

EMPLOYMENT LAW: THE (IN)DEFINITE DILEMMA

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This article will shed light on the difference between a definite and indefinite contract in terms of Maltese Employment Law.² The author shall be delving into the salient principles of the law, along with an understanding of its interpretation by the Courts.

Although the law does not oblige the employer and the employee to enter into a formal contract of employment, the Employment and Industrial Relations Act (EIRA), Chapter 452 of the Laws of Malta, gives the discretion to the Minister³ in providing a set of:

Regulations prescribing the minimum information which every employer shall be bound to provide to every employee and the manner in which such information is to be given to the employee.⁴

To this effect, Legal Notice 431 of 2002⁵ explains that where such contract of employment was not signed by the parties (the employer and the employee), or in case where there is a written contract, which however, does not cover all or some of the information specified and which is to be notified to the employee in accordance with

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² Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 33 'A person may bind himself to give his services for a fixed term or for an indefinite term, or in respect of a specified task, undertaking, work or service [omissis].'

³ 'Minister' means the Minister from time to time responsible for Employment and Industrial Relations.

⁴ *ibid* Article 35 'The Minister may, after consultation with the Board, make regulations prescribing the minimum information which every employer shall be bound to provide to every employee and the manner in which such information is to be given to the employee and to regulate any other matter relating to the employer's obligation to inform or consult the employee or the employees' representatives on employment conditions, and, in such regulations the Minister may grant exemption from the obligation imposed by this article or establish different rules for different classes or types of employment.'

⁵ Information to Employees Regulations SL 452.83 Article 4 'In those cases where no written contract of employment has been signed between the employer and the employee, and, or in those cases where the written contract does not cover all or some of the information required to be notified to the employee by these regulations, the employer shall be bound to give or send to the employee a letter of engagement or a signed statement, by not later than eight working days from the commencement of employment [omissis].'

the Information to Employees Regulations, the employer is bound to provide such information through an engagement letter or a mere statement within eight working days from the commencement of employment. Hence in cases where there is some form of written employment contract, the employer is duly bound to provide the employee with a signed copy of the said covenant. The aforementioned engagement letter or statement shall include all the basic conditions of employment as provided in terms of the Information to Employees Regulations.

Article 4⁶ of Subsidiary Legislation 452.83 highlights the minimum obligatory information to be provided when one is drafting a contract of employment. In situations where such contract does not exist, this minimum information is to be included in the engagement letter or statement abovementioned. The minimum information includes, amongst others, basic personal details of the employer, the period of probation applicable,⁷ date of commencement of employment, any collective agreements in place vis-à-vis the employment, and the normal hours of work. The *raison d'être* behind such legislation is to protect the employee by providing him with basic information related to his employment.

The Definite Contract?

The definite contract, or as also referred to, the fixed-term contract,⁸ is an employment agreement with an identified commencement and a specified termination

⁶ Information to Employees Regulations SL 452.83 Article 4 '[omissis] and which shall include the following information: (a) the name, registration number and registered place of business of the employer and a legally valid identification document number, sex and address of the employee and the place of work: Provided that in the absence of a fixed place of work it should be stated that the employee will be employed at various places together with the registered place of business: Provided further that if there is no registered place of business, the domicile of the employer is to be stated; (b) the date of commencement of employment; (c) the period of probation; (d) normal rates of wages payable; (e) the overtime rates of wages payable; (f) the normal hours of work; (g) the periodicity of wage payments; (h) in the case of a fixed term contract of employment, the expected or agreed duration of the contract period; (i) the paid holidays, and the vacation, sick and other leave to which the employee is entitled; (j) the conditions under which fines may be imposed by the employer; (k) the title, grade, nature or category of the work for which the employee is employed; (l) the notice periods to be observed by the employer and the employee should it be the case; (m) the collective agreement, if any, governing the employee's conditions of work; and (n) any other relevant or applicable condition of employment: Provided that if any of the above information is regulated by any law, regulation, national standard order, sectoral regulation order or collective agreement, the information may, where appropriate, be given in the form of a reference to the laws, regulations, orders or collective agreements governing that same information: Provided further that where an employer engages a person under a contract for service as an outworker for an undertaking, he shall provide the employee with a signed statement showing - (a) the name, registration number and registered place of business of the employer and a legally valid identification document number and address of the employee; and (b) the rate to be paid for the work; and (c) any special conditions regulating the contract.'

