The Employment Law Review

Fourth Edition

Editor
Erika C Collins

Law Business Research

The Employment Law Review

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THE LAW REVIEWS

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EDITOR'S PREFACE

It has once again been my great pleasure to edit this most recent edition of *The Employment Law Review*. In reviewing chapters for inclusion in this edition, I was struck repeatedly by both the breadth and variety of laws and approaches to employment regulation across jurisdictions as well as the similarities, especially with regard to certain trends, some of which are discussed below. As with the earlier editions, this book is not meant to provide a comprehensive treatise on the law of any particular country but instead is intended to assist practitioners and human resources professionals in identifying key issues so that they may, in turn, help their clients avoid potentially troublesome (and often costly) missteps.

One of the common themes during 2012 was an increase in the promulgation of laws and regulations designed to increase flexibility and lower the costs of labour for employers while maintaining sufficient protections for employees. A prime example of this trend is the passage throughout 2012 of legislation in EU Member States implementing the EU Directive on Temporary Agency Work, which came into effect in December 2011. The Directive and related implementing legislation ensure certain minimum compensation and benefits for temporary agency workers while also increasing flexibility for employers. Both Vietnam and Mexico also adopted legislation in 2012 that sanctions, but also places limitations on, labour outsourcing arrangements. In Brazil, President Dilma Rousseff's Greater Brazil Plan also has been aimed at increasing employment and avoiding the slowdown and economic crisis faced by other jurisdictions. Among the employment-related measures implemented pursuant to the Greater Brazil Plan are relief from payroll contributions for the information technology sector and other incentives to foster employment. Finally, in the UK, a novel idea is under consideration that would allow an employer to issue an ownership interest in the company to the employee in exchange for the employee's agreement not to be protected by the unfair dismissal laws.

While these efforts are, of course, aimed at benefiting workers by addressing unemployment, a number of them also are by-products of another trend: the implementation of austerity measures in response to debt crises in Europe and elsewhere. Fewer unemployed citizens means lower entitlement spending for governments. Other

employment-related austerity measures also have been implemented or proposed that are less beneficial to employees and jobseekers. In the Netherlands, for example, the period of time during which an individual can collect unemployment benefits was reduced from three years to two. Portugal continues to consider a reduction of remuneration and benefits for civil servants and employees public enterprises.

This fourth edition once again includes several general-interest chapters – one addressing employment issues in cross-border mergers and acquisitions, one addressing social media in the workplace, and another addressing global diversity initiatives. This edition also boasts the addition of five new countries, bringing the number of covered jurisdictions to 52.

I wish once again to thank our publisher, particularly Lydia Gerges, Adam Myers and Gideon Roberton; all of our contributors; and my associate, Michelle Gyves, for their tireless efforts to bring this edition to fruition.

Erika C Collins
Paul Hastings LLP
New York
February 2013

Chapter 30

MALTA

Ron Galea Cavallazzi[1]

I INTRODUCTION

The main legislation regulating employment law in Malta is the Employment and Industrial Relations Act ('the EIRA'). There are over 100 regulations, as subsidiary legislation, regulating specific aspects of employment law.

The Industrial Tribunal is the main body vested with jurisdiction to take cognisance of cases involving, *inter alia*, discrimination and gender inequality, victimisation, harassment and unfair dismissal. The Industrial Tribunal also has the competence to settle trade disputes.

Issues related to employment that are not within the competence of the Industrial Tribunal can be heard and determined by the First Hall of the Civil Court.

In certain cases, an appeal on a point of law may be lodged from a decision of the Industrial Tribunal before the Court of Appeal within 12 working days from the date of the decision of the Tribunal.

The EIRA also provides for the establishment of an Employment Relations Board, which is intended to make recommendations on national and sectoral conditions of employment and to advise on other matters referred to the Board by the responsible minister.

