negative consequences for doing so, are normally observed. However, the third element, the duty for others to respect the right to disconnect (e.g. by not sending emails after hours) is easily overlooked but essential in securing the right to disconnect and ensuring that not all responsibility is put on the individual to enforce her right. Finally, it is worth reiterating that the right to disconnect does not imply an automatic obligation to disconnect from work; employees should still be able to use digital tools after hours in exceptional circumstances, as long as such circumstances have been previously defined.

It is similarly important to discuss why a right to disconnect is to be implemented, and what the risks are if this right is not introduced [10]. As previously noted, a constant connection to work and ensuing lack of rest can have important implications for the employees' health and overall performance in the company. Clearly defining the purpose of the right is important for its implementation. Conversely, merely referring to a legal obligation is likely to cause employees to view the right to disconnect as only having a formal purpose without any substantive objective.

The "right to disconnect" can benefit both individual employees and organisations as a whole. Establishing an effective work-life balance for employees is likely to reduce staff burn-out and overload, leading to a more productive workforce during working hours. The reduced pressure may have further benefits such as higher staff retention rates and increased employee morale, as well as a feeling from employees that their mental health is recognised and supported by their employer.

Employers should take care not to become too prescriptive in any new rules or policies which establish a "right to disconnect" in their workplace. In limiting employees' hours or the times during which employees are contactable, employers run the risk of curtailing the flexibility provided by remote working. This could have as negative an impact on employees as the impact of "burn-out" and failing to disconnect. Employers should approach calls for rapid, unilateral changes with care [11].

Thus, the right to disconnect legislation varies in each country. One country has chosen to focus on legislation for public employees, others have focused on employee numbers. Other countries such as Portugal have introduced fines while others have not. Since the explosion of working from home during the pandemic, governments in European countries have focused on bringing in new policies to reflect the new world of work. Other EU member states are still in discussion about national legislation. While the EU parliament itself has also had some discussion surrounding legal framework of right to disconnect, nothing further has been introduced [12].

Role of the social partners - the social partners must play a central role in defining the modalities (practical details) of a right to disconnect and its related policies at the workplace, and national laws should necessarily prescribe a role for them in further negotiating the right to disconnect. Currently, the connection between teleworkers and employees' representatives is very weak and no real social dialogue regarding their specific rights can really take place. Apart from reshaping the modalities of electing employees' representatives, including setting up trade unions organisations, their mode of function and modalities, in order to adapt them to the digital era, a mechanism must be identified to involve social partners in identifying and defining rules on technical and organisational measures necessary to ensure

employees' right to disconnect, on practical details relating to the implementation and observance of this right based on the specificity of the industry, company and, respectively, workplace, working conditions, job roles and related attributions [13].

The role of the social partners in identifying and defining the said rules may follow the mechanism already provided for in the Labour Code in other cases. The law may stipulate that such concrete rules are to be negotiated through the collective agreement at the level of the employer or, in lieu of this, are to be laid down in internal rules.

At the start of March 2022, the Trades Union Congress (TUC) also warned that the intrusive and increasing use of surveillance technology in the workplace was "spiralling out of control" and could lead to widespread discrimination, work intensification and unfair treatment without stronger regulation to protect employees.

Employees are to be protected against discrimination based on the employee's availability, less favourable treatment, dismissal or other adverse treatment in retaliation for exercising or wishing to exercise their right to disconnect. So, not only will employees have the right to disconnect, but also, and this may be even more important in practice, they will be protected from sanctions for their lack of availability. On the other hand, the employer will also not be able to reward or promote subordinates for staying in constant contact with the enterprise. In view of the genuine difficulty of proving that an employee was subjected to unfavourable treatment in the exercise or enjoyment of his or her rights, the directive would shift the burden to the employer to prove that the difference in treatment of the employee was based on other grounds, as in the case of discrimination based on criteria other than the employee's availability.

The states are to provide for effective, proportionate and deterrent sanctions for violations of employers' obligations relating to the employee's right to disconnect.

It can be assumed that the Polish parliament may regulate such sanctions in two ways. The violation of obligations relating to implementation and observance of the right to disconnect may be treated in the same way as other violations of working time regulations (threatened with a fine up to PLN 30,000). The employee's availability (or exercise of his or her right) may also be considered a discriminatory criterion; in the event of discrimination on this basis, the employee would be entitled to compensation in an amount not less than the applicable minimum monthly wage (PLN 2,800 in 2021) [14].

In 2017, France introduced regulations that set tighter boundaries around when a remote worker's obligations begin and end. In 2018, pest control firm Rentokil was ordered to pay 60,000 euros ($71,000) for violating those rules. It was the first case of its kind after the introduction of the right to disconnect into the French legal system.

Earlier this year, Ireland introduced a code of conduct on the right to disconnect for all workers, where complaints can be brought to a workplace dispute board [15].

Even in those European countries that have enacted the right to disconnect legislation, this right first came about through employer policies and collective agreements.

In France, the right to disconnect first came to prominence in collective agreements in 2012, with the French insurance company AXA and French renewable energy company Areva.19 The right was further championed in 2014 by the General Union of Engineers, Manager and Technicians (UGICT) on behalf of engineers, executives and technicians. The UGICT sought to prevent employers from using communication technology to overcome limits imposed by law or collective bargaining to daily and weekly working time limits, and sought to prevent "disconnection" from becoming only an obligation on the part of the worker [16, p. 117].

Employer policies with respect to the right to disconnect have taken a number of forms. Perhaps the most common form is an employer policy setting a time after which employees cannot send or receive emails.

Some employers have taken this even further, and installed software programs which prevent email servers from sending emails to mobile phones during certain hours. Volkswagen has taken this tack, turning off the company email server for all smart phones half an hour after work ends for the day and only switching it back on half an hour before work starts the next day [17].

Other employers have installed software that sends an automatic email letting employees know the email is "out of schedule" and can wait until the next workday begins [18].

BMW has taken a more flexible approach, whereby employees may agree with their supervisor on the fixed hours during which they will be available, and mobile activities carried out during off work time will be credited to their working hours account. However, employees are allowed to insist on their right to inaccessibility during holidays, the weekend and after the end of work [19].

Conclusions. Consequently, collective bargaining at enterprise level is the main way of determining the terms and conditions for implementing the right to disconnect. Finally it is important to mention that the Ukrainian social partners should be able to promote a healthy working life and to build a preventive culture is a shared responsibility of governments, employers and employees, health professionals and societies as a whole.

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