

Equality, Diversity and Discrimination

Dr Pamela Dingli

Dr Clyde Bonnici

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Agenda

1. Equality as a Human Right;
2. Anti-Discrimination under Various Laws;
3. Anti-Discrimination under EIRA;
4. Equal Pay for Equal Work.

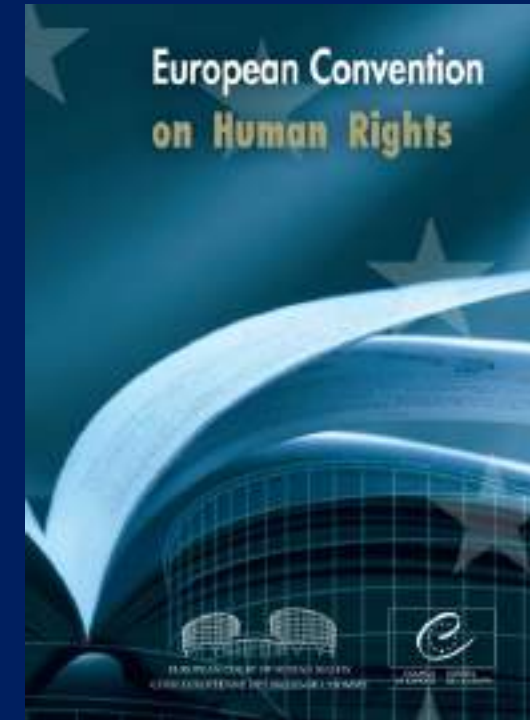




Equality as a Human Right

European Convention on Human Rights

- Most important Human Rights instrument in Europe;
- An instrument of the Council of Europe, NOT the EU;
- Enforceable in the national courts: made part of Maltese Law by means of the European Convention Act (Cap. 319 of the Laws of Malta);
- Enforced by the local Courts – victim has a final right of appeal before the European Court of Human Rights in Strasbourg.



European Convention on Human Rights

- Article 14 Prohibition of discrimination:
- The enjoyment of **the rights and freedoms set forth in this Convention** shall be secured without discrimination on any ground such as:
 1. sex,
 2. race,
 3. colour,
 4. language,
 5. religion,
 6. political or other opinion,
 7. national or social origin,
 8. association with a national minority,
 9. property,
 10. birth
 11. or other status.
- Article 1 of Protocol No. 12 – General prohibition of discrimination
- 1. The enjoyment of **any right set forth by law** shall be secured without discrimination on any ground such as
 1. sex,
 2. race,
 3. colour,
 4. language,
 5. religion,
 6. political or other opinion,
 7. national or social origin,
 8. association with a national minority,
 9. property,
 10. birth
 11. or other status.
- 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

European Convention on Human Rights

- Article 14 prohibits discrimination in “The enjoyment of the rights and freedoms set forth in the Convention”: has no independent existence, examined in conjunction with another right of the Convention.
- This does not mean that there has to be a violation of another right for there to be a finding of discrimination i.e. a breach of Article 14
- the notions of discrimination prohibited by both Article 14 of the Convention and Article 1 of Protocol No. 12 are to be interpreted in the same manner.
- Article 1 of Protocol 12 extends the scope of protection against discrimination to “any right set forth by law”.
- Introduces a general prohibition of discrimination and a “free-standing right” not to be discriminated against.
- According to the Explanatory Report the scope of protection of that Article concerns four categories of cases, in particular where a person is discriminated against:
 - in the enjoyment of any right specifically granted under **national law**;
 - in the enjoyment of a right which may be inferred **from a clear obligation of a public authority under national law**, that is, where a public authority is under an obligation under national law to behave in a particular manner;
 - by a public authority in the **exercise of discretionary power** (for example, granting certain subsidies);
 - by **any other act or omission by a public authority** (for example, the behaviour of law enforcement officers when controlling a riot).”

European Convention on Human Rights

- When deciding cases of discrimination, the Court will apply the following **test**:
 1. Has there been a **difference in treatment of persons in analogous or relevantly similar situations** – or a **failure to treat differently persons in relevantly different situations**?
 2. If so, is such difference – or absence of difference – **objectively justified**? In particular,
 - a. Does it **pursue a legitimate aim**?
 - b. Are the **means employed reasonably proportionate to the aim** pursued?