II YEAR IN REVIEW

Throughout 2012 most of the cases before the Industrial Tribunal dealt with issues of unfair dismissal. The tendency is for the Tribunal to treat dismissal as a last resort, a radical measure that should be taken by the employer only after all other alternatives fail in their attempt to restrain the employee's disobedience or malpractice.

1 Ron Galea Cavallazzi is a partner at Camilleri Preziosi.

With regard to warnings, there have been a number of pronouncements where the Tribunal looked into the efficacy of warnings and emphasised the employer's role in drawing to the attention of the employee any conduct that could eventually lead to the termination of his or her employment.

Issues such as discrimination based on sexual orientation or change in gender, age discrimination, balance between work time and family time, and extension of maternity leave have found their way before the Industrial Tribunal in recent years. It also appears that the concept of constructive dismissal is gaining popularity among employees.

III SIGNIFICANT CASES

In *Geniev Zerafa v. Phone Direct Limited*,[2] the employee instituted harassment proceedings against her employer on the grounds that he condoned the use of obscene language in the workplace and at times even participated in such conduct.

The Tribunal emphasised the role of the employer to ensure that the work environment is free from any form of assault on the dignity of its employees. The Tribunal also went on to explain that an employer would be held responsible for compensating the employee where the employer, being aware of such conduct, failed to stop it.

The Tribunal ruled that there was a case of sexual harassment and ordered the defendant to pay compensation in the amount of €2,330 to the plaintiff.

In 2010, the Industrial Tribunal gave its first award on the concept of verbal harassment, in the case of *Doris Bonello v. General Soft Drinks Company Limited*.[3] This recognised that verbal comments, whether by fellow employees or by the employer, are capable of constituting harassment. Of particular importance was the Tribunal's acceptance of the fact that it is sufficient for any such conduct to have taken place only once to give rise to a claim for harassment.

In determining whether the employer may be held liable for conduct by an employee in respect of a fellow employee, the Tribunal considered whether the employer created a sensitive work environment where any such conduct can be comfortably reported by an employee.

The Tribunal awarded the plaintiff €2,000 by way of compensation for verbal harassment suffered in the workplace.

With the increased awareness on the right to a workplace free from discrimination, there has also been an increase in complaints against discriminatory practices. Cases on discriminatory treatment range from complaints about different salary rates for workers pertaining to the same class of employment for work of equal value[4] to complaints about discriminatory treatment in the award of promotions.[5]

2 Industrial Tribunal, 27 June 2007, decision No. 1803.

3 Industrial Tribunal, 27 July 2010, decision No. 2019.

4 *Neil John Pavia v. Mediterranean Aviation Company Limited*, 1 June 2010, Industrial Tribunal.

5 *George Aquilina v. Air Malta plc*, 1 July 2008, Industrial Tribunal.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

In Malta there is no specific requirement for a contract of employment to be in writing. The EIRA, however, requires that a written statement be provided to the employee containing the basic conditions of employment.

In those cases where a written contract of employment is in place, the employer must provide the employee with a signed copy of the agreement by not later than eight working days from the date of the contract.

In those cases where there is no written contract of employment or where the written contract does not cover all or some of the information required to be notified to the employee the employer is bound, by not later than eight working days from the commencement of employment, to provide a letter of engagement or a signed statement including information relating to the conditions of employment.

Fixed-term contracts are permissible under Maltese law and are regulated by the EIRA as well as the Contracts of Service for a Fixed Term Regulations.

The employer must inform the employee of any changes to the terms and conditions of employment after the commencement of employment, by means of a signed statement to be delivered by the employer not later than eight days from the date when the changes come into effect. The employer is not obliged to notify the employee of any changes resulting from a change in the laws, regulations or a collective agreement regulating the place of work.

Case law has confirmed that contracts of employment cannot be changed unilaterally.

ii Probationary periods

By default, the first six months of every contract of employment is probationary. The parties may agree on a shorter probationary period. In relation to certain posts the probation period is of one year unless otherwise specified in the contract of service or in the collective agreement.

