

*Mateusz Barwański** <https://orcid.org/0000-0001-7597-3366>

RIGHT TO REST OF THE SELF-EMPLOYED UNDER INTERNATIONAL AND EU LAW¹

Abstract. The main objective of the foregoing article will be to determine whether a self-employed person has the right to rest under international and EU law. According to the research conducted by the OECD, in 2021, the self-employment rate for all countries reached 16.5% of all employed persons. Therefore, bearing in mind that self-employed persons constitute such a large group of all people who provide paid work, it is justified to consider whether they may be entitled to the appropriate protective guarantees, also in the area of the right to rest. Appropriate rest includes not only the right to a holiday, but also a period of daily and weekly rest and the limitation of the maximum working time. The right to rest is also very important in terms of work efficiency and safety in the workplace. Therefore, efforts should be made to ensure that every contractor, including the self-employed, has the right to a proper rest in order to regenerate his strength and exercise the right to health and safety, which every person is entitled to according to international legal regulations.

Keywords: the right to rest, self-employment, the right to safe and healthy working conditions, people working outside the employment relationship, non-employees.

PRAWO DO WYPOCZYNKU SAMOZATRUDNIONYCH W ŚWIETLE PRAWA MIĘDZYNARODOWEGO I UNIJNEGO

Streszczenie. Głównym celem niniejszego artykułu będzie ustalenie, czy samozatrudnionym przysługuje prawo do wypoczynku na gruncie regulacji prawa międzynarodowego i unijnego. Według badań przeprowadzonych przez OECD w 2021 r. współczynnik samozatrudnienia dla wszystkich krajów osiągnął poziom 16,5% spośród wszystkich pracujących. Jest to zatem bardzo liczna grupa spośród wszystkich świadczących pracę zarobkową, co uzasadnia podjęcie rozważań dotyczących przyznania tym wykonawcom pracy odpowiednich gwarancji ochronnych, również w obszarze prawa do wypoczynku, które stanowi bardzo istotne uprawnienie człowieka świadczącego pracę zarobkową. Na właściwy wypoczynek składa się nie tylko prawo do urlopu, ale także kwestia odpoczynku dobowego i tygodniowego oraz ograniczenia w zakresie maksymalnego czasu pracy.

* University of Lodz, Faculty of Law and Administration, mateuszbarwasny@gmail.com

¹ The article was prepared as part of a project financed by the National Science Centre in Poland pursuant to the decision number DEC-2018/29/B/HS5/02534. The project's registration number is: 2018/29/B/HS5/02534.

Prawo do wypoczynku jest też bardzo istotne z punktu widzenia wydajności pracy oraz zachowania bezpieczeństwa w miejscu pracy. Dlatego powinno się dążyć do tego, aby każdy wykonawca pracy, w tym samozatrudniony, miał prawo do właściwego odpoczynku w celu regeneracji sił i realizacji prawa do bhp, które według międzynarodowych regulacji prawnych przysługuje każdemu człowiekowi.

Słowa kluczowe: prawo do wypoczynku, samozatrudnienie, prawo do bezpiecznych i higienicznych warunków pracy, osoby pracujące zarobkowo poza stosunkiem pracy, niepracownicy

The right to rest is one of the fundamental rights of a person performing work (Florek, Seweryński 1988, 200). Already acknowledged in the nineteenth century, it became an important postulate of many labour movements, which at that time indicated a huge need to limit the number of working hours. Many of these demands, including those concerning the limitation of working time and the granting of holiday entitlements, have been reflected in international and national legal regulations. The right to rest is also very important from the point of view of work efficiency and maintaining safety in the workplace. It has been a long held belief that if a person providing work is tired, they pose a greater danger to themselves and others. Therefore, every person performing work should be given the right to rest in order to recuperate. The proper rest consists not only of the right to time off or holiday, but also the daily and weekly rest and restrictions on the maximum working time (Góral 2011, 179). In recent years, numerous socio-economic changes, as well as the development of new technologies, have led to the emergence of new, flexible forms of earning a living. One of the most dynamically developing forms of gainful employment is self-employment. This is confirmed by numerous documents, reports and studies of international institutions and organizations involved in the acquisition and analysis of statistical data related to the labour market. According to the research conducted by the OECD in 2021, the self-employment rate for all countries reached 16.5% of all working people.² This means that, on average, every sixth economically active person is self-employed. These studies show that this is a very large group among all those providing paid work. This therefore justifies consideration of the right to rest of the self-employed. The purpose of this article will be to determine whether the self-employed have the right to rest under international and EU law.

