

EMPLOYMENT LAW - PERSONS WITH DISABILITY IN EM- PLOYMENT

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This article will provide a general understanding of constructive dismissal in terms of Maltese Employment Law. The author shall delve into the development of the notion, its applicability within the industry, along with an understanding of its interpretation by the Courts.

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This article will shed light on what should be considered as the legal obligations imposed on the employer in respect of persons with disability in terms of Maltese employment law, specifically the Employment and Industrial Relations Act.¹ The author shall be delving into the salient provisions of the law,² its applicability within the industry, along with an understanding of its interpretation given by jurists.

The word disability is generally defined as ‘a physical or mental condition that limits a person’s movements, senses, or activities’,³ or ‘an illness, injury or condition that makes it difficult for someone to do things that other people do’⁴

Selwyn opines that the definition of disabled person is a person who has ‘a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities’⁵ hence it implies that there must be some form of illness or condition with limits the individual, of whatever gender, from executing daily tasks. Taylor opines that the most problematic hurdle which a person with disability is faced with is to be able to show that [s]he falls within such definition.⁶ Most disabled individuals’ physical or mental impairment is not visible which can lead to lack of understanding of what the disability is,⁷ since the stereotype definition or image is an individual bound to a wheel-chair.⁸

1 Chapter 452 of the Laws of Malta.

2 The author will delve into the understanding and applicability of Persons with disability (employment) Act Chapter 210, Regulation and Appeal of Persons with Disability Regulations SL 210.01, Standard Percentage of Employment of Persons with Disability Order SL 210.02, Designated Employment of Persons with Disability Order SL 210.03 and Part-Time Employment of Persons with Disability Regulations SL 210.04 of the Laws of Malta.

3 Thompson. D, ‘Oxford Dictionary’ Oxford University Press, 2000, pg 154

4 Cambridge Dictionary, Cambridge, UK ; New York : Cambridge University Press, 2007.

5 Selwyn. N, ‘Law of Employment’, 14th Edition, Oxford University Press, 2006 pg 151.

6 Taylor. S, Emir. A, ‘Employment Law: An Introduction’ 3rd Edition, Oxford ; New York ; Auckland : Oxford University Press, cop. 2012, pg 267.

7 Mac Donald. L, ‘Sensitive Issues in Employment’ 1999 Blackhall Publishing Ireland 89.

8 Goodwin v Patent Office. [1999] ICR 302 pg 309 *‘In order to constitute an adverse effect it is not the doing of the acts which is the focus of attention but rather the ability to do (or not to do) the acts. Experience shows that disabled people often adjust their lives and circumstances to enable them to cope for themselves. Thus, a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be “Yes;” yet their ability to lead a “normal” life had obviously been im-*

As to the Maltese legal position the Constitution of Malta provides for the right to work,⁹ such right is to be protected by the State,¹⁰ hence over the past years the legislator pursued the implementation of legislation resulting in the Persons with Disability (Employment) Act.¹¹ The aim was to introduce a framework to provide the industry with obligations in respect of persons with disability in employment.

The Employment and Industrial Relations Act¹² does not provide a clear definition of who should be considered as a “*person with disability*” however it sets out the principle that any discriminatory treatment against persons with disability is prohibited.¹³ The Equal Opportunities (Persons with Disability) Act¹⁴ prevents any form of discrimination against a person with disability in regard to:

- (i) procedures relative to applications for employment;
- (ii) the hiring, promotion, or dismissal of employees;
- (iii) employees’ compensation;

paired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be “No”. Those might be regarded as day-to-day activities contemplated by the legislation and that person’s ability to carry them out would clearly be regarded as adversely affected [omissis] Furthermore, disabled persons are likely, habitually, to play down the effect that their disabilities have on their daily lives. If asked whether they are able to cope at home, the answer may well be “Yes”, even though, on analysis, many of the ordinary day-to-day tasks were done with great difficulty due to the person’s impaired ability to carry them out. Mr Blyghton observed that it was partly for this reason that the Green Card scheme did not work as it had been intended. The focus of attention required by the Act is on the things that the applicant either cannot do or can only do with difficulty, rather than on the things that the person can do [omissis]’

9 Constitution of Malta, Chapter II, Declaration of Principles, Article 7 ‘The State recognises the right of all citizens to work and shall promote such conditions as will make this right effective’.

10 *ibid* (n6) Article 12(1) *The State shall protect work.*

11 Chapter 210 of the Laws of Malta ,Act II of 1969.

12 *Ibid* N 2

13 Employment and Industrial Relations Act, (n 2) Article 2, ‘*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, colour, disability, religious conviction, political opinion or membership in a trade union or in an employers’ association’.

