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The Right to Disconnect in the Context of Employees' Mental Health[1]

Abstract: The development of technology has a significant impact and creates new requirements in the field of labour-law relations. One of these requirements is the protection of occupational health and safety by preventing the blurring of boundaries between employees' work and private lives. The most important means which is currently the subject of discussions in the professional community, but also in practice, is the right to disconnect. This paper is devoted exactly to this right, its perception at the level of the institutions of the European Union, and its legal enshrinement in the legislation of the Slovak Republic.
Keywords: mental health, right to disconnect, teleworking, occupational safety and health.

Introduction

The digital age brings with it a number of benefits that have a positive impact on the work environment and ways of performing work. It led to the develop-

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ment of flexible working opportunities and, ultimately, should make it easier to organize time so that the employee has sufficient time for rest and regeneration in addition to working life. Employees no longer perform work only in the standard way at the employer's workplace and under their direct and continuous supervision. Like the company itself, work in many areas is moving to the virtual world, where communication between employer and employee is closely linked to technology and the Internet. Actual practice clearly indicates that modern technologies also have negative consequences, including blurring the boundaries between work and private life. This dangerous and growing psychosocial factor should be reduced by granting employees the right to disconnect.

The right to disconnect has been a matter of interest for a long time, but due to the pandemic, which has fundamentally affected the way work is performed, the need for its legal enshrinement is growing. Such tendencies are also present in the institutions of the European Union, and we can clearly identify efforts to legally enshrine the right to disconnect, which would belong to all employees without exception.

Although the specific text of the directive has not been approved to date, we can expect its adoption to become a priority. The Slovak Republic has also responded to these demands and, with effect from 1 March 2021, has granted teleworkers the right to disconnect. Assessing the sufficiency of the legal regulation of the right to disconnect in the light of the trends developing in the European Union institutions, which are also a matter of interest, forms the main objective of this paper. In the conclusion, we will try to formulate *de lege ferenda* proposals which, in our opinion, will sooner or later have to be considered, and suggestions are made as to how the current legislation could be amended to reflect European trends in this area and thus achieve the stated objective of protecting employees.

Right to Disconnect

The right to disconnect is currently not explicitly defined in any human rights document. However, many of them regulate rights that provide a solid basis for securing and enforcing workers' rights to fair working conditions, limitations on working time to ensure time off work, rest and leave, measures to reconcile work and private life and, more generally, to ensure occupational health safety.[2] In this context, we refer in particular to Article 24 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Economic, Social and Cultural Rights, and International Labour Organisation Convention No. 1/1919 concerning the limitation of working time to eight hours a day and forty-eight hours a week in industrial enterprises.

Furthermore, European Union[3] law does not currently contain an explicitly defined and recognised right to disconnect. However, if we take a closer look at the various sources of EU law, in particular the Directives, we can find connections to the right to disconnect in their provisions. The most significant is Directive 2003/88/EC of the European Parliament and of the Council of 4 September 2003 concerning certain aspects of the organisation of working time, according to which all workers should have adequate rest periods, the concept of 'rest' being expressed in units of time, i.e. days, hours or parts thereof. Adequate rest for the purposes of the Directive is understood to mean that workers have a regular period of rest, the duration of which is expressed in units of time and which is of sufficient duration and continuity to ensure that they do not cause injury to themselves, to co-workers or to others as a result of exhaustion or other irregular work scheduling, and that they do not cause themselves, their co-workers or others any short-term or long-term damage to their health.

Although the above-mentioned sources guarantee the right of employees to rest after work, at present in practical terms it is available in its entirety mainly to employees whose work is exclusively performed in the employer's

2 *ETUC Position on the Right to disconnect*. Adopted at the Executive Committee of 22–23 March 2021, 2.

3 Hereinafter: EU.

workplace, but when they are outside the workplace they have no possibility to react to the employer's requirements, or the employer does not make these requirements due to the type of work performed by the employee. Such employees are exposed to the risk that the employer will order them to work overtime or will not respect the maximum limits set by law for working time and the minimum limits set for their rest periods. In this case, however, they have several statutory instruments to remedy the unlawful situation. We are talking in particular about a complaint addressed to the employer or a complaint to the competent labour inspectorate. This is the threat of a financial sanction which the employer faces in the event of a breach of the provisions of Act No. 311/2001 Coll. on the Labour Code[4] which in practice appears to be the most effective means of encouraging the employer to comply with the limits set by law concerning the organisation of working time.

