

The Basics of Employment Law

MAMO TCV
ADVOCATES

Dr Christine Calleja

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Award in Office Management and Administration
Fundamentals

Agenda

Part I – Employment Contracts and Employees

- Formation of contracts;
- Contracts of service vs contracts for service;
- Fixed term vs indefinite term contracts;
- Probation;
- Different kinds of workers – posted workers; secondment; part-time workers.

Definitions

- Chapter 452:

"employee" means any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of another person, including an outworker, but excluding work or service performed in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service"



Definitions

- Chapter 452:
- ""employer" includes a partnership, company, association or other body of persons, whether vested with legal personality or not;
- 'Acts' of the employer will frequently be acts of the management (also employees) – employer will still be accountable.



Formation of contracts

- Employer-employee relationship is a question of fact not only of contract;
- Contract of employment – “an agreement, whether oral or in writing, in any form, whereby a person binds himself to render service to or to do work for an employer in return for wages”
- Obligation of Employers: Transparent and Predictable Working Conditions – information which must be given to employees either in a contract or a statement.
- Employer must also keep records with certain information of employees.



Information to be provided...

- (a) the name, registration number and registered place of business of the employer and a legally valid identification document number, gender, and address of the employee and the place of work:
- Provided that in the absence of a fixed place of work it should be stated that the employee will be employed at various places together with the registered place of business:
- Provided further that if there is no registered place of business, the domicile of the employer is to be stated

Continued...

- (b) the place of work. Where there is no fixed or main place of work, the principle that the worker is employed at various places or is free to determine his place of work, and the registered place of business or, where appropriate, the domicile of the employer;
- (c) the title, grade, nature or category of work for which the worker is employed;
- (d) brief specification or description of the work;
- (e) the date of commencement of the employment relationship;

Continued...

- (f) in the case of a fixed-term employment relationship, the end date or the expected duration thereof;
- (g) in the case of temporary agency workers, the identity of the user undertakings, when and as soon as known;
- (h) the duration and conditions of the probationary period;
- (i) the training entitlement provided by the employer, if any;

Continued...

- (j) the amount of paid leave to which the worker is entitled, including but not only, vacation leave, paternal leave, parental leave, maternity leave, carer's leave, urgent family leave, bereavement leave, marriage leave, quarantine leave, jury service leave, sick leave and injury leave, or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;
- (k) without prejudice to article 36 of the Act, the procedure to be observed by the employer and the worker, including the formal requirements and the notice periods, where their employment relationship is terminated or, where the length of the notice periods cannot be indicated when the information is given, the method for determining such notice periods;

Continued...

- (1) without prejudice to Title I of Part III of the Act, and every other legislation in force laying down the minimum remuneration, overtime and special rates of pay, the remuneration including the initial basic amount, any other component elements, if applicable, indicated separately, the frequency and method of payment of the remuneration to which the worker is entitled and the conditions under which fines maybe imposed by the employer and their quantum;

Continued...

- (m) without prejudice to the Organisation of Working Time Regulations, and other more specific provisions relating to the organisations of working time for certain occupations or occupational activities, if the work pattern is entirely or mostly predictable, the length of the worker's standard working day or week and any arrangements for overtime and its remuneration and, where applicable, any arrangements for shift changes;

Continued...

- (n) if the work pattern is entirely or mostly unpredictable, the employer shall inform the worker of:
- (i) the principle that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work performed in addition to those guaranteed hours;
- (ii) the reference hours and days within which the worker may be required to work;
- (iii) the minimum notice period to which the worker is entitled before the start of a work assignment and, where applicable, the deadline for cancellation of the work assignment;

Continued...

- (o) any collective agreements governing the worker's conditions of work or in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of such bodies or institutions within which the agreements were concluded;
- (p) where it is the responsibility of the employer, the identity of the social security institutions receiving the social contributions attached to the employment relationship and any protection relating to social security provided by the employer.
- (q) any other relevant or applicable condition of employment.

On Demand Contractors

- Prohibition of zero hour contracts:
- What is a zero hour contract?

A contract of employment or other work arrangement under which a worker is required to be available for work or services as and when needed by the employer, and where the employer promises payment on the basis of hours so worked without guaranteeing a minimum number of hours to the worker.

Zero Hour contracts prohibition...

- (a) where the nature of the activity concerned requires the availability of replacement workers on short notice; and as long as the zero-hour contract is not the whole-time employment of the worker;
- (b) where the worker is a full-time student, subject to any applicable laws, regulations and administrative or statutory provisions.