First of all, it is necessary to look at the acts adopted by the United Nations (hereinafter: UN). The Universal Declaration of Human Rights³, adopted on 10 December 1948 in Paris, also focuses on the protection of the human being in socio-economic aspects, including the right to perform gainful employment in

² Own calculation based on the OECD research of 2021: <https://data.oecd.org/emp/self-employment-rate.htm> (accessed: 28.02.2022).

³ The Universal Declaration of Human Rights, adopted on 10 December 1948 in Paris, http://www.unesco.pl/fileadmin/user_upload/pdf/Powszechna_Deklaracja_Praw_Czlowieka.pdf (accessed: 28.02.2022), hereinafter: UDHR.

strictly defined conditions, which also involves guaranteeing their right to rest. The provisions of the UDHR do not refer directly to self-employment. However, the provisions of this document guarantee certain rights to “every man.” This construction means that all people are protected, regardless of the legal form of providing paid work. The beneficiaries of socio-economic guarantees are not only those employed under an employment relationship, but also self-employed persons. This means that the act also contains demands concerning the right to rest of this group of persons providing gainful employment. Article 24 of the cited act guarantees everyone the right to leave and rest, including a reasonable limitation of working hours and periodic paid leave (Florek, Seweryński 1988, 203). It should also be emphasized that Article 24 of the UDHR provides for several aspects related to leisure. It does not refer only to guarantees of a paid leave, but also calls for the introduction of a “maximum and reasonable number of working hours.”

The regulations relating to the analyzed issues are also included in the International Covenant on Economic, Social and Cultural Rights of 19 December 1966⁴. From the point of view of the protection of the self-employed with regard to the right to rest, Article 7 of the ICESCR on the right to fair and favourable working conditions is particularly relevant. It ensures safe and healthy working conditions for all people, as well as adequate rest, leisure time and reasonable working time limitations, periodic paid holidays and remuneration for public holidays (Article 7(d)). It is worth mentioning that, as in the case of UDHR, ICESCR covers “everyone” in its personal scope, regardless of the legal basis for performing work. Furthermore, the use in Article 7 of that act of the words “in particular” indicates that the catalogue contained therein is illustrative. This means that countries should also introduce other solutions that have a positive impact on the availability of rights in this area. Such an approach means that under UN documents and acts, the right to rest is also granted to self-employed persons (Kędzia, Hernandez-Polczyńska 2018, point 1.1).

Acts adopted by the International Labour Organisation (hereinafter: ILO) also regulate protection in the area of the right to rest. They broadly postulate the right to paid annual leave and order the introduction of limitations on working time. These regulations provide for the protection of self-employed workers performing certain professions. In addition, it should be noted that most normative acts of the ILO broadly define their personal scope, covering various professional groups, regardless of the legal form of work (Rycak, Pisarczyk 2019, point 13.3).⁵ On the basis of these regulations, the right to rest is universal and should be granted to every person involved in performing gainful activity, regardless of its legal basis

⁴ Journal of Laws of 1977, No. 38, item 169, hereinafter: ICESCR.

⁵ These conventions use different terms, e.g.: staff (ILO Convention Nos 1 and 30), all employed persons (ILO Convention No. 132 of 3 June 1970 concerning paid annual leave), seafarer (ILO Convention No. 142 of 23 June 1975 concerning the role of vocational guidance and training in the development of human resources).

