

Employment and Industrial Relations Law

Equality, Diversity and Discrimination



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Diploma in Law (Malta)

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Part 1: Equality, Diversity and Discrimination

[General]



Equality – What does it imply?

The state of 'being equal'.

In general, equality is about ensuring equality of access, treatment, opportunities, resources, outcomes and impact.

Inequality can be manifested through prejudice, oppression and discrimination – direct and indirect – and can be systemic through behaviour, policies, practices and culture.



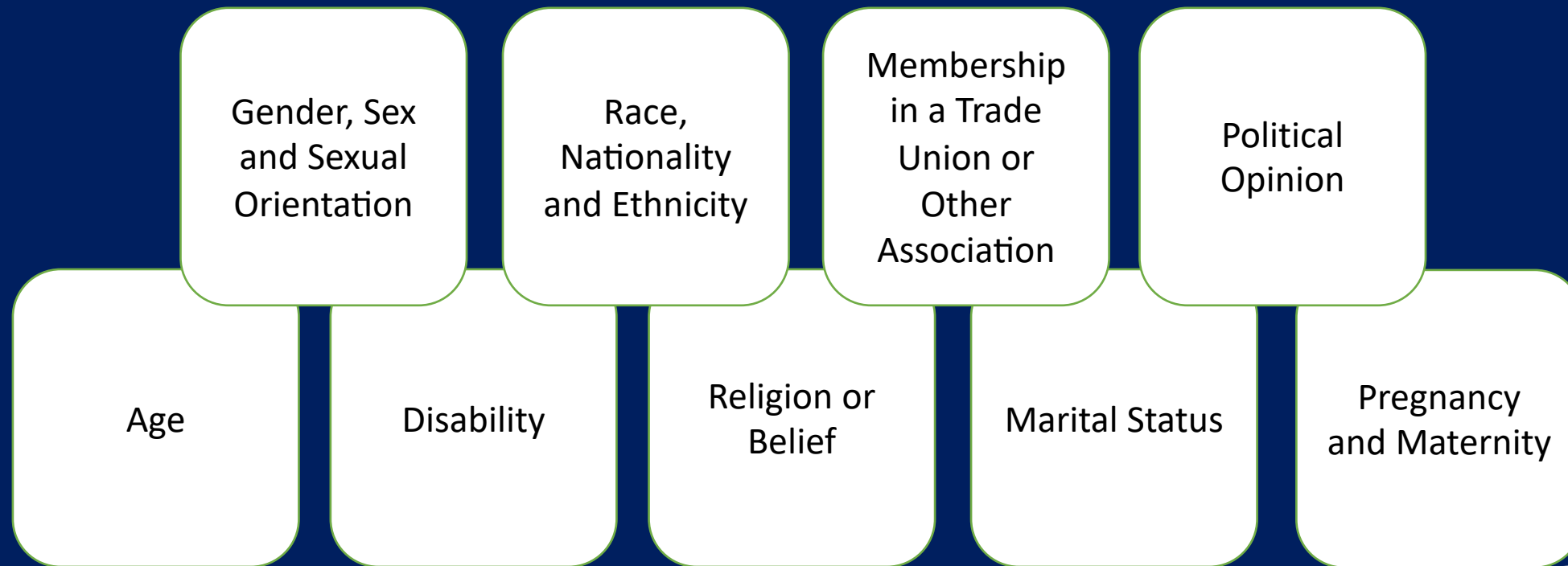
Equality – What does it imply?

Achieving equality is a two-step process:

1. Identification – of the barriers and biases, in relation to whatever these might be.
2. Taking action – to overcome specific inequalities, discrimination, disadvantages and marginalisation experienced by certain groups and individuals including the “protected characteristics”.



Diversity – Protected Characteristics



Diversity – What about your workforce?

Diverse and inclusive workforces are beneficial for decision making, innovation and problem solving as people bring a diverse range of backgrounds and experiences with them.

What about your organisation?

- Does it cater for a diverse workforce? If so, to what extent?
- How does it react to diversity issues and tensions? What would the outcome be?
- Does it avoid making changes to avoid further possible tensions, hence making certain persons/groups (generally minority) feel uncomfortable or out of place?



Discrimination – What is it (legally)?

”...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”.

[Article 2, Employment and Industrial Relations Act, Chap. 452]



Discrimination – What is it (legally?)