During the period of probation either party may choose to terminate the contract of employment without giving any reason. No notice is required if the employee has been in employment for less than one month. After having been in employment for more than one month, one week's notice of termination is required.

iii Establishing a presence

Any person hiring employees must be registered as an employer with the Commissioner of Inland Revenue. An employer also has an obligation to inform the Employment and Training Corporation that an employee has been employed.

Registration is required even if employees are being hired through an agency or a third party, so long as the relationship is an employment relationship.

A foreign company can engage an independent contractor, but it may nonetheless, in certain circumstances, be required to be registered for tax purposes.

Maltese law provides no definition of a permanent establishment ('PE'). Any references to PE are interpreted as referring to the meaning given to it in double taxation

treaties, which are based on the OECD Model Convention on Income and on Capital. In terms of the OECD Model definition, a contractor can only create a PE for the foreign company if it is a dependent agent of the foreign company.

Where a foreign company hires Maltese employees to work in Malta, the employees will be entitled to all the statutory benefits provided under Maltese law.

The employer is responsible for deduction of the tax to be paid by the relevant employee. The tax is deducted directly from the employee's emoluments being paid for the relevant period.

V RESTRICTIVE COVENANTS

Maltese law does not regulate restrictive covenants. Maltese courts have, however, had the opportunity to pass judgment on the matter. The decisions are based on the theory of clauses in restraint of trade and state that any such provisions may be impugned, in deserving cases, on the basis of Article 985 of the Maltese Civil Code, which provides that things that are impossible, or prohibited by law, or contrary to morality or to public policy, may not be the subject matter of a contract.

The aim of restrictive covenants should be restricted to what is necessary for the employer to protect its legitimate trade interests, such as client information and trade secrets. In addition, the employee's right to employment cannot be prejudiced and accordingly any post-termination restrictive covenants should strike a balance between the interests of the employee and the employer.

Based on the available case law, for a post-termination restrictive covenant to be enforceable, it must: (1) be required in order to protect the employer's legitimate business interests; (2) not go beyond what is required to do this; (3) be limited by a specific time and to a geographical area; and (4) the employee should receive compensation (commensurate to the burden imposed by the restriction).

VI WAGES

i Working time

Working hours are regulated by the Organisation of Working Time Regulations. Save for the exceptions in the Regulations, the average working time for each seven-day period of a worker, including overtime, should not exceed 48 hours calculated over a reference period. An employee may opt out from the application of this limitation.

Night work is regulated by the same regulations. A night worker's normal hours of work should not exceed an average of eight hours in any 24-hour period.

ii Overtime

Until 2012 there was no general regulation relating to overtime and compensation for overtime was dealt with in the various Wage Regulation Orders (which relate to particular types of business and regulate the conditions of employment thereof).

With the coming into force of the Overtime Regulations an employee whose overtime rate is not covered by a Wage Regulation Order is to be paid at the rate of 1.5

times the normal rate for work carried out in excess of a 40-hour week, averaged over a four-week period or over the shift cycle.

Wage Regulation Orders prevail over the Overtime Regulations where the rate of overtime specified in the former is more favourable to the employee.

VII FOREIGN WORKERS

The Information to Employees Regulations[6] provides for a list of records to be held by the employer in respect of each employee, irrespective of whether the employee is a foreigner or a national. There is no limit on the number of foreign workers a workplace or company may have.

EU citizens may enter into, remain and reside freely in Malta and may even seek and take up employment (or self-employment) in Malta upon presentation of a valid identification document. This right is subject to limitations on the grounds of public policy, public security and public health and where any such stay is prolonged over a period of three months, a residence permit is required.

Where an EU citizen intends to take up employment in Malta, a licence is required in addition to a residence permit. Any such citizen shall be considered to have resident status for as long as he or she does not become voluntarily unemployed.

