

MALTA

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Contents

| | | |
|-----|---|----|
| 1. | National court system | 1 |
| 2. | Restrictions regarding access to justice | 2 |
| 3. | Length of judicial proceedings | 4 |
| 4. | Are procedures concluded within a reasonable time? | 5 |
| 5. | Does provision exist for speedy resolution of particular cases? | 5 |
| 6. | Is it possible to waive the right of access to a judicial body? | 6 |
| 7. | Access to non-judicial procedures | 7 |
| 8. | Legal aid | 12 |
| 9. | Forms of satisfaction available to a vindicated party | 13 |
| 10. | Adequacy of compensation | 14 |
| 11. | Rules relating to the payment of legal costs | 15 |
| 12. | Rules on burden of proof | 16 |

1. National court system

The national judicial system for civil proceedings follows a two tier system whereby the claim is first presented before the court of first instance, named the First Hall of the Civil Court. A right of appeal on points of law and fact is then provided for to the Court of Appeal, a court composed of three senior judges. This is the final court. In proceedings of judicial review however the system could involve more tribunals/boards than simply the civil court in both tiers, as usually proceedings of judicial review arise from decisions of administrative or quasi administrative boards. However once a final decision is obtained from the administrative board, a right to seek judicial review lies first before the First Hall of the Civil Court and consequently to the Court of Appeal. There are a few instances where the right of appeal is not to the Court of Appeal composed of three judges, but to the Court of Appeal in its inferior jurisdiction composed of one judge. The latter is the case for example in appeals against decisions made by the Appeals Board

of the Inland Revenue Department. Also judgments of the Industrial Tribunal are subject to appeal on points of law only before the Court of Appeal in its inferior jurisdiction.

On the other hand, criminal proceedings are first heard by the Court of Magistrates or the Court of Criminal Judicature or the Criminal Court in the setup of a jury and then an appeal lies to the Court of Criminal Appeal. Still proceedings of a constitutional nature and those claiming a violation of human rights under the European Convention Act are first presented before the First Hall of the Civil Court in its constitutional jurisdiction and then an appeal lies to the Constitutional Court.

In both instances just mentioned the court of appeal is not restricted in any manner and may review partly or entirely the judgment of the first court or that of the Industrial Tribunal. Except that in the case of the Industrial Tribunal it may only entertain appeals on the wrong interpretation or application of the law. Moreover the court of appeal has established a general principle that it will not disturb the appreciation of evidence made by the first instance tribunal unless this is marred by a grave mistake.

In relation to anti-discrimination proceedings under Maltese law, generally the victim would not be the accused in criminal proceedings, but would only be the complainant before the designated equality body or before the Industrial Tribunal or the Civil Court. Conclusions of the equality commissions are not subject to appeal.

2. Restrictions regarding access to justice

In practice access to justice may be restricted either due to time limitation, costs, or due to limited rights of appeal, or to a situation whereby one party does not have full access to the documents presented by the other.

The main restriction which exists relates to the time period in which a case of discrimination can be brought before a court. In terms of Legal Notice 461 of 2004 an action before the Industrial Tribunal and/or before the civil court must be brought within four months from the alleged discrimination. However, this time frame is of two years in terms of Legal Notice 181 of 2008 which deals with gender discrimination in access to and supply of goods and services.

On the other hand, the legislation dealing with employment, that is, Chapter 452 of the Laws of Malta¹ provides a prescription period of 4 months within which an action may be brought before the Industrial Tribunal, after which the case is considered time-barred. The 4 month time bar may be considered too short, and specifically in the cases where a non judicial body may be asked to give its opinion, the time period would not allow for that opinion to be received and the person to decide on the way forward based on that opinion.

Another element which may be considered a restriction regarding access to justice is the exclusion of discrimination on the basis of nationality from the provisions of the race directive. This effectively means that the vast majority of ethnic minorities in Malta will not be able to avail themselves of the protection that the directive and its national transposition purport to provide.

