EMPLOYMENT LAW: RESTRAINT OF TRADE CLAUSE

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This article will shed light on what should be considered as the general understanding of a restraint of trade in terms of Maltese employment law. [2] The author shall be delving into the salient provisions of the law, its applicability within the industry[3], along with an understanding of its interpretation by the Courts of Malta.

It is apparent within applicable law that there exists no definition of what is to be considered a *restraint from trade*, nor does there exist any provision which deals or provides specifically for the understanding and applicability of such clauses related to restraint from trade[4]. The fact that the legislator neither defined the words *restraint from trade* nor delved into whether such understanding can or cannot be the subject to a contract clause, has left such interpretation up to the active jurisprudence of the Maltese Courts.

Nevertheless the Employment and Industrial Relations Act, Cap 452 of the laws of Malta ("EIRA") does not exclude their applicability in employment contracts. It is noteworthy to refer to Article 4 of Subsidiary Legislation 452.83 (Information to Employees Regulations). [5] This regulation provides an exhaustive list of mandatory

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[2] Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta.

[3] The author will delve into the understanding and applicability of overtime from a general perspective. The Maltese Employment Law is extremely complex, and was drawn from several Wages Council Orders and Regulations which can apply to different strata and trade accordingly.

[4] QK 31/07/1969 QK 31 July 1969 [First Hall Civil Court] Joseph Xerri nomine vs. Brian Clarke.

[5] Information to Employees Regulations, SL 452.83 of the Laws of Malta, Article 4 '[omissis] and which shall include the following information: (a) the name, registration number and registered place of business of the employer and a legally valid identification document number, sex and address of the employee and the place of work: Provided that in the absence of a fixed place of work it should be stated that the employee will be employed at various places together with the registered place of business: Provided further that if there is no registered place of business, the domicile of the employer is to be stated; (b) the date of commencement of employment; (c) the period of probation; (d) normal rates of wages payable; (e) the overtime rates of wages payable; (f) the normal hours of work; (g) the periodicity of wage payments; (h) in the case of a fixed term contract of employment, the expected or agreed

information to be included within a contract of employment, and amongst others, one finds that the contract of employment should include, if any, the conditions under which fines may be imposed by the employer. This article can be linked to Article 19 of the EIRA[6] which explains that when such fines are imposed on employees in employment contracts such covenant should be brought before the Director responsible for Employment and Industrial Relations for his approval.

The applicability of Article 19 of the EIRA was the subject of several judgments including the retrial case in the names of **Mark Bugeja et vs. Geoffrey Camilleri** [7] where the Court of Appeal explained that a restraint from trade clause which sets out pre-liquidated damages does not qualify to be subject to the conditions found in Article 19 of the Employment and Industrial Relations Act (thus reversing the judgment delivered by the court of appeal on the 29 March 2008[8] and reconfirming the judgement delivered at first instance[9]).

The Court of Appeal in **Mark Bugeja et vs. Geoffrey Camilleri** [10] held that *'Fil-każ in eżami l-klawsola in kwestjoni tirreferi biss għal "għemil" wieħed cioe' jekk*

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duration of the contract period; (i) the paid holidays, and the vacation, sick and other leave to which the employee is entitled; (j) the conditions under which fines may be imposed by the employer (emphasis made by author); (k) the title, grade, nature or category of the work for which the employee is employed; (l) the notice periods to be observed by the employer and the employee should it be the case; (m) the collective agreement, if any, governing the employee's conditions of work; and (n) any other relevant or applicable condition of employment: Provided that if any of the above information is regulated by any law, regulation, national standard order, sectoral regulation order or collective agreement, the information may, where appropriate, be given in the form of a reference to the laws, regulations, orders or collective agreements governing that same information: Provided further that where an employer engages a person under a contract for service as an outworker for an undertaking, he shall provide the employee with a signed statement showing - (a) the name, registration number and registered place of business of the employer and a legally valid identification document number and address of the employee; and (b) the rate to be paid for the work; and (c) any special conditions regulating the contract.'

