Department of Industrial
and Employment Relations

121, Melita Street,
Valletta, CMR 02
Tel: (+356) 2122 4245
Fax: (+356) 21243177
E-mail: ind.emp.relations@gov.mt
Website: http://www.ind.dep.gov.mt

I Review
Department of Industrial and Employment Relations

Issue 2 · January 2007

Editorial Note

Welcome to the second issue of I Review, a newsletter published by the Department of Industrial and Employment Relations with the aim to inform and to contribute to public debate on employment conditions and industrial relations in Malta.

We are happy to say that the first issue was well received and we thank you for your encouraging feedback. While it is hoped that you find this issue equally interesting, we invite you once again to submit articles for possible publication in the future.

In this Issue

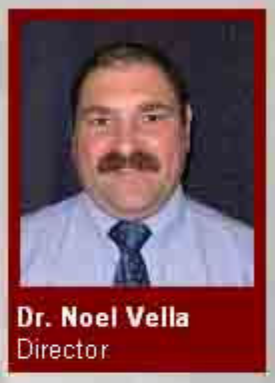
The Green Paper on Labour Law

The green paper on Labour law has proven to be a much discussed and controversial issue even before its official unveiling in November 2006. Its presentation was initially expected at the end of May but the initial draft was modified in the wake of criticism from employers' associations and some member states who were of the opinion that the original version was too forthright in expressing the views of the drafters.

The recent Employment in Europe 2006 report suggests that well-designed unemployment benefit systems, co-ordinated with active labour market policies seem to perform better than employment protection legislation as an insurance against labour market risks. There is an increasing diversity of working arrangements which tend to move away from the traditional standard permanent full-time employment. Increasingly recourse is made to part-time, fixed-term, and temporary contracts. These type of contracts may facilitate entry into the labour market and in fact EU-15 data show that the majority of such workers are reported to have found standard employment [2003 figures compared to 1997 figures]. As expected, this data varies considerably from one member state to the other. Indeed in Malta such contracts account for a small minority. But the reality remains that employment legislation is being outpaced by changes in the labour market.

The aim of this green paper is to launch a public debate on how labour law can evolve to support the Lisbon Strategy's objective of achieving sustainable growth with more and better jobs. One of the challenges faced by the European labour market is to adapt employment legislation in such a way as to promote greater flexibility whilst at the same time maximizing security for all. It is acknowledged that labour law is only one of the many factors requiring consideration in the quest to achieve a fairer, more inclusive and responsive labour market which makes Europe more competitive. However it is a factor which has attracted and indeed merits considerable thought and discussion, hence the green paper.

In particular, the green paper focuses on a number of topical issues which are brought up for debate. The matters raised are employment transitions, uncertainty with regards to the law, three way relationships, organization of working time, mobility of workers and enforcement issues and undeclared work. A number of questions are asked on each issue with the aim of stimulating further debate. These are addressed to member states, social partners and other stakeholders.


Dr. Noel Vella
Director

As always, finding the right balance between two potentially conflicting issues can prove elusive, and a measure which may be considered by some to offer stringent employment protection, may be considered to offer insufficient protection by others.

Responses are to be sent to the Commission by the end of March 2007. Following this public consultation, the main policy issues and options identified in the responses will be

"There is an increasing diversity of working arrangements which tend to move away from the traditional standard permanent full-time employment."

(Continued on page 2)

(Continued from page 1)
considered in a follow-up Commission Communication later in 2007.

More info can be obtained from:

http://ec.europa.eu/employment_social/labour_law/green_paper_en.htm

The questions in this document are listed below:

Questions

1. What would you consider to be the priorities for a meaningful labour law reform agenda?
2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, then how?
3. Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?
4. How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?
5. Would it be useful to consider a combination of more flexible employment protection legislation and well designed assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?
6. What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?
7. Is greater clarity needed in Member States' legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?
8. Is there a need for a “floor of rights” dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?
9. Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in "three-way relationships"?
10. Is there a need to clarify the employment status of temporary agency workers?
11. How could minimum requirements concerning the organization of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organization of working time should be tackled as a matter of priority by the Community?
12. How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of 'worker' in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?
13. Do you think it is necessary to reinforce administrative co-operation between the relevant authorities to boost their effectiveness in enforcing Community labour law? Do you see a role for social partners in such cooperation?
14. Do you consider that further initiatives are needed at an EU level to support action by the Member States to combat undeclared work?

