

Proposed Amendments to the Employment & Industrial Relations Act, 2002



meea

MALTA EMPLOYERS' ASSOCIATION

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Preliminary

In October 2002 the two Acts, Act XXII of 2002, (entitled “An Act to Consolidate the Conditions of Employment (Regulations) Act (Chapter 135) and the Industrial Relations Act (Chapter 266), which regulated the employment and industrial relations in Malta, were consolidated into one law, that is, Chapter 452 of the Laws of Malta, commonly known as the EIRA. This consolidation included an alignment of local legislation with EU legislation in preparation for Malta’s entry into the EU in 2004.

As with so many other laws, this law has its procedural aspects as well as its substantive provisions. The EIRA is a very active law; it is used on a daily basis and has widespread application. It has become imperative to take stock of the flaws and lacunae found in the law, and further developments within the EU in the field of employment and industrial relations.

A clear and unequivocal legal framework that ensures employment matters are adequately covered and regulated is very desirable. There should not be any legal equivocations in respect of basic employment rights, obligations and procedures, and laws should avoid becoming subject to multiple interpretations. Comprehensive and clearly written laws will serve as an effective tool that contributes towards a smooth conduction of daily employment relations. Industrial relations too will benefit from a set of regulations that will clarify, rather than complicate, relations between employers, Unions and government, and so help to avoid the development of complex and sometimes confrontational situations. Industrial disputes often require a legal solution but it must be stated that industrial relations should prevalently be conducted on a platform of dialogue and engagement and not prevalently on over regulation and extensive legislation. In industrial relations sensible accommodations and arrangements are often the better option out of an impasse.

Tribunals and legal interventions should be resorted to only after the players, employers, employees, Unions and Employers Associations would have failed to reach consensual

settlements. No doubt however in particular situations recourse to law is necessary and will render an unequivocal solution to contending parties.

Whilst over regulation has to be avoided it is required that the law covers with clear rules all the relevant basic aspects of the interaction and relationships between parties.

So a set of laws needs to be logical, clear, concise, just, balanced, easy to apply, relevant to the real needs and subject to one unequivocal interpretation. It is in this light that the MEA is putting forward these proposals for additions and amendments to the 'Employment & Industrial Relations Act'. In particular it is noted that if the endorsement of these proposals is acceptable, to all parties concerned then perhaps a period of more positive engagement in employment and industrial relations could be inaugurated.

MALTA EMPLOYERS' ASSOCIATION

1. Definitions

Practically every law provides for a number of definitions in its preliminary sections in order to help one in reading, understanding and interpreting the law itself. To this effect, **section 2** of the law is of utmost importance and the relative definitions should be loud and clear. The more the law develops, the more definitions are needed. At times, re-defining of certain terms is necessary. When the need for such changes is felt, then the legislator ought to take action.

The MEA hereby deems appropriate to point out that it has become necessary that some changes to this section of the law are made.

1.1 Definitions of a Trade Union and an Employers' Association

The law provides for a definition of a "trade union" as much as it provides for a definition of an "employers association", yet the MEA is presently proposing that the law should also provide for a definition of who should be considered, *ex lege*, to be a member thereof.

To this effect, in section 2 of the law, following the definition of "Trade Union", there should be inserted the following definition:

Trade Union or Employers' Association Member/s means a member/s who has an up-to-date payment of his/her membership fees evidenced in the

records of such Trade Union or Employers' Association as required under Article 57(1) of this Act.

This will help facilitate a number of issues and understandings which arise from time to time in relation to union recognition.

1.2 Definition of Director

The definition of "Director" should come to read:

"Director" means the Director General responsible for Employment and Industrial Relations or any other authorized person so delegated by the same Director General.

1.3 Discriminatory Treatment

It is being proposed that age, sexual orientation and gender identity should be included in the definition of discriminatory treatment. The definition should read:

"discriminatory treatment" means any distinction, exclusion or restriction which is not justifiable in a democratic society including discrimination made on the basis of marital status, pregnancy or potential pregnancy, sex, gender identity, colour, disability, religious conviction, age and sexual orientation, political opinion or membership in a trade union or in an employers' association;

1.4 Definition of Tribunal

The definition of "Tribunal" should come to read:

"Tribunal" means the Employment and Industrial Tribunal established by Article 73.

2. Union Recognition

The MEA firmly believes that the issue of union recognition is not satisfactorily catered for by our current legislation.

Recognition disputes tend to get out of control and cause undue disruption and problems to employers. Unfortunately, many a time, trade unions themselves do not recognize the fact that such disputes are more prejudicial to their members than beneficial. The law therefore needs to offer concrete guidance towards solutions.