European Convention on Human Rights

- **Eweida and Others v. the United Kingdom (ECtHR) (2013):**
 - A practicing Christian nurse, Ms Chaplin, worked on a geriatric ward which had a uniform policy that provided that 'no necklaces will be worn to reduce the risk of injury when handling patients'. The applicant was asked to remove the cross and chain, and when she refused, she was moved to a non-nursing position. She complained of religious discrimination.
 - The Court held that the reason for asking her to remove the cross, namely the protection of health and safety on a hospital ward, was inherently of a greater magnitude. Moreover, in this field, the domestic authorities were better placed at making decisions about clinical safety than a court. Thus, the Court could not conclude that the measures complained of were disproportionate.



European Convention on Human Rights

- **Emel Boyraz v. Turkey (ECtHR) (2014):**

- Applicant, a security officer, was terminated because following a Court judgement, such posts were to be reserved to military men.
- The Government argued that the different treatment was legitimate: security officers had to work at nights in rural areas, and they had to use firearms and physical force in case of an attack on the premises being guarded. The authorities considered that women were unable to face those risks;
- The Court held that this reasoning could not in itself justify the difference in treatment between men and women: applicant was dismissed not because she failed to fulfil her duties, but merely because of her sex.
- The Court found a violation of Article 14 in conjunction with Article 8 (right to respect for private life)



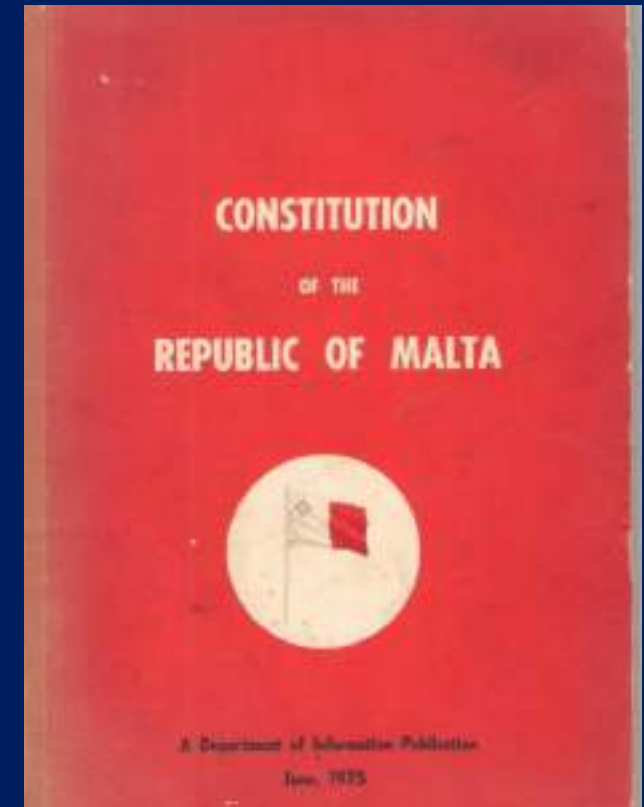
European Convention on Human Rights

- The Convention may also imply “positive obligations” on States to prevent, stop or punish discrimination.
- **Thlimmenos v. Greece (ECtHR) (2000):**
 - Applicant was refused appointment as a chartered accountant, because individuals convicted of a serious crime could not be so appointed. Applicant had been convicted of insubordination for refusing to wear his military uniform during compulsory service. He was a Jehovah’s Witness, a pacifist group, and he had so refused because of his belief.
 - The Court held that the State failed to introduce appropriate exceptions to the rule barring persons convicted of a serious crime from the profession of chartered accountants – the law should have distinguished among those convicted of a serious crime, and those convicted of a serious crime in the exercise of their beliefs. The former were to be disqualified, and the latter were to be exempted.
 - The State failed to treat differently persons whose situations are significantly different – this also constituted discrimination.



