

Employment and Industrial Relations Law

Diversity, Discrimination & the Law



Diploma in Law (Malta)



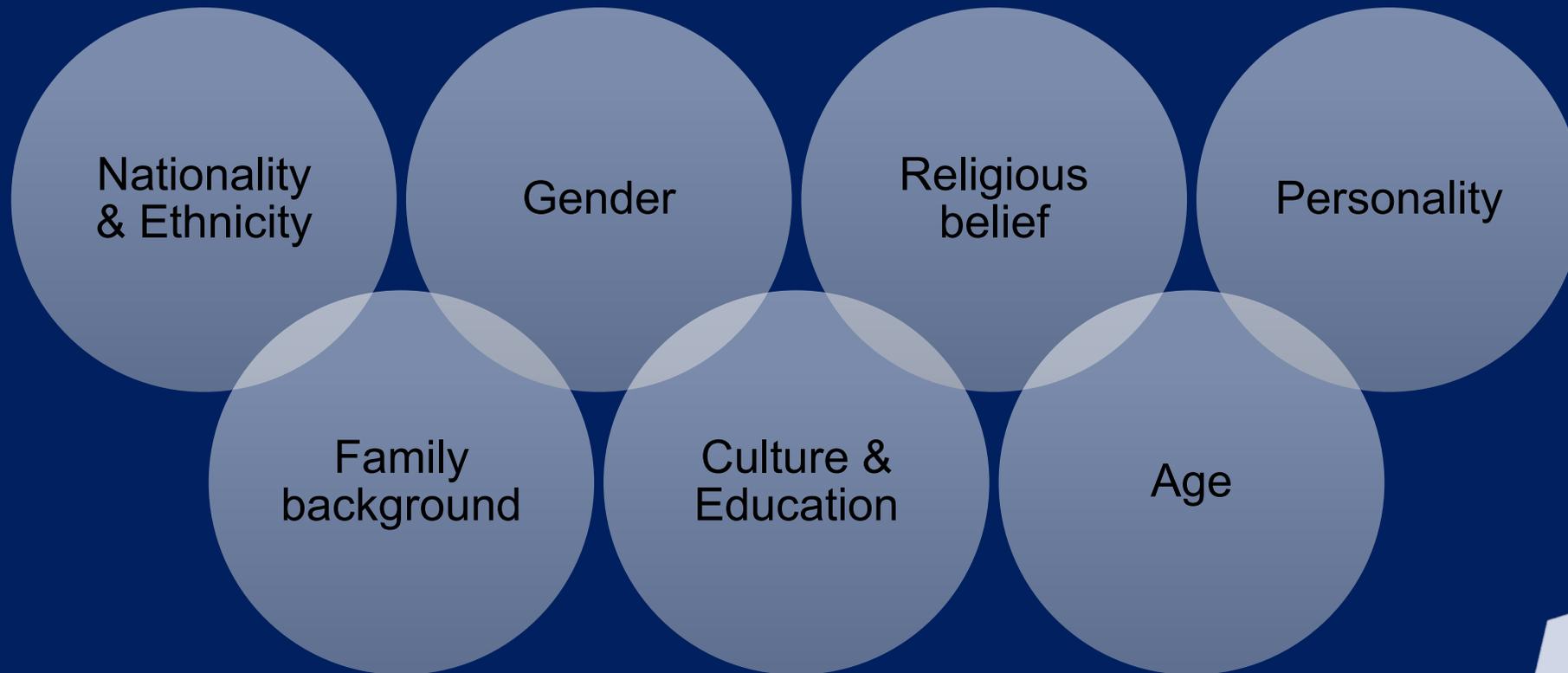
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Defining Diversity



