Editorial Note

Welcome to Issue number 7 of our newsletter I Review.

Regular amendments in labour related legislation are very important in order to assist an evolving labour market and in particular to safeguard the conditions of employment. This issue contains two articles that provide a good insight of such relatively recent amendments, namely the Employment Status National Standard Order (L.N. 44 of 2012) and the Temporary Agency Workers Regulations (L.N. 461 of 2010). Another article covers the DIER efforts in international relations, in particular its participation in tri-partite delegations representing Malta at the annual International Labour Office (ILO) conference in Geneva. Employee or Consultant? is the title of the review of a case decided by the Industrial Tribunal and that was subsequently challenged in front of the court of appeal.

We hope that you shall find this issue interesting and we look forward for your comments and suggestions.

Employment Status National Standard Order

In most cases, the differentiation between the inherent characteristics of a self-employed individual plying his or her trade or profession and those of an employee are readily apparent. Such a differentiation of status has various consequences, not least being the lack of regulatory protection to self employed persons which is provided through employment law to employees.

However, there are some instances when the boundary, usually sharp and clear, between what constitutes an employment relationship and what constitutes a self-employed one is nebulous at best. The phenomenon of bogus self employment has always existed, but there is anecdotal evidence that the recent improvement in basic working conditions of part timers may have tempted less scrupulous employers to try to avoid their new legal obligations.

Up until a few years ago, only a part timer working more than 20 hours per week was entitled to the pro rata entitlements due to the equivalent full timer. This has been addressed by the recent legal amendments which brought about an equivalence in conditions between a part timer, irrespective of the weekly number of hours worked, and the equivalent full timer. A minority of employers may have considered that classifying their existing or prospective employees as self-employed individuals, and requesting them to register for VAT purposes and having them issue VAT receipts, could exclude them from their new obligations. This is abusive. The usual sectors often quoted are the cleaning, health and security sectors, but it would be unfair to limit one's attention to these sectors and it would be equally unfair to lump all employers in a particular sector in the same basket.

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Also of concern is the fact that the avoidance of complying with regulatory requirements, in this case regarding conditions of employment, can result in cost savings giving an unfair competitive edge to ‘bad’ employers, possibly resulting in loss of contracts being awarded to more scrupulous employers. This is unacceptable as it could result in a race to the bottom insofar as conditions of employment are concerned.

Employment and Industrial Relations Act

The Act 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.....’ Thus any person who works under the ‘immediate direction and control’ of another person is considered to be an employee in terms of the Act. However this can be very subjective and in itself depends or may be influenced by various factors. There was also no specific provision in the law to cater for the effects of a declaration by the court that a relationship is not one of self employment but of employment. Issues where it was felt that there was such a legal lacuna include those related to commencement of probationary period, length of notice and quantification of wages due to a person whose status has been declared to be one of employment.

National Standard Order

In this scenario, it was felt that a Legal Notice was necessary to address these issues. This set out both the criteria which would be considered in order to determine the existence of an employment relationship and what the consequences of such a categorisation would mean in practice. After discussion with the social partners through the Employment Relations Board, the result was the Employment Status National Standard Order, LN 44/2012, which came into force on 31st January 2012.

Main features of NSO

1. Applicability

a. The LN prevails over any declaration or agreement with regards to employment status.

b. The LN does not prevail over any other law defining or regulating specific conditions of employment of employees falling under that law.

2. Criteria.

The LN sets out eight criteria which need to be considered in assessing whether a relationship which is nominally self employed is actually one of employment. If 5 of the criteria are satisfied, the relationship is to be considered one of employment. The criteria are that the person concerned:

a. depends on one single person for whom the service is provided for at least 75% of his income over a period of one year;

b. depends on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out;

c. performs the work using equipment, tools or materials provided by the person for whom the service is provided;

d. is subject to a working time schedule or minimum work periods established by the person for whom the service is provided;

e. cannot sub-contract his work to other individuals to substitute himself when carrying out work;

f. is integrated into the structure of the production process, the work organisation or the company’s or other organisation’s hierarchy;

g. performs an activity which is a core element in the organization and pursuit of the objectives of the person for whom the service is provided; and

h. carries out similar tasks to existing employees, or, in the case when work is outsourced, he performs tasks similar to those formerly undertaken by employees.

3. Exemptions

The Director is empowered to consider requests made by any person to exempt relationships from being considered as being of employment if there are particular grounds for doing so long as such a request is made prior to the commencement of such a relationship. The possibility was also given to seek an exemption within 6 weeks of the date of entry into force of the NSO with regards to relationships entered into before 31st January 2012.