Restrictions due to costs are to be considered not only in the light of an increase in court tariffs which has occurred in the latter years, but more so the increase of costs and the restricted access to free legal aid. Section 912 of the Code of Organisation and Civil Procedure² provides that legal aid is only granted to those persons whose net assets, including the value of immovables, is not more than an average of six thousand euro and at the same time the person does not earn more than the minimum wage in the preceding year. Moreover, there must be a likelihood of probable cause for legal aid to be granted in proceedings which are not of a criminal character. In the case of criminal proceedings, the accused is encouraged to accept legal assistance.³

Although there do not seem to be obstacles to access any of measures of redress, one can question the effectiveness of the sanctions or redress that may be provided by these proceedings. While the civil court and the Industrial Tribunal have a number of powers including the payment of damages suffered, one is to note that damages for pain and suffering are not considered possible under the law. Moreover, the conclusion of an investigation by the designated equality body is not public, cannot contain implementation of sanctions or fines or liquidation of compensation and moreover is only binding upon the parties where they opt to submit themselves to the conclusion of the investigation. In essence, therefore, while the measures of redress and access to them are effective, the possible outcomes or type of redress may lack some effectiveness in addressing the circumstances.

1 Employment and Industrial Relations Act, www.mjha.gov.mt

2 Chapter 12 of the Laws of Malta; Code of Organisation and Civil procedure, www.gov.mt

3 Chapter 9 of the Laws of Malta; Section 519 of the Criminal Code; www.gov.mt

Restrictions on the right of appeal in that a right of appeal may only be made available on points of law do exist in the different types of proceedings. There are instances where appeals lie only on points of law. This is found in appeals from the Industrial Tribunal⁴ where the Tribunal has delivered a judgment on non-discrimination in employment. Moreover there is no right of appeal from the conclusion reached by the designated equality bodies on investigating allegations of discrimination.

3. Length of judicial proceedings

Civil proceedings for discrimination are expected to follow the same procedure as other proceedings of civil law nature. This leads one to consider that a few months will be taken for the first appointment of the case by the court, from then another few months, an average of 2 years would be required for conclusion of the first instance proceedings, depending on the number of witness and complexity of the evidence. In appeal stage one would expect the same time periods to apply as those in the first instance. It is likely that another year or two will be taken by appeal proceedings. Once a judgment becomes final this becomes immediately executable.

With regards to the Industrial Tribunal, the cases that were presented took just under two years to reach a conclusion.

The equality bodies are not bound by a time frame within which they are to conclude an investigation. Proceedings of investigation before the equality commissions generally take some months before reaching a conclusion. The equality bodies do not have the power to order reparation or compensation, but generally the parties adhere to the opinion or proposals made by the commissions.

Criminal cases on issues of discrimination are generally of a summary nature and these will take a few months. However once a final decision is given execution is immediate.

⁴ Chapter 452 of the Laws of Malta; Employment and Industrial Relations Act, Section 82(3); www.mjha.gov.mt

4. Are procedures concluded within a reasonable time?

While it is not possible to consider the time before the courts as only one proceeding on discrimination is available for consideration, yet in relation to the equality commissions one may comment that with more resources and stronger investigative powers the time taken for investigation could greatly be reduced.

The government has sought to tackle delays in criminal and civil proceedings by introducing other tribunals, such as the Small Claims Tribunals⁵ and by raising the threshold of competence of the Court of Magistrates.⁶ In this respect, less formal procedures are followed. However, the independence of the Small Claims Tribunal has been doubted in the general debate by legal practitioners questioning the independence of the adjudicator due to lack of security of tenure and also due to the post being of a part-time nature with adjudicators practicing as lawyers before the ordinary courts at the same time. Amendments to the Code of Organisation and Civil Procedure⁷ have also been made with respect to the issue of warrants which assist in the execution of judgments seeking to shorten the time that the procedure for the issue of such warrants takes. A special summary procedure has also been established for use by creditors whereby according to section 166A of the Code of Organisation and Civil Procedure⁸ one can opt to send a judicial letter to one's debtor and should the latter not reply or accept the claim then the creditor will automatically acquire an executive title which can be immediately executed. The appointment of new judges and magistrates has also been undertaken to seek to make procedures less lengthy.