Managing Diversity

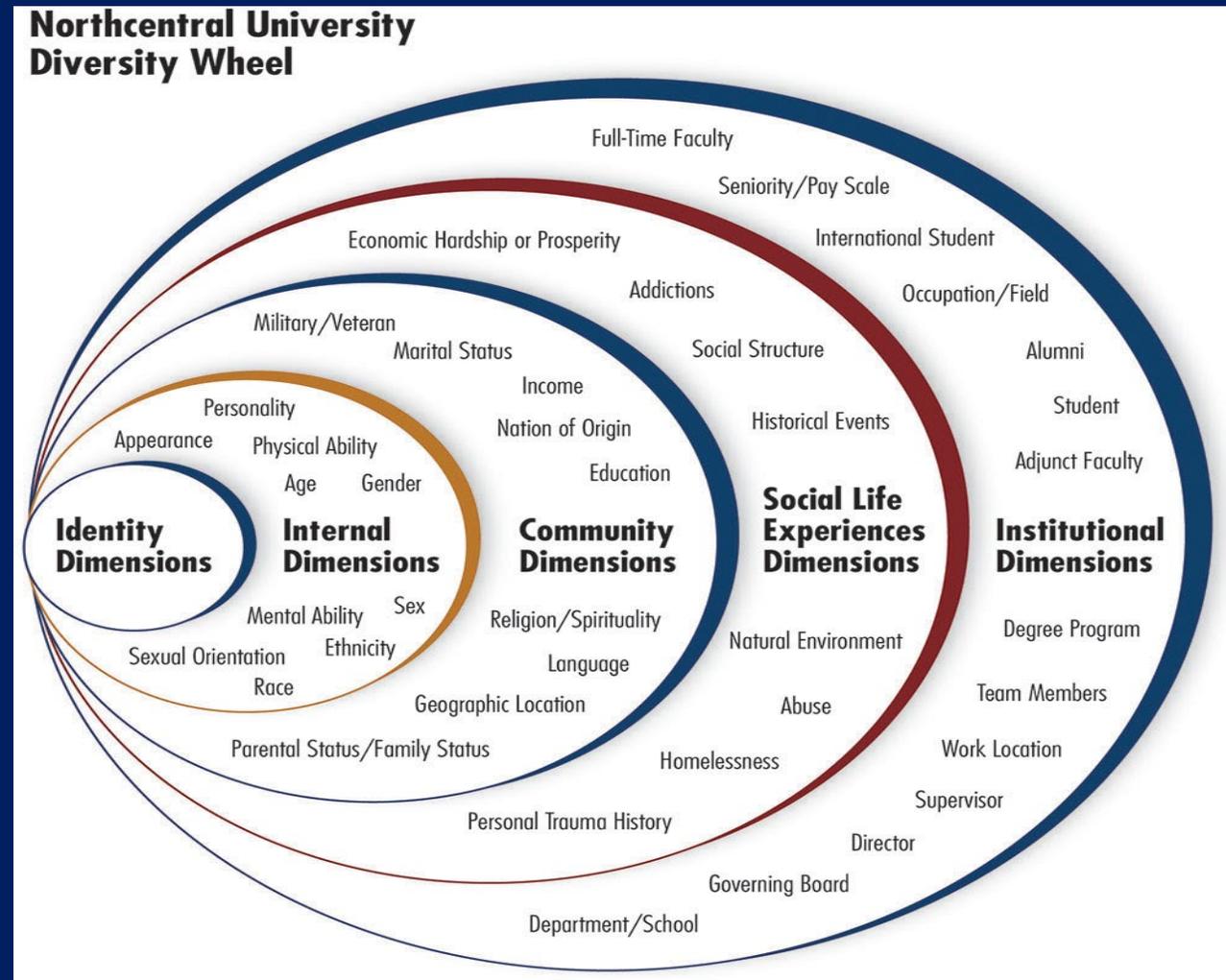
*“Diversity recognises that, though people have **things in common** with each other, they are also **different in many ways**. Inclusion is where those differences are seen as a **benefit**, and where perspectives and differences are shared, leading to **better decisions**.”*

CIPD

cipd.co.uk/knowledge/fundamentals/relations/diversity



Dimensions of Diversity



And You?

Ask yourself the following questions with regards to your company's diversity management vis-à-vis workers & clients:

- Do you cater for a diverse workforce? To what extent?
- Do you react positively towards diversity issues and tensions with a view to immediate resolution?
- Do you avoid making accommodating changes to avoid further tensions, hence making certain persons feel uncomfortable or out of place?



Diversity Management & Business

Research conducted by the Work Foundation adds that effective diversity policies have been linked to high performance organisations and result in:

- Improved performance & satisfaction (and therefore less staff turnover and less administration costs)
- Improved employer image
- Improved brand awareness and access to new markets
- Improved ability to respond and change through creativity and innovation
- Innovative approaches to products
- Reflective diversity makes customers feel at home



Protection from Discrimination

The Maltese Constitution

“... no law shall make any provision that is discriminatory either of itself or in its effect.”

Article 45 (1)

“... no person shall be treated in a discriminatory manner by any person

...

