

GENDER IN EMPLOYMENT UNDER MALTESE LAW - A LEGAL PRACTITIONER'S PERSPECTIVE

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In this contribution, I focus on some of the current practical problems that we face in our every day practice in relation to cases on sexual discrimination. Most of these topics are related to the legal structure or to the possible application of the law. The aim of this paper is not to criticize the government or any of the bodies involved in the drafting of the legislation concerned, but rather to fuel further discussion that may lead to improvements in the practical use of our legislation.

1. Cost and Accessibility of Remedies

According to the Equality for Men and Women Act (EMWA), in particular Section 19, if a person feels aggrieved by an act of his employer, he or she may apply to the competent court of civil jurisdiction for damages. In this regard it is submitted that an improvement of the accessibility to the current remedy needs to be addressed in the sense that if a person feels discriminated on the basis of his or her sex, one has two choices. In the first instance, the alleged victim may refer to the National Commission for the Promotion of Equality for Men and Women (NCPE) in order to file a complaint. In such cases, the NCPE investigates the matter and it acts in the name of the complainant. If the complainant is (a) either not pleased with the outcome of the investigation initiated by the NCPE or (b) the complainant wishes to file a suit individually without involving the NCPE, the EMWA (section 19) instructs that person to file a suit in the 1st Hall, Civil Court. The problem with such a remedy is the cost. In cases such as the one at hand, where the court will be asked to liquidate the damages payable to the plaintiff in terms of the EMWA, in order to file a suit a fee of LM250 in judicial fees and legal costs alone is levied. Unfortunately such costs are high when compared to the other remedies available and render such remedies inaccessible for some employees.

Another parallel remedy available to a complainant if the discrimination is linked to one's employment is recourse to the Industrial Tribunal. In such instance, the judicial fees are nil but in this regard another problem is present in the sense that, although there are no test cases, currently employers are encouraged not to worry too much about discrimination cases

brought against them. In 2004, the Industrial Tribunal is still giving awards for dismissal in the range of Lm500 so, as a result, employers aren't too worried about sex discrimination claims being brought against them. In this regard, it is submitted that, if the tribunal discovers that the employer discriminated against its employees, a minimum award as dictated by statute should be present in order to make employers more aware and proactive on the subject. If nothing is done in this regard, employers will not be incentivised to comply with the law and ensure equality on the place of work.

One could also argue further in that the above practical difficulties could in fact be contrary to the 2002 Directive¹ since there may be an argument that the above remedies are not adequate remedies since, according to the directive, all remedies available at law should be effective, proportionate and dissuasive.

2. A Lack of Clarity in Possible Cases of Indirect Discrimination

It is quite evident that the cases which have been decided so far by our Civil Courts in relation to breaches of the principle of non-discrimination on the basis of sex as found in our Constitution² concerned blatant infringements of the law.

So far, no case has been lodged either in our law courts or in particular in the industrial tribunal concerning an instance of 'opaque' or indirect discrimination. Let us consider that an application on the basis of alleged indirect discrimination has been filed in the Industrial Tribunal. In such cases, a complainant will find that a definition of indirect discrimination is not found under the definitions section of EIRA 2002 and one is forced to refer to the definition of indirect discrimination included in Equal Treatment in Employment Regulations 2004 and the relevant European directives, which, as such, do not really apply to sex discrimination.

In such instances, the Employment and Industrial Relations Interpretation order of 2003 is of no help either. At this stage allow me to make an assumption that the definition was not included most probably because when the law was drafted (in fact till this very day) the new proposed Directive on Equal Treatment of 2002³ which would apply to sex discrimination was and is not yet in force.

In the light of the new Equal Treatment Directive 2002/73/EC and in the light of the EU *Acquis* generally, the Industrial Tribunal should most definitely give such cases of indirect discrimination their due weight and the definitions of 'direct' and 'indirect' discrimination should perhaps be inserted in EIRA as they are in EMWA. It would be interesting to see what would happen if the Industrial Tribunal decides that it is not competent to hear such cases? What happens if the tribunal decides that indirect discrimination on the basis of sex is not covered by EIRA and the case is thrown out? Presumably, the government intends to include such definitions in the forthcoming regulations on sex discrimination which will be issued when the new Equal Treatment Directive comes into force, but should we wait till then?