4. Effects of presumption of employment relationship

a. contract automatically considered at law to be one of:

   i. indefinite duration

   ii. whole time, unless otherwise specified in writing

   iii. date of engagement to be the date of first initial continuous provision of services

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The Temporary Agency Workers Regulations

The Temporary Agency Workers Regulations came into force last December. The regulations are considered to be innovative as this is the first time that the law is regulating temporary work.

The Regulations, Legal Notice 461 of 2010, transpose into Maltese Law, Directive 2008/104/EC on temporary agency work. In the preamble to the Directive, specifically, paragraph 12 thereof, it is stated that “This Directive establishes a protective framework for temporary agency workers which is non-discriminatory, transparent and proportionate, while respecting the diversity of labour markets and industrial relations.” Thus the Directive can be said to be a minimum harmonization directive which lays down the general principles aimed at protecting the temporary worker. However, the individual Member States can lay down more favourable provisions or different provisions in terms of the same Directive, in line with the prevailing industrial relations system in each Member State.

The Regulations apply to workers who have entered into a contract of employment or an employment relationship with a temporary work agency, whether on an indefinite, a whole-time, a part-time or a fixed term basis, who are assigned, whether on a regular or on an irregular basis, to a user undertaking to work temporarily under its supervision and direction. The Legal Notice also applies to public and private undertakings engaged in economic activities, whether or not they are operating for gain, which are temporary work agencies or which perform the same functions as temporary work agencies, whether as a main or as an ancillary function or which are user undertakings. The Regulations do not apply to employment contracts or relationships concluded under a specific public or publicly supported vocational training, integration or retraining programme, as is the case of the Employment Training Corporation. A word must be said about the definitions found in these Regulations. First, a "temporary agency worker" is said to mean a worker who has entered into a contract of employment or an employment relationship with a temporary work agency and who is assigned, whether on a regular or on an irregular basis, to a user undertaking to work temporarily under its supervision and direction. Secondly, a "temporary work agency" means any natural or legal person who enters into contracts of employment or employment relationships with temporary agency workers and who assigns, whether on a regular or on an irregular basis, the temporary agency workers to user undertakings to work there temporarily under their supervision and direction.

"The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.”

Thus the temporary work agency is any undertaking who as a main or subsidiary activity assigns its own workers to work within a user undertaking under the latter’s direction and control. The temporary worker is the worker who is so assigned. For the purposes of the Employment and Industrial Relations Act and the ensuing Legal Notices, it is the temporary work agency which is and should be considered as the employer of the temporary worker. The user undertaking is not and shall not be considered as the employer of the temporary worker.

The Regulations, as the parent directive, provide for equality of treatment, in so far as the basic working and employment conditions are concerned, of the temporary worker during his assignment. An assignment is defined by our regulations as the period during which the temporary agency worker is placed at the user undertaking to work temporarily under its supervision and direction. Regulation 4 of LN 461 of 2010 states that the basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would...
contract of employment or an indefinite employment relationship with a temporary work agency and is paid by the temporary work agency between assignments. This exception is also found in the parent directive which holds, in article 5 (2) thereof that “As regards pay, Member States may, after consulting the social partners, provide that an exemption be made to the principle established in paragraph 1 where temporary agency workers who have a permanent contract of employment with a temporary-work agency continue to be paid in the time between assignments.”

Our law makes yet another exception in regulation 5(2) of the LN which states that where a temporary agency worker is not paid by the temporary agency in between assignments, the equal treatment principle, only in so far as pay is concerned, shall not apply for the first four weeks of an assignment if an assignment lasts fourteen weeks or more. However, if the temporary agency worker is subsequently replaced, the temporary agency employee assigned as a replacement will have equal treatment regarding pay from the first day of the assignment.

This derogation from the general principle of equal treatment has been agreed to by the Maltese national social partners representing management and labour. Such an agreement is allowed by the Directive, specifically in article 5 thereof.

The Legal Notice, as the parent directive, affords other rights to the agency worker, besides strictly equal treatment rights. Indeed, the worker has a right to be informed by the user undertaking of any vacant posts in the user undertaking so as to give such worker the same opportunity as other workers in that undertaking to find permanent employment. This must be tied up with the principle that any clause in any contract or agreement prohibiting or having the effect of preventing the conclusion of a contract of employment or of an employment relationship between a user undertaking and a temporary agency worker shall be null and void. Indeed the possibility of a temporary agency worker, to take up more secure and reliable employment SHALL NEVER be hindered. Moreover, as is laid down in regulation 7 of the Legal Notice, no payments or charges shall be demanded or levied on any temporary agency worker by the temporary employment agency in consideration for recruitment by a user undertaking or in consideration for concluding a contract of employment with a user undertaking. Likewise, no deductions shall be made from the wages of a temporary agency worker by the temporary employment agency in consideration of employment opportunities.

