Termination of Employment Relationships:

The Legal Situation in Malta

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Introduction

The enactment of the Employment and Industrial Relations Act, 2002 (Act XXII of 2002) [EIRA], marked a major development in employment and industrial relations in Malta. Although there was legislation to regulate employment relations [Conditions of Employment (Regulation) Act, 1952][1] and industrial relations [Industrial Relations Act, 1976][2] in Malta, it was felt that such legislation needed to be updated to conform with current needs and realities. Malta's accession to the European Union on 1 May 2004 was the impetus which led the Maltese authorities to enact new legislation in respect of employment and industrial relations.

Thus, whilst consolidating existing legislation on these issues, the legislator needed to adapt the legislation to the new scenarios and challenges which arose over the years, as well as those relevant parts of the *acquis communautaire* which Malta bound itself to implement.

Besides containing several substantive provisions, the EIRA is also an enabling Act. In fact, it contains several provisions which vest the Minister responsible for Employment and Industrial Relations with the authority to issue regulations either to bring into force specific provisions of the Act or to introduce new legislative provisions in respect of employment and industrial relations. In view of the latter power vested in the Minister, several regulations have been issued in the form of subsidiary legislation to cover various aspects, particularly in respect of employment relations. Such regulations have the force of law and are enforceable by the Maltese courts. Certain of these regulations are referred in this study.

One of the most important aspects of employment and industrial relations is that relating to the termination of employment relations, whether by the employer or the employee. Although the Conditions of Employment (Regulations) Act 1952 dealt with this matter in detail, and in fact the main principles existing under such legislation has been included in the EIRA, over the years the need was felt to fine tune certain parts of these provisions to bring them in line with local and international developments, both legislative as well as judicial. It is pertinent to note that when reviewing decisions of the Industrial Tribunal in connection with the undertaking of this study, it was noted that, except for a few cases, all cases brought before this Tribunal dealt with the termination of employment relationships.

It is to be noted that the EIRA does not apply to employment in the public sector, except for certain limited provisions dealing with industrial relations.

[1] Act XI of 1952.
[2] Act XXX of 1976.

Employment relations in the public sector are regulated by the Public Service Management Code. This Code does not constitute primary or secondary legislation but is merely a collection of circulars and other rulings issued by the Management and Personnel Office at the Office of the Prime Minister to regulate conditions of employment in the public service and rules of conduct for public service employees. Breaches of this Code are sanctioned by the Public Service Commission which is an independent body established by Article 109 of the Constitution of Malta. The primary role of this Commission is that of giving advice and making recommendations to the Prime Minister in the making of appointments to public offices, in the removal of persons from such offices and in the exercise of disciplinary control over public officers.

The purpose of this study is to analyse and assess the legal situation in Malta in the area of the termination of employment relationships. In carrying out this study a detailed and comprehensive study of Maltese legislation, case law, policy and practice in this area were considered. In addition, interviews were carried out with some of the most important trade unions in Malta, with employers' representatives as well as with the competent authority in Malta.

1. Sources of Law

(1) Constitutional status of the rules on the right to work

The "the right to work" is a principle which is recognised under Article 7 of Constitution of Malta. This provides that:

> The State recognises the right of all citizens to work and shall promote such conditions as will make this right effective.

Though this right is recognised by the Maltese Constitution it is not an enforceable right. In fact, it is to be found under Chapter II of the Constitution which lists a number of principles which, though fundamental to the governance of the country, are not judicially enforceable. Article 21 of the Constitution provides that the provisions of Chapter II:

> shall not be enforceable in any court, but the principles therein contained are nevertheless fundamental to the governance of the country and it shall be the aim to apply these principles in making laws.

(2) International Agreements and Conventions

Malta is a party to, *inter alia*, the following international agreements and conventions in the field of employment relations:

(a) ILO Convention 135 concerning protection and facilities to be afforded to workers' representatives in the undertaking - ratified by Malta on 9 June 1988.

(b) The European Social Charter – this was ratified by Malta on 4 October 1988 and the Charter became operative for Malta on 3 November 1988.

(c) The Revised European Social Charter – this was ratified by Malta on 27 July 2005. It is to be noted that the collective complaints protocol has not yet been ratified by Malta.

(3) Sources of Law and their hierarchy

The main source of Maltese law relating to employment and industrial relations is the Employment and Industrial Relations Act, 2002. This Act governs, amongst other matters, the termination of employment relationships and the remedies which may be sought by the employee or the employer in cases where an employment relationship has been terminated.

Being an enabling Act, the EIRA also vests the Minister responsible for Employment and Industrial Relations with the authority to issue regulations, in the form of subsidiary legislation, to cover various aspects which also relate to the termination of employment relationships. These are :

- Part-Time Employees Regulations, 2002 (Legal Notice 427 of 2002)
- Contract of Service for a Fixed Term Regulations, 2002 (Legal Notice 429 of 2002);
- Guarantee Fund Regulations, 2002 (Legal Notice 432 of 2002);
- Transfer of Business (Protection of Employment) Regulations, 2002 (Legal Notice 433 of 2002);
- Collective Redundancies (Protection of Employment) Regulations, 2002 (Legal Notice 428 of 2002) and its amendment of 2004 (Legal Notice 442 of 2004);
- Parental Leave (Entitlement) Regulations, 2003 (Legal Notice 225 of 2003);
- Employee (Information and Consultation) Regulations, 2006 (Legal Notice 10 of 2006).

With regards to employment in the public service, conditions of such employment are regulated by the Public Service Management Code, also known as the Estacode. This Code does not constitute primary or secondary legislation but is merely a collection of circulars and other rulings issued by the Management and Personnel Office at the Office of the Prime Minister to regulate conditions of employment in the public service and rules of conduct for public service employees.

(4) Role of judge-made law and custom

Although in Malta there is no doctrine of precedent, and therefore judicial decisions are not binding on subsequent proceedings, even if in a court or tribunal of inferior jurisdiction, decisions of the Courts, and also of the Industrial Tribunal in this case, play a very important role in the interpretation of legislation, particularly in defining the grounds for dismissal.

Though custom does not have a binding effect, it is, sometimes, considered in the interpretation of laws.

(5) Collective Agreements

Though not considered to be a source of law, collective agreements play a very important role in employment relations in Malta. The conditions of employment of a substantial number of employees in Malta, both in the private and in the parastatal sector, are regulated by collective agreements.

Collective agreements are mostly a reproduction of the law and then there are some clauses which would be different to each collective agreement thus adapting certain things to the circumstances of the employer. This is done because most employees will not be knowledgeable of the provisions of the law and so in this way they will be clearly listed in the collective agreement. Usually collective agreements will have several clauses which regulate the entire employment relationship.

Such collective agreements would also refer to the termination of employment relationships and usually contain provisions setting out the procedure to be followed to terminate and employment relationship.[3]

Within fifteen days from signature, a copy of the collective agreement must be registered at the Department of Industrial and Employment Relations by the employees' representatives.

2. Scope of the rules governing the termination of an employment relationship, special arrangements

(1) Ways of terminating an employment relationship

In Malta, employment relationships may be terminated either by operation of law or else on the initiative of either of the parties.

<u>Termination by operation of law</u>

Termination by operation of law takes place when an employee is employed under a contract for a fixed term and such term expires. In such instance, unless the employee continues in the employment of the employer, then the employment relationship shall be automatically terminated.

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[3] Jonathan Galea and Preluna Hotel & Spa – MF/2242 - 25 July 2005 - Decision No 1626
Josephine Camilleri and U.C.I.M Co. Ltd – FM/2258 - 14 December 2005 - Decision No 1655
Michael Fenech and Malta International Airport plc. – AC/1737 - 2 September 2004 - Decision No 1534

Furthermore, in terms of the Social Security Act, 1987[4] retirement is compulsory on attaining the prescribed age. Whereas currently the retirement age in Malta is set at 61 years of age for men and 60 years for women,[5] the Maltese government has recently announced a reform to the pensions system and this provides that over the next few years the retirement age will increase to age 65 for both men and women. The last proviso to Article 36(14) of the EIRA provides that the employer can terminate the employment of an employee when the employee reaches retirement age as defined in the Social Security Act. The rights protecting employees from unfair dismissal are extinguished upon reaching retirement age. It is however possible for the employer and the employee to agree that the employee shall continue to render his services after reaching retirement age.

It would not be lawful for an employer to terminate an employee's employment on grounds of age if such employee would not have reached the statutory retirement age (unless the employer is able to prove to the Tribunal that such termination was based on a good and sufficient cause). Also, it would not be lawful for an employer to impose an earlier retirement age without the employee's consent. However, if an employee is, due to physical or mental incapacity, unable to continue working, he may be granted early retirement.

With respect to employees in the public sector, the statutory retirement age for males is age 61 unless they choose to retire at 60. On the other hand, the statutory retirement age of female public sector employees is age 60 unless they opt to retire at age 61.

Termination at the instance of either party

Any party to an employment relationship may terminate such relationship.