(see more Stefański 2018). The justification for such a construction is primarily to guarantee the safety of people providing work and as well as any people who may suffer from an increased risk of fatigue-related accidents and injuries. A good example is ILO solutions adopted in relation to: people involved in road transport,⁶ medical staff,⁷ seafarers⁸ and people working in mines.⁹ One of the most important acts of the ILO setting minimum standards of protection in the area of the right to rest is ILO Convention No 132 of 3 June 1970 with regard to paid annual leave.¹⁰

⁶ See ILO Convention No. 67 of 28 June 1939 on Working and Rest Time in Road Transport, <http://www.mop.pl/doc/html/konwencje/k067.html> (accessed: 11.03.2022). The aforementioned Convention ensures that the working time of self-employed persons and members of their families working in road transport should not exceed eight hours a day and forty-eight hours a week. The act also regulates the appropriate daily and weekly rest periods for self-employed people working in road transport. This ILO Convention was revised by ILO Convention No. 153 of 27 June 1979 on Working and Rest Time in Road Transport, <http://www.mop.pl/doc/html/konwencje/k153.html> (accessed: 11.03.2022), which not only upheld the above regulations, but also introduced several other protective guarantees for self-employed persons in road transport. Undoubtedly, the purpose of the acts referred to here was to improve working conditions, as well as to increase the level of safety both for people working in transport and for other road users. It was therefore recognised that the driver, regardless of the legal basis for the performance of work, should be guaranteed a multifaceted right to rest.

⁷ See ILO Convention No. 149 of 1 June 1977 on employment and working and living conditions for nursing staff, <http://www.mop.pl/doc/html/konwencje/k149.html> (accessed: 11.03.2022). Article 1 of that act defines the term ‘nursing staff’ and covers all categories of persons providing nursing care or services. That approach supports the inclusion of the self-employed among those entitled to benefit from the guarantees contained in that Convention. In accordance with Article 6 thereof, nursing staff will benefit from conditions at least equivalent to those enjoyed by other workers in the country concerned. This means that persons providing nursing care or services on their own account are covered by regulations concerning: working time, including the principles of payment for overtime, for inconvenient work and for shift work (Article 6(a) of the Convention); weekly rest (Article 6(b) of the Convention); paid annual leave (Article 6(c) of the Convention) and training leave (Article 6(d) of the Convention).

⁸ See ILO Convention No. 146 of 29 October 1976 concerning paid annual leaves for seafarers, <http://www.mop.pl/doc/html/konwencje/k146.html> (accessed: 11.03.2022). It introduces in Article 3 the right of every seafarer to a paid annual leave of a certain minimum amount (not less than 30 calendar days per year). The personal scope covers any person employed in any capacity on a seagoing vessel. This means that the rights under this act also apply to self-employed seafarers.

⁹ See ILO Convention No. 46 of 21 June 1935 on restrictions on working time in coal mines, <http://www.mop.pl/doc/html/konwencje/k046ang.html> (accessed: 11.03.2022), which guaranteed certain rights of rest not only to workers, but also to other persons working underground. According to Article 2 of that act, a worker is any person who works underground performing any type of work, as well as any person employed directly or indirectly in coal mining. This means that under this Convention the right to maximum working time standards and to a minimum weekly rest is granted to the miner regardless of the legal basis for the performance of work. It can therefore be seen that all people working underground have been protected in this respect, even if they provide their work as self-employed.

¹⁰ ILO Convention No. 132 of 3 June 1970 concerning paid annual leave, <http://www.mop.pl/doc/html/konwencje/k132.html> (accessed: 11.03.2022).

Article 2 of this act indicates that its provisions apply “to all employed persons” (see more Babińska-Górecka 2020, point 17.1.2).¹¹ Therefore, it does not specify the specific form on the basis of which the person providing the work would be entitled to exercise the rights contained therein. On this basis, it can be assumed that the Convention under consideration also covers self-employed persons performing gainful employment for a specific contracting entity. Article 3 of that act introduces the right of any person covered by it to paid annual leave of a fixed minimum amount. This dimension may in no case be less than three working weeks for one year of work (Florek, Seweryński 1988, 210; Rycak, Pisarczyk 2019, point 13.11). In addition, Article 12 of the Convention prohibits the possibility of waiving the right to minimum paid annual leave or not taking such leave in exchange for compensatory benefit.

