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Article

UNFAIR & UNCONSTITUTIONAL PROPOSALS

Since joining the EU in 2004 Malta has all the required legislation in place concerning equality and discrimination, with a particular focus on the place of work. The current relevant legal framework includes Chapter 456: Equality for Men and Women Act and Chapter 452: Employment and Industrial Relations Act (Part IV: Protection against Discrimination related to Employment). This set up, fully EU compliant, has over the last 12 years satisfactorily served employees and employers in all matters concerning Equality and Discrimination in work and employment.

It now results that not all are satisfied with the rights and guarantees currently prevailing regarding Equality and Discrimination and the Social Dialogue Minister, Helena Dalli, is proposing to commence regulating work and employment through two controversial new Bills, namely a "Human Rights and Equality Commission Act 2015" and an "Equality Act 2015". Needless to say, this intention to suppress the current satisfactory employment laws worries Employers and belies a disproportionate influence exercised by particular lobbies. We are seeing a relentless effort, conducted thoroughly to impose draconian discrimination and equality legislation that the same EU does not require and is not recommending.

Employers are set to lose a valid legal set-up specifically conceived and refined over time, for the world of work and employment. This set-up effectively caters for the exigencies and realities of the work environment. Now through these ill-advised, severe and very rigid proposed laws Employers will be hampered in their work. Furthermore these proposed Acts, through their severity, depict Employers as incompetent operators and severely lacking in their ability and willingness to guarantee equality and non-discrimination at work.

To add to the problems of Employers there seems to be an erroneous willingness, on the part of politicians, in their perpetual quest for votes, to accommodate unreasonable requests from minorities. It is important to seek to protect and promote the good of minorities (women and gays etc.) but it is not correct, in doing this, to trample on the rights of other groups. We seem to be heading towards a possible approval by Parliament of a set of unfair and unconstitutional laws

Particular Lobbies appear worried by a low number of abuse reports and convictions that are occurring in respect of discrimination and equality at the workplace. This low score is being attributed to

35/1, South Street,
Valletta VLT 1100, Malta
t: (+356) 21 237585, 21 222992
f: (+356) 21 230227
e: admin@maltaemployers.com
www.maltaemployers.com

defects in the current law. So the Ministry's reaction is the introduction of more severe laws that will create a powerful commissioner, who will de facto become a Judge in his own right, with his own law court, in parallel to the country's established courts of Law. This commissioner will be given powers of promotion of objectives, powers of initiation of investigations, powers of coercive interrogation, powers of prosecution, judgement and condemnation. In Malta's legislative history there has never been such a proposal for arbitrary, and possibly persecutory power, concentrated in one autonomous non-legal person who will double up as a judge of those Employers he will be investigating and prosecuting.

With full authority this commissioner will interrogate arbitrarily selected witnesses, as well as an accused, and will utilise his punitive powers to get each one to collaborate with him so that eventually he can pass on to the judgement phase of his intervention.

Employers, similar to normal citizens, have a right to basic legal guarantees, and so Employers want to retain the current set-up whereby a Commissioner reports a transgressing Employer to the Police for referral to a duly constituted Court of Law. Employers do not want a Commissioner to proceed to directly prosecute, judge and condemn them in his own autonomous "Tribunal" where there are no safeguards to a fair trial.

Furthermore, in a "Tribunal" presided by a "commissioner", who will act as investigator, prosecutor, jury and judge, Employers object to the "shifting of the burden of proof" whereby an accused Employer is "a priori" considered guilty until he/she manages to prove his/her innocence. Currently this "shifting of the burden of proof" applies only in sexual harassment cases heard in properly constituted Courts of Law.

Employers, do not agree with, but may understand, the current aforementioned imposition of the "shifting of the burden of proof" as a help and support to a perceived "weak" employee facing a "strong" Employer. But Employers absolutely refuse that they remain considered the "strong" party and so "a priori" considered guilty, even when facing a commissioner who ex-officio accuses them of an offence (any offence against the multitude of provisos in the proposed act) and, in addition, as co-accusers, supporting him, he will have one or more NGO's.

Employers question the ability of this "Commissioner" to be impartial when judging an employer on an accusation formulated on the basis of an investigation which he/she him/herself would have conducted. Furthermore, this "Commissioner" would be passing judgement on issues which under the same proposed law, she/he is obliged to promote and nurture. A first year law student will immediately tell you

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that such a “judge” cannot but be prejudiced and will not behave impartially.

There are many other objectionable passages and orientations in the proposed “Equality Act 2015” and “The Human Rights and Equality Commission Act 2015” but in particular ‘one’ very objectionable orientation stands out. We are witnessing misguided attempts to grant wide ranging judicial powers to Commissions and Commissioners, raising them to the level of our Law Courts and Judges. Fortunately for us our Court of Appeal, (Competition office vs Association of Estate Agents), has confirmed that accusations of misdemeanours of a serious entity, carrying severe punishments, can only be considered by duly constituted Law Courts, and not Commissions. These latter can and should only handle inferior infringements, like, for example, traffic offences which imply minor sanctions like small fines.

Legal experts have long been drawing attention to this dangerous development whereby “criminal” offences get “de-penalised” and defined as “administrative” offences. In this manner the processing of such offences, gets delegated to “Commissions” and “Commissioners”, rather than, as legally correct, to a proper Court of Law where an accused has the assurance of a fair and just process of judgement.

So it is not surprising that we have officially learned that, from the original draft Equality law proposal, the power of the Equality Commissioner, to inflict a 6 month prison sentence on an Employer, or a 3 month prison sentence on a witness, has been removed. It is encouraging that someone realised that the provision granting this power was illegal and anti-constitutional and so removed it from the proposal.

In conclusion the “Competition Office” Court of Appeal ruling creates hope that so many objections, that Employers and other institutions have, to these Equality and Discrimination Bills, will be seriously considered by the proposers of these Acts, if not, the objections will be brought to the attention of our Law Courts.

Arthur Muscat
President
Malta Employers’ Association

35/1, South Street,
Valletta VLT 1100, Malta
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