

Employment and Industrial Relations Law

Termination of Employment



Lecturer: Dr Naomi Schembri

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Diploma in Law (Malta)

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Contracts of Service

*“A person may bind himself to give his services for a **fixed term** or for an **indefinite term**, or in respect of a specified task, undertaking, work or service...”*

[A. 33, Employment and Industrial Relation Act, Chapter 452]



What do you think?

What could lead to termination of employment? Can you think of particular scenarios leading to termination?



Reasons for Termination

1. Probation (by employer or employee)
2. Fixed Term Contracts (automatic. Consequences apply if prior)
3. Resignation (by employee, but can be due to constructive dismissal)
4. Retirement (when reaching pensionable age)
5. Redundancy (by employer, generally for economic, technical or organisational reasons)
6. Dismissal (by the employer, on the basis of a good and sufficient cause, due to reasons attributable to employee)



Termination during Probation

- 6 months, or 1 year – depending on role/position. May be shorter if agreed upon.
- Employer/employee may terminate at any time, without giving a reason (both in fixed and indefinite term contracts).
- A week's notice is mandatory, if employment has been continuous for a period of one month.



Termination by Expiry of Fixed Term Contract

- Fixed termination date.
- If either employer or employee decide to terminate before expiry of the fixed termination date – payment by the terminating party equivalent to one half of the “full wages” that would have been due for the remaining period. Not due if termination happens on the basis of a “good and sufficient cause”.
- “full wages” = wage payable to an employed person by or on behalf of his employer, excluding any payment for overtime, bonuses, allowances, remuneration in kind and commissions.
- Conversion from a fixed term to an indefinite term – Remember the 12 day rule.



Termination by Resignation

- An indefinite-term contract may be terminated by the employee upon the giving of notice in line with the periods outlined in Article 36(5) EIRA.
- No reason necessary.
- Upon notice from employee, the employer may either:
 - i. allow the employee to continue to perform work until the period of notice expires; or
 - ii. at any time during the currency of the period of notice, pay the employee a sum equal to the wages that would have been payable in respect of the unexpired period of notice.
- Failure by employee to give notice – to pay employer a sum equivalent to half the wages that would have been payable for the period of notice. Not due if termination happens on the basis of a “good and sufficient cause”.



Termination by Resignation (Constructive Dismissal)

- If resignation by employee is instigated by the employer or any circumstance (whether direct or indirect) relating to the employer, this may be tantamount to constructive dismissal.
- Not regulated under Maltese law.
- Maltese Tribunals/Courts have been consistently applying the doctrine as found under English law.
- *“Where the employee himself terminates the contract with or without notice, in circumstances where he is entitled to terminate it without notice by reason of the **employer’s conduct**: this is known as ‘constructive dismissal’ for although the employee resigns it is the employer’s conduct which constitutes **a repudiation of the contract** and the employee accepts that repudiation by resigning”* (Selwyn’s Law of Employment).
- ***Morrow v Safeway Stores plc** (2002, Employment Appeal Tribunal, UK): “if there has been conduct by the employer likely to destroy or seriously damage the trust and confidence relationship this will mean, inevitably, that there has been a fundamental breach going to the root of the contract and entitling the employee to resign and claim constructive dismissal”.*
- Burden of proof is on employee.



Termination by Resignation (Constructive Dismissal) (cont.)

- ***Western Excavating (ECG) Ltd v Sharp*** (Appeal, 1978, Lord Denning): To succeed in a claim for constructive dismissal, an employee must prove:
 - a) The employer's actions fundamentally breached one of the express or implied terms of the employee's contract;
 - b) The employee resigned as a direct result of the breach; and
 - c) The employee did not wait too long before resigning in response to the employer's breach.
- ***Philip Camilleri vs Bortex Clothing Co Ltd*** (Industrial Tribunal, 2014): “*Meta ngħidu constructive dismissal nifmu li għalkemm mad-daqqa t’għajn l-impjegat ikun telaq irriżenja hu fil-fatt dan il-pass ikun riżultat tal-fatt li min iħaddem ikun, irragonevolment, poġġa lill-ħaddiem daru mal-ħajt sal-punt li dan ma kellux triq oħra ħlief dik li jitlaq. Ma jkunux kwistjonijiet frivoli iżda serji sew”.*
- Other relevant cases: *Geniev Zerafa v Phone Direct Ltd* (IT, 2007); *Perit Andrew Ellul v Fondazzjoni għall-Iskejjel ta’ Għada* (IT, 2022).

Termination by Retirement

- An employment relationship shall be deemed to be automatically terminated when the employee reaches pension age.
- Agreement to the contrary may be reached between the employer and the employee.



