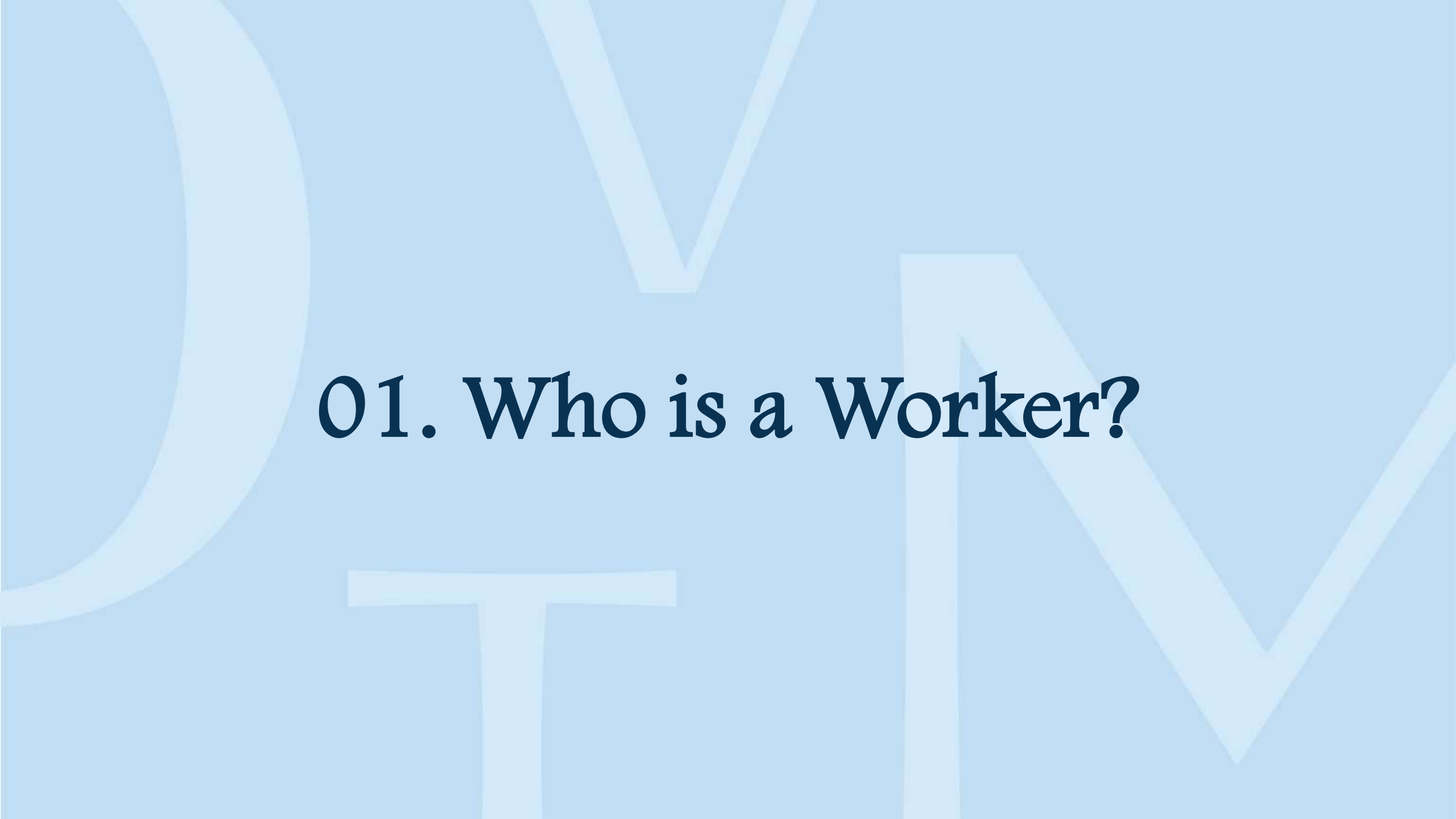




Lecture 2 – The Basics of Employment Law

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01. Who is a Worker?

Who is a ‘Worker’?

Chapter 452 defines ‘employee’ as:

*“any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and **under the immediate direction and control of another person**, including an outworker, but excluding work or service performed in a professional capacity **or as a contractor** for another person when such work or service is not regulated by a specific contract of service”*

Contracts of Service vs Contracts for Service

Employed persons work under a contract of services

Self-employed persons/contractors work under a contract for services

Main distinction as found in the definition of employee: works under the direction and control of another person with regard to the manner in which the work is done.

Difficult to determine in the case of highly skilled workers / professionals.

Criteria to be classified as an Employee

Employer-employee relationship is a question of fact, not only of contract;

Employment Status National Standard Order (S.L. 452.108) establishes the criteria to determine whether a person is an employee or self-employed;

Independently of the intention of the parties or the designation in the contract;

Presumption of an employment relationship if at least 5 out of 8 criteria are satisfied.

Exemption may be granted by the Director.

Criteria to be classified as an Employee

- (a) he depends on one single person for whom the service is provided for at least 75% of his income over a period of one year;
- (b) he depends on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out;
- (c) he performs the work using equipment, tools or materials provided by the person for whom the service is provided;
- (d) he is subject to a working time schedule or minimum work periods established by the person for whom the service is provided;
- (e) he cannot sub-contract his work to other individuals to substitute himself when carrying out work;

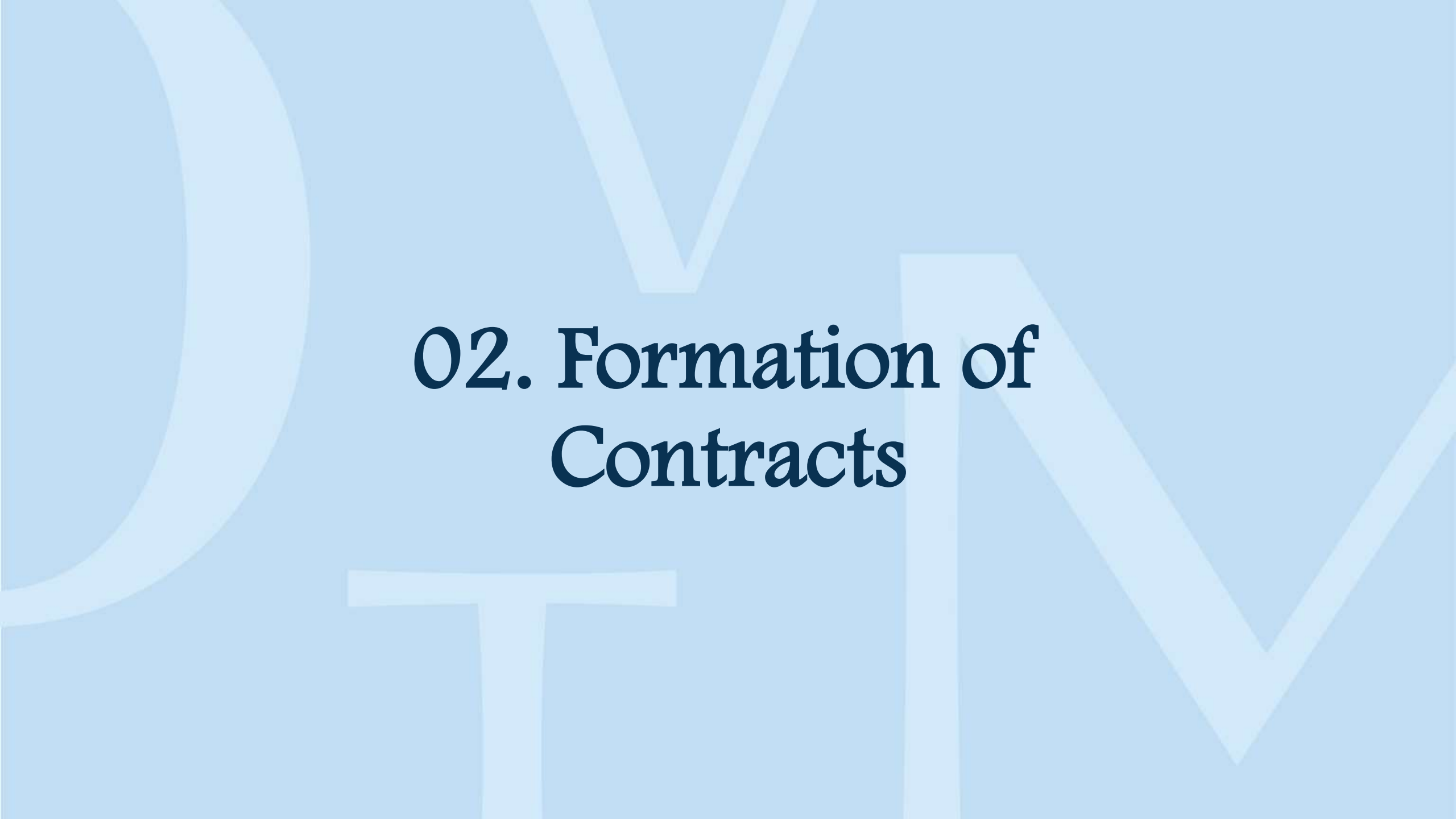
Criteria to be classified as an Employee

