

One main challenge for the European social partners, as portrayed in the Lisbon Strategy, is to develop the labour market in such a way as to promote greater managerial flexibility while ensuring the workers' security. The situation is becoming complicated by the widespread emergence of new atypical forms of occupations. The reform of labour law and public administrative structures through social dialogue are perceived as necessary requirements for the emergence of a fairer, more inclusive labour market.

Atypical Occupations and Social Dialogue¹

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The vast majority of Malta's labour force is engaged in standard, open-ended, full-time occupations and the existing legal and administrative structures are generally regarded as providing an adequate framework for effective industrial relations. The social partners, as the main protagonists, are agreed that no effort should be spared to ensure that the established, minimum conditions of employment and standard of living are maintained and safeguarded for all. Hence the need for constant update of these provisions is acknowledged in order to confront adequately the challenges presented by the introduction of various forms of atypical, non-standard, occupations which are recently emerging in Malta as in other countries. These cover a wide range of activities and include part-time work as a main occupation, definite and occasional contracts, telework, agency work, home working, flexible working time arrangements, camouflaged self-employment under civil contracts, home working, and above all, informal work.

The critical question about these 'new' forms of work is whether the workers are constrained to perform them by their employers and/or the force of circumstances or whether they do so as a matter of choice. It should be noted, for instance, that there are circumstances where the benefits of definite contracts may outweigh those of indefinite contracts. Likewise, part-time work may be very suitable for some persons, generally women, who are burdened with additional

¹ This paper is based on a more elaborate study by the same author entitled *The Impact of New Forms of Labour on Industrial Relations and on the Evolution of Labour Law in Malta* (2008).

responsibilities in the family or elsewhere. In most cases, however, occupational flexibility is being introduced at the expense of job security.

Normally, the solution to such situations may be sought through collective bargaining. However, for various reasons, this solution is not always feasible. The vast majority of the employees engaged in the new, non-standard forms of work, are not covered by collective agreements and are not even trade union members. Nor do the current regulations regarding *Employee Information and Consultation* provide adequate protection for them. These deficiencies apply not only to workers engaged in the informal sector, but also to others who work as independent workers or who have purely economic relations with their employers.

In recent years, the number of fixed term employees and of part-time employees has been rising and 95.7% of those whose part-time work is their main occupation are women. Other workers are occupied as economically dependent workers. There are also casual workers, home workers, temporary agency workers and others who have to contend with precarious conditions of employment. Above all, there is a sizeable informal sector which includes both irregular migrants from nearby African countries and others who are neither protected by the country's employment laws nor covered by the provisions of social security.

The exact number of independent or home workers is unknown. Traditionally a number of companies used to 'farm out' part of their production processes to individuals - very often women – who would perform their tasks independently, in their homes and paid by piece rates. Similar opportunities are now provided by telework, some kinds of which are also performed from homes. According to the 'Employment Barometer' carried out by the Employment and Training Corporation (ETC) during 2004 – 2005, only about 3.8% of employers made use of some form of telework. However, the rate in the larger companies, with over 200 employees, is double that figure. In fact, another study carried out by the National Statistics Office (NSO) revealed that 11.4% of all employees regularly use telework. It is also known that the number of employees in call centres is on the increase. Indeed, a major bank increased the workforce in its call centre to 600 at the end of 2007.

The practice of temporary agency work in Malta, though real, is still not widespread. It tends not to be advertised and, to date, it is not covered by any specific regulatory framework. However, one of the measures introduced in the 2008 Government Budget aims at promoting temporary employment by making it possible for unemployed persons to continue registering for work if they only have a short term occupation.

In the opinion of the social partners,² the employment categories where flexibility characteristics predominate in Malta tend to be those of *self-employed persons who are engaged in informal activities on a part-time basis*. The sectors where most of these persons are engaged tend to be those of construction, hospitality (particularly in small, independent, catering establishments), cleaning and security.

According to the trade unions, in these last two sectors some bidders for public contracts are submitting quotations with computations for wages which are even below the legal minimum requirement for employees in these sectors. In some cases call centres and in the 'on line betting' centres located in Malta, employees are reportedly being employed on a week-to-week basis and paid according to the number of calls actually made. The construction industry is increasingly being manned by illegal immigrants, under conditions which are far below the legal minimum and with little regard for occupational health and safety.

On the other hand, the employers pointed out that the decision to do part-time work as a main occupation might be a viable option for some employees. Some such employees may be females who may also have to perform other household duties. The recent legal amendment prescribing *pro rata* conditions for part-time work was intended to reduce sources of discrimination against part-timers. It was pointed out that employees on a definite contract may actually have certain legal safeguards which exceed those of employees on an indefinite contract. One such example may be a case of dismissal of an employee before the end of the contractual period who is obliged to pay the full amount under the contract. The crucial issue in all such cases is whether the employees concerned are constrained to engage in such 'non-standard' forms of work or whether they do so as a matter of their own choice.

