

*Employment and Industrial Relations Law*

## **Employment Status and the Employment Contract**

**Lecturer: Dr Emma Grech**

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**Diploma in Law (Malta)**  
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# Part 1

## Employment Contract



Recalling our last lecture...

Sources of Employment Law:

*Written statement of particulars / The contract of employment*



# Definition

The Employment and Industrial Relations Act (Chapter 452 of the Laws of Malta) (the "EIRA") defines the "contract of employment" as,

"an agreement, (other than service as a member of a disciplined force except as may be provided in or under this Act) 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, and, insofar as conditions of employment are concerned, includes an agreement of apprenticeship:

... Provided that unless otherwise specifically referred to in another law, in this Act or in any regulations made under this Act, irrespective of the declared nature of the relationship, whenever the employer exercises effective direction, control and choice over the nature of the work or tasks being or to be performed by a person for the employer, that relationship shall be considered to be one of a contract of service and the person carrying out the work shall be deemed to be an employee of the employer."



# What does the employment contract regulate?

- A contract of employment regulates the employee's conditions of employment.
- In practice, a contract of employment includes things that are in part **regulated by law** and in part **regulated by the convention of the parties**... but must still be objectively reasonable!
- Regulated by law: ?
- Regulated by the convention of the parties: ?
- In addition, recall Article 42 of the EIRA...



# Article 42 – Conditions Less Favourable

- **Employers cannot impose conditions on employees which are less favourable than those provided for in the law**
- An exception exists where the employer can prove that such action is taken to avoid effecting redundancies
- A permit needs to be formally obtained from DIER (with the justifications) which must be renewed every 4 weeks



# Pacta Sunt Servanda

... if the contract is drawn up in line with the law, it will be deemed the LAW between the parties.

This is why it is imperative that contracts of employment are drawn up by duly qualified professionals. They will advise you about added safeguards, such as...



## Severability clause

- A severability clause means the whole agreement is not void because one part is

## Whole agreement clause

- A clause which clarifies that THIS IS IT! There are no other contracts / arrangements in place between the parties. All the more important in a scenario where a verbal contract is permissible





# Oral (verbal) or written? (1)

## **ALWAYS HAVE THE CONTRACT DRAWN UP IN WRITING. WHY?**

- Article 2 of the EIRA mentions that a contract of employment can be either oral or in writing. This is however a measure intended to protect the employee.
- In addition, even though an oral agreement in terms of the same Article 2 classifies as a contract of employment, one must consider the Transparent and Predictable Working Conditions Regulations (Subsidiary Legislation 452.126). Regulation 4 provides that the requisite information shall be provided to the employee in **WRITING**.. THIS IS THE BARE MINIMUM.



# Oral (verbal) or written? (2)

## **ALWAYS HAVE THE CONTRACT DRAWN UP IN WRITING. WHY?**

- Preferably, provide a fully fleshed-out CONTRACT of employment that is signed by both parties. That said, a written statement of particulars could also be deemed valid at law
  
- The more comprehensive and clear the document regulating the relationship is, the less issues can arise down the line



# The Transparent and Predictable Working Conditions Regulations (1)

- The Transparent and Predictable Working Conditions Regulations (Subsidiary Legislation 452.126) stemmed from the Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union
- This directive aimed to update the already existing Council Directive 91/533/EEC of 14 October 1991 on the employer's obligation to inform employees of the conditions applicable to the employment relationship in the context of a more modern labour market



# The Transparent and Predictable Working Conditions Regulations (2)

- Regulation 5 states that employers are required to provide information to employees regarding the 'essential aspects' of the employment relationship, which shall **include**:
  - (a) Details on the name, registration number and registered place of business of the employer as well as valid ID, gender, and address of the employee and the place of work (note that in the absence of a fixed place of work the information should state that the employee will be employed at various places together with the registered place of business. If there is no registered place of business, the domicile of the employer is to be stated),
  - (b) The place of work (whether fixed, and if not, the principle that the worker is employed at various places or that he is free to determine his place of work, as well as the registered place of business or the domicile of the employer as the case may be),
  - (c) Title, grade, nature or category of work,



# The Transparent and Predictable Working Conditions Regulations (3)

- (d) Brief specification or description of the work,
- (e) Date of commencement of the employment relationship,
- (f) The end date or expected duration of the employment relationship (only in the case of fixed-term contracts),
- (g) Identity of user undertakings when known (for temporary agency workers),
- (h) Duration and conditions of the probationary period,
- (i) Training entitlement provided by the employer (if applicable),
- (j) Amount of paid leave entitled to worker including: vacation leave, parental leave, paternal leave, maternity leave, carer's leave, urgent family leave, bereavement leave; and marriage, quarantine, jury service, sick leave and injury leave,



# The Transparent and Predictable Working Conditions Regulations (4)

(k) Procedure to be observed for termination of employment (including formal requirements and the notice periods),