The termination of employment relationships at the instance of the employer can take place either during probation (for any reason) or after the probation period would have lapsed. After probation, termination could either take place on grounds of redundancy or for a good and sufficient cause if the contract is an indefinite term contract and for any reason whatsoever if it is a fixed-term contract.

Employees, on the other hand, may terminate their employment relationship with their employer either during probation or else by resigning at any time during the existence of the contract after the probation period would have lapsed.

[4] Act X of 1987. Chapter 318 of the Laws of Malta.
[5] Article 2.

Termination by mutual consent

It is also possible for an employment relationship to be terminated with the mutual consent of the employer and the employee.

(2) Exceptions for certain employers or sectors

Article 123 of the Police Act, 1961[6] provides for those instances in which a Police officer may be granted retirement from the Force. These are: (a) on or after attaining the age of fifty-five years or on completion of twenty-five years' service in the Force; (b) on the abolition of his office; (c) on compulsory retirement for the purpose of facilitating improvement in the organisation of the Force, by which greater efficiency and economy can be effected; (d) in the case of termination of employment in the public interest as provided in the Act; and (e) due to incapacity by reason of infirmity of mind or body.

Furthermore, in terms of Article 39 of the EIRA, the provisions of the Act relating to termination of employment, collective redundancies and transfer of business under Articles 36, 37 and 38 respectively, shall not apply in respect of seamen employed on ships under the provisions of the Merchant Shipping Act, 1973.[7] In the event of any conflict between any of the provisions of the Merchant Shipping Act and any of the provisions of the EIRA, the EIRA shall apply.

(3) Specific requirements for certain types of contract

Maltese law provides that contracts of employment may be either for a fixed term or for an indefinite term.

Article 2(1) of the Contracts of Service for a Fixed Term Regulations, 2002[8] defines a 'contract of service for a fixed term' as a contract of service entered into between the employer and an employee where the end of the contract is determined by reaching a specific date, by completing a specific task or through the occurrence of a specific event. Fixed-term contracts can also be terminated for any reason whatsoever and without the need to give any prior notice but in such cases a penalty shall be payable by the terminating party to the other party in accordance with the rules set out below.

If the contract expires and the employee is retained by his/her employer, he shall be deemed to be retained on an indefinite contract unless the employee

[6] Chapter 164 of the Laws of Malta.
[7] Chapter 234 of the Laws of Malta.
[8] Legal Notice 429 of 2002.

is not given a new contract of service within the first twelve working days following the expiry of the previous contract.

Regulation 7 of this legal notice provides that a provision in a contract of service for a fixed term restricting the duration of the contract shall be of no effect and the employee shall be considered an employee employed under a contract of indefinite duration if the employee has been continuously employed under the contract (taken alone or with a previous contract of service) for a fixed term exceeding a period of four years and the employer cannot provide objective reasons to justify the limitation of a renewal of such a contract for a fixed term.

Of particular interest in this context are two preliminary decisions delivered by the Industrial Tribunal.[9] In both cases various preliminary pleas were raised by the employer, one of which being that the employees were employed on a fixed term contract and that therefore the Industrial Tribunal did not have jurisdiction to decide the cases. The employees contested this claim on the basis of the fact that they had been employed by the employer under a fixed term contract in the year 2000 and between such date and the date of termination of their employment they were re-employed five other times. Each time less than six months had passed between one employment contract and another and therefore their employment was considered to be continuous in terms of Legal Notice 429 of 2002 and that since more than four years passed since the date on which they were first employed till the date they were declared redundant, then their contract was to be considered as being one of an indefinite term and that therefore the Industrial Tribunal had jurisdiction to determine the cases.

The Industrial Tribunal considered that in view of the fact that Legal Notice 429 of 2002 came into force on 1 January 2003, it had to decide when one was to start calculating the four year period mentioned in Regulation 7 of the legal notice in terms of which a fixed term contract was to be considered a contract for an indefinite duration, namely, either from the date on which the original contract of employment was entered into, or the date of entry into force of Legal Notice 429 of 2002. The Tribunal decided that since this legal notice does not specifically provide that it shall apply with retroactive effect, then its provisions would be applicable as from the date on which it came into force. In fact, the Tribunal held that, when the legislator wanted a particular piece of legislation to apply retroactively, this was specifically provided for. Thus, the Tribunal decided that with respect to the fixed term contracts which

[9] Amanda Jane Saliba v Hal-Ferh Company Limited – FM/2244 - 25 May 2005 – Preliminary decision of the Industrial Tribunal No. 1607

Doris Hili v Hal-Ferh Company Limited – FM/2243 - 25 May 2005 – Preliminary decision of the Industrial Tribunal No. 1606

See also: Joseph Mercieca v Water Services Corporation - AC/1805 - 26 July 2004 – Preliminary Decision of the Industrial Tribunal No 1528

terminated prior to the entry into before Legal Notice 429 of 2002, the provisions of the said legal notice would not apply and therefore they were not to be added to the contract which was in force after 1 January 2003. However, with regards to the successive fixed term contracts entered into between the employer and the employees after 1 January 2003, the provisions of Legal Notice 429 of 2002 were applicable.

The above-mentioned Regulation 7 of Legal Notice 429 of 2002 is subject to two exceptions:

(a) collective agreements - Paragraph 4 provides that collective agreements may modify the application of paragraph 2 of Regulation 7 in relation to any employee or a specified description of employees, by substituting for such provisions one or more different provisions which in order to prevent abuse arising from the use of successive contracts of service for a fixed term, specify one or more of the following:

    (i) the objective reasons justifying the renewal of such contract;

    (ii) the maximum total duration of successive fixed term contracts of service; or

    (iii) the number of renewals of such successive fixed term contracts of service.

(b) public service employees – Paragraph 5 states Regulation 7 shall not be applicable to employment in the public sector.

It is also to be noted that the conditions of employment in a fixed term contract shall not be less favourable than those which would have been applicable had the same contract of employment at the same place of work been for an indefinite time, unless this is justified on objective grounds.

If an employee has been retained in employment after the date of termination of a fixed-term contract of service or is re-employed by the employer for a fixed or indefinite term within one year from the date of termination of the fixed-term contract, the conditions of employment shall not be less favourable than those which would have been applicable had the contract of service been for an indefinite time and the aggregate probationary period shall in no case be longer than that provided for by law.

In the case of premature termination of fixed-term contracts, if it is the employer who dismisses an employee before the expiration of the time definitely specified by a contract of service, the employer shall pay to the employee one-half of the wages that would have accrued to the employee in respect of the remainder of the time specifically agreed upon. Wages here

refer to the wages payable to the employee by the employer, excluding any remuneration for overtime, any forms of bonus, any allowances, and remuneration in kind and commissions. In practice, there may be cases where despite the afore-mentioned, the employer and employee agree to an amount to be paid to the employee in full and final settlement of all amounts due to the employee by the employer in view of the termination of the employment relationship.

If it is the employee who abandons the service of his/her employer before the time definitely specified by the contract of service, s/he shall pay to the employer a sum equal to one-half of the full wages to which s/he would have become entitled if s/he had continued in the service for the remainder of the time so specifically agreed upon.

With regards to indefinite term contracts, these shall continue until terminated by the employer for a good and sufficient cause or on the ground of redundancy, or by the employee through resignation, as explained hereunder.

(4) Exceptions or specific requirements for certain categories of employers

All employees may invoke the provisions of the EIRA if they consider their termination of employment to have been unfair.

In cases of collective redundancies, Article 37 of the EIRA provides that an employer shall not terminate the employment of any employee on grounds of collective redundancy before he has notified in writing the employees' representatives recognised by him of the termination of employment contemplated by him and has provided the said representatives with an opportunity to consult with the employer.

The Collective Redundancies (Protection of Employment) Regulations, 2002,[10] issued in virtue of the above-mentioned Article 37, provide that an employer proposing to declare the redundancies, shall not terminate the employment of such employees before he has notified the employees' representatives in writing of the termination of employment contemplated by him and has provided the said representatives with an opportunity to consult with the employer. These regulations apply in the cases of establishments employing more than 20 employees.

[10] Legal Notice 428 of 2002

Furthermore, the Employee (Information and Consultation) Regulations, 2006,[11] provides that the employer has a duty to provide information and consult the representatives of the employees with regards to:

1. the probable development of the undertaking's activities and economic situation;

2. the situation, structure and probable development of employment where this is a threat to employment within the undertaking; and

3. decisions likely to lead to substantial changes in work organisation or in contractual relations.

Thus, if the above-mentioned developments and decisions shall affect the tenure of employment of the employees then such consultation would be required. It is to be noted that since these regulations apply to undertakings employing one hundred and fifty employees and over on 13 January 2006; undertakings employing between one hundred and one hundred and forty nine employees on 23rd March, 2007; and undertakings employing fifty employees and over on 28th March, 2008. However, these regulations, however do not apply to personnel employed on vessels which fall under the Merchant Shipping Act.

(5) Exceptions or specific requirements for certain categories of employee

Article 2 of the EIRA defines an employee as:

> 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.