Practical information

The Contract of employment

A contract of employment or a contract of service is an agreement, whether oral or in writing, whereby a person binds himself to render service or to do work for an employer, in return for wages. Thus even a verbal agreement between an employee and an employer is valid and is enforceable by law.

However, in those cases where no written contract of employment has been signed between the employee and the employer, the latter is bound to give the employee a letter of engagement or a signed statement which should include the following details:

- the date of commencement of employment;
- the period of probation;
- the normal rates of wages payable;
- the overtime rates pf wages payable;
- the normal hours of work;
- the periodicity of wage payments;
- in the case of a fixed or definite contract of employment, the expected or agreed duration of the contract period;
- the paid holidays, and the vacation, sick and other leave to which the employee is entitled;
- the conditions under which fines may be imposed by the employer;
- the title, grade, nature or category of work for which the employee is employed;
- the notice periods to be observed by the employer and the employee should it be the case;
- the collective agreement, if any, governing the employee’s conditions of work;
- any other relevant or applicable condition of employment.

The above details should be included in a written contract of employment signed between the employer and the employee. If the contract does not include any one of the above details, the employer is still bound to the give such details to the employee in a separate statement.

Both written contracts and statements should be given to the employee by not later than eight working days from the commencement of employment.

ECJ means business with the Transfer of Business Directive

Dr. Pamela Dingli
Junior Legal Officer

Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or business applies to any transfer of an undertaking, business or part of an undertaking or business to another employer as a result of a legal transfer or merger. Since the 1998 amendment to the then directive 77/187 by directive 98/50 (which were later consolidated in directive 2001/23), the Directive makes it clear in article 1(1) that there is a transfer where there is a transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. The Council had adopted the directive with a view to provide for the protection of employees in the event of a change in employer. Indeed, the rights and obligations that a transferor of an undertaking has which arise from a contract of employment or from an employment relationship existing on the date of the transfer of an undertaking shall, by reason of such transfer, be transferred to the transferee. The scope of application of Directive 2001/23/EC to a large extent hinges on two concepts. The first is that of the transfer of an undertaking and the second that of a legal transfer.

The European Court of Justice has been examining the scope of the directive and the meaning of a transfer of an undertaking since 1986. In *Spijkers* (Case 24/85), the Court gave its first ruling on the meaning of the 'transfer of an undertaking'. The decisive criterion is whether there is an economic entity that retains its identity. The Court established that an overall assessment is required, that is, all the circumstances characterizing the transaction must be taken into account and no factor is decisive on its own. As the Court had not given a clear definition of the 'transfer of an undertaking', national courts felt uncertain and referred more and more cases to the ECJ. Moreover, the question arose as to whether atypical forms of transfers such as contracting out should fall within the scope of the directive.

The Court changed its approach in 1994, in *Schmidt* (Case C-392/92). However the ECJ just ruled whether the Directive was applicable to the specific case referred to it. In this case, the Court held that the similarity of the activity was conclusive. This is obviously a surprising conclusion, given that in *Spijkers* it had established that no factor is decisive on its own. The judgement in Schmidt instigated a high degree of criticism and the pressure prompted the ECJ to review its position in *Suzen* (Case C – 13/95). In the latter case, the ECJ ruled that there could be no transfer of an undertaking if neither significant assets nor a major part of the workforce, in terms of their number and skills, had been transferred. The similarity of activity is not sufficient for the directive to apply. This interpretation, however, still gives rise to a number of objections. In particular, the requirement of the transfer of assets is arbitrary from the employees' point of view and the test is one, which, in the context of the contracting out of services, offers the transferor and the transferee some scope for structuring their agreements so as to avoid the impact of the Directive.

