

Employment and Industrial Relations Law

Employment Status & the Contract of Employment

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Diploma in Law (Malta)



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Have it in writing!

Provide a written statement of particulars – does this mean a contract?

- How to decide which to provide?
- What do I need to include?
- Can I do away with having a written agreement or statement?
- Can the contract be electronic?



The Transparent and Predictable Working Conditions Regulations

- These regulations were introduced in October 2022
- They repealed the Information to Employees Regulations, which previously regulated contracts of employment
- They also added a few more conditions to be included in contracts, as per the EU Regulation of the same name



Types of Contracts

Contracts may be of 2 types:

- Fixed term
- Indefinite

Employees may work:

- Full-time
- Part-time
- Casual



Fixed Term (Definite) Contracts

- Run for a specified period of time
- Can be renewed
- Equal treatment with comparable indefinite employees
- Employees on fixed term contracts must be informed of indefinite posts which become available
- No change from an indefinite to a definite contract



Fixed Term (Definite) Contracts

- Minimum of 6 months, unless a shorter period is objectively justified in writing
- Probation must be proportionate – 2 months for every 6 months, up to 6 months if the contract is for 15 months or longer
- What about for jobs eligible for longer (12 month) probation?



Fixed Term (Definite) Contracts

- Early termination may result in a penalty amounting to half the remaining salaries to be paid
- An exception lies to this, if there is a good and sufficient cause
- If a new fixed term contract is entered into within 6 months from the termination of a previous one with the same employe, it consitutes continuous employment if the main tasks and duties remain essentially the same.



Zero-Hour Contracts

- PROHIBITED
- Except for the following cases:
 - Nature of activity requires short-notice worker replacement (so long as this contract is not the employee's whole-time employment)
 - Worker is a full-time student



Details of the Employer and Employee

Employer details:

- Name
- Registration number
- Place of business (address)

Employee details:

- Identification document number
- Sex
- Address



Place of Work

- Specific location
- Employer's regular place of business
- What if it is not defined or not static?



Commencement Date

Having the commencement date noted in the contract is essential. Note that the commencement date may not always be the same as the date on which the contract is signed.

Why is this important?

- *Charlene Vella vs. Banif Bank (Malta) plc (2012)* - application of commencement date over agreement date gave a definite answer as to when probation began



Probation

The period set for probation must be included. At the same time, take into account the following:

- Does the 6 month or 12 month maximum apply?
- Shorter probationary period?
- Conditions of the probationary period



Remuneration

- Rate of pay
- Overtime rates
- Special rates
- Other component elements
- This section must also include the of payment and the conditions under which any may be applied, and their quantum



Benefits

You should always provide for statutory bonuses – these are non-discretionary.

You may also provide for other bonuses or allowances, such as:

- Performance bonuses
- Car allowance
- Phone allowance
- Equipment allowance



Training

Mandatory training for the employee



The Working Time Regulations

- What are the maximum regular working hours per week?
- What are the basic permitted overtime hours?

Employers should consider having signed opt-out agreements to allow cases of employees working over the statutory maximum working hours. Such agreements should be signed following the contract of employment being entered into.



Hours of Work

- Hours, if fixed, should be indicated
- Allow room for flexibility if you wish, but be wary of being too generous!



Hours of Work

- If hours are not predictable, employees must be notified of:
 - The principle that hours are not predictable
 - The reference hours/days expected to work
 - Minimum notice for work allocation and for cancellation thereof



Unpredictable Working Hours

- Minimum notice periods for work assignments:
 - 30 days for work assignments of 6 weeks or more
 - 15 days for work assignments of between 2 weeks and 5 weeks
 - 7 days for work assignments of between 1 week and 2 weeks
 - 3 days for work assignments of 5 to 7 days
 - 1 day for work assignments of less than 5 days



Leave

- Vacation leave
- Sick leave
- Paternity leave
- Parental leave
- Maternity leave
- Carer's leave
- Urgent family leave
- Bereavement leave
- Marriage leave
- Quarantine leave
- Jury leave
- Injury leave

Where any such entitlements cannot be determined at contract stage, the employer must provide the way in which they may eventually be calculated



The Employee's Role

An outline of the employee's role, including:

- Job title
- Job grade
- Nature and category of work (where applicable)
- Reporting lines

What about providing a job/role description? Substantial changes to the employee's role post-signature may require the employee's express consent.



Temporary Agency Workers

- Details of the user undertakings
- What if these are not known well in advance (at contract stage)?



