



Executive summary

Malta Country report on measures to combat discrimination

by Tonio Ellul

1. Introduction

At the end of 2004, the Maltese population was estimated at 389,769 of which 193,917 (49.6%) were males and 196,752 (50.4%) were females. In addition, the permanent foreign residents in Malta in the same period amounted to 12,899 persons. The Labour Force Survey for December 2005 indicates that the number of employed persons in Malta was estimated at 148,229 of which 69.96% were male and 30.04% were female.

Various organisations in Malta, both governmental and non-governmental, actively seek to combat discrimination on various grounds and react positively towards the principle of equal treatment. Besides the measures taken to implement the Directives, the government has sought and still seeks dialogue and consultation with persons and entities working to combat discrimination. Similarly the government agencies set up to combat discrimination, namely the National Commission for Persons with Disability and the National Commission for the Promotion of Equality for Men and Women work closely with the Ministries concerned.

Special Programmes to assist particular groups of persons have also been drawn up. One such programme is provided for in The Persons with a Disability (Employment) Act, 1969, which provides for the compulsory engagement, on a quota basis, of disabled persons registering for employment. Also, the Employment Services Division at the Employment and Training Corporation has a section known as the "Over 40s Section" which was set up in 2001 with the aim of helping persons aged over 40 to find employment as soon as possible. To this end various schemes have been created, providing financial assistance to employers and employees and training and work exposure to the unemployed.

2. Main Legislation

The principles of equality of treatment and non-discrimination were first introduced into the Maltese Constitution of 1964. This provides protection from discrimination on the basis of race, place of origin, political opinions, colour, creed or sex and also states that no law shall make any provision that is discriminatory either of itself or in its effect. In 1987, the European Convention Act was enacted. Through this Act, which provides that the substantive Articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms have become and are enforceable as part of the Laws of Malta, Article 14 of the said European Convention can be invoked before and enforced by the Maltese Courts in the event that a person is hindered in the enjoyment of the fundamental rights and freedoms provided for in the Convention on grounds of discrimination. Access to the Courts in cases of alleged breach of either of these two instruments is unhindered and available to all. Persons who do not have adequate financial means to institute legal proceedings in Malta can apply for legal aid by the State.

In addition to this general protection, Malta has introduced a number of specific legislative acts to implement Council Directives 2000/78/EC and 2000/43/EC, in particular the Employment and Industrial Relations Act 2002, which relates to employment in the private

sector; the Equal Opportunities (Persons with Disability) Act, 2000; the Equality for Men and Women Act, 2003; and Article 82A of the Criminal Code which criminalizes incitement to racial hatred. In 2004, Legal Notice 461 was published to fill the lacunae under the Employment and Industrial Relations Act 2002 with regards to discrimination on the grounds of religion or religious belief, disability, age, sexual orientation, and racial or ethnic origin in the field of employment.

There are, however, certain provisions of the two Council Directives which have still not been implemented. In fact, to date there is no body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin, even though it is envisaged that in the near future the Commission for the Promotion of Equality for Men and Women will be designated as such specialised body. In addition there is no specific legislation in Malta which prohibits discrimination on the ground of race or ethnic origin in relation to (i) social protection, including social security and healthcare, (ii) social advantages, (iii) education, (iv) access to and supply of goods and services which are available to the public, and (v) housing, as required under Article 3(1) (e) to (h) Directive 2000/43. To this end, the Maltese Government has drafted legislation in order to fill this lacunae. Such legislation has gone through the first reading in Parliament in June 2005 and is now at the office of the Attorney General for review. Furthermore, those provisions under the Employment and Industrial Relations Act 2002 which relate to discrimination in employment have not been extended to cover employees in the public sector.

It is to be noted that there are no provisions in Maltese law which are in breach of the said Directives.

Malta is also a party to various international human rights instruments that provide for the protection against discrimination. These include: The European Convention for the Protection of Human Rights and Fundamental Freedoms and various protocols thereof (but not Protocol 12), The European Social Charter, The Framework Convention for the Protection of National Minorities, The Revised European Social Charter, The International Convention on the Elimination of All Forms of Racial Discrimination, The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and ILO Convention 111 on Discrimination in Employment and Occupation.

3. Main Principles and Definitions

Definitions

All the grounds of discrimination mentioned in the directives are prohibited under Maltese law.

The only ground which is however specifically defined under Maltese law is the ground of disability under the Equal Opportunities (Persons with Disability) Act, 2000. Though this Act does not make any express reference to direct and indirect discrimination, the provisions of the Act clearly prohibit both forms of discrimination. Article 6 of the said Act also provides that a person shall be discriminating against another person on the ground of disability if he treats or proposes to treat such other person less favourably than he treats or would treat others who do not have such a disability because of the fact that such other person is accompanied by (a) an interpreter; (b) a reader; (c) an assistant; or (d) a carer. It is argued that this could be deemed to constitute discrimination by association.



Furthermore, Legal Notice 461 of 2004 issued under the Employment and Industrial Relations Act, 2002, provides for the prohibition against both direct and indirect discrimination and in fact it contains wording taken from Article 3 of the Directives. Thus, it may be argued that Maltese law prohibits discrimination based on presumed characteristics. This has not been raised before a judicial authority in Malta as yet.