> "The scope of application of Directive 2001/23/EC to a large extent hinges on two concepts. The first is that of the transfer of an undertaking and the second that of a legal transfer."

Given the state of confusion in which the Court's case law stood in 1997, the Community institutions amended article 1 (1) of the Directive by the addition of sub-paragraph (b); 'there is a transfer within the meaning of this Directive where there is the transfer of an economic entity which retains its identity, meaning an organized grouping of resources which has the objective of pursuing an economic activity'. It is to be pointed out that the wording is very similar to that used by the ECJ in *Suzen*. In spite of the fact that the new version of the directive implements the case law of the Court on the interpretation of its scope, Member States continued to refer their questions to the ECJ.

The ECJ dealt with five cases in two judgments of 12 December 1998; *Hernandez Vidal* (Joined cases C – 127/96, C – 229/96 and C – 74/97) and *Sanchez Hidalgo* (Joined cases C- 173/96 and 247/96). The facts of these cases are very similar, for they all dealt with the transfer of economic activities and employees without the transfer of any assets. *Sanchez Hidalgo* concerned the contracting out of home help services and the contracting out of surveillance services at a medical supply depot. Contracting out is the transfer from an employer to an outside contractor of an ancillary activity. In *Hernandez Vidal*, the ECJ had to consider the contracting in of three cleaning contracts, that is, the transfer of an ancillary activity from an outside contractor to the main employer. The Court held that contracting-in situations should in principle fall within the scope of the Directive in the same way as contracting-out scenarios. This statement is perfectly consistent with

(Continued on page 4)

(Continued from page 3)
both the wording of the directive (which does not distinguish between contracting-in and contracting-out) and its purpose.

In *Hernandez Vidal* and *Sanchez Hidalgo*, the Court relied heavily on Suzen. Its reasoning can be divided into two main parts. In the first stage of its reasoning, the ECJ defined the term entity as referring to 'an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective'. The Court made it clear that an economic entity cannot be reduced to the activity entrusted to it. Moreover, whilst such an entity must be sufficiently structured and autonomous, it will not necessarily have significant assets. In certain sectors, assets are often reduced to their most basic and the activity is essentially based on manpower. These are labour-intensive sectors. In the second stage of its reasoning, the Court considered whether the economic entity had been transferred. It held that a transfer in a labour-intensive sector can only take place if the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their number and skills, of the employees assigned by his predecessor to that task.

A case dealing with a non-labour intensive activity, the sector of bus transport, is *Oy Liikenne* (Case C – 172/99). The sector of bus transport is obviously not labour intensive, as it requires substantial plant and equipment. The Court held that in an industry necessarily dependent on assets, the transfer of the majority of the workforce alone could not trigger the application of the Directive. In such sectors, where the tangible assets contribute significantly to the performance of the activity, the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity.

The ECJ tackled the issue of subcontracting in *Temco* (Case C-51/00). In this case, Volkswagen entrusted the cleaning of a number of its production plants to BMV, which subcontracted the cleaning work to its subsidiary GMC. Volkswagen subsequently terminated its contract with BMV and instructed Temco to provide the same services. GMC dismissed most of its staff, part of which were re-engaged by Temco. A Belgian employment court asked the ECJ by a preliminary reference whether an undertaking has indeed been transferred and whether there is a legal transfer or merger in terms of the Directive, since GMC never had a contractual relationship with Volkswagen. As to the first question, the Court relied on its previous cases and ruled that a transfer was within the scope of the Directive provided that the employees taken over were an essential part, in terms of their number and skills, of the employees assigned by the subcontractor to the performance of the subcontract. As regards the second question, the ECJ had already decided on several occasions that the absence of a direct contractual link between the transferor and transferee could not as such preclude a transfer within the meaning of the Directive. In the words of the Court, "the fact that the transferor undertaking is not the one which concluded the first contract with the original contractor but only the subcontractor of the original co-contractor has no effect on the concept of legal transfer since it is sufficient for that transfer to be part of the web of contractual relations even if they are indirect".