Maltese Constitution

- Chapter II – Declaration of Principles:
- Article 14:
 - *“The State shall promote the equal right of men and women to enjoy all economic, social, cultural, civil and political rights and for this purpose shall take appropriate measures to **eliminate all forms of discrimination between the sexes** by any person, organisation or enterprise; the State shall in particular aim at ensuring that women workers enjoy equal rights and the same wages for the same work as men.”*



Maltese Constitution

- Article 45:
 - (1) Subject to the provisions of sub-articles (4), (5) and (7) of this article, **no law** shall make any provision that is discriminatory either of itself or in its effect.
 - (2) Subject to the provisions of sub-articles (6), (7) and (8) of this article, no person shall be treated in a discriminatory manner by **any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.**
 - (3) In this article, the expression "discriminatory" means **affording different treatment to different persons** attributable wholly or mainly to their respective descriptions by:
 - race,
 - place of origin,
 - political opinions,
 - colour,
 - creed,
 - sex, sexual orientation or
 - gender identitywhereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.



Maltese Constitution

- Differences between the Convention and the Constitution:
 - Article 45 contains an **exhaustive** list of prohibited grounds → the lists of the Convention are **indicative** (includes grounds not envisaged in the Constitution, such as language, association with a national minority, property, birth);
 - The prohibition of discrimination in the Convention is limited to '*the enjoyment of rights and freedoms set forth in the Convention / of any right set forth by law*' → the Constitution has no such limitation;



European Convention on Human Rights

- **Charles Spiteri vs Minister of Public Building and Works et (CC) (5 October 1988):**
 - Concession at the time granted to Gozitan public officers working in Malta to leave earlier than other employees on Friday to catch the ferry;
 - Plaintiff was a Government employee, President of a Gozitan Union, and former Opposition election candidate – in the context of an industrial dispute with the Government, he was the only person denied this concession;
 - The Court found discrimination – plaintiff's political opinions and his trade union activities led to the discrimination in his regard.



European Convention on Human Rights

- **Architect Vincent Galea vs Chairman Public Service Commission et al (CC) (20.02.1987):**
 - Plaintiff was employed with the Government. Disciplinary proceedings were taken against him for publishing articles in partisan newspapers;
 - The Court found that there were other public officials who, like the plaintiff, published partisan articles without permission, but no disciplinary proceedings were taken against them;
 - Thus, the Court found that the plaintiff was discriminated against.



Maltese Constitution

- General Principles established by the Maltese Constitutional Court:
 1. The first element which the Court will try to establish is to ensure that one is comparing like with like – applicant must prove he was treated unjustly in comparison with other persons in analogous situation;
 2. For discrimination to be proven, there is no need to prove intention to discriminate, if from the facts presented, there is no other plausible explanation to the difference in treatment except a prohibited ground of discrimination;
 3. Not every difference in treatment is prohibited.



Maltese Constitution

- Article 45 (contd.) – exceptions not be considered discriminatory:
 - (4) any law so far as it makes provision:
 - For restrictions / advantages which are reasonably justifiable in a **democratic society** (does not apply to difference in treatment attributable to description by **sex**); or
 - For authorising the taking during a period of **public emergency** of measures that are reasonably justifiable for dealing with the emergency.
 - (5) any law to the extent that it makes provision:
 - With respect to qualifications for service or conditions of service in any **disciplined force**;
 - With respect to qualifications (not related to sex or gender identity) for service as a **public officer** or for service of a local government authority or a public corporation / agency.
 - (9) A requirement that the **Roman Catholic Apostolic Religion** shall be taught by a person professing that religion shall not be held to be discriminatory.



Maltese Constitution

- There is no prescription period for Human Rights actions;
- Remedies for finding of discrimination:
 - The Court has very vast remedial powers: it may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, the protection against discrimination;
 - In **Charles Spiteri vs Minister of Public Building and Works et (CC) (5 October 1988)**, the Court ordered the Government to rectify the discrimination and start giving the plaintiff the same concession as other employees i.e. to leave early from work to catch the Gozo Ferry;



Maltese Constitution

- The Court can also award damages, both financial and moral;
- In **Architect Vincent Galea vs Chairman Public Service Commission et (CC) (20.02.1987)**, the Court ordered the re-admission of the plaintiff to the workplace, and the wages and bonuses (with interests) that were deducted from his pay after being found guilty of publishing political articles without authorization.