- (f) he is integrated in the structure of the production process, the work organisation or the company's or other organization's hierarchy;
- (g) the person's activity is a core element in the organization and pursuit of the objectives of the person for whom the service is provided; and
- (h) he carries out similar tasks to existing employees, or, in the case when work is outsourced, he performs tasks similar to those formerly undertaken by employees.

Roski v Emperor Aviation (CoA) 91/2019

Tribunal considered – he was not registered with JobsPlus + never paid tax or social security contributions in Malta; he had refused to furnish documents to prove that his only income was through the defendant company and that he had paid his taxes and social security in the UK; he had issued invoices in the name of a company;

Other factors such as being subject to time schedules and using equipment of the company – no other choice since he was a pilot – did not mean he was an employee.



02. Formation of Contracts

Employment Contracts

An employment contract can be orally or in writing

Nevertheless, in terms of the Transparent and Predictable Working Conditions Regulations (S.L 452.126), the employer has to provide the employee with 'minimum information' relating to essential aspects of their employment relationship either in a contract or a statement

The information (a) to (e) and g, k, l, m – to be provided between the 1st working day and the 7th calendar day

Other information – within 1 month from first working day

Transparent and Predictable Working Conditions Regulations

The Regulations transposed EU Directive 2019/1152 and the aim was to ensure minimum requirements relating to working conditions applicable to every worker in the EU;

The information is to be provided by the employer, in writing (on paper or electronically if it can be accessible to the worker and can be stored and printed, in which case the employer shall retain proof of transmission or receipt)

What rights does the Directive Guarantee to Employees?

- more complete information on the essential aspects of their work, to be received early and in writing,
- a limit to the length of probationary periods at the beginning of the job to six months,
- The right to take up another job with another employer, any restrictions to this right need to be justified on objective grounds,
- be informed within a reasonable period in advance when work will have to be done
- effective measures that prevent abuse of zero-hour contract work, meaning work contracts without a fixed amount of working hours,
- receive a written reply to a request for transfer to another more secure job, and
- receive cost-free mandatory training related to the job where the employer has a duty to provide this.

Minimum Information to be Given (a) to (e) and g, k, l, m

- Details on the employer and the employee
- Place of work
- Title, grade, nature or category of work
- Description of work
- Date of commencement of employment
- In case of temporary agency workers – the identity of the user undertaking
- Procedure to be followed for termination of employment (including notice periods)
- Remuneration including overtime and special rates pay, frequency of payment
- Hours of work (if work pattern is predictable)

Other Information

- In case of a fixed-term contract; the end date
- Duration and conditions of probation
- Training entitlement to be provided by the employer, if any
- Leave entitlements
- If work pattern is unpredictable – information on schedule, guaranteed paid hours, remuneration for work performed in addition to guaranteed hours, hours and days in which the worker may be required to work, minimum notice period before beginning work on an assignment, deadline to cancel work assignment
- Existence of any collective agreements
- Identity of social security institutions receiving social contributions in relation to the employment relationship
- Any other relevant or applicable condition of employment

Additional Information for Workers Working Outside Malta

Workers working outside Malta in excess of 4 consecutive weeks – need to be in possession of required information before departure and must also include:

- (a) the country or countries in which the work abroad is to be performed and its anticipated duration;
- (b) the currency to be used for the payment of remuneration;
- (c) where applicable, the benefits in cash or in kind relating to work assignments abroad; and
- (d) information as to whether repatriation is provided for, and if so, the conditions governing the worker's repatriation.

Employer Must keep Records

Employer is to keep a copy of the contract or statement or letter of engagement and is to keep a register with the information listed in regulation 9.

May be requested to furnish the Director of the DEIR with certain information as listed in the same regulation 9.

No retention period is specified in the Regulations for this information.

No Changes Allowed

The employer cannot amend employment conditions after commencement of employment unless this is the result of a change in the law, or collective agreement or is a temporary measure to prevent redundancies and approved by the Director.

Exception: Changes to the benefit of the employee and signed off by the employee

Zero Hour Contracts

A zero hour contract is defined as:

"A contract of employment or other work arrangement under which a worker is required to be available for work or services as and when needed by the employer, and where the employer promises payment on the basis of hours so worked without guaranteeing a minimum number of hours to the worker."

Zero Hour Contracts

The Transparent and Predictable Working Conditions Regulations prohibits zero-hour contracts except:

- (a) Where the nature of the activity requires the availability of replacement workers on short notice (and provided this is not the whole-time employment of the worker)
- (b) Where the worker is a full-time student (if he is a student and a whole-time worker, the latter status prevails for the purpose of this exception)

Parallel Employment

The employer cannot prevent a worker from taking up employment with other employers, outside the work schedule established with that employer, nor subject a worker to adverse treatment for doing so... BUT – an employer may prohibit a worker from taking up employment with other employers on the basis of objective grounds, such as health and safety, the protection of business confidentiality, the integrity of the public service or the avoidance of conflicts of interest.

Unpredictable Work Pattern

“Work pattern” is defined as the form of organisation of the working time and its distribution according to a certain pattern determined by the employer

If work pattern is mostly unpredictable, the following conditions need to be satisfied:

- i. Work takes place within predetermined reference hours and days (time slots in specified days during which work can take place);
- ii. Worker is informed of a work assignment within a reasonable notice period.

Law provides for specific notice periods depending on length of work assignment.

Conditions not satisfied – employee can refuse the work assignment without adverse consequences.

Change to Predictable Work Pattern

An employee with at least 6 months service AND completed probation: can request employer employment with more predictable and secure working conditions if available.

Employer must provide a written reply within 1 month from request.