⁷ The probationary period is set to be six months however in the case of a contract of service in respect of employees holding 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.

⁸ Contracts of Service for a Fixed Term Regulations SL 452.81 Article 2(1) "'contract of service for a fixed term" means a contract of service entered into between an employer and an employee where the end of the contract is determined by reaching a specific date, or by completing a specific task, or through the occurrence of a specific event.'

date. Such contracts are usually used for particular tasks, including project based employment having a sunset clause coinciding with the final date of the project.

Considering the brief nature of the fixed-term contract, it is typical for the employee to receive an enhanced remuneration. The legislator felt the need to protect the employee entering into such definite contract. Indeed, the Employment and Industrial Relations Act⁹ provides 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 [omissis].’¹⁰ Furthermore, there is a clear distinction as regards to the repercussions to any possible abrupt termination by whosoever is at fault.

Therefore, in a fixed-term contract of employment one has to distinguish between termination before and after the period of probation, and termination for a good and sufficient cause.¹¹

If the employment is terminated during the period specified as being the probationary period, the employer does not suffer any liability whatsoever. The same applies in cases where the employee himself opts to terminate the contractual relationship during such period.¹² The probationary period can be considered as a cooling off period where the employee and the employer can test if the employment relationship is expected to be successful or otherwise. However, during the duration of such probationary period, the party terminating the employment contract is obliged to provide a week’s notice to the other party if the employment relationship would have exceeded beyond one month.¹³

The law¹⁴ provides that a probationary period applies *ipso jure* irrespective whether the contract is on fixed-term or otherwise, as confirmed in the case of **Borg Roderick vs. Hospitality Services Ltd.**¹⁵ Nevertheless in this case the Court of Appeal held that when considering the short nature of the contract (in this case it was five months), and the fact that the probationary period was not specifically mentioned in the contract, it automatically implied that the employment agreement was not subject to probationary periods.

⁹ Employment and Industrial Relations Act Chapter 452 of the Laws of Malta (n 2).

¹⁰ *ibid* Article 34(1).

¹¹ Notwithstanding such terminology repeatedly mentioned within Chapter 452, the legislator failed to provide a clear definition of what such good and sufficient cause constitutes, and both employers and legal advisors rely on the interpretational given by the Courts and or the Industrial Tribunal. However the legislator did provide what will not tantamount to good and sufficient cause if applied by the employer. Such exhaustive list can be found within the Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, proviso to Article 36(14)

¹² Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 36(2) ‘During the probationary period the employment may be terminated at will by either party without assigning any reason [omissis].’

¹³ *ibid* [omissis] *Provided that a week’s notice of the termination of employment shall be given to the other party in the case of an employee who has been in the employment of the same employer continuously for more than one month.*’

¹⁴ Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, (n2).

¹⁵ 6/2012, Borg Roderick vs. Hospitality Services Ltd. Court of Appeal (Inferior Jurisdiction) as per Justice Raymond Pace, 29 November 2012.

This decision can be said to be somehow ironic and in direct conflict with provisions of the law¹⁶ considering that the Employment and Industrial Relations Act provides no distinction between fixed-term and definite contracts as regards probation periods. To add insult to injury, the fixed-term contract in question had an umbrella clause saying 'All the above and any other conditions not mentioned above are regulated by the Laws of Malta'¹⁷, which in this case implies that if the probation period was not mentioned, the provisions of the law automatically kick in. Nonetheless, in view of the aforementioned case it would be wise for one to specify the probationary period within the contract.