The same Article defines a "contract of service" as:

> an agreement, (other than service as a member of a disciplined force) 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.

Thus, any person who holds any office who satisfies the requirements of the above definition may benefit from the protection afforded by the EIRA.

[11] Legal Notice 10 of 2006 which gives effect to the relevant provisions of Directive 2002/14/EC

However, self-employed persons do not fall under the protection afforded to employees by the EIRA.

All employees are subject to **probation**. Article 36 of the EIRA provides that the first six months of any employment under a contract of service shall be probationary employment unless both parties agree to a shorter probation period. If the employee is engaged in a technical, executive, administrative or managerial posts and whose wages are at least double the minimum wage established in that year, such probation period shall be of one year unless otherwise specified in the contract of service.

During the probationary period, the employment may be terminated at will by either party without assigning any reason[12] and neither party is bound to give notice of such employment if this is done during the probationary period which does not exceed a continuous period of more than one month. If the employee has exceeded one month of his/her probationary period, then a week's notice of the termination of employment shall be given by the party terminating the contract to the other party.

In the case of employees employed under an indefinite term contract, should any of the parties wish to terminate the contract such party must give the other party **notice of termination of employment**. The duration of such notice depends on the duration of the employment relationship. If the employment relationship lasted more than one month but less than six months then the notice period shall be of one week; if it lasted more than six months but less than two years then two weeks notice must be given; if it lasted more than two years but less than four years then the notice period is of four weeks; if it lasted more than four years but less than seven years then eight weeks notice must be given; and if the employment relationship lasted more than seven years then one additional week for every subsequent year of service up to a maximum of twelve weeks.

In the case of persons employed in technical, administrative, executive or managerial posts, the parties may agree to longer periods. However, notice of termination of employment may not be given during maternity leave or during the period of incapacity for work due to a pathological condition arising out of confinement

The period of notice shall begin to run from the next working day following the day on which notice is given.

Furthermore, Regulation 10 of Legal Notice 427 of 2002 entitled the "Part-Time Employees Regulations, 2002" provides that is an employee refuses to transfer from part time to whole time work and vice versa this shall not in

[12] Carmel sive Lino Farrugia vs. Alexandra Place Hotel Limited – Civil Court, First Hall – 7 July 2003 – Writ of Summons No. 296/1997/1

itself constitute a valid reason for termination of employment, unless such termination of employment is justified under any other grounds in the EIRA.

3.1 Mutual agreement

The EIRA does not make specific mention of termination of employment relationships by mutual agreement but focuses on the termination of employment by either the employer or the employee. However, in view of the fact that an employment relationship is governed by a contract, then such employment relationship may be terminated by the parties if they mutually consent thereto and under such terms as they may agree between them, just like any other type of contract.

3.2 Termination otherwise than at the wish of the parties

(1) Grounds for a contract to come to an end by operation of law

In cases of fixed-term contracts, these are automatically terminated on reaching a specific date, on completion of a specific task or through the occurrence of a specific event. In such cases, no further action is required by the parties. If, however, the employee is retained in employment after the specified date or event or after completion of the specific task, such employee shall be deemed to be employed under an indefinite term contract.

Furthermore, an employment relationship shall be deemed to be automatically terminated when the employee reaches retirement age unless agreement to the contrary is reached between the employer and the employee.

In all other cases, an employment relationship would terminate as a result of some action by the employer (dismissal or redundancy) or by the employee (resignation or abandonment of service).

(2) Effects of the existence of a ground

Once the grounds mentioned in 3.2.1 verify themselves, the employment will be automatically terminated and the employer would only be bound to pay the employee the wage or salary agreed to between them in the contract of employment.

If, following the termination of the employment, the employee is unemployed, such employee may apply for unemployment benefits, whereas

if the termination of the employment was based on the employee's retirement, such employee is entitled to receive a retirement pension.

(3) Remedies

If an employee under a fixed-term contract is of the opinion that the employment relationship should not have been terminated either because the date of termination was not reached, the task was not completed or the condition did not verify itself, such employee may seek a remedy before the court. The Industrial Tribunal only has jurisdiction to hear and determine cases of unfair dismissals in cases of employees engaged under an indefinite term contract. If the employee is paid on a monthly basis then the action should be filed within one year whereas if the employee is paid on an annual basis, then the period for filing the action shall be eighteen months.

(4) Penalties

If a contract of employment is terminated on the grounds mentioned in 3.2.1, no penalties are due.

3.3 Dismissal

An employer has the right to dismiss an employee whether such employee is employed under a fixed-term contract or under and indefinite-term contract.

3.3.1 Fixed-term contract

Employees under a fixed-term contract can be dismissed for any reason.

If such dismissal takes place before the expiration of the time definitely specified by a contract of service, Article 36(11) of the EIRA provides that the employer shall pay to the employee one-half of the full wages that would have accrued to the employee in respect of the remainder of the time specifically agreed upon.[13] Wages in this context means the wage payable to such employee excluding any remuneration for overtime, any forms of bonus, any allowances, and remuneration in kind and commissions.

[13] John L. Camilleri vs. Thomas J. Galea et noe – Civil Court, First Hall – 10 May 2002 – Writ of Summons No. 1621/1994/1

If the dismissal occurs during the probation period, then if the employment lasted for less than one month, the employer would not be bound to pay the employee other than for the work carried out till the date of dismissal, whereas if the employment lasted for more than one month then the employer would have to either give the employee one weeks' notice or else dismiss such employee with immediate effect and pay such employee half the salary or wage which would have been due to such employee for such week.

In the event that the dismissal takes place due to a reason which the employer imputes to the employee, such as for example misconduct, and therefore the employer decides not to pay the employee the amounts mentioned in the two preceding paragraphs, the employee may institute proceedings before the court to claim the payment of the amount payable to him.

3.3.2 Indefinite-term contracts

In the case of indefinite term contracts, since such contracts have no expiry date, the employment relationship shall carry on until such time as it is terminated, whenever that may be.

With regards to the dismissal of employee employed under indefinite term contracts, one is to distinguish between the following:

(i) Dismissal during the probation period;

(ii) Dismissal by the employer on the ground of redundancy;

(iii) Dismissal by the employer for a "good and sufficient cause";

(iv) Dismissal by the employer for reasons related to the capacities or personal attributes of the employee, excluding those related to misconduct.

3.3.2.1 Dismissal during the probation period

All employees are subject to probation. Article 36 of the EIRA provides that the first six months of any employment under a contract of service shall be probationary employment unless both parties agree to a shorter probation period. If the employee is engaged in technical, executive, administrative or managerial posts and whose wages are at least double the minimum wage established in that year, such probation period shall be of one year unless otherwise specified in the contract of service.

In the case of dismissal during probation, if the employment lasted for less than one month, the employer would not be bound to pay the employee other than for the work carried out till the date of dismissal, whereas if the employment lasted for more than one month then the employer would have to either give the employee one weeks' notice or else dismiss such employee with immediate effect and pay such employee the salary or wage which would have been due to such employee for such week.

3.3.2.2 Dismissal by the employer on the ground of redundancy

(1) Procedural Requirements

The EIRA provides that an employer may dismiss an employee from his employment on grounds of redundancy. In such case, the employer must give the employee due notice as follows:

Duration of employment relationship	*Notice period*
❑ more than one month but less than six months	1 week
❑ more than six months but less than two years	2 weeks
❑ more than two years but less than four years	4 weeks
❑ more than four years but less than seven years	8 weeks
❑ more than seven years	1 additional week for each subsequent year of service up to 12 weeks maximum

In the case of persons employed in technical, administrative, executive or managerial posts, the parties may agree to longer periods. The period of notice shall begin to run from the next working day following the day on which notice is given.

If the employee was employed under an indefinite contract for less than six months and this is followed by another period of employment in the same class of employment commencing within the next following six months from the last day of employment, the two periods shall, for the purposes notice in regard to the second period of employment be deemed to be one continuous period.

(2) Substantive Conditions

Maltese law sets out the following rules in the case of redundancy:

- any employee whose employment is terminated on grounds of redundancy shall be entitled to reemployment if the post formerly occupied by him is again available;

- within a period of one year from the date of termination of employment and in such case such employee shall be reemployed at conditions not less favourable than those to which he would have been entitled if the contract of service relating to him had not been terminated;

- any employee who shall have been so re-employed shall, for the purposes of law, be deemed to have continued in his employment notwithstanding that his employment had previously been terminated on grounds of redundancy;

- the employee who shall be declared redundant shall be that person who was engaged last in the class of employment affected by such redundancy (last in first out rule).[14] If, however, such person is related to the employer (not being a limited liability company or a statutory body) by consanguinity or affinity up to the third degree, the employer may, instead of terminating the employment of such person, terminate that of the person next in turn.

On receiving notice of termination on the ground of redundancy from the employer, the employee may either continue to perform work until the period of notice expires or, at any time during the currency of the period of notice, require the employer to pay him a sum equal to the wages that would be payable in respect of the unexpired period of notice and therefore in the latter case not work during the notice period. Usually employees in this situation opt for the latter since during such notice period they would start seeking new employment. Also, if the employer fails to give 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.