If the employer is a natural person or a small/medium sized enterprise – within 3 months.

Breaches to the Transparent and Predictable Working Conditions Regulations

The employee can submit a complaint to the Director of Employment and Industrial Relations, and they can impose a fine on the employer.

If the employer imposes a requirement on the employee which is in contravention to the regulations and the employee is dismissed for refusing to comply with such requirement, this constitutes unfair dismissal.

The employee may request the employer in case of dismissal to provide duly substantiated grounds in writing for the dismissal.



03. Fixed Term vs Indefinite Term Contracts

Fixed Term Contracts

Contracts of Service for a Fixed Term Regulations (S.L 452.81) define 'contract of service for a fixed term' as:

"a contract of service entered into between an employer and an employee where the end of the contract is determined by reaching a specific date, or by completing a specific task, or through the occurrence of a specific event."

Conversion from Fixed to Indefinite

In case of continuous employment for 4 years (gaps of less than 6 months are included) – the employment will transform from a fixed-term to an indefinite term unless there is an objective reason for example; occupies a top management position or a position of trust

If there is an objective reason to keep the employee on a definite contract, this reason needs to be specified in the contract

Conversion also occurs if employee on a fixed term contract is retained in employment following termination of contract and is not given a new contract within the first 12 working days following termination.

Conditions of Employment

If an employee is retained in employment following termination of a fixed-term contract or re-employed within 1 year from date of termination, the conditions of employment must not be less favourable than those which would have been applicable had contract been indefinite.

Principle of non-discrimination with other comparable permanent employees; the employee on a fixed-term contract shall have the right to be informed of vacancies; access to training.

Termination of a Fixed Term Contract

The main distinction between fixed term contracts and indefinite contracts is the right to terminate.

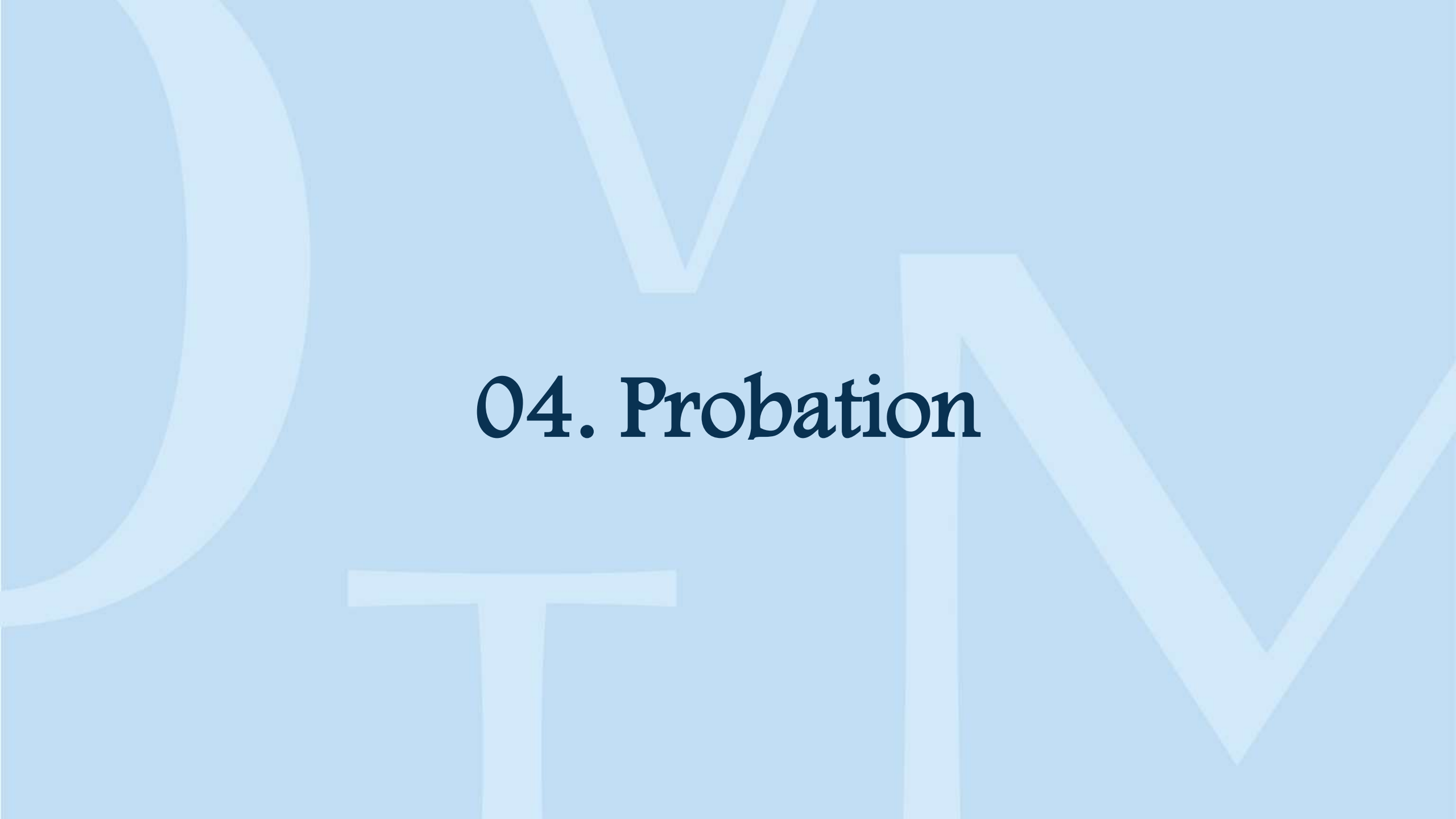
No party can terminate a fixed-term contract prior to the end date stipulated in the employment contract unless for a good and sufficient cause.

If a party terminates without having a good and sufficient cause, that party is liable to pay the other, half the wages that would have been due/payable to the employee until the end date.

New Provisions on Duration of Fixed Term Contracts

Fixed term contract cannot be shorter than 6 months UNLESS a shorter period is justified by objective reasons based on precise and concrete circumstances characterising a given activity.

In the eventuality of a contract for a shorter period which is justified by objective reasons, the contract must list in writing the objective reasons why the duration is for less than 6 months.



04. Probation

Probation

The benefit of probation for the employer is that he can terminate without having to give a reason and this termination cannot be challenged unless on specific grounds such as discrimination. One week's notice must be given if the employee is in employment for more than 1 month.

Exception to the right to terminate without giving a reason: If the employee is pregnant

Article 12A of the Protection of Maternity (Employment) Regulations provides for the suspension of probation and in case of termination, the employer must give a reason to show that it is not related to her pregnancy.

Probation

The statutory probationary period is 6 months or 1 year in the case of employees holding a technical, executive, administrative or managerial post and have wages that are at least double the minimum wage. The probationary period can be shorter is agreed between the parties

New Provisions in the Law for Probation of Fixed Term Contracts

With regards to fixed term contracts, the probationary period needs to be proportionate to the expected duration of the contract.

If the fixed-term contract is renewed (same functions and tasks), the employer cannot impose a new probationary period.

New Provisions in the Law for Probation of Fixed Term Contracts

Contract of between 6 months to 15 months duration – two months for 6 months contract duration.

Contract is for less than 6 months – probation shall be 1/3 of the duration of the contract.

Fixed term contract exceeding 15 months duration – probation shall be of six months.