Employees who carry out their work in whole or in part by means of information and communication technologies are in a completely different situation. Despite the many advantages that information and communication technologies bring to the performance of work, they also come with many negatives and risks. The constant connectivity made possible by ICT-based mobile devices can pose risks to health and well-being, as well as causing work-life balance conflicts associated with longer working hours and the blurring of work-life boundaries.[5] Information and communication technologies are a primary reason for the blurring of spatial and temporal boundaries between work and private life, and today's Internet and devices allow for constant accessibility. This makes it difficult to define and measure actual working time, especially when employees read and respond to work emails from home. New communication cultures are also emerging, characterised by a high level of expectation that responses and replies will be prompt.[6]

4 Hereinafter: the Labour Code.

5 Eurofound, *Right to disconnect: Exploring company practises*. Luxembourg, 2021, 1.

6 Elke Ahlers, "Flexible and remote work in the context of digitalization and occupational health", *International Journal of Labour Research* 8. no. 1–2. 2016: 90.

In general, it appears that there are two paradigms for addressing the problems associated with enhanced communications technology involving connectivity and immediacy. One approach, known as the "French legislative model," is characterized by efforts to regulate electronic communication between employers and employees after hours through statutes and standard-setting. This approach has so far achieved the highest popularity. The second method, which can be referred to as the "German self-regulatory model," involves voluntary individual instruments in which private companies adopt policies in the light of their specific and individual needs. This tactic is based on the assumption that any government intervention is a legislative missstep.[7] Some authors stress that the right to disconnect should be implemented mainly through collective agreements that can ensure a work-life balance.[8]

Legally Enshrining the Right to Disconnect

The working environment and ways of doing work have for years been accompanied by the tendency of change, driven in particular by the rapid and continuous development of digital technologies. Even if it might seem that I am talking mainly about the period from the millennium to the present day, the opposite is true. More than 30 years ago, the US Supreme Court declared that the workplace is no longer just a place located in between four walls. The workplace is a place where you take your smartphone, pager, laptop or smartwatch and where you can continue working long after the workday is over.[9] These have led, and continue to lead, to psychosocial risks that include invasion of employee privacy, threats to occupational health and safety, reduced produc-

7 Clarence W. Von Bergen, Martin Bressler, "Work, Non-Work Boundaries and the Right to Disconnect", *Journal of Applied Business and Economics* 21, no. 2. 2019: 51–70.

8 Matteo Avogaro, "Right to disconnect: French and Italian proposals for a global issue", *Revista Direito das Relações Sociais e Trabalhistas* 4, no. 3. 2018: 110.

9 Paul M. Secunda, "The employee right to disconnect" *Notre Dame Journal of International & Comparative Law* 9, no. 1. 2019: 8.

tivity of employees whose (especially) mental health is at risk, and last but not least the blurring of the boundaries between work and private life.

The blurring of the boundaries between work and private life is just one of many consequences affecting the mental health of employees, and the risks arising from employers' demands for the constant availability of employees affect both teleworkers and employees who carry out their work at the employer's workplace. Employees are required to be online at all times, to complete tasks immediately, or even to perform multiple tasks simultaneously, according to employers' needs and expectations. And this way of doing work (multitasking) is associated with increased mental effort and stress, which can lead to tele-bullying.[10] The blurring of the boundaries between work and private life is an important psychosocial factor that can lead to increased employee stress, anxiety and even physical problems related to the constant sedentary lifestyle resulting from the need to be online all the time.[11]

The absence of real rest time, not just formally declared, has a significant negative impact on employees' health. The understanding of health in this respect cannot be limited to the physical health of the individual. Health is made up of both physical and mental health, and it is mental health that has become a frequently debated topic in recent years, and efforts to protect it have been the subject of international, European and national debates.

