

Employment Status and the Contract of Employment

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Agenda

1. Definition of an Employment Contract;
2. General Principles of Contract Law;
3. Types of Employment Contracts;
4. Employment Contract Clauses:
5. Employee Status and criteria.





The Employment Contract

Contract of Employment: Definition

- The EIRA defines the “contract of employment” as;

“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**, and, insofar as conditions of employment are concerned, includes an agreement of **apprenticeship**:

Provided that **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.”



General Principles of Contract

- The Employment Contract is a Contract: it is therefore subject to the general rules of Maltese Law on contracts, with some caveats owing to its particular nature.
- General principles of contract include:
 - Pacta sunt servanda;
 - Amendments to the contract;
 - Good Faith.



Pacta Sunt Servanda

- Article 992(1) of the Maltese Civil Code envisages the principle of *pacta sunt servanda*: “Contracts legally entered into shall have the force of law for the contracting parties.”
- The relationship between two parties to a contract is governed by that which is agreed upon in said contract. Described as being ‘*the general sacrosanct principle of contract and its obligatory nature*’ - **Topserv Limited vs Edwin Vella (CA) (17.2.2003)**.
- **Amanda Mifsud vs Alex Lapira (CA) (22.5.2009)**: Where the parties agree in the contract to conditions of employment which are less favourable to the employee than those specified in the law, *pacta sunt servanda* does not apply, and instead, the minimum rights at law apply (Art 42 DIER).
- **David Borg vs W.V.S. (Marketing) Ltd (CA) (1.12.2004)**: Article 992(1) ‘*has an emphatic character in the sense that a pact agreed upon in a writing cannot be varied by the unilateral will of one of the contracting parties.*’



Amendments to Contracts of Employment

- Transparent and Predictable Working Conditions Regulations (S.L. 452.126):
- 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.
- Prohibits arbitrary modifications: requires changes in law or consent of both parties.



Good Faith

- Article 993 of the Maltese Civil Code encapsulates another one of Malta's chief principles of contract law: *“Contracts must be carried out in good faith (...).”*
- This obligation has been held by Maltese Courts to be *‘the basic basis of obligations and of contracts in general’* - **Raphael Attard Flores et vs Kinematics Ltd (CA) (20.4.2006)**.
- In practice, this principle entails that *‘every party, with commitment, carries out those rules of conduct which are suitable to preserve the interests of the other party’* - **Patrick Staines noe vs Dr Godfrey Gauci Maistre noe (FH) (18.1.2006)**.





Types of Employment Contracts

Oral vs Written Contracts of Employment

- Definition of contract of employment in Art. 2 EIRA enables such contracts to be verbal:
 - *"contract of service" and "contract of employment" means 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, and, in so far as conditions of employment are concerned, includes an agreement of apprenticeship: (...)*
- **XXX vs Commissioner for Inland Revenue (ART) (7.1.2014):**
 - Tribunal held that as evidenced in the above definition, an employment contract can be verbal or written, and does not necessarily have to be written.
 - The Tax Commissioner was requesting the production of a written contract of employment for eligibility to a tax benefit for employees.
 - The Court held that this approach is too rigid and not supported by the Law, and the employee's failure to provide a written contract was not sufficient reason to disqualify them.



Oral vs Written Contracts of Employment

- Article 2 of the EIRA provides that a contract of employment can be either oral or written. This is however a measure intended to protect the employee.
- One should always have the contract drawn up in writing – generally includes agreements which derogate from the ‘general’ conditions at law.
- More clarity and certainty: **Ismael Sammut vs A Falzon Energy Project Ltd (COM) (27.10.2021)**:
 - Plaintiff employee sued his former employer for the balance of his unpaid wage;
 - Former employer argued that the amount claimed did not constitute a wage but rather a discretionary performance bonus which it was entitled to retain;
 - There was no written contract of employment between the parties;
 - The Court held that if what the Company is alleging was true and the sum was only a discretionary bonus, it should have honoured its obligations at law and provided a written declaration to the employee with the conditions of employment;
 - The Court held that the employer cannot use its own failure to provide information to its advantage, and opted to believe the employee’s version of events