In various cases, the Industrial Tribunal has held that if the redundancy of the employee was terminated due to economic problems of the employer, then the Tribunal would not be competent to take cognisance of the case.[15] If, however, redundancy is not proven and such ground for dismissal was only a

[14] Oliver Borg and Atlas Tools Engineering Company Limited – MF/2163 – 10 October 2005 - Decision No 1639.
Joseph Darmanin and Joinwell Limited – JB/1818 – 21 January 2005 - Decision No 1575

[15] Edward Briffa and Meridian Art International Limited gia Image Direct International Limited – FM/2210 – 16 February 2005 - Decision No 1585
Simon Dalton and Sliema Chalet Company Limited – FM/1931 – 26 May 2004 - Decision No 1512

pretext to terminate the employee's employment, such as if for example another person is shortly after employed in the same post, the Tribunal would usually award the dismissed employee compensation[16] since another person would be working in his/her stead by that time.

(3) Specific Requirements for Collectives Redundancies

In cases of collective redundancies, the Collective Redundancies (Protection of Employment) Regulations, 2002[17] provide that an employer proposing to declare the redundancies, shall not terminate the employment of such employees before he has notified the employees' representatives in writing of the termination of employment contemplated by him and has provided the said representatives with an opportunity to consult with the employer.

These regulations apply in the cases of establishments employing more than twenty employees. In fact, if the establishment employs more than twenty employees but less than one hundred employees, for there to be a collective redundancy ten or more employees must be dismissed by the employer on the ground of redundancy within a period of thirty days. If the establishment employs more than one hundred but less than three hundred employees then for there to be considered a collective redundancy, ten percent or more of the number of employees must be made redundant, whereas if there are more than three hundred employees, then thirty employees must be made redundant.

(4) Remedies

The employer must forward a copy of its reasons for termination of employment to the Director responsible for Employment and Industrial Relations on the same day that this is notified to the employees' representatives. In the case of collective redundancies resulting from a judicial decision, these regulations do not apply.

As stated above, this does not apply in respect of seamen employed on ships under the provisions of the Merchant Shipping Act 1973.

In instances where due to the fact that an employer is insolvent the employees' [18] claims for unpaid wages arising out of contracts of service

[16] Wilfred Sammut and AX Construction Limited – FM/1539 – 4 December 2002 - Decision No 1360

[17] Legal Notice 428 of 2002

[18] In this context the following categories of persons are excluded: outworkers who do not have a written contract of employment, private domestic servants, relatives of the employer who do not have a written contract of employment, the spouse of the employer, persons who normally work for less than 18 hours a week for one or more employers, the crews of

cannot be paid, the Guarantee Fund Regulations, 2002[19] provide that out of the Guarantee Fund established under Article 21 of the EIRA, there shall be paid in respect of employees' outstanding claims for wages resulting from contracts of service, an amount which shall not exceed thirteen weeks' national minimum wage payable at the time of the dismissal or termination, less any unemployment or social assistance benefits to which the employee may be entitled in accordance with the Social Security Act for the period starting from the date of termination of the employment and ending on the end of the thirteenth week after such termination. The General Workers Union (GWU) has stated that more should be done by the employer to ensure that the rights of the employees, in the case of redundancy, are safeguarded. It believes that employers who know that a company will be closing down due to economic problems should provide for the training and retraining of its employees and that it is the responsibility of the employers to make sure that these workers are employable; thus, it states, training should be part of the package of gratuities.

(5) Collective Agreements

In some instances, collective agreements provide for redundancy gratuities in the form of a payment given to the employees over and above the payment due to them for the work they have done. Though the EIRA makes no provision for this, this is one instance where collective agreements grant employees better conditions of employment than those prescribed by law.

3.3.2.3 Dismissal contrary to certain specified rights or civil liberties

In the case of an indefinite term contract, an employer may dismiss an employee if there is a good and sufficient cause for so doing. In such case there is no need to give notice of termination in accordance with the notice periods set out above since the termination of employment would be immediate.

The Industrial Tribunal has consistently held that dismissal of an employee for a good and sufficient cause must be a last resort.[20] In fact, the employer should give more than one warning to the employee to ask such employee to mend his ways and it is only if the employee fails to mend his ways that the employer would be justified in dismissing the employee.[21]

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sea-going vessels, and employees who on their own or together with their spouse or children, were owner or part owners of the employer's undertaking or business in the last five years prior to the insolvency.

[19] Legal Notice 432 of 2002.

[20] Anthony Bernard and Visual Trends & Co. Ltd. – AC/1577 - 2 February 2004 - Decision No. 1478

[21] John Portelli and Dragonara Casino Co. Ltd. – 16 January 2006 - Case No. 2184

The law does not define a "good and sufficient cause" but only lays down those situations which may not be set up as a good and sufficient cause by an employer for termination of an employee's employment. These situations are:

- 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; or

- that the employee no longer enjoys the employer's confidence;[22] or

- that the employee gets married;[23] or

- that an employee is pregnant or is absent from work during maternity leave; or

- 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; or

- 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; or

- that the business in which the employee is engaged has undergone a transfer of ownership, unless he proves that the termination is necessary for economic, technical or organisational reasons entailing changes in the workforce.

Mario Fenech and Dowty Automotive (Malta) Limited – AD/1802 – 22 September 2004 - Decision No 1540

Saviour Nappa and Burmarrad Commercials Limited – GBC/2200 – 10 October 2005 - Decision No 1635

Mark Zammit and RMF Limited – AC/1749 - 22 September 2005 - Decision No 1629

John Fauzza vs Dr. Carmelo Mifsud Bonnici LL.D. – Civil Court, First Hall – 28 April 2003 – Writ of Summons No. 1168/1977/1

Stefan Attard vs. The Mayor (Fgura) et noe – Civil Court, First Hall – 20 October 2005 – Writ of Summons No. 1717/2001/1

Joseph Grech and LCJ & Co. Ltd. – FM/1720 – 6 August 2003 - Decision No 1427

Omar Granata and Sliema Fort Co ma' TGI Friday's – MP/1419 – 13 June 2002 - Decision No 1302

[22] Pamela Galea and Volksbank Malta Ltd – FM/1521 – 30 October 2002 - Decision No 1346

Carmel sive' Charles Mercieca vs. Simonds Farsons Cisk p.l.c., gia' Simonds Farsons Cisk Ltd – Civil Court, First Hall – 30 June 2004 – Writ of Summons 1836/1998/1

[23] Marisa Briffa and Tower Supermarket Complex – HW/1669 – 27 July 2004 - Decision No 1530

Furthermore, notice of termination of employment may not be given during maternity leave or during the period of incapacity for work owing to a pathological condition arising out of confinement due to pregnancy.

If the employee feels that there was no good and sufficient cause for the dismissal, such employee may institute proceedings against the employer before the Industrial Tribunal which will decide whether the circumstances of that particular case constituted a good and sufficient cause. Each case is determined on its own merits and it is to be noted that in Malta there is no doctrine of precedent (see 1.4 above).

Furthermore, Regulation 10 of Legal Notice 427 of 2002 entitled the "Part-Time Employees Regulations, 2002" provides that a part time employee shall be regarded as having been unfairly dismissed if the reason for the dismissal or the grounds for the dismissal are:

(a) that the employee has:

(i) brought proceedings against the employer under these regulations;

(ii) requested from his employer a written statement of reasons under regulation 5 of the said legal notice;

(iii) given evidence or information in connection with such proceedings brought by any employee;

(iv) otherwise done anything under the Part-Time Employees Regulations in relation to the employer or any other person;

(v) alleged that the employer had infringed the Part-Time Employees Regulations; or

(vi) refused (or proposed to refuse) to forgo a right conferred on him by the Part-Time Employees Regulations; or

(b) that the employer believes or suspects that the employee has done or intends to do any of the things mentioned above.

Another situation which would not be deemed to be a good and sufficient cause for termination of employment arises the Parental Leave (Entitlement) Regulations, 2003[24] which grant a right to both male and female workers to be granted unpaid parental leave on the grounds of birth, adoption or legal custody of a child to enable them to take care of that child for a period of three months until the child has attained the age of eight years. Regulation 10 of these regulations provides that if an employer dismisses an employee solely

[24] Legal Notice 225 of 2003.

because such employee takes or applies to take parental leave in accordance with the regulations, such dismissal shall not constitute a valid reason for termination of employment, unless the termination is justified on the grounds set out in the EIRA. If the termination is justified on the grounds set out in the EIRA, the notice of termination of employment may be given during the period of parental leave and in such case such notice shall result in the automatic suspension of the parental leave from the third working day following the date of issue of the notice.

3.3.2.4 Dismissal by the employer for reasons related to the capacities or personal attributes of the employee, excluding those related to misconduct.