Other Matters

- Collective agreements
- 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
- Other applicable conditions of employment



Parallel Employment

Employers may not prohibit parallel employment, except if it:

- Conflicts with the employee's work schedule
- Has health and safety implications
- Risks conflict of interest or confidentiality breaches



Staff Handbook

Your contract should provide that the employee must adhere to the content of the handbook, which should contain basic policies and procedures (such as disciplinary and grievance procedures, anti-harassment and bullying policies, leave policies etc.)

Employers should not include handbook content in the contract for ease of amendment. Furthermore, in this way a breach of a policy won't result in a direct breach of contract.



Fines

- What fines will you impose?
- When may an employee be liable to a fine?

IMPORTANT – to be able to impose fines on employees, you must be in possession of a fines permit issued from the DIER. Without it, the imposition of fines is illegal.



Confidentiality

Confidentiality is a crucial element in various businesses as employees may be exposed to a significant amount of confidential business information.

Ensure that employees are obliged to return or delete (from own devices) any company property or information which they possess upon termination.



Restraint of Trade Clauses

What kind of restrictions may be placed on employees in the contract?

- *Attilio Vassallo Cesareo vs Anthony Cilia* (2006) – a restraint of trade provision must be favourable to both (quid pro quo) and not only to one party)



Restraint of Trade Clauses

- Antonio's Barbershop case (Camilleri vs. Sicurella, 2018):
 - Restraint on working with any type of competitor (barbers, hairdressers, sale of men's hair products etc.) anywhere in Malta: this restrained the entirety of the plaintiff's working ability in Malta, and thus violates the very right to work enshrined in the Constitution of Malta (even if a non-citizen).
 - Restraint on soliciting clients/recent ex-clients: should only apply to the clients with whom the plaintiff had direct dealings
 - Restraint on soliciting employees to work with competitors: totally illegal as employees are not the employer's 'assets' (*FirstUnited Ltd v. Farrugia Wismayer*) – confidentiality restrictions will nonetheless apply



Termination of Employment

- Formal requirements to be observed
- Notice periods
- How notice may be calculated



Obligations on Termination

Ensure that your employees are informed that they are obliged to delete or erase any employer information which they possess.

The clause should also include a reservation of the employer's right to take legal action in case of non compliance.



Data Protection

You should ensure that employees are informed of 2 basic criteria:

- That the information you collect about them will be safeguarded through the Employee Privacy Notice
- That they will abide by your data protection standards and rules when handling data while on the job



Entire Agreement Clause

The Entire Agreement clause provides that the written agreement being entered into between the employer and the employee is the only agreement which is to apply in the circumstances and that no other agreement (whether in the form of anything in writing, any mutual oral agreement etc.) shall apply despite what might have been acceded to before.



Governing Law & Jurisdiction

In a contract, you should indicate:

- Which jurisdiction's law applies to it
- Which jurisdiction's courts or tribunals apply



Provision of Information

Information relating to the following may be provided as a reference to the applicable law:

- Probation
- Training
- Leave
- Termination and notice
- Remuneration



Provision of Information

- All information must be provided to the employee by the seventh day of employment
- Exception (within 1 month of employment):
 - Duration of FT contract
 - Probation
 - Training entitlement
 - Leave
 - Unpredictable working hour patterns
 - Collective agreements



Provision of Information

- Where the employer has not abided by such obligations, the employee may file a complaint with the DIER, wherein the employer may be ordered to provide the information
- A fine of at least €450 may nonetheless be levied



Working Abroad

- Workers who work in other countries (EU or not) for more than 4 weeks, all information must be provided by date of departure and must include:
 - The country/countries where the employee is to work
 - Anticipated duration
 - Currency of remuneration
 - Benefits in cash or kind
 - Information on repatriation and conditions thereof



Employer's Records

Employers must retain copies of all contracts of employment, and a register of employee details including:

- Employee name, address, gender and ID document number
- Job
- Date of commencement
- Nature of contract (definite/indefinite, full-time/part-time)
- Date of termination (if definite)
- Ordinary working hours & overtime worked, and weekly wages
- Daily and weekly rest
- Leave
- Any updates to the worker's status/conditions



Employer's Records

Keeping up to date and accurate records are essential – the DIER may conduct inspections randomly, or upon a complaint being filed, and any such details may be required to be presented



Predictable Conditions

A worker with at least six (6) months service with the same employer, who has completed his probationary period, if any, may request his employer a form of employment with more predictable and secure working conditions where available and receive a reasoned written reply.