Article 45(2)



Gender Equality

The Maltese Constitution

“The State shall promote the equal right of men and women to enjoy all economic, social and cultural, civil and political rights and for this purpose shall take appropriate measures to eliminate all forms of discrimination between the sexes by any person, organization or enterprise; the State shall in particular aim at ensuring that women workers enjoy equal rights and the same wages for the same work as men.”

Workplace Discrimination

Legal sources providing for protection against discrimination at the place of work:

- The Employment and Industrial Relations Act (EIRA) (Chapter 452)
- The Equal Treatment in Employment Regulations (Subsidiary Legislation 452.95)
- The Equality for Men & Women Act (Chapter 456)
- The Procedure for Investigation Regulations (Subsidiary Legislation 456.02)

Defining Discrimination

The Employment and Industrial Relations Act:

“ ... 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.”

Defining Discrimination

The Equal Treatment in Employment Regulations:

“... 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 ...”

Protected characteristics under these Regulations: religion, religious belief, disability, age, sex (including gender reassignment treatment), pregnancy or maternity, sexual orientation, and racial or ethnic origin



Defining Discrimination

The Equal Treatment in Employment Regulations also cover practical ways of how discrimination can occur:

- Harassment (including sexual)
- Less favourable treatment based on rejection to submit to harassment
- Instruction to discrimination on the grounds of sex
- Less favourable treatment on the grounds of pregnancy or maternity
- Less favourable treatment concerning a person who will undergo/is undergoing/has undergone any type of gender reassignment treatment



The Equal Treatment in Employment Regulations

They apply to:

- Recruitment & selection criteria and access to employment (therefore including recruitment agencies)
- Employment & employment conditions
- Vocational training
- Membership in employee, employer and professional organisations

They don't apply to:

- Differences based on nationality
- The armed forces (re age & disability)



Race & Ethnicity

Race: one of the main groups that humans can be divided into according to their physical differences, for example the colour of their skin; the fact of belonging to one of these groups (Oxford Dictionary)

- Therefore, racism is prejudice based on socially significant physical features. A racist believes that certain people are superior, or inferior, to others in light of racial differences. Racists approve of segregation, or the social and physical separation of classes of people.

Ethnicity: the fact of belonging to a particular nation or people that shares a cultural tradition (Oxford Dictionary)

- The most common characteristics distinguishing various ethnic groups are ancestry, a sense of history, language, religion, and forms of dress.



Types of Discrimination

Direct Discrimination: examples -

- The owner of a salon fires an Asian employee as a customer complained that she prefers to be served by Maltese beauticians
- A secretary in an architect's studio is fired because he refuses to attend his politician-employer's district meetings as he wishes to remain politically neutral

Indirect Discrimination (may appear neutral): examples -

- An employer unreasonably forbids a parent of a disabled child to telework for some hours
- An employer has a minimum height requirement to apply for jobs in a hotel for no apparent reason.



Types of Discrimination

ATTENTION – Discrimination can also occur before onboarding! For example:

- An advert for wait-staff in a bar are only open for women under thirty years
- During an interview, a woman is asked whether she plans to have children, and she answers yes. The interviewer remarks that this would mean that she would need maternity leave and possible parental leave in the future and says that she won't be suitable for the position



Discrimination by Association

Discrimination by association occurs when the person being put at a disadvantage does not personally share a particular trait but is in some way associated to someone who does, and the discrimination occurs on that very basis:

- Coleman vs. Attridge Law – it was concluded that an employee who was not disabled but who was the primary carer of a disabled person (ex. child) could be discriminated against by association



Harassment

The Equal Treatment in Employment Regulations define harassment as “unwanted conduct or requests” with relation to any of the protected characteristics under the Regulations, which aim to:

- Violate the victim’s dignity; and
- Create an “intimidating, hostile, degrading, humiliating or offensive environment” for the victim.



Sexual Harassment

As per the Criminal Code, harassment includes:

- Subjection to physical intimacy
- Requesting of sexual favours
- Subjection to acts or conduct with sexual connotations (words, gestures, display or circulation of pictures & videos etc.)
- Subjection to any other act or conduct which “is unwelcome to the victim, and could be reasonably regarded as offensive, humiliating, degrading, and, or intimidating towards that person”



Sexual Harassment

Sexual harassment is an offence under the *Maltese Criminal Code*. Article 251A provides that punishments can range from:

- A multa of anywhere between €5,000 and €10,000; or
- Imprisonment for a period from 6 months to 2 years; or
- Both.