The conditions of employment of persons performing non-standard work are varied but are generally sub-standard. This applies particularly to workers in the informal sector due to lack of regulations. In the case of irregular migrants, the conditions are very poor due to the lack of regulation. Many of these who work in the construction industry are recruited by the day, are often paid one half of what the local workers in the sector receive, and expected to give little regard for established health and safety standards. Some employers, particularly in the small hotels and catering industry, are said to be resorting to various schemes in order to avoid having to pay overtime rates to their employees. One way is that of hiring the employees of another company as part-timers.

2 *Senior representatives of the social partners were interviewed for the purposes of this paper.*

The Role of Labour Law

A degree of protection for some of those employed in the new forms of labour is offered by Malta's labour laws. These include part-timers, casual employees and those on a definite employment contract.

A *part timer*, under Maltese Employment Law, is an employee who works less hours of work weekly when compared to a full time or a whole time employee. Broadly speaking, part timers are not to be treated less favourably than full timers in so far as remuneration and benefits are concerned. Essentially therefore, *pro rata* calculations and payments as compared to whole timers or full timers are usually applicable to part timers. Part timers are currently regulated by the Part Time Employees Regulations 2002, under which part timers are entitled *pro rata* entitlements.³

The notion of *casual employee* is not regulated by statute. A casual worker as it is locally understood is an employee who does not work a number of fixed or pre-determined hours and the employer may call the employee to work when the employee's services are required. On the other hand, the employee is obliged to go to work when his employer calls him. This category of worker is often found in industries such as tourism where the work is seasonal and unpredictable. For many years such workers were unregulated but today this position has changed to some extent. An employer, who wishes to employ a casual worker, has to register such workers with the ETC and that worker has to be afforded all the rights as would be available to a part time employee working the same hours as the casual worker.

Maltese labour law provides for *definite service contracts to be automatically converted* into ones for an *indefinite period under certain conditions*. It also legislates against discrimination between employees under other forms of contracts of service and those with a contract for an indefinite duration. In this way, the law promotes the security afforded to employees under a contract for an indefinite duration.

In order to protect an employee from potential abuse by his or her employer, the law lays down the conditions for the conversion from a definite term contract into an indefinite term contract. Article 7 of the Contracts of Service for a Fixed Term Regulations 2002.⁴ in fact says that if an employee is continuously employed on a fixed term contract or contracts for more than four cumulative years, the employee is considered to be on a contract of indefinite duration.

3 As amended by LN 140 on 1st July, 2007. In practice, it is only those part-time employees who pay social security contributions who are entitled to *pro rata* benefits – that is, with a minimum of 8 hours per week as their main employment.

4 Legal Notice 429 of 2002

The protection of employees on a definite term contract is also reflected in the anti-discrimination provisions⁵ that specifically lay down that the conditions of employment in a fixed term contract may not be less favourable than those for an indefinite term in the same place of work, unless different treatment is justified on objective grounds.

Economically dependent workers do not have an employment contract but are dependent on a single employer for their source of income. Despite their ambiguous status, they are legally classified as self employed. Due to the relatively small numbers of workers involved, they are not yet perceived as an important category in Malta and no official figures are published about them. Nevertheless, research⁶ has revealed that they are present in the following sectors: gas cylinder distributors, port haulers, lotto agents, beverage salesmen, installers of cable television and teachers of English in foreign language schools. Some of these categories have been operating on a commission basis for many years. However, following the recent amendment to the legislation extending *pro rata* conditions to all part-time employees, some employers are now believed to be exerting pressures on their employees to adopt such a fictitious status of self-employed workers. Such a move eliminates many legal obligations on the part of 'employers' towards their employees such as in cases of dismissal, if required. It would also avoid having to grant the employees *pro rata* benefits equivalent to vacation leave (one month's pay) and sick leave (2 months) - even if the employers may agree to fork out the National Insurance contributions liable as self-employed persons. For instance, in some small hotels, 'self-employed' chambermaids are said to be paid a flat rate according to the number of guest rooms cleaned. In view of the possible increase in the numbers of such workers in future, it is expected that the matter will be put on the national agenda for discussion among the social partners.

Nevertheless, despite the recent advances in legislation, many of the workers engaged in the new forms of work have little or no access to the protection offered by the provisions of labour law. This particularly applies to the formally self-employed and to those in the informal sector. And, as already noted, one of the unintended by-products of the recent extension of pro-rata benefits to part-time workers has been an increase of 'fictitious self employment'.

Administrative Measures

During recent years, various measures have been implemented by government to enforce labour laws and to curb abuses, particularly in the informal sector.

⁵ Section 34 (1) of EIRA.

⁶ Manwel Debono & Sue-Ann Scott, *Situation of Economically Dependent Workers*. Centre for Labour Studies, University of Malta, EIROnline, 2006.