Upon the lapse of the probationary period, but before the lapse of the definite time stipulated by the contract of service, neither the employer nor the employee are bound to give notice for a specified period of time when opting to terminate the contractual relationship. Nonetheless, it would be professional to require that some form of notice be provided.

Once the probation period elapses, the law requires that half the salary of the remaining working days be paid by the party terminating the employment contract. The salary in such cases is determined on the basis of the basic remuneration and does not include bonuses, commissions, allowances or any other perks.¹⁸ Therefore, if the employer terminates the contract before it reaches its predetermined termination, the latter would have to pay half of the remuneration the employee would have been paid had he fulfilled his contractual obligations.¹⁹ Conversely, the situation would be the same should the employee terminate the employment contract before its natural termination.²⁰

The above was the basis of the case in the name of **Falcon Tours Limited (C4425) vs. Schembri Alison**.²¹ Plaintiff filed action against its former employee to recover half of the basic remuneration on the basis of Article 36(12) of the EIRA. The plaintiff's pleas were entertained by the Court, which in turn concluded that there had been an abrupt termination of the fixed-term contact, and thus ordered the former employee to pay liabilities in the amount of €3,494.06.

The legislator left a window ajar to be used both in favour of the employer and employee, that is; the dismissal or abandonment on the basis of good and sufficient

¹⁶ Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 36(1) 'Saving the provisions of subarticle (16), the first six months of any employment under a contract of service shall be probationary employment unless otherwise agreed by both parties for a shorter probation period' (emphasis by author).

¹⁷ *ibid* page 2 of 11.

¹⁸ *ibid* Article 36(12) '[omissis] reference to "full wages" or "wages" is to mean the wage payable to an employed person by or on behalf of his employer, excluding any remuneration for overtime, any forms of bonus, any allowances, and remuneration in kind and commissions.'

¹⁹ *ibid* Article 36(11) 'An employer who dismisses an employee before the expiration of the time definitely specified by a contract of service, 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.'

²⁰ *ibid* Article 36(12) '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.'

²¹ 535/2008, Falcon Tours Limited (C4425) vs. Schembri Alison, Small Claims Tribunal as per Adjudicator Dr Veronica Galea Debono, 14 April 2011.

cause.²² In such situations neither the employer nor the employee will be compensated for the early termination of the contract..

Hence if the contract of employment is terminated or abandoned for good and sufficient cause, no liability will be incurred by the employer or the employee, depending on whom of the two parties will invoke such ground to justify the termination or abandonment.

Another distinct characteristic of a fixed-term contract is the mutation into an indefinite contract. This will occur if the employee has been continuously employed under such contract of service for a fixed-term in excess of a period of four years.²³ Importantly the meaning given by the legislator to the words 'continuously employed' includes definite term contracts renewed or extended within the first six months from the end of the previous fixed-term contract.²⁴ Hence the legislator gave this extended meaning to try to curb possible abuse by the employer to avoid indefinite contracts.

Finally, and of utmost importance, fixed-term contracts cannot be unilaterally changed. Therefore, both employee and the employer are to agree on the changes being proposed. Frequently, it is the employer who has the impetus to propose changes to the terms and conditions, and thus the employer must inform the employee, in writing, of any proposed changes related to the employment contract. When the changes are carried out *ipso jure* the employer is not bound to notify the employee of such legislative changes which might affect directly or indirectly the employment relationship.

The Indefinite Contract?

The indefinite contact is an employment agreement which terminates upon retirement, death, voluntary resignation, redundancy or dismissal for good and sufficient cause. Usually such contracts are used when the duration of the contract cannot be defined, thus not readily estimated. In such cases where an indefinite

²² Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 36(14) 'Notwithstanding the foregoing provisions of this article, an employer may dismiss the employee and the employee may abandon the service of the employer, without giving notice and without any liability to make payment [omissis] if there is good and sufficient cause for such dismissal or abandonment of service.'