The third country national must apply for a work permit. Upon a work permit being issued, the third country national must apply for a residence permit. Residence permits are generally granted for the duration of the validity of the work permit.

Income earned, accrued or derived in Malta is subject to tax in Malta irrespective of the worker's nationality.

The EIRA applies to contracts of service in Malta, accordingly any benefits prescribed under the EIRA, and subsidiary legislation, are available to a foreign worker employed in Malta under a Maltese contract of service.

The EIRA does not distinguish between local or foreign employees, as long as they are employed under a Maltese employment contract. Specific legislation also defines particular rights of foreign employees working in Malta, such as the conditions of employment not being less favourable than the minimum conditions of employment of comparable employees.

VIII GLOBAL POLICIES

There is no legal requirement for an employer to have a formal set of disciplinary rules. It is, however, common practice for an employer to have its own set of rules. Any such disciplinary rules must be brought to the employees' attention in order to be applicable.

Such rules are normally either included in a contract of employment, or in the form of a policy that must be made known to employees on commencement of employment or on its being issued, or in a collective agreement that is the result of a collective bargaining process.

6 Legal Notice 431 of 2002.

Where the rules are contained in a collective agreement the EIRA prescribes that a copy is to be sent to the director responsible for employment and industrial relations within 15 days of its execution.

Discrimination and sexual harassment are specifically prohibited. Although there is no obligation for employers to draw up rules to this effect, it is encouraged.

There is no requirement that the rules be written in the local language. From decisions of the Industrial Tribunal it appears that any such rules must be brought to the attention of the employees and be such as to be understood by the employees. Accordingly they should presumably be in a language that the employees understand.

If the rules are contained in a collective agreement then the collective agreement is generally signed by representatives of the employees and considered to be binding on the employees. If the rules are drawn up by an employer as a policy, although there is no specific position provided for at law, decisions specify that any such rules must be sufficiently publicised to the employees.

There is no specific guidance on where the rules should be posted and distributed, except for the fact that the rules are brought to the attention of the employees through suitable means. Whether or not the company's intranet would be sufficient publicity in respect of all employees would depend on specific circumstances.

Incorporating the disciplinary rules into the employment contract is a possibility, but it is not particularly common practice.

IX TRANSLATION

There is no obligation to have employment documents translated into the local, or the employee's native language, and, to our knowledge, there have not been any decisions in this regard in the local context. The Industrial Tribunal is, however, likely to endorse the UK line of reasoning, if faced with a similar circumstance.

A translation is recommended in order to ensure that the employee has knowledge of the contents of the employment contract including any rights and obligations arising therefrom.

It would be advisable to translate the employment contract as well as any other related documents particularly those containing anything relating to the recognised conditions of employment as defined in the EIRA.

Given that there is no obligation at law, as long as the contents of the original document are faithfully reproduced into the translated document, it is not likely that any further formalities are required.

The employment contract does not have to be translated into the language of the employee in order to be enforceable in court but a tribunal is likely to look into whether the employee is familiar with the contents of the document.

X EMPLOYEE REPRESENTATION

Employees may form work councils or form part of other representative bodies, as specifically recognised in a number of regulations.

The special negotiating body in terms of the European Works Council Regulations is to be made up of a number of members in proportion to the number of employees employed in each Member State by the Community-scale undertaking or Community-scale group of undertakings. The allocation in respect of each Member State is one seat per portion of employees employed in that Member State amounting to 10 per cent or a fraction thereof, of the number of employees employed in all the Member States taken together.

In respect of trade union representation, there is no fixed ratio of representation, however a trade union would require a majority of 50 per cent plus one of the employees in a class of employees in order to claim the right to be recognised by the employer to represent that class for collective bargaining purposes.

In terms of the European Works Council Regulations, members to the special negotiating body situated in Malta are selected by means of an election from among eligible candidates. The central management appoints a person to supervise the process of nominations.

In respect of trade union representation, there is no regulated process.