5. Does provision exist for speedy resolution of particular cases?

A complainant or applicant may ask the courts, the Industrial Tribunal or the equality commissions to treat the case with urgency. This request must be substantiated with reasons. In these instances, civil courts (in other proceedings) have at times shortened the proceedings by a

5 Chapter 380 of the Laws of Malta, Small Claims Tribunal Act; www.mjha.gov.mt

6 Chapter 9 of the Laws of Malta, Criminal Code, Section 370; www.mjha.gov.mt

7 Act VII 2007 An Act to amend the Code of Organisation and Civil Procedure; www.doi.gov.mt

8 www.mjha.gov.mt

substantial period of time depending on the nature of the request and the particular circumstances of the case.

It is possible to request the Courts to treat a particular case with urgency for sufficiently grave reasons – when granted, the Court will hear the case with the greatest possible speed. In fact, Article 107 of the Code of Organization and Civil Procedure (COCP) states that *“It shall be lawful for the court, in cases of urgency, to abridge any legal time and to order that an act be carried into execution from one day to another or from one hour to another or forthwith.”* Also, Article 195(4) of the COCP refers to *“where the cause is to be heard with urgency”*, an earlier date will be affixed and *“no adjournment of the hearing shall be granted except for grave and exceptional reasons to be stated in the records of the case: Provided that in causes which are to be heard with urgency the said period of two months shall not apply.”*

6. Is it possible to waive the right of access to a judicial body?

No reference is made in the legislation on the possibility of waiving the right of access to a judicial body and this is therefore not allowed. Moreover, the equality in employment regulations provides that the regulations are without prejudice to collective agreements however this is based on the condition that the minimum requirements are still met, in which case, it would seem that such a waiver would not be allowed.

The civil courts will only recognise a waiver of one’s right of access to a judicial body if this is included in an out of court settlement that has been freely entered into. On the other hand, the possibility of dis-applying the time-limits applicable for the institution of proceedings where one proves that he/she was pressured into not seeking redress or faced obstacles in seeking redress does not exist. Moreover, where an individual presents a complaint before the National Commission for Equality, should the Commission fail to deliver its conclusion within such a time that would allow the complainant to also institute proceedings before the other bodies, then that individual would lose recourse to the other proceedings. Having said so, however one is to keep in mind that the individual is not barred in any way from instituting proceedings before any of the other bodies while a complaint is pending before the Commission for Equality.

7. Access to non-judicial procedures

There is the possibility of accessing non-judicial bodies in order to obtain redress.

Non-judicial proceedings available include the Industrial Tribunal and the investigative powers granted to the National Commission for the Promotion of Equality between Men and Women.

The body which has been set up in order to oversee the implementation of the anti-discrimination legislation is the National Commission for the Promotion of Equality between Men and Women (Equality Commission or Commission (NCPE)), which is designated as the Equality Body. It is this Equality Commission that deals primarily with racial and ethnic discrimination⁹. The remit of the Commission was extended to cover issues of racial discrimination through Article 10 of the Equal Treatment of Persons Order promulgated in 2007¹⁰. The Commission does not, however, cover issues of racial discrimination in employment which discrimination is regulated through a separate legal instrument: The Equal Treatment in Employment Regulations¹¹.

Article 10 of Equal Treatment of Persons Order provides that the functions of the Commission are set out in Article 12(1) of the Act as being:

- To identify, establish and update all policies directly or indirectly related to issues of equality for men and women;
- to identify the needs of persons who are disadvantaged by reasons of their sex and to take such steps within its power and to propose appropriate measures in order to cater for such needs in the widest manner possible;
- to monitor the implementation of national policies with respect to the promotion of equality for men and women;
- to liaise between, and ensure the necessary co-ordination between, government departments and other agencies in the implementation of measures, services or initiatives proposed by Government or the Commission from time to time;
- to keep direct and continuous contact with local and foreign bodies working in the field of equality issues, and with other groups, agencies or individuals as the need arises;
- to work towards the elimination of discrimination between men and women;
- to carry out general investigations with a view to determine whether the provisions of the Act to Promote Equality for Men and Women (the Act) are being complied with;