The basis of the amendments to the law as put forward by the MEA rests on three pillars, namely,

- A clear definitions of a "trade union member" and an "employers' association member" (dealt with under 1.1 definitions)
- B clearer obligations on unions and employers associations to maintain up-to-date records on paid-up memberships
- C more power should be given to, and obligations placed upon, the registrar of trade unions, to inspect and verify records.

The MEA believes that such a legislative intervention will go a long way to make memberships and union recognition disputes more manageable and solvable.

As it is being proposed Article **57 (1) should read:**

57 (1) Every Trade Union and every Employers' Association shall keep an up-to-date record of the names of the members of the Union or Association, as the case may be, showing their respective date of

membership, their up to date payment of membership fees, identity card numbers, addresses and Trades or Occupations.

(2) The Registrar shall have power at any time to inspect such records or to cause such records to be inspected by a person authorised by him in that behalf, and every trade union and every employers' association shall give him and any other person authorised as aforesaid all reasonable facilities for that purpose.

(3) Upon a request by a direct interest disputing party, (Trade Union/s, Employer/s, workers) it shall be incumbent on the Registrar to intervene and exercise the power under sub-article (2) above, in situations where Trade Disputes arise that concern recognition of Trade Unions by employers, and membership or non-membership of a worker in a particular Trade Union, or an employer in an Association.

(4) Specifically for the purposes of establishing "recognition" rights and obligations the Registrar in confidence will request a Trade Union or an Employers' Association which will comply to present to him relevant members' original signed membership application forms and/or latest membership fees receipts issued to members. The registrar in confidence will request an employer, who will comply, to present to him lists of relevant persons in employment and the names of such employees with union check-off arrangements.

2.1 The right to strike

The Association feels that there should be entrenched in law the obligation to give the employer 3 days' notice prior to a strike being effected.

3. Protection of Wages

The MEA considers the provisions of the law relating to the protection of wages as being of fundamental importance, thereby recognizing the fact that “the wage” remains possibly the most important factor for both the employer and employee alike. The MEA however deems that certain provisions of the law in this regard need some fine-tuning and the law should be brought in line with today’s times, in recognition of the advances made in technology, banking facilities and computerization, amongst others.

The law already provides for transfer of wages from the employer’s account into the Bank account of an employee [vide section 11(1)], Social Security Department itself already pays injury, sickness and maternity benefits to employees by transferring directly into their bank account.

The MEA would like to stress that this system of payment should become the norm and incentives for employers should be provided to this effect. Furthermore and in line with the above, the MEA is hereby suggesting amendments to the proviso to **Article 11(1)**, by deleting the words “*or is consented to by the employee concerned*” and thus reading:

Provided that payment of wages by cheque on a bank account in Malta or payable to the Bank account of an employee shall be deemed to be payment in legal tender in cases in which payment in this manner is customary or necessary.

The MEA acknowledges a common issue which arises when an employee is in breach of his contract of employment or of such employee’s statutory obligations in relation to his employer, particularly upon termination of an employment relationship where the employee so decides to terminate. Whereas all the employer’s obligations towards such an employee should remain untouched as catered for by the law, there have in the past been various instances when and where employees, who would have so terminated

their employment contracts, would be in debt towards their employer, for one reason or another, but would still receive their dues in full without a *set-off* being made. This brings a situation whereby the employer would have to pay and settle all dues to the ex-employee, but would have to sue his ex-employee for what is due to such employer. This anomaly should be rectified, and setting-off what the parties owe to each other, definitely simplifies matters for both parties alike.

To this effect, the MEA is suggesting that the provisions of Article 15(1) of the Act will not be applicable to instances whereby the employee is in debt with the employer in terms of Article 36 sub-sections (10), (12) and (20).

Article 15 (1) should therefore read:

15. (1) Except where expressly permitted by the provisions of this Act or required by any other law, or where ordered by or in virtue of an order of a competent court, or permitted in an agreement entered into between an employer or employers or an organisation of employers on the one hand and a trade union or trade unions representative of the employees concerned on the other, an employer shall not make any deductions nor enter into any contract with an employee authorising any deductions to be made from the wages to be paid by the employer to the employee.