The justification for covering self-employed persons with the right to rest can also be found in the provisions of the European Social Charter¹². Article 2 of that act, which regulates the right to fair working conditions, obliges Member States to: determine a reasonable number of working hours daily and weekly and to shorten them in the event of productivity gains; provide paid holidays; at least two weeks of paid annual leave and a week’s rest (Florek, Seweryński 1988, 203, 208; see more Stefański 2020, point 15.2). The ESC, like some acts of international law, including primarily the acts of the ILO and the acts adopted by the Council of Europe (hereinafter: COE), grant certain legal guarantees mainly to “workers.” It should be noted, however, that the original English-language versions of those documents used the term “worker” (“travailleurs”) rather than “employee,” which is important in the context of determining the scope of personal legal protection. “Employee” means a person employed solely on the basis of a contract of employment. On the other hand, the term “worker” covers persons working both under a contract of employment and outside an employment relationship, including the self-employed. For this reason, the term “worker” refers to a much wider group of people providing work than “employee.” Therefore, a number of acts of international law guarantee protection in the area of the provision of work for both persons working under an employment relationship and those who are self-employed in conditions similar to those of employees (Servais 2017, 215). Taking into account the above considerations, it should be concluded that self-employed persons are covered by guarantees under Article 2 of the ESC, provided that they meet the conditions specified by law (otherwise Zwolińska 2019, 55).

In the acts of primary EU law, we will not find many provisions guaranteeing the right to rest to work contractors (Babińska-Górecka 2020, point 17.1). Article 158 TFEU (formerly Article 142 EC Treaty) states that ‘Member States shall

¹¹ With the exception of seafarers, who have a separate regulation in this area, ILO Convention No. 146 of 29 October 1976 concerning paid annual leave for seafarers.

¹² Journal of Laws of 1999, No. 8, item 67, as amended, hereinafter: ESC.

endeavour to maintain the existing equivalence of paid leave schemes.’ This is a rather laconic provision that expresses the demand to maintain the institution of paid leave in all EU countries, without specifying any other rules. This regulation is only of a programmatic nature and does not grant any specific rights to persons providing work (Mitrus 2013a). However, protective guarantees regarding the right to rest can be found in the provisions of the Charter of Fundamental Rights of the EU.¹³ Under Article 31(2) thereof, “every worker has the right to a limitation of the maximum working time, to daily and weekly rest periods and to a paid annual leave.” The right to rest on the basis of the CFR is understood broadly, because it is interpreted through the prism of dignity and protection of human life and health. That act uses the term “worker” here. For the sake of proper interpretation, it is therefore necessary to present an understanding of the term. Until the enlargement of the EU, the Court of Justice of the EU (hereinafter: CJEU) took the view that this concept, for the purposes of implementing the principle of freedom of movement of work, should be identified only with persons having the legal status of workers in the light of the provisions of national labour law in force in individual Member States. According to the interpretation at that time, the employee was a natural person employed on the basis of an employment relationship governed by the labour law of the EU Member State from which he migrated in order to take up employment in another EU country (CJEU judgment of 14.07.1976, C-13/76 *Donà v. Mantero*, ECR 1976, 1333; CJEU judgment of 5.10.1988, C-196/87 *Steymann v. Staatsecretaris van Justitie*, Collection of Judicial Decisions of 1998, 6159; CJEU, 15.12.1995, C-415/93 *Union Royale Belge de Société de Football Association v. Bosman*, ECR 1995, No. 12, item I-4921; CJEU judgment of 20.11.2001, C-268/99 *Aldona Malgorzata Jany and Others v. Staatsecretaris van Justitie*, ECR 2001, No. 11A, item I-8615. It was only later that it was assumed that the English term “worker” – as opposed to the term “employee” – also covers those contractors who do not have an employment relationship, but personally perform work on a different legal basis than an employment contract (a similar situation occurs in the context of international law regulations). Therefore, according to the most recent interpretation, the term “worker” (“travailleurs”) includes anyone who personally performs work for another person or entity, regardless of the legal basis for employment (Terry, Dickens 1991, 221–222). Therefore, the CJEU, when granting protection in the area of work under the norms of EU law, ceased to be guided by the national labour law provisions of individual Member States (Court of Justice Judgment of 14.10. 2010, C-428/09, *Union Syndicale Solidaires Isere v. Premier Ministre et al.*, ZOTSiS 2010, No. 10B, item I-9961). It considered that regardless of the legal basis of employment, working time, amount of remuneration or period of employment – every work performed by a natural person is subject