Oral vs Written Contracts of Employment

- Article 7 EIRA:
 - *‘On engagement of any employee, the employer shall explain to the employee the provisions of any recognized conditions of employment as may be applicable and shall deliver to the employee a written statement about such conditions as may be prescribed.’*
- Transparent and Predictable Working Conditions Regulations (S.L. 452.126):
 - Reg. 4: *‘The employer shall provide each worker with the information required in pursuant to these regulations **in writing**. The information shall be provided and transmitted on paper or, provided that the information is accessible to the worker, that it can be stored and printed, and that the employer retains proof of transmission or receipt, in electronic form.’*
 - Reg. 8: *‘A copy of any written contract of employment or statement or letter of engagement shall be kept by the employer.’*
 - Reg. 19: *‘Any person contravening any provision of these regulations shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) of not less than €450.’*



Oral vs Written Contracts of Employment

- What if there is a written contract of employment, but the employee did not sign?
- **Grazia De Cesare vs Joe Cannataci noe et (FH) (16.6.2005):**
 - Plaintiff applied and started working as a teacher, but did not sign the contract of employment offered to her since she disagreed with some of the conditions concerning pay and duration.
 - The Court held that there was still an employment contract between the two: employee was performing her job and being paid, and the employer accepted to have her onboard despite the contract not being finalised, for the benefit of his students.



Definite and Indefinite Contracts

What is the main difference?



Definite Contract

- A definite contract is a contract of employment where the end of the contract is determined by either:
 - i. reaching a specific date;
 - ii. by completing a specific task;
 - iii. through the occurrence of a specific event.

Indefinite Contract

- An indefinite term contract has a fixed commencement date, but no pre-determined date of termination.

Difference in term and duration

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Difference in termination



General Rules of Definite Contracts

- EIRA:
 - Art 33: indefinite contract shall not be changed into a FTC where no substantial change has been effected as to the work of the employee or to his category, and any agreement to this effect shall be null and void.
 - Art. 36: No FTC shall be shorter than 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 FTC for a period shorter than 6 months, the employer shall list in writing in that contract the objective reasons for which the contract is entered into for less than 6 months.
- Contracts of Service for a Fixed Term Regulations (S.L. 452.81):
 - Reg. 4: FTC employees shall not be treated less favourably solely because they have a contract for a fixed term;
 - Reg. 5: Duty of employer to inform employees on a FTC of vacancies of indefinite term positions which become available in the place of work.



From Definite to Indefinite

- Art 34 EIRA: Any employee on a FTC whose contract has expired and is retained by his employer shall be deemed to be **retained on an indefinite period** contract if the said employee is not given a new contract of service **within the first 12 working days following the expiry of the previous contract.**
- Reg. 7 of S.L. 452.81: A FTC shall be transformed into a contract of service for an indefinite period if:
 - (a) the employee has been continuously employed under such a FTC, or under that contract taken in conjunction with a previous FTC/s for a fixed term in excess of a period of continuous employment of **four years** (to prevent consecutive FTCs from being computed into the period of four years of continuous there must be a minimum gap of **6 months**); and
 - (b) the employer cannot provide **objective reasons** to justify the limitation of a renewal of such a contract for a fixed term.



From Definite to Indefinite

- An employer may only retain an employee on a FTC beyond four years when such retention is justified by objective reasons based on precise and concrete circumstances characterizing a given activity. Such circumstances may result, in particular, from the specific nature or from inherent characteristics, of the tasks to be performed in the FTC, and may, where appropriate, include situations such as where an employee:
 - (a) was employed as a **casual substitute** or similar employee on a back to back basis or as a **temporary substitute** employee;
 - (b) occupies - (i) a **top management position**, or (ii) a position where the maintenance of a **higher level of trust** is necessary by virtue of the nature of the position or where a higher level of trust is objectively an essential element of the employment relationship;
 - (c) was employed by means of an appointment made to safeguard **particular security or economic interests of the State**: Provided that this shall only apply when the employee is granted a contract of employment for a minimum period of two years;
 - (d) was employed on temporary assignments in **missions or postings abroad** for a duration not exceeding six years;
 - (e) was engaged to serve as a **person of trust of a particular individual who himself holds an office of a temporary nature** such as persons engaged to serve in the office of holders of publicly elected office.





Employment Contract
Clauses

Transparent and Predictable Working Conditions Regulations (S.L. 452.126)

- Establish the information that Employers must provide to employees, and in doing so, they provide the clauses that are required to be included in the employment contract.
- Information from (a) to (e) and (g), (k), (l) and (m) – to be provided between the **1st working day and not later than the 7th calendar day**;
- This includes crucial information such as parties' details, place of works, job description, remuneration.
- Other information mentioned – **within one month** of the first working day.