Provided that an employer shall be able to deduct from wages solely in the following instances:

a) if an employee fails to give notice of termination of employment and is liable to pay a sum equal to half the wages that would be payable in respect of the notice period and this in terms of Article 36 (10);

b) if an employee abandons the service of his employer prior to the expiry of his contract and is liable to pay to his employer a sum equal to one half of the full wages to which he would have become entitled if

continued in the service for the remainder of the time specifically agreed upon in terms of Article 36 (12);

c) if an employee does not resume work or after having so resumed work, abandons the service of her employer without good and sufficient cause within six months from the date of such resumption and is liable to pay the employer a sum equivalent to the wages she cost the employer during maternity leave.

Furthermore, it is hereby being proposed that the DIER should have an appropriate desk/office whereby all calculations are made in instances of disagreement between the employer and the ex-employee following termination of employment as above mentioned. Such desk/officer will be entitled to call the parties, ask for all relevant documentation and his calculation will be binding on the parties concerned for set-off purposes to be made in terms of the law, without prejudice to a right of appeal from the decision of the DIER in this regard to the Tribunal.

To this effect, the following legislative amendments are being proposed:

Sub-article (5) should be added to **Article 15** of the Law and is to read as follows:

(5) Notwithstanding the provisions of this Article, an agreement may be entered into between the employer and the employee to set-off from any wages due to the employee, any dues to the employer by the employee in terms of Article 36 sub-sections (10), (12) and (20).

Provided that should the employer and the employee disagree on the quantum to be set-off, whether as to the quantum due by the employer and/or the quantum due by the employee, then either party may refer the issue to the Director who in turn, through his delegated person, will resolve the issue as to what is due by either party to the other, within one week from such referral. The Director's decision is binding for the effects of setting-off ex lege, but either party will be entitled to appeal from the Director's decision before the Industrial Tribunal within two weeks from

decision, in which case, if the appeal is upheld, in whole or in part, the Industrial Tribunal may order any refund or payment by either party to the other.

4. Public Holidays

The MEA believes that the issue of competitiveness remains high on the agenda in today's economic world and scenario. Within this context, it becomes imperative to have, through proper legislation, measures which protect the high level of competitiveness that our country should enjoy. It is high time that amendments are made to Article 17 of the Act. Since public holidays falling during the weekend are lost to employees then the MEA proposes that public holidays falling on an employee's day of rest whether falling during the week or during the weekend too should be lost.

Hence to this effect, with the exception of employees working in the hotel industry, the MEA is proposing that **Article 17** should thus read as follows:

Notwithstanding any other provision in this Act or elsewhere, where a public holiday falls on a Saturday, Sunday or other weekly day of rest of an employee, no additional day of vacation shall be given to employees.

5. The Tribunal

The MEA primarily acknowledges the valuable work done by the Industrial Tribunal over the years. Albeit having limited resources, chairpersons and staff alike have performed well in order to give this quasi-judicial body the status it deserves. The MEA is however hereby making numerous proposals, some of which involving major reform, in order to attribute a more defined role to the Industrial Tribunal, and also to ensure a more professional outlook and an improved legislative framework. Above all, the MEA would like to ensure complete transparency and impartiality in the constitution and functioning of the Tribunal.

The MEA would ideally wish to see **ALL** employment and industrial relations issues and disputes falling under the competence and jurisdiction of one judicial body, namely the Tribunal. Nevertheless, the MEA recognizes that there may be constitutional and legal issues which impede this from happening.

5.1 Change in name

The MEA proposes that the Industrial Tribunal be renamed as “**The Employment and Industrial Tribunal**” since this Tribunal does not only deal with industrial disputes and interpretation of collective agreements, but also considers cases concerning conditions of employment including discrimination, harassment, victimization and alleged unfair dismissal cases. The name itself will give a more comprehensive meaning to the concept of having a one-stop shop within the competence and jurisdiction of the Tribunal.

Hence the amendment to the definition of “Tribunal” in Article 2 of the Act as well as the amendment to wherever the term “Industrial Tribunal” is presently used in the EIRA.

It is being proposed that Article 75 (1) reads as follows:

75. (1) Notwithstanding any other law, the Employment and Industrial Tribunal shall have the exclusive jurisdiction to consider and decide -

- (a) all cases of alleged unfair dismissals; and*
- (b) all cases of discrimination, harassment including sexual harassment as well as victimization within the work environment;*
- (c) all cases dealing with deduction of wages;*
- (d) all cases dealing with monies owed to the employer by the employee and vice-versa.*

for all purposes other than proceedings in respect of an offence against any enactment and the remedy of a worker so dismissed or otherwise alleging a breach of his right under Title I of this Act shall be by way of reference of the complaint to the Employment and Industrial Tribunal and not otherwise:

(2) Where it is alleged that a worker has been unfairly dismissed by an employer, or where there is an alleged breach of any obligation arising out of any matter falling within the jurisdiction of the Employment and Industrial Tribunal under Title I of this Act or any regulations prescribed thereunder, the matter shall be referred to the Tribunal for a decision by it by means of a referral in writing made by the worker alleging the breach, or by some other person acting in the name and on behalf of such worker.

