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LAWmail is designed to keep you up to date with current developments in Employment, HR practice and Occupational Health and Safety. It is written for those clients or contacts of Law At Work – Malta with and without formal legal or HR backgrounds.

We hope you find it useful.

New Regulations Issued under EIRA 2002 during 2007

This year has been an exceptionally busy year for Government as a number of regulations amending existing legislation have been published in order to perfect compliance with the various EU Directives and Regulations that have already been incorporated in our law.

Part Timer Benefits Amendment

I would suppose that the amendment that will affect Maltese employers the most would be the amendments to the **Part Time Regulations of 2002**. Effectively, the government was forced to eliminate the 20-hour threshold for part timer benefits and bonus payments, as these run counter to the principle that part timers should not be treated less favourably as found in the parent European Directive.

The legal notice issued on the 18th of May of this year (**LN 140**), which came into force on the **1st of July 2007**¹ eliminated the 20 hour threshold and left only the payment of social security contributions as the sole test for the trigger of pro rata benefits for the part timer under our law. In other words, prior to this amendment, an employee would be entitled to benefits if he/she would be working for 20 hours or more as an average² AND would be paying the social security contributions via his/her employer. Now, the only test would be if the employee is paying the social security contributions via his/her employer and no minimum amount of hours is necessary.

The report of the Times of Malta³, did in fact say that those persons who work as part timers for 8 hours a week would be entitled to pro rata benefits. This is not exactly the case as it is only those part timers who pay social security contributions via their employer who qualify for pro rata benefits. As Andrew Borg Cardona put it in his letter to the Times, “The threshold of eight hours to which your report refers does not exist in the law: one must surmise that this figure was referred to because it is this number of hours of employment per week that triggers off the obligation to pay Social Security contributions.”

Interestingly, the time for a part timer to lodge a complaint in the Industrial Tribunal claiming a breach of the regulations was also extended from 3 months to 4 in order to be in line with other local regulations.

¹ See Legal Notice 164 of 2007

² Incidentally, the calculation for the average remained the same: *i.e* 13 consecutive week periods starting from 1st Jan of the applicable calendar year.

³ <http://www.timesofmalta.com/core/article.php?id=267038&hilite=hours>

Replacement of the Fixed Term Contracts Regulations

On the 13th of March 2007, the Government published the new fixed term workers regulations that replaced those issued in 2002. The changes to the old regulations that came into effect on the 15th of June relate mainly to the 4-year period and the exceptions for that rule.

Although initial reports on this regulation stated that not much has changed from the old regulations, these new regulations do in fact hold a number of hidden secrets that help the employer solve many of the old queries. At the same time, these new regulations tackle the issue of ‘objective reasons’ for having a fixed term contract for more than 4 years in much more detail than the 2002 regulations.

I propose tackling these regulations by answering some hypothetical questions that an employer may be asking after having read the regulations:

Has the period of 4 years maximum term for a fixed term contract changed?

No, the period remains the same, so that unless proper objective reasons are given, the employer may only employ an employee on successive⁴ fixed term contracts for a maximum of 4 years. After that the contract transforms into an indefinite one.

So what has been clarified?

There have been many clarifications in these new regulations due to the problems that we all had with the 2002 regulations. For starters, the regulations do not apply to temporary, fixed term appointments given to a person who is already employed (usually at a lower grade) on an indefinite term contract with a particular employer. The latter situation is in fact typical with Public Corporations. In this sort of scenario therefore, the appointment can be for more than 4 years.

These regulations do specify that any period where the employee was on a fixed term contract prior to the 15th June 2007, counts towards determining the 4-year term.

Also, once the four years are up and no objective reason is given, the contract of employment is deemed to be indefinite **from the day following the expiry of the 4th year of the employee on a fixed term contract.** However the **first day of employment of the employee with his employer** is taken to be the applicable date in order to calculate the notice periods in case of redundancy and in order to determine seniority.

It is still doubtful what notice period is to apply to an employee when he or she comes to resign from employment. Must the employee count back from the 1st day of employment or must one only count the months from the date of conversion in order to compute the notice period? The law seems to indicate that the notice period should be calculated on the basis of all the years of employment, as the regulations specify that although the actual date of conversion is the one following the 4 year period, it also states that for ‘all other purposes’ one must take into consideration all the term of employment with the employer in question. Possibly the latter issue would have to be clarified by our courts.

If I want a fixed term contract for, say 5 years, whom can I give it to?

You can give it to all types of employees, IF you have ‘objective reasons’ for doing so.