Harassment

Legal Notice 461 of 2004 provides protection from harassment in matters of employment on all the grounds mentioned in the Directives. It defines harassment as a form of discriminatory treatment where it has the effect of violating the dignity of the person who is being harassed or where it has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person who is so subjected. As against corresponding provisions of the Directives, Maltese law does not require that the effects of the harassment be cumulative. Furthermore, it provides that a person shall also be deemed to have discriminated against another if the former neglects his obligation to suppress any form of harassment at their place of work or within their organisation. The prohibition of harassment is also mentioned under the Public Service Management Code which regulates employment conditions for the public service.

Instruction to discriminate

Legal Notice 461 of 2004 prohibits the instruction to discriminate in the field of employment. No such prohibition, however, exists under the Equal Opportunities (Persons with Disability) Act, 2000, and the Equality for Men and Women Act, 2003.

On a more general level, the Constitution of Malta provides that 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. Furthermore, certain provisions of the Civil Code and the Criminal Code can provide the basis for a judicial action to be taken against a person whom, it is alleged, gave instructions to another person to discriminate.

Exceptions and exemptions; reasonable accommodation

With respect to exceptions and exemptions, there are no laws, rules and regulations in Malta providing for exemptions in relation to occupational requirements as laid down in the Race Equality Directive. With regards to the occupational requirements laid down in the Employment Equality Directive, the Employment and Industrial Relations Act, 2002, as well as the Equality for Men and Women Act, 2003, contain provisions in this respect. Maltese law also provides for the provision of reasonable accommodation under subsidiary legislation issued in terms of the Occupational Health and Safety Authority Act 2000, as well as under the Equal Opportunities (Persons with Disability) Act 2000. In addition, the Equal Opportunities (Persons with Disability) Act 2000 provides that employers must provide reasonable accommodation for employees with disabilities.

There is no requirement under Maltese legislation to provide reasonable accommodation to people discriminated against on the other grounds covered by the two Directives.

4. Material Scope

Protection against discriminatory treatment under Maltese law is provided for both by general and specific laws. The Constitution of Malta and The European Convention Act contain a



general prohibition against discrimination that could be taken to include all the fields of application listed in Article 3 of both Directives.

The more specialised legislation contains specific anti-discrimination provisions in respect of certain spheres (mainly employment) or persons (discrimination on the basis of sex and discrimination against disabled persons). In this case, the protection afforded by these laws extends to matters between private persons, other than to matters between private persons and public entities or authorities. In fact, the Employment and Industrial Relations Act, 2002, provides for the prohibition of discrimination in a general manner by providing that an employer should not subject his employees or prospective employees to any discriminatory treatment 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. The Act does not apply to persons who work or perform services 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 and neither does it apply to self-employed and military personnel. With respect to persons who hold a statutory office, the Act will only apply if the person concerned has a contract of employment.

With respect to employment in the public sector, this is, as stated above, regulated by the Public Service Management Code. The Employment and Industrial Relations Act empowers the Prime Minister to prescribe the applicability of those provisions of the Act relating to discrimination to public sector employees. In case of discrimination of employees in the public sector by public authorities, such employees can invoke the anti-discrimination provisions of the Constitution and the European Convention Act.

Under the Employment and Training Services Act, 1990 it is illegal for a person to, *inter alia*, show favour to, or to discriminate against, any person for employment with any employer on the grounds of race, colour, sex, creed or on the grounds of his party or other political beliefs or associations.

The Employment and Industrial Relations Act, 2002, as well as the regulations issued hereunder, prohibit discrimination in matters concerning vocational training and guidance and remuneration for work of equal value as provided for in Article 3(1)(b) and (c) of the two Directives. Maltese law also prohibits discrimination on the grounds mentioned in Articles 3(1)(d) of the Directives. In cases of alleged discrimination in respect of the matters mentioned in paragraphs (e) to (h) of the Race Equality Directive (namely social protection, including social security and healthcare; social advantages; education; access to and supply of goods and services which are available to the public, including housing), there is no legislation transposing those provisions of the Directive. The alleged victim can however seek to protect his rights by seeking redress under the Constitution, under the European Convention Act, 1987 and under the Ombudsman Act 1995.

The protection afforded by The European Convention Act, on the other hand, though wider in view of the fact that the grounds for discrimination are not exhaustive, is more restrictive in that the right or rights which must have been violated on the grounds of discriminatory treatment are the rights laid down in Articles 2 to 13 of the Convention.

5. Enforcing the Law

Maltese legislation lays down various courses of action that one may follow should an individual believe that they were subjected to discriminatory treatment. Apart from recourse



to action before the Civil Court, First Hall, sitting in its Constitutional jurisdiction or the Constitutional Court, there exist other bodies where an alleged victim can address his or her complaint, depending on the nature of such complaint. These include the Industrial Tribunal (under the Employment and Industrial Relations Act, 2002), the National Commission for Persons with Disability (under the Equal Opportunities (Persons with Disability) Act, 2000), the National Commission for the Promotion of Equality for Men and Women (under the Equality for Men and Women Act, 2003), the Public Service Commission (under the Constitution of Malta), the Ombudsman (under the Ombudsman Act, 1995), the Broadcasting Authority (under the Constitution of Malta), and the Employment Commission (under the Constitution of Malta).