(3) Any referral made in accordance with the last preceding sub-article shall be made by means of a declaration stating the facts of the case, presented in the Registry of the Tribunal and shall, in all cases, be so presented by not later than four months from the effective date of the alleged breach.

5.2 Jurisdiction & Competence of the Employment and Industrial Tribunal

As previously indicated, the optimal scenario in this respect would involve one Tribunal having jurisdiction on all issues arising both from employment and industrial relations. This sole Tribunal would hear and decide all cases related to employment and industrial law issues, whether they be of a civil / administrative or criminal nature, (eg. When DIER instruct police to institute criminal proceedings against an employer for unlawful deductions from wages). The said Tribunal would have the competence and jurisdiction over all issues brought before it, be they claims put forward by the employee or claims put forward by the employer. The MEA however acknowledges the practical and, above all, legal implications of this proposal which necessitate further changes in other laws.

5.3 The current system

On a preliminary basis, the situation, as it stands at present, may be summed up as follows:

Issues of a penal/criminal nature are dealt with by the Court of Magistrates in its Criminal Judicature, whereas issues of a civil (albeit industrial nature) are dealt with either by the Industrial Tribunal (which has exclusive jurisdiction over certain issues) or the ordinary civil courts of Malta.

Over the years procedures have changed due to legislative enactments and also judicial pronouncements. The MEA has taken note of the various judicial pronouncements/judgments delivered to date.

The MEA places particular emphasis on the importance of establishing a clear legal position with regard to determining the proper forum to be availed of by any persons seeking judicial remedy.

5.4 Proposals

The MEA thus proposes an amendment, constituting a possible major reform in the set-up/constitution of the Tribunal:

The Tribunal whether convened to hear alleged unfair dismissal/alleged discrimination cases or industrial disputes will be chaired by a Chairperson who has to be a qualified lawyer with seven years experience along with two lay members, not being lawyers. Each party to the suit will be entitled to choose a member from a panel of members as currently composed. The said identified members shall provide the Chair with the technical assistance and practical work environment experience which may be required in dealing with such cases.

The role of these two members shall not be merely consultative. To be validated the decision of the Tribunal requires the endorsement of the chairperson and at least one of the members.

The dissenting or abstaining member has to verbalize his or her reservations for consideration by the competent appeals body if an appeal is launched.

Both parties retain the right to appeal from a decision of the Employment and Industrial Tribunal. The MEA is proposing that this is done before an Employment Appeals Tribunal rather than Court of Appeal in its Inferior Jurisdiction.

Article 75 deals with the jurisdiction of the Tribunal and grants exclusive jurisdiction to the said Tribunal to hear and determine all cases of alleged unfair dismissal, and also cases falling within the jurisdiction of the Tribunal by virtue of Title I of the Act, or any regulations prescribed there-under. The Article in question provides however, that the Tribunal will not hear and determine issues of a criminal/penal nature arising from the law, and further stipulates that the jurisdiction of the Industrial tribunal shall not overlap issues which the Constitution of Malta reserves to any other authority with respect to public officers. Whilst emphasising that the Tribunal should have competence to hear and decide cases instituted by the employer against the employee or ex employee and vice-versa the MEA agrees that the tribunal should not have the competence to deal with cases involving public officers.

Article 80 on the other hand concerns the decisions delivered by the Tribunal. To this effect the law states that in giving an award, decision or advice, the Tribunal shall take into consideration the social policies of the Government on principles of social justice, the requirements of any national development plan and also other economic policies of the government in the course of implementation, and shall endeavour to ensure that its award, decision or advice is in furtherance of such policies. The MEA is proposing that these conditions are removed as the MEA does not agree with the reasoning behind it since decisions should be taken in an unconditional impartial manner.

Article 80 further provides that when any matter before the Tribunal concerns or relates to public officers, the said Tribunal shall ensure that there is no encroachment on the functions of the PSC.

The same provision (80) finally stipulates that any award or decision delivered by the Tribunal is subject to the overriding authority of Parliament.

Other sub-sections of Article 80 are irrelevant for the purposes of the present report.

5.5 Discussion and Recommendations

- All parties appearing before the Tribunal as a quasi-judicial authority should enjoy equal treatment, and no party, particularly the Government or a Government-owned entity, should be advantaged in any manner.