The growing need to recognise and regulate the right of employees to disconnect and thus protect their health has also become a major issue in the European Union institutions. On the basis of the case-law of the Court of Justice[12] and various studies,[13] the European Parliament proceeded to adopt the Reso-

10 Marcel Dolobáč, "Technostres – ochrana duševného zdravia zamestnanca" in *Pracovné právo v digitálnej dobe*. Praha, 2017: 58.

11 International Labour Organization. Teleworking Arrangements during the COVID-19 crisis and beyond. 2021, 11.

12 See the Judgment of the Court of Justice C-518/15 and C-55/2018.

13 See the study by the European Added Value Unit of the European Parliament's Research Service entitled *The Right to Disconnect* (available online at: <https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642847/EPRS_BRI(2020)642847_EN.pdf>).

lution of the European Parliament of 21 January 2021 with recommendations to the Commission regarding the right to disconnect (2019/2181(INL)).[14] In the Resolution, the European Parliament highlights the negative consequences of the use of information and communication technologies and the need to be constantly connected, including the blurring of the boundaries between work and private life, the impact on employees' mental health (reduced concentration, cognitive and emotional overload, isolation, dependence on technology, lack of sleep, anxiety and burnout syndrome) and their physical health (the impact of static body postures over long periods of time causing muscle strain and musculoskeletal disorders). The objective of the EU Directive on the Right to Disconnect should be to protect health and safety and improve working conditions for all workers by setting minimum requirements for the implementation and enforcement of the right to disconnect.[15] The European Parliament Resolution also called on the Commission to include the right to disconnect in its new strategy on occupational health and safety and to explicitly develop new psychosocial and occupational health and safety measures.

At the same time, the European Parliament called upon the Commission to submit a proposal for an act on the right of disconnect on the basis of Article 153(2)(b) in conjunction with Article 153(1)(a), (b) and (i) TFEU, while the proposal for an act in the form of a directive is being annexed to the said Resolution. In the Resolution, the European Parliament defines the right to disconnect as the right not to perform directly or indirectly work activities and not to engage in work-related communication via digital tools outside working hours, while defining working time in accordance with Article 2(1) of Directive 2003/88/EC.[16] The right to disconnect should belong to all workers who use equipment, including information and communication technologies, for

14 Hereinafter: the Resolution.

15 *ETUC Position on the Right to disconnect.* Adopted at the Executive Committee of 22–23 March 2021, p. 6

16 'working time' means any time during which a worker works under the instructions of an employer and performs his activity or duties in accordance with national law and/or practice.

work purposes, and employers should be obliged to respect this right, and the European Parliament stresses that this should be granted to all workers, regardless of their status and working conditions, and should apply to all sectors, both private and public.

The European Parliament, in the wording of the requested draft directive, not only takes the approach of prescribing an obligation for Member States to legally enshrine the right to disconnect for all employees indiscriminately, but obliges Member States to ensure that employers take the necessary measures to implement the right of employees to disconnect. To this end, Member States should ensure that employers set up an objective, reliable and accessible system to measure the amount of time each worker works each day, in accordance with the right to the protection of the privacy and personal data of employees. The requested draft directive also obliges Member States to establish, in consultation with the social partners, the following minimum working conditions:

- practical arrangements for switching off digital tools for work purposes, including all work-related monitoring tools;
- a system for measuring working time;
- a health and safety assessment, including psychosocial risks, regarding the right to disconnect;
- the criteria for any exemption from the requirement that employers exercise the right of workers to disconnect;
- in the case of an exemption under point (d), the criteria for determining how compensation for work performed outside work is calculated in accordance with Directives 89/391/EEC, 2003/88/EC, (EU) 2019/1152 and (EU) 2019/1158 and with national laws and procedures;
- awareness-raising measures, including on-the-job training, to be taken by employers regarding the working conditions referred to in this paragraph.[17]

17 Article 4(1) of the Annex to the European Parliament Resolution of 21 January 2021 with recommendations to the Commission on the right of disconnect (2019/2181(INL)).

The requested draft directive also includes a requirement for Member States to ensure the protection of employees who have exercised their right to disconnect and to take appropriate measures to prevent any sanctions against them by the employer based on the exercise of the right to disconnect. At the same time, the requested draft directive proposes to eshrine a reversal of the burden of proof in the event of termination of employment or other unfavourable treatment by the employer, the remedy for which (in the event of termination of employment) would be sought by the employee concerned in court, if the facts preceding the termination of employment or other unfavourable treatment would lead to the presumption that the reason for their exrcise or imposition by the employer was vested in the application of the employee's right to disconnect.