²³ Contracts of Service for a Fixed Term Regulations SL 452.81 Article 7(1)(a) 'the employee has been continuously employed under such a contract for a fixed term, or under that contract taken in conjunction with a previous contract or contracts of service for a fixed term in excess of a period of continuous employment of four years [omissis]'

²⁴ *ibid* Article 7(5) 'For the purposes of this regulation, the term "continuously employed" shall include those contracts of a fixed-term which are renewed within six months from their termination and this period between the contracts shall be included in the calculation of the four year qualifying period referred to in sub-regulation (1)(a).' Provided that another contract of service for a fixed-term entered into after the lapse of the six month period shall not be considered as continuous employment: Provided further that another contract of service for a fixed term entered into within the six month period after the termination of a previous contract shall be considered as continuous employment if the tasks under the subsequent contract are substantially the same as the tasks under the previous contract of employment: Provided also that the tasks shall still be considered to be substantially the same even though they encompass changes related to technical progress or changes in work practices or in the way the tasks are carried out or the contract includes a promotion related to work assigned in any previous contract.

contract is proposed, the parties to the contract of employment would be in agreement to commit to the terms and conditions therein for an indefinite period of time.

Typically, such indefinite contracts are offered to employees not holding technical, executive, administrative or managerial posts. Therefore, one would be looking at middle management and lower levels of operational or administrative work.

The probationary period in an indefinite contract starts from the day of engagement; hence like in fixed-term contracts, both the employee and the employer have six months to assess the development of their work relationship.²⁵ During the first month both parties can terminate their contractual relationship without providing any notice whatsoever. Nevertheless, upon the lapse of the first month and until the end of the probationary period, a week's notice is mandatory.²⁶

Therefore, in this regard, the Employment and Industrial Relations Act does distinguish between fixed-term contracts and indefinite contracts. As in the case of fixed-term contracts, the probationary period can be extended to one year in situations where the employment is of a technical, executive, administrative or managerial posts, which remuneration thereof would be at least double the minimum wage.²⁷ This is not compulsory and therefore can be derogated therefrom.

It can be said that if the employee does not fall within the scope of the subjective categories mentioned above, the mandatory applicable probationary period shall be that of six months, unless both parties agree on a shorter probation period.²⁸

During the probationary period, the employment relationship may be terminated or abandoned by either party without providing any reason for such termination or abandonment.²⁹ This was the basis of the decision of the Court of Appeal in the case of **Vella Charlene v. Banif Bank (Malta) Plc**.³⁰ Plaintiff filed action before the Industrial Tribunal,³¹ whereby it was alleged that her contract was terminated after the lapse of the probationary period. During the hearing before the Tribunal, it was held that the dismissal was carried out during the probationary period,

²⁵ Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 36(1) 'Saving the provisions of subarticle (16), the first six months of any employment under a contract of service shall be probationary employment unless otherwise agreed by both parties for a shorter probation period [omissis].'

²⁶ *ibid* - Article 36(2) 'Provided that a week's notice of the termination of employment shall be given to the other party in the case of an employee who has been in the employment of the same employer continuously for more than one month.'

²⁷ *ibid* – Article 36(1) '[omissis] Provided that in the case of a contract of service, or collective agreement, in respect of employees holding 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 or in the collective agreement.'

²⁸ *ibid* Article 36(1).

²⁹ *ibid*- Article 36(2) 'During the probationary period the employment may be terminated at will by either party without assigning any reason.'

³⁰ 21/2011, Vella Charlene vs. Banif Bank (Malta) Plc, Court of Appeal (Inferior) as per Justice Raymond Pace, 26 July 2012.