[6] Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 19 '(1) Unless otherwise prescribed in a collective agreement, where: (a) the terms of any written contract of service signed by the employees or the terms of a written statement signed by an employer in accordance with article 7 specify in detail the fine or fines to which the employee may become liable in respect of an act or omission; and (b) the terms of any such contract or the terms of any such statement have been previously approved by the Director (responsible for Employment and Industrial Relations), it shall be lawful for the employer to make such deductions as may be authorised by such contract or such written statement. (2) Notwithstanding the provision of subarticle (1), where an employee fails without just cause to give to his employer the total number of hours of work as bound by the terms of any contract of service applicable to him, the employer shall not inflict on the employee any fine for such loss of work but may deduct from the total wages due to the employee that part thereof which corresponds to the work so lost. (3) Where any fine or fines are imposed by a person or by a group of persons, however named, authorised to perform such function by the employer, such person or persons shall be liable for their acts, without prejudice to the liability of the employer, as if they were the employer. (4) Unless otherwise prescribed in a collective agreement, when an employer suspends an employee from work and during the period of suspension does not pay him wages or pays him less than the wage to which the employee is entitled, the employer shall be deemed to have made a deduction from the wages of the employee by way of a fine equivalent to the amount underpaid to him in wages.

[7] 345/2008/2 [Court of Appeal] Justice Gino Camilleri 28 June 2013.

[8] vide 345/2008/1 - decided on the 29th March 2012 – Justice Raymond C. Pace

[9] vide 345/2008/CSH decided on the 22nd February 2011

[10] ibid.

wara t-terminazzjoni tal-impjieg fi żmien determinat, r-ritrattat jimpjega ruħu ma klijenti tar-ritrattandi u tipprevedi l-ħlas ta'ammont ġie miftiehem bħala danni likwidati. Tali klawsola ma tistax titqies li b'xi mod tillimita lir-ritrattat fil-professjoni jew negozju tiegħu. Din il-kondizzjoni, li ġiet aċċettata mill-impjegat (ritrattat), m'għandhiex tiġi kategorizzata bħala "inqas" jew "aktar" favorevoli għal impjegat. Barra minn hekk is-sanzjoni preveduta bil-klawsola in kwestjoni lanqas ma għandha titqies li hi "multa" ai termini tal-artikolu 19 tal-Kap.452.' [11]

The local jurisprudence dealing with such clauses developed over the past two decades, nevertheless the position is by far not comparable to the advanced interpretation of restraint from trade clause given by the English Courts. In the case **Attillio Vassallo Cesareo nomine vs. Anthony Cilia Pisani** [12] the court explained that *'Għal kuntrarju tas-sitwazzjoni lokali, fl-Ingilterra klawsola bħal dawn kienu jifformaw is-suġġett f'deċiżjonijiet sekolari. Storikament għall-bidu u in linja ġenerali r-regola addottata kienet li kuntratti bi klawsoli in restraint of trade kienu jitqiesu invalidi. Eventwalment beda jiġi aċċettat il kunċett ta' "partial restraint if reasonable and not contrary to the public interest.'* [13]

The landmark judgment delivered by the House of Lords which dealt with the notion of restraints from trade and its applicability in employment contracts and to which the Maltese Courts often refer, is **Nordenfelt Vs. Maxim Nordenfilt Guns and Ammunition Co. Ltd.** [14] The facts of the case revolved around a sale of a business specialising in the manufacture of armaments. The parties to the contract agreed that the company (Nordenfelt) '*would not make guns or ammunition anywhere in the world, and would not compete with Maxim in any way for a period of 25 years*[15]. The court held that:

'(i) All restraints of trade, in the absence of justifying circumstances, are contrary to public policy and therefore void; (ii) It is a question of law for the decision of the Court whether the special circumstances adduced do or do not justify the restraint; and if a restraint is not justified, the Court will, if necessary, take the point, since it relates to a matter of public policy, and the Court does not enforce agreements which are contrary to public policy; (iii) A restraint can only be justified if it is reasonable (a) in the interests of the contracting parties, and (b) in the interests of the public; (iv) The onus of showing that a restraint is reasonable between the parties rests upon the person alleging that it is so, that is to say, upon the covenantee. The onus of showing that, notwithstanding that a covenant is reasonable between the parties, it is nevertheless injurious to the public interest and therefore void, rests

[11] ibid p14.
[12] 254/1986/1 [Court of Appeal] Chief Justice Vincent De Gaetano 03 March 2006.
[13] ibid p5.
[14] [1894] AC 535 [House of Lords England].
[15] ibid.

upon the party alleging it to be so, that is to say, usually upon the covenantor. But once the agreement is before the Court it is open to scrutiny in all its surrounding circumstances as a question of law.'