As a rule, in Malta, no distinction is made between dismissal on disciplinary grounds and dismissal on grounds related to the employee's capacities and therefore the same rules mentioned in 3.3.2.3 would apply in this situation also.[25]

Article 36 of the EIRA provides that in the event that an employee suffers personal injury by accident arising out of and in the course of employment or by any of the occupational diseases specified in the Social Security Act in each case occurring in the service of the employer, the employer can only terminate such employee's contract of service with the consent of the employee. During such period of incapacity wages (less injury benefit payable under the Social Security Act not including any benefit for permanent disability) shall accrue in favour of the employee during the first twelve calendar months of incapacity. On cessation of such incapacity for work the employer shall, within twenty-one days from an application made by the employee, re-instate the employee in his former employment or, if the injury or disease has caused a disablement rendering the employee unfit for the former employment, in other suitable employment. The employee must apply for re-instatement in writing within seven days from the cessation of the incapacity for work.

Sub-article (17) of Article 36 of the EIRA prohibits an employer from dismissing a whole-time female employee during the period of her maternity leave or the period of five weeks following the end of such leave in which she is incapable for work owing to a pathological condition arising out of confinement. Any such period of incapacity for work shall be deducted from the period of sick leave to which the employee is entitled at the time of such incapacity, so however that the period of incapacity which exceeds such entitlement shall be deemed to be leave of absence without entitlement to wages. The employer may require the employee to produce evidence of such incapacity for work and may require his own doctor to visit such employee and to report to him on the condition of the employee's health.

[25] Paul Grech and Sea Malta Co. Ltd. – JB/1504 – 12 December 2003 - Decision No 1456

On the termination of her maternity leave or of the period of her incapacity for work owing to a pathological condition arising out of confinement, the employee shall be entitled to resume work in the post she occupied on the commencement of her maternity leave, or in an analogous post if at the time when she becomes so entitled the post she formerly occupied is no longer available. If the employee fails to resume work as aforesaid, or, after having so resumed work, abandons the service of her employer without good and sufficient cause within six months from the date of such resumption, she shall be liable, without prejudice to any other liability under the EIRA, to pay the employer a sum equivalent to the wages she received during the maternity leave.

3.3.3 Remedies

The remedies available to an employee who has been dismissed are two:

(a) If the employee was employed under a fixed term contract, such employee shall be entitled to receive from the employer the payment of a sum of money equivalent to one half of the salary that would have otherwise been paid to the employee till the date of termination of the contract.

If the employee was employed under an indefinite term contract, the employee shall have the option either of continuing to perform work until the period of notice expires or, at any time during the currency of the period of notice, of requiring the employer to pay him a sum equal to half the wages that would be payable in respect of the unexpired period of notice.

(b) An employee who has been dismissed from employment and who considers such dismissal to be unfair may request the Department of Industrial and Employment Relations (DIER) to intervene in the matter on his behalf. Such intervention usually takes the form of a conciliation meeting.

If the dispute is not resolved, if the employee has been employed under a fixed-term contract, such employee may institute proceedings before the court. If, however, the employee has been employed under an indefinite term contract, such employee may file a complaint for unfair dismissal before the Industrial Tribunal within four months from the effective date of dismissal.

The Industrial Tribunal may either order reinstatement or re-engagement of the employee[26] or the payment of financial compensation by the employer to the employee.

Article 81 of the EIRA provides that where on a complaint for unfair dismissal referred to the Industrial Tribunal such Tribunal finds that the grounds of the complaint are well-founded and the complainant specifically requested to be reinstated or re-engaged and 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. If, however, 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 reengagement of the complainant. In cases where the complainant was appointed or selected to such post as aforesaid by his fellow workers the Tribunal may however all the same order reinstatement or re-engagement in the post held by the employee before such appointment or selection.

If the complainant would not have specifically requested and the Tribunal finds that the grounds for the complaint are well-founded, then if the employee was unfairly dismissed the Tribunal shall make an award of compensation which shall be paid by the employer to the complainant, in respect of the dismissal. 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.

In this regard it is felt that at times the amount of financial compensation awarded by the Industrial Tribunal is not sufficient. A representative of one of the largest unions in Malta (UHM) argues that the Tribunal should award higher financial compensation primarily so as to act as a deterrent to employers when they are considering terminating an employment relationship for a cause which is not good and sufficient. The said Union also believes that it might be useful if the EIRA were to lay down a minimum amount of financial compensation which the Tribunal would award to an employee in case such employee is unfairly dismissed. This would also be useful when an employee decides to bring a case before the Industrial Tribunal because in this way the employee may see beforehand whether it is worth bringing the case before the Tribunal or not.

[26] Maria Concetta Agius and Danish Bakery Limited – AC/2175 – 10 October 2005 - Decision No 1637

3.3.4 Penalties

Employers who breach or fail to comply with any conditions of employment laid down in the EIRA or any regulations made thereunder, or with conditions laid down in collective agreements, shall, unless a different penalty is established for such offence, on conviction be liable to a fine of not less than Lm 100 and not exceeding Lm 1000.

If the employer is convicted of:

(a) having failed to pay wages at not less than the rate applicable in accordance with a recognised condition of employment or with a contract of service whichever shall be the higher, or

(b) having made any illegal deduction or inflicted any fine other than those specifically permitted by law, or

(c) having failed to make payment of any bonus payable, or any other payment due by an employer to any employee, or

(d) having withheld any remuneration or any payment in lieu of notice, or

(e) having failed to allow paid holidays, or

(f) having failed to effect payment of any moneys due to an employee,

the court shall, at the request of the prosecution, besides awarding the punishment imposed by law, order the offender, on proof of the amount, to refund or pay to the employee or employees concerned the said amount due by him and, in the case of holidays with pay not allowed, a sum equal to the pay thereof, and any such order by the court shall be of the same force and effect and be executable in the same manner as if it had been given in a civil action duly instituted between the employee or employees concerned or the apprentice or apprentices concerned, as the case may be, and the employer.

3.3.5 Transfer of the firm

Article 38 of the EIRA provides that when a business or other undertaking is taken over, in whole or in part by a person (the "transferee") from any employer (the "transferor") any employee in the employment of the transferor on the date of transfer of the undertaking shall be deemed to be in the employment of the transferee and the transferee shall take on all the rights and obligations which the transferor has towards the employee. It further provides that the transferor and the transferee shall inform the employees' representatives of their respective employees affected by the transfer with:

(a) the date or proposed date of the transfer; (b) the reasons for the transfer; (c) the legal, economic and social implications of the transfer for the employees; and (d) the measures envisaged in relation to the employees.

Following the transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

Regulation 5(3) Transfer of Business (Protection of Employment) Regulations, 2002,[27] issued in virtue of Article 38 of the EIRA provides that whenever a transfer which involves a substantial change in working conditions to the detriment of the employee results in the termination of the contract of employment, the employer shall be regarded as having been responsible for such a termination.

3.4 Termination by the employee

Just as is the case with employers, employees also have the right to terminate their employment whether they are employed under a fixed-term contract or under and indefinite-term contract.

3.4.1 Fixed-term contract

An employees under a fixed-term contract can be terminate the employment relationship for any reason.

If such termination takes place before the expiration of the time definitely specified by a contract of service, Article 36(12) of the EIRA provides that an employee who abandons the service of his employer before the time definitely specified by the contract of service shall pay to his employer a sum equal to one-half of the full wages to which he would have become entitled if he had continued in the service for the remainder of the time so specifically agreed upon.[28] Wages in this context means the wage payable to such employee excluding any remuneration for overtime, any forms of bonus, any allowances, and remuneration in kind and commissions.

If termination takes place during the probation period, then if the employment lasted for less than one month, the employee would not be bound to pay anything to the employer. If, however, the employment lasted

[27] Legal Notice 433 of 2002.

[28] Falcon Tours Limited vs. Marvin Mizzi - Civil Court, First Hall – 8 June 2001 – Writ of Summons No. 3450/1996/1.

for more than one month then the employee would have to either give the employer one weeks' notice or else terminate the employment with immediate effect and pay the employer an amount equivalent to half the salary or wage which would have been due to such employee for such week.

In the event that the termination takes place due to a reason which the employee imputes to the employer, and therefore the employee decides not to pay the employer the amounts mentioned in the two preceding paragraphs, the employer may institute proceedings before the court to claim the payment of such amounts.

3.4.2 Indefinite-term contracts

In the case of indefinite term contracts, since such contracts have no expiry date, the employment relationship shall carry on until such time as it is terminated, whenever that may be.

With regards to the termination of an employment relationship by an employee employed under indefinite term contracts, one is to distinguish between the following:

(i) Termination during probation;

(ii) Resignation;

(iii) Termination for a "good and sufficient cause";

(iv) Desertion of post.

3.4.2.1 Termination during probation

In the event that an employee chooses to terminate his employment during probation, if the employment lasted for less than one month, the employee would not be bound to pay anything to the employer. If, however, the employment lasted for more than one month then the employee would have to either give the employer one weeks' notice or else terminate the employment with immediate effect and pay the employer an amount equivalent to half the salary or wage which would have been due to such employee for such week.