Probation

Probation cannot be extended, not even by agreement between the parties. It can however be shorter by agreement.

In the case of promotions, the employer cannot impose a new probationary period with the right to terminate. A 'trial period' for the role can be implemented but if the employer is not happy, there is no right to terminate but the employee would revert to previous position.

Probation is suspended if the employee takes 2 or more weeks of approved leave (extended by the corresponding duration of leave). During this suspension, the employer cannot dismiss the worker.

Dennis Paul Nugent vs Malta Public Transport (Industrial Tribunal, 28/02/2017)

The Industrial Tribunal confirmed that:

- Employer has the right to terminate without giving a reason;
- Even if reason is given, Tribunal has no competence to 'judge' that reason.

However, the Tribunal advised employers NOT to give reasons for termination during probation.



05. Part~Timer Workers



05. Employee Rights

I. Payment of Wages

One of the most basic and important obligations on the employer is to pay wages

Some important rules on wages:

- Wages must be paid in full in money being legally tender in Malta
- An employer cannot impose restrictions or terms on how the wages are spent
- Wages are privileged debts (they have high ranking)
- Payment must be made at regular intervals (not more than 4 weeks in arrears)

Deductions and Fines

Deductions from wages are prohibited even if the employee owes an amount to the employer (such as, notice money on termination of employment).

Exception found in article 19(2) – it is lawful to deduct from wages hours not worked by an employee.

In case of suspension from work (ex. During disciplinary proceedings), the employer cannot suspend payment of wages unless prescribed in a collective agreement.

Fines and deductions need to be approved by the Director of Employment and Industrial Relations

Post-Termination Restraints and Damages

Is a post-termination restraint which provides for payment of pre-liquidated damages a fine?

Let's have a look at Mark Bugeja vs. Geoffrey Camilleri:

The employment contract contained the following clause: *"The employee cannot take up employment for a minimum period of two years after date of termination of employment with the Firm with any person, firm or company who for two years prior to the termination of this agreement were clients of the Firm. In such case the parties agree that the employee will pay the Firm by way of agreed damages the sum of two thousand Liri (LM2000)".*

Post-Termination Restraints and Damages

Employee had started working with the MFSA following termination of his employment – MFSA had been a client of the plaintiff;

Court of Magistrates (22/02/2011): *pacta sunt servanda* – employee was obliged to pay the penalty as per his contract;

Court of Appeal (20/03/2012): clause was regulated by Art. 19 and required approval of Director – clause was null and against public policy as it was in restraint of trade.

Retrial (Court of Appeal) (28/06/2013): these were pre-liquidated damages and not a fine and thus not a restraint of trade.

Court of Appeal (13/02/2014): confirmed decision and also held clause was not in restraint of trade. (confirmed in Mark Bugeja et vs. Mellyora Grech, CoA, 27/05/2015)

II. Discrimination

Chapter 452: "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.**" (a protected characteristic)

S.L. 452.95: "discriminatory treatment" means any distinction, exclusion, restriction or difference in treatment, whether direct or indirect, on any of the grounds mentioned in regulation 1(3) which is not justifiable in a democratic society"

Protection from Discrimination

Protection does not only apply during employment but employers are also prohibited from discriminating in advertising or offering employment or selecting applicants.

S.L 452.95 states that anti-discrimination laws apply to: 'conditions for access to employment, including the advertising of opportunities for employment, selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotions'

Employers also cannot subject employees or a class of employees to discriminatory treatment on the conditions of employment or dismissal. This includes compensation packages on termination of employment.

Discrimination in Termination

Protection does not only apply during employment but employers are also prohibited from discriminating in advertising or offering employment or selecting applicants

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Discrimination in Termination

British High Commission cases:

Jackie Jordan v British High Commission (Court of Appeal 26/03/2010)

Glynis Valeria Pace v British High Commission (Court of Appeal 14/01/2015)

Method of calculation for redundancy payments must be the same for all employees who are made redundant (no discrimination in dismissal).

Permissible Discrimination?

Article 26 of Chapter 452 on anti-discrimination is without prejudice to the Equal Opportunities (Persons with Disability) Act which provides for specific quotas for employing registered persons with a disability.

In fact, the laws on discrimination (particularly art. 26) do not apply to - any preference or exclusion which is reasonably justified taking into account the nature of the vacancy to be filled or the employment offered, or where a required characteristic constitutes a genuine and determining occupational requirement or where the requirements are established by any applicable laws or regulations."

Permissible Discrimination?

The Equal Opportunities (Persons with Disability) Act provides for a register of persons with a disability;

Obligation on employer to give employment to such number of registered persons as per an established quota;

Obligation to comply when vacancies occur.

Obligation 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 20 persons (2% of employees i.e. 1 for every 50 employees)

Failure to meet quota – asked by the Jobsplus to make an annual contribution of €2,400 for every person with disability that should be in his employment – max. €10,000.

Obligation to keep a register – number and names of employees and of registered persons

Employer may apply for an exemption from the Minister- consideration being the nature of the work.

Occupational Requirements

Difference in treatment based on one's religious belief, religion, disability, age, sexual orientation and racial or ethnic origin can be justified –

By reason of the nature of the activity or the context in which they are carried out, the characteristic constitutes a genuine and determining occupational requirement provided objective is legitimate and requirement is proportional. For example:

- Actors for a film
- Choosing attendants in public toilets
- Female worker for a centre for domestic violence on women

Interview/Advert Stage

Article 10 of the Equality for Men and Women Act states that its “unlawful for persons to publish or display or cause to be published or displayed any advertisement, or, otherwise to advertise a vacancy for employment which discriminates between job seekers or to request from job seekers information concerning their private life or family plans”

Adverts should be gender neutral, use inclusive and non-discriminatory language.

[https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Resourses and Tools /Guidelines/inclusive_advertising.pdf](https://ncpe.gov.mt/en/Documents/Our_Publications_and_Resources/Resourses_and_Tools/Guidelines/inclusive_advertising.pdf)

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Equal Pay

Article 27 of Chapter 452 lays down the principle of equal pay: “Employees in the same class of employment are entitled to the same rate of remuneration for work of equal value.”

The original intention was to remove gender gaps between men and women, but this principle is broadly being applied across all employees not just between men and women.

Same Class

Neil John Pavia vs Mediterranean Aviation Company Limited (6/10/2010) Court of Appeal – all first officers were entitled to the same wage independently of the aircraft which they flew, even though each aircraft required different training and experience – they all formed part of the ‘same class’ of first officers.

Work of Equal Value

Roberta Spiteri vs St Microelectronics (Malta) Limited (30/09/2015) Court of Appeal – performance of the work done does not change the value of the work done.

Cannot justify difference in wage solely on performance – this can be done by a performance bonus.

Equal Pay (Transparency and Reporting) Regulations – S.L 452.172

New Regulations that came into force in June 2026 transposing EU Directive 2023/970

The Regulations strengthen the principle of equal pay for equal work or work of equal value, which already existed under Maltese law.

Equal Pay (Transparency and Reporting) Regulations – S.L 452.172

Under the new Regulations, employers need to:

- Explain how pay levels are determined;
- Justify differences in pay using objective and gender-neutral criteria;
- Maintain structured documentation supporting pay decisions;
- Provide clear salary information to both job applicants and employees

Equal Pay (Transparency and Reporting) Regulations – S.L 452.172

The new pay transparency rules in Malta introduce several key risk areas:

- Unexplained gender pay gaps across comparable roles;
- Inconsistent pay-setting practices within a company, and across companies within the same group where pay conditions are determined by a common single source;
- Lack of formal pay policies or documentation outlining the objective and gender-neutral criteria used to determine pay structures;
- Limited visibility on pay gap data and reporting requirements.

