

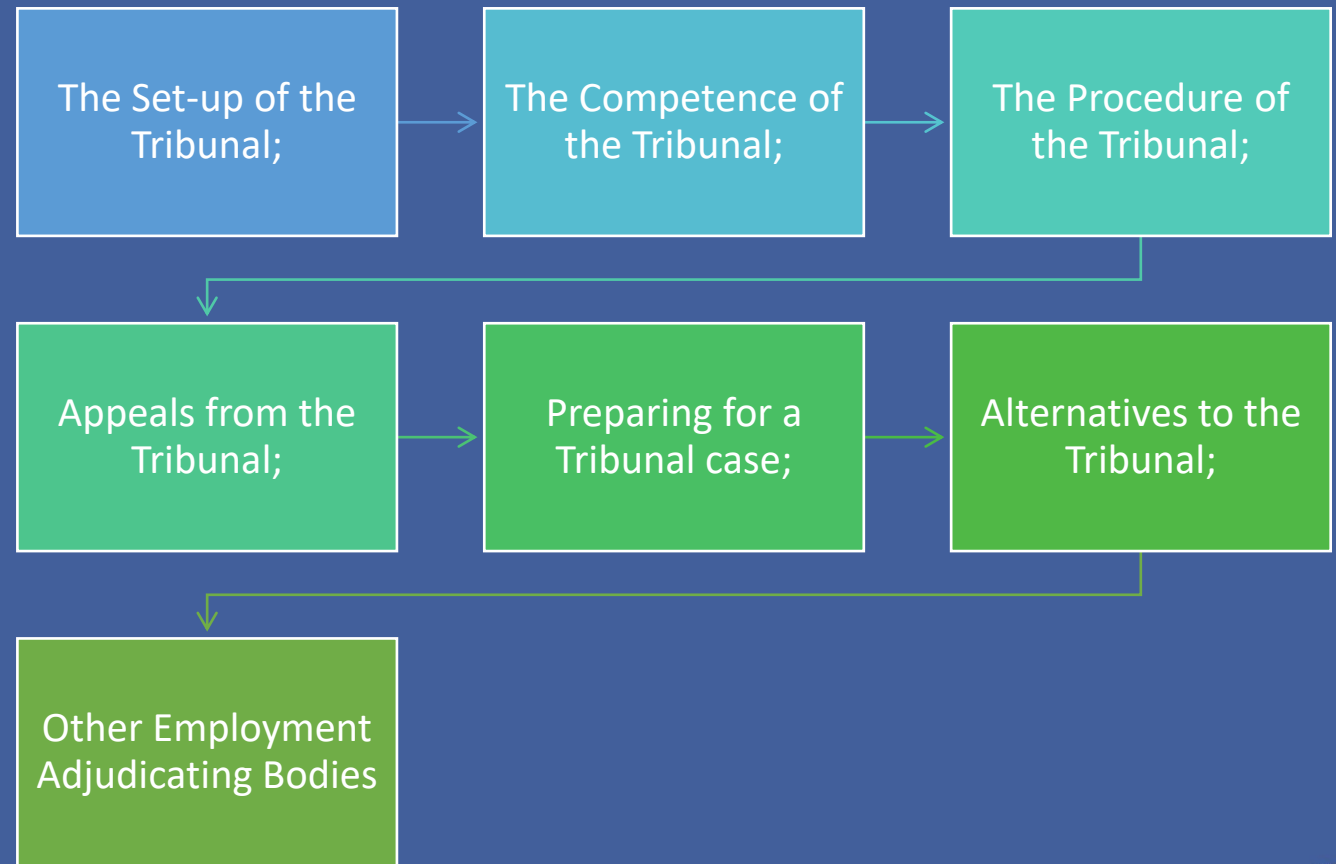
# The Workings of the Industrial Tribunal

Dr Christine Calleja

MAMO TCV  
ADVOCATES



# Today's discussion...



# History of the Tribunal

Industrial Relations Act (1976) – new concept of an Industrial Tribunal;

Offered the possibility for the first time of reinstatement of employees who had been unfairly dismissed.

# Before the Tribunal...

- Conditions of Employment (Regulations) Act (CERA) – an employee cannot be dismissed except on grounds of redundancy or for just cause.
- Remedy – ordinary courts + only a fine could be imposed on the employer.
- NO reinstatement and NO compensation.
- IRA – Tribunal had competence AND could order an effective remedy – reinstatement and/or compensation.
- Jurisdiction was exclusive.