One of the recent cases where the ECJ interpreted the directive's scope broadly is *Abler* (Case C-340/01). This case concerned the provision of catering services in a hospital in Austria. The Court was yet again faced with a preliminary ruling in which it had to decide on the applicability of the Directive in a contracting out situation. In the case at hand, the hospital entered into a contract with Sanrest, under which Sanrest took over the provision of catering services within the hospital, providing patients and staff with meals and drinks. When the agreement with Sanrest was terminated, the hospital entered into a new contract with Sodexho. The latter refused to take on any of Sanrest's materials, stock or employees, and by the time Sodexho took over, Sanrest's stocks had been reduced so that there was nothing left. Sodexho received no accounting data, menu plans, diet plans, recipe collections nor general records from Sanrest. The Court established that the activity in question was asset intensive rather than labour intensive. Even though none of the outgoing contractor's assets or employees were taken over by Sodexho, Sodexho was using the same hospital premises and equipment as Sanrest. The ECJ held that this was sufficient to constitute the transfer of a stable economic entity. The failure of the incoming contractor to take over any of the outgoing contractor's workforce or other assets did not, in the situation where the activity in question was asset intensive, prevent the entity from retaining its identity after the transfer. Thus where an activity depends on the use of certain specialized equipment or premises, it seems that the directive will apply if the incoming contractor continues to use that equipment or premises, notwithstanding a refusal by the incoming contractor to take on any assets or employees directly from the outgoing contractor.

"The Directive relating to the safeguarding of employees' rights in the event of transfers of undertakings is one of the most contentious directives in European labour law."

The Directive relating to the safeguarding of employees' rights in the event of transfers of undertakings is one of the most contentious directives in European labour law. The ECJ has handed down more than 40 cases on this Directive. Obviously, the evolution of jurisprudence on the concept of 'transfer' has not been simple and straightforward. However one cannot negate the fact that the ECJ has been very actively involved in crystallizing the scope of the directive and thus the employment rights which the same directive seeks to protect.

Any Future for Malta's Trade Unions?

Many people in Malta are under the impression that trade unions, particularly the General Workers' Union, are currently on the verge of extinction. The recent spate of resignations, the setting up of smaller independent unions, the doubts about membership figures and the negative media publicity, all seem to confirm that view.

Until recently, Maltese unions seemed immune to the decline experienced by their colleagues in other countries. Elsewhere the membership was shrinking but in Malta, it was constantly increasing. It is only in the last few years that the impact of re-structuring, privatization, downsizing and the shift from manufacturing to the services industry is being reflected in loss of membership.

Profs. Edward Zammit

It is probably true that the actual membership figures are lower than those officially reported. In fact, if one excludes the pensioners' sections from the larger unions, the decline would be even more evident…. The real power of a union does not merely lie in its 'paid-up' membership figure.

It is probably true that the actual membership figures are lower than those officially reported. In fact, if one excludes the pensioners' sections from the larger unions, the decline would be even more evident. However, one can easily draw the wrong conclusion about the meaning of these figures. The real power of a union does not merely lie in its 'paid-up' membership figure. Nobody doubts, for instance, the strength and influence of the French trade union movement – despite the known fact that the total union membership only amounts to seven or eight percent of the total workforce. Yet if they merely flex their muscles, the whole country could be brought to a standstill. And the same, no doubt, equally applies to Malta.

Still there is certainly no room for complacency. There can be no doubt that the Maltese unions, like their colleagues elsewhere, are facing an uncertain future. No matter how vital they might have been in the past, their survival in the emerging post-industrial society cannot be guaranteed. It all depends on their ability to identify the social and economic changes taking place in the world around them, to adapt themselves to the new situations, and to confront the new challenges without betraying their basic mission.

Union leaders are always eager to know what their members expect from them and to meet their demands. Clearly, no union can afford to detach itself from its own roots. But the members' expectations may be unrealistic and may even jeopardize their own employment. Union leaders know that the members' interests are best served when their jobs are secure. They are well aware of the realities of today's global economy where the supply of labour far exceeds the demand. And they also know that their members' interests may be better served through social dialogue rather than conflict. What course do they steer amid these seemingly irreconcilable differences?

