

16th December 2016

Article

FROM PERSECUTED TO PERSECUTORS

A security camera reveals a man attacking an elderly lady, his third victim, hurting her and relieving her of money and jewellery. Making his third appearance in court, the criminal relapser, as is within his rights, declares himself innocent. It is up to the prosecution to prove his guilt beyond reasonable doubt. The criminal relapser is, rightly so, afforded all the guarantees for a due process of justice in a constitutionally compliant court of law presided by a competent judge.

An employer is accused by an employee of harassment at the place of work and discrimination on the basis of “gender identity”. He is summoned to appear before an empowered “Commissioner for Human Rights and Equality” who has the authority to investigate, prosecute, judge him and confirm his condemnation. The permissible punishments this Commissioner can mete out apparently could range from a Euro 5,000 fine to a period of imprisonment, or both. When facing the Commissioner, the employer cannot plead innocent but is “a priori” considered guilty, and is held as such until, and unless, he manages to prove his innocence, this beyond reasonable doubt. This concept is described as the shifting of the burden of proof and is based on an erroneous and dishonest principle. Now according to a proposed Bill this is the standard of justice to be meted out to Employers as laid out in the “Human Rights and Equality Commission Act 2015”, being proposed for Parliamentary approval, by the Minister for Social Dialogue, Consumer Affairs and Civil Liberties, the Hon. Helena Dalli. Our Courts of Criminal and Civil Jurisdiction do not recognize this concept of “the shifting of the burden of proof”. In Malta it is always up to a Prosecution to prove the guilt of an accused. A further proposal by this Minister is the “Equality Act 2015” which will go to create a very enabling legal framework for a Commissioner to arbitrarily take initiatives and strike out against presumed employer offenders, who will be considered guilty as they may get accused by possibly ill meaning employees, or by negative and aggressive NGO’s or by the same Commissioner ex officio.

The shifting of “the Burden of Proof” in the hands of an all-powerful Commissioner/Judge acting in isolation could prove lethal to an accused employer. Furthermore this Commissioner could turn out to be legally illiterate, since the proposed Bill does not specify the qualifications and experience required for the post.

Besides that of a Judge this Commissioner has a pro-active duty to promote specific causes, like, for example, the enhancement of migrant, feminist and gay rights. It is therefore very doubtful how far this Commissioner/judge can be objective and impartial when judging

an employer accused of presumably offending against his specific pet causes.

This proposed Act further expands on an already existing adequate listing of characteristics that an employer could be deemed to infringe. The possible infringements may occur on the basis of “belief, creed or religion”, “gender expression”, “gender identity”, “race, colour or ethnic origin”, “HIV status”, “sex orientation” and “sex characteristics” such as genitalia, hormones, “muscle mass”, “hair distribution”, “stature”, “breasts”, etc., etc. Furthermore the infringements against these characteristics, may occur through direct, indirect or intersectional discrimination. So much for complicating the life of employers with farfetched unclear definitions open to abusive, diverse and strange interpretations, that will extend a wide and insidious catchment net. Considering the way these Bills are worded, employers will be rendered extremely vulnerable to possible unscrupulous employees and negative officials of particular NGO's.

To add further to the peril of being made to submit to possibly a totally inadequate person, wielding dangerously unrestrained judicial power, the proposal of the Minister, unless she has had a rethink, incredibly, includes a provision whereby this Commissioner may, at his discretion, delegate any of his powers, including judicial authority, to any person holding any office under him!

The Minister must stop this madness and desist from promoting these unnecessary ill-conceived and ill-drafted Bills and allow employees, employers and Unions to continue abiding by the current laws on Equality and Discrimination at the place of work. Current laws are EU compliant, satisfy all EU requirements, and guarantee a safe legal framework for both parties, employees and employers. The framework includes a Commissioner and a Director of Employment and Industrial Relations with no judicial powers but very effective persuasive powers and as needed reporting to the Police leading to recourse to an Industrial Tribunal or other Court that ensures final redress of injustices.

On issues of Equality and Discrimination, it is presumptuous and not wise of the Minister to force Malta to foolishly attempt to go beyond EU standards and practices. Malta is erroneously being made to walk into dangerous uncharted territory with amateurishly thought out concepts. These concepts are being enshrined in legislation that seems to have been written according to standards prevalent in legal undergraduate papers. Very dangerous consequences will result from these ill-conceived anti employer Bills.

Excluding the Constitution, Clause 27(4), of the proposed “Equality Act”, towards the end declares that in any conflict which other laws may have with this Act it is this “Equality Act” that will prevail. This

pre-eminence feature, indicates an arrogant determination to impose one's will against all reasonable checks and balances.

So it will have to be the Constitution that should save us from what appears to be the shoddiest legislative proposals ever presented to Parliament for approval. It is surprising how lawyers are not reacting to this threat to employers and citizens. Is it possible that they are not perceiving a legislative proposal that will elevate a Commission and a Commissioner to a status identical to that of a Court of Law presided by a Judge? An improvised Court of Law without fair rules, expertise and impartiality to guarantee an equitable trial and judgement to a person who a priori will be assumed guilty!

The final appeal of the MEA is a request to Government to completely drop these two Bills. Employees, Employers and Unions are more than well served with the current legal structures. As they seem to prevail, it is time to stop invasive influences and power that extreme fringes of immigrant, Feminist and Gay lobbies appear to exercise within the Ministry of Social Dialogue and Industrial Relations. As it appears to have gone berserk this pressure is resulting in the likes of these pieces of legislation which are being imposed on the whole community through the pretence of tackling falsely alleged rampant discrimination. It is important to highlight that these Bills go beyond regulating the specific world of work. They are intended to, and will, regulate so many other areas. They will control and condition the behavior of citizens as they go about their daily life. It is therefore very worrying that the Bills, as proposed, in practice will infringe on basic human rights of citizens. The Minister for Civil Liberties is there to serve not just minority groups but also a majority citizen group which includes employers. We hope we are not here witnessing the proverbial blackmail and leveraging of voting power, with politicians succumbing to, and indulging in, an exercise of vote harvesting.

Finally it is most unfair and incorrect to give advantage to, and enhance the rights of, a particular group within society at the expense of another. The MEA is prepared for the eventual need to challenge partisan, arbitrary and erroneous diktats at constitutional level.

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