Termination by Redundancy

- An employer may terminate on grounds of redundancy – Acceptable when employers need to reduce their workforce.
- Any employee who is terminated due to redundancy shall be entitled to re-employment if the post formerly occupied is available again within a period of one year from the date of termination.
- Re-employment shall be at conditions not less favourable than those to which he/she would have had had he/she not been made redundant.
- Re-employment shall be considered as continuation of the previous employment, as if it had never been terminated.
- Remember the 'last in, first out' rule – employer to terminate the employee who was engaged last in the class of employment affected by the redundancy.



Collective Redundancies

“...means the termination of the employment by an employer on grounds of redundancy, over a period of thirty days, of:

- (a) ten or more employees in establishments normally employing more than twenty employees but less than one hundred employees;*
- (b) 10% or more of the number of employees in establishments employing one hundred or more but less than three hundred employees; and*
- (c) thirty employees or more in establishments employing three hundred employees or more”*

[Collective Redundancies (Protection of Employment) Regulations (S.L. 452.80)]



Collective Redundancies (cont.)

- Prior to terminate employment on the basis of a collective redundancy, an employer shall **notify** in writing the employees' representatives of the contemplated termination and provide them with an opportunity to consult. Such **consultation** shall:
 - commence within 7 working days from notification, in which period the employer shall provide the employees' representatives with a **written statement giving all relevant information** – including the reasons for the redundancies; the number of employees to affected; the number of employees normally employed by him; the criteria proposed for the selection of the employees to be made redundant; details regarding any redundancy payments which are due and the period over which such redundancies are to be effected;
 - cover ways and means of avoiding the collective redundancies, or of reducing the number of employees affected by such redundancies, and for mitigating the consequences thereof.
- The employer shall forward a copy of the notification and of the statement to the Director of DIER (/ Registrar General of Shipping and Seamen in case of crew-members of a ship) **on the same day** these are notified to the representatives.



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Dismissal

- An employer may terminate employment if there is “good and sufficient cause”. The Industrial Tribunal has on multiple occasions explained that this should be a last resort (*Anthony Bernard and Visual Trends & Co. Ltd*)
- The giving of notice in line with the periods under Article 36(5) EIRA. Upon notice from employer, the employee may either:
 - i. continue to perform work until the period of notice expires; or
 - ii. at any time during the currency of the period of notice, require the employer to pay him/her half the wages that that would have been payable in respect of the unexpired period of notice.
- The law does not explain what IS a “good and sufficient cause”, but exhaustively lists what would NOT qualify as a “good and sufficient cause”.
- Burden of proof is on employer.
- What would be a “good and sufficient cause”?



Dismissal – NOT a Good and Sufficient Cause

- That the employee at the time of the dismissal was a member of a trade union, or is seeking office as, or acting or has acted in the capacity of an employees' representative;
- Except in the case of a private domestic employee, that the employee no longer enjoys the employer's confidence;
- That the employee contracts marriage;
- That an employee is pregnant with child or is absent from work during maternity leave;
- That the employee discloses information, whether confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting on the employer's name and interests;



Dismissal – NOT a Good and Sufficient Cause (cont.)

- That the employee has filed a complaint or is participating in proceedings against the employer involving alleged violation of laws or regulations or is having recourse to competent administrative authorities;
- That the business in which the employee is engaged has undergone a transfer of ownership, unless employer proves that the termination is necessary for economic, technical or organisational reasons entailing changes in the workforce.



Disciplinary Procedures

- Maltese law is silent on disciplinary procedures and warnings in employment.
- Maltese Tribunals/Courts turn to English law to assist in interpretation and application of these concepts.
- Employers may (no obligation) find it useful to introduce disciplinary procedures, delegating their implementation to HR, and generally notified to employees either as part of the contract of employment or in a separate handbook/policy.
- Usually reflect the level of misconduct by linking a penalty to the grievance of the misconduct e.g. minor misconduct – written warning, gross misconduct – instant dismissal.
- Should be used as a corrective mechanism rather than a punishment.
- Follow the principles of natural justice (*Laraine Clark vs Civil Aviation Authority; Antoinette Vella vs CareMalta Limited; Austin Gonzi vs Malta Drydocks Corporation*).
- Right to appeal.
- Where a disciplinary procedure is in place the employer is bound to adhere to it strictly (*Selwyn; Raymond v Sir Lindsay Parkinson Ltd*).



Disciplinary Warnings

- Not regulated by Maltese law. Therefore, we fall on English case law / authors for interpretation and application purposes.
- No need to have a disciplinary procedure in place to issue warnings.
- Warnings can be verbal / written.
- Need not lead to dismissal – primarily intended as corrective mechanism.
- Generally advisable to have and document 3 written warnings, to be signed and handed to employee, prior to dismissal.
- The effect of the warning must be commensurate to the gravity of the misconduct (*Val Marco Valente vs Alfred Pisani et noe*).