Equal Treatment

Equal Treatment in Employment Regulations (S.L. 452.95) – prohibition of discrimination (direct and indirect) and harassment;

Sets out a procedure in the case of discrimination – request in writing to the employer who must reply within 10 days.

Requirement to provide reasonable accommodation for persons with disabilities.

Leave Entitlements

Leave entitlements depend on the particular sector of work – applicable Wage Regulation Order for some sectors;

If there is no applicable WRO – Minimum Special Leave Entitlement Regulations (S.L. 452.101); Overtime Regulations (S.L. 452.110); Organisation of Working Time Regulations (S.L. 452.87) apply;

Urgent Family Leave

Urgent Family Leave Regulations (S.L. 452.88) – time-off from work for urgent family reasons in case of sickness or accident;

15 hours now increased to 32 hours as urgent family leave – first 16 hours deducted from annual leave and remaining 16 hours deducted from sick leave;

Maria Dolores Grima u MMDNA (17/09/2015) Decision Number 2406 – urgent leave denied to employee – her resignation was deemed to be a dismissal.

Maternity Leave

Protection of Maternity (Employment) Regulations (S.L. 452.91)

18weeks maternity leave – 14 weeks paid by employer, 4 weeks paid by State;

Entitled to same rights and benefits which accrue to other employees during her leave;

Entitled to return to work and resume her post or a similar post;

On return to work, the employee must work 6 months, otherwise she is liable to repay the maternity leave received;

Time-off to attend ante-natal examinations if these have to take place during hours of work (not to be deducted from annual leave or sick leave, its extra time-off)

Leave Entitlements ~ Parents

Work Life Balance for Parents and Carers Regulations (S.L 452.125)

4 months of parental leave on ground of birth, adoption, fostering or legal custody of a child until the child is 8 years old.

Out of the 4 months, 2 months are paid at the rate set for the sickness benefit and 2 months are unpaid.

Paternity leave paid – 10 days

Carers' leave unpaid – 5 days

Eligibility – has to be in employment with same employer for a continuous period of at least 12 months

Flexible Working Arrangements for Workers

Workers with children up to the age of 8 years have a right to request flexible working arrangements for caring purposes which may include remote working, work on reduced hours and flexitime.

Employers shall consider and respond to requests for flexible working arrangements within 2 weeks, providing reasons for any refusal.

Working Time

Organisation of Working Time Regulations (S.L. 452.87)

Establishes daily rest; rest breaks; weekly rest;

Daily rest – 11 hours per 24 hour period

Weekly rest – 24 hours per 7 day period in addition to the 11 hours

Breaks – break to be given for every 6 hours worked

Maximum working time – 48 hours unless employee agrees to work more hours;

Leave of 24 days + extra day for public holidays falling over the weekend – 20 days cannot be replaced by an allowance in lieu except where employment is terminated;

Only up to 50% of leave may be carried forward.

Overtime:



Employees obliged to work overtime – up to 8 hours per week;



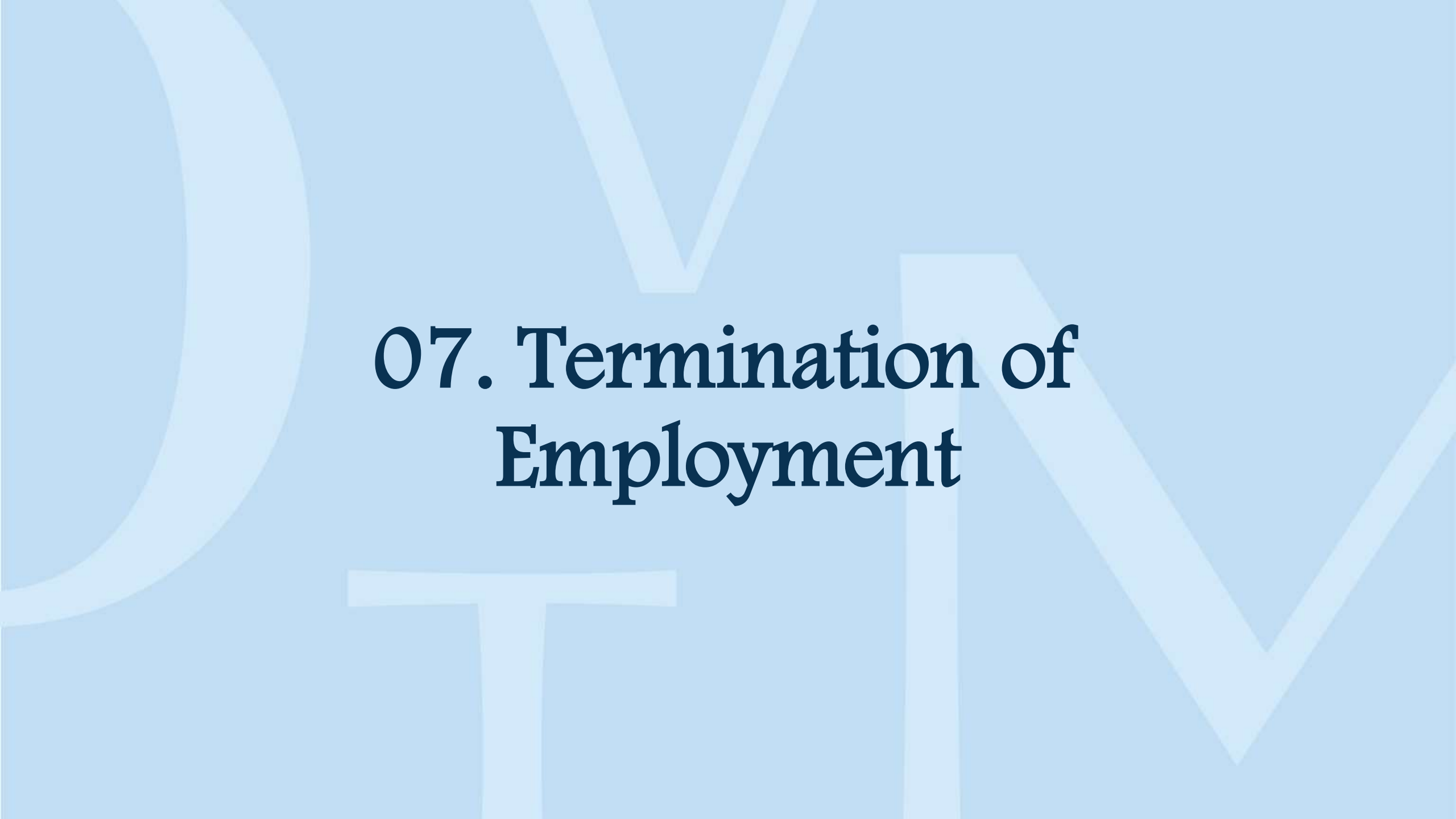
All employees entitled to overtime of 1.5 times the normal rate for work carried out in excess of 40 hours (except those covered by a WRO);



Can wage be sufficient to cover overtime?



What about management grades?



07. Termination of Employment

Can Definite Term Contracts be Terminated?