14 Chapter 413 of the Laws of Malta, Article 7 (1).

- (iv) job training; and
- (v) any other terms, conditions, and privileges related to the employment of a persons with disability.

The Persons with Disability Employment Act provides that a ‘person with disability’ is a person over compulsory school age, who, by reason of injury, disease, congenital deformity, or other physical or mental incapacity, is substantially handicapped in obtaining or keeping employment, or in undertaking work on his own account, of a kind which apart from that injury, disease, deformity, or incapacity would be suited to his age, experience and qualifications; and the word ‘disability’, in relation to any person, shall be construed accordingly.¹⁵

The Act¹⁶ provides that Employers (being individual or body corporate) having in their employment more than twenty (20) individuals duly registered with the Corporation¹⁷ as being their employees, out of which one is to exclude ‘any employees who are related to the employer by consanguinity or affinity up to the third degree’,¹⁸ are obliged to have and maintain a two per cent (2%) quota of persons with a disability.¹⁹

The legislator provides an indication within the marginal note to article 15 of the Act, as to the level of importance Parliament wanted to transmit, with the aim of having all persons with disability included within the country’s work force. In using the words ‘compulsory employment of registered person’²⁰ Parliament wanted to impose a direct obligation on all employers, so much so, that if such obligation is not fulfilled by the employer compulsory fines are directly applicable.²¹

15 *ibid* (n 12) Article 2.

16 Persons with Disability (Employment) Act (n 12)

17 *ibid* (n 16) Article 2 ‘means Jobsplus [ex Employment and Training Corporation] established by article 5 of the Employment and Training Services Act’

18 *ibid* (n 16) Article 15 (8) ‘This article applies to any person who for the time being has, or would in accordance with his normal practice have, in his employment not less than twenty persons: Provided that, in the computation of the number of persons employed, no account shall be taken of any employees who are related to the employer by consanguinity or affinity up to the third degree.

19 Standard Percentage of Employment of Persons with Disability Order SL 210.02 of the Laws of Malta, Article 2 ‘The standard percentage for the purpose of the Persons with Disability (Employment) Act, shall be two per cent’.

20 *ibid* (n 16) Persons with disability (employment) Act Article 15.

21 *ibid* (n 16) Persons with disability (employment) Act Article 16 (5A) ‘A person who fails to respect the quota referred to in sub- article (2) and determined in accordance with sub-article (5) shall be asked by the Corporation to make an annual contribution of two thousand and four

The Corporation is entrusted with the enforcement of the quota is provided in Article 16 (5A).²² This article was introduced by virtue of Act XXII of 2015 which imposed a contribution of two thousand and four hundred euro (€2400) for every person with disability who should have been employed by the employer in respect to the aforementioned quota, nevertheless the legislator provided a capping of ten thousand euro (€10,000) per employer for every person that should have been employed.

Notwithstanding the fines above-mentioned, data shows that as at December 2016, 2,764 individuals with disability were in employment, this when compared to 2,466 registered in December 2015. These statistics show that there was an increase of 298 individuals with disability in employment.²³

In total around 1,025 companies register in Malta employing more than twenty (20) employees, out of which around 450 are in conformity with the law. Nevertheless some 575 employers remain in breach of the law in regard to the two per cent (2%) quota.²⁴ Hence it can be considered that companies (employers) opted to choose not to engage in employment a person with disability, conversely opting to pay the fine of two thousand and four hundred euro (€2400).²⁵ It has been reported that this exercise, carried out by the Corporation, is to generate circa €1.5 million in fines.²⁶

In summary, the author is of the opinion that the current systems leave much to be desired, notwithstanding that the legislator tried to create some form of positive discrimination with the aim to balance out the hurdles posed on a person with disability when applying for employment.

hundred euro (€2400) for every person with disability that should be in his employment, to a maximum of ten thousand euro (€10,000) for any one person who so fails to respect the quota’.

22 Standard Percentage of Employment of Persons with Disability Order (n21).

23 National Statistics Office (NSO) Labour Force Survey - Labour Market Statistics Directorate C - Social Statistics and Information Society <https://nso.gov.mt/en/nso/Sources_and_Methods/Unit_C2/Labour_Market_Statistics/Pages/Labour-Force-Survey.aspx> Accessed 06/06/2017 at 21.51.

24 Dalli M. ‘*Employers face €14 million in penalties over disability quotas*’ (19 January 2017) <http://www.maltatoday.com.mt/news/national/73475/employers_face_14_million_in_penalties_over_disability_quotas_#WThRFP1dDIU> accessed 07/06/2017 at 21.33

25 The funds collected will be administered by the Corporation, and used to set up and administer the Lino Spiteri Foundation. This foundation will use the funds to train and assist disabled persons to find Employment.

26 *ibid* (n 25).