As a rule, actions before such authorities are brought by the victim him/herself in terms of Maltese law, in principle it is not possible for a person to bring an action on behalf of another, unless the former can prove that he has a legitimate interest in the action. However, there is nothing at law that prohibits an association or other entity from intervening with the administrative authorities on behalf of a person complaining that he has been subjected to discriminatory treatment. With regards to administrative procedures, there has not been any prohibition at law for an association or other entity from intervening with the administrative authorities on behalf of a person complaining that he has been subjected to discriminatory treatment.

However, Legal Notice 461 of 2004 now provides that nothing shall prevent any association, organization or other legal entity, having a legitimate interest in ensuring that these regulations are complied with, to engage itself either on behalf or in support of the complainant, with his or her approval, in any judicial or administrative procedure provided for the enforcement of obligations under these regulations.

An entity that is legislatively empowered to assist a complainant of alleged discriminatory treatment is the National Commission Persons with Disability. This Commission is empowered to provide, where appropriate, assistance, including legal and financial assistance, to persons with disabilities in enforcing their rights under the Act. Furthermore, the Commission must assist any person who wishes to make a complaint under the Act but who requires assistance to formulate the complaint orally and/or in writing.

The Employment and Industrial Relations Act, 2002 also permits that action be taken on behalf of a person who is the subject of alleged discriminatory treatment. Where it is alleged that a worker has been unfairly dismissed by an employer, or where there is an alleged breach of any obligation under Title I of the Act (thus including discriminatory treatment) or any regulations prescribed there under, the matter shall be referred to the Industrial Tribunal for a decision by it by means of a referral made by the worker alleging the breach or by a person acting in the name and on behalf of such a worker.

Maltese law does not provide for situational testing. Furthermore, there is no reported case-law on the matter. Thus it is not clear whether or not situational testing would be accepted as evidence in judicial, administrative or other procedures.

Burden of Proof

The general principle under Maltese law is that the burden of proof lies on the person making the allegation. However, the Employment and Industrial Relations Act, 2002, provides that discriminatory treatment shall include 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. Furthermore, Legal Notice 461 of 2004 provides that in any proceedings brought by a person claiming discriminatory treatment in respect of his/her employment, it shall be sufficient for the plaintiff to prove that he or she has suffered discriminatory treatment and it shall become incumbent on the defendant to prove that such treatment was justified in accordance with these regulations, in the absence of which, the Tribunal or Court shall uphold the complaint of the plaintiff.

The Equal Opportunities (Persons with Disability) Act, 2000 does not provide any rules relating to the shifting of the burden of proof.

Maltese law does not specifically permit or prohibit the use of statistical evidence to establish indirect discrimination. To date, in Malta there is no case law relating to the admissibility or otherwise of statistical evidence and on the conditions of its eventual admissibility.

Sanctions

In cases where it is found that a person has acted in a discriminatory manner, the various laws provide various sanctions of varying degrees ranging from fines to imprisonment. As the sanctions vary it is not possible to determine if they are all proportionate, effective and dissuasive. However, the fact that there does not appear to be any reported decisions of the imposition of such sanctions would seem to indicate that the sanctions are indeed proportionate, effective and dissuasive.

Thus, in terms of Article 30 of the Employment and Industrial Relations Act, breaches of Articles 26 (gender discrimination), 27 (work of equal value), 28 (victimisation) or 29 (harassment) may be sanctioned with the cancellation of any contract of service or of any clause in a contract or in a collective agreement which is discriminatory or by the payment of reasonable compensation awarded by the Industrial Tribunal to the aggrieved party. Under Article 24 of The Equal Opportunities (Persons with Disability) Act, a claim for damages as with any other civil action; and any damages in respect of an unlawful act of discrimination may include compensation for moral damages whether or not they include compensation under any other head, up to a maximum of two hundred Liri (Lm200). It is to be noted that this is the first instance where the law in Malta specifically provides for the award of moral damages to an aggrieved party.

In the Criminal Code, Article 82A imposes imprisonment for a term from six to eighteen months for a person who has been convicted for using threatening, abusive or insulting words or behaviour, or displaying any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up racial hatred or whereby racial hatred is likely, having regard to all the circumstances, to be stirred up. Furthermore, the Criminal Code provides that any sentence to a punishment established by law shall always be deemed to have been awarded without prejudice to the right of civil action. Maltese legislation does not mention instances of multiple discrimination as aggravating circumstances.

6. Equality Bodies

As yet there is no body designated in Malta to promote equality of treatment for all persons without discrimination on the grounds of racial or ethnic origin and neither is there any designated body to address the issue of multiple discrimination. However, it is being considered that the National Commission for the Promotion of Equality for Men and Women,



will also be designated as the national authority which will be designated to promote equality of treatment for all persons without discrimination on the grounds of racial or ethnic origin as well as to address issues of multiple discrimination.