Maltese Constitution

- Positive discrimination is allowed:
 - The Constitution expressly allows positive discrimination in matters of gender issues that is to say administrative and legislative measures may be introduced to favour a disadvantaged member of a particular sex.
- (11) Nothing in the provisions of article 45 shall apply to any law or anything done under the authority of a law, or to any procedure or arrangement, in so far as such law, thing done, procedure or arrangement provides for the taking of special measures **aimed at accelerating de facto equality between men and women**, and in so far only as such measures, taking into account the social fabric of Malta, are shown to be **reasonably justifiable in a democratic society**.



Human Rights vs Private Persons

- Can private persons be found responsible for human rights violations?
- **Raymond Zammit vs General Workers' Union (FH) (29.10.2007):**
 - Defendant trade union brought disciplinary proceedings against the plaintiff, which plaintiff alleged breached his right to a fair hearing;
 - The Court held that an individual was entitled to protection against human rights violations even when committed by a private person, provided he first sought protection under ordinary law (i.e. under the EIRA and its regulations).
- **Nicholas Cutajar vs Mark Portelli pro et noe (FH) (21.2.2013):**
 - Human rights are given effect against private entities indirectly, through ordinary law.

A blue-tinted photograph featuring a classic balance scale as the central element. The scale is positioned on top of a stack of several thick, old books. The books are open, showing their pages. The background is a soft, out-of-focus light blue. The overall composition is centered and balanced, with the text overlaid in the middle.

Anti- Discrimination under Various Laws

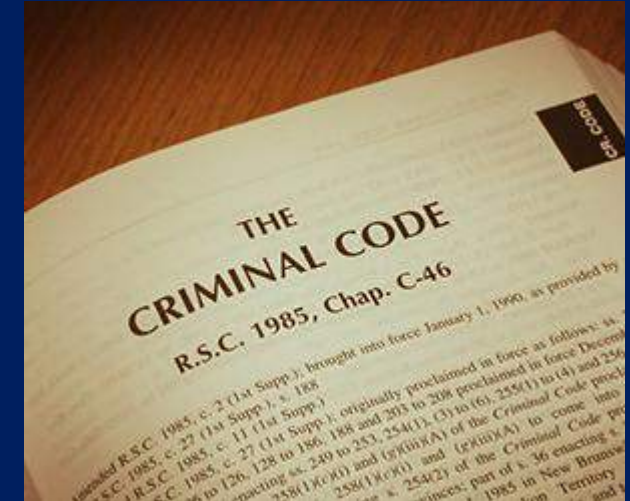
Criminal Code

139A. Any public officer or servant or any other person acting in an official capacity who intentionally inflicts on a person severe pain or suffering, whether physical or mental -

(d) for any reason based on discrimination of any kind, shall, on conviction, be liable to imprisonment for a term from 5 to 9 years:

Provided that no offence is committed where pain or suffering arises only from, or is inherent in or incidental to, lawful sanctions or measures.

- 3 requirements:
 1. Infliction of severe pain or suffering (physical or mental);
 2. Intentional, for any reason based on discrimination;
 3. Committed by a public officer, except in the imposition of lawful sanctions or measures.



Equality for Men and Women Act

- Article 4: Prohibits employers from discriminating:
 - In arrangements made to determine who should be offered employment;
 - In terms and conditions on which the employment is offered; or
 - In the determination of who should be dismissed;
- Defines discrimination as including the treatment of a person in a less favourable manner than another person is, has been or would be treated on these grounds:
 1. sex;
 2. family responsibilities;
 3. sexual orientation;
 4. age;
 5. religion or belief,
 6. racial or ethnic origin, or
 7. gender identity, gender expression or sex characteristics'



Equality for Men and Women Act

- Examples where employers shall be deemed to have discriminated – if they:
 - Arrange working conditions (i.e. promotions, distribution of tasks, offer of training opportunities, etc) in a manner that employees are assigned a less favourable status than others on the basis of sex or because of family responsibilities;
 - Alter working conditions to the detriment of employees who invoked rights accorded to them under this Act;
 - Neglect their obligation to suppress sexual harassment;
 - Give less favourable treatment to men and women on the basis of one of the protected ground;
 - Treat a woman less favourably for reasons of actual or potential pregnancy or childbirth;
 - Put persons at a particular disadvantage compared with persons of the other sex or of the same sex or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, gender expression or sex characteristics unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.