Parallel Employment

- The employer cannot prevent a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subject a worker to adverse treatment for doing so... BUT – an employer may prohibit a worker from taking up employment with other employers on the basis of objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interest.

Minimum Predictability

- If work pattern is mostly unpredictable, the following conditions need to be satisfied:
 - i. Work takes place within predetermined reference hours and days;
 - ii. Worker is informed of a work assignment within a reasonable notice period.
- Law provides for specific notice periods depending on length of work assignment.
- Conditions not satisfied – employee can refuse the work assignment without adverse consequences.

Failure to provide information...

- Can submit a complaint to the Director – can impose a fine on the employer.
- Unfair dismissal if the reason for dismissal is that worker refused to comply with a requirement of the employer in contravention to these regulations.
- May request employer in case of dismissal to provide duly substantiated grounds in writing for the dismissal.

Contracts of Service v Contracts of Employment

- Employed persons – work under a contract of services;
- Self-employed persons – work under a contract for services;
- Main distinction as found in the definition of employee: works under the direction and control of another person with regard to the manner in which the work is done.
- Difficult to determine in the case of highly skilled workers / professionals.
- Employment Status National Standard Order (S.L. 452.108) – criteria to determine whether a person is an employee or self-employed;
- Independently of the intention of the parties or the designation in the contract;
- Presumption of an employment relationship if at least 5 out of 8 criteria are satisfied.
- Exemption may be granted by the Director.

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;
- (e) he cannot sub-contract his work to other individuals to substitute himself when carrying out work;
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Criteria:

- (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.



Fixed-Term vs Indefinite Contracts

Definition of a fixed-term contract (Contracts of Service for a Fixed Term Regulations (S.L. 452.81)):

- “contract of service for a fixed term” means a contract of service entered into between an employer and an employee where the end of the contract is determined by reaching a specific date, or by completing a specific task, or through the occurrence of a specific event.”

Principle of non-discrimination with other comparable permanent employees; be informed of vacancies; access to training.

Fixed Term Contracts

- Transformation of fixed-term contracts to indefinite term if:
 - Continuous employment for 4 years (gaps of less than 6 months are included);
 - No objective reason by employer.
- Conversion also occurs if employee on a fixed term contract is retained in employment following termination of contract and is not given a new contract within the first 12 working days following termination.



Fixed Term Contracts

- Most common objective reason – occupies a top management position or a position of trust;
- This needs to be specified in the contract – otherwise there will be conversion.
- If employee is retained in employment following termination of a fixed-term contract or re-employed within 1 year from date of termination – conditions not less favourable than those which would have been applicable had contract been indefinite + aggregate probation period cannot be longer.



Probation

- Purpose of probation: employer keeps his right to confirm employment after a specified period.
- Probation by law – 6 months or shorter by agreement / 1 year in the case of employees holding technical, executive, administrative or managerial posts and wages at least double minimum wage.
- Termination without assigning reason (except in cases where the employee is pregnant) but 1 week's notice if employment longer than 1 month.



Probation

- Probation applies by law but should be specified in the case of a fixed term contract (*Roderick Borg u Hospitality Services Company Limited – 29th November 2012*);
- Exceptions in the case of pregnancy – Reg. 12A of the Protection of Maternity (Employment) Regulations – suspension of probation and the need to give reason for termination.



Probation

- Cannot be extended - not even by agreement;
- No new probationary period in the case of promotions – trial periods with reversal to prior position.
- ***Dennis Paul Nugent v Malta Public Transport (Industrial Tribunal 28/2/2017) -***
 - ▶ 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.



Part-Time Employees:

- "part-time employee" means an employee whose normal hours of work, calculated on a weekly basis or on an average over a period of employment of up to one year, are less than the normal hours of work of a comparable whole-time employee and who is not a whole-time employee with reduced hours;



Part-Time Employees

- Equal treatment with full-time employees;
- Paid at the same hourly rate as full-time employees;
- Paid overtime when hours are in excess of 40 hours;
- Right to receive a written statement;
- Pro-rata entitlement to leave and bonuses;
- Cannot force an employee to transfer from full to part time or vice versa;