⁹ Chapter 456 of the Laws of Malta available at:

http://docs.justice.gov.mt/lom/Legislation/English/Leg/VOL_14/Chapt456.PDF

¹⁰ Legal notice 85 of 2007 available at: <http://www.equality.gov.mt/filebank/LN%2085%20of%202007.pdf>

¹¹ Legal notice 461 of 2004 available at: <http://docs.justice.gov.mt/lom/Legislation/English/SubLeg/452/95.pdf>

- to investigate complaints of a more particular or individual character to determine whether the provisions of this Act are being contravened with respect to the complainant and, where deemed appropriate, to mediate with regard to such complaints;
- to inquire into and advise or make determinations on any matter relating to equality between men and women as may be referred to it by the Minister;
- to provide assistance, as and when appropriate, to persons suffering from discrimination in enforcing their rights under this Act;
- to keep under review the working of this Act, and where deemed required, at the request of the Minister or otherwise, submit proposals for its amendment or substitution;
- to perform such other function as may be assigned by this or any other Act or such other functions as may be assigned by the Minister.

Article 10(2) of the Equal Treatment of Persons Order provides that these functions, initially stipulated to cover discrimination on the basis of sex, apply *mutatis mutandis* to racial discrimination within the meaning of the provisions of the Order.

The law allows the Commissioner to initiate investigations of its own initiative. The wording of article 11 of the Order clearly indicates this. It states that “The Commissioner may initiate investigations on any matter involving an act or omission that is allegedly unlawful under the provisions of this order”. It then goes on to state that “The Commissioner 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 this order.

In carrying out its functions, other than investigations upon receipt of a complaint, the Equality Commission is not hampered in any way from taking action. In this respect, therefore implementing its functions relies entirely on its own discretion, even if this is of course hampered by resources.

The procedures before the commission are not of a judicial nature and in fact, *‘the findings of the Commissioner under sub-article (1) shall not be binding on the complainant and the person against whom the complaint is directed unless they expressly declare in writing to be so bound’*¹². The possible measures available to the Commission are to call upon the alleged perpetrator of the discrimination, to investigate through the collection of evidence and after its conclusion to invite the parties for mediation. However, when the act constitutes an offence, the Commission is to

¹² Chapter 456 of the Laws of Malta, Equality between Men and Women Act, Article 18(2), www.mjha.gov.mt

report this to the police for their own investigations. Yet there is no binding force in any of the decisions of the Commission, even if they have moral strength.

The Equality Commission does not have the power to sanction through orders of execution or imposition of fines or compensation. Its conclusions in any investigation initiated upon complaint may only lead to mediation between the parties, where the parties so agree. Otherwise, there is only a 'moral' obligation on the harasser to abide with the conclusion of the Equality Commission. On the other hand, the Equality Commission often undertakes follow up activities based on its findings where it has investigated ex officio. Yet these follow up activities are not of the character of sanctions but more of the character of education and training and awareness raising. One follow up measure that may be undertaken by the Equality Commission is to refer the case to the Civil Court where the victim may claim compensation. However this procedure has not been utilised as yet.

The NCPE is also empowered to mediate between the parties to bring them to an amicable solution which may for example include the changing of conditions of employment but not the liquidation of compensation, unless both parties agree to this. It is to be noted that NCPE has no power to liquidate compensation nor to order its payment; this is left within the powers of the Industrial Tribunal or the Civil Court where neither of the two act as mediators but as judges. Moreover, mediation procedures follow the conclusion of an investigation that has been carried out by NCPE, whereby the parties are brought together. In this respect, complainant and the person found to have acted discriminately may be represented by legal advisor or other attorney appointed by him/her. It is also important to note that since it is only NCPE who has the role of mediator, and since its work is protected by confidentiality, then the outcomes of mediation do not become publicly known. Despite this, NCPE does publish summaries of its conclusions in its annual reports without indicating details that may identify the persons involved.¹³ Consequently, one cannot speak of mediation as bringing about effective, proportionate and dissuasive outcomes if an outcome qualifies to be such only where the victim receives compensation.