The Legal Notice also addresses training rights and rights to make use of facilities at the user undertaking in regulation 8. The temporary agency worker shall be given access to the amenities or collective facilities in the user undertaking, in particular any canteen, child care facilities and transport services, under the same conditions as workers who have been employed directly by the user undertaking, unless the difference in treatment is justified by objective reasons. Regarding training, the
The International Labour Organisation

Origin of the International Labour Organisation.

The idea of regulating labour at an international level gradually gained favour throughout the 19th century. The ILO was created in 1919, as part of the Treaty of Versailles that ended World War I, to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice. Articles 387 to 427 of the Treaty deal with the organisation of the ILO which comprises a tripartite conference – the International Labour Conference; a tripartite executive body – the Governing Body and a permanent secretariat – The International Labour Office.

The First Session of the ILO, which brought together delegations from 40 countries, was held in Washington, between October and November of 1919. During this first Conference, six conventions and six recommendations on fundamental issues such as hours of work, maternity protection, night work by women and young people and minimum age for work in industry were adopted.

The ILO was located in Geneva in the summer of 1920. Its first Director was Albert Thomas, a Frenchman. Under his strong impetus, 16 Conventions and 18 Recommendations were adopted in less than two years.

The International Labour Organisation today

At present, there are 185 countries who are ILO members. The ILO is the only United Nations Agency which has a tripartite format, that is governments, employers and workers representatives. This tripartite structure makes the ILO a unique forum in which the governments and the social partners of its Member States can freely and openly debate and elaborate labour standards and policies. The very structure of the ILO, where workers and employers together have an equal voice with governments, shows social dialogue in action, it ensures that the views of the social partners are closely reflected in ILO labour standards, policies and programmes.

The ILO accomplishes its work through three main bodies:

i) the Governing Body: this is the executive council of the ILO and meets three times a year in Geneva. It is composed of 56 titular members (28 Governments, 14 Employers and 14 Workers) and 66 deputy members (28 Governments, 19 Employers and 19 Workers). Ten of the titular governments’ seats are permanently held by States of chief industrial importance (Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom and the United States). The other Government members are elected by the Conference every three years. The Employer and Worker members are elected in their individual capacity. The Governing Body takes decisions on ILO policy, decides the agenda of the International Labour Conference and elects the Director-General of the ILO

ii) the International Labour Conference: this Conference meets once a year in May/June in Geneva, Switzerland. During the Conference, international labour standards, such as Conventions and Recommendations are discussed and adopted and this Conference serves also as forum for discussion on key social and labour questions. It also adopts the ILO’s budget and elects the Governing Body. Each Member State is represented by a delegation consisting of two government delegates, an employer delegate, a worker delegate and their respective advisors. Every delegate has the same rights and all can express themselves freely and vote as they wish. Worker and employer delegates may sometimes vote against their government’s representatives or against each other. This diversity of viewpoints, however does not prevent decisions being adopted by a very large majorities or in some cases even unanimously. During each Conference a number of Heads of State and prime ministers are invited to address participants.

iii) the International Labour Office: this is the permanent secretariat of the ILO. It is the focal point for the ILO’s overall activities, which it prepares under the scrutiny of the Governing Body and under the leadership of the Director-General. The Office employs about 2,700 officials from over 150 nations at its headquarters in Geneva and in around 20 field offices around the world.

International Labour Standards

Since its inception in 1919, the International Labour Organisation has maintained and developed a system of international labour standards aimed at promoting opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and dignity. These standards are legal instruments drawn up by the ILO’s constituents, that is governments, employers and workers and are adopted at the ILO’s annual International Labour Conference. These standards take the form of either a convention, which is a legally...
binding international treaty that may be ratified by member states, or a recommendation which serve as a non-binding guideline. In many cases, a convention lays down the basic principles to be implemented by ratifying countries, while a related recommendation supplements the convention by providing more detailed guidelines on how it could be applied. A Recommendation can also be autonomous, that is not linked to a convention.