*“...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...”*
[Article 2, Equal Treatment in Employment Regulations, S.L. 452.95]

*“... to combat discriminatory treatment on the grounds of **religion or religious belief, disability, age, sex** [including gender reassignment], **sexual orientation, and racial or ethnic origin**”* [Article 1(3), Equal Treatment in Employment Regulations, S.L. 452.95]



Part 2: Equality, Diversity and Discrimination

[Applicable Laws]



Local Laws & Regulations

- Employment and Industrial Relations Act (EIRA) (Chap. 452)
- Equal Treatment in Employment Regulations (S.L. 452.95)
- Protection of Maternity (Employment) Regulations (S.L. 452.91)
- Equal Opportunities (Persons with Disability) Act (Chap. 413)
- Equality for Men and Women Act (Chap. 456)
- Equal Treatment of Persons Order (S.L. 460.15)
- The Maltese Constitution



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



Application

Applies to:

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

Doesn't apply to:

- Differential treatment based on nationality
- The armed forces (re. disability and age)



Practical Scenarios

The definition of “*discriminatory treatment*”, also covers practical scenarios in which this can occur:

- a. Harassment (including sexual), and less favorable treatment based on rejection to submit to harassment
- b. Instruction to discriminate on the grounds of sex
- c. Less favorable treatment on the grounds of pregnancy or maternity
- d. Less favourable treatment concerning a person who will undergo/is undergoing/has undergone any type of gender reassignment treatment



Types of Discrimination

Direct Discrimination:

*“...shall be taken to occur where one person is treated less favourably than another is, has been, or would be, treated in a **comparable situation**...”.*

Indirect Discrimination:

*“...shall be taken to occur where an **apparently neutral** provision, criterion or practice would put persons...at a disadvantage when compared with other persons...”. Unless:*

(i) “that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”; or

(ii) “with regards to persons with a particular disability, the employer or any person or organization to whom these regulations apply, is obliged, under any law, to take appropriate measures...so as to eliminate disadvantages entailed by such provision, criterion or practice”.

[Article 3(2)(a) and (b), Equal Treatment in Employment Regulations, S.L. 452.95]



Types of Discrimination - Examples

Direct Discrimination:

- Example 1: The owner of a restaurant fires an Indian employee as a customer complained that she prefers to be served by Maltese waiters
- Example 2: 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):

- Example 1: An employer unreasonably forbids a parent of a disabled child to telework for some hours
- Example 2: An employer has a minimum height requirement to apply for jobs in a hotel for no apparent reason



Harassment – General

“...unwanted conduct or requests relating to any of the grounds referred to in subregulation (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”.*

[Article 3(3), Equal Treatment in Employment Regulations, S.L. 452.95]



Harassment – Sexual

“...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 conduct or 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”.

[Article 3(5), Equal Treatment in Employment Regulations, S.L. 452.95]



Equal Pay for Work of Equal Value

The employer has an obligation to follow the ‘equal pay for equal work’ principle, particularly between persons of different gender (but not only).

“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”.

[Article 3A, Equal Treatment in Employment Regulations, S.L. 452.95]



Equal Pay for Work of Equal Value – The Transparency Directive

- Aims to combat pay discrimination and help close the gender pay gap in the EU.
- Will require employers (with at least 150 employees, dropping to 100 after four years) throughout the EU to report (every three years, and if employing 250 or more, annually) gender pay gaps:
 - Across the company as a whole;
 - Within each category of workers who do the same work or work of equal value.
- Creates a number of individual rights to pay transparency, such as:
 - requiring employers to advertise the salary range for each job vacancy;
 - requiring employers to stop asking job applicants about their current and past pay;
 - new right to all workers to request information about what others doing comparable jobs are paid, on average, which essentially means that employers will need to respond to requests for information for relevant equal pay statistics;
 - compensation to victims of gender pay discrimination. Burden of proof rests on employer.

'Acceptable' Discrimination

- In some instances, discrimination may occur on the basis of a genuine occupational requirement or age [Articles 4 and 5, Equal Treatment in Employment Regulations, S.L. 452.95].
- The burden of proof lies on the person alleging the justification.
- Example (occupational requirement): 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.
- Example (age): setting special conditions for the access to vocational training of younger employees to promote their vocational integration and protection.



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

Regarding persons with disabilities, the principle of 'equal treatment' shall be without prejudice to measures taken at the workplace aimed to create/maintain facilities for safeguarding or promoting integration into the workforce.

[Article 6(1) and (2), Equal Treatment in Employment Regulations, S.L. 452.95].



Positive Action OR Positive Discrimination?

DON'T GET CONFUSED!

- PA: doing something to encourage individuals having one or more of the protected characteristics to feel more integrated in the workplace. For example: implementing family friendly policies; reasonable adjustments to existing policies for people with disabilities. THIS IS LAWFUL.
- PD: the automatic favouring of an individual from an underrepresented group into a role without considering whether they have the right skills for the post, whilst other candidates who are better qualified are passed over. 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. THIS IS UNLAWFUL.