3.4.2.2 Resignation

An employee who decides to resign from his post under a contract of an indefinite duration, other than for a good and sufficient cause, must give the employer notice of such termination. The duration of the notice period is dependent on the duration of the employment relationship and is the same as that set out in 3.3.2.2 above.

If the employee fails to give notice as aforesaid, 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.

3.4.2.3 Termination by the employee for a "good and sufficient cause"

In the event that an employee chooses to terminate his employment relationship with the employer for a good and sufficient cause then such employee is not bound to give notice and shall not be liable to pay the employer any of the amounts mentioned above.

3.4.2.4 Desertion of the post

If an employee decides to desert his employment this may be regarded as tacit resignation and that therefore the contract of employment shall be deemed to have been terminated.[29]

3.4.3 Remedies

The employer may institute proceedings before the court for the enforcement of any of such employer's rights by an employee. Such action must be instituted within five years.

4. General questions relating to all forms of termination of employment relationships

4.1 Non-competition clauses/agreements

The EIRA makes no specific reference to non-competition agreements or clauses of non-competition in contracts of employment. In practice such clauses are included in contracts of employment relating to employees employed in management positions or in particularly sensitive positions with

[29] Bernadette Darmanin and Paradise Bay Hotel – FM/1558 – 8 August 2002 - Decision No 1323

the employer. The Maltese Courts have held that agreements/clauses in restraint of trade must be related to the nature of the employment and must be limited to a reasonable amount of time.[30]

4.2 Conditions of employment less favourable than those provided for by law

Article 42 of the EIRA provides that unless otherwise provided by the EIRA, if a contract of service between an employee and his employer or a collective agreement entered into between the employer and the recognised union representatives, provides for any conditions of employment, including conditions relating to the termination of the contract, less favourable to the employee than those specified in or under the EIRA, they shall have effect as if for those conditions less favourable to the employee there were substituted the conditions specified in or under the EIRA. However, , in exceptional cases, the employer in agreement with the employee or union representatives may provide for different conditions of employment than those specified in or under the EIRA as long as such agreement is a temporary measure to avoid redundancies and as long as it is approved by the Director of Employment and Industrial Relations, which approval must to be reviewed every four weeks.

4.3 Issue of certificates of service

On termination of a contract of service lasting over one month, then in terms of Article 41 of the EIRA, the employer is bound, if requested by the employee, to issue a certificate stating the duration of the employment, the nature of the work or services performed and, if the employee so desires, the reason for the termination of the contract and the rate of wages paid.

4.4 Full and final settlement

Maltese employment does not specifically deal with the issue of full and final settlement. In practice, however, it is not uncommon that on termination of an employment relationship and on the payment of all amounts due to the employee by the employer by virtue of the employee's employment, such as salary till the date of termination, bonuses *pro rata* to the date of termination, payments for untaken vacation leave till the date of termination, as well as the payment of any additional amounts agreed to between the employer and the

[30] Attilio Vassallo Cesareo and Saviour Coppini in the name and representing International Machinery Limited vs. Anthony Cilia Pisani – Civil Court, First Hall - 31 January 2003; Court of Appeal - 3 March 2006 – Writ of Summons No. 254/1986/1

employee, the parties sign an agreement declaring that this amount given to the employee is to be considered in full and final settlement and the employee will not have the right to pursue the issue further before the Industrial Tribunal.

5. The role of trade unions

Trade union membership is widespread in Malta and in cases of termination of employment relationships by employers without the consent of the employee, employees seek assistance from their trade unions also. In such instances, the first step taken by trade unions is to approach the employer to see whether such dismissal was justified or not and to try and reach an agreement.

If an agreement is not reached and the trade union feels that the termination was not justified, it would assist the employee in filing proceedings before the competent body, namely the Industrial Tribunal or the Courts.

When employees is dismissed due to redundancy, the unions try to help their members by obtaining redundancy gratuities for them, by ensuring that the correct procedure with regards to the notice periods and "last in first out" rules are followed, by seeking to assist them to obtain training and also by directing members to employers who may possibly employ the affected employees. The GWU also provides training through its own educational foundation, the Reggie Miller Foundation.

In the case of termination due to disciplinary actions they try to help members by negotiating with the employer for possible reinstatement. This is also the case when they feel that there is an unfair dismissal. In the case of the latter, should negotiations fail, then legal advice and assistance with tribunal and/or court proceedings would be available to the members.

6. The role of the Malta Employers' Association

The Malta Employer's Association (MEA) seeks to assist its members by trying to solve the disputes which they may have with their employees. The MEA initially considers the circumstances of the particular case to see if the employer's decision to dismiss an employee is legally justified. If it considers this to be the case, is seeks to organise a meeting with the employee or the employee's representatives in an effort to resolve the dispute. If this is not successful, it seeks conciliation through the Department of Industrial and

Employment Relations, and if even this fails, then matters would be left in the hands of the Industrial Tribunal to decide.

7. Conclusion

It is generally felt that Maltese legislation governing termination of employment relationships is satisfactory. In fact, most of the provisions of the EIRA relating to this aspect of employment relations were taken from the Conditions of Employment (Regulations) Act of 1952 and have therefore been accepted and utilised for over fifty years.

However, certain aspects may be improved upon. One of the issues which could possibly be revisited by the legislator relates to the amount of financial compensation which may be awarded by the Industrial Tribunal. In fact, at times it has been felt that such financial compensation does not adequately indemnify the employee for both the moral damage as well as the pecuniary damages suffered. Furthermore, it might be useful if the EIRA were to lay down a minimum amount of financial compensation which the Tribunal would award to an employee in case such employee is unfairly dismissed. Besides acting as a deterrent for an employer should such employer decide to terminate an employment relationship without legally valid grounds, it would also be useful when an employee decides to bring a case before the Industrial Tribunal because in this way the employee may see beforehand whether it is worth bringing the case before the Tribunal or not.

Another area where matters may be improved relates to the duration of proceedings before the Tribunal. Article 78 (1) of the EIRA provides that the Tribunal shall decide any issue referred to it within a period that does not exceed one month from the date of the referral, unless in the opinion of the Chairperson, a longer period is necessary for a valid reason which must be stated and registered in the proceedings of the Tribunal. In most instances proceedings take much longer than the prescribed time. Though the period of one month may not be realistic for the Tribunal to hear and decide upon a case, premises to house the Industrial Tribunal should be identified and allocated specifically to the Industrial Tribunal to do away with the current practice of having sittings in halls within the law courts when these are available, and also guidelines or regulations should be published to set out realistic timetables for the conclusion of the proceedings.

Although the Department for Employment and Industrial Relations seeks to ensure compliance with the EIRA, in practice this is not always possible. Thus, trade unions have taken on a supervisory role to ensure that employers do not breach the provisions of the Act.

According to the MEA there are some clauses in the law which are vague. The issue which often arises is: where an employee is ill for a long period of time exceeding any leave s/he is entitled to, would the employer be justified in terminating his/her employment? This depends entirely on the decision given by the Industrial Tribunal. However, in such situations the parties may come to an agreement.

Appendix - Synopsis of decisions/judgements mentioned in Report

Anthony Bernard and Visual Trends & Co. Ltd. – AC/1577 - 2 February 2004 - Decision No. 1478
Anthony Bernard was employed by Visual Trends & Co. Ltd as an Executive Accountant. Eventually his work designation was changed and he was assigned a job in business development. Some time later and without any previous warnings he received a letter of termination of employment, based on the following:

(a) One of Visual Trends & Co. Ltd's clients was not happy with Bernard's performance and in fact he was removed from the post of Executive Accountant so as not to prejudice Visual Trends & Co. Ltd's reputation with its clients; and

(b) This showed that probably the plaintiff was not good for his job.

After this Visual Trends & Co. Ltd decided to give the Bernard more time and space in order to be able to improve his work. Visual Trends & Co. Ltd claimed that although it was patient with him, Bernard still did not manage to reach the level of work required of him and therefore his job was terminated.

The Industrial Tribunal stated that termination should be the last remedy resorted to and other measures should be taken prior to termination. Thus, the Tribunal ordered Visual Trends & Co. Ltd to pay Bernard compensation.

Joseph Mercieca v Water Services Corporation - AC/1805 - 26 July 2004 – Preliminary Decision of the Industrial Tribunal No 1528
On 7 March 2001, Mercieca was employed for a definite period of three years by the Water Services Corporation (WSC) as 'Head - Public Relations'. On termination of the said contract he was not re-employed by the WSC. Prior to that, in 1998 he had been employed with the WSC for another definite period as Manager - Marketing and Public Relations. Furthermore, three years before that he had been employed by the WSC as Senior Public Relations Customer Care Officer.

The WSC claimed that the Industrial Tribunal did not have jurisdiction to hear the case on the ground that Mercieca was employed under a definite term contract. It also stated that if this claim was not accepted by the Tribunal, then, Article 7 of Legal Notice 429 of 2002 should not be applicable in this case since it is known that unless stated clearly in the law that such law is to be applied retroactively it is taken as if the law is not applicable retroactively. Thus, since Mercieca was employed before Legal Notice 429 of 2002 came into force, such Legal Notice did not apply to this case.