As is clear, the requested draft directive is not limited to the requirement that the right to disconnect be legally enshrined in national legislation, but also stipulates minimum requirements to ensure that it is actually enforceable in practice. If the directive as requested is adopted by the European Parliament and the Council in the near future, we can expect that its transposition will significantly improve the current position of employees performing their work using information and communication tools and will thus contribute significantly to preventing the blurring of the boundaries between the work and private lives of these employees.

The requested draft directive included in the resolution is viewed positively and the European Trade Union Confederation required in its opinion[18] the Commission to start the legislative process without further delay and to present the draft directive as proposed by the European Parliament.

The Right to Disconnect Under Legislation in Slovakia

Before the adoption of the right to disconnect in the Labour Code, theory and practice in Slovakia recommended the employee to assert in the employment con-

18 *ETUC Position on the Right to disconnect*. Adopted at the Executive Committee of 22–23 March 2021.

tract the so-called right to disconnect from the network, i.e. not to be disturbed by the employer on non-working days.[19] However, while such a recommendation is appropriate, it is essential to point out that few employees will be given a real opportunity to influence the content of their employment contract. The legislation in the Slovak Republic has undergone a seemingly significant change with the legal enshrinement of the right of employees to disconnect, which until 1 March 2021 was not adjusted or regulated in the Slovak legislation.[20] The amendment to the Labour Code introduced a new concept of legal regulation of homeworking and teleworking, which responds to the needs of practice resulting from the increasing number of employees who, also (but not exclusively) due to the pandemic, started to perform their work from their homes. According to a study carried out by the European Foundation for the Improvement of Living Conditions, in 2020 around 37% of employees across the EU Member States started working from home (in the form of teleworking), while in Slovakia this is almost 30% of employees.[21] With effect from 1 March 2021, the right to disconnect is conceived in the Labour Code as follows: "An employee performing homework or telework shall have the right not to use the work equipment used for the performance of work from home or telework during his or her continuous daily rest and continuous weekly rest, unless he or she is ordered or has agreed to be on work standby or to work overtime during that time, during the period of leave, on a holiday for which work has been cancelled or during obstacles to work. An employer shall not treat as a failure to perform an obligation if an employee refuses to perform work or comply with an instruction during the time referred to in the first sentence."[22]

19 Helena Barancová, *Nové technológie v pracovnom práve a ochrana zamestnanca (možnosti a riziká)*. Praha, 2016: 116.

20 The change was brought about by Act No. 76/2021 Coll. amending Act No. 311/2001 Coll. the Labour Code as amended and supplementing certain acts (hereinafter: the amendment to the Labour Code).

21 Eurofound, *Living, working and COVID-19. First findings – April 2020*. Luxembourg, 2020: 5.

22 Provision of Sec. 52 (10) of Act No. 311/2001 Coll., the Labour Code.

The quoted provision grants the right to disconnect exclusively to employees performing work from home and teleworking. The personal scope of the provision is therefore limited and employees who exercise their right at the employer's workplace are not granted a right to disconnect by the legislation. We see this fact as a major shortcoming, since, as many studies have shown, the rest time of employees who carry out their work using information and communication technologies is very often interfered with by requests from the employer or the employees' supervisors. This refers to short e-mail replies, but also to tasks that require a significant part of the employee's rest time. At the same time, trends in the European Union institutions suggest that the right to disconnect should be granted to all employees without distinction, as long as they meet the condition that they use information and communication technologies in their work. It is expected that in the near future it will be necessary to regulate the personal scope of the right to disconnect and, in accordance with the principle of equal treatment, to grant it to all employees working with information and communication technologies, whether they work in the public sphere (civil service, public works) or in the private sphere.