Equal Pay

- The employer is duty-bound to follow the ‘equal pay for equal work’ principle, particularly between persons of different gender
- The law in fact states the following: “the employer shall ensure, in particular, that where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex”
- Remember, this is not only a case of gender equality, but applies among all employees (Grezzju Azzopardi vs. PBS Ltd, Industrial Tribunal, 2012)



'Defending' Discrimination?

Sometimes, discrimination may occur on the basis of a genuine occupational requirement, depending on the organisation in question

The burden of proof lies on the person alleging that there exists such a requirement.

Example:

- A woman is chosen over a man with the same qualifications for a post at a guidance centre to specifically cater for women in dire situations who regularly claim that they prefer to speak to women about their issues



Positive Action

Regarding persons of a particular religion/religious belief, disability, age, sexual orientation, racial or ethnic origin, it is not unlawful to:

- Provide them with access to benefits relating to training to prepare them for particular work
- Encourage them to take advantage of opportunities to do particular work

With regards to disabled persons, the principle of equal treatment shall be without prejudice to measures taken at the workplace aimed at creating or maintaining provisions of facilities for safeguarding or promoting their integrations into the working environment.



Positive Action

Positive action should not imply a guarantee of recruitment for people who share a protected characteristic - an employer must still appoint the best person for the job, even if they do not have the particular protected characteristic being targeted by the positive action.

For example:

- It is noted that there is a lack of female fire-fighters. A recruitment exercise is launched to specifically attract women applicants, together with an open day for such applicants to meet women firefighters and be encouraged to join.
- However, the fire service must not guarantee that all women will get through the initial stages of the application process.



DON'T GET CONFUSED!

Positive action and positive discrimination are totally different! The latter is an affirmative action (reverse discrimination), where someone is chosen solely on the grounds of their gender or racial group, and not on their abilities. This is unlawful.

For example:

- A kindergarten director believes that women are much better suited for childcare than men. She therefore only hires women to work for her and immediately dismisses any male applicants.



Report of Discrimination

- The alleged victim or the Director of Employment & Industrial Relations may send a report to the employer requesting a reply with regard to the alleged discrimination, to be filed within 10 days. It should include:
 - The employer's version of events
 - Grounds disputing the allegations
 - Explanation of relevant procedures adopted to prevent discrimination
- All such communication may be used as evidence before the Industrial Tribunal.
- An employee may lodge a complaint against his/her employer before the Tribunal within 4 months of the alleged breach



Employers' Obligations

Employers must:

- Ensure that employees are aware of the contents of the Regulations and of any measures taken in terms of the Regulations, by any appropriate means
- Take action to prevent discrimination on grounds of sex (specifically harassment & sexual harassment)

Any provisions contravening the Regulations in any contract (individual or collective) or internal rules shall be null and void.





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The Protection of Maternity (Employment) Regulations

The Regulations cover all employees who:

- Are pregnant
- Have recently given birth
- Are breastfeeding

For the Regulations to apply to the employee, she must inform the employer about her date of confinement in writing.



Maternity Entitlements

- The employee is granted 18 weeks (uninterrupted) of maternity leave.
- The employee may take time-off work for ante-natal check ups, without loss of pay, if such appointments cannot be made outside working hours
- Employees cannot be obliged to work overtime if pregnant or for a period of 12 months after the date of birth/adoption of the child
- Employers must transfer pregnant employees from night work to day work if they provide a medical certificate to this effect (if not technically feasible, the employee must be put on special maternity leave – refer to next slide)

Maternity Entitlements

- Employers must make temporary adjustments to the working hours and environment where possible, or assign the employee alternative work (if the employee refuses, she forfeits her right to maternity leave)
- Special maternity leave is given when the employee's health is for some reason at risk by reason of pregnancy/birth, despite the employer having made arrangements
- During any leave, the employee is still entitled to all rights and benefits accruing to employees of the same class of work, and she must be given the same/similar work upon return. However, she has no right to performance/production bonuses or allowances.



Maternity & Dismissal

Probation:

- A reason for dismissing a pregnant employee on probation must be given
- Probation is suspended until employee returns from maternity leave

Good & sufficient cause:

- Reasons in writing must be given to the employee (naturally, such reasons must be unrelated to maternity), and a copy must be sent to the Director of Employment & Industrial Relations

Dismissal of an employee on the basis of her refusal to comply with a requirement imposed by the Regulations, or refused to forgo her rights under the Regulations, is unlawful.