Equality for Men and Women Act

- Examples which shall not be considered as discrimination:
 - Special protection to women during childbirth or pregnancy;
 - Measures of positive action for the achievement of substantive equality for men and women;
 - Less favourable treatment based on sex in relation to access of employment where by reason of the particular occupational activities concerned, or the context in which they are carried out, such characteristic constitutes a genuine occupational requirement and where such treatment remains within the limits of what is appropriate and necessary in the circumstances (i.e. proportionate).



Equality for Men and Women Act

- Article 10 prohibits:
 - advertisements of vacancies which discriminate between job seekers, or
 - requesting from job seekers information concerning their private life or family plans:

unless employers prove that the work advertised can only be performed by a person of a specific sex.

- Advertising includes dissemination of information about the vacancy by word of mouth from person to person.



Equality for Men and Women Act

- Act establishes a National Commission for the Promotion of Equality for Men and Women, chaired by a Commissioner for the Promotion of Equality;
- Commission's functions include:
 - Identifying, establishing and updating all policies related to issues of equality;
 - Investigating to determine whether the provisions of this Act are being complied with;
 - Providing assistance to persons suffering from discrimination in enforcing their rights under this Act.
- If upon an investigation the Commissioner finds the commission of a criminal offence, he shall report the matter to the Commissioner of Police;
- If the wrongdoing does not constitute an offence, the Commissioner mediates between the complainant and the person against whom the complaint is directed. If the terms negotiated during the mediation are not abided by, the Commissioner may request the Court to order such person to undertake all necessary remedial action.
- In the case of any alleged discrimination, the Commission may refer the matter to the competent court or to the Industrial Tribunal for redress. The Commission may join in and become a party to the suit.

Equality for Men and Women Act

- Article 5: Employers shall, upon the request of any person claiming to have been sexually harassed or discriminated against, or upon a request made by the Commissioner, provide within ten working days a **report** on the allegation made or the procedures used by the employers in the matter alleged to constitute such sexual harassment or discrimination. This is done at the expense of the person requesting the report, unless it is found that such harassment or discrimination took place, in which case the perpetrator shall be responsible.
- Article 19: a person who alleges that any other person has committed in his or her regard any act which under any of the provisions of this Act is unlawful, shall have a **right of action** before the competent court of civil jurisdiction requesting the court to order the defendant:
 - to desist from such unlawful acts and,
 - where applicable, to order the payment of compensation for such damage suffered through such unlawful act



Employment Law



Anti-
Discrimination
under EIRA



EIRA

- Article 26:
 - It shall not be lawful for any person -
 - (a) when advertising / offering / selecting applicants for employment, to subject any applicants for employment to **discriminatory treatment**;
 - (b) in regard to employees already in the employment of the employer, to subject any such employees to **discriminatory treatment**, in regard to conditions of employment (including promotions or engagement in a different class of employment or dismissal.
 - Prohibits discrimination before and during engagement.
- Definition of Discriminatory Treatment:
 - any distinction, exclusion or restriction which is **not justifiable** in a democratic society including discrimination made on the basis of
 1. marital status,
 2. pregnancy or potential pregnancy,
 3. sex,
 4. colour,
 5. disability,
 6. religious conviction,
 7. political opinion or
 8. membership in a trade union
 9. or in employers' association:

EIRA

- Article 26:
 - Discriminatory treatment shall include:
 - a) the engaging or selection of a person who is less qualified than a person of the opposite sex, unless the employer can prove that the action was based on acceptable grounds related to the nature of the work or on grounds related to previous work performance and experience;
 - b) actions, terms of payment or employment conditions that are **less favourable** than those applied to an employee in the same work or work of equal value, on the basis of discriminatory treatment;
 - c) actions whereby the employer knowingly manages the work, distributes tasks or otherwise arranges the working conditions so that an employee is assigned a clearly less favourable status than others on the basis of discriminatory treatment.