In this situation trade union leaders often adopt an ambivalent attitude. On the one hand they express strong, aggressive language especially when addressing members in a rally or through their own papers, but appear very reasonable and moderate on television, when confronting a wider, national audience. And despite their militant rhetoric, they only resort to limited industrial actions and usually end up settling for a sensible, compromise solution. In fact, when the total incidence of strikes in Malta, including those in the public sector, are compared with those of other EU states, Malta's figures, over the years, are consistently below the European average. The ambivalent roles displayed by union leaders may be attributed to the fact that, like politicians in a democracy, they have to maintain a difficult balance between their 'leadership' and 'representative' roles.

Among all the challenges faced by trade unions and workers today, the most urgent one is that of workers' education and vocational training. It is only through a constant development of their competences that workers can become assured of employability throughout their careers in a world where lifelong job tenure is becoming an increasingly elusive goal. Education enables workers to become more actively involved in their workplace. Education enlightens workers about the real state of their country's economy so they may avoid pressurizing their union leaders to pursue unrealistic and unattainable goals. Above all, education helps workers to appreciate the real values of life so they may resist exploitation through the glitter of today's individualistic, consumer society often resulting in personal, social and environmental degradation.

The Role of the Employment Relations Officer

Matters related to industrial relations and conditions of employment fall within the remits of the Department of Industrial and Employment Relations. The Department is responsible for the enforcement of the regulations that are contemplated in the Employment and Industrial Relations Act (Cap. 452) and its subsidiary legislation. One of its roles is to monitor and ensure that all rights and obligations established therein are adhered to by both employer and employee.

A number of employment relations officers are engaged with the purpose of providing guidance in connection with applicable regulations related to conditions of employment and in insisting on compliance where irregularities are detected. Customer care is given utmost importance. A customer care service is provided by the Department where queries and complaints related to conditions of employment are received and dealt with. Employees who are in employment, ex-employees who terminated their employment and employers alike can make use of the service. The contact is normally made through:

- Calling personally at the offices.
- Telephone.
- Correspondence by mail, email etc.

Employment relations officers who are engaged on this work are available at the Department on a daily basis. It is estimated that an average of approximately 400 cases are dealt with every week. Many of the queries are replied to immediately while other complaints are solved with the direct intervention of the officer who is handling the case. Some other matters that require more checking are responded to after the necessary consultation is made. The remaining difficulties may require further investigations at the workplace.

In this respect employment relations officers conduct inspections on site. On arrival at the undertaking the officer asks to speak to the employer or, in his/her absence, to the person who is at that time responsible. Where it is the case, the human resources manager is consulted. A meeting is held and the relevant points are discussed. If required, a number of employees are also interviewed on an individual basis and not in the presence of the employer. During the course of the inspection certain records and/or documents related to the employees' conditions of employment are to be made available to the employment relations officer if so requested. The officer also has the right to request a copy of any of such documents. Here it is important to point out that the employer is obliged to give all the required information that may even include personal or sensitive data of employees. Being requested by a competent authority in terms of a legal requirement, such an obligation is in accordance with the Data Protection Act.

The following is a list of records/ information that an employer must keep at the undertaking and which an employment relations officer from the Department of Industrial and Employment Relations may eventually request while effecting an inspection:

1. Register of employees (reg. 9 in LN 431 of 2002), including details as follows:
   - the name, address, sex, identity card number and date of birth of the employee
   - the occupation of the employee
   - the date of commencement of employment
   - the nature of the contract of employment namely whether the contract is of an indefinite or of a fixed duration and in the case of fixed term contracts of employment the date of termination of such contract
   - the time, paid for at ordinary time rates, during which the employee is employed
   - the time, paid for overtime or higher rates, during which the employee is employed
   - the periods of daily and weekly rest accorded to the employee
   - the total wages paid to the employee each week
   - any change or update in the conditions of the employee's occupational status.
2. Contract of Service (reg. 8 in LN 431 of 2002)

