



Executive Summary

Country Report Malta 2011 on measures to combat discrimination

By Tonio Ellul

1. Introduction

At the end of 2010, the Maltese population was estimated at 417,617 of which 207,586 (49.70%) were males and 210,031 (50.30%) were females.¹ The Labour Force Survey published in January 2012 indicates that the number of employed persons in Malta as at September 2011 was estimated at 170,466 of which 111,288 were male and 59,178 were female.

Various organisations in Malta, both governmental and non-governmental, actively seek to combat discrimination on various grounds. Besides the measures taken to implement the Directives, government has sought and still seeks dialogue and consultation with persons and entities working to combat discrimination.²

2. Main legislation

The principles of equality of treatment and non-discrimination were first introduced into the Maltese Constitution of 1964 providing 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 Act³, 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, 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; 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

¹ The number of foreign citizens residing in Malta in the same period amounted to 20,395.

² 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.

³ This 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.



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. The latter regulations were amended by Legal Notice 53 of 2007 which refer, in particular, to the provision of reasonable accommodation to persons with disabilities and the defence of rights in line with the provisions of Directive 2000/78. In virtue of Legal Notice 54 of 2007 the Equal Treatment in Employment regulations were extended to employees in the public sector. It is to be noted that there are no provisions in Maltese law which are in material breach of the Directives.

Legal Notice 85 of 2007, the Equal Treatment of Persons Order, further implemented the provisions of Directive 2000/43/EC. In terms of this legal notice the Commission for the Promotion of Equality for Men and Women was designated as the body responsible for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. In addition this Order 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. Malta is also a party to various international human rights instruments that provide for the protection against discrimination.

As a general comment, sparse reference to local practice on the subject areas is made because there is little case-law or publicly available material and only sparse practice exists.

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, 2000.⁴

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 having 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

⁴ 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. Furthermore, Legal Notice 461 of 2004 and Legal Notice 85 of 2007 provide for the prohibition against both direct and indirect discrimination.



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.⁵

Discrimination by association

Article 3(1)(b) of the Equal Opportunities (Persons with a Disability) Act, 2000, provides that a person is considered to be acting discriminatorily when 'he treats or proposes to treat a person less favourably on the basis of a characteristic that appertains generally to persons who have such a disability or a presumed characteristic that is generally imputed to persons who have such a disability.'

Furthermore, since Legal Notice 461 of 2004 and the Equal Treatment of Persons Order, 2007 provide for the prohibition of both direct and indirect discrimination, and such definitions are taken from the Council Directives, it may be argued that Maltese law prohibits discrimination on the grounds mentioned in the Directives based on presumed characteristics.

Victimisation

Article 28 of the Employment and Industrial Relations Act provides that if any person (a) files a complaint to the lawful authorities or initiates or participates in proceedings for redress on grounds of alleged breach of the provisions of the Act, or (b) discloses information, confidential or otherwise, to a designated public regulating body, regarding alleged illegal or corrupt activities being committed by his employer or by persons acting in the employer's name and interests, it is unlawful to victimise such person for having acted accordingly.

In this case this provision goes further than that required by Article 11 of the Employment Equality Directive since it does not only relate to breaches of the obligation of equal treatment but to any breach of the provisions of the Act. The wording of Article 28, particularly in the case mentioned in (b) above, appears to extend protection against victimisation to persons other than the complainant.

In line with the provisions of the Race Directive, Article 7 of the Equal Treatment of Persons Order provides that it shall not be lawful to victimize any person for having made a complaint to the lawful authorities or for having initiated or participated in proceedings for redress on grounds of alleged breach of the provisions of these regulations, or for having disclosed information, confidential or otherwise, to a designated public regulating body, regarding alleged acts of discrimination or discriminatory treatment.

⁵ The prohibition of harassment is also mentioned under the Public Service Management Code regulating employment in the public service.