(l) Remuneration, overtime and special rates of pay, frequency and method of payment, conditions under which fines may be imposed by the employer and their quantum,

(m) [If the work pattern is entirely or mostly predictable:] length of the worker's standard working day or week and any arrangements for overtime and its remuneration as well as, where applicable, any arrangements for shift changes,

(n) [if the work pattern is entirely or mostly unpredictable:] (1) that work schedule is variable (including number of guaranteed paid hours and the remuneration for work performed in addition to these guaranteed hours; (2) reference hours and days within which the worker may be required to work, (3) 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,



# The Transparent and Predictable Working Conditions Regulations (5)

- (o) Existence of collective agreements (if any),
- (p) Identity of social security institutions that are receiving the social contributions attached to the contract of employment and any protection provided by employer regarding this,
- (q) Any other relevant condition of employment.

***IMPORTANT: Should this information not be provided for in the existing employment contract, then the information referred to in paragraphs (a)-(e), (g), (k), (l), and (m) should be provided to the worker in the form of a document by not later than the seventh calendar day starting on the first working day. The other information, if not provided previously, should be provided within one month of the first working day. Failure to do so, the employer would be deemed to be in contravention with the Regulation and would be liable, on conviction, to a fine (multa) of not less than €450.***

# Main types of contracts of employment (1)

Contracts may be of two types:

- Fixed term
- Indefinite

Employees may work:

- Full-time
- Part-time
- Casual / Zero-Hour: note SL 452.126, which prohibits this kind of work save for in specific circumstances





# Main types of contracts of employment (2)

*Do not simply adapt, lock, stock and barrel, an indefinite contract of employment to a definite contract of employment (or vice versa), as there are various matters to consider...*

- Fixed term contracts are definite and may be renewed.
- Can a fixed-term contract be shorter than 6 months?
- Employees on fixed term contracts must be informed of indefinite posts which become available.
- You cannot change from an indefinite to a definite contract.



# Main types of contracts of employment (3)

- Probation period calculation...
  - In the case of a fixed term contract of a duration of between 6 and 15 months, the probationary period shall be calculated on the basis of \_\_\_ months per 6 months contract duration ???
  - For a fixed term contract exceeding \_\_\_ months duration, probation shall be of 6 months ???
  - If the fixed term contract is of a duration less than \_\_\_ months, the probationary period shall be one third of the duration of the contract ???
- Regulation 4 of the Contracts of Service for a Fixed Term Regulations (Subsidiary Legislation 452.81) states the fundamental rule on the principle of non-discrimination whereby it is expressly prohibited for employees on a contract of service for a fixed term to be treated in a less favourable manner than comparable permanent employees...



# Main types of contracts of employment (4)

- There are, however, two exceptions: (i) if the task for which the employee has been employed is specific or has a top management nature, and includes objective considerations which justify such differentiation; and (ii) when the difference arises in view of the recognition of length of service, experience, qualifications or conditions of pay and work attached to the contract of service immediately preceding the contract of service for a fixed term, and such other differences as are justified on objective grounds.
- The general rule is that successive definite contracts cannot last for longer than 4 years, at which point the employment becomes indefinite.
  - Be away of the definition of “continuous employment”
- Either party may terminate the contract by paying a penalty amounting to half the remaining salaries to be paid.
  - Is this always the case?





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# Details of the contract of employment (1)

## 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. It resulted that Ms Vella was employed under an indefinite contract of employment dated May 5, 2009. However, under clause 2.2 of her contract, it was stated that “the date of commencement of employment shall be **May 11, 2009**”.



# Details of the contract of employment (2)

## THE JOB

- An outline of the employee's role, including:
  - Job title
  - Job grade
  - Nature and category of work (where applicable)
  - Where they are going to be reporting
  - 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.



# Details of the contract of employment (3)

## PROBATION

- In the case of a fixed term contract of a duration of between 6 and 15 months, the probationary period shall be calculated on the basis of 2 months per 6 months contract duration.
- For a fixed term contract exceeding 15 months duration, probation shall be of 6 months.
- If the fixed term contract is of a duration less than 6 months, the probationary period shall be one third of the duration of the contract.
- Probation can be shorter by agreement between the parties.
- Workers holding technical, executive, administrative or managerial positions, and whose wages are at least double the minimum wage, shall have a probation of 12 months



# Details of the contract of employment (4)

## WAGES

- Above minimum wage – ensure that you check the relevant minimum wage/s and statutory entitlements, paying attention to the applicable Wage Regulation Order
- Wages should be paid at regular intervals not exceeding 4 weeks in arrears.
- Wages are also to be paid for overtime – the “48-hour rule”





# Details of the contract of employment (5)

## WORKING TIME

- Daily breaks: where the working day is longer than six hours, an employee is entitled to not less than fifteen minutes of rest, unless a longer period of rest is provided by any other regulation or agreement.
- Between one working day and another: every worker is entitled to a minimum daily rest period of 11 consecutive hours.
- Weekly day of rest: everyone is entitled to an uninterrupted weekly rest period of 24 hours in addition to the 11 hours daily rest within a 7-day period, or 48 consecutive hours in a period of 14 days in addition to the 11 hours daily rest
- **IMPORTANT: no minimum rest period can be substituted by monetary compensation.**