- The Tribunal's award, subject to the right of appeal and/or retrial if so permitted by law, should be final and binding. Consequently, with the exception of the Employment and Industrial Appeal's Tribunal, no entity should have the power to override the Tribunal or its decisions.

- The MEA strongly opposes the provisions established by virtue of Article 80 above-cited, allowing for the possibility of subjecting an award or decision delivered by the Employment and Industrial Tribunal to the overriding authority of the House of Representatives. This is of more particular concern now that the Chairperson of a particular Government entity being a party to a dispute before the Tribunal may well be a Member of the same House of Representatives. The MEA therefore is adamant that the separation of powers is retained and that decisions of the judiciary are not overridden.

It is to be noted that just before the House of Representatives entered its 2013 summer recess legislation was enacted permitting Members of Parliament to be appointed chairpersons of Government-owned entities. The MEA feels that this gives rise to a conflict of interest.

If these suggestions of the MEA are not taken up then the MEA will insist that the Tribunal should not hear and determine those disputes/issues involving the Government or a Government-owned entity.

5.6 Time Frames

Whilst acknowledging that the one month period within which the Tribunal is expected to hear and decide a case is unrealistic, the MEA deems appropriate that the law should provide a maximum period of time within which a decision is to be delivered from the sitting date wherein the case would have been put off for decision. The MEA finds the practice of certain chairpersons of putting off the case *sine-die* until one day the parties are informed of the date of decision as unacceptable – that is a situation which leaves all parties in the limbo, not knowing when and if a decision will be delivered. Uncertainty is definitely not an ally of justice, if justice, even here, is not only to be done but seen to be done.

To this effect, amends to Article 78(1) of the Act are being so proposed:

78(1) The Tribunal shall decide any issue referred to it within a reasonable time from the date of the referral. Any decision or award is to be given by the Tribunal within three months from the date of the last sitting when the case is put off for decision.

5.7 Awards and Compensation

The MEA proposes that chairpersons should be bound by upper thresholds of compensation. Compensation awarded should not be left at the total absolute discretion of the Tribunal as is the current situation. The MEA is proposing that the maximum amount awarded should not exceed eighteen months salary. The Appeal's Tribunal should have jurisdiction to revise the amount of compensation awarded.

5.8 Compensation to Adjudicators

The MEA feels that Adjudicators should be well compensated for the work conducted. Their work-load has today increased and in various instances, the complexity of cases brought before the Tribunal has increased considerably.

To this effect, the MEA encourages the Director General (DIER) to invest heavily in all the infrastructure required, such as computers, library, databases, access to foreign jurisdiction decision, particularly the UK, training etc.

The MEA further believes also that Adjudicators of the Industrial and Employment Tribunal should not be permitted to represent either plaintiffs or defendants in other cases before the Employment and Industrial Tribunal. There is a clear conflict of interest when individuals on the one hand act as adjudicators and on the other hand act as official representative in different labour-related cases.

5.9 Appeals

The MEA is proposing that appeals should be limited to alleged unfair dismissal cases and that this is done before the proposed Employment Appeals Tribunal and not the Court of Appeal in its Inferior Jurisdiction. This Tribunal should be composed of a presiding judge (an Employment Tribunal Appeals Judge) to whom this additional responsibility will be given against specific compensation and who has the obligation to meet dissenting panel members who sat on the Tribunal in First Instance with the possibility of making reference to any reservations they might have had.

The MEA feels that amendments to this provision of the law should be made to reflect the following:

- a) Appeals should not be limited to only certain issues determined and decided by the Tribunal, but should be opened to include a right of appeal from any decision of the tribunal
- b) Appeals should not be limited to point of law only, but should also include issues of wrong appreciation and application of the facts brought before the tribunal
- c) Appeals should be filed within twenty days, in line with practically all other appellate procedures before our Judicial system.
- d) The MEA believes though, that particularly where an industrial dispute is registered and subject to the judicial proceedings, then interim measures may be given by the Tribunal as much as by the appellate court/tribunal.

To this effect, the MEA is proposing that **Article 82(3)** should read as follows:

82(3) Following any decision of the Tribunal, any person may lodge an appeal to the Employment Appeals Tribunal within twenty days of such decision.

Provided that, at the request of the appellant made concurrently with the application for the appeal, in cases only, solely and exclusively referring to an industrial dispute duly registered between the parties according to law, through a partial decision to be delivered within two weeks from date of such application, the EAT may suspend the execution of the Tribunal's decision, under the terms and conditions it may deem fit.

The present proviso relative to pleas in relation to issues of point of law will thus be eliminated.