The Industrial Tribunal is a quasi judicial body, whose decisions are enforceable, but which only has a remit on discrimination within employment. An individual may simultaneously institute proceedings before the civil courts and also ask the Police to investigate and prosecute a case of discrimination. It is not obligatory to institute proceedings before either of these tribunals, and an

¹³ www.equality.gov.mt

individual may seek redress from the civil courts. However, it is generally the rule that once an individual presents proceedings before the Industrial Tribunal then he/she is barred from presenting simultaneously proceedings before the civil courts. On the other hand, if an individual has presented a complaint to the Equality Commission, the commission's investigation will stop if the individual institutes proceedings before the civil courts.

The Equal Treatment in Employment Regulations then provides that a person claiming to have been subjected to discriminatory treatment, whether direct or indirect may refer the matter to the industrial tribunal for redress. Article 14 of the Regulations then provides that "Any person contravening the provisions of these regulations shall be guilty of an offence and shall, on conviction, be liable to a fine (Multa) not exceeding two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37) or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment.

One can refer to two proceedings decided by the Industrial Tribunal on the 27th July 2007 both in the name of Geniev Zerafa v. Phone Direct Ltd¹⁴ in relation to gender discrimination. In decision number 1802 the complainant alleged that she had left her employment after suffering sexual harassment at the place of work. In this decision the Chairperson concluded that this situation amounted to a constructive dismissal for a reason not valid at law and ordered the company to pay to the complainant the amount of 2329.40 Euros. In Decision number 1803 the same complainant claimed that she had suffered sexual harassment and sought compensation. The Chairperson concluded that the fact that one of the managing directors had stayed in his long johns at the place of work after having been caught in the rain while on his way to work amounted to sexual harassment and condemned the company to pay to the victim the amount of 2330 Euro.

Redress on the basis of disability in all fields may be obtained from the National Commissions for Persons with Disability in a similar manner as is provided by the Commission for the Promotion of Equality between Men and Women. The Equality Commission and the National Commission for Persons with Disability, have both been set up by law¹⁵ for this purpose, even if, they do not

¹⁴ Case 2270JB Decision number 1803 and Case 2267JB Decision number 1802

¹⁵ Chapter 456 of the Laws of Malta, the Equality for Men and Women Act, www.equality.gov.mt and the Equality for Persons with Disability Act,

www.knpd.org.mt

have the power of enforcement of their decisions. The Commission is empowered to assist victims of discrimination by supporting their court case, or taking such action on their behalf.

In some cases, namely, employment with regards to all grounds and access to goods and services with regards to disability, sex and race, the legal framework also provides alternative measures to a general right of access to court. However, it is only the Industrial Tribunal, with its ability to impose remedies, that can be considered to be a quasi-judicial body, thereby leaving the civil courts alone as judicial bodies competent to be seized with proceedings claiming redress for discrimination.

Other non-judicial procedure that one may avail himself/herself of is by presenting a petition to the Ombudsman. The functions of the Ombudsman are regulated by The Ombudsman Act.¹⁶

The Ombudsman is empowered to investigate matters either (a) out of its own motion (b) or on the complaint of any person who, having an interest, feels aggrieved by any Governmental decision or action. When investigating any matter the Ombudsman is not subject to any direction or control of any other person or authority, and the investigation will be carried out in private. The Ombudsman is empowered to make those enquiries and hear and obtain information from any person it deems fit. When investigating a complaint, the Ombudsman may also demand the production of any document or information from any person and can summon witnesses and administer oaths. However the Prime Minister may prohibit information and documents from being disclosed in the interest of national security. The Ombudsman will generally hear the statements of the complainant. Proceedings are inquisitorial in nature however, and while safeguards exist to ensure the Ombudsman's impartiality the complainant does not have an automatic right to be present for the proceedings and/or to be represented by a lawyer. Decisions delivered are reasoned.

The Ombudsman will generally deliver its opinion within a matter of months, however none of the ombudsman's opinions are binding on the Government (though they are as a rule adhered to).