Part-Time Employees

- If part-timer feels difference in treatment from full-timers → can request a written statement from the employer stating reasons for such differential treatment
- Part-timer is deemed to be unjustly dismissed if dismissal is based on the fact that:
 - (a) The employee brought proceedings against the employer
 - (b) The employee requested a written statement for differential treatment to full-timers
 - (c) The employee gave evidence or information in proceedings brought by another employee
 - (d) The employee has done something in terms of the Part-Time Employees Regulation in terms of the employer or any other person
 - (e) The employee alleged that the employer breached the provisions of the Part-Time Employees Regulation
 - (f) The employee refused (or proposed to refuse) to forgo a right given to him by the Part-Time Employees Regulation
 - (g) The employer believes or suspects the employee has done or intends to do any of the above



Agenda

Part II – Employee Rights

- Protection of Wages;
- Protection from discrimination;
- Leave entitlements;
- Working times;
- Overtime;
- Telework;
- Whistleblowing



Protection of Wages:

- Employee's main duties → to carry out the work for which he was employed and to follow the directions of the employer
- Employer's main duty → to pay wages and to provide a safe working environment
- Irene Bugeja u Vassallo Builders Group Ltd (Industrial Tribunal/13/07/2006) → referred to the parallel duties of employer and employee. It held that the employee should take care of his employment which is providing his daily bread and, the employer should ensure a good working environment to enable the employees to carry out their duties



Protection of Wages:

Chapter 452:

- Art. 11 – entire amount of wages paid in money being legal tender in Malta;
- Paid to the employee
- Possible to pay by cheque or bank transfer and possible to give remuneration in kind as long as at least the statutory minimum wage is paid in money which is legal tender;
- No terms imposed as to how wages are to be spent;
- Prohibition of deductions from wages;



Protection of Wages:

- Prohibition of Fines – Art. 19
- Deduction from wages in respect of a fine which is contemplated in the contract of employment/written statement and, has been approved by Director (DIER) is lawful;
- Another lawful deduction – if the employee fails to work the hours requested of him, may deduct that part of the wages corresponding to the unworked hours
- What about fines which are not deducted from wages?
- What about pre-liquidated damages in post-termination restraint clauses?



- To allow all individuals an equal and fair prospect to access opportunities;
- Individuals who are in similar situations should receive similar treatment and not be treated less favourable because of a particular 'protected' characteristic which they possess.

Aim of Anti-Discrimination Laws:



What is discrimination?

Chapter 452: "discriminatory treatment" means any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers' association.

S.L. 452.95: "discriminatory treatment" means any distinction, exclusion, restriction or difference in treatment, whether direct or indirect, on any of the grounds mentioned in regulation 1(3) which is not justifiable in a democratic society"



Which are the prohibited grounds?

- Direct discrimination → Grounds of religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin;
- Indirect discrimination → an apparently neutral (harmless) provisions which puts persons of a particular group at a disadvantage when compared to other persons;
- What if there are no is no particular ground for discriminating?



Protection from discrimination:

- Chapter 452: Art. 26: not lawful to discriminate in:
 - *i) advertising/ offering employment or selecting applicants;*
 - *ii) subject employees or class of employees to discriminatory treatment as regards conditions of employment or dismissal.*
- Equal Treatment in Employment Regulations (S.L. 452.95)
- Regulations apply *inter alia*:

'conditions for access to employment, including the advertising of opportunities for employment, selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotions'



Discrimination in Termination:

- British High Commission cases:
- Jackie Jordan v British High Commission (Court of Appeal 26/03/2010)
- Glynis Valeria Pace v British High Commission (Court of Appeal 14/01/2015)
- Method of calculation for redundancy payments must be the same for all employees who are made redundant (no discrimination in dismissal).



Occupational Requirements

- Difference in treatment based on one religious belief, religion, disability, age, sexual orientation and racial or ethnic origin can be justified –
- By reason of the nature of the activity or the context in which they are carried out, the characteristic constitutes a **genuine and determining occupational requirement** provided objective is legitimate and requirement is proportional



Occupational Requirements:

- Actors for a film – dark skinned people / people of one sex;
- When choosing attendants in public toilets;
- Female worker for a centre for domestic violence on women;

→ very limited instances.



Interview/Advert Stage:

- Art. 10 of the Equality for Men and Women Act –
“unlawful for persons to publish or display or cause to be published or displayed any advertisement, or, otherwise to advertise a vacancy for employment which discriminates between job seekers or to request from job seekers information concerning their private life or family plans”

Exception – where the work can only be performed by a person of a specific sex.



Harassment

- Chapter 452: “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”.



Harassment

Equal Treatment in Employment Regulations (S.L. 452.95):

(3) No person shall harass another person by subjecting him to unwanted conduct or requests relating to any of the grounds referred to in sub regulation (1), when such conduct or request takes place with the purpose, or which has the effect of –

- (a) violating the dignity of the person who is so subjected, and
- (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the person who is so subjected.