So what does the term ‘objective reasons’ mean?

The EU Directive on fixed term workers is aimed at protecting the abuse of fixed term contracts with employees as such contracts might create a state of uncertainty as opposed to job security. The EU Directive therefore, created an escape route for employers who have ‘objective reasons’ for extending the period of a contract beyond the 4-year threshold.

⁴ Please note that fixed term contracts with a 6month break or less in between are considered to be successive.

The Malta regulations specify that the employer may retain an employee beyond 4 years on a fixed term contract if:

1. *That worker is a casual or temporary worker*
2. *The worker occupies a management position*
3. *The worker is employed for a specific task or until a specific event*
4. *The worker is employed on diplomatic missions or a specific appointment made to protect the interests of Malta or*
5. *The worker is employed as a person of trust to serve an office of a publicly elected body or employed as a member of a board of any statutory or public authority, committee, commission or corporation or of a public sector entity.*
6. *The worker is an advisor, consultant or serves in the public and private sector as a person of trust.*

It can easily be said that the exceptions to the general rule are quite comprehensive in nature, but we must mention that points no (2) and (6) above on management positions and persons of trust, may run counter to the European Directive in that no such exceptions are found in the text of the Directive for Malta to apply, so we might be expecting an amendment to the regulations in the near future.

If an employer wants to apply the ‘objective reason’ to a particular contract of employment, in order to extend it beyond the 5 years, the employer has to do one of the following:

1. **For new contracts:** The employer must write the reasons for extending the contract beyond 4 years in the contract of employment OR ELSE the employer must specify the conditions of employment once the contract is converted into an indefinite one. If the latter is not done, the conversion after 4 years is automatic and the conditions of the indefinite term contract will be the same as those on the fixed term contract.
2. **For current contracts with private employers and Public Service employees who have been more than 4 years on a fixed term contract with Government:** The employer has till the 15th December 2007 or until the expiry of the current fixed term contract to specify the objective reasons for maintaining that person beyond 4 years on a fixed term contract. If the latter is not done, the conversion after 4 years is automatic and the conditions of the indefinite term contract will be the same as those on the fixed term contract.

PLEASE NOTE THAT THE NEW RULES SHALL NOT AFFECT THE STATUS OF THOSE EMPLOYEES WHO HAVE ALREADY BEEN ‘CONVERTED’ INTO INDEFINITE TERM EMPLOYEES, PRIOR TO THE 15TH JUNE 2007.

Private Rules for the Public Service

Four legal notices⁵ were also issued this year with the aim of extending some of the regulations that were only applicable to the private sector until some time ago, to the public sector.

The 2007 Part Timers Regulations, the 2007 Fixed Term Worker Regulations and the Equal Treatment Regulations of 2004 were in fact made applicable to the Government and Public Service employees as from March 2007, together with the respective sections on these subjects in EIRA 2002.

These short but effective regulations are therefore now to be read together with the Management Code⁶ and the Collective Agreements applicable to the Public Service.

The regulations applying the 2007 Fixed Term Worker Regulations to Public Service employees were in fact issued twice as LN 52 was replaced by another one with the same name published on the 12th of

⁵ LN 46, 52, 54 and 157 of 2007

⁶ Previously known as the ESTA Code

June. In this 'new' version of the regulation, Government excluded the provisions of the 2007 Fixed Term Worker Regulations and of EIRA relating to the 12 working day rule. This means that the rule that a contract of employment of fixed term is automatically converted into one of indefinite term, if the employee remains in employment following the expiry of the fixed term contract without a new contract being presented to him, does NOT apply to the Public Service employees.

Amendment to the Equal Treatment Regulations of 2004

Amongst all these regulations, the Equal Treatment Regulations of 2004 were also amended. The amendments are mainly aimed to amend the rules on disability discrimination and also to improve the regulations on enforcement and access to the Industrial Tribunal under the 2004 regulations.

The amendments are particularly important in relation to the burden of proof as it is now clear that the person alleging discrimination has to establish that there are facts which can lead to discrimination prior to the employer defending his claim.

Please don't hesitate to contact us if you would like further information on the above issues, or any other employment, HR or health and safety related matter⁷.

Our readers are also reminded that past issues of our Law Mail update, recent case summaries and other interesting information can be found on our website: www.lawatwork.com.mt

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⁷ *Disclaimer: This newsletter is not intended to impart advice; readers are advised to seek confirmation of statements made herein before acting upon them; specialist advice should always be sought on specific issues.*