Hence the courts determined that a restraint from trade clause must be one which is reasonable and in the interest of both contracting parties. This means that if the restraint of trade clause would benefit one party it could be classified as being unreasonable, for instance for restricting an employee's right to work, a fundamental right protected by the Maltese Constitution. [16] By way of example, if a clause merely limits the employee from entering into an employment relationship with clients of the employer post termination for a specific limited period of time, it is likely that that clause would not be considered as limiting the right to work. Very often such restraint of trade clause are generally tied up with a provision for pre-liquidated damages.

Indeed, the Court of Appeal in **Mark Bugeja et vs. Mellyora Grech** held that the restraint of trade in question did not limit the employee's right to work to an extent that would render the provision unenforceable**.** [17] In this case the defendant's employment contract prevented her from entering into a subsequent employment contractual relationship with clients who are or were in business relationship with the employer for a period of two years from the termination of the contract. Clause 7.5 of the defendant`s employment contract read as follows *'The employee cannot take up employment for a minimum period of two years after date of termination of employment with the Firm, with any person, firm or company who for two years prior to the termination of this agreement were clients of the Firm. In such case the parties agree that the employee will pay the Firm by way of agreed damages the sum of two thousand Maltese Liri (Lm2,000)."* [18] In this case the Court of Appeal held that *'din il-Qorti ma tqisx il-kondizzjoni stipulata fi klawsola 7.5 bħala waħda irraġonevoli, kapriċċuża, jew ġenerika li tirrestrinġi kompletament il-kapaċità lavorativa tal-konvenuta appellata.'* The court explained that the restriction was limited vis-à-vis the client database of the employer, and did not in any way restrict the defendant from working as self-employed or with any other firm rendering similar services.

The Court of Appeal also held that the pre-liquidated damages need to be reasonable: *'Qorti tosserva ukoll illi l-ammont ta' Lm2,000 f'danni prelikwidati fih innifsu hu ammont ta' danni li hu ta' deterrent biex impjegat ma jiksirx il-kundizzjoni ta' għażla ta' prinċipal. Però mhux tali li jelimina għal kollox il-libertà ta' xogħol tal-impjegat ma' min irid. Għaldaqstant jingħad illi il-quantum ta' danni pre-likwidati akkordati għandu ukoll jitqies bħala wieħed raġonevoli.'* [19] Hence the Court in its

[16] Constitution Of Malta – Chapter II – Declaration of Principles - Article 7 '*The State recognises the right of all citizens to work and shall promote such conditions as will make this right effective'.*
[17] 144/2011/1 [Court of Appeal] Justice Edwina Grima 27 May 2015.
[18] ibid p11.
[19] ibid p21.

dictum was explicitly clear and concluded that the restraint of trade clause in question was a *'fair and reasonable condition'* [20] which the defendant '*liberalment aċċettat il-pattijiet kontrattwali stipulati fil-kuntratt ta' l-impjieg tagħha ben konxja tar-riskju li kienet qed tidhol għalih meta aċċettat ir-restrizzjoni fuqha imposta f'każ illi hija tagħżel li ittemm l-impjieg tagħha.'* [21] To the extent that the damage is reasonable, the Courts would enforce the terms of the contract on the basis of the doctrine of *pacta sunt servanda*. [22]

Whilst the doctrine of precedent does not apply in Malta, the Courts have consistently provided there are four legitimate interests which employers are entitled to protect, namely: (i) soliciting existing employees, (ii) disclosure of confidential information and trade secrets, (iii) working for its competitors and (iv) use of the existing customers and connections. [23] It being noted that these are considered to be valid reasons for an employer to seek protection from employees, the question would still remain whether the level of protection used is deemed to be reasonable or otherwise.

In summary, it can be held that the guidelines for any clause restricting the right of work of an employee at the termination of a contract are reasonableness (both vis-à-vis restriction and amount considered as pre-liquidation damages) coupled together with the applicability of the restraint of trade clause in time and space.

[20] ibid p22.
[21] ibid p22.
[22] Garner, Bryan A., Black, Henry Campbell, Black's law dictionary (Thomson/West 2004) p1217 - *'pacta sunt servanda (pak-t<J s<Jnt s<Jr-van-dd). [Latin "agreements must be kept"] The rule that agreements and stipulations, esp. those contained in treaties, must be observed <the Quebec courts have been faithful to the pacta sunt servanda principle>. [Cases: Contracts C:=> 1.]'*
[23] Selwyn .N, Law of Employment (Oxford University Press 2008) para 19.24.