To date the ILO have adopted 189 Conventions and 202 Recommendations. The Governing Body has identified eight conventions as “Fundamental”, covering subjects that are considered as fundamental principles and rights at work. These Conventions are:

- Forced Labour Convention, 1930 (No. 29)
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1948 (No.98)
- Equal Remuneration Convention, 1951 (No. 100)
- Abolition of Forced Labour Convention (No. 105)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)

**Malta and the ILO**

Malta has been a member of the ILO since 4th January 1965. To date Malta has ratified 61 Conventions out of which 54 are in force. These include the eight fundamental conventions. Malta is an active member of the ILO. Through its official delegation made up of Government, employers’ and workers’ representatives, it participates in the annual International Labour Conference and other regional meetings organised by the ILO from time to time. In fact, between the 30th May 2012 and the 15th June 2012, the Director of the Department led a tripartite delegation at the 101st Session of the I.L.O. Conference in Geneva. The Hon Dr. Chris Said, Minister for Justice, Dialogue and the Family also attended and addressed this Conference. The Maltese delegation included a number of high-ranking officials from Trade Unions and Employers’ Associations. Mr. Tony Zarb, (GWU) and Mr. Joseph Farrugia (MEA), respectively the Maltese Workers’ and Employers’ delegates also addressed the Conference.

Items placed on the Agenda of this year’s Conference included the elaboration of an autonomous Recommendation on the Social Protection Floor, a general discussion on the youth employment crisis and a recurrent discussion on the strategic objective of fundamental principles and rights at work, under the follow-up to the ILO Declaration on Social Justice for a Fair Globalization of 2008, and the follow-up (revised, June 2010) to the ILO Declaration on Fundamental Principles and rights at Work, of 1998. At the end of the Conference, the Recommendation on the Social Protection Floor was adopted.

Malta also organised, together with the ILO, two high level Conferences. In September 2000, a tripartite Conference for ILO Constituents in the EU Accession Countries was held. This Conference dealt with social dialogue, employment policy and principles of equal treatment. In March 2003 another high-level tripartite conference was held on social dialogue and labour law reform.

During last year’s International Labour Conference, Malta was elected to the Governing Body as a Deputy Member.
temporary agency worker shall be entitled to participate in vocational training programmes provided by or on behalf of the user undertaking in the same manner as workers who have been employed directly by the user undertaking, unless the difference in treatment is justified by objective reasons. Of course, the enjoyment of these rights do not prejudice the right of the temporary agency worker to have access to such facilities at the temporary work agency and to participate in any training programme provided by the temporary work agency between assignments. After all, it is the agency who is the actual employer of the agency worker and thus the rights and obligations of that particular employment relationship remain intact.

Directive 2008/104 tackles the representation of agency workers and the collective rights in articles 7 and 8. Indeed, in article 7, it is stated that “Temporary agency workers shall count, under conditions established by the Member States, for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed at the temporary-work agency. Member States may provide that, under conditions that they define, temporary agency workers count for the purposes of calculating the threshold above which bodies representing workers provided for by Community and national law and collective agreements are to be formed in the user undertaking, in the same way as if they were workers employed directly for the same period of time by the user undertaking. Those Member States which avail themselves of the option provided for in paragraph 2 shall not be obliged to implement the provisions of paragraph 1.” This article has been transposed in regulation 9 of our Legal Notice. This states that the temporary agency worker, only in so far as the temporary work agency is concerned, is to be included in the calculations for determining thresholds for the purposes of worker representation. Thus Malta has availed itself of option number 1 as provided for by the aforementioned article of the Directive.

Article 8 of the Directive reads, “Without prejudice to national and Community provisions on information and consultation which are more stringent and/or more specific and, in particular, Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, the user undertaking must provide suitable information on the use of temporary agency workers when providing information on the employment situation in that undertaking to bodies representing workers.

It is universally acknowledged that the strength of a law lies in its enforcement mechanism. The Temporary Work Regulations make provision for two types of redress.

The temporary worker, when compared with the traditional worker, is in a weaker position and thus must be protected as a vulnerable employee.

As is the case of the majority of regulations issued under the Employment and Industrial Relations Act, the Department of Employment is empowered to institute criminal proceedings against any person who allegedly breaches any of the provisions of the law. Regulation 13 states that “any person contravening the provisions of these regulations shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than five hundred euro (€500) and not exceeding two thousand and three hundred and twenty-nine euro (€2,329)”. 

(Continued from page 4)
or public sector can only occur if the necessary constitutional provisions are respected. Thus a person employed in the public service or sector whose relationship is nominally self employed but who is in reality an employee because he satisfies 5 or more of the 8 criteria cannot expect to have his relationship converted into one of employment as this would bypass the relevant Constitutional safeguards and would be an invitation to commit abuse. In this respect the NSO provides for a penalty in the form of one week’s compensation for every year or part of in that relationship. This redress is possible through recourse to the Industrial Tribunal at any time during the relationship and, only in this particular scenario, up to 4 months after the relationship is terminated.