EIRA

- Exceptions:
 - the rights and obligations prescribed by the Equal Opportunities (Persons with Disability) Act;
 - any preference or exclusion which is reasonably justified taking into account the nature of the vacancy to be filled or the employment offered;
 - where a required characteristic constitutes a genuine and determining occupational requirement;
 - Where the requirements are established by applicable laws or regulations.



Case Law: Important Principles

- **William Dingli vs Gozo Channel Operations Limited (IT)**
(8.2.2023):

- Plaintiff alleged that the fact that his employer issued an internal call for the role of PFSO, when he already occupied said role, was discriminatory;
- Definition of discriminatory treatment in EIRA includes ‘*any distinction, exclusion or restriction which is not justifiable in a democratic society*’ – does not need to be based on any protected characteristic;
- Nevertheless, there must necessarily be a comparator with whom the employer acted differently than it did with the plaintiff;
- Since there were no other individuals with whom a clear and unequivocal comparison could be made, the Tribunal could not find discrimination.



Case Law: Important Principles

- **Joshua Bugeja vs MCAST (CA) (15.5.2024):**
 - Plaintiff, a Senior Lecturer at MCAST, complained that other Senior Lecturers in a different institute benefitted from an annual bonus, when he did not. He alleged that this was discriminatory;
 - The Court found that the allowance is only given to lecturers that are following a certification path in the industry;
 - Plaintiff did not satisfy this requirement: his certificates were long acquired, and he was not acquiring newer ones;
 - Hence, the Court found no discriminatory treatment;
 - Importance of comparing like-with-like.



Case Law: Important Principles

- **Paul Borg vs APS Bank Ltd (CA) (26.3.2010):**
 - Plaintiff, a Senior Manager with the defendant bank, complained that he was being discriminated against, because unlike other managers, he was not being given managerial tasks;
 - The Tribunal found that for a short period of time, plaintiff was not assigned any work – this was discriminatory when compared to other managers.
 - The Court of Appeal confirmed this: not assigning work to an employee is not only degrading and humiliating, but also discriminatory and a violation of the duty of good faith.



Case Law: Important Principles

- **Alessandro Francesco Cutuli vs Asfaltar Construction Limited (CA) (12.6.2024):**
 - Plaintiff, an Italian national, was involved in an altercation with a Maltese employee. He was subsequently dismissed on the basis of 'redundancy'. The Maltese employee was retained;
 - The Industrial Tribunal held that 'redundancy' was a mere excuse, and the fact that the company did not act in the same manner with the Maltese employee as it did with the plaintiff was discriminatory;
 - The dismissal was therefore unlawful.



Remedies

- Article 30 EIRA:
 - A person who alleges discrimination may within 4 months lodge a complaint to the Industrial Tribunal;
 - The Industrial Tribunal, if satisfied that the complaint is justified, may take such measures as it may deem fit, including:
 - The cancellation of any contract of service or clause therein or in a collective agreement;
 - Order payment of compensation for loss and damage sustained as a consequence of the breach.
- **Paul Borg vs APS Bank Ltd (CA) (26.3.2010):** compensation of 1,500Eur;
- **Alessandro Francesco Cutuli vs Asfaltar Construction Limited (CA) (12.6.2024):** compensation of 3,000Eur



Various Subsidiary Legislation under EIRA

- Part-time Employees Regulations (S.L. 452.79):
 - Duty of Employer to ensure Part-Time Employee not treated less favourably than a comparable whole-time employee.
- Telework National Standard Order (S.L. 452.104):
 - Tele-workers shall enjoy the same rights as comparable employees at the employer's premises.
- Work-Life Balance for Parents and Carers Regulations (S.L. 452.125):
 - Discrimination against workers for availing of leave, being paternity, parental, carers' leave, time off from work on grounds of force majeure or any flexible arrangement, shall be prohibited.