Security of Tenure of Chairperson and Member of the Tribunal

Employment and Industrial Relations Act

Part III

The Industrial Tribunal

Art 73 (6) Varying the composition of the panel BUT continue on pending cases

Art 73 (7) No removal from pending cases

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SECURITY OF TENURE (*Current situation*)

The current law gives the right to the Prime Minister to, from time to time, vary the composition of the panel of chairpersons, as well as the composition of the panel of members, of the Tribunal. This right to de facto terminate the appointments cannot be exercised to remove these appointees from pending cases, which pending cases will, by right, be seen to a conclusion by the original appointees.

The MEA is proposing to remove this prerogative, enjoyed by the Prime Minister / Minister, to vary, at will, the composition of the panel.

The MEA is of the opinion that a clear security of tenure, for whatever period (one, two or three years) chairpersons and members are appointed, should be a feature of fundamental importance. During their period of appointment these appointees, to fulfill their duties with serenity, must not feel subject to external interventions that could cut short their period of appointment. The premature removal from the Panel of a Chairperson, or a member, should only be justified on the basis of inappropriate or manifestly incompetent behaviour and this will be determined through a defined procedure before an appropriate judicial committee.

Lastly the MEA is proposing that the chairpersons and Members of the Employment and Industrial Tribunal should benefit from familiarization training on the workings of the Tribunal, the provisions of the EIRA as well as the general environment of Industrial Relations and Employment.

6. The Department of Employment & Industrial Relations – DIER

Mention has already been made of changes needed to improve the functioning of this very important Department. The MEA believes that the DIER should be headed by a Director General (DG DIER) who will assume overall responsibility of the Department, but who will be helped by another two Directors, namely:

a Director for Employment Relations (DER),

a Director for Industrial Relations and for Dispute Resolution (DIRDR).

In all cases, the DG (DIER) will be entitled to delegate work and assignment to the respective Directors, and hence the inclusion of the term “person so delegated” in the amended definition to the term “Director” as above explained (vide 1.2 above).

6.1 Director General (DG DIER)

The role of the Director General within the DIER (DG DIER) should assume, more or less, the same role as that assumed by the DG at the Law Courts. The Director General would be responsible for the management and administration of the DIER, the Employment & Industrial Tribunal, including the registry, archives and other services, and will liaison with the DG (Law Courts) in so far as the Tribunal and EAT is concerned.

6.2 Director of Employment Relations (DER)

The role of this Director (DER), who will be answerable to the DG (DIER), will be that of assuming responsibility for the Employment Relations part of the DIER. Hence, the DER will be responsible for anything that has to do with employment contracts, conditions of work, and practically all that falls within TITLE I of the Act.

6.3 Director for Industrial Relations and Dispute Resolution (DIRDR)

The role of this Director (DIRDR), who will also be answerable to the DG (DIER), will be that of assuming responsibility for the Industrial Relations part of the DIER. Hence, the DIRDR will be responsible for anything that has to do with trade unions and employers' organizations, collective agreements and practically all that falls within TITLE II (Part I, Part II and Part III) of the Act.

7. Leave Entitlements

7.1 Right of employers to obligatory leave

Several of the WRO's, stipulate that a number of days (normally 4) from the annual entitlement should not form part of a shut-down and should be left optional to the employee. Conversely, therefore in these cases the company has the right to effect a shutdown or plan the leave of the employee for the remaining entitlement.

One problem that the MEA finds is, that where the WRO does not stipulate such or where this is not provided for in a collective agreement, the company does not have the aforementioned facilities.

The MEA notes that, similar to Italian culture for example, mid-August has become a common occurrence for companies to have their shut-down. It has also become common for Maltese employees to try and bridge public holidays to weekends, particularly when such public holidays fall on a Thursday or a Tuesday.

To this effect, it is hereby being suggested that, for those Wage Council Wage Regulation Orders that do not regulate the matter then as long as the employees are duly informed within the month of December of the preceding year, at least 8 days of the leave entitlement of the employee of the subsequent calendar year may be planned as obligatory leave by the employer, and this namely to cover shut-down periods, particularly in festive periods and mid-summer periods as well as bridging weekends when public holidays fall on a Thursday or Tuesday.

In this way, the employer and employee alike would be able to plan the leave periods *a priori*, to the benefit of both.

(ii) 8 days of the annual leave entitlement of employees may be planned by the employer as obligatory on the employee to cover shut-down periods in the mid-summer months and the festive periods as well as to bridge any public-holidays falling on a Thursday or Tuesday with week-ends.