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**;
- 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, is the domicile of the employer;
- C. The **title, grade, nature or category** of work of the employee;
- D. Brief specification /**description of the work**;
- E. The date of **commencement** of the employment relationship;
- F. In the case of a fixed-term contract, the **end date/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;
- J. The amount of **paid leave** to which the worker is entitled: where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;



Information to be provided

- K. The procedure and notice period to be observed where employment relationship is **terminated**;
- L. The **remuneration** including the initial basic amount, any other component elements, the frequency and method of payment and the conditions under which fines may be imposed by the employer and their quantum;
- M. 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**;
- 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;



Information to be provided

- 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.**



Where the Contract is silent, the Law applies

- **Mark Grima vs Fork & Night Ltd (IT) (19.4.2022):**
 - The Tribunal held that when the contract is silent, the law applies;
 - Since in the contract of employment there was no reference to a period of probation or its duration, the periods established by law apply;
 - Where the law is silent, it does not mean that probation was excluded: if the Parties want to exclude probation, they must do so in writing.



Place of Work: Telework

- **Telework National Standard Order (S.L. 452.104)**: Defines telework: where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis.
- Telework may be required as a condition of employment in an employment contract or, where there is no specific reference to teleworking in the employment contract, by agreement, in the course of the employment relationship.
- By agreement: either in the contract, or in the course of employment.
- Where there is no specific reference to teleworking in the employment contract and telework is undertaken in the course of the employment relationship:
 - if the employer makes an offer of telework, the employee is free to accept or refuse (Provided that such refusal shall not constitute a good and sufficient cause for termination / change in conditions of employment);
 - if an employee expresses the wish to opt for telework, the employer may accept or refuse such request;



Place of Work: Telework

- Agreement for the performance of telework shall be in writing and contain written information as is required by the Transparent and Predictable Working Conditions Regulations, including:
 - (i) **location** where telework is to be carried out,
 - (ii) provisions related to the **equipment** used for telework including its ownership, maintenance, liability and costs,
 - (iii) the **amount of working time** to be spent at the place of telework and at the workplace,
 - (iv) the **schedule** by which the employee will perform telework, where applicable,
 - (v) the **description** of the work to be performed,



Place of Work: Telework

(vi) the **department** of the undertaking to which the teleworker is attached, the teleworker's **immediate superior** or other persons to whom the teleworker can **report** and reporting arrangements,

(vii) provisions related to **monitoring**, if any,

(viii) **notice of termination** of telework agreement, and

(ix) in cases where telework is undertaken in the course of the employment relationship and there is no reference to teleworking in the employment contract, a reference to the **right of reversibility** by either party, including the right of the teleworker to return to his pre-telework post.



Place of Work: Telework

- where both parties agree to a telework arrangement, each party shall have the right to **terminate** that telework agreement and the employee shall **revert to his pre-telework post**:
 - (i) in the **first two months** of the telework arrangement, by giving **three days' notice** in writing to the other party, and
 - (ii) **after the first two months**, by giving **two weeks' notice** in writing, unless a different period is agreed in the written agreement on telework:
- Provided that if the decision to terminate the agreement on telework is taken by the employee, that decision **shall not constitute a good and sufficient cause for terminating employment**, nor shall it lead to a change in the conditions of employment of the employee concerned.



Place of Work: Telework

- Duties of teleworker:
 - To take good care of the equipment and data provided by the employer;
 - To keep workload and performance standards equivalent to employees working at employer's premises;
 - To manage his working time;
 - Not to collect or distribute illegal material via the internet.



Place of Work: Telework

- Duties of the Employer:
 - To provide, install and maintain the equipment necessary and for providing technical support facility (unless otherwise agreed);
 - To provide the teleworker with the same rights as other employees at the employer's premises, including rights to participate in training and career development programmes;
 - To respect the privacy of the teleworker – may only put in place any kind of monitoring if this is agreed by the teleworker and is proportionate;
 - To take the measures necessary to prevent the teleworker from being isolated from the rest of the workforce (i.e. opportunities to meet with colleagues);
 - To ensure the protection of data used and processed by the teleworker.