(4) For the purposes of these regulations, employers or any persons or organisation to whom these regulations apply shall also be deemed to have discriminated against a person if they -(a) instruct any person to discriminate against another person;

(b) neglect their obligation to suppress any form of harassment at their workplace or within their organisation, as the case may be.

(5) No person shall sexually harass another person by subjecting him to any form of unwanted verbal, non-verbal or physical conduct or request of a sexual nature, when such conductor request takes place with the purpose, or which has the effect of violating the dignity of the person who is so subjected, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment for the person who is so subjected.



Equal Pay:

- Article 27 - principle of equal pay:
- *“27. Employees in the same class of employment are entitled to the same rate of remuneration for work of equal value.”*
- Extended the principle of equal pay for equal work between men and women.
- What is meant by ‘same class’ and ‘work of equal value’?



Equal Pay:

- *Roberta Spiteri vs St Microelectronics (Malta) Limited (30/09/2015) Court of Appeal* – performance of the work done does not change the value of the work done.
- Cannot justify difference in wage solely on performance – this can be done by a performance bonus.



Equal Treatment:

- *Equal Treatment in Employment Regulations (S.L. 452.95)* – prohibition of discrimination (direct and indirect) and harassment;
- Set out a procedure in the case of discrimination – request in writing to the employer who must reply within 10 days.
- Requirement to provide reasonable accommodation for persons with disabilities.



Leave Entitlements:

- Conditions of employment depend on the particular sector – applicable Wage Regulation Order for some sectors;
- No WRO – Minimum Special Leave Entitlement Regulations (S.L. 452.101); Overtime Regulations (S.L. 452.110); Organisation of Working Time Regulations (S.L. 452.87);

Leave Entitlements:

- *Urgent Family Leave Regulations (S.L. 452.88)* – time-off from work for urgent family reasons in case of sickness or accident;
- 15 hours as urgent family leave – deducted from annual leave;
- *Maria Dolores Grima u MMDNA (17/09/2015) Decision Number 2406* – urgent leave denied to employee – her resignation was deemed to be a dismissal.

Leave Entitlements:

- *Protection of Maternity (Employment) Regulations (S.L. 452.91)*
- Special arrangements for pregnant employees; employees who recently gave birth; breastfeeding employees.
- 14weeks maternity leave – up to 4 weeks more of (unpaid) leave;
- Entitled to same rights and benefits which accrue to other employees during her leave; entitled to resume her post or a similar post;
- Special procedure to dismiss.



} Paternity Leave – Work Life Balance for Parents and Carers Regulations

- Fathers or equivalent second parents (not biological father) – 10 days paternity leave – birth or adoption, without loss of wages i.e. paid as other leave.
- Right not subject to a period of work qualification or length of service qualification.
- Right granted irrespective of marital or family status.

Parental Leave

Entitlement is per child;

Also for part-timers and those on fixed term contracts;

Need a period of continuous employment with the same employer for a period of at least one year (but period can be shorter as per contract or CA).

Using Parental Leave

- Workers have the right to request to use parental leave in a flexible way.
- Employer – is to provide reasons for any refusal in writing within two weeks from the request.
- Leave may be granted on a full-time or part-time or piecemeal way.
- Worker must give 2 weeks' notice in writing – specify beginning and end of leave.

During Parental Leave

- Employee has the right to apply for promotions at work.
- To facilitate return to work following leave – both employer and employee are bound to maintain contact during leave and may make arrangements for reintegration measures.



Grounds for Parental Leave

- Individual right of each parent to be granted paid parental leave on grounds of birth / adoption / child fostering / legal custody of a child – period of four months until child is 8 years old.
- Only two months are paid AND at the rate set for the sickness benefit entitlement under the social security Act.
- Sickness benefit – married rate (€21.85) or single rate (€14.15).



Staggering of leave and payments

- 0 – 4 years of age – 50% of entitlement will be paid (i.e. you can take 2 months but will be paid for 1 month);
- 4 – 6 years of age – 25% of entitlement will be paid;
- 6 – 8 years of age – 25% of entitlement will be paid.



Foster Parents

- Rate of payment is the same as that for parents;
- Allowance is given per parent applying for parental leave not for each child fostered.



Further provisions...

- Two months of parental leave cannot be transferred – so parents may transfer the remaining two months...
- Parental leave is to be availed of in established periods of at least 2 weeks each (but can reach a different agreement).