Provided that, the employer shall so inform his employees of such obligatory-planned leave throughout the month of December preceding a new calendar year, and any new employment throughout that year shall be subject to such planned leave if authorized by the Director of Employment Relations (DER).

7.2 Overutilization of annual leave entitlement

It is not always practical for employers to allocate two working days vacation leave per month. Whenever employees apply for more leave than has effectively accrued in their favour, the employer currently has the option of either not authorizing the leave or of granting unpaid leave. This emanates from the fact that employers cannot claim back payment for an overutilization of leave on the employee's part.

The MEA is proposing that employers should be free to deduct payment for overutilization of vacation leave from the wage when and if employees tender their resignation. Alternatively, the employer could be entitled to effect deduction from the four-yearly bonus/allowance payable to the employee, in which case amendments to **Article 23** of the Act have to be made.

In view of the above proposed changes, amendments might have to be made to the Organisation of Working Time Regulations, namely **Legal Notice 247 of 2003** as duly amended, and particularly Article 8 thereof.

8. Sick-Leave

8.1 Self-inflicted Sickness

The MEA is of the opinion that absenteeism from work due to self-inflicted unfitness for work including, but not limited to, drunkenness, hangover, sunburn, sun-strokes, sports injuries will not render the employee entitled to sick-leave, even if the employee is certified by his own doctor as unfit for work.

8.2 Cosmetic surgery

A distinction has to be made between surgery for purely medical reasons and surgery for cosmetic reasons. The MEA notes that surgery for cosmetic reasons has become rather wide-spread and the employer should not shoulder any responsibility whatsoever for such absenteeism. The MEA further advocates in favour of such surgery to be performed by the employees throughout their annual leave entitlement. Nevertheless the MEA acknowledges that each case should be tackled on its own merits.

To this effect, the MEA proposes, **Article 3 of Legal Notice 432 of 2007** (Minimum Special Leave Entitlement Regulations) should read thus:

(1) A whole-time employee, irrespective of the nature of his work or the place of his work, shall, in every calendar year, be entitled to sick-leave in the amount of two working weeks less an amount equivalent to the sum set for sickness benefit entitlements at the rate established under the Social Security Act. Part-time employees shall have a pro-rata entitlement to sick-leave, and shall have their pay duly deducted at the rate established under the Social Security Act.

Provided that –

(a) the first three days of any claim for sick leave shall be paid in full by the employer; and

(b) persons in receipt of a social security pension in respect of retirement or widowhood in terms of the Social Security Act shall, for the purpose of calculating the sick leave pay due, be deemed to have received an amount equal to the sum set for sickness benefit entitlement at the rate established under the Social Security Act.

(2) Unless otherwise provided in an applicable collective agreement, an employee who has been absent from work on sick- leave shall present a medical certificate issued by a registered medical practitioner attesting to the employee's incapacity for work during any such period of absence, and the reason and cause, whenever possible, leading to such incapacity for work. Such medical certificate shall be presented to the employer on the day of return to work or, if such period of absence is longer than five days, within five days of the onset of sick leave absence. The employer shall have the right, if he deems fit, to send a medical practitioner to visit and examine an employee who is on sick leave. Such medical practitioner sent by the employer shall certify the employee's incapacity to work, the expected duration of such incapacity and the reason and cause for such incapacity.

Provided that in the eventuality that there is any discrepancy between the medical certificate as provided by the employee and that of the medical practitioner so sent by the employer, then, where the employer so deems necessary and at his sole discretion, a third medical practitioner shall, at the expense of the employer, visit and examine the employee and his certificate shall be binding.

(3) The employee shall not be entitled to any sick-leave in cases where such employee is to undergo any cosmetic surgery, and to this effect, the employer may send a medical practitioner, before or after the surgery, to visit the employee to certify that such surgery was or was not cosmetic surgery.

Furthermore, the employee shall not be entitled to any sick-leave entitlement in the eventuality that the reason for absenteeism from work is due to self-inflicted injury or sick-leave.

(4) In the eventuality that the employee is not entitled to sick-leave as per above sub-article (3), his days of absenteeism will be deducted from his salary.

(5) The sick leave entitlement shall be calculated on the basis provided for annual leave as specified in regulation 8(1) of the Organization of Working Time Regulations.

(6) Notwithstanding sub-regulation (1), when an employee is in employment for less than twelve months, the employee shall only be entitled to sick leave as is in proportion to the period in employment.

9. COLA Mechanism

As it stands today, the basis of the mechanism is the rate of inflation. That in itself protects solely and uniquely the employee's perspective to having a decent wage. One is to understand that the employer's perspective is just as important in this matter given that it is the employer who at the end of the week, pays out the wage.

