Global Workplace Law & Policy

Your right to disconnect is about to start

David Mangan (Maynooth University (Ireland)) · Thursday, September 19th, 2024

How will the right to disconnect work?

The French Disconnection

France's 'right to disconnect' was a pioneering attempt to engage with workers' health and safety in response to the extension of working time precipitated by digitalisation. The concept originated with a decision of the Labour Chamber of the Cour de Cassation in October 2001 (2 October 2001 n°99-42.727). Subsequently, Bruno Mettling's report, *Transformation numérique et vie au travail* (Ministre du Travail, de l'Emploi, de la Formation Professionnelle et du Dialogue Social), of September 2015 paved the way for an amendment to Article L. 2242-8 of the French Labour Code providing workers with right to disengage from the workplace outside of working hours.

From France onwards?

The right has since been more widely adopted. There have been several discussions of the topic in academic literature. A few examples of laws illustrate the development. In Act No.81/2017 (10 May 2017), **Italy** allowed self-employed smart/remote workers and employers to devise rest periods and disconnection from technology for work purposes. The right was limited to remote working/teleworking. **Spain's** Organic Law 3/2018 on the Protection of Personal Data and Guarantee of Digital Rights obliges employers to devise a policy regarding a right to disconnect. As noted in a previous contribution to this site, Law 83/2021, of 6 December 2021, which entered into force as of 1 January 2022, **Portugal**amended the Teleworking Framework set forth in the Portuguese Labour Code and imposed a duty on employers to refrain from contacting employees outside of regular working hours. Loi du 28 juin 2023 provided for a right in **Luxembourg** in workplaces where more than 15 workers are employed.

In Europe, the right to disconnect has gained momentum. An **EU Parliamentary Committee's 2020 report** grounded its recommendation of a right to disconnect directive in part on an "'ever-connected' or 'always on' culture that can have detrimental effect on workers".[1] The **European Law Institute** offered its report on guiding principles for the right (2023). (Luca Ratti, one of the authors of the ELI guide, has contributed to this site previously.) The **EU Commissioner for Jobs and Social Rights** committed (12 December 2023) to legislate on the matter. Development of a right to disconnect as a form of worker freedom and autonomy, however, seems to be uniquely Continental European.

We might say there is a transatlantic divide where the **US** does not have a right (**California** has been debating the topic). It may be contentious whether the US would recognise such a right. The **Canadian** province of **Ontario** has a requirement for employers, as of 2021, to have a policy (though there is no legal entitlement to a right to disconnect). The right is absent in the **UK**, though the new government (as of 2024) has proposed to create a "right to switch off". **Ireland**only has a code of conduct which is not legally enforceable. Enforceability is a significant problem: what is a right without enforcement? The Irish approach, which may be a 'high' point of protection amongst these examples, is a modest benchmark for autonomy because it simply underscores the hesitation of some legislators to develop an explicit right that is more meaningful than a nod to the rhetorical.

To this point, **Australia** has added a law which seems to engage with enforcement. (See further Gabrielle Golding's commentary.) Section 333M of the **Fair Work Act** defines a right to disconnect as: "An employee may refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of the employee's working hours unless the refusal is unreasonable". This legislation has broader application than other such laws. It applies to communications from employers, co-workers, and third parties (s.333M(2)). It also sets out five factors in determining what is "unreasonable" contact (s.333M(3)). Finally, there is a path to enforcement: either as a "workplace right" through which an employee can bring an "adverse action" complaint (s.342 Fair Work Act); or as an occupational health and safety action.

A meaningful, enduring right?

As a concept, the right to disconnect represents as an enlightened approach to the changes to work precipitated by information and communications technologies (ICT). It accepts the health and safety challenges to an 'always on' culture which ICT has facilitated. The 'right' also recognises the autonomy of the workforce by separating the individual from work, and accepting individuals'

freedom for other pursuits outside of work (whether they be family-oriented, or individual such as hobbies).

The right to disconnect represents the larger issue of regulating work in a digitalised environment: *are we serious about recognising autonomy in response to the 'always on' work culture influenced by ICT, or will we retain a penchant for orthodoxy with some progressive tropes?*

Treatment of disconnection by legislators has followed a familiar pattern. Generally, the right to disconnect has been recognised as a discrete 'right' which is then inserted into an existing framework (including employment's well-entrenched notion of subordination of the workforce to management). This pattern sets up the 'right' to fall short of facilitating freedom and autonomy for the workforce, particularly in an 'always on' culture. The piecemeal approach deployed to date does not sufficiently address the profound shift effected by ICT in the work setting. On its own, the right to disconnect constitutes a simplistic concept applied to an under-determined problem. Discussion of the right to disconnect in concert with remote work offers one aspect of a holistic approach.

As the EU moves towards developing a directive on this topic, there is an opportunity. A holistic approach into which the 'right' is situated is an important facet in making a success of this opportunity. (The absence of an overarching approach is a more general issue which has been a trait found in measures undertaken in response to technological developments.)

Is this really a right to disconnect?

While the right to disconnect is a positive development, it is also an emblem of an orthodox approach. The "right" to disconnect revolves around the "centrality" of work as a hierarchical work relationship in which individuals voluntarily accept to be directed by a superior. It proposes a time free from intrusion from the obligations that come with being contactable (called into work duties) outside of normal working hours. This is, though, a singular construction of the "right". Viewing it *only* as a time when an individual should not be contacted sets a rather modest aim. The parameters of an employment contract come into question when considering the need for such a right. Additionally, should this time not also be free from the employer entirely, such as monitoring of social media posts? As it is currently discussed, *the right to disconnect is NOT a right that totally disconnects the individual employee from the employment relationship.*

Disconnection is, instead, a *limited suggestion of workplace protection.* (Is this the extent of a right now?) In a discussion of autonomy, the right to disconnect is conspicuously attenuated. It is *only* about protection for employees from punishment when they do not respond to contacts from work (employer, third parties, co-workers). There is a curious absence of a substantive right, with only elements of a procedural right in its place.

References

[1] European Parliament, Committee on Employment and Social Affairs, *Draft Report with recommendations to the Commission on the Right to Disconnect*, 2019/2181(INL), 28 July 2020, 4.

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