Carer's Leave

- Entitlement to 5 days of carer's leave which are UNPAID.
- Carer – worker providing personal care or support to a relative OR to a person living in the same household as the worker and who is in need of care for serious medical reasons.
- Proof – worker needs to be provide medical proof that the relative or person living in the same household is suffering from an illness and is in need of care and support.



Flexible Working Arrangements

- Employees with children up to 8 years of age and carers – right to request flexible working arrangements for caring purposes.
- Arrangement can be limited in duration – employee can request to return to original working pattern before expiration of arrangement and employer is to consider this request.
- May include – remote working / reduced hours / flexi time.
- Employer is reply within 2 weeks from request AND is to give reasons for any refusal or postponement.



Working Time:

- *Organisation of Working Time Regulations (S.L. 452.87)*
- Establishes daily rest; rest breaks; weekly rest;
- Maximum working time – 48 hours unless employee agrees to work more hours;
- Leave of 24 days + additional day for public holidays which fall on the weekend – only 4 days can be replaced by an allowance in lieu except where employment is terminated;
- Only up to 50% of leave may be carried forward.



Overtime:



Employees obliged to work overtime – up to 8 hours per week;



All employees entitled to overtime of 1.5 times the normal rate for work carried out in excess of 40 hours (except those covered by a WRO);



Can wage be sufficient to cover overtime?



What about management grades?



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Agenda

• Part III

1. Termination of Definite vs Indefinite Term Contracts
2. Probation
3. Retirement Age
4. Good and Sufficient Cause
5. Redundancy
6. Amicable Solutions
7. Constructive Dismissal
8. Transfer of Business

Can Definite Term Contracts be Terminated?

- Definite term contracts may not be terminated before the expiration of the agreed term except in the case of a good and sufficient cause
- If terminated early → the party terminating is liable to pay the other a sum equal to half the full wages that would have been payable to the employee for the remainder of the term specifically agreed upon.

Termination of Indefinite Contracts by Employee

- Indefinite term contracts may be terminated by the employee at any time by way of notice.
- Exception → In the case of a good and sufficient cause, no notice is required to be given (constructive dismissal)
- Statutory notice periods depend on duration of employment of the employee

Statutory Notice Periods

- Employed for more than 1 month but not more than 6 months → 1 week
- Employed for more than 6 months but not more than 2 years → 2 weeks
- Employed for more than 2 years but not more than 4 years → 4 weeks
- Employed for more than 4 years but not more than 7 → 8 weeks
- Beyond 7 years → add 1 week for every year beyond 7 years (max. 12 weeks)

- For employees holding a technical, administrative, executive or managerial post →
can agree on a longer notice period

What if the employee does not work the notice period?

- Notice starts to run from the next working day
- If the employee does not work the notice → liable to pay the employer a sum equal to half the wages (excluding overtime, bonuses and other allowances) that would have been due to him for the unworked period of notice.

What if the employer does not wish for the employee to work the notice period?

- On receiving notice from the employee, the employer can:
 - Allow the employee to work the notice period on full pay
 - Not allow him to work the notice period and pay him a sum equivalent to the wages that would have been payable for the unworked period of notice

Termination of Indefinite Contracts by the Employer

- Indefinite term contracts may only be terminated by the employer on the following grounds:
 - During probation without having to give a reason
 - When retirement age is reached
 - For good and sufficient cause
 - On the ground of redundancy

Who cannot be dismissed?

- Employees on injury leave → they are entitled to 1 year injury leave
- Employees on maternity leave → entitled to resume work in the same post AND obliged to work for at least 6 months post-maternity leave (similar principle for adoption leave)

Termination During Probation

- No need to give a reason except in case of pregnant employees
- If employed for more than 1 month → 1 week's notice needs to be given
- Can notice period be longer during probation?

Pensionable Age

- Proviso to Art. 36 (14) → employer can terminate the employment of an employee when the employee reaches pension age as defined in the Social Security Act (depends on the year of birth);
- Employer and employee can agree that employment should continue even after retirement – can be dismissed at any time after pension age;

Good and Sufficient Cause

- Whether the reason for termination is a 'good and sufficient cause', will be determined by the Industrial Tribunal on a case by case basis.
- Some examples of situations which the Tribunal deemed to constitute a good and sufficient cause include theft or mismanagement of company funds, abandonment of the workplace, other warnings in force

Are Warnings an Automatic Right to Terminated?