Equal Treatment in Employment Regulations

- Give effect to EU Directives and apply to both the public and the private sector.
- Discrimination made to include particular notions:
 - Harassment and sexual harassment, as well as less favourable treatment for rejecting such conduct;
 - Less favourable treatment of women related to pregnancy or maternity leave;
 - Less favourable treatment of a person who underwent gender reassignment;
 - Failing to suppress harassment.



Equal Treatment in Employment Regulations

- Exceptions:
 - Where differences are objectively and reasonably justified by a legitimate aim;
 - Differences of treatment based on nationality when it comes to entry into and residence of TCN and stateless persons in Malta;
 - Discriminatory treatment in the AFM re disability and age;
 - Laws necessary for public security, for maintaining public order, for preventing crime, for protecting health, and for protecting the rights and freedoms of others;
 - Anti-discrimination rules in collective agreements.



Equal Treatment in Employment Regulations

- Notable provisions:
 - Where an employer has an ethos based on religion, it is legitimate for said employer to require that its work is carried out by a person of that particular religion (ex. Church schools);
 - Employers shall provide reasonable accommodation for persons with disability, by taking measures to enable such persons to access, participate, and advance in employment, unless such measures imposed a disproportionate burden on the employer;



Equal Treatment in Employment Regulations

- Notable provisions (contd.):
 - DIER appointed as the equality body in respect of issues relating to race or ethnic origin falling under these regulations;
 - Obligation not to discriminate extended to trade unions, employers' organisations, and employment agencies;
 - Right of victim / director to send notification of alleged discrimination to allegedly discriminating entity. The entity shall submit a written reply within 10 working days, giving its version of events and an explanation of any relevant procedure adopted to prevent discrimination. From failure to reply, unlawful act is inferred.