³¹ The Industrial Tribunal is set out and regulated by the Employment and Industrial Relations Act. The decisions of the industrial tribunal are not subject to appeal, except on points of law. In addition, its awards are binding and cannot be revised prior to the elapsing of at least one year after the issue of any such award. For further information about the Industrial Tribunal vide <http://socialdialogue.gov.mt/en/Pages/Entities/Industrial-Tribunal.aspx>

and was directly related to lack of performance. Notwithstanding the undisputable clarity of the law, the Tribunal granted right to plaintiff to rebut and defend such accusations. During the appeal stage, the Court of Appeal held that:

*'La darba instab li t-terminazzjoni ta' impjieg kienet fi żmien ta' prova u hekk iddeċieda t-Tribunal ma jistax jingħad u wisq inqas jiġi eżaminat jekk t-terminazzjoni kienitx għar-raġuni ġusti jew le għaliex dan immur kontra l-Liġi stess.'*³²

Therefore, the Court of Appeal reconfirmed that during the probationary period, neither of the parties is obliged to provide any justification or reason for the termination or abandonment of the employment contract.

Unlike the fixed-term contract scenario, an indefinite contract employment is subject to a notice period.³³ The legislator this time round provided a transition period which is beneficial for both parties. During the notice period of termination of employment, depending on the nature of such termination, the employee would usually start the handover process and the employer would focus on the induction of the replacement, if any.

The law provides specific notice of termination of employment periods depending on the duration of the employment relationship. The duration of notice periods are as follows: (a) for more than one month but not more than six months - one week notice (b) for more than six months but not more than two years - two weeks' notice; (c) for more than two years but not more than four years - four weeks' notice; (d) for more than four years but not more than seven years - eight weeks' notice; (e) for more than seven years, an additional one week for every subsequent year of service up to a maximum of twelve weeks' notice.³⁴ The notice period is considered to be operative as from the next working day on which such notice would have been given.³⁵

The law also explains that longer notice of termination of employment periods may be agreed upon by the employer and employee in the case of technical,

³² Court of Appeal (Inferior) (n 30) page 8 of 10 – (Translation) Once it was found that the termination of employment was during the probationary period, the Tribunal cannot delve or determine whether the termination was not for just cause or not, because doing so would be going diametrically opposite to the Law itself.'

³³ Notice Period is to be given either by the employee, or by the employer in cases of redundancy.

³⁴ Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 36(5) 'Notwithstanding any agreement to the contrary, and without prejudice to what is stated in paragraph (f), notice of the termination of employment proposed either by the employer or by the employee under a contract of service for an indefinite time, shall be of the following respective duration, if the employee has been in the employment of the same employer continuously - (a) for more than one month but not more than six months - one week; (b) for more than six months but not more than two years - two weeks; (c) for more than two years but not more than four years - four weeks; (d) for more than four years but not more than seven years - eight weeks; (e) for more than seven years, an additional 1 week for every subsequent year of service up to a maximum of twelve weeks; (f) or such longer periods as may be agreed by the employer and employee in the case of technical, administrative, executive or managerial posts: Provided that notice of termination of employment may not be given during maternity leave or during the period of incapacity for work to which subarticle (17) refers or during such other period as the Minister may prescribe.'

³⁵ *ibid* - Article 36(7) 'The period of notice shall begin to run from the working day next following the day on which notice is given.'

administrative, executive or managerial posts.³⁶ Therefore, longer notice of termination of employment periods only apply in the case of the specific nature of the employment, and if there is mutual agreement between the parties to the contract.

There can be situations where the employee might not want to work during the notice period, or the employer might not wish that the employee remains on the premises, for several reasons. The Employment and Industrial Relations Act provides for these situations and explains that if the employer gives notice of termination, the employee shall have the right to contemplate whether or not to work the abovementioned notice period or not. In cases where the employee opts to work his/her notice period, (s)he will be entitled to the full remuneration as per contract. Conversely, if the employee decided against working the notice period, then (s)he would only be entitled to half the remuneration for the notice period applicable.³⁷ The law also provides for instances where the employer fails to give notice to the employee. In this situation, the employer is liable to pay the employee full remuneration for the notice period.³⁸