Industrial Tribunal – Unfair Dismissal

- In the context of an indefinite contract, termination may only happen upon retirement, death, voluntary resignation, redundancy or dismissal for good and sufficient cause.
- Any unlawful dismissal, provides the employee with a right of action before the Industrial Tribunal pleading either for reinstatement, re-engagement or compensation.
- Any such action shall, in all cases, be so presented by not later than **four months** from the effective date of the alleged breach.



Industrial Tribunal – Unfair Dismissal (A. 81 EIRA)

“(1) Where on a complaint for unfair dismissal referred to the Tribunal under article 75, the Tribunal:

- (a) finds that the grounds of the complaint are well-founded, and*
- (b) on the specific request of the complainant to be reinstated or re-engaged made in the referral or in the statement of his case, the Tribunal considers that it would be practicable and in accordance with equity, for the complainant to be reinstated or re-engaged by the employer, the Tribunal shall make an order to that effect, stating the terms on which it considers that it would be reasonable for the complainant to be so reinstated or re-engaged:*

Provided that where the complainant is employed in such managerial or executive post as requires a special trust in the person of the holder of that post or in his ability to perform the duties thereof, the Tribunal shall not order the reinstatement or re-engagement of the complainant; but where the complainant was appointed or selected to such post as aforesaid by his fellow workers the Tribunal may order his reinstatement or re-engagement in the post held by him before such appointment or selection.



Industrial Tribunal – Unfair Dismissal (A. 81 EIRA) (cont.)

(2) Where on a complaint made under article 75, the Tribunal finds that the grounds for the complaint are well-founded:

(a) in cases of unfair dismissal, if there is no specific request for reinstatement or re-engagement or the Tribunal decides not to make an order for reinstatement or re-engagement as aforesaid, the Tribunal shall make an award of compensation, to be paid by the employer to the complainant, in respect of the dismissal:

Provided that, in determining the amount of such compensation, the Tribunal shall take into consideration the real damages and losses incurred by the worker who was unjustly dismissed, as well as other circumstances, including the worker's age and skills as may affect the employment potential of the said worker..."



Industrial Tribunal – Unfair Dismissal (Cases)

- ***Connie Ciantar v Mario Attard nomine fil-kummerċ ‘Pick ‘n Save’ (29 January 2021)***: Although the employer/defendant did not clearly dismiss the employee/plaintiff, through the use of words “itlaqli ‘l barra” and “issa ħa nkeċċik”, also taking into account his previous behaviour towards plaintiff, the Tribunal concluded that she was unjustly terminated.
- ***Michelle Zammit v Gutenberg Press Ltd (6 February 2023)***: The Tribunal considered that defendant did not follow a disciplinary process, did not give any warnings, or if it did these were not recorded, and simply proceeded to dismiss the plaintiff, and this contrary to the collective agreement which was in place and applicable to the employer. Termination was considered as unjust, and compensation to plaintiff was order to be paid from defendant.

Industrial Tribunal – Unfair Dismissal (Cases)

- ***Claudio Nanetti v Malta Public Transport Services (Operations) Ltd (12 January 2023)***: Plaintiff was dismissed following a number (11) of warnings for misconduct and gross misconduct registered against him by defendant company including references to “*dahal f’barrier, dahal go arblu tad-dawl, biddel zewg buses minghajr ma nforma l-control room li kellhom difett, hela ta hin u meta naqas li jsegwi health and safety regulations bazici tal-highway code u seta kkaguna ncident serju...baqa diehel bil-bus f’ta’ quddiemu, wehel fi triq meta avzat mill-control room biex ma jghaddix minnha, ma gabarx passiggieri skont istruzzjonijiet mill-control room, wasal hamsa u ghoxrin minuta tard u kkaguna tluq tard tar-rota u meta cempel sick u t-tabib tal-kumpanija ma sabux id-dar*”. The Tribunal noted that employer had given multiple opportunities to plaintiff to fix his shortcomings (incl. through warnings, 6 disciplinary procedures and 5 suspensions, and concluded that plaintiff did not take care of his employment. His dismissal was justified and for good and sufficient cause.

Amicable Exits & Termination Agreements

- Not all terminations need to be contentious / litigious.
- What should a termination agreement include?



Termination Agreement

1. Identify the Parties
2. Termination Date
3. Salary and other benefits to be paid up to termination date
4. Ex gratia payment (if any)
5. Tax Indemnity clause
6. Return of Company Property
7. Intellectual Property clause
8. Confidentiality clause
9. Full and final settlement clause
10. Withdrawal of litigious rights
11. Jurisdiction and Applicable Law
12. Entire Agreement





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