The Work-Life Balance for Parents and Carers Regulations

The EU WLB Directive aimed to make various changes which were implemented into Maltese law in 2022, including:

- Paid paternity leave
- Changes to parental leave
- Carer's leave
- Right to request flexible working patterns



Paternity Leave

- 10 working days (paid) IMMEDIATELY
- Available for the father or equivalent second parent
- Applicable on birth or adoption of child
- Irrespective of:
 - Length of service
 - Marital/family status



Parental Leave

IMPORTANT:

**THE PARENTAL LEAVE ENTITLEMENT
REGULATIONS HAVE BEEN REPEALED**



Parental Leave

- The entitlement is available to both male and female employees, whether full or part timers, who were in employment for at least 12 months
- Applicable in the case of birth, adoption or fostering
- Entitlement is for 4 months leave until the child is 8 years old

The employer and employee may decide whether to grant the parental leave on a full time or a part-time basis, in a piecemeal way or in the form of a time credit system.

2 out of the 4 months may be transferred between parents.



Parental Leave

Parental leave shall be paid at **sickness benefit rates** in the following manner:

(a) fifty per centum (50%) of entitlement will be paid, where the child or children for whose care parental leave was granted has or have not attained four (4) years of age;

(b) twenty five per centum (25%) of entitlement will be paid, where the child or children for whose care parental leave was granted has or have attained the age of four (4) years but has or have not yet attained the age of six (6) years; and

(c) twenty five per centum (25%) of entitlement will be paid, where the child or children for whose care parental leave was granted has or have attained the age of six (6) years but has or have not yet attained the age of eight (8) years:

Parental Leave

At times, a request for the granting of parental leave may be refused. Justifiable reasons include:

- Places where the work is on a seasonal nature
- Where a replacement cannot be found within the notice given by the employee
- Where the specific employment of the employee requesting parental leave is of strategic importance to the undertaking or place of business
- Where the business does not employ more than ten persons
- Where a significant proportion of the workforce applies for parental leave simultaneously



Parental Leave

If an employer postpones the granting of parental leave, the employee must be informed within 2 weeks of employee's request, and the employer shall not prejudice the right to use up the full entitlement until the child is 8.

Following return from parental leave, the employee must be given the same job, or as similar as possible. The employee may also request a change to working hours/patterns (temporarily). Both the needs of the employer and employee must be assessed.

If notice of termination is given during parental leave (by either party), parental leave is automatically suspended.



Start of Paternal / Parental Leave

Once the employee provides:

- Birth certificate (only parental)
- Proof of foster placement
- Proof of start of adoption proceedings / certificate of successful home study by the relevant authority / of successful adoption
- Proof of legal custody in any other case



Carer's Leave

Carer: any worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of care or support for a serious medical reason

Relative: a worker's son, daughter, mother, father, spouse or, partner in civil partnership

Entitlement:

- 5 working days
- Unpaid
- Evidence of individual's illness and requirement of care and support shall be requested



Right to Request Flexible Working Patterns

Parents of children under 8 years old and carers have the right to request flexible working patterns, which includes:

- Remote working
- Flexible schedules
- Reduced hours



Right to Request Flexible Working Patterns

The law says that flexible arrangements may be limited in duration – take heed from this suggestion ...

In such cases, the employer must consider a request by employee to return to previous arrangements, and must give an adequate justification if the request is refused

Does this imply that employers cannot cancel flexible arrangements? ...



Urgent Family Leave Regulations

- Urgent Family Leave is given on the grounds of force majeure in relation to immediate family members. Situations include accidents, sudden illness or sickness requiring assistance or presence of the employee or births or deaths
- Entitlement consists of 15 hours on full pay for full timers, or pro rata for part timers (deducted from vacation leave entitlement)
- Advance notice is not always required (depending on the circumstances), but preferably notice of at least 24 hours is given



Adoption Leave

- Adoption Leave is given for an uninterrupted 18-week period
- Adoption Leave starts on the date when the child passes into the custody of the adoptive parents via judgment of the court in the child's country of origin.
- In the case of two parents, adoption leave may be split as they agree to in writing (whether the same or different employer). If only one employee is working, he must provide proof that the other is not in order to benefit from the full entitlement.
- Notification to the employer must be made at least 2 weeks before the leave begins (or as soon as practicable)



The National Commission for the Promotion of Equality (NCPE)

The NCPE works towards and investigates cases which relate to discrimination on the following grounds:

- sex/gender and family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, and gender identity, gender expression or sex characteristics in employment; banks and financial institutions, as well as education
- racial / ethnic origin and gender in the provision of goods and services and their supply
- freedom of movement for workers in the EU





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