¹ *vide* Article 8d

² Refer to *Victoria Cassar v MMA et (2001)* and to *Margaret Camilleri et v The Cargo Handling Co Ltd (2003)*

³ 2002/73/EC

3. The Time to Claim

Under the current rules as found in EIRA, there is a 4 month peremptory period after which an employee cannot claim discrimination. Although the content of the provision in question is quite clear, its application leaves room for doubt and interpretation. In practice one can be faced with a problem in that it is not clear from when this period starts. Is it from when the act of discrimination affects the injured party or from when the employer implemented the discriminatory provision? What if, for example, a discriminatory collective agreement was agreed upon in 2004 but an aggrieved employee was only affected by the provision upon her employment in 2005. Can he/she claim?

In this instance it is submitted that the legislators should not leave it up to the tribunals to decide this point and a clarification of the sections of EIRA is definitely called for.

Also, under the EMWA there is no mention of a period within which an employee may claim. Since the action is one for damages, one can presume that the prescription period for such cases would be 2 years. It is submitted that the law should be clarified in this regard in order to clarify the issue for employers and employees alike.

4. Interviews and Results

Section 26(1)(a) of EIRA and Section 4 of the EMWA states that an employer cannot discriminate (a) when advertising or offering employment and (b) in determining who should be offered employment.

Although the sections in question place quite a heavy burden on the employer in that attention during interviews is definitely called for, a complainant will find a number of practical obstacles which could possibly be regulated by legislation. A fundamental question which remains unanswered in practice is: does the employee have the right to know what was the reason for not being chosen? Are there any obligations on the employer to keep any records in this regard?

This practical problem is one that should not be ignored. At present, employers may interview future personnel and a number of questions may be asked. Perhaps these questions are not discriminatory per se, but in the long run the employer discriminates just the same by choosing only male or female applicants for the job without stating so. There are no obligations on the employer to keep records of the interviews or to state the reasons why a person was not chosen. In fact, if a person who feels that he or she feels discriminated against during an interview and that person asks the interviewing employer why he/she was not chosen, he/she is probably told that other applicants had better qualifications and/or experience. That person however, does not have the possibility to verify such an answer.

It is submitted that the law should go further than uttering a general principle in that prior to proceedings, the employer in question should be bound to keep records of the interviews in question and the employee should have access to the results of her interview and to reasons why he/she was not chosen. This would of course be complementary to the powers of the

NCPE to investigate alleged discrimination and to the onus of proof rules that are applicable in court.

5. Justifications

It is submitted that the local legal position on the various justifications that may be brought by employers is unclear and insufficient. If one refers to EMWA 2(5) and EIRA 26(3) there are a lot of disparities and differences in provisions that are food for confusion. Each of these sections are, at times, not in line with the European Directive of 2002.

More specifically, the EMWA in Section 2(5) does not include the principle of proportionality as reflected in the phrase ‘provided that the objective is legitimate and the requirement is proportionate’ which was introduced in the 2002 Directive following a number of important decisions of the European Court of Justice. Section 26(3) of EIRA on the other hand takes a very general approach without specifying most elements of a proper justification as listed in the 2002 Directive.

In the light of the above, it is proposed that our laws should be amended and harmonised to include all the principles set out in Article 2(6) of the new 2002 directive, thereby effectively reflecting the recent developments which occurred at a European level.

6. Women’s Participation in the Labour Market

A number of papers and discussion seminars have been held on the participation of women in the labour market. Although the following is simply a personal opinion, a number of provisions relating to the legal protection afforded to women may be a burden on Maltese employers and in the long run could hinder competitiveness with other markets.

The principles behind the protection of occupational health and safety in relation to pregnant women, for example, is usually welcomed by many employers. However, (a) does the maternity leave at law have to be on full pay or may the payment due by employers to pregnant women during maternity leave be reduced so as to enable Malta to compete on this front with its European counterparts? It is submitted that such a reduction in the maternity leave payment will possibly improve women’s participation in the labour market and it will certainly change an employer’s perception of the female labour market. Moreover, (b) the current parental leave regulations enable mothers who gave birth to take parental leave in conjunction with maternity leave. It is submitted that in this instance, there should be restrictions in this regard in that parental leave should only be taken after the child reaches the age of one year since this would enable the employer to eliminate some of the unpredictability, in terms of return to work, that a pregnancy entails.

7. Harassment

An examination of the provisions on harassment as found in EIRA⁴, reveals that at present, only sexual harassment is protected under the provisions of the aforesaid act. The other forms of harassment which may not be directly linked with a sexual act or gesture are not

⁴ Please refer to Section 29 of EIRA

mentioned. In such instances, a complainant may refer to the NCPE under the EMWA or to the Equal Treatment Regulations of 2004 if the harassment is linked with the subject matter being tackled by the Regulations. However, it is still recommended that in order to harmonise the position at law, EIRA should be amended to expand its remit in this regard in order to reflect the provisions and scope of the 2002 Directive in their entirety.