Reporting Discrimination

The alleged victim or the Director of Employment & Industrial Relations (DIER) has the right to send a report with regard to the experienced discrimination to the employer concerned and requesting a reply, which must be given within 10 working days from receipt. The employer's reply shall include:

- The employer's version of events
- Grounds disputing the allegation
- Explanation of any relevant procedures adopted to prevent discrimination

ATTN 1: All such communication may be used as evidence before proceedings initiated before the Industrial Tribunal.

ATTN 2: The non-reply of the employer within the given time-frame, without a reasonable excuse, may be used by the Tribunal as inference that an unlawful act was indeed committed by the employer.

[Article 9, Equal Treatment in Employment Regulations, S.L. 452.95]



Employer's Obligations

Employer's must:

- Ensure that employees are aware of the provisions of the Regulations and of any measures taken in terms of the Regulations
- Take action to prevent all forms of discrimination on the grounds of sex (particularly harassment/sexual harassment)

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

[Articles 12, 12A and 13 Equal Treatment in Employment Regulations, S.L. 452.95]





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The Employment and Industrial Relations Act (Chap. 452 of the Laws of Malta)

[Part IV – Protection Against Discrimination Related to Employment]



Discrimination and Gender Equality (A. 26)

It shall not be lawful, for any person to:

- a. subject job applicants to discriminatory treatment when advertising, offering or selecting applicants for employment
- b. subject employees to discriminatory treatment in regard to conditions of employment or dismissal

“*discriminatory treatment*” shall include:

- Selecting/engaging an individual less-qualified than an individual of the opposite sex (unless justified on acceptable grounds related to the nature of the work)
- Less favorable actions, terms of payment, employment conditions between employees performing the same work or work of equal value
- Management of work, distribution of tasks, arrangement of working conditions intended to assign a less favorable status to employees



Work of Equal Value (A. 27)

Employees in the same “class”[*] of employment are entitled to the same remuneration when performing “work of equal value”.

BUT a collective agreement may stipulate different:

- ✓ salary scales
- ✓ annual increments and
- ✓ other conditions of employment

which are different with respect to workers employed at different times AS LONG as such salary scales/increments/conditions may be achievable within a specified period of time.

[] “...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: Provided that where there is no collective agreement or where a 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**” [A. 2 EIRA]*



Victimisation (A. 28)

It shall not be lawful to victimise persons who would have, regarding alleged illegal or corrupt activities committed by the employer (including representatives):

- a. disclosed information or made a complaint to the competent authorities
- b. initiated or participated in proceedings for redress on grounds of alleged breaches of the EIRA



Harassment (A. 29)

It shall not be lawful for an employer OR employee to harass another employee OR employer by subjecting such person to any unwelcome act, request or conduct, including:

- spoken words
- gestures
- the production, display or circulation of written words, pictures or other material

which is based on sexual discrimination and which could reasonably be regarded as offensive, humiliating or intimidating to such person.

Sexual harassment would have occurred if the victim is:

- subjected to an act of physical intimacy
- requested sexual favours
- subjected to any unwanted act/conduct having sexual connotations
- treated differently as a result of his/her rejection of the unwanted act/conduct

Part 3: Equality, Diversity and Discrimination [Remedies]



Trade Unions

Unions play an important role in the workplace:

- Advise on and resolve workplace issues by being a voice for employees
- Act as an employee representative during bargaining negotiations
- Negotiating collective agreements
- Other responsibilities such as ensuring that employers are meeting their minimum obligations and looking into suspected breaches of employment laws, including discrimination



Department for Industrial and Employment Relations (DIER)

- Main aim is to protect the interests of workers holding employment contracts, while actively promoting a healthy working relationship, and to contribute towards stable industrial relations through enforcement of the EIRA.
- The Director General, Industrial & Employment Relations being also the Head of Department is responsible for the whole strategic overview of the Department's operations and functions, including:
 - ✓ Provision of the necessary monitoring and enforcement of employment conditions as established by law;
 - ✓ Regulating employment contracts in an equitable manner so as to ensure that rights and obligations pertaining to each party in the contract are observed;
 - ✓ Protection of workers whose employment relationship has been terminated by an employer;
 - ✓ Eliminating discriminatory practices;
 - ✓ Provision of effective mediation and conciliation in order to reduce industrial actions and trade disputes;
 - ✓ Promotion of good relationship between employers' and workers' representatives.



The National Commission for the Promotion of Equality (NCPE)

A national commission established under the Equality for Men and Women Act (Chapter 456 of the Laws of Malta).