The relationship between non-judicial and judicial procedures is one whereby the non-judicial proceedings and more so their conclusion may be presented as evidence before the judicial courts. Moreover, the equality commissions are also entrusted with the discretion to institute proceedings or to aid the applicant in instituting proceedings before the civil courts. Although the situation whereby proceedings before a court have been instituted while investigations by the equality

¹⁶ Chapter 385 of the Laws of Malta, www.mjha.gov.mt

commissions are underway has not as yet arisen, however it is expected that where this to arise the equality commissions would suspend their investigation.

8. Legal aid

The state provides free legal aid in all cases provided that the plaintiff and/or defendant fulfils a number of criteria based mainly on financial position. This is not a specific service for discrimination cases but is a general service. Free legal aid is only available in front of the Courts and not in front of the tribunals set up under the provisions of the Directive. In this respect therefore, while the proceedings of investigation initiated by complaint before the Equality Commission are free of charge, yet a victim has legal fees to pay when instituting proceedings before the Civil Courts or the Industrial Tribunal. No costs are however due when making a report to the Police, except when the victim engages a lawyer to represent him or her in such criminal proceedings. In the case of criminal proceedings, the accused is encouraged to accept legal assistance.¹⁷ In criminal proceedings, it is the police who prosecute even if the complainant may engage a lawyer to represent her/him in those proceedings as an interested person.

Article 16 of the Equal Treatment of Persons Order of 2007¹⁸ and Article 11 of the Equal Treatment in Employment Regulations¹⁹ provide that nothing in these legislations or in any other law shall prevent any association, organization or other legal entity, having a legitimate interest in ensuring that this legislations are complied with, from engaging 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 this order/regulations. The only requirements for such entities to engage with such proceedings are therefore: the approval of the Plaintiff (alleged victim of discrimination); a legitimate interest (gives space to NGOs, Unions, etc to engage.)

There are no publicly funded NGOs or associations that offer legal assistance and representation in discrimination cases. Under the provisions of article 13(2) however, NCPE may opt to refer an allegation of discrimination to the competent court on behalf of the person discriminated against.

¹⁷ Chapter 9 of the Laws of Malta; Section 519 of the Criminal Code; www.gov.mt

¹⁸ Equal Treatment of Persons Order, www.doi.gov.mt under European Union Act, Chapter 460 of the Laws of Malta, www.mjha.gov.mt

¹⁹ Equal Treatment in Employment Regulations, Legal Notice 461 of 2004 as amended by Legal Notice 53, 338 and 427 of 2007 and Legal Notice 137 of 2008, www.doi.gov.mt

The law does not indicate who will undertake the costs for such proceedings, even if one could understand that these are to be covered by the Equality Commission. This would of course represent another drain on its budget. In this respect, therefore more often than not, such proceedings are funded by the victim.

The provisions highlighted above with regards to NGOs apply also to Social Partners. They may therefore engage with such procedures either on behalf or in support of the alleged victim. The conditions to be met are a legitimate interest and the approval of the victim. Trade Unions very often support victims through the provision of information and assistance however in the field of racial discrimination, considering that the number of reported cases has been very limited, it is hard to state what role Trade Unions would undertake.

However, there are limitations for free legal aid. In civil proceedings Section 912 of the Code of Organisation and Civil Procedure²⁰ provides that legal aid is only granted to those persons whose net assets, including the value of immovables, does not exceed € 6,988 (excluding his/her principal residence) and who does not earn more than the national minimum wage in the preceding year. Moreover, there must be a likelihood of probable cause for legal aid to be granted in proceedings which are not of a criminal character.

9. Forms of satisfaction available to a vindicated party

Compensation for damages suffered can be awarded by both the civil court and the Industrial Tribunal.

In terms of article 30(2) of the Employment and Industrial Relations Act²¹ the Industrial Tribunal must liquidate compensation for loss and damages sustained by the aggrieved party. While according to the Equal Treatment of Persons Order²² in presenting proceedings before the civil court the applicant may ask for the liquidation of compensation to make good for damages suffered.