Instruction to discriminate

Legal Notice 461 of 2004 prohibits the instruction to discriminate in the field of employment and under Legal Notice 85 of 2007 in respect of discrimination under Directive 2000/43/EC. No such prohibition, however, exists under the Equal Opportunities (Persons with Disability) Act, 2000, and the Equality for Men and Women Act, 2003.⁶

Exceptions and exemptions; reasonable accommodation

Article 2(3) of the Equal Treatment of Persons Order provides that a less favourable treatment which is based on a characteristic related to racial or ethnic origin and takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment shall not constitute discrimination where by reason of the particular occupational activities concerned, or of the context in which they are carried out, the treatment is legitimate and the characteristic constitutes a genuine occupational requirement which is proportionate in the circumstances.

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 latter Act provides that employers must provide reasonable accommodation for employees with disabilities.

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 contain specific anti-discrimination provisions in respect of certain spheres (mainly employment) or persons (discrimination on the basis of sex, race and ethnic origin 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

⁶ 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.



authorities. In fact, the Employment and Industrial Relations Act 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.

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 fact, in virtue of Legal Notice 54 of 2007 the Equal Treatment in Employment Regulations were extended to employees in the public sector. In case of discrimination of employees in the public sector by public authorities, such employees can invoke the 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 and the regulations issued thereunder, 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,⁷ the Equal Treatment of Persons Order, 2007 has transposed those provisions of the Directive.

The alleged victim can also seek to protect his rights by seeking redress under the Constitution, under the European Convention Act and under the Ombudsman Act. 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 courts, there exist other bodies where an alleged victim can address his or her complaint. These include the Industrial Tribunal (under the Employment and Industrial Relations Act, 2002), the National Commission for Persons

⁷ 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.



with Disability (under the Equal Opportunities (Persons with Disability) Act), the National Commission for the Promotion of Equality for Men and Women (under the Equality for Men and Women Act), the Public Service Commission (under the Constitution of Malta), the Ombudsman (under the Ombudsman Act), the Broadcasting Authority (under the Constitution of Malta), and the Employment Commission (under the Constitution of Malta).⁸

As a rule, actions before such authorities are brought by the victim himself since, 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. Both Legal Notice 461 of 2004 and Legal Notice 85 of 2007 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. It 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.

In terms of Article 11 of the Equal Treatment of Persons Order the Commissioner for the promotion of equality may initiate investigations on any matter involving an act or omission that is allegedly unlawful under the provisions of the Order. He may also initiate investigations on the receipt of a complaint in writing by persons who claim to be the victims of an act or omission contrary to the provisions of the Order. Furthermore, if it appears to the Commissioner that persons who wish to make a complaint require assistance to formulate the complaint, he is to take or order the taking of such reasonable steps as may be necessary to assist such persons in making the complaint.

Under the Employment and Industrial Relations Act 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 worker.

⁸ With respect to the Employment Commission, the Constitution limits the remit to discrimination on the basis of political opinion.



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 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. Similarly, the Equal Treatment of Persons Order provides for the shifting of the burden of proof.⁹

The Equal Opportunities (Persons with Disability) Act, 2000 does not provide any rules relating to the shifting of the burden of proof. Since there have not been many cases wherein persons were prosecuted for breach of the Directives, it is assumed that this is also because the sanctions are considered to be proportionate, effective and dissuasive. However, there is no data to support this view.

6. Equality bodies

The National Commission for the Promotion of Equality for Men and Women (NCPE) has been designated as the body in Malta to promote equality of treatment for all persons without discrimination on the grounds of racial or ethnic origin. The current primary task of NCPE is to monitor the implementation of the Act to Promote Equality for Men and Women and to promote equality in spheres where it may be lacking and to ensure compliance with the provisions of the Equal Treatment of Persons Order. The Commission seeks to ensure that Maltese society is a society free from any form of discrimination in all sectors and at all levels with respect of training and employment, and the provision of services and benefits. It has the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues.

⁹ This rule shall also apply where the Commission itself takes action to refer an allegation of discrimination to the competent court on behalf of the person discriminated against or where it intervenes in support of a person alleging discrimination and taking action for redress.