   In case there is no written contract of service the employer is bound to give each employee a signed statement showing the employee's basic conditions of employment in terms of reg. 4 of LN 431 of 2002, within eight working days from commencement of employment. A copy of such statement is to be kept by the employer.
3. Parental Leave (reg. 11 in LN 225 of 2003)

Mr. George Camilleri
Manager Operational Procedures

(Continued on page 7)

Kompetenza tat-Tribunal Industrijali

Mr. Vincent Micallef
Ind. Trib. Secretary

Il-kompetenza storika tat-Tribunal Industrijali kienet inġiebet fis-seħħ bis-saħħa ta' l-Artikolu 28 ta' l-Att dwar ir-Relazzjonijiet Industrijali - magħruf bħala l-IRA - (Kap. 266). Dan l-artikolu kien jippreskrivi li t-Tribunal Industrijali kellu ġurisdizzjoni eskluziva li jikkonsidra u jiddeċiedi l-każijiet kollha fejn jiġi allegat li saret tkeċċija inġusta.

Fl-Artikolu 2 ta' l-IRA, "tkeċċija inġusta" tfisser "… it-temm minn prinċipal dwar dak il-ħaddiem b'kuntratt ta' impieg għal żmien mhux stabbilit …" u, in vista ta' din id-definizzjoni, kien ġie ritenut li t-Tribunal Industrijali ma kellux kompetenza li jikkonsidra u jiddeċiedi każijiet fejn l-impieg ikun regolat b'kuntratt definit.

Flimkien ma' l-IRA kien jikkoezisti l-Att dwar il-Kondizzjonijiet ta' l-Impieg - magħruf bħala ic-CERA - (Kap. 135). Dawn iż-żewġ Atti ġew konsolidati bl-Att XXII tas-sena 2002 dwar l-Impiegi u r-Relazzjonijiet Industrijali - magħruf bħala l-EIRA - (Kap. 452) li, fl-Artikolu 75(1), jipprovdi li: -

"Minkejja kull ma jinsab f'kull liġi oħra, it-Tribunal Industrijali għandu l-ġurisdizzjoni eskluživa li jikkunsidra u jiddeċiedi: -

(a) Il-każijiet kollha fejn jiġi allegat li saret tkeċċija inġusta; u

(b) Il-każijiet kollha li jaqgħu taħt il-ġurisdizzjoni tiegħu bis-saħħa tat-Titolu 1 ta' l-istess Att jew ta' regolamenti preskritti taħtu."

Għandu liġi nnutat li l-każijiet li jaqgħu taħt il-ġurisdizzjoni tat-Tribunal Industrijali taħt it-Titolu 1 ta' l-Att jinkludu, fost oħrajn, diskriminazzjoni u għoti ta' fastidju u li dawn il-każijiet jistgħu jiġu deċiżi biss mit-Tribunal li jkun presjedut minn avukat.

Wieħed mill-ewwel każijiet li ġew intavolati quddiem it-Tribunal Industrijali bis-saħħa ta' l-EIRA kien introdott minn Rita Nehls (rikorrenti) kontra Sterling Travel and Tourism Ltd (intimati) fejn ir-rikorrenti allegat li kienet tkeċċiet inġustament mill-impieg li kellha ma' l-intimati b'kuntratt definit.

L-intimati taw eċċezzjoni prelimari li biha sostnew li r-rikorrenti ma kellha l-ebda dritt tieħu l-passi li ħadet peress illi l-impieg tagħha kien regolat b'kuntratt definit u li, għalhekk, il-każ ma kienx jaqa' taħt il-kompetenza ta' l-istess Tribunal.

(Continued on page 8)

(Continued from page 6)

Including records of parental leave granted to an employee during the course of employment. The employee may request a copy of such records even after having terminated employment.

