

# The Employment Contract – Key Considerations

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# 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 (S.L. 452.126) 2022 – information which must be given to employees either in a contract or a statement – within 7 days.
- 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.



# Transition to other form of employment

- Employee with at least 6 months service AND completed probation: can request employer employment with more predictable and secure working conditions if available.
- Employer must provide a written reply within 1 month from request.
- Natural persons or SMEs – within 3 months.

# 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.



# Roski 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.



# Case 3527/HW

## Bourgeais v Sara Grech Ltd

### 15/12/20

- Sub-agents / estate agents working with a company – can they be deemed to be an employee or is there a general exemption for them issued by the DIER?



# Albert Falzon v Melita Mobile Ltd (CoA 30/1/2017)

- Tribunal decision – worker did not satisfy at least 5 of the criteria (6/11/2014)
- CoA – considered again whether the applicant met the criteria or not and reconfirmed decision of the Tribunal.





# Why is the difference relevant?

- Issues of income tax, social security contributions and VAT registration;
- Issues of employee registration with JobsPlus;
- Issues of employee rights – leave, sick leave, other leave, government bonus.
- Issues of protection from termination, contract renewal – reinstatement and compensation.
- Jurisdiction of the Industrial Tribunal – only in the case of ‘employees’.

# Why is the difference relevant?

- Issues of jurisdiction in the case of disputes:
- Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- *In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.*
- General rule → *persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*
- What is domicile?

# Jurisdiction

## Article 21

1. An employer domiciled in a Member State may be sued:
  - (a) in the courts of the Member State in which he is domiciled; or
  - (b) in another Member State:
    - (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or
    - (ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

# Jurisdiction

- Article 22
  - 1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.
  - 2. The provisions of this Section shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.
- Article 23
  - The provisions of this Section may be departed from only by an agreement:
  - (1) which is entered into after the dispute has arisen; or
  - (2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

# Pre-Brussels Regulation

- 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.
- Today?

# Choice of Law

- Regulation 593/2008 on the law applicable to contractual obligations (Rome I)
- Article 8 Individual employment contracts:
  - 1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

# Choice of Law

- 2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.
- 3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.
- 4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

# Engaging workers in other countries

- What contract can be provided for workers of a Maltese company working abroad?



# 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.

# Fixed Term Contracts

- New rule in article 36 (1)(a) of Chapter 452:
  - Provided that no fixed term contract shall be shorter than six(6) months unless a shorter period is justified by objective reasons based on precise and concrete circumstances characterising a given activity. Whenever an employer intends to enter into a contract of service for a fixed term with a prospective employee for a period shorter than six (6) months, the employer shall list in writing in that contract the objective reasons for which the contract is entered into for less than six (6) months:

# 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 – 29<sup>th</sup> 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 further than what law provides - 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.

# New provisions

- Fixed term contract – cannot be shorter than 6 months UNLESS a shorter period is justified by objective reasons based on precise and concrete circumstances characterising a given activity.
- Contract for a shorter period – must list in writing the objective reasons for which the contract is entered into for less than 6 months.



## New provisions

- Contract of between 6 months to 15 months duration – two months for 6 months contract duration.
- Contract is for less than 6 months – probation shall be 1/3 of the duration of the contract.
- Fixed term contract exceeding 15 months duration – probation shall be of six months.

# New provisions

- Probation period can be shorter.
- Probation period shall be suspended in the case of any two weeks or more approved leave – probation shall be extended to a corresponding duration of the leave.
- Employer cannot dismiss a worker during period of suspension of 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



# Can the parties agree to anything?

42. Unless in such case as is otherwise provided by this Act, if a contract of service between an employee and his employer or a collective agreement entered into between the employer and the recognised union representatives, provides for any conditions of employment, including conditions relating to the termination of the contract, less favourable to the employee than those specified in or under this Act, they shall have effect as if for those conditions less favourable to the employee there were substituted the conditions specified in or under this Act:
- Provided that, in exceptional cases, the employer in agreement with the employee or union representatives may provide for different conditions of employment than those specified in or under this Act as long as such agreement is a temporary measure to avoid redundancies and as long as it is approved by the Director, which approval needs to be reviewed every four weeks.

# Can the parties agree to anything?

- Overtime.
- Termination by notice in fixed term contracts.
- Non-payment of wages.
- Waiver of leave.

# Can clauses in the contract survive termination?

- Confidentiality;
- Assignment of IP rights;
- Non-solicitation clauses and non-compete clauses;
- Repayment of training expenses.



# Cutrico Services Ltd v Penza Josef (CoA, 4/05/2022)

- Non-solicitation clauses aren't prohibited must they must be reasonable and limited to situations which are required to safeguard the interests of the employer
- In this case, the clause is reasonable because it is limited to (i) a period of 2 years after termination of employment, (ii) interaction with and solicitation of clients of the employer and (iii) entities/persons who were clients or did business with the company in the last 2 years of the employee's employment.
- The clause is only null insofar as it relates to clients which the employee did not have a professional relationship with during his employment.



# Cutrico case

- Reference to Eurosupplies Limited vs Paul Tihn (CoA 30/06.2021)
- “The first instance court considered the clause invalid in so far as it refers to time when defendant is no longer in plaintiff’s employ because the clause is “unlimited in time”. Although such a clause may indeed not validly be unlimited in time, nevertheless it may validly prohibit certain activities for a reasonable time after termination of employment. The clause can therefore only be considered as invalid to the extent that it prohibits those activities beyond a reasonable time.”

# Can 'penalties' in the contract be enforced?

- Generally any form of 'fines' imposed on employee (unless authorised by the Director of the DIER) are prohibited → interpretation of Article 19 of Chapter 452;
- Penalties accompanying post-termination restrictive clauses used to be unenforceable – against public policy/ restrictive of trade.

# Mark Bugeja et v Geoffrey Camilleri Court of Appeal 28/06/2013

- Restrictive clause – prohibition from working for clients after termination of employment;
- Pre-liquidated damages of Lm2000 in case of breach;
- Court of Appeal had decided clause was unenforceable as Director had not given his consent.
- Retrial – Clause provided for pre-liquidated damages and not a fine – could be enforced.



# Bugeja Mark v Mellyora Grech, Court of Appeal, 27/5/2015

- Same clause was at issue;
- CoA made reference to retrial judgment – article 19 was not applicable to the case at issues;
- Not deemed as being in restraint of trade → reasonable condition for a limited period of time only.
- Comment by Court – condition did not limit ability of employee to work with ANY competitor but simply with clients of the employer.



# Camilleri Antonio vs Sicurella Salvatore (26/05/21) - CoA

- Very interesting judgment on post-termination restraints.
- Can a non-compete clause be enforceable? If yes, under what circumstances?

# Obligations which arise beyond the contract

- Anthony Caruana & Sons Ltd v Christopher Caruana, Court of Appeal, 28/2/2014
- Established post-termination fiduciary duties;
- Ex-employee was approaching clients to terminate their relationship with the company and instead start trading with his new company;
- Was given Lm10,500 upon termination for 'continued goodwill';
- Article 1124A (1) Civil Code – imposition of fiduciary obligations on employees + clause in contract – ordered to pay back amount received.

# What is so exceptional in the termination of an employment contract?

- Protection from termination – good and sufficient cause.
- Redundancy rules – rule on re-employment.
- No redundancy in a fixed term contract.
- Rules on conversion to indefinite.
- Right to re-instatement.





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