The representatives forming part of the special negotiating body remain in office until its function to negotiate for an agreement to establish a works council or an alternative information and consultation procedure ceases.

No specific term is provided in respect of trade union representation.

Apart from the benefits enjoyed by all employees in terms of the EIRA, members of the special negotiating bodies also have the right to continue receiving their salaries when absent from work for the purpose of attending meetings or to perform other duties that are required of them under the regulations. Additionally, members of any such bodies are entitled to attend training sessions without loss of wages in certain circumstances.

The employer has an obligation to recognise the union or works council. The right for a trade union to be recognised in the circumstances set out above has emerged from case law.

The works council has the right to meet with the central management once a year. In exceptional circumstances or decisions affecting the employees' interests (such as relocation of business or collective redundancies) there remains the right to be informed and to meet for information and consultation purposes.

XI DATA PROTECTION

i Requirements for registration

In terms of the Data Protection Act ('the DPA') a personal data controller has an obligation to notify the Information and Data Protection Commissioner prior to carrying out any processing operation (subject to limited exceptions).

The company must identify the information being processed and the processing activities.

By default, the data subject's free and unambiguous consent is required for processing data. There are, however, instances where consent is not required. All of the excepted circumstances require a judgment to be made to balance the interests of the controller and the data subject.

The controller should not process more personal data than is necessary, considering the purpose of processing. In addition, the personal data processed must be adequate and relevant in relation to the purposes of the processing.

The DPA requires the controller to implement appropriate technical and organisational measures to protect the personal data that is processed against accidental destruction or loss or unlawful forms of processing by providing an adequate level of security.

ii Cross-border data transfers

Subject to certain exemptions, the data controller is generally required to notify the Information and Data Protection Commissioner of a cross-border transfer of data, even through the notification referred to above.

The transfer of personal data to a third country that does not ensure an adequate level of protection requires an authorisation by the Commissioner. Save for specifically excepted circumstances, the consent of the data subject is required for the information to be processed irrespective of the territorial scope of the transfer.

The use of safe harbour agreements is recognised in Malta. If a safe harbour processor intends to carry out an onward transfer, it must verify whether the third country subscribes to safe harbour principles, is subject to the applicable directive or otherwise whether it is bound to the level of protection and security of safe harbour by a written agreement.

iii Sensitive data

Sensitive personal data is defined as personal data that reveals race or ethnic origin, political opinions, religious or philosophical beliefs, membership of a trade union, health or sex life.

According to the DPA, sensitive personal data may be processed if the data subject has given his or her explicit consent to processing, or has made the data public. Sensitive personal data may be processed if appropriate safeguards are adopted and the processing is necessary so that:

a the controller is be able to comply with his or her duties or exercise his or her rights under any law regulating the conditions of employment;

b the vital interests of the data subject or of some other person will be able to be protected and the data subject is physically or legally incapable of giving his or her consent; or

c legal claims will be able to be established, exercised or defended.

iv Background checks

Employers may have a legitimate interest in conducting background checks. The general principles of data protection still apply, however, in the sense that the employee's consent is still required for the processing of personal data.

The same principles apply in the case of credit checks. Financial information of the data subject qualifies as personal data.

An employer may ask a prospective employee to produce a criminal record together with his or her job application. In certain instances an employer may request

regular updates of an employee's criminal record. A criminal record can only be obtained by the individual to whom it relates.

Employers should not process personal data of employees without the prior approval of the Commissioner where any such personal data involves risks of improper interference with the rights and freedoms of the data subject.

XII DISCONTINUING EMPLOYMENT

i Dismissal

Contracts of employment for an indefinite duration may only be terminated by the employer for a 'good and sufficient cause' or on grounds of redundancy. Contracts of employment for a fixed term may be terminated by the employer for a 'good and sufficient cause' or at any time (without cause) subject to a penalty.