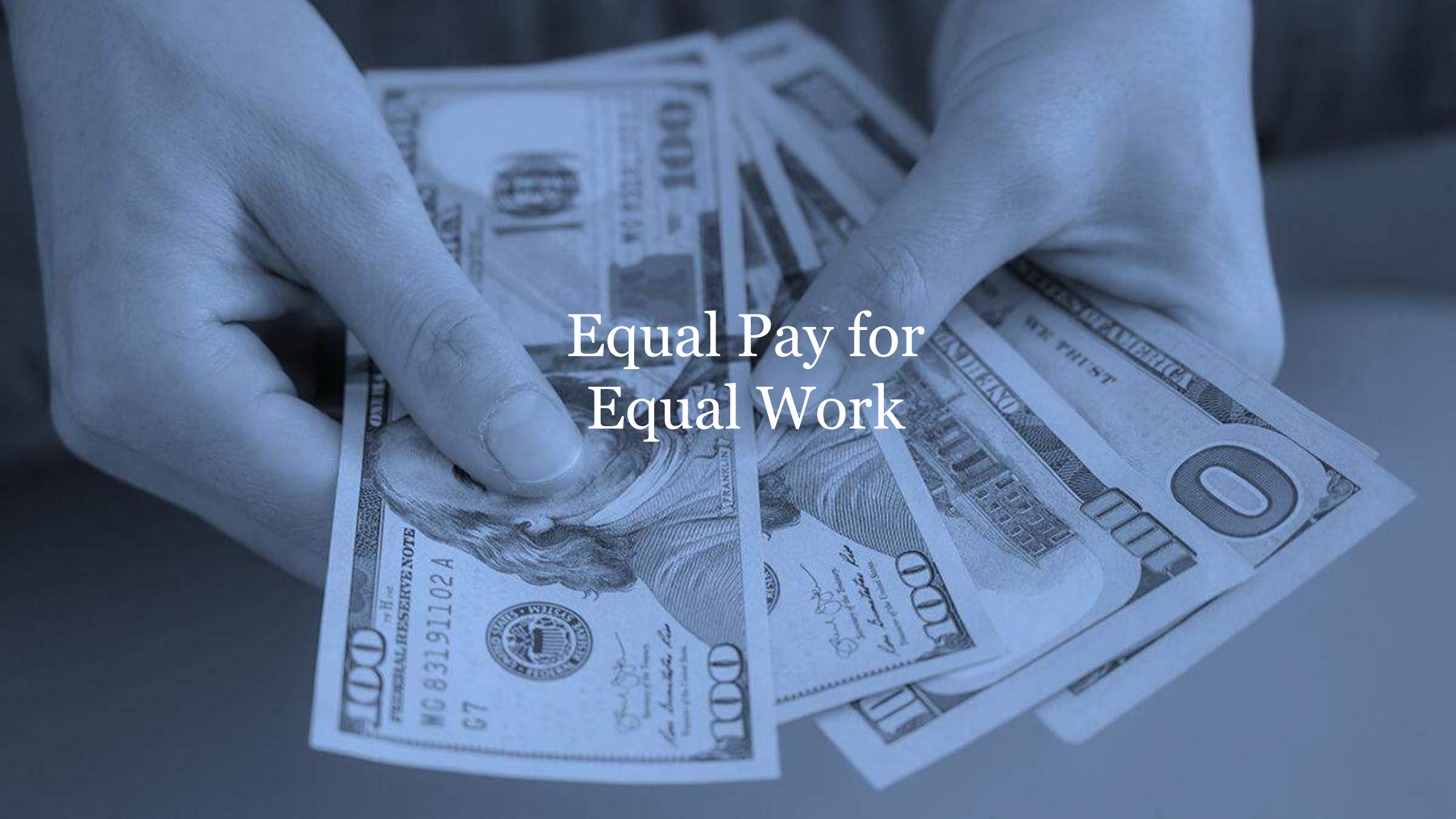


Equal Treatment in Employment Regulations

- Notable provisions (contd.):
 - Provisions in individual or collective contracts or internal rules which are contrary to the principle of equal treatment are null and void'
 - Breach of regulations liable to fine not exceeding 2,329.37Eur or to imprisonment for period not exceeding 6 months, or both;
 - Where the discriminatory treatment is committed by:
 - The employer – Industrial Tribunal competent to hear claim;
 - Any other person – court is competent, can order defendant to desist and to pay compensation for damage suffered

To be filed within 4 months.



A close-up photograph of two hands holding several US dollar bills. The bills are fanned out, showing various denominations including \$100 and \$10. The image has a blue tint. The text "Equal Pay for Equal Work" is overlaid in the center in a white serif font.

Equal Pay for
Equal Work

EIRA

- Article 27:
 - Employees in the same class of employment are entitled to the same rate of remuneration for work of equal value.
 - Held by the Courts to be a rule of public order.
 - Implements the EU Equal Pay Directive in Maltese Law.



What must the Employee prove?

- For there to be a breach of the equal work for equal pay principle, employee must prove:
 1. That he is receiving lower pay (given a broad interpretation: includes ex. pension);
 2. That the other employees receiving higher pay are performing the same work or work of equal value



Same work or work of equal value

- It is enough to prove that the persons being compared have the same job title on their employment contract;
- Like work = the work must be the same or broadly similar, and any differences between the work done are not of practical importance. If there are any differences, the Tribunal must ask if these are such that it is reasonable to expect to see them reflected in a different wage;
- Employees who have received different professional training, and thus could be called upon to perform different duties, are not employed to the same work.



What must the Employer prove?

- The Employer must prove that the inequality in pay is not discriminatory;
- Inequality in pay for equal work can be justified as follows:
 - By means of the rights and obligations prescribed by the Equal Opportunities (Persons with Disability) Act;
 - Any preference or exclusion which is reasonably justified taking into account the nature of the vacancy to be filled or the employment offered;
 - Where a required characteristic constitutes a genuine and determining occupational requirement;
 - Where the requirements are established by any applicable laws or regulations.



Does better performance justify a higher salary?

- No – performance does not decrease the value of work:
 - Example: A discretionary increase in salary given as a ‘performance appraisal’, which increase is not limited to the year when the worker received better ratings than his colleagues, but continues to apply in subsequent years, is discriminatory.



Dr Pamela Dingli

Dr Clyde Bonnici

pamela.dingli@gvzh.mt clyde.bonnici@gvzh.mt