# Details of the contract of employment (6)

## HOLIDAY AND VACATION LEAVE

- Employees must be informed of:
  - All paid holidays – covering public and national holidays
  - Vacation leave
  - Shut down
- The employee should seek to utilise his/her vacation leave entitlement during the same calendar year when it is due. It is only possible to carry forward up to 50% of the annual leave entitlement to the following year if there is an agreement with the employer.
- A minimum period equivalent to four weeks (160 hours) cannot be replaced by any allowance, except where the worker's employment is terminated.



# Details of the contract of employment (7)

## SICK LEAVE

- Employees must be informed of:
- Sick leave entitlements (which may differ depending on your applicable Wage Regulation Order)
- When they have to submit a doctor's certificate
- If you may send a company doctor to check on them



# Details of the contract of employment (8)

## GENERAL CONDITIONS OF EMPLOYMENT

- **IMPORTANT:** It is essential to check out whether your industry falls under the competence of a Wage Regulation Order, which may provide for distinct conditions of employment depending on the sector or industry



# Details of the contract of employment (9)

## OTHER SOURCES

- The Employer's HR Handbook
- GDPR Policies
- Whistleblowing Policies

Generally, seek to include an **ACKNOWLEDGMENT** in the contract of employment.



# 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.
- Be very careful about imposing PENALTIES on employees for a breach of confidential information clauses... GET LEGAL ADVICE.



# Restrictive Covenants (1)

- A restrictive covenant is typically a clause in a contract which prohibits an employee from competing with their ex-employer for a certain period after the employee has left the business, or prevents the ex-employee from soliciting / dealing with customers of the business.
- The starting point - void on the grounds that it is a restraint of trade and contrary to public policy.
- However, generally, if the ex-employer can convince a court that the covenant is:
  - designed to protect its legitimate business interests; and
  - extends no further than is reasonably necessary to protect those intereststhen it should be upheld and enforced.



# Restrictive Covenants (2)

Local Courts have consistently provided there are four legitimate interests which employers are entitled to protect, namely: (i) soliciting existing employees, (ii) disclosure of confidential information and trade secrets, (iii) working for its competitors and (iv) 'use' of the existing customers and connections.

In **Mark Bugeja et vs. Mellyora Grech (Court of Appeal), 2015**, the Court upheld the following restraint of trade clause:

The employee cannot take up employment for a minimum period of two years after date of termination of employment with the Firm, with any person, firm or company who for two years prior to the termination of this agreement were clients of the Firm. In such case the parties agree that the employee will pay the Firm by way of agreed damages the sum of two thousand Maltese Liri (Lm2,000).





# Parallel employment

- An employer may not prohibit 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...
- Exception: 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 or the avoidance of conflicts of interest.



# Changes to the employment contract

- **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.**





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# Part 2

## Employment Status



# Who is an 'employee?'

“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.



# Employment Status

**IMPORTANT:** The Employment Status National Standard Order (Subsidiary Legislation 452.108), which came into force in 2012

Intended to avoid situations of abuse



# The Employment Status Criteria (1)

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



# The Employment Status Criteria (2)

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





# The Employment Status Criteria (3)

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



# The Employment Status Criteria (4)

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

- Point (c): the Court held that plaintiff was burdened with a number of contractual responsibilities that were indispensable for the performance of this work, amongst which were to personally provide a vehicle for the towing of the trailer and the generator, the garaging of the trailer and generator in his personal garage, as well as other obligations relating to the general maintenance, insurance, fuel and running costs tied up with this trailer. The Court held that when considering these obligations, it is difficult for it to be considered that these regard a typical and ordinary employment relationship.



# The Employment Status Criteria (5)

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

- Point (f): the plaintiff argued that the defendant company only had one mobile shop that was very important to its sales... in the event that he was not able to go out with it, no one else could, and this not only from the company's behalf but also third parties, since sub-contracting was expressly prohibited. He therefore held that his work forms part of the company's "work organisation". The Court, however, did not agree - the primary service rendered by the plaintiff consisted in the towing of the trailer from one locality to another and does not fall within the **core business** of its structure.



# Points of interest (1)

- Possibility of either the employee or employer may submit a written request to the DIER to exempt the relationship if it is considered that there are particular grounds relating to that activity to exempt it from this requirement
  - Such exemption shall remain valid unless rescinded by the Director
- When an employment relationship has been established in terms of the NSO criteria, the employee shall be considered to have been engaged on an indefinite contract with the date of engagement being the date of the initial continuous provision of services



## Points of interest (2)

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# Thank You

[emma.grech@thecitylegal.com](mailto:emma.grech@thecitylegal.com)



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