- Definite term contracts may not be terminated before the expiration of the agreed term except in the case of a good and sufficient cause
- If terminated early → the party terminating is liable to pay the other a sum equal to half the full wages that would have been payable to the employee for the remainder of the term specifically agreed upon.

Termination of Indefinite Contracts by Employee

- Indefinite term contracts may be terminated by the employee at any time by way of notice.
- Exception → In the case of a good and sufficient cause, no notice is required to be given (constructive dismissal)
- Statutory notice periods depend on duration of employment of the employee

Statutory Notice Periods

- Employed for more than 1 month but not more than 6 months → 1 week
 - Employed for more than 6 months but not more than 2 years → 2 weeks
 - Employed for more than 2 years but not more than 4 years → 4 weeks
 - Employed for more than 4 years but not more than 7 → 8 weeks
 - Beyond 7 years → add 1 week for every year beyond 7 years (max. 12 weeks)
-
- For employees holding a technical, administrative, executive or managerial post → can agree on a longer notice period

What if the employee does not work the notice period?

- Notice starts to run from the next working day
- If the employee does not work the notice → liable to pay the employer a sum equal to half the wages (excluding overtime, bonuses and other allowances) that would have been due to him for the unworked period of notice.

What if the employer does not wish for the employee to work the notice period?

- On receiving notice from the employee, the employer can:
 - Allow the employee to work the notice period on full pay
 - Not allow him to work the notice period and pay him a sum equivalent to the wages that would have been payable for the unworked period of notice

How is Notice Money Calculated in case of Irregular Hours?

- Notice money calculated on the average earning of the employee during the three months immediately preceding the day on which notice is given or the abandonment or termination of employment takes place

Termination of Indefinite Contracts by the Employer

- Indefinite term contracts may only be terminated by the employer on the following grounds:
 - During probation
 - When retirement age is reached
 - For good and sufficient cause
 - On the ground of redundancy

Who cannot be dismissed?

- Employees on injury leave → they are entitled to 1 year injury leave
- Employees on maternity leave → entitled to resume work in the same post AND obliged to work for at least 6 months post-maternity leave (similar principle for adoption leave)

1. Termination during Probation

- No need to give a reason except in case of pregnant employees
- If employed for more than 1 month → 1 week's notice needs to be given
- Can notice period be longer during probation?
- **Meeting Point Hotel Management (Malta) Ltd vs. Dayna Maria Spiteri (TTZ 20/11/2018)** → The article of the law which specifies that in case of termination of employment during probation, 1 weeks' notice is to be given, is a matter of public policy and cannot be derogated from with the consent of the parties. Notice period cannot be longer than 1 week during probation

Dennis Paul Nugent vs. Malta Public Transport (Industrial Tribunal 28/2/2017)

- Employee claimed he was not given a fair hearing when dismissed during probation;
- The Tribunal concluded that:
 1. Employer has the right to terminate without giving a reason;
 2. Even if reason is given, Tribunal has no competence to 'judge' that reason.
- Tribunal advised employers NOT to give reasons for termination during probation.

2. Pensionable Age

- Proviso to Art. 36 (14) → employer can terminate the employment of an employee when the employee reaches pension age as defined in the Social Security Act (depends on the year of birth);
- Employer and employee can agree that employment should continue even after retirement – can be dismissed at any time after pension age;
- Debate about new employment which is entered into by a person who has already reached pension age.

Christinus Harvey v British High Commission (16/07/2013 Industrial Tribunal)

- The employee claimed that the termination of employment by way of reaching retirement age is permitted by law only on the attainment of the retirement age, but not at a later stage (a one-time opportunity)
- The Industrial Tribunal held that this is not the case and that once someone reaches retirement age, he no longer enjoys security of tenure of employment.
- Exception → when one is employed **after** reaching retirement age

3. Good and Sufficient Cause

- No definition of 'good and sufficient cause'
- The law only lists what is **not** a good and sufficient cause:
 - The employee at the time of the dismissal was a member of a trade union, or is seeking office as, or acting or has acted in the capacity of an employees' representative;
 - Except in case of a private domestic employee, that the employee no longer enjoys the employer's confidence;
 - The employee contracts marriage;
 - The employee is pregnant with child or is absent from work during maternity leave;

- The employee discloses information, whether confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting on the employer's name and interests;
- The employee has filed a complaint or is participating in proceedings against the employer involving alleged violation of laws or regulations or is having recourse to competent administrative authorities;
- The business in which the employee is engaged has undergone a transfer of ownership, unless he proves that the termination is necessary for economic, technical or organisational reasons entailing changes in the workforce.

What constitutes ‘Good and Sufficient Cause’?

- Whether the reason for termination is a ‘good and sufficient cause’, will be determined by the Industrial Tribunal on a case by case basis.
- Some examples of situations which the Tribunal deemed to constitute a good and sufficient cause include theft or mismanagement of company funds, abandonment of the workplace, other warnings in force

Jason Aquilina vs Go Plc (Industrial Tribunal 3/06/2022)

- Case of unfair dismissal
- Claims by employer of absenteeism → No evidence was presented. When alleging such, it is expected that the employer present some form of record of work of attendance
- Claims that the employee was working another job during working hours → only evidence presented is that during a random spot check, they found the employee outside the shop where he was allegedly working. This is not sufficient especially since Jobsplus showed that he wasn't working there.
- Unfair dismissal → Awarded Euro 32,500 in compensation

Procedure for Termination for a Good and Sufficient Cause

DISCIPLINARY ACTION

Are Warnings an Automatic Right to Terminated?

- There is no concept of 'automatic right to dismiss' after 3 warnings
- There are other things to consider such as → the time which elapses between one warning and another
- Warnings should ideally be in writing. Verbal warnings might also be relevant but difficult to prove (Joseph Ebejer u Zahra Limited, 24/11/2008 – Decision 1888)

Are Warnings an Automatic Right to Terminated?

- The need for warnings and the number which should be given before termination depend on the gravity of the incident in question (Joseph Mula u Coastline Hotel Limited, 6/05/2011 – Decision No. 2069)
- Even following warnings → a final meeting should be held before the decision to dismiss is taken
- Serious breaches which might merit dismissal → employee should be given opportunity to defend his case (right to be heard)

Disciplinary Proceedings

- No mention in the law but developed by case law;
- Importance of acting reasonably in dismissing → following a reasonable procedure;
- David Calleja v Peak Leisure Limited (Court of Appeal, 12/12/2017) → once Tribunal decides that the dismissal was fair on the merits, it cannot order compensation to be given based on the fairness or otherwise of the procedure of dismissal as the law makes no provision for such compensation.

Are Disciplinary Proceedings Always Necessary?

- Gulio Antonio Spampinato vs Enetsport Limited (Court of Appeal, 25/03/2019) → the CoA concluded that given the facts of the case, the employee was not entitled to any compensation, irrespective of the fact that disciplinary proceedings were not taken (implying that these are not always necessary)
- James Buhagiar vs Jani Limited (Court of Appeal, 27/06/2018) → The Court of Appeal said that the Industrial Tribunal shouldn't be the one to compensate someone who should have been dismissed simply because the employer did not adopt disciplinary proceedings

Are Disciplinary Proceedings Always Necessary?

- More recent case law → The approach has changed
- John Azzopardi vs APS Bank Limited (Court of Appeal, 17/02/2021) → the bank should have appointed a Board of Discipline to decide if the employee's conduct warranted dismissal. Since it was established that the Bank failed to abide by the proper procedure, the employee's dismissal cannot be considered fair and just.