# Set-Up of the Industrial Tribunal

- Title II (Industrial Relations) Part III – The Industrial Tribunal.
- Prime Minister appoints a panel of not more than 15 persons as chairpersons – consultation with the MCESD.
- At least 3 lawyers – 7 years of experience (?)
- Period of 3 years but can be extended further.
- Cases which related to discrimination, equal pay etc (NOT unfair dismissal) – chairperson needs to be a lawyer.

Who is  
entitled to  
protection?

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Employee (contract of service) v self-employed (contract for service);

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Employment Status National Standard Order (S.L. 452.108) - Employment is a matter of fact more than contract

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Meeting 5 out of 8 criteria = employee.

# Criteria

- (a) he depends on one single person for whom the service is provided for at least 75% of his income over a period of one year;
- (b) he depends on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out;
- (c) he performs the work using equipment, tools or materials provided by the person for whom the service is provided;
- (d) he is subject to a working time schedule or minimum work periods established by the person for whom the service is provided;

# Cont.

- (e) he cannot sub-contract his work to other individuals to substitute himself when carrying out work;
- (f) he is integrated in the structure of the production process, the work organisation or the company's or other organization's hierarchy;
- (g) the person's activity is a core element in the organization and pursuit of the objectives of the person for whom the service is provided; and
- (h) he carries out similar tasks to existing employees, or, in the case when work is outsourced, he performs tasks similar to those formerly undertaken by employees.



# Roski Eduard v Emperor Aviation (CoA 91/2019)

- Tribunal considered – he was not registered with JobsPlus + never paid tax or social security contributions in Malta; he had refused to furnish documents to prove that his only income was through the defendant company and that he had paid his taxes and social security in the UK; he had issued invoices in the name of a company;
- Other factors such as being subject to time schedules and using equipment of the company – no other choice since he was a pilot – did not mean he was an employee.

# Limitations on jurisdiction...

- 1991 case (Decision 427) – Maria Dal Pane Ciarlo and Scuola Elementare Dante Alighieri: employer with the Italian government but paid by the Italian Embassy in Malta.
- Tribunal – since the employer was an Italian entity (Italian Ministry for Foreign Affairs), proceedings could only be instituted in Italy.
- Application of Private International Law rules.

# Situation today – Brussels Regulations

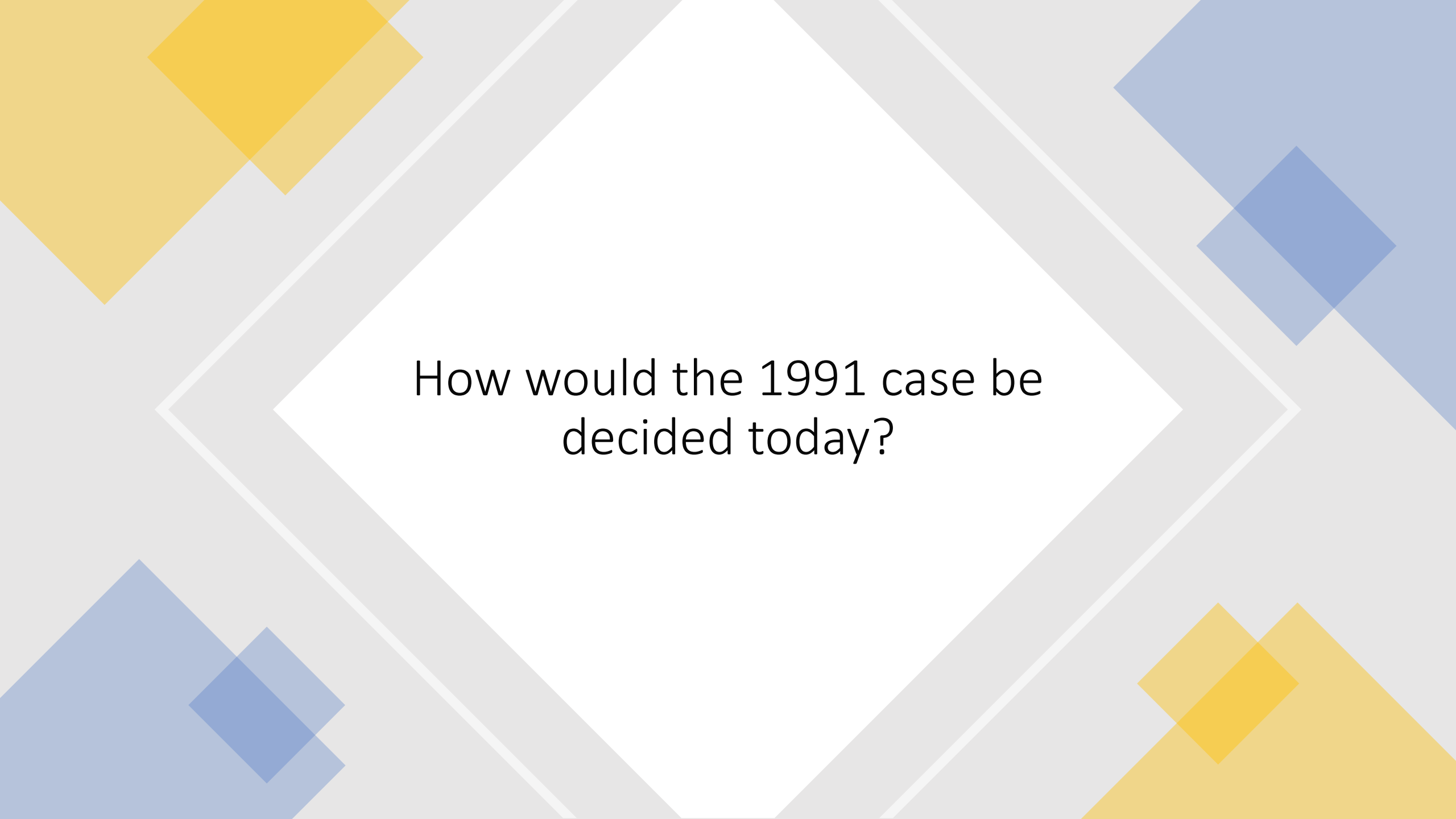
- Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- If an employer is not domiciled in a MS but has a branch, agency or other establishment in a MS – employer deemed to be domiciled in that MS.

# Cont.

- Employed domiciled in a MS may be sued:
  - - courts of MS where he is domiciled OR in another MS from where the employee habitually carries out his work or the last place from where he did so OR if he does not habitually carry out work in one country, where the business which engaged him is situated.
- Employer not domiciled in a MS – can be sued in country from where the employee carries out his work or where the business is situated.

# Cont.

- Employer can only sue the employee in the courts of the Member State where the employee is domiciled.
- Employer can however bring a counter claim in the same court hearing the original claim.
- Can only depart from these provisions by agreement:
  - 1. Entered into AFTER the dispute has arisen; OR
  - 2. Allows the employee to bring proceedings in other courts.



How would the 1991 case be  
decided today?

# Powers of Tribunal in cases of unfair dismissal

Reinstatement (restoration of former position as if the dismissal has not taken place);

Re-engagement (engagement under a new contract).

There needs to be a specific request by the applicant.

It needs to be practical and in accordance with equity.

Reluctance of the Tribunal to order reinstatement in small companies / sole owner; personality clashes.

# Reinstatement excluded...

- When the applicant is employed in a managerial or executive post which requires a special trust in the person of the holder of that post or in his ability to perform his duties.



# Compensation

- If there is no request for reinstatement/re-engagement OR the Tribunal does not make such an order – Tribunal is to make an order for compensation.
- Reinstatement – usually without loss of pay from date of dismissal until date of reinstatement.

# Calculating Damages



In determining compensation, Tribunal is to take into account:



-Real damages and losses incurred by the employee;



-Other circumstances which may affect the applicant's employment potential such as his age and his skills.

# How is compensation calculated?

Borg Carmel v Malta Public Transport (Operations) Ltd, 8<sup>th</sup> March 2019, Court of Appeal.

Stephen Briffa v Arkadia Marketing Ltd, 25<sup>th</sup> February 2019, Court of Appeal.

Doreen Saliba v Foster Clarks Products Limited, 2<sup>nd</sup> February 2022, Court of Appeal.

# Other cases...

- Cases of discrimination / equal pay for equal work / victimisation / harassment (cases which need to be heard by a Chairperson who is a lawyer who has been practising for at least 7 years...)
- Tribunal can – cancel employment contract / cancel clause in the employment contract / cancel clause in a collective agreement / AND order payment of compensation for loss and damage sustained in consequence of the breach.

# Jurisdiction of the Tribunal

- Article 75 (1) of Chapter 452:
- (a) all cases of alleged unfair dismissals;
- (b) all claims made in accordance with sub-articles (11) and(12) of article 36 of this Act, for sums which may become due to a worker or to an employer following the termination of a contract of service for a fixed term before the expiration of the term definitely specified in the contract; and;
- (c) all cases falling within the jurisdiction of the Industrial Tribunal by virtue Title I of this Act or any regulations prescribed thereunder.

# 1. Cases of unfair dismissal

- "unfair dismissal", in relation to a worker, means:-
  - (a) the termination by the employer in respect of that worker of a contract of employment for an indefinite time (other than probationary employment as defined in this Act) being a termination which is not made solely on the grounds of redundancy or for a good and sufficient cause in accordance with the relevant provisions of this Act or any regulations prescribed hereunder, or
  - (b) which is made in contravention of the provisions of article 64(4), or
  - (c) which, though made on grounds of redundancy or for a good and sufficient cause, is discriminatory as defined in this Act or any regulations prescribed hereunder; and includes any failure by the employer to re-employ such person or to re-employ him as provided in article 36(3), or
  - (d) the termination by the employer in respect of that worker of a contract of employment for a fixed term:

# Definition before amendments of 2020...

- "unfair dismissal", in relation to a worker, means:-
- (a) the termination by the employer in respect of that worker of a contract of employment for an indefinite time (other than probationary employment as defined in this Act) being a termination which is not made solely on the grounds of redundancy or for a good and sufficient cause in accordance with the relevant provisions of this Act or any regulations prescribed hereunder, or
- (b) which is made in contravention of the provisions of article 64(4), or
- (c) which, though made on grounds of redundancy or for a good and sufficient cause, is discriminatory as defined in this Act or any regulations prescribed hereunder; and includes any failure by the employer to re-employ such person or to re-employ him as provided in article 36(3).

# Why was it changed?

Waldemar David Galea vs L-Universita' ta' Malta (25/01/2019) – Court of Appeal.



## a. Termination of an indefinite contract

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Only justification – probation OR redundancy OR a good and sufficient cause.

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If employer proves either one – no unfair dismissal.

# Probation

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Duration – 6 months or 1 year (maximum).

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Extensions of probation – when is it permitted and how is it to be done?

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Duration of notice during probation - 20/11/2019 – Case 546/2018PM1).

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Special rules for probation for a woman who is pregnant/ recently given birth / breastfeeding (S.L. 452.91).

# *Dennis Paul Nugent v Malta Public Transport (Industrial Tribunal 28/2/2017)*

- ▶ Employee claimed he was not given a fair hearing when dismissed during probation;
- ▶ Tribunal:
  - i) Employer has the right to terminate without giving a reason;
  - ii) Even if reason is given, Tribunal has no competence to ‘judge’ that reason.
- ▶ Tribunal advised employers NOT to give reasons for termination during probation.

# Redundancy

- Rules:
  - 1. If post becomes available within 1 year from date of termination – post to be offered again to person made redundant.
  - 2. Selection criteria for redundancies – Last In First Out Rule per class of employment.
- What is class – definition in Chapter 452.

# Class

- *"class" when used in the context of a group or a category of employees shall refer to the groups or categories listed in a collective agreement:*
- *Provided that where there is no collective agreement or where a collective agreement does not stipulate groups or categories of employees, it shall refer to the work performed or expected to be performed independently of the title or name given to the post;*

# *Victoria Spiteri vs St. Catherine's High School – Court of Appeal – 18/10/2006);*

- ‘Class’ should not be given too strict an interpretation – consider also ‘interchangeability’ of employee.
- *“Generalment redundancy tirriferi fejn intrapriza jehtigilha li tnaqqas in-numru tal-haddiema taghha ghax sejra finanzjarjament hazin. Izda hemm ukoll kazi, li anke dan it-Tribunal jaccetta, li minhabba reengineering, xi zvilupp teknologiku jew xi tibdil fil-metodologija tax-xoghol, jew ghal ragunijiet ta’ marketing ikun jinhtieg xi tnaqqis ragonevoli fil-workforce.”*

# *David D'Anastas vs Thermoplastics Ltd – Court of Appeal – 26/06/2012*

- Is there the need to offer alternative employment prior to making an employee redundant?
- What is the snowball effect?

# Theuma Alessandra sive Sandra v Mangion Alfred (Court of Appeal 23/05/2008):

- Quoting English case law the Court proposed these guidelines:

*“(a) was the employee dismissed?*

*(b) if so, had the requirements of the business for employees to carry out work of a particular kind ceased or diminished (or were they expected to do so)?*

*(c) if so, was the dismissal caused wholly or mainly by that state of affairs?” (“Safeway Stores vs Burrell 1997)*



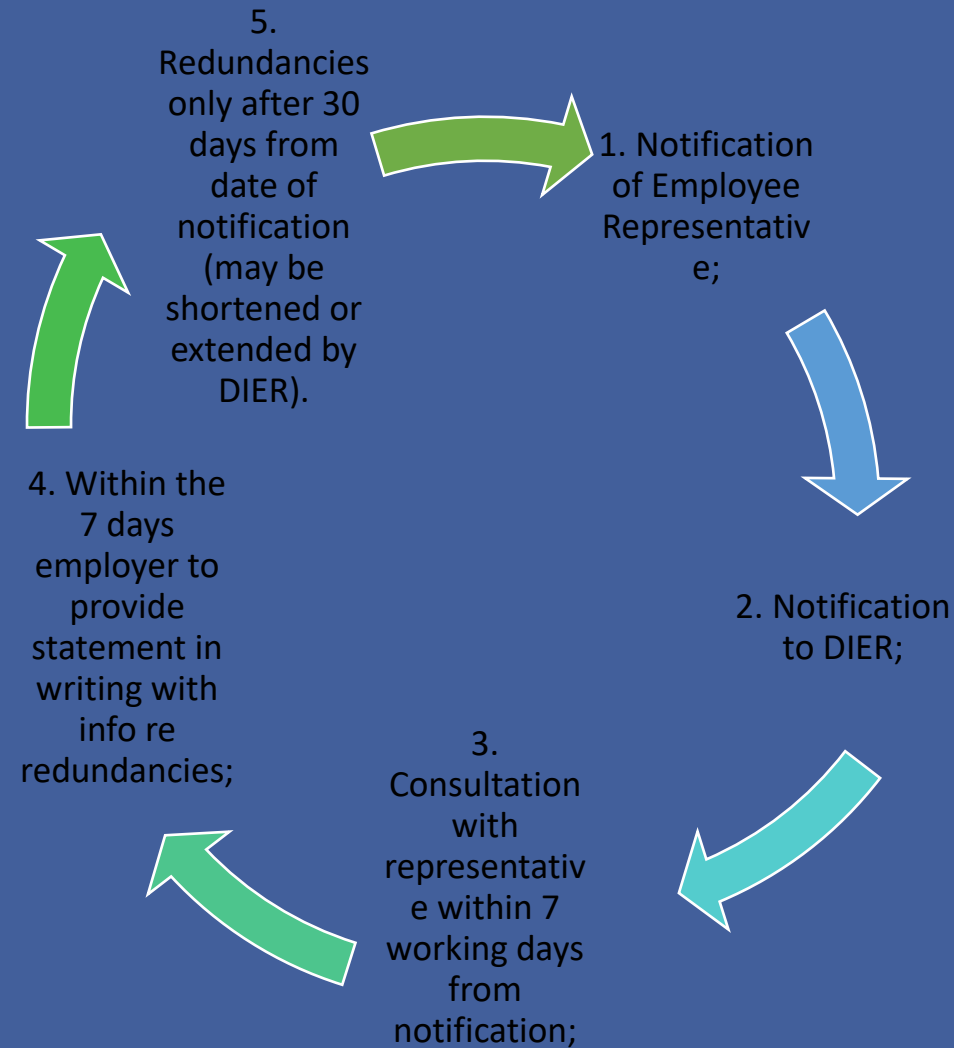
# Should closing down of business be permanent for 'redundancy'?

- *Angela Vassallo u Milano Due Limited, 15/7/2017, Court of Appeal*
- Industrial Tribunal and Court of Appeal accepted that a redundancy can occur even if the business does not close down permanently but for a few months only.
- I.T. and CoA also accepted that redundancy was genuine even if no mention of the word 'redundancy' was made in the termination letter.
- *“Fic-cirkostanzi, ristrutturar tax-xoghol sabiex tigi salvagwardjata l-vijabilita’ tal-azjenda hija permessa mill-ligi u konfermata mill-Qrati.”*

# Collective Redundancies (Protection of Employment) Regulations S.L. 452.80

- "collective redundancy" means the termination of the employment by an employer on grounds of redundancy, over a period of thirty days, of:
  - (a) ten or more employees in establishments normally employing more than twenty employees but less than one hundred employees;
  - (b) 10% or more of the number of employees in establishments employing one hundred or more but less than three hundred employees; and
  - (c) thirty employees or more in establishments employing three hundred employees or more

# Procedure



# Good and sufficient cause

- No definition in the law as to what constitutes a good and sufficient cause;
- Law only lists what is NOT a good and sufficient cause in Art. 36 (14) –
- Examples:
  - i) membership of a trade union or employees' representative;
  - ii) employee no longer enjoys the employer's confidence (except domestic employee);
  - iii) employee contracts marriage.

# Examples of a good and sufficient cause...

- Someone who abandons their work and does not return to work after being called to do so;
- Theft / mismanagement of company funds;
- When there are other warnings still in force;
- Competing with the employer;
- Insubordination;
- Incompetence;
- Health reasons?

# Procedure for Termination for a Good and Sufficient Cause

- No automatic right to dismiss after 3 warnings (*Teddy Cilia u Maltapost plc – 14/03/2011 – Decision 2060*);
- Consider also the time which elapses between one warning and another;
- Verbal warnings can also be relevant but difficult to prove (*Joseph Ebejer u Zahra Limited – 24/11/2008 – Decision 1888*);

# Warnings

- The need for warnings and the amount which should be given depend on the gravity of the incident in question (*Joseph Mula u Coastline Hotel Limited – 6/05/2011 – Decision No. 2069*);
- Even following warnings, a final meeting should be held before the decision to dismiss is taken;
- In case of serious breaches which might merit dismissal, employee should still be given the opportunity to defend his case.

# Disciplinary Proceedings:

- No mention in the law but developed by case law;
- Importance of acting reasonably in dismissing – following a reasonable procedure;
- *David Calleja v Peak Leisure Limited (Court of Appeal, 12/12/2017)*
- Held: once Tribunal decides that the dismissal was fair on the merits, it cannot order compensation to be given based on the fairness or otherwise of the procedure of dismissal as the law makes no provision for such compensation.
- *Lucianne Lia v Borg & Aquilina Ltd (Court of Appeal, 30/04/19).*



# Are disciplinary proceedings necessary or not?

- Court of Appeal Decisions...
- James Buhagiar v Jani Limited (26/01/2018) & Gulio Antonio Spampinato v Enetsport Ltd (25/03/2019)

VS

- John Azzopardi v APS Bank Ltd (17/02/21)

## 2. All cases falling within the jurisdiction of the Industrial Tribunal by virtue of Title I of this Act or any regulations prescribed thereunder.

- Art 26 – Prohibition against discrimination:
  - It shall not be lawful for any person –
  - (a) when advertising or offering employment or when advertising opportunities for employment or when selecting applicants for employment, to subject any applicants for employment or any class of applicants for employment to discriminatory treatment;
  - (b) in regard to employees already in the employment of the employer, to subject any such employees or any class of employees to discriminatory treatment, in regard to conditions of employment;

# Cont.

- **Art. 27 – Equal Pay for Equal Work**
- 27. Employees in the same class of employment are entitled to the same rate of remuneration for work of equal value:
- Provided that an employer and a worker or a union of workers as a result of negotiations for a collective agreement, may agree on different salary scales, annual increments and other conditions of employment that are different for those workers who are employed at different times, where such salary scales have a maximum that is achieved within a specified period of time.

# Cont.

- Art. 28 – Victimization

- 28. It shall not be lawful to victimise any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of this Act, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer's name and interests.

# Cont.

- Art. 29 – Harassment

- 29. (1) It shall not be lawful for an employer or an employee to harass another employee or to harass the employer by subjecting such person to any unwelcome act, request or conduct, including spoken words, gestures or the production, display or circulation of written words, pictures or other material, which in respect of that person is based on sexual discrimination and which could reasonably be regarded as offensive, humiliating or intimidating to such person.

# Art. 29 continued

- (2) It shall not be lawful for an employer or an employee to sexually harass another employee or the employer (hereinafter in this article referred to as "the victim") by:
  - (a) subjecting the victim to an act of physical intimacy; or
  - (b) requesting sexual favours from the victim; or (c) subjecting the victim to any act or conduct with sexual connotations, including spoken words, gestures or the production, display or circulation of written words, pictures or other material where - (i) the act, request or conduct is unwelcome to the victim and could reasonably be regarded as offensive, humiliating or intimidating to the victim; (ii) the victim is treated differently, or it could reasonably be anticipated that the victim could be so treated, by reason of the victim's rejection of or submission to the act, request or conduct.

# Remedies

- Tribunal can – cancel employment contract / cancel clause in the employment contract / cancel clause in a collective agreement / AND order payment of compensation for loss and damage sustained in consequence of the breach.

# Appeals - IRA

- In IRA – no appeal was available from a decision of the Industrial Tribunal.
- Court of Appeal – refused to consider cases – basis of argument was that Tribunal had exclusive jurisdiction and no appeal was granted by law.
- Mallia v Debono 13/02/1997 – review limited to cases of:
  - Ensuring Tribunal had not violated the law;
  - Ensuring Tribunal had complied with principles of natural justice;
  - Ensuring Tribunal had applied the law correctly.



# Appeals - Today

- Right of appeal – only as point of law – what does it mean?
- 12 days from the date of the decision of the Tribunal to file an application before the Court of Appeal (Inferior Jurisdiction).
- Has the Court of Appeal extended its jurisdiction?

# Points of law only?

- *Ian Falzon vs Awtorita' ghat-Trasport f'Malta (12<sup>th</sup> November 2019 - Court of Appeal)*

# Interpretation of awards

- May refer to the Tribunal to interpret an award / decision of the Tribunal itself.
- Tribunal hears the parties unless they agree no hearing is necessary.
- Vexatious applications – Tribunal may order the offending party to pay to the other a penalty not exceeding €465.87.

# The need for change?

- **Luke Engerer vs International Fashion Co Limited et (Court of Appeal, 18<sup>th</sup> November 2019):**
- *Dan il-każ isaħħaħ il-ħtieġa urgenti li chairpersons tat-Tribunal Industrijali li jisimgħu u jiddeciedu każijiet li jissemmew fl-artikolu 75 tal-Kap. 42 ikollhom background legali jew għallinqas jingħataw taħriġ legali qabel ma jibdew jaqdu d-dmirijiet tagħhom ta' chairperson. Idejalment Tribunal għandu jkun presjedut minn Maġistrat. Il-fatt li persuna ikollha esperjenza fil-qasam industrijali m'huwiex biżżejjed sabiex jokkupa l-kariga importanti ta' chairperson tat-Tribunal Industrijali. Persuna b'dik l-esperjenza tista' tkun idonja sabiex tagħti pariri dwar temi ta' natura industrijali, pero' mhux li tmexxi l-proċeduri u tiddeciedi l-kawżi fil-meritu.*

# Preparing for a case... discussion

- Harassment;
- Equal Pay for Work of Equal Value;
- Unfair Dismissal.

# Powers of Tribunal in trade disputes

- What is a trade dispute?
- "trade dispute" means a dispute between employers and workers, or between workers and workers, which is connected with any one or more of the following matters:
  - (a) terms and conditions of employment, or the physical conditions in which any workers are required to work;
  - (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers;
  - (c) allocation of work or the duties of employment as between workers or groups of workers

- (d) matters of discipline;
- (e) facilities for officials of trade unions;
- (f) machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures;
- (g) the membership or non-membership of a worker in a particular trade union

# Trade Disputes

- Matter may be referred to the Director or a conciliator.
- No conciliator or no solution – Director refers matter to Minister.
- Minister may – appoint court of inquiry or on application by both parties, refer matter to the Industrial Tribunal (Chairperson + 2 other members).



# Procedures of the Industrial Tribunal

- Art 78 – one month to decide an issue referred to it unless a longer period is necessary.
- Case may be presented by the party itself or another representing or aiding the party.
- Tribunal can regulate its own procedure – ensure justice is done.
- Sittings to be held in public unless there are special circumstances.

# Industrial Tribunal Procedure Rules S.L. 452.18

- Secretary of Tribunal informs parties of the date of the hearing and asks them to provide copies of the statement of the case – to reach Secretary 7 days before the date of the hearing.
- Problem – no proper notification system as in normal courts.
- Copies given to each party.
- Parties need to inform Secretary about the identity of their representative.
- Provide list of witnesses – indication of proof intended to be made.
- Procedure for case – party instituting case is to start (inversion in some cases).

# Industrial Tribunal Procedure Rules

- Decisions and Awards:
  - Must be in writing;
  - Not specify in detail the reason for the decision or award but make reference to the main evidence heard;
  - Tribunal needs to make it clear from the decision or award that all relevant arguments of both parties have been taken into consideration.

# Proof in the Industrial Tribunal

- Preliminary please;
- Dismissal cases vs constructive dismissal;
- Other cases – discrimination and harassment etc.

# What must the parties prove?

- **3511/16/AM: Thomas Rosander vs Mr. Green Limited**
- “Kif dejjem gie ritenut, ghal dak li huwa apprezzament tal-provi, l-kriterju determinanti mhuwiex jekk il-gudikant assolutament jemminx dak li jkun gie spjegat lilu, izda jekk dawk l-ispjegazzjonijiet humiex verosmili fic-cirkostanzi svarjati tal-hajja (Borg vs Bartolo– Appell Inferjuri – 25 ta’ Gunju 1980). Il-grad ta’ prova rikjest fil-kamp civili huwa dak li bizzejjed li jkun inissel certezza morali f’mohh il-gudikant li tkun indotta minn preponderanza ta’ provi meqjusa fuq bilanc ta’ probabilitajiet (Caruana vs Laurenti - Prim’Awla tal-Qorti Civili - 8 t’April 1994; Borg vs Manager ta’ l-Intrapriza tal-Halib - Prim’Awla tal-Qorti Civili - 17 ta’ Lulju 1981; Vassallo vs Pace - Vol.LXX.II.144 u Zammit vs Petrococchino - Appell Kummercjali - 25 ta’ Frar 1952)...L-istess jghodd ghall-procedura quddiem dan it-Tribunal.”

# Other employment adjudicating bodies...

- Court of Magistrates – criminal offences
- 1 year prescriptive period for offences.
- *32. Any person contravening the provisions of articles 28 and 29 shall be guilty of an offence and shall be liable on conviction to imprisonment for a term from six months to two years or to a fine (multa) of not less than five thousand euro (€5,000) and not more than ten thousand euro (€10,000), or to both such fine and imprisonment.*

# Court of Magistrates

- *45. (1) Any employer who contravenes or fails to comply with any recognised conditions of employment prescribed by a national standard order or by a sectoral regulation order or collective agreement, or with any provisions of this Act or any regulations made thereunder shall, unless a different penalty is established for such offence, on conviction be liable to a fine (multa) of not less than two hundred and thirty-two euro and ninety-four cents (232.94) and not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37).*

# National Employment Authority

- Set up by the Employment and Training Services Act (Chapter 594);
- Functions: (a) investigate and adjudicate, in such manner as it may determine, any complaints which any interested party may bring before it regarding employment and training services provided by Jobsplus;
- (b) to hear appeals as provided for in this Act;
- (c) such other functions as are or may be assigned to it by this Act or any other law.



# Employment Commission

- *(1) The Commission shall have jurisdiction to hear and determine any application made by any person in pursuance of article 120(8) and (9) of the Constitution on the ground that, in respect of employment, a distinction, exclusion or preference that is not justifiable in a democratic society has been made or given to his prejudice by reason of his political opinions.*
- Other means of redress available – decline to exercise its powers.

# Alternatives to the Tribunal?

- Voluntary Arbitration – appeal?
- New Employment Court – presided by a retired judge or magistrate.
- Mediation between the parties.

# The Workings of the Industrial Tribunal

Dr Christine Calleja

MAMO TCV  
ADVOCATES