- There is no concept of 'automatic right to dismiss' after 3 warnings
- There are other things to consider such as → the time which elapses between one warning and another
- Warnings should ideally be in writing. Verbal warnings might also be relevant but difficult to prove (Joseph Ebejer u Zahra Limited, 24/11/2008 – Decision 1888)

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) → 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.

What is Redundancy?

- Maltese law does not provide a definition of redundancy
- Victoria Spiteri vs St Catherine High School (CoA, 18/10/2006) →
Redundancy refers to a situation where an enterprise is constrained to reduce its workforce

What is Redundancy?

- The employer can terminate a contract of employment on the ground of redundancy by giving notice
- The statutory notice periods for employees resigning from employment apply in cases of termination by the employer on grounds of redundancy

Rules of Redundancy – Last In First Out Rule

- “where an employer intends to terminate the employment of an employee on the grounds of redundancy, he shall terminate the employment of that person who was engaged last in the class of employment affected by such redundancy”
- Exception → in the case of family members

Rules of Redundancy – Last In First Out Rule

- What is a 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”
- Where there is no collective agreement or where the 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 → Class should not be given too strict an interpretation – consider also ‘interchangeability’ of employee

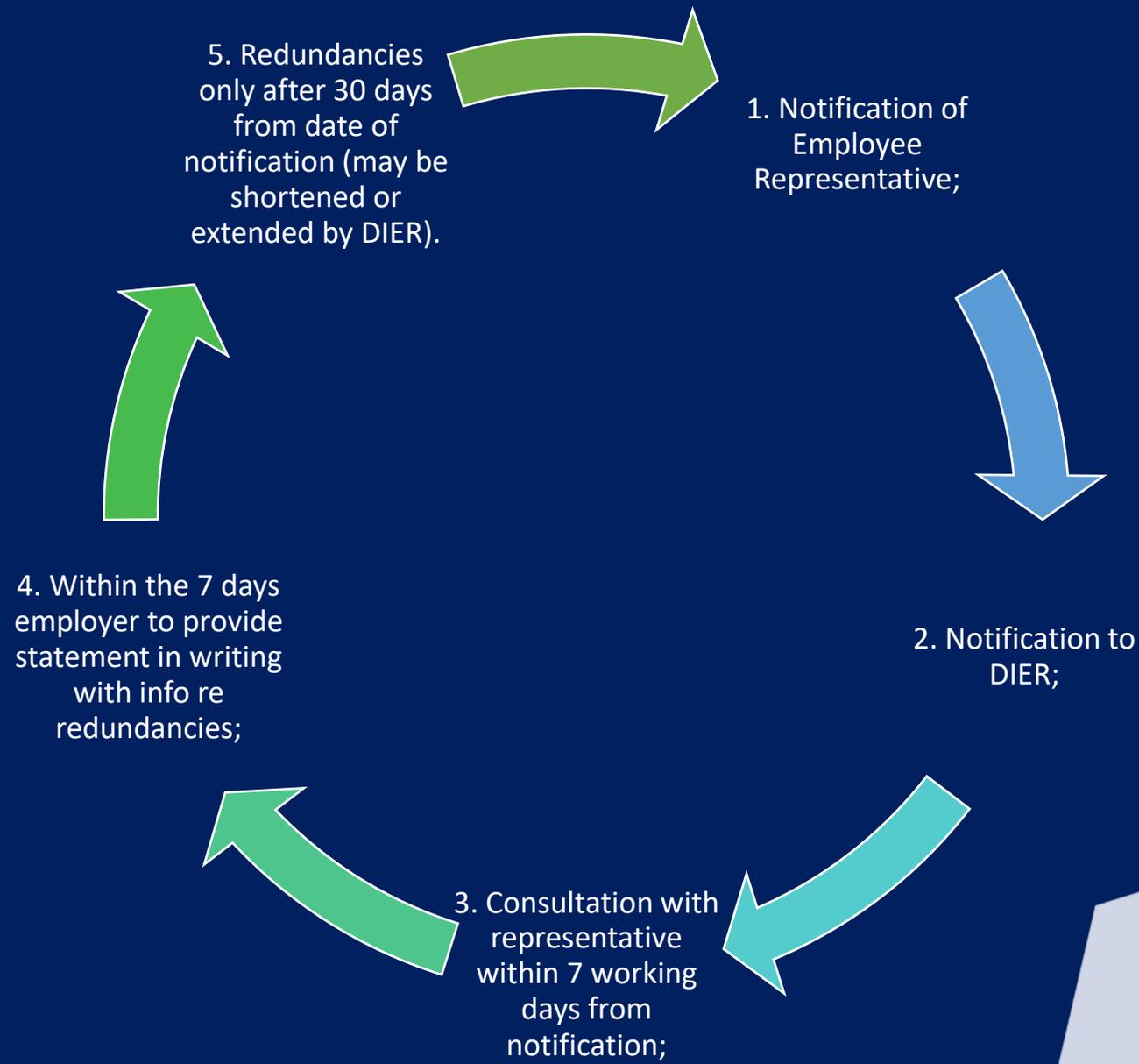
Rules of Redundancy – If the Post Becomes Available Again