Mercieca stated that he was employed by the company on a definite contract which was extended many times and that in terms of Legal Notice 429 of 2002 an employee who has been employed on a definite tem contract for a period of over four years shall be considered to be employed on an indefinite contract. He had, in fact, worked with the company for over four years, even though under different contracts of employment.

After viewing the submissions laid down by the parties the Industrial Tribunal gave a preliminary decision that the contract was an indefinite and not a definite contract.

The Company felt aggrieved by such a decision and brought the proceedings before the Court of Appeal asking the court to reverse the decision of the Industrial Tribunal and decide that Mercieca was employed on a definite contract. The Court of Appeal stated that since the Industrial Tribunal had given a partial but, in that regard, final decision, then the Court of Appeal could take cognisance of the case if the party appealing requested this appeal either verbally in the Tribunal after the judgement was delivered or in writing six days thereafter. Since neither procedure was followed, the Court of Appeal decided that the proceedings were null and void and could not therefore decide on the matter in question.

Proceedings on the merits are still underway before the Industrial Tribunal.

Carmel sive Lino Farrugia vs. Alexandra Place Hotel Limited – Civil Court, First Hall – 7 July 2003 – Writ of Summons No. 296/1997/1

Farrugia was employed by Alexandra Place Hotel Limited as financial controller. His contract of employment provided that the directors of the Alexandra Place Hotel Limited should not interfere in the normal administration of the Hotel and if such happened the employee could bring this to the notice of the Board of Directors and if such events would repeat themselves the Employee could resign and be entitled to receive the equivalent of 3 months salary as compensation of termination. It was proven that many instances of interference in Farrugia's work occurred and therefore he had no alternative but to resign from his post.

However, since he resigned during his probation period the Court could not decide against the Alexandra Place Hotel Limited since during the probation period Farrugia's employment could have been terminated by either party at any time without giving any reasons.

Jonathan Galea and Preluna Hotel & Spa – MF/2242 - 25 July 2005 - Decision No 1626

The Preluna Hotel & Spa terminated Galea's employment as he was found to be drunk one night while he was working as a bar man. Although it was the first time that Galea had caused trouble at work, since dismissal on this ground was possible under the collective agreement, the Industrial Tribunal decided that the termination was in fact justified.

Josephine Camilleri and U.C.I.M Co. Ltd – FM/2258 - 14 December 2005 - Decision No 1655

Camilleri worked as a cleaner with U.C.I.M Co Limited under an indefinite term contract. On one occasion she failed to report for work for more than five consecutive days due to the fact that her sister was terminally ill. U.C.I.M Co Limited stated that Camilleri had never informed them that she would be taking leave for a long period of time and in fact the only written proof that there was, was an email stating that she would have abstained from work on a particular day. The Collective Agreement regulating Camilleri's employment provided that if an employee did not report for work for a period of five consecutive days without informing the employer, U.C.I.M Co Limited would take this to mean that the employee had resigned from the job.

The Industrial Tribunal held that the Collective Agreement is binding on the parties and since there was no proof that the employee had in fact informed the Company that she would have abstained from work for a period of time exceeding one day, it decided in favour of U.C.I.M Co Limited and stated that therefore the termination of the employment was just.

Michael Fenech and Malta International Airport plc. – AC/1737 - 2 September 2004 - Decision No 1534

Michael Fenech, employed as a supervisor at the Malta International Airport, was on duty on 11 September 2001 at the time of the terrorist attacks in the United States of America. When he heard of the attacks in New York he phoned the Malta Police Department to report a bomb hoax at the Malta International Airport. As a result his employment was terminated. Although in terms of the collective agreement he had the possibility to attend the board meeting at which his case was being discussed, he was not informed of the meeting and therefore did not attend. He therefore claimed that the collective agreement had been breached since he was not given a chance to put his case forward before the Board of Directors. Furthermore it was proven that he suffered from a medical condition. The Industrial Tribunal therefore held that the rules laid down in the collective agreement had not been followed and that the termination of employment was not just. His reinstatement in his post was ordered.

Pamela Galea and Volksbank Malta Ltd – FM/1521 – 30 October 2002 - Decision No 1346

Volksbank Malta Ltd terminated Galea's employment on the ground that it had lost trust in her. Furthermore, she had not been given any warnings before her dismissal. The Industrial Tribunal held that the law clearly provides that lack of trust can never be considered as a good and sufficient ground for termination of employment and that her dismissal was unfair.

Carmel sive' Charles Mercieca vs. Simonds Farsons Cisk p.l.c., gia' Simonds Farsons Cisk Ltd – Civil Court, First Hall – 30 June 2004 – Writ of Summons 1836/1998/1

Mercieca, who was employed as Group Accountant was dismissed on the basis that Simonds Farsons Cisk p.l.c. lost all faith and trust in him. It claimed that the nature of Mercieca's post required the Company to have trust in him. Furthermore it was alleged that Mercieca was not doing his job properly and could not relate properly with persons in his department and that his attitude towards his superior and other colleagues was not conducive to good working relations.

The Court held that an employer cannot terminate an employment relationship solely because it has lost trust in an employee. However, due to the fact that there were relationship problems between Mercieca and his superior and colleagues, the Court decided in favour of Simonds Farsons Cisk p.l.c.

Marisa Briffa and Tower Supermarket Complex – HW/1669 – 27 July 2004 - Decision No 1530

Briffa worked as a cashier at Tower Supermarket Complex. One week before her wedding, she was informed that she would work for the next two weeks but after that her employment would be terminated on the grounds that she was pregnant before she had been employed and that therefore she was not adequate for that particular job. It was proven that in fact she was not pregnant but that she had asked for three weeks vacation leave due to her marriage at a time which was a very busy period for the employer's business. It was also proven that she had always performed her duties in a diligent manner. The Industrial Tribunal held that the claims of the Tower Supermarket Complex was not justified.

John Portelli and Dragonara Casino Co. Ltd. – 16 January 2006 - Case No. 2184

Portelli was on sick leave for a long period of time. In fact he had utilised his full sick leave entitlement and had started taking his vacation leave due to his illness. Dragonara Casino Co Ltd warned him that if he did not return to work they would have no other alternative but to terminate his employment.

It had also, on several occasions, even tried to set up a meeting with Portelli to discuss the case but such attempts were ignored by the Portelli. Due to the situation, the Industrial Tribunal decided that Portelli's dismissal was justified.

Mario Fenech and Dowty Automotive (Malta) Limited – AD/1802 – 22 September 2004 - Decision No 1540

Fenech was employed as press operator by Dowty Automotive (Malta) Limited. In the course of his employment he was given a written warning since it was alleged that he produced work which was below standard. Furthermore, he was suspended from work for hitting another employee, he was given a verbal warning because he was found wasting time and was also served with a written warning (and subsequently suspended) due to various wrong doings. Eventually his employment was terminated. The Industrial Tribunal held that he had been given many chances and warnings and that the termination of his employment was justified for the above reasons.

Saviour Nappa and Burmarrad Commercials Limited – GBC/2200 – 10 October 2005 - Decision No 1635

Nappa had an argument with his superior and was asked to go and speak to the owner of Burmarrad Commercials Limited. Nappa used bad language and even threatened the owner of the Company. Since he did not want to apologise for his actions, Nappa's employment was terminated. It was proven that other than for this particular incident Nappa had been employed by the company for many years without any problems. The Industrial Tribunal decided that the decision to terminate his employment was too sudden.

Mark Zammit and RMF Limited – AC/1749 - 22 September 2005 - Decision No 1629

Zammit was employed as a receptionist by RMF Limited. During his probation period he had been told on various occasions that he had to make a greater effort to show that he could live up to the company's expectations, however he did not show any interest to improve his performance. Furthermore, he was given an official warning for not observing company policies. The Industrial Tribunal decided the termination of Zammit's employment was justified.

Stefan Attard vs. The Mayor (Fgura) et noe – Civil Court, First Hall – 20 October 2005 – Writ of Summons No. 1717/2001/1

Attard was employed as a desk clerk at a local council, under a definite term contract. Due to his actions towards the public as well as due to the fact that he was allegedly careless and did not have any organisational skills his employment was terminated prematurely.

The Court stated that even though it is preferable that an employee be given written warnings before taking further actions against him, even verbal warnings, taken together with the circumstances of the case, may justify the employer dismissing the employee.

A fundamental principle of industrial relations is that a person occupying a 'managerial post' must not only have the necessary qualifications and experience, but must also get along with his/her superiors and those working for him/her. He/she must show good attitude with the employees working for him/her and must also have good managerial skills, so as to be able to obtain those results expected from him by his/her superiors.

Due to the above reasons the Court held that the dismissal was justified.

John Fauzza vs Dr. Carmelo Mifsud Bonnici LL.D. – Civil Court, First Hall – 28 April 2003 – Writ of Summons No. 1168/1977/1

In this case Fauzza was dismissed after his relations with other employees deteriorated.