Place of Work: Telework

- Work-Life Balance for Parents and Carers Regulations (S.L. 452.125)
- Workers:
 - with children up to the age of 8 years, and
 - carers,

have the right to request flexible working arrangements (including include but are not limited to, remote working, work on reduced hours, and flexitime) **for caring purposes**.

- These arrangements may be **limited in duration**, in which case the worker shall have the right to request to return to the original working pattern before the end of the agreed period where justified on the basis of a **change in circumstances**.



Place of Work: Telework

- Employers shall consider and respond to requests for flexible working arrangements within **2 weeks, providing reasons** for refusal /postponement of such arrangements.
- A worker cannot be **discriminated against** or **dismissed** because they availed themselves of / requested any flexible arrangement.
- Workers who consider that they have been dismissed on the grounds that they availed themselves of a flexible working arrangement, may request the employer to provide duly substantiated reasons for their dismissal. Such reasons shall be provided by the employer in writing, within fifteen 15 days.



Title, Grade and Description of the Work

- Need not be very detailed.
- To keep in mind: '*principle of equal pay for equal work*' – equal work to be determined according to title and job description.
- Employee will be held accountable for the title and the job description on his contract: **Thomas Rosander vs Mr. Green Limited (IT) (21.1.2022)**:
 - Although the Employee was registered with Jobsplus as Chief Operating Officer, for the Tribunal, it is the contract that counts, where his role was indicated as a Chief Product Officer.
 - According to his job description, he was responsible to capture problems in product development.
 - Employer was justified in dismissing him even if he did not cause the problem in the product himself.



Probation: General

- *“Probationary periods allow the parties to the employment relationship to verify that the workers and the positions for which they were engaged are compatible while providing workers with accompanying support.”*
(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 Para.27)
- 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;
- The Parties can agree to exclude probation: **Sammy M. Hazzouri vs Jesmond Formosa et noe (CA) (22.2.2016)**



Probation: Dismissal without Reason

- During probation, either party may terminate without assigning reason but 1 week's notice if employment longer than 1 month.
- **Carmel sive Lino Farrugia vs Alexandra Palace Hotel Limited (FH) (7.7.2003):**
 - The Court held that during probation, the employer could terminate the employee without assigning a reason and without any consequences.
 - Therefore, the employee could not sue for compensation for constructive dismissal.
- Comments from 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.



Probation: Definite Contracts

- Fixed-term contract – probation needs to be proportionate to the expected duration of the contract;
 - Exceptional circumstances where contract is for less than 6 months – probation shall be $\frac{1}{3}$ of the duration of the contract – 2 months;
 - Contract of between 6 months to 15 months duration – 2 months for 6 months contract duration;
 - Contracts exceeding 15 months duration – probation shall be of six months.
- Where a contract is renewed for the same function and tasks, the employment relationship is not subject to a new probationary period.



Probation: Promotions

- **Chantelle Conti vs Pizza by Luca Ltd (IT) (6.5.2013):**
 - Plaintiff was promoted from a part-time cashier to an accounts clerk, signing a new contract of employment;
 - She was dismissed within the first few months of being promoted – plaintiff claimed unfair dismissal, defendant claimed probation;
 - Tribunal considered that although the two jobs were back-to-back, they were two jobs of a different nature, and are therefore to be considered as two different contracts of service with separate probations.
 - Termination was during probation and therefore valid.
- No new probationary period in the case of promotions – trial periods with reversal to prior position.



Probation: Suspension

- 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.



Probation: Maternity

- Protection of Maternity (Employment) Regulations (S.L. 452.91):
 - In the case of a pregnant employee on probation, the employer is bound to give reason for her dismissal in writing to justify that this is unrelated to her pregnancy;
 - Failure to provide such written reasons, or if the employee considers that the reasons given are unjustified, may lead to a claim of unfair termination.
 - Where during probation, the employee commences maternity leave, the probation is suspended and continues on her return to work.