²⁰ Chapter 12 of the Laws of Malta; Code of Organisation and Civil procedure, www.gov.mt

²¹ Chapter 452 of the Laws of Malta, Employment and Industrial Relations Act, article 30(2), www.mjha.gov.mt

²² Legal Notice 85 of 2007, Section 15, www.equality.gov.mt

However, moral damages are not generally recognised at law and therefore compensation is limited to the damages and losses actually suffered. Moral damages are only referred to under section 15(3) of the Equal treatment of Persons Order²³ which provides that: *“(3) In any such action as is provided in sub-article (1) of this article the plaintiff shall, over and above and in addition to such damages and costs as may have been actually suffered and be due according to law, be entitled to recover by way of compensation such sum of money as the court in its discretion may consider reasonable taking into account all the circumstances of the case and as the court on the trial of the cause shall award and assess.”*

The designated equality commissions do not have the competence to provide compensation, any other form of reparation or ‘satisfaction.’ It is only possible from such commissions in the form of a finding of discrimination. Moreover, the parties may then accept to participate in mediation under the supervision of the commission, in which case the parties will be bound by the agreement therein reached.

Furthermore, the civil court also has the power to order the defendant to desist from the discriminatory treatment and to order the discriminatory treatment to stop. The Industrial Tribunal may also order the re-employment of a person who was unjustly dismissed or in a case of a constructive dismissal, while it may also declare a condition in an employment contract null.

10. Adequacy of compensation

Compensation is only available for actual damages suffered and there is no evidence that moral damages are considered or compensated for.

There are no studies to indicate that the judgments of the Industrial Tribunal delivered so far have acted as a deterrent. Cases decided by the Industrial Tribunal have awarded the compensation of € 2,329. Moreover, the conclusions reached by the equality commissions may also be seen as lacking legal strength since they are not binding upon the parties and the commissions do not have the power to make specific orders of reparation. This becomes graver when coupled with

²³ Legal Notice 85 of 2007, www.equality.gov.mt

lack of knowledge or understanding by employers and providers of services and goods of their obligations under the law.

Although there do not seem to be obstacles to access any of measures of redress, one can question the effectiveness of the sanctions or redress that may be provided by these proceedings. While the civil court and the Industrial Tribunal have a number of powers including the payment of damages suffered, one is to note that damages for pain and suffering are not considered possible under the law. Moreover, the conclusion of an investigation by the designated equality body is not public, cannot contain implementation of sanctions or fines or liquidation of compensation and moreover is only binding upon the parties where they opt to submit themselves to the conclusion of the investigation. In essence, therefore, while the measures of redress and access to them are effective, the possible outcomes or type of redress may lack some effectiveness in addressing the circumstances.

11. Rules relating to the payment of legal costs

The general rule of procedure is that the adjudicator of the Industrial Tribunal and the judge in court has full discretion on allocating costs. However generally speaking, with regards to cases before the civil courts, it is the ‘losing’ party that is responsible for the payment of all legal costs. Article 223(1) of the Code of Organization and Civil Procedure provides for this. However there are instances when the court does share the costs of the proceedings depending on the fault of each of the parties, the complexity of the case or the circumstances giving rise to the case.

While there are no particular costs for a complainant in investigations being carried out by the designated equality body, except for the right of the employer to demand the payment of a reasonable amount for the preparation of the employer’s report,²⁴ yet there are costs involved in both the proceedings before the civil court and before the Industrial Tribunal. In both instances the complainant incurs judicial costs and also legal costs, yet it is only before the civil court that the complainant may have access to legal aid.

²⁴ Chapter 456 of the Laws of Malta; Section 5(2) of the Equality for Men and Women Act; www.gov.mt

12. Rules on burden of proof

The shift of the Burden of Proof is guaranteed through Article 13 of the Equal Treatment of Persons Order of 2007 which states that “if a person who considers that he or she has been discriminated against establishes, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination against him or her, the burden of proving that there has been no discrimination shall lie on the person, establishment or entity against whom the allegation of discrimination is directed”. This provision also applies in the case 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”.

Article 15(2) provides that in any proceedings under sub article 1 of this article (action before the competent court of civil jurisdiction) it shall be sufficient for the plaintiff to prove that he or she has been treated less favourably in terms of the provisions of this Order and it shall be incumbent on the defendant to prove that such less favourable treatment was justified in accordance with the provisions of this order”.

The mechanism for the shifting of the burden of proof is therefore in line with the requirements of Article 