¹³ OJ U.E., C 2007, No. 303, p. 1, as amended, hereinafter: CFR.

to special protection (CJEU judgment of 4.06.2009, Joined Cases C-22/08 and 23/08 *Vatsouras v. Arbeitsgemenscha*, LEX No. 498659). The adoption of such an interpretation allows for the conclusion that in many cases the scope of personal protection guaranteed by EU law has been extended to self-employed persons. Such an approach to this issue determines that the right to rest under the CFR also applies to persons providing their work on the basis of sole proprietorship, working personally for another entity (Mitrus 2013b, 16–30).

The justification for the protection of the self-employed in the scope of the right to rest can also be derived from the provisions of the European Pillar of Social Rights¹⁴. Principle 9 of this document addresses the issue of work-life balance. It mandates the introduction of leave, flexible working arrangements and access to care services. Analyzing EFPS, it should be stated that its creators began to notice dynamically changing socio-economic realities. That is why it calls for flexibility on the one hand and, on the other, for the protection of all workers, including holidays and maximum working time standards. In my opinion, the content and objectives of the EFPS clearly show that the guarantees resulting from this document also apply to persons performing work outside the employment relationship, including the self-employed.¹⁵

An important act of secondary EU law in the context of the issue under consideration is 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. L. of 2003 No. 299, p. 9), which repealed Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ L. L. of 1993 No. 307, p. 18 with further amendments) It guarantees the right to rest in four essential aspects, namely: a break from work during the working day, a daily and weekly rest period and annual leave (Babińska-Górecka 2020, point 17.1.1.2). The foregoing Directive also introduces certain rules for night shifts as well as in the area of rest periods for certain occupational groups.¹⁶ In my view, the personal scope of that act also covers self-employed persons if they provide their work on personally for another entity. This is determined not only by the definition of the term “worker” under EU legislation, but also by the content of its Preamble. It states that the justification for the adoption of the Directive was to guarantee the protection of life and health to persons providing work, which is universal and includes every person.

¹⁴ OJ EU.C of 2017, No. 428, p. 10, hereinafter: EFPS.

¹⁵ This act explicitly refers to the self-employed, see, for example, Principle 5(c) – “Innovative forms of work that ensure quality working conditions shall be fostered. Entrepreneurship and self-employment shall be encouraged. Occupational mobility shall be facilitated” and Principle 12 – “Regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed, have the right to adequate social protection.”

¹⁶ This applies to: persons working on board seagoing fishing vessels, mobile workers and those working on offshore equipment.

The foregoing article considers the right to rest of the self-employed under international and EU law. The analysis of this issue led to the presentation of the following conclusions. First, the right to rest is closely linked to the right to safe and healthy working conditions enjoyed by every work performer, including a self-employed person. Secondly, the protective standards regulated by many acts of international and EU law cover all “working people,” using the term “worker” in a broad sense (“worker” or “travailleurs”). This justifies the granting of a number of rights to the self-employed in the area under consideration. This is not only about guaranteeing the right to leave (or a break from paid work), but also about ensuring proper daily and weekly rest. Thus, bearing in mind the growing scale of self-employment, as well as the growing awareness of the rank and importance of fundamental human rights resulting from the regulations of international and EU law, the legislators of individual countries should grant appropriate protective guarantees in the area of the right to rest to persons providing gainful employment in the above-mentioned conditions.