Training Entitlement

- Where an employer is required by EU law, national law or by collective agreements to provide training to a worker to carry out the work for which he is employed, such training shall be provided to the worker **free of cost**, shall **count as working time**, and where possible, shall take place **during working hours**. (Transparent and Predictable Working Conditions Regulations)



Notice: Indefinite Contracts

- An employment contract may be terminated by one party giving notice to the other party. The default notice periods according to law are the following:
 - i. for more than 1 month but not more than 6 months 1 week;
 - ii. for more than 6 months but not more than 2 years 2 weeks;
 - iii. for more than 2 years but not more than 4 years 4 weeks;
 - iv. for more than 4 years but not more than 7 years 8 weeks;
 - v. for more than 7 years, an additional 1 week for every subsequent year of service up to a maximum of 12 weeks;
 - v. or such longer periods as may be agreed by the employer and employee in the case of technical, administrative, executive or managerial posts.



Notice: Indefinite Contracts

- Where the **employee gives notice**: employer can either
 - allow the employee to work his notice or
 - pay the employee a sum equal to the wages that would have been payable in respect of the unexpired period of notice.
- Where the **employer gives notice**: employee can either
 - work his notice or
 - require the employer to pay him a sum equal to **half** the wages that would have been payable in respect of the unexpired period of notice.
- Where there is sufficient cause for dismissal / abandonment, the employer / employee is not required to give notice / compensate it.



Notice: Indefinite Contracts

- Failure to give notice incurs a penalty:
 - If an **employee** under a contract of service for an indefinite time fails to give notice, he shall be liable to pay to the employer a sum, equal to **half the wages** that would be payable in respect of the period of notice.
 - If the **employer** fails to give the said notice, he shall be liable to pay to such employee **a sum equal to the wages** that would be payable in respect of the period of notice.
- Where there is sufficient cause for dismissal / abandonment, the employer / employee is not required to give notice / compensate it.
- An employee who is serving his notice is still an employee of the employer and still bound by the duty of fidelity towards the company: **Eurosupplies Limited vs Paul Tihn (FH) (9.3.2016)**



Notice: Definite Contracts

- Maltese Law only envisages notice to terminate a FTC during probation: a week's notice of the termination of employment shall be given to the other party in the case of an employee who has been in the employment for more than one month. (Art. 36 of the Maltese Employment and Industrial Relations Act)



Remuneration: Legal Tender & Bonuses

- Every employer shall pay wages to his employees at regular intervals which shall not exceed **4 weeks in arrears**.
- Wages shall be paid to employee in money being legal tender in Malta (Euros), unless expressly allowed by the law.
- Every employer shall pay to each employee statutory bonuses :
 - End of June: €135.10;
 - From the 15th until the 23rd December: €135.10;
 - End of March: €121.16;
 - End of September: €121.16'



Remuneration: Protection of Wages & Fines

- Employer cannot deduct from wages to be paid to the employee, or enter into an agreement with the employee authorising said deductions.
- Exceptions: where expressly permitted by law, where order by a competent court, or permitted in an agreement with a trade union.
- The employer may, at the request of the employee, make deductions from the wages for the purpose of a superannuation or thrift scheme (ex. pension scheme), or for any purpose in which the employer has no beneficial financial interest.



Remuneration: Protection of Wages & Fines

- Employer cannot impose Fines on the employee unless:
 - These are expressly catered for in the employment contract AND approved by DIER; or
 - Prescribed in a collective agreement.
- Do NOT include pre-liquidated damages for breach of post-termination covenants, i.e. for breach of confidentiality.



Remuneration: Allowances

- Unlike statutory bonuses, allowances and performance bonuses do not fall within the definition of wages:
 - "wages" means remuneration or earnings, payable by an employer to an employee and includes any statutory bonus other than any bonus or allowance related to performance or production.
- Therefore, they do not enjoy the same protection as wages.
- Nevertheless, they are still reviewable by the Courts.
- **Joanna Azzopardi vs Mapfre MSV Life plc (CA) (16.12.2020):**
 - Although it may be agreed that a performance bonus is discretionary, the award (or otherwise) of such bonus is still subject to Court review.



Remuneration: Overtime

- An employee whose overtime rate is not covered by a Wages Council Wage Regulation Order shall be paid **one and a half times** the normal rate for work carried out in excess of a forty-hour week.
- The statutory limit in terms of the Overtime Regulations (S.L. 452.110) is an average weekly working time (including overtime) of 48 hours. For this limit not to apply, the employee must give his consent in writing (either in the contract of employment or in a separate declaration).