4. Working time (reg. 20 (3) in LN 247 of 2003), including records related to:

   - The employee's consent in writing to work more than an average of 48 hours weekly and the specific number of hours worked in a reference period as referred to in reg. 7(3). – (reg. 20 (1)(c))
   - Details in respect of night work as provided in regulations 9 and 10 dealing with night time, hazards and health assessment – (reg. 11)

5. Employment of Young Persons (reg. 10(1)(c) & (2) in LN 440 of 2003), including:

   - full name
   - date of birth
   - the time the young person commences and finishes work each day
   - the rate of wages or salary due to the young person for his or her normal working hours each day, week, month or year, as the case may be
   - the total amount actually paid to each young person by way of wages or salary.

Other useful records that are normally kept by the employer:

- payroll
- leave records
- quarterly report on working hours re part-time employees that may be eligible to pro-rata benefits
- copy of agreement to work on reduced hours
- documents regarding authorisations issued by DIER
- relevant Wage Regulation Order
- work permit, in case of foreign employees
- collective agreement, if any
- memorandum and articles of association, in case of companies

It-Tribunal, bid-deċiżjoni preliminari tat-22 ta' April 2004 (Deċiżjoni Numru 1499), iddeċieda li t-tkeċċija ta' l-appellanti mill-impieg ma' l-intimati saret qabel ma għalaq iz-żmien tal-kuntratt definit u għalhekk, skond l-Artikolu 75(1) (a) u (b) ta' l-EIRA, għandha dritt li tkompli bil-każ tagħha.

Għalhekk, għalkemm dan m'huwiex inkluż fid-deċiżjoni, it-Tribunal iddeċieda li għandu l-ġurisdizzjoni eskluziva li jikkunsidra u jiddeċiedi dan il-każ u, naturalment, każijiet simili.

L-intimati talbu u ottjenew il-permess tat-Tribunal biex jappellaw minn din id-deċiżjoni.

Fl-Appell l-intimati talbu li d-deċiżjoni preliminari tiġi revokata peress illi l-każ jittratta kwestjoni ta' impieg għal żmien definit u, għalhekk, l-eżami dwar it-tkeċċija minn dan l-impieg ma jaqax taħt il-kompetenza tat-Tribunal Industrijali.

Il-Qorti ta' l-Appell (Kompetenza Inferjuri), presjeduta mill-Onorevoli Imħallef Philip Sciberras, b'deċiżjoni datata 23 ta' Frar 2005, wara li ċċitat testwalment l-Artikolu 75 ta' l-EIRA fl-intier tiegħu, ikkunsidrat illi: -

"Għalkemm mill-ewwel daqqa ta' għajn jidher li għalkemm fl-Artikolu 75(1)(a) (b) ta' l-EIRA sostanzjalment intużat l-istess diċitura ta' dak li kien l-Artikolu 28 ta' l-IRA, fl-istat attwali l-ġurisdizzjoni tat-Tribunal Industrijali twessgħat konsiderevolment. "Dan issa għandu l-kompetenza eskluziva wkoll li jitratta u jiddeċiedi talbiet rigwardanti kondizzjonijiet ta' impieg, protezzjoni tal-paga, protezzjoni kontra diskriminazzjoni relatata ma' l-impieg, temm ta' kuntratti ta' servizzi, infurzar u ksur rigward impiegi, fost materji oħra ilkoll trattati taħt Titolu 1 ta' l-Att. Manifestament ukoll it-tifsira ta' 'tkeċċija nġusta' ġiet amplifikata minn kif kienet taħt il-Kapitolu 266."

Il-Qorti ta' l-Appell ma waqfitx fuq it-tifsira ta' "tkeċċija gusta" kif deskritta fl-Artikolu 2 ta' l-EIRA u komplit: - "Loġikament ir-riżoluzzjoni tal-punt ta' liġi sottomess (mill-intimati) għal liema jirreferi s-subinċiż (a) ta' l-Artikolu 75 (1) iżda jokkorri liġi ndagat fil-parametri ta' dak preċiżat fis-subinċiz (b) tiegħu, fl-isfond tad-Dikjarazzjoni tal-Każ sottomessa (mir-rikorrenti) litTribunal Industrijali."