The issue of undeclared work also tends to be closely associated with those of social security. The Employment and Training Corporation, the Department of Industrial and Employment Relations and the Occupational Health and Safety Authority are being actively involved in these measures. Yet, despite the recent positive results, it is generally acknowledged that there still exist considerable abuses particularly by persons doing undeclared work while receiving unemployment benefits. While such abuses are censured by the government and social partners alike, many believe that the existing efforts to curb undeclared work should be intensified.

In such situations, the social partners emphasize the need for the intervention of labour law as a minimum safety net and for the law to be accompanied by the necessary administrative and enforcement apparatus. This need is particularly evident in the case of the sizeable informal sector. The difficulties which the unions face in their efforts to organise the 'new' kind of workers, with the consequent lack of collective agreements, highlight the need to ensure that minimum standards are legally safeguarded at both the national and sectorial levels.

The Role of the Social Partners

In the employers' opinion, at this point in time, it is important to avoid adding more labour legislation. They argue that if the existing laws are not being observed by a small minority of employers, it should be ensured that these laws are observed and enforced, instead of introducing new ones. On the other hand, the trade unions argue that as new forms of employment contracts are cropping up, such as the case of new 'self employed people' who depend on a particular employer for their earnings, some sort of legislation should be introduced to protect such employees. The Government, as an employer, was among the first to introduce family friendly measures such as reduced, flexible hours. Through such measures, a number of women workers are no longer leaving employment.

It is generally agreed that flexibility needs to be introduced so that existing family friendly measures could be accommodated. However, labour law should ensure that the minimum standards are met and leave room for collective bargaining. One should also consider allowing more flexibility when negotiating collective agreements. For example, an agreement may be reached to lower the number of sick leave entitlements in lieu of other benefits.

Some employers further argue that labour market segmentation should not necessarily be regarded negatively. They feel that certain European directives go beyond the minimum labour standards. While agreeing that a minimum “floor of rights” should be established, one should see that such rights are not inflated. While collective agreements stimulate productivity, legislation may stifle productivity. They feel that sometimes the EU Commission tends to adopt a paternalistic attitude and insist that free collective bargaining between an employer and a union should not be stifled. They argue that whilst ensuring adequate standards of employment, labour legislation should always allow an element of flexibility, and the employers generally agree that Maltese legislation has achieved the right balance in this regard.

On their part, trade unions face particular difficulties when trying to recruit members from among the employees engaged in the new, atypical occupations. These employees often work in small batches and are not in contact with one other. There are cases, like that of a major cleaning company and of a large security firm, both employing up to 500 employees, who never actually meet as a group. Furthermore, when employees try to join a trade union, they are often dissuaded from so doing by their employers who may even confront them with various threats. Reflecting on the situation, one leading trade unionist complained: ‘As a result of the shifts currently taking place in the labour market, we are losing much of our strength.’ He further noted that in most instances, the sectors where the new forms of work are emerging are those where traditionally trade unions are not strong. Hence, most of the new, atypical occupations present a further challenge to the trade unions. As a result of their lack of union representation, not only do these workers have inferior working conditions but they are also deprived of standard conditions regarding occupational safety and health.

It is known that approximately 21,000 workers (14.3% of the total labour force) are covered neither by a collective agreement nor by a Wage Regulation Order (WRO). There are 29 sectors of workers not covered by a WRO and some of them include important areas in Malta’s labour market, where the new forms of work are emerging. Among others, these sectors include: information technology, banking, telecommunications, betting companies,

financial services, entertainment / recreational centres, casinos, social work, postal services, local authorities, offshore companies, employment agencies, veterinary services and yacht yards. Thus, apart from the national legal provisions regarding wages, etc., these employees have no rights to sickness leave, bereavement leave, marriage leave, injury leave, birth leave, and jury service leave entitlements. There is agreement among the social partners that this matter ought to be rectified and it is expected that a recommendation will be made to government through the proper channels in the near future.

Beyond this, there is little ongoing discussion regarding the impact of the new forms of work on national labour law, apart from the need to regularise the position of such workers regarding the payment of income tax, national insurance contributions and the maintenance of established standards regarding occupational safety and health.

In response to the EU Commission's green paper issued in 2006, Malta's social partners, both individually and collectively, made a number of suggestions on how labour law may be reformed both at the European and national levels in order to cope effectively with the new, emerging situations. It should be noted, however, that the part actually played by the social partners is limited. There is a recognised need to develop further the process of structured consultation among the social partners - particularly at the *Malta Council for Economic and Social Development*. In spite of a determined attempt by government to reform this council, the social partners often complain that it is still ineffective. Some even claim that in place of real discussion and consultation, they are often confronted with preconceived ideas and political bias. Clearly a lack of trust prevails among them and this situation renders active collaboration difficult. In practice, the social partners are also hampered by limited resources at their disposal and this makes it even more difficult for them to make a valid contribution.

The ultimate aim of these initiatives is to liberalise the labour market as much as possible without threatening job security, thus extending the principle of *flexicurity* throughout all the sectors of Malta's labour market - as envisaged by the European Employment Strategy.