Alessandro Luigi Giampaolo Nati u Bstarters Limited (Industrial Tribunal 23/03/2022)

- The employee could have been disciplined and given the opportunity to defend himself (which would mean adherence to the principle of *audi alteram partem*).
- This is especially important where the employer is considering termination (which is considered the death penalty in employment)
- Disciplinary proceedings may only potentially be done away with where the conduct is so grave that there is no reason for disciplinary proceedings to take place
- In this case, the abrupt dismissal was deemed to be a rash decision which deprived the employee from being given a fair hearing and from defending himself

4. Redundancy

- Maltese law does not provide a definition of redundancy
- Victoria Spiteri vs St Catherine High School (CoA, 18/10/2006) → Redundancy refers to a situation where an enterprise is constrained to reduce its workforce
- The employer can terminate a contract of employment on the ground of redundancy by giving notice (statutory notice periods apply)

Rules of Redundancy – Last In First Out Rule

- “where an employer intends to terminate the employment of an employee on the grounds of redundancy, he shall terminate the employment of that person who was engaged last in the class of employment affected by such redundancy”
- Exception → in the case of family members

Rules of Redundancy – Last In First Out Rule

- What is a class? when used in the context of a group or a category of employees shall refer to the groups or categories listed in a collective agreement”
- Where there is no collective agreement or where the collective agreement does not stipulate groups or categories of employees, it shall refer to the work performed or expected to be performed independently of the title or name given to the post
- Victoria Spiteri vs St Catherine’s High School → Class should not be given too strict an interpretation – consider also ‘interchangeability’ of employee

Rules of Redundancy – If the Post Becomes Available Again

- If the post becomes available again within 1 year from date of termination → the post must be offered to the person who was made redundant. If not, it is 'unfair dismissal'.
-
- The definition of 'unfair dismissal' includes failure to re-employ a person within 1 year from when he is made redundant if the post becomes available once again

The Redundancy has to be Genuine

- Theuma Alessandra sive Sandra v Mangion Alfred (Court of Appeal 23/05/2008)
- Quoting English case law the Court proposed these guidelines:
 - *“(a) was the employee dismissed?”*
 - *“(b) if so, had the requirements of the business for employees to carry out work of a particular kind ceased or diminished (or were they expected to do so)?”*
 - *“(c) if so, was the dismissal caused wholly or mainly by that state of affairs?”* (*Safeway Stores vs Burrell 1997*)

The Redundancy has to be Genuine

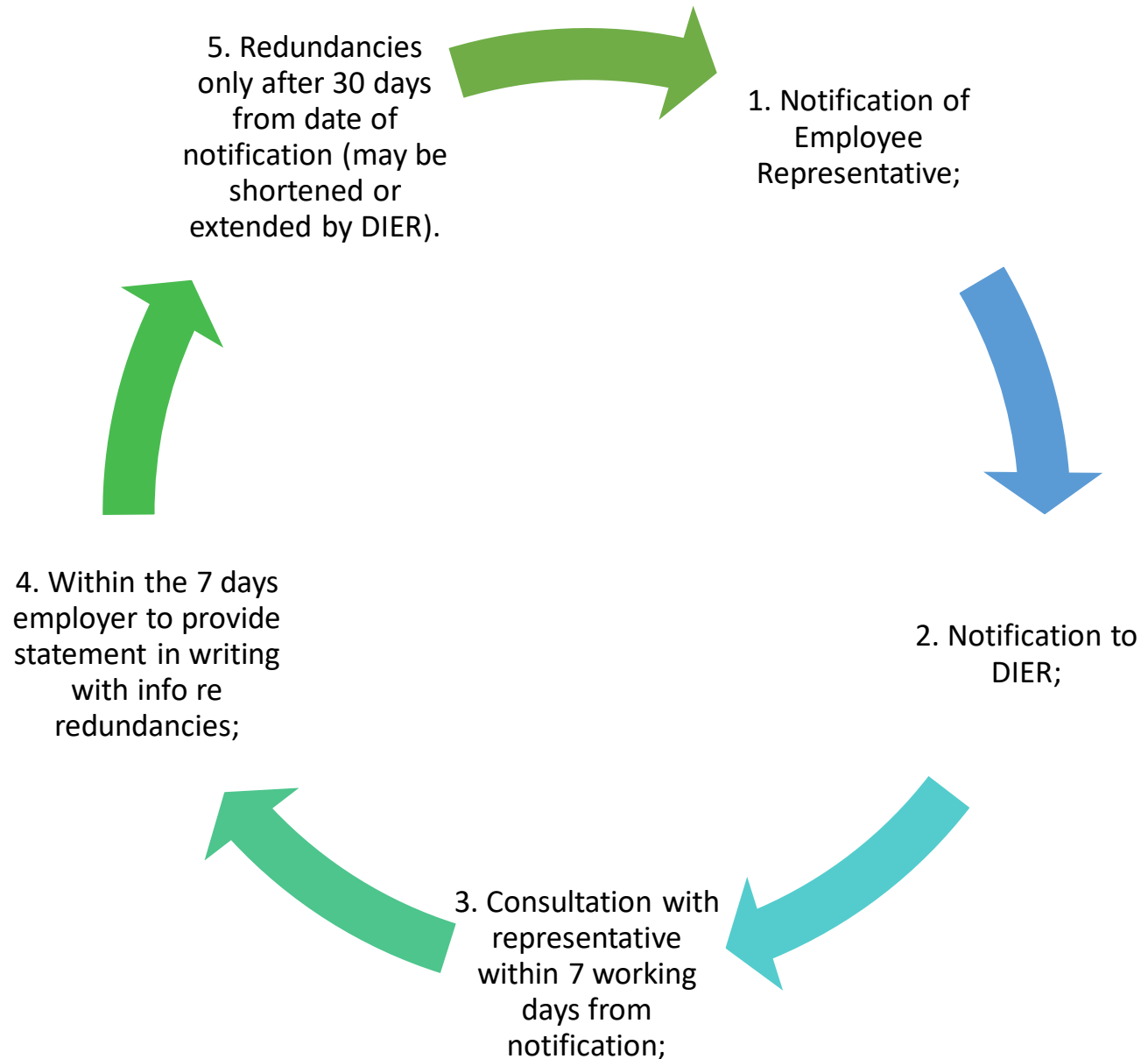
- Angela Vassallo u Milano Due Limited (15/7/2017, Court of Appeal)
- Industrial Tribunal and Court of Appeal accepted that a redundancy can occur even if the business does not close down permanently but for a few months only.
- I.T. and CoA also accepted that redundancy was genuine even if no mention of the word 'redundancy' was made in the termination letter.

Collective Redundancies – S.L 452.80

The termination of employment by an employer on grounds of redundancy, over a period of thirty days of:

- 10 or more employees in establishments normally employing more than 20 employees but less than a 100 employees;
- 10% or more of the number of employees in establishments employing 100 or more but less than 300 employees;
- Thirty employees or more in establishments employing 300 employees or more.

The Procedure



06. Constructive Dismissal

What is Constructive Dismissal?