Ikkunsidrat ukoll li mid-diċitura tad-dikjarazzjoni tal-każ tar-rikorrenti jidher manifestament illi din kienet qed tinvoka d-dispost ta' l-Artikolu 36 ta' l-EIRA raffigurat taħt Taqsima V – Temm ta' Kuntratti ta' Servizz, hekk formanti parti mit-Titolu 1 ta' l-Att li għalih jirreferi s-subinċiż (b) ta' l-Artikolu 75.

Il-Qorti ta' l-Appell, fid-deċiżjoni tagħha, ikkunsidrat ukoll illi: -

"Markatament, l-Artikolu 36 jitratta kemm minn temm ta' kuntratti ta' servizz għal żmien bla limitu kif ukoll minn dawk għal żmien definit. Jipprovdi wkoll għalhekk għal każ fejn prinċipal jibgħat il-barra (fit-test ingliż "dismisses") lill-impjegat qabel ma jagħlaq iz-żmien speċifikat. Qabel l-introduzzjoni ta' l-Att in diskussjoni, materja bħal din kienet taqa' fl-isfera ta' ġurisdizzjoni tal-qrati ordinarji. Fl-istat attwali tal-liġi din il-ġurisdizzjoni ġiet expressis konferita lit-Tribunal Industrijali u għalhekk esorbitat ruħha mill-isfera ta' kompetenza tal-qrati biex għaddiet lit-tribunal speċjali;

Fiz-żmien meta l-materja kienet tattira l-attenzjoni tal-qrati ordinarji kien ġie deċiż illi "għandu jkun ċar li l-interpretazzjoni ġusta ta' din il-fraži ("jibgħat il-barra") titħalla f'idejn il-ġudikant li għandu jasal għal tifsira oġġettiva u raġonevoli ta' dak li wieħed jistenna li l-bniedem komuni jifhem b'dan it-terminu. Interpretazzjoni din li ċertament ma għandhiex titħalla f'idejn l-arbitriju jew il-kapriċċi tal-prinċipal jew l-impjegat imma li għandha – fejn ma hemmx qbil – tiġi ġudizzjarjament determinata" ("William Saliba – vs- Avukat Dottor Louis Cassar Pullicino nomine", Appell, 9 ta' Mejju 1997). Tali determinazzjoni ġudizzjarja tal-kwestjoni issa għaddiet ope legis f'idejn it-Tribunal Industrijali. Hu proprju dan it-tribunal li issa jrid jiddetermina jekk it-tkeċċija kienetx jew le bla ebda raġuni ġustifikativa ossija mingħajr "raġuni tajba u biżżejjed" li jsemmi s-subinċiz (14) ta' l-Artikolu 36, hekk, del resto parafrazat bi kliem proprji fid-Dikjarazzjoni tal-Każ ta' l-appellanta quddiem it-Tribunal;

Fiċ-ċirkostanzi tal-każ it-Tribunal kien għalhekk għal kollox korrett meta arroga għalih id-dritt li jkompli jitratta l-każ quddiemu u jiddefinieh. L-aggravju allura ma jistax liġi akkolt u qed liġi respint."

L-appell ġie għalhekk miċħud u d-deċiżjoni tat-Tribunal Industrijali ġiet b'hekk konfermata.

Tribunal Industrijali …. issa ghandu l-kompetenza eskluziva wkoll li jitratta u jid-deciedi talbiet rigwardanti kondizzjonijiet ta' impieg, protezzjoni tal-paga, protezzjoni kon-tra diskriminazzjoni relatata ma' l-impieg, temm ta' kuntratti ta' servizzi, infurzar u ksur rigward impiegi, fost materji ohra

Contact Us

If you have queries on your minimum conditions of employment, termination benefits, or other queries related to the industrial relations in Malta contact the Department of Industrial and Employment Relations for assistance.

Tel: 2122 4245, 2122 3658, 2122 0497

Email: ind.emp.relations@gov.mt

Or Visit us at: 121 / 109, Melita Street, Valletta, CMR 02

www.industrialrelations.gov.mt