- If the post becomes available again within 1 year from date of termination → the post must be offered to the person who was made redundant. If not, it is 'unfair dismissal'.
- The definition of 'unfair dismissal' includes failure to re-employ a person within 1 year from when he is made redundant if the post becomes available once again

Collective Redundancies

- The termination of employment by an employer on grounds of redundancy, over a period of thirty days of:
 - 10 or more employees in establishments normally employing more than 20 employees but less than a 100 employees;
 - 10% or more of the number of employees in establishments employing 100 or more but less than 300 employees;
 - Thirty employees or more in establishments employing 300 employees or more.

The Procedure



Out of Court Settlements

- Always the option to offer termination payments to employees to avoid litigation → Full and final settlement
- The termination payments cannot be discriminatory
- Art 26(1)(b) → not lawful to subject employees to discriminatory treatment in regard to conditions of employment or **dismissal**

What is Constructive Dismissal?

- Relatively new concept in Maltese law → situation in which the employee is forced to leave employment as a result of breach of contract by the employer;
- No mention in the law but developed by case law
- Treated similarly as a direct unfair dismissal → employee will be entitled to compensation.

Development of Constructive Dismissal

- Tactics used by employer in getting rid of employees without actual dismissal.
- Concept developed under English law;
- Freedom of contract limited in an employment relationship – development of implied terms in the employment contract under common law.
- House of Lords judgment – *Malik v BCCI* – obligation of mutual trust and confidence.

Definition by Norman Selwyn:

- “Where the employee himself terminates the contract, with or without notice, in circumstances where he is entitled to terminate it without notice by reason of the employer's conduct: this is known as 'constructive dismissal', for although the employee resigns, it is the employer's conduct which constitutes a repudiation of the contract, and the employee accepts that repudiation by resigning.”

Maltese Jurisprudence

- Geniev Zerafa u Phone Direct Ltd (Industrial Tribunal) (27/7/2007 – decision no. 1802) – ‘terminazzjoni forzata jew indotta sabiex l-impjegat jitermina l-impjieg tiegħu’;
- Peter Agius u Melita plc (Industrial Tribunal) (2/2/2011 – decision no. 2049) – ‘trattament ħażin da parti tal-prinċipal li jirriżulta fi ksur fundamentali tal-kuntratt tax-xogħol, b'mod li jagħmilha ntollerabbli għall-impjegat li jkompli fil-ħidma tiegħu’
- Av. Dr Carmel Chircop v Awtorita' Marittima ta' Malta (Court of Appeal) (5/10/2001) – ‘Ċirkostanza ta' temm mill-impieg ta' persuna li, fid-dieher, qisha tkun irriżenjat mill-impieg, imma li, fil-fatt, tkun twasslet f'qagħda li jkollha titlaq kontra r-rieda tagħha minħabba l-imġieba tal-imgħallem tagħha.’

Requirements for Constructive Dismissal

- The requirements for proving constructive dismissal are:
 - breach of contract by the employer of an express term such as non-payment of wages or of an implied term such as breach of mutual trust and confidence presumed to exist in an employment relationship;
 - the breach is fundamental;
 - acceptance of the breach by the employee;
 - timely reaction to the breach by informing the employer of the reason for resignation at the time of resignation, otherwise it may be deemed that the employee accepted the situation and the resignation was for other reasons

Breach of Contract - What is a 'breach'?

- Breaches of either an express term or an implied term.
- Most important implied term → Implied Term of Mutual Trust and Confidence.
- English Employment Appeals Tribunal (Day v Pickles Farm Ltd) →
"Quite what amounts to a case of constructive dismissal is largely, although not wholly, a matter of evidence and fact rather than of law".

Examples of breaches of the implied term:

- *Courtaulds v Andrew*: Shop manager telling the employee – “You can’t do the bloody job anyway!”
- *Whitbread plc Thresher v Gullyes*: overburdening an employee with work;
- *GMB Trade Union v Brown*: lack of flexibility in handling grievance procedure;

Duty of Mutual Trust and Confidence

- Malik judgment: the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.