The reply must be given within 1 month of the request

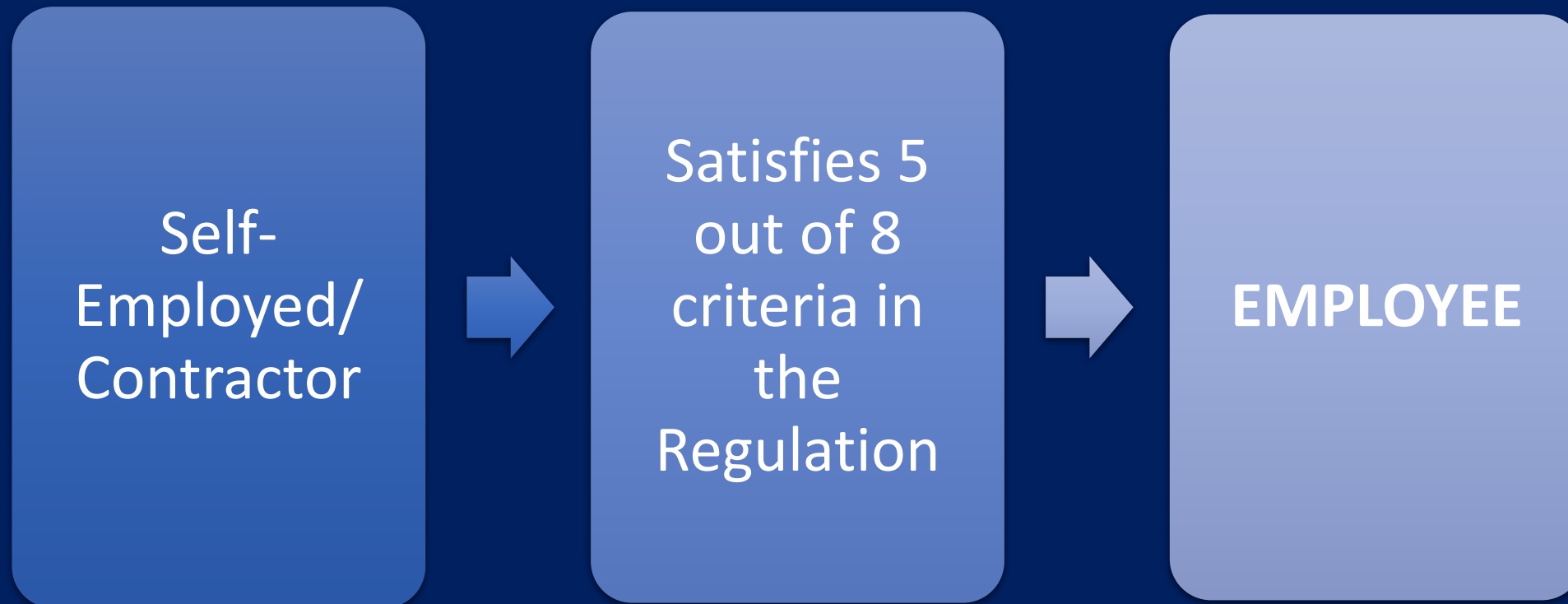


Changes to Contracts

No condition of employment can be modified or amended after the commencement of employment, unless such modification or amendment is a result of a change in laws, regulations or a collective agreement regulating the place of work or, without prejudice to the generality of the foregoing, a result of the application of the proviso to article 42 of the Act.



Employee Status – SL 452.108



The Employment Status Criteria

- 75% of the worker's annual income comes from the person for whom the service is carried out
- One person determines what work is assigned, how and from where it is to be carried out
- Equipment, tools and materials are provided by the person for whom the service is carried out
- The worker is subject to a schedule or minimum work periods established by the person receiving the service



The Employment Status Criteria

- The worker cannot sub-contract to other individuals
- The worker is integrated into the service receiver's work structure (or hierarchy) and production process
- The worker's activity is a core element in the organisation and pursuit of objectives in the service receiver's business
- The worker carries out similar tasks to those of existing employees (or former ones)



Employment Status

Albert Falzon vs. Melita Mobile Ltd – Court of Appeal, 2017

- The employee was responsible for taking care of a mobile trailer for Melita as a contractor, not an employee
- The Tribunal found that he satisfied only 3 of the 8 criteria and therefore dismissed the case
- The plaintiff appealed, claiming that he satisfied at least another 3 criteria, however the Court of Appeal only found he satisfied 1 other criterion, which still did not reach the threshold of 5





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