Where the employee gives notice of termination to the employer, the latter shall have the right to opt whether to allow the employee to work the notice period or not.³⁹ In such circumstances, the situation would be slightly different than the scenario contemplated above. If the employer allows the employee to work the notice period, the former is to remunerate the latter in full, whereas if the termination is immediate, therefore without requiring the notice period to be worked, the employee would still be entitled to the full remuneration for the entire notice period (s)he would have had to work. ⁴⁰ In the situation where the employee fails to give notice, then the latter shall be liable to pay the employer a sum equivalent to half the remuneration of the notice period.⁴¹

Unlike the situation contemplated under the termination of fixed-term contracts, the law does not exclude from the remuneration any bonuses, commissions, allowances or other to be paid during notice periods. Nevertheless, it is to be pointed out that there can be situations where bonuses, commissions, allowances and others perks, are linked to some particular objective condition (such as annual performance or key performance indicators), which condition makes it subjective whether to include as part of the remuneration during notice period subjective.

³⁶ *ibid.*

³⁷ –*ibid* Article 36(8) ‘On receiving notice from the employer as aforesaid the employee under a contract of service for an indefinite time 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.’

³⁸ *ibid* - Article 36(10) ‘[omissis] If the employer fails to give the said notice, he shall be liable to pay to such employee a sum equal to the wages that would be payable in respect of the period of notice.’

³⁹ *ibid* - Article 36(9) ‘On receiving notice from the employee as aforesaid, the employer shall have the option either to allow the employee to continue to perform work until the period of notice expires or, at any time during the currency of the period of notice, to pay the employee a sum equal to the wages that would have been payable in respect of the unexpired period of notice.’

⁴⁰ *ibid.*

⁴¹ *ibid* Article 36(10) ‘If an employee under a contract of service for an indefinite time 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 [omissis].’

Finally, the employee would also be entitled to a pro rata consideration of the statutory annual bonuses once notice is given. The same applies if there is any vacation leave which was not utilised. Equally in cases where the employee would have utilised any vacation leave which is above than that statutory allocated, the employee is bound to make good for such.

The Answer to the Dilemma

Following the illustration of the basic differences between fixed-term and indefinite contract,⁴² the decision to opt for a definite or indefinite contract of employment depends on several elements, including the nature of the employment, the duration, and also sensitivity of the post itself within the corporate structure. Market practice demonstrates that the decision is generally one taken by the employer.

The above is to be considered from a practical perspective. Fixed-term contract of employment is to be considered when the employment is linked to a particular project or to a sensitive executive role (example Chief Executive Officer or Managing Directors). In the latter scenario the contract termination date would tally with the forecasted project conclusion. Some fixed-term contracts, especially those related to projects, provide for an automatic extension; the underlying rationale being to avoid having to renegotiate a contract should the anticipated project deadline extend beyond the originally anticipated date. Similarly, when dealing with senior executives, fixed-term contracts are generally the natural option. The reason why an employer might choose this form of employment contract also depends on the sensitivity of the post. For instance, in the case of a Chief Executive Office, the role requires, inter alia, a synergy between the CEO and management and with the Board of Directors. Should this not materialise, the employer may require the flexibility to terminate at will.

On the other hand, an indefinite contract is usually considered in those situations where the employee's priority is security of tenure. Indefinite contracts are by far, market practice in Malta.

In conclusion, it could be argued that in practice the employer is placed in a dominant position giving him/her the right to dictate the terms of the employment contract, hence the reasoning behind the legislator to protect the interest of the employee. The protection granted to the employer must also be seen in light of Article 12(1) of the Constitution which safeguards the right of employees to work under proper work conditions.⁴³

⁴² This article cannot be taken or considered as a full illustration of the Maltese Employment Law. Employment is one of the areas which are vastly regulated by several European Union directives and regulations.

⁴³ Constitution of Malta, Article 12(1) 'The State shall protect work.'