7. Redress
An employee may refer his case to the Industrial Tribunal in cases where there is alleged infringement of any right conferred by the NSO within 4 months when the employee became aware of the alleged infringement.

Six months on
Over the past 6 months, the Department has investigated the status of 453 individuals. Table 1 is a breakdown of the findings.

As can be seen, almost 60% of the persons whose status was investigated had a correct status [49% correctly being considered as self employed and 11 % correctly being considered as employees]. However, the status of 40% of the total individuals whose status was investigated was incorrectly classified as self employed, although in this segment, there were 88 persons [19% of total investigated] who had particular circumstances justifying their exemption (73% of which were in the private sector and 27% in the public service or sector). Nine other requests for exemption were refused. Thus after excluding this segment, it transpires that in 95 cases [21% of cases investigated], there was a false self employment status.

It is, as yet, too early to say whether the NSO is having the desired effects in addressing abusive declarations of self employment in the medium / long term.

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<td>Bona fide employees</td>
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</tr>
<tr>
<td>Self-employed satisfying 5 of 8 criteria according to LN persons exempted</td>
<td>183</td>
<td>88*</td>
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<tr>
<td>Self-employed satisfying 5 of 8 criteria according to LN persons deemed to be employees</td>
<td>95</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>453</strong></td>
<td><strong>183</strong></td>
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*24 public sector; 64 private sector.
Impjegat jew Konsulent?


Il-fatti fil-qosor li wasslu għal din il-kawża kienu: -


Dan il-kuntratt kien jistipula diversi kundizzjonijiet fosthom s-siġegħat ta’ xogħol li r-rikorrenti kellu jahdem għas-soċjetà intimata, il-post tax-xogħol tiegħu, il-vacation li kellu ġinjha, li jħallas il-kontribuzzjoni tas-siġurta’ soċjali tiegħu bhala self-employed, kellu jiġi ġrastrat bhala tali mal-Korporazzjoni tax-Xogħol u t-Tahriġ u mad-Dipartiment tal-VAT u jħallas il-VAT fuq ir-rimunurazzjoni tiegħu.


Is-soċjetà intimata tat l-eċċezzjonijiet li: -

• Ir-rikorrent kien ġie ngaqġat fuq kuntratt biex jagħṭiha servizzi għal terminu definit fil-kapacita’ tiegħu ta’ konsulent.
• Li hija kienet topera fis-settur pubbliku u ma setgħetx timpjega haddima jekk mhux skont ir-regolamenti dwar l-impiegj applikabbli għal soċjetajiet similu.
• Li, għax kienet organizzazzjoni li opiera fis-settur pubbliku, l-avviż legali inkluzzjonijiet ma kien japplika għalilha.

Għall-eċċezzjonijiet tas-soċjetà ir-rikorrent issottometta li l-kuntratt tiegħu mas-soċjetà intimata kien kuntratt ta’ servizzi u mhux għal servizzi.


Fid-9 ta’ Frar 2011 it-Tribunal Indistrijali ta’ id-deċiżjoni tiegħu wara li kunsidra li: -

• Iż-żewġ punti saljenti ta’ kontestazzjoni bejn il-partijiet huma i. id-definizzjoni tar-relazzjonijiet tar-lavartivit kuns trattwali bejn il-partijiet u


(Continued on page 10)
Relations cannot be held responsible for errors or omissions in articles or illustrations.

As independent statutory bodies u government departments and ministries.  

Dwar it-Cirkolari Numru OPM 4066/97 u l-applikabilita tal-AL 429/2002 il-Qorti, fliwaqt li riferiet u kkwotat il-ktieb ta’ David Foulkes ‘Administrative Law’ (Butworths 1990 – Seventh Edition p. 71–73 - ‘A circular may contain advice or guidance as to the exercise by the recipients of their powers ...the circular has no legal status’) sostniet li din m’għandhiex il-portata ta’ liji. Sostniet ukoll li mill-provi jirriżulta li s-soċjetà appellata hija soċjetà kummerċjali mill-aspetti kollha tagħha, inklużu dawk legali, amministrattivi u mанżeri, hija kkwotata fil-Borża ta’ Malta bl-isma tagħha li jinbiegħu skont il-liji fis-suq u hija ġestita kollha kemm mhi mill-privat u bl-ebda mod ma taqa’ taħt il-kontroll tal-Kummissjoni dwar is-Servizz Pubbliku, u konsegwenti għal dan kollu lanqas jista’ impjegat tagħha jiġi kkunsidrat bħala “uffiċċjal publikkub”.  


Il-qa’ għadu pendenti fit-Tribunal Industrijali għal-likwidazzjoni tal-kumpens dovut.