BIBLIOGRAPHY

- Babińska-Górecka, Renata. 2020. “Prawo do wypoczynku.” In *System Prawa Pracy*. Tom 10: *Międzynarodowe publiczne prawo pracy. Standardy europejskie*. Ed. by Krzysztof W. Baran. Warszawa: LEX/el.
- Florek, Ludwik. Michał Seweryński. 1988. *Międzynarodowe Prawo Pracy*. Warszawa: Instytut Wydawniczy Związków Zawodowych.
- Góral, Zbigniew. 2011. *O kodeksowym katalogu zasad indywidualnego prawa pracy*. Warszawa: Wolters Kluwer.
- Kędzia, Zdzisław. Anna Hernandez-Połączyńska. 2018. *Międzynarodowy Pakt Praw Gospodarczych, Socjalnych i Kulturalnych. Komentarz*. Warszawa: C.H. Beck.
- Mitrus, Leszek. 2013a. “Artykuł 31 Karty Praw Podstawowych Unii Europejskiej.” In *Karta Praw Podstawowych Unii Europejskiej. Komentarz*. Ed. by Andrzej Wróbel. Warszawa: C.H. Beck.
- Mitrus, Leszek. 2013b. “Prawa społeczne w Karcie Praw Podstawowych Unii Europejskiej.” *Państwo i Prawo* 7: 16–30.
- Rycak, Magdalena. Łukasz Pisarczyk. 2019. “Prawo do wypoczynku.” In *System Prawa Pracy*. Tom 9: *Międzynarodowe publiczne prawo pracy. Standardy globalne*. Ed. by Krzysztof W. Baran. Warszawa: LEX/el.
- Servais, Jean-Michael. 2017. *International Labour Law*. Alphen aan den Rijn: Wolters Kluwer.
- Stefański, Krzysztof. 2018. “Prawo do wypoczynku (nie)pracowników. Problem zasadności rozszerzenia przepisów o czasie pracy i urlopach wypoczynkowych na osoby zatrudnione poza stosunkiem pracy.” In *Umowa o pracę a umowa o zatrudnienie*. Ed. by Grzegorz Goździewicz. Warszawa: LEX/el.
- Stefański, Krzysztof. 2020. “Czas pracy.” In *System Prawa Pracy*. Tom 10. *Międzynarodowe publiczne prawo pracy. Standardy europejskie*. Ed. by Krzysztof W. Baran. Warszawa: LEX/el.
- Terry, Michael. Linda Dickens. 1991. *European Employment and Industrial Relations Glossary: United Kingdom, Sweet and Maxwell*, London–Luxembourg–Dublin: Office of Official Publications of the European Communities.

Zwolińska, Agnieszka. 2019. "Prawo do odpoczynku a zatrudnienie cywilnoprawne." *Praca i Zabezpieczenie Społeczne* 1: 54–65.

Legal acts

Acts of international law and international documents

The Universal Declaration of Human Rights, adopted on 10 December 1948 in Paris, http://www.unesco.pl/fileadmin/user_upload/pdf/Powszechna_Deklaracja_Praw_Czlowieka.pdf (accessed: 22.02.2022).

International Covenant on Economic, Social and Cultural Rights of 19 December 1966, *Journal of Laws* of 1977, No. 38, item 169.

European Social Charter (*Journal of Laws* of 1999, No. 8, item 67).

ILO Convention No. 46 of 21 June 1935 on restrictions on working time in coal mines, <http://www.mop.pl/doc/html/konwencje/k046ang.html> (accessed: 11.03.2022).

ILO Convention No. 67 of 28 June 1939 on Working and Rest Time in Road Transport, <http://www.mop.pl/doc/html/konwencje/k067.html> (accessed: 11.03.2022).

ILO Convention No. 132 of 3 June 1970 concerning paid annual leave, <http://www.mop.pl/doc/html/konwencje/k132.html> (accessed: 11.03.2022).

ILO Convention No. 146 of 29 October 1976 concerning paid annual leaves for seafarers, <http://www.mop.pl/doc/html/konwencje/k146.html> (accessed: 11.03.2022).

ILO Convention No. 149 of 1 June 1977 on employment and working and living conditions for nursing staff, <http://www.mop.pl/doc/html/konwencje/k149.html> (accessed: 11.03.2022).

ILO Convention No. 153 of 27 June 1979 on Working and Rest Time in Road Transport, <http://www.mop.pl/doc/html/konwencje/k153.html> (accessed: 11.03.2022).

EU law acts

Treaty on European Union (*Journal of EU Laws* of 2004, No. 90, item 864/30).

Charter of Fundamental Rights of the EU (OJ U.E., C 2007, No. 303, p. 1, as amended).

European Pillar of Social Rights, OJ EU.C of 2017, No. 428, p. 10).

Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ L. L. of 1993, No. 307, p. 18 with further amendments).

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. L. of 2003, No. 299, p. 9).