- Relatively new concept in Maltese law → situation in which the employee is forced to leave employment as a result of breach of contract by the employer;
- No mention in the law but developed by case law
- Treated similarly as a direct unfair dismissal → employee will be entitled to compensation.
- Tactics used by employer in getting rid of employees without actual dismissal.
- Concept developed under English law

Maltese Jurisprudence

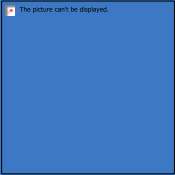
- Geniev Zerafa u Phone Direct Ltd (Industrial Tribunal) (27/7/2007 – decision no. 1802) - 'terminazzjoni forzata jew indotta sabiex limpjegat jitermina l-impjieg tiegħu';
- Peter Agius u Melita plc (Industrial Tribunal) (2/2/2011 – decision no. 2049) – 'trattament ħażin da parti tal-prinċipal li jirriżulta fi ksur fundamentali tal-kuntratt tax-xogħol, b'mod li jagħmilha ntollerabbli għall-impjegat li jkompli fil-ħidma tiegħu'
- Av. Dr Carmel Chircop v Awtorita' Marittima ta' Malta (Court of Appeal) (5/10/2001) – 'Ċirkostanza ta' temm mill-impieg ta' persuna li, fid-dieher, qisha tkun irriżenjat mill-impieg, imma li, fil-fatt, tkun twasslet f'qagħda li jkollha titlaq kontra r-rieda tagħha minħabba l-imġieba tal-imgħallem tagħha.'

Requirements for Constructive Dismissal

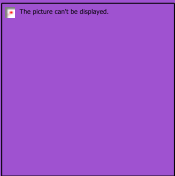
- The requirements for proving constructive dismissal are:
 - breach of contract by the employer of an express term such as non-payment of wages or of an implied term such as breach of mutual trust and confidence presumed to exist in an employment relationship;
 - the breach is fundamental;
 - acceptance of the breach by the employee;
 - timely reaction to the breach by informing the employer of the reason for resignation at the time of resignation, otherwise it may be deemed that the employee accepted the situation and the resignation was for other reasons

Examples of breaches of the implied term:

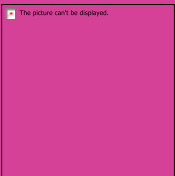
- *Courtaulds v Andrew*: Shop manager telling the employee – “You can’t do the bloody job anyway!”
- *Whitbread plc Thresher v Gullyes*: overburdening an employee with work;
- *GMB Trade Union v Brown*: lack of flexibility in handling grievance procedure;



Sexual Harassment cases:



Geniev Zerafa u Phone Direct Ltd – sexual harassment (Industrial Tribunal 27/7/2007)= a breach of the implied duty of trust and confidence.



Doris Bonello u The General Soft Drink Co Ltd (Industrial Tribunal, 27/7/2010) - sexual harassment proven but no case of constructive dismissal.

Duty of Mutual Trust and Confidence

Breach of Express Terms

- Variation of employee's benefits and duties – case of Miriam Reid u Kestrel Services (15/12/2006 Industrial Tribunal) – engaging a supervisor during the leave of the employee;
- Change in terms and conditions of the contract / reduction in pay- Sun Route Ltd u Claire Zammit Cordina (CoA 25/01/2002) (changing post of the employee).
- Changes in contract terms may be fair ex. In reorganisations.

The Last Straw Doctrine

- Rule → no breach if breach is insignificant;
- Resignation because of an insignificant incident but part of a series of breaches → can still amount to a breach;
- Revival of breaches which occurred earlier → otherwise deemed to have been waived.

Which behaviour can be attributed to the employer?

- In corporate scenarios Tribunal might have to ask: “Was the person doing acts authorised by the Company?” or “Was the person acting within the general control or for the benefit of the Company?”
- A company might avoid a claim by apologising or offsetting such behaviour.
- Employer can be responsible for behaviour of third parties – either if responsible for their behaviour or failing to protect the employees from such the behaviour of third parties.

Acceptance of the Breach

- 'Acceptance' of the breach by the employee as opposed to a waiver – importance of acting in a timely manner.
- Ideally employee should inform employer with the reason for resignation at the time of the resignation.
- Weathersfield v Sargent: English Court of Appeal stated that → "Constructive dismissal cannot be established unless it is made clear to the employer that the employee is leaving because of the employer's repudiatory conduct towards him".
- Not to be interpreted that reason must be given at time of leaving but if this is not done – more easy to conclude there was no constructive dismissal.

Acceptance of the Breach

- Western Excavating v Sharp:
- “[H]e [the employee] must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

Acceptance of the Breach

- Philisian Debono u Arrigo Group of Hotels Ltd (Industrial Tribunal, 5/11/2008):
- An important consideration: “tempestivita’ tar-reazzjoni tal-haddiem ghall-agir tal-principal.
- “Jekk jibqa’ jahdem u ma jiehux passi immedjati jista’ jigi nterpretat li jkun accetta s-sitwazzjoni”.

Proving Constructive Dismissal

- Constructive dismissal cases → employee must again prove dismissal.
- In constructive dismissal cases → this means employee must prove that the resignation was in fact an indirect dismissal – i.e. employee will have to bear the burden of proof.

Amanda Scerri vs MI Child Care (12/01/2022)

- The employee worked as a 'Team Leader Carer'
- Restructuring of the company → her role was going to become obsolete, so the company offered her another role under the same conditions
- For some reason, the proposal to take up a new role did not materialize so she reverted back to her original role of Carer
- She resigned and claimed Constructive Dismissal
- Industrial Tribunal found that the company did not carry out such restructuring with the aim of irritating the employee and found that the employee did not prove that the management did something or imposed a measure because of which she could not continue to work there



08. Transfer of Business

Transfer of Business

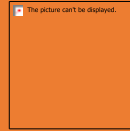
- Contract → between Employer and Employee;
- Directive 2001/23 → creates a legal fiction – continuation of the employment contract with a third party without the consent of the employee or the new employer.
- Effect → prevents termination of employment in case business is transferred.
- Transfer of Business (Protection of Employment) Regulations S.L. 452.85

Transfer of Business

- 'there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.'

Transfer Business

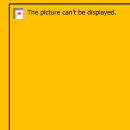
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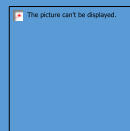
Mergers;



Take-overs;



Leasing arrangements;



Even in situations where there is no agreement between the two employers – old lessee → lessor → new lessee;

Transfer of Business

1. Activities cease to be carried out by client and are carried out by contractor;

2. Activities cease to be carried out by contractor and are carried out by another contractor;

3. Activities cease to be carried out by a contractor and are carried out by client itself.

Transfer of Business

- A service provision change can also be considered to be a transfer of business.
- A transfer of a 'part' of the undertaking can also be considered to be a transfer of business.

Is there retention of identity?

- the type of undertaking or business;
- whether or not the business' tangible assets are transferred;
- the value of its intangible assets at the time of the transfer;
- whether or not the majority of employees are taken over by the new employer;
- whether or not its customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer;
- the period, if any, for which those activities were suspended.

Obligations upon Transfer

- Automatic transfer of employees with same employment conditions;
- Employee made redundant prior to transfer – right to be reemployed with transferee if post becomes available within 1 year from termination;
- Information to be given to transferee by transferor and to employees re conditions of employment;
- There may be dismissals for technical, economic or organisational reasons entailing changes in the workforce.

Obligation of Transferor and Transferee

Deliver a written statement containing information re transfer to employee representatives at least 15 days before transfer or before employees are affected by the transfer;

Duty to deliver a copy to the DIER on the same date.

Questions?

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