The right to disconnect is formulated by the Slovak legislator as the right not to use work equipment used for homeworking or teleworking of an employee during his/her continuous daily rest and continuous weekly rest (except when ordered – or he or she has agreed – to work overtime or work standby), during leave, holidays for which work is cancelled, and when there are obstacles to work. However, the concept of work equipment is not further defined by the legislator in the Labour Code. Its definition, however, can be found in Section 2(a) of Slovak Government Regulation No. 392/2006 Coll. on minimum safety and health requirements for the use of work equipment, according to which work equipment is a machine, device, apparatus or tool used at work. However, the non-use of work equipment used for the performance of work, as the essence of the right to disconnection, is not sufficient. The nature of the employees' work and the extent of the work equipment may vary in practice. Where an employee

performs work the substance of which consists in the use of particular software or a program whose functionality is implemented by means of a laptop or desktop computer, the laptop, the desktop computer and the program or software may be regarded as the work equipment. In this case, the employee's private mobile phone may not be considered work equipment and the employer may nevertheless use it to contact the employee with a question or request. In order for the right to disconnect, as enshrined by the Slovak legislator, to be truly effective, it is necessary for the employer, in cooperation with the employee or employee representatives, to set out in the employment contract or in its internal regulations what is considered to be work equipment used for the performance of work. However, the Labour Code does not impose such an obligation on the employer. The practical significance and application benefit of the right to disconnect thus conceived remains highly questionable. In this respect, we consider that a more targeted and precise definition of the right to disconnect, as proposed by the European Parliament in the Directive, would be more appropriate, i.e. the right to disconnect should consist of the right not to carry out work activities directly or indirectly, and of the right not to engage in work-related communication via digital tools outside working hours. Such a right would not be dependent on the definition of work-related equipment, but would directly allow employees to refuse to carry out any activities related to their work outside working hours.

The protection of employees exercising the right to disconnect under the Slovak legislation is ensured by the legislator through the prohibition of treating the non-use of work equipment as a failure to fulfil an obligation. Thus, in practice, an employer could not sanction an employee who exercised the right not to use work equipment outside working hours with a warning about unsatisfactory performance of work tasks, which is a substantive condition for termination of the employment relationship by notice by the employer under Section 63(1)(d)(4) of the Labour Code.[23] Although the protection thus provided is undoubtedly in

23 Provision of Section 63(1)(d)(4): "The employer may give notice to an employee only for reasons where the employee is not performing his/her work tasks satisfactorily and the

place, it cannot be regarded as sufficient anymore, since the employee is the weaker party in the employment relationship and we can reasonably expect that an employee who had the will to exercise the right to disconnect would not do so if he or she knew in advance that such an action would be perceived negatively by the employer. On the other hand, an employer who naturally respects the rest time of his employees will not contact them outside their working hours and it is in principle irrelevant to him whether the right to disconnect is legally enshrined in the Labour Code. However, of course, the right of employees to disconnect cannot be left to the employer's goodwill alone. From this point of view, we consider the protection of the employee exercising the right to disconnect to be insufficient, and it is necessary for this protection to be extended and for the legislator to oblige the employer to take measures to enable the right to disconnect to be exercised. In this regard, we again refer to the requested draft directive contained in the European Parliament Resolution, which sets out in detail the minimum requirements for such measures.

In relation to the protection of the physical and mental health of employees performing telework, it is necessary to point out the direct limited scope of the Labour Code, as it provides in Section 52(7) that an employee who schedules his/her own working time when working at home or teleworking is not covered by certain provisions on the scheduling of weekly working time, continuous daily rest and continuous weekly rest, and others. Despite the fact that the legislator, as mentioned above, has proceeded from the change of the legal regulation of telework, it has not eliminated one fundamental deficiency. It should be noted that even a teleworker who schedules his own working time is entitled to uninterrupted daily rest and uninterrupted weekly rest. This is recognised both by international documents and by the Constitution of the Slovak Republic. The effective wording of Article 52(7) gives the impression that the teleworker is not entitled to it, or that the employer does not have to respect and observe

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employer has called upon him/her in writing within the last six months to remedy the deficiencies and the employee has failed to remedy them within a reasonable time."