To this effect, it is being suggested that the productivity levels and the efficiency levels ought to be factored in the mechanism in arriving at just and equitable wage increases, beneficial to the wage earners as much as to the wage providers.

10. Retirement Age

The Proviso to **Article 36(14)** of the Act states that the employer can terminate the employment of an employee when the employee reaches retirement age as defined by the Social Security Act.

This proviso should be clarified in order to allow the employer an absolute discretion on termination of employment of any employee who has reached pensionable age and remains in employment.

The MEA interprets this proviso to mean that if the employee remains in employment after his attaining pensionable age, the employer may still terminate such employment at his sole discretion. However the MEA fully acknowledges that the proviso, as is, creates uncertainty, and the legislator should make it clear by amending the law to the effect that once the employee attains pensionable age, then even if kept in employment, the employer may terminate at will.

To this effect, it is hereby being suggested that the Proviso to Article 36(14) should read thus:

Provided further that the employer can terminate the employment of an employee when the employee reaches retirement age as defined in the Social Security Act or at any time thereafter if the employee remains in employment subsequent to the attainment of his retirement age.

11. Redundancy

The MEA would like to make clear that it disagrees with proposals already put forward to the MCESD, based on the idea that selection criteria for redundancies will include a reference to the sick-leave usage of an employee.

Besides the fact that termination due to redundancy signifies that it is a termination by the employer for a reason beyond the control of the employee (Proviso to Article 2 of L.N. 428 of 2002) the MEA believes that employees should not be penalized for exercising a right that they enjoy, in this case sick leave entitlement. In case of abuse of sick leave entitlement the employer may take different measures to curb abuse of such right.

The MEA agrees that the Last in First Out Principle should remain the determining factor in restructuring processes, including redundancies.

12. Notice Periods

As the law stands, the employee is not obliged to work the notice-period, but can simply resign with immediate effect and pay the employer half the salary which would have otherwise been paid for the period of notice not worked. That is the utmost “penalty” an employee may have to bear – but the consequences on the employer would be much more serious.

The MEA opines that employees should be more responsible and ethical towards their work and they should be obliged to work a minimum established period of the required notice period, exclusive of any sick leave, (i.e. perjodu lavorativ) in order to give a handover if requested by the employer. Payment of half the salary of the notice period alone is not an effective means for the employer who is left in the lurch.

It is common practice that employees leave the place of work, even if at the cost established by the law, and leave the employer to deal with hand-over single-handedly, at times with great difficulties to make heads and tails of the work-practices adopted by the employee who would have left employment without working the notice-period or part thereof. The law should allow for a more responsible handing over when an employee terminates employment.

To this effect, the MEA proposes that a minimum number of days for handing over shall, at management’s discretion, become compulsory upon the giving of notice of termination, and this under the sanction of a penalty to be established by law.

13. Maternity

With regards to employees who availed themselves of maternity leave and who did not satisfy the six month rule before terminating their employment with the company which paid for their maternity leave, the MEA is proposing that the employee will be obliged to refund to the company not merely the net wage but the gross amount since this is the actual cost incurred by the employer during the period of maternity leave. Hence Article 36 (20) should read as follows:

36 (20) Where a female employee does not resume work as provided in the preceding sub-article, or, after having so resumed work, abandons the service of her employer without good and sufficient cause within six months from the date of such resumption, she shall be liable, without prejudice to any other liability under this Act, to pay the employer a sum equivalent to the cost incurred by the employer during the maternity leave.

14. Overtime

Over-time is defined by the Act as any hours of work in excess of the normal hours of work.

The MEA is proposing that jobs will be classified as “exempt” from over-time or “non-exempt”. Non-exempt employees should be entitled to overtime-pay whilst exempt employees should not.

The MEA is proposing that some jobs are classified as exempt by definition. In practice, this is already being done, and in most administrative, technical, managerial and executive posts yearly salaries are inclusive of any over-time worked.

With few exceptions, the MEA is bringing up for discussion the following suggestions:

a) to be exempt an employee must:

perform administrative, technical, executive or managerial duties. This definition is being suggested in line with the proviso to Article 36 (1) of the EIRA which relates to the probationary period, and stipulates that such posts bring a one-year probationary period rather than the standard six months.

Furthermore Article 36 (5) (f) also establishes a mutually agreed longer notice period for so defined technical, administrative, executive or managerial posts.

Conclusion

MEA's proposal is a holistic one meaning that if parts of MEA's proposal are rejected then this might affect other parts in the document which might require further amendment.