The NCPE works towards, and investigates, cases relating to discrimination on the grounds of:

- i. 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;
- ii. racial/ethnic origin and gender in the provision of goods and services and their supply; and
- iii. freedom of movement for workers in the EU.



Industrial Tribunal

- A person who alleges that he/she has been the victim of discriminatory treatment, whether indirectly or directly, in relation to his/her employment in terms of the Equal Treatment in Employment Regulations (S.L. 452.95), has 4 months from the alleged breach to institute proceedings before the Industrial Tribunal.
- A person who alleges that his/her conditions of employment are, or the employer is, in breach of Articles 26-29 EIRA, has 4 months from the alleged breach to institute proceedings before the Industrial Tribunal.



Relevant Case Law – 4 month rule

- **Grezzju Azzopardi vs Public Broadcasting Services Ltd (Court of Appeal, 2 January 2008):** *“Huwa sintomatiku f’materja ta’ ksur bhal dan illi minn natura stess tieghu ma jistax jigi alleccjat ma’ xi data effettiva in kwantu jekk l-appellanti, kif allegat, ikompli jissubixxi l-istess trattament differenzjali u jissokta jircievi rata ta’ rimunerazzjoni inferjuri ghal xoghol ta’ valur ugwali, komparat ma’ haddiema ohra fl-istess klassi, tali ksur ma jista hlief jitqies wiehed li, kif kwalifikat mil-kazistika Ingliza citata mill-appellanti, huwa a continuing act perkorribbli matul id-durata tal-impjieg”*
- **Albert Cassar vs Enemalta Corporation u b’digriet tal-5 ta’ Mejju 2017, Engineering Resources Ltd assumiet l-atti tal-kawza (Industrial Tribunal, 2 December 2022):** *“Mill-provi jirrizulta li l-ksur lamentat huwa ta’ natura kontinwata u ghaldaqstant ghar-ragunijiet premessi t-Tribunal qed jiddeciedi billi jichad l-ecezzjoni tas-socjeta’ ntimata u jordna l-prosegwiment tal-kaz”*. [Case on the merits still pending]



Relevant Case Law – Discrimination

- Olivia Ann Camilleri vs HSBC Bank Malta plc (Industrial Tribunal, 14 March 2022):** *“It-Tribunal irid jidhol fil-kwistjoni tad-diskriminazzjoni. Jirrizulta illi kien hemm impjegata ohra li kienet ta’ dem four day week bir-reduced hours u jekk ghalhekk dan l-agir jikkostitwixxi diskriminazzjoni. Il-Bank issottometta li din l-impjegata l-ohra kienet ta’ dem gewwa sezzjoni differenti li setghet ta’ dem reduced working hours u gimgha qasira mhux ta’ hamest’ijiem. Hawn it-Tribunal jinnota li minkejja huma mpjegati mal-istess kumpanija jezistu diversi sezzjonijiet fl-istess kumpanija. Ghalkemm ma’ l-ewwel daqqa t’ghajn jirrizulta li stante li huma mpjegati tal-istess kumpanija u prima facie jidher li giet diskriminata ghax ma nghatatx l-istess kundizzjonijiet ghandu jirrizulta li x-xoghol kien differenti u l-urgenza sabiex jitlesta x-xoghol kien differenti...Ghalhekk it-Tribunal jikkonkludi li f’dan il-kaz ma hemmx kaz ta’ diskriminazzjoni kontra l-Bank”.*
- Mildred Marmarà and Yvonne Penza vs The Nuance Group (Malta) Ltd (Industrial Tribunal, 12 October 2022):** *“It-Tribunal filwaqt li jifhem li l-pagi tal-impjegati ezistenti ma jistghux jintmessu ma jistax jacçetta li impjegati godda ma jistghu qatt jilhqqu l-pagi tal-impjegati ‘l-antiki’ meta dawn qegħdin jagħmlu xogħol li mhux talli huwa ta’ valur ugwali imma huwa l-istess xogħol. L-argument tas-socjetà li dejjem iddiskutiet mal-unjin u għamlet dan kollu bil-barka tal-istess unjin zgur ma jezonerax lis-socjetà mill-obbligi legali tagħha...Huwa minnu li l-ligi tindika illi permezz ta’ ftehim kollettiv huwa permess illi jkun hemm skali ta’ paga differenti għal impjegati illi jigu ingaġġati fi zminijiet differenti, naturalment abbażi tal-esperjenza, seniorità u lealtà tagħhom lejn is-socjetà inkwistjoni. Madanakollu il-ligi hija wkoll esperessament cara fejn tgħid li dawn l-iskali għandhom ikollhom “massimu li jintlaħaq wara zminien stabbilit”.*



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