the minimum limits applicable to continuous daily rest and continuous weekly rest. We hold that the correct grammatical wording should be that "the performance of telework is not covered by the provisions of (…) on the distribution of uninterrupted daily rest, uninterrupted weekly rest (…)."Teleworkers also have the right to adequate rest after work, they just have to determine the rules for scheduling it themselves, as in the case of rest and meal breaks.[24] However, this shortcoming is not the only one that needs attention. We hold that a teleworkers are employees just like those who work directly at the employer's workplace. They should therefore be entitled to the same rest during the day and week as regular employees. After all, the prohibition of discrimination or giving preferential treatment to teleworkers is legally expressed in Article 52(11) of the Labour Code, which provides that an employee performing homeworking or teleworking shall not be favoured or restricted in comparison with a comparable employee with a place of work at the employer's place of work. We hold that teleworkers who schedule their work hours entirely by themselves are entitled to uninterrupted daily rest and uninterrupted weekly rest, even if they schedule their own hours. However, the current legislation does not directly reflect this fact. In order to protect the health of employees and to prevent the blurring of the boundaries between work and private life, it is necessary that this entitlement be directly expressed and that mechanisms be established to enable the extent of continuous daily rest and continuous weekly rest to be monitored, e.g. in the form of monitoring and recording of the working time of teleworkers. In this context, it is precisely digital technologies that allow us to create a control system that reflects the actual time worked by the employee. At the same time, it is possible to impose an obligation on teleworkers to inform the employer of their working time and, at the same time, to treat the employer's work requirements outside this framework as working time or overtime, for which employees will be compensated in the form of wages or

24 Jana Žuľová, "Sociálne práva zamestnancov vykonávajúcich teleprácu" in *Pracovné právo v digitálnej dobe*. Praha, 2017: 90.

compensatory time off. Such provisions of the Labour Code could have a positive impact on eliminating the employer's arbitrariness as to the frequency of interference with the employee's rest and recovery time.

The modification of the provision limiting the scope of certain provisions on working time is a key point of interest, since the currently effective right to disconnect in the Slovak Republic's legal order is directly dependent on it being clearly and distinctly determined, or at least identifiable, which part of the day is considered to be a time of continuous daily rest and which part of the week is designated for the employee's continuous rest during the week. If this is not clear and distinct, there is a risk that the employee will not be able to exercise the right to disconnect and, in a worse case scenario, will be sanctioned for unsatisfactory performance of work tasks by the employer.

We view positively the efforts of the Slovak legislator to legally enshrine the right to disconnect. However, we would question its applicability and benefit, which should be to protect the (mental) health of employees and prevent the blurring of the boundaries between work and private life. It is essential that the current effective provision on the right to disconnect is seen only as a first step and that it is followed up by further legislative steps towards real protection of employees and their right to rest. At the same time, it is necessary to create or legally enshrine means of protecting employees whose right to disconnect will not be respected by employers.

Conclusion

European Union law does not currently contain an explicitly defined and recognised right to disconnect. The contrary is true though. Employees suffering from stress, anxiety or burnout caused by the persistent blurring of the boundaries between work and private life are experiencing higher rates of absenteeism and increased healthcare costs. It is essential to bear these facts in mind, as their negative effects are felt indirectly by both the employer and the state. It is therefore essential to enshrine the right to disconnect in law, not just in a for-

mal sense, but in such a way that its regulation be actually applied and achieve the stated aim of protecting the employee.

Trends emerging in the European Union institutions suggest that we may soon reach such a regulation. At present, we can also see attempts to regulate the right to disconnect at the level of the Member States, which includes the Slovak Republic. Despite the efforts of the Slovak legislator, effective regulation of the right to disconnect in Slovakia is not currently the means that would actually provide the required and sufficient protection for employees. It is necessary to amend this regulation and to focus in particular on ensuring that the right to disconnect is granted to all employees and not only to those performing work from home or telework. At the same time, the regime of this right should be changed so that it is not only linked to the non-use of work equipment, but also allows employees not to respond in their free time to any requests from the employer, supervisors or colleagues. Finally, it is essential that the legislator creates means of protection for employees exercising their right to disconnect, which are genuinely effective and have a preventive and deterrent effect in relation to the employer.

However, in order not to confine ourselves to criticising our legislator, we must, however, take a positive view of their move to change the legislation as regards the right to disconnect. However, it is essential to pay more attention to the content of this right and its application, because a right that is incorporated into the text of a law without its subsequent application and the means used to enforce it fails to achieve the objective of protecting employees and their health.

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