The Court stated that the reason for dismissal must be proved by the person alleging it and that once this is proved one must determine whether the dismissal is proportionate to the actions of the employee taking into account all the facts of the case. It furthermore held that the reason giving rise to the dismissal must be habitual and grave. The gravity of the employees act may result from the facts themselves or else from the systematic recurrence of different factors. However, it is not excluded that one grave episode may, under certain circumstances, be considered grave enough to justify dismissal. The Court also declared that an employer may only properly dismiss an employee after due warnings have been given and after the employee is given a chance to explain his conduct.

Joseph Grech and LCJ & Co. Ltd. – FM/1720 – 6 August 2003 - Decision No 1427

Grech was employed by LCJ & Co Ltd as a chef. On one occasion some rabbits which had been bought were not properly stored and therefore went bad. Consequently they had to be thrown away. The Industrial Tribunal held that it was not clear whether this was due to the fault of Grech or due to the fault of other employees since more than one person was at work at the time. Furthermore, no formal warning was given to Grech before his dismissal.

The Industrial Tribunal held that warnings are taken by employers in an effort to make the employee change his ways and to indicate to him the

consequences if he does not take heed of such warnings. In this case it decided that the dismissal of the employee was not just.

Omar Granata and Sliema Fort Co ma' TGI Friday's – MP/1419 – 13 June 2002 - Decision No 1302

Granata was promoted from assistant kitchen manager to kitchen manager. However his performance did not satisfy his employers and on two occasions he took long leave due to stress. Furthermore on some occasions he had abused of drugs and let employees under his supervision do the same. The Industrial Tribunal held that although it did not approve of Granata's actions, since no warnings were given to him his dismissal was not justified.

Maria Concetta Agius and Danish Bakery Limited – AC/2175 – 10 October 2005 - Decision No 1637

Danish Bakery Limited had a policy that any food which was not up to standard and which therefore could not be sold to customers could be taken by the employees as long as they first informed the management. On one occasion, Agius put some sweet pastry in her handbag to take home since it would not be sold to the clients as it was not up to standard. Her bag was checked by company personnel and the sweet pastry was found in her bag. As she had not informed her employer that she was taking the pastry, her employment was immediately terminated. Agius pleaded that when the food was not up to standard then in practice the employees took it home without asking the employer since this was deemed by employees to be a mere formality. In fact Agius had taken food home without informing her employer and on this occasion she did not try to hide it even though she knew that there would have been a spot check of her bag. The Industrial Tribunal declared that the termination of employment was unjustified.

Paul Grech and Sea Malta Co. Ltd. – JB/1504 – 12 December 2003 - Decision No 1456

Grech's employment was terminated on the ground of physical disability and for medical reasons. It was held that since Sea Malta Co Ltd required its employees to be able bodied seamen, an employee's disability would constitute a danger to the employee himself, to other employees and to the Sea Malta's property. For these reasons, the Industrial Tribunal decided that the plaintiff's employment was terminated for a just cause.

John L. Camilleri vs. Thomas J. Galea et noe – Civil Court, First Hall – 10 May 2002 – Writ of Summons No. 1621/1994/1

The Court held that for a dismissal of an employee to be justified this must be for a good and sufficient reason. It held that the abolition of the post of the employee in question does not amount to a sufficient reason for a dismissal of

an employee having a definite term contract of employment and therefore it ordered the employer to pay Camilleri half the salary he would have been entitled to had his employment not been terminated prematurely.

Oliver Borg and Atlas Tools Engineering Company Limited – MF/2163 – 10 October 2005 - Decision No 1639.
Borg worked as a welder with Atlas Tools Engineering Company Limited. At a point in time his employment was terminated on grounds of redundancy, even though he was not he lat person employed in that post. Atlas Tools Engineering Company Limited argued that Borg did not have the same qualifications as some of the other employees, including those employees hired after Borg, and that most of the work which needed to be done could not be done by Borg. The Industrial Tribunal decided that the termination of Borg's employment was not just since the Company did not base its decision on the 'last in first out rule'.

Joseph Darmanin and Joinwell Limited – JB/1818 – 21 January 2005 - Decision No 1575
Joinwell Limited was facing financial difficulties and decided to adopt a system of forced or voluntary retirement from work on grounds of redundancy. As the principle of 'last in first out' was not followed, the Industrial Tribunal decided that the termination of employment on grounds of redundancy was not justified.

Edward Briffa and Meridian Art International Limited gia Image Direct International Limited – FM/2210 – 16 February 2005 - Decision No 1585
In this case the Industrial Tribunal held that the decision to terminate Briffa's employment on grounds of redundancy was justified since the department he worked in was being shut down and there was no other place within the organisation suitable for him.

Simon Dalton and Sliema Chalet Company Limited – FM/1931 – 26 May 2004 - Decision No 1512
In this case the Industrial Tribunal held that the decision to terminate Dalton's employment on grounds of redundancy was justified since Sliema Chalet Company Limited was facing financial difficulties he was in fact the last employee employed by Sliema Chalet Company Limited. Therefore, the 'last in first out' rule was properly observed.

Wilfred Sammut and AX Construction Limited – FM/1539 – 4 December 2002 - Decision No 1360

Sammut was declared redundant by AX Construction Ltd. However he claimed that the redundancy was not genuine since another person was employed to do exactly the same job he was doing and t AX Construction Ltd was not encountering financial problems. Therefore, the Industrial Tribunal held that the dismissal was unjustified as there were no real grounds for redundancy.

Bernadette Darmanin and Paradise Bay Hotel – FM/1558 – 8 August 2002 - Decision No 1323

Darmanin, employed in the laundry section of the Paradise Bay Hotel was given a warning for failing to follow the Company's procedure. She reacted by saying that she was going to leave her job. She was asked to sign a letter saying that she was resigning but refused to do so. When asked to return to work she refused to so because she said that she wanted justice to be done. The Industrial Tribunal therefore decided that she had resigned out of her own volition and that therefore the Paradise Bay Hotel had acted in a proper manner.

Attilio Vassallo Cesareo and Saviour Coppini in the name and representing International Machinery Limited vs. Anthony Cilia Pisani – Civil Court, First Hall - 31 January 2003; Court of Appeal - 3 March 2006 – Writ of Summons No. 254/1986/1

Cilia Pisani was employed as General Manager of International Machinery Limited by virtue of a contract of employment dated 20 October 1981. On 31 October 1984 his employment was terminated by mutual agreement. In the contract regulating the termination of his employment, one particular clause provided that if Cilia Pisani carried on or was engaged in the same line of business in which the International Machinery Limited was engaged at that time or divulged any secrets entrusted to him by virtue of his appointment, within five years, which was later reduced to two years, from the date of termination of employment, he would be liable to pay International Machinery Limited a penalty.

The Civil Court, First Hall, referred to a judgment delivered by the Commercial Court in the case *Joseph Xerri nomine vs. Brian Clarke*, decided on 31 July 1969, wherein it was stated that although there is no specific provision of codified law in Malta which deals with restraint of trade as such, and jurisprudence or judicial precedent are not abundant on this matter, it may safely be asserted that if clauses in restraint of trade may be impugned at all this may be attempted under Article 985 of the Civil Code which provides that things which are impossible, or prohibited by law, or contrary to morality, or to public policy, may not be the subject matter of a contract. The Court also quoted the decision of the British House of Lords in the case *Nordenfelt vs. Maxim Nordenfelt Guns and Ammunition Co. Ltd. [1894]* wherein it

was held that clauses in restraint of trade can only be justified if it is reasonable in the interests of the contracting parties and in the interests of the public. The onus of showing that a restraint is reasonable between the parties rests upon the person alleging it.

The Court stated that clauses in restraint of trade must be related to the nature of the employment and must be limited to a reasonable amount of time and that the law which is applicable in such circumstances is the law which was in force when the obligation and the contract of employment were drawn up, and not the law which is in force when the controversy arises, even though the law would have changed in the meantime. In fact, the right to work cannot be prejudiced by a clause in a contract restraining trade.

For the reasons laid down above, the Civil Court, First Hall, decided that the International Machinery Limited had not managed to prove that the clause restraining trade was valid according to law or justified according to the reasonableness test, and therefore, decided that the penalty due by Cilia Pisani was not due.

International Machinery Limited appealed from this decision to the Court of Appeal which held that although it did not agree with the Civil Court, First Hall, referring to foreign judgements, the relationship between the parties was to be regulated by the Civil Code and the Conditions of Employment (Regulations) Act (which preceded the Employment and Industrial Relations Act 2002, currently in force). As the Conditions of Employment (Regulations) Act (and also the Employment and Industrial Relations Act 2002) provided that an employee cannot be bound by conditions of employment which are less favourable then those conditions laid down in the Act law without the authorisation of the Director of Labour and Immigration (now the Director of Employment and Industrial Relations). As such authorisation was not sought in this case, the clause on restraint of trade was therefore prohibited by law. For this reason the Court of Appeal concluded that the International Machinery Limited's appeal was not justified and confirmed the judgement of the Civil Court, First Hall.