Working Hours: Full-Time & Reduced Hours

- Full-Time;
- Full-Time with Reduced Hours:
 - A full-time employee who in agreement with the employer works for less than the number of hours of work applicable to a full-time employee, provided that such employment is his **principal employment** in respect of which social security contributions are payable.
 - Entitled to *pro rata*:
 - Wages and statutory bonuses;
 - Vacation leave, injury leave, injury leave, maternity leave, parental leave, remaining entitlements;



Working Hours: Part-Time

- Part-Time employee: an employee whose normal hours of work are less than the normal hours of work of a comparable full-time employee and who is not a whole-time employee with reduced hours.
- Employment need not be his principal employment.
- Shall be paid same hourly rate as full-time employees, and given pro-rata entitlements (i.e. leave, bonuses) – unless more favourable provisions are agreed.
- Shall not be treated in a less favourable manner than comparable full-time employees solely because they work part-time, unless different treatment is justified on objective grounds.
- If a part-time employee feels he is being treated differently, he may request a statement from his employer, to be given within 21 days, which shall provide the objective reasons for difference in treatment.



Other Conditions

- Contracts of Employment typically include other clauses, which are intended to safeguard the interests of the business:
 - Parallel Employment;
 - Confidentiality Clauses;
 - Restrictive Covenants.



Parallel Employment

- Transparent and Predictable Working Conditions Regulations (S.L. 452.126):
- 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.
- However, 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.



Confidentiality

- **Eurosupplies Limited vs Paul Tihn (FH) (9.3.2016):**
 - Contract of Employment provided that *‘The employee undertakes to uphold confidentiality of all affairs of the employer, its brands, its suppliers and its clients both during the term of employment as well as thereafter.’*
 - The Court found that during his employment, the Employee (a Sales Manager) breached this contractual obligation by complaining to a competitor about the quality and the pricing of his employer’s products (these being *‘affairs of the employer’*).
 - The employee was liable in damages – although damages suffered were difficult to prove, the Court still awarded the employer with an amount of 10,000Eur, which was increased to 15,789Eur on appeal.



Restrictive Covenants

- Typically consist of post-employment restraints, for ex. non-solicitation of clients and employees, non-compete, gardening leave;
- Their enforceability is a point of contention in Maltese case-law;
- Most recent pronouncement on this matter – **Delvetro Limited vs Kishore Kumar Neduru (FH) (26.9.2024)**:
 - The contract of employment of the defendant, a former accounts officer of the plaintiff company, included a clause prohibiting him, for 2 years following termination, from being employed or offering services to the company's clients, with whom he had direct contact. A breach of his condition envisaged a penalty of 30,000Eur as pre-liquidated damages;
 - The former employer sued for this amount, alleging that within the 2 years, defendant had become employed with a client;



Restrictive Covenants

- The Court held that as a rule, post employment restraints are not prohibited in the Maltese legal system, as long as they abide to certain rules, including the following:
 - The clause foresees a reasonable period of time, such that their effect is strictly limited to what is necessary to safeguard the rights of the employer;
 - The clause must not be indefinite;
 - The clause must contain a quantum of damages that is not disproportionate or excessive when considering the entirety of the employment contract.
- The burden rests on the employer to show that the clauses in question are required to secure his commercial interests, and do not impinge on the right to work of the employee to an extent that renders them in violation of the public order.



Restrictive Covenants

- The Court in this case considered the following to be reasonable:
 - The duration of two years;
 - The restriction on the employee not to be employed with a client with whom he had direct contact;
- and the following to be unreasonable:
 - The prohibition of the employee from providing **any service** to the client of his former employer (and therefore even services that have nothing to do with his role as an account officer);
 - The lack of a definition of having '*direct contact*';
 - The excessive amount of pre-liquidated damages, which amounted to over 4 times the employee's annual salary.
- For these reasons, the Court held the clause to be **unenforceable**.





Employment Status and Criteria

The EIRA defines “Employment” as:

...any relationship whereby *one person does work or performs services for another*;

"Employee":

- Any person who has entered into or works under a **contract of service, or a person who has undertaken personally to execute any work or service for, and under the immediate **direction and control** of another person... but excluding work or service performed in a personal capacity or as a contractor.**
- Thus, to be considered an employee, there need not be a contract of service – it is sufficient if the individual undertakes to execute any work or service for another person – **Joe Abdilla et vs Prime Minister et (CA) (27.9.2019)**;
- This wide definition of an employee blurs the distinction between employed and self-employed.



Contract of Service vs Contract of Employment

- 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;
- (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.

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