Duty of Mutual Trust and Confidence

- Discrimination: almost always lead to a finding of a breach of the mutual trust and confidence obligation;
- Discrimination against third parties may also form basis of the claim – Weathersfield Ltd v Sargent – policy not to rent cars to dark-skinned or Asian people entitled the employee to resign and claim constructive dismissal.



Sexual Harassment cases:



Geniev Zerafa u Phone Direct Ltd – sexual harassment (Industrial Tribunal 27/7/2007)= a breach of the implied duty of trust and confidence.



Doris Bonello u The General Soft Drink Co Ltd (Industrial Tribunal, 27/7/2010) - sexual harassment proven but no case of constructive dismissal.

Duty of Mutual Trust and Confidence

Breach of Express Terms

- Variation of employee's benefits and duties – case of *Miriam Reid u Kestrel Services* (15/12/2006 Industrial Tribunal) – engaging a supervisor during the leave of the employee;
- Change in terms and conditions of the contract / reduction in pay–
- *Sun Route Ltd u Claire Zammit Cordina* (CoA 25/01/2002) (changing post of the employee).
- Changes in contract terms may be fair ex. In reorganisations.

The Last Straw Doctrine

- Rule → no breach if breach is insignificant;
- Resignation because of an insignificant incident but part of a series of breaches → can still amount to a breach;
- Revival of breaches which occurred earlier → otherwise deemed to have been waived.

Acceptance of the Breach

- 'Acceptance' of the breach by the employee as opposed to a waiver – importance of acting in a timely manner.
- Ideally employee should inform employer with the reason for resignation at the time of the resignation.
- *Weathersfield v Sargent*: English Court of Appeal stated that → “Constructive dismissal cannot be established unless it is made clear to the employer that the employee is leaving because of the employer’s repudiatory conduct towards him”.
- Not to be interpreted that reason must be given at time of leaving but if this is not done – more easy to conclude there was no constructive dismissal.

Acceptance of the Breach

- Western Excavating v Sharp:
- “[H]e [the employee] must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

Acceptance of the Breach

- Philisian Debono u Arrigo Group of Hotels Ltd (Industrial Tribunal, 5/11/2008):
- An important consideration: “tempestivita’ tar-reazzjoni tal-haddiem ghall-agir tal-principal.
- “Jekk jibqa’ jahdem u ma jiehex passi immedjati jista’ jigi nterpretat li jkun accetta s-sitwazzjoni”.

Proving Constructive Dismissal

- Constructive dismissal cases → employee must again prove dismissal.
- In constructive dismissal cases → this means employee must prove that the resignation was in fact an indirect dismissal – i.e. employee will have to bear the burden of proof.

Transfer of Business

- Contract → between Employer and Employee;
- Directive 2001/23 → creates a legal fiction – continuation of the employment contract with a third party without the consent of the employee or the new employer.
- Effect → prevents termination of employment in case business is transferred.
- Transfer of Business (Protection of Employment) Regulations S.L. 452.85

Transfer of Business

- 'there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.'

Transfer of Business



Mergers;



Take-overs;



Leasing arrangements;



Even in situations where there is no agreement between the two employers – old lessee → lessor → new lessee;

Transfer of Business

1. Activities cease to be carried out by client and are carried out by contractor;

2. Activities cease to be carried out by contractor and are carried out by another contractor;

3. Activities cease to be carried out by a contractor and are carried out by client itself.

Transfer of Business

- A service provision change can also be considered to be a transfer of business.
- A transfer of a 'part' of the undertaking can also be considered to be a transfer of business.

Is there retention of identity?

- the type of undertaking or business;
- whether or not the business' tangible assets are transferred;
- the value of its intangible assets at the time of the transfer;
- whether or not the majority of employees are taken over by the new employer;
- whether or not its customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer;
- the period, if any, for which those activities were suspended.

Obligations upon Transfer

- Automatic transfer of employees with same employment conditions;
- Employee made redundant prior to transfer – right to be reemployed with transferee if post becomes available within 1 year from termination;
- Information to be given to transferee by transferor and to employees re conditions of employment;
- There may be dismissals for technical, economic or organisational reasons entailing changes in the workforce.

Obligation of Transferor and Transferee

Deliver a written statement containing information re transfer to employee representatives at least 15 days before transfer or before employees are affected by the transfer;

Duty to deliver a copy to the DIER on the same date.



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