The employer must notify the Employment and Training Corporation of any termination of employment on the appropriate form. There is no requirement to notify a trade union or works council on termination of employment. There is, however, a requirement of notification and consultation in cases of collective redundancies.

An employee whose employment is terminated on the grounds of redundancy is entitled to be rehired if the same post becomes available within 12 months from termination. Employers are generally expected to offer alternative employment, where possible, in cases of redundancy.

Notice is only required in cases of dismissal for redundancy and, when an employee has been employed for over one month, during probation. On receiving notice from the employer, the employee may choose to either work through the notice period, or to request the employer (at any time during the notice period) to pay a sum equal to half the wages that would be payable in respect of the unexpired period of notice.

If an employee is on injury leave as a result of an injury on duty, or is suffering from an occupational disease, the employer may not terminate such employees' employment. The EIRA also protects pregnant employees and employees on maternity leave against dismissal.

Payments on termination are due either for the notice period in cases of redundancy, or by way of penalty if a fixed-term contract is terminated prematurely without cause. If an employer dismisses an employee (on an indefinite contract) summarily, the employee may also be entitled to compensation for unfair termination. Although not regulated by law, settlement agreements are common and seem to have been accepted by the Maltese courts.

ii Redundancies

Termination of employment on grounds of redundancy must be in accordance with the 'last in, first out' rule.

In the context of collective redundancies an employer must notify its decision to the employees' representatives and to the Department of Industrial Relations and engage in a process of consultation with a view to identifying means of avoiding collective redundancies or reducing the number of employees who are affected.

The employer's obligation is to consult with representatives of the affected employees; however, in practice the government is normally also notified.

An employee who is made redundant has the right to be re-engaged by the employer if the post previously occupied is available again within 12 months from termination.

The notice period in cases of redundancy is based on the length of service of the employee and is specified in the EIRA. The employee may either work through the notice period or request payment of a sum equal to half the wages that would be payable in respect of the unexpired period of notice.

As stated above, employees who are on injury leave or affected by an occupational disease, or pregnant, or on maternity leave, are protected against dismissal. In cases of redundancy, the only severance payment is payment for the notice period. Settlement agreements are not as common in cases of redundancy as in other instances of termination.

XIII TRANSFER OF BUSINESS

Transfer of business is provided for in the EIRA and the Transfer of Business (Protection of Employment) Regulations.

When a business or part of a business is transferred, any employee in the employment of the transferor on the date of transfer of the undertaking is automatically deemed to be in the employment of the transferee, who takes on all the rights and obligations of the transferor in relation to the employee. Obligations relating to notification and information are also imposed on the transferor and transferee.

Following the transfer, the transferee must continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

XIV OUTLOOK

It is likely that disputes in employment are to become more technical and that the move from a less formal procedure in the Industrial Tribunal to one that is more comparable with the procedure formally adopted in other courts will continue due to the increasing presence of legal representation of parties to a dispute.

Employers might wish to consider the options available to them when engaging new employees, assessing the types of available employment relationship in relation to the post that the new employee is to occupy.

Appendix 1

ABOUT THE AUTHORS

RON GALEA CAVALLAZZI

Camilleri Preziosi

Ron read law at the University of Malta and graduated as a Doctor of Law (LLD) in 2004 and was called to the Bar in 2005. He joined Camilleri Preziosi in 2004 as a trainee, became an associate in 2005 and senior associate in 2010. Ron was appointed as a partner in 2013.

Ron is a member of the Malta Chamber of advocates and regularly deals with Maltese, English and Italian speaking clients. He is actively involved in matters concerning employment and industrial relations, public procurement, competition law and state aid, aviation law, information technology, energy and general commercial law.

His experience in employment and industrial relations includes advice to a number of the larger and medium-sized local companies, as well as international firms having a presence in Malta. He has also been involved in collective agreement negotiations, as well as regularly representing clients before the Industrial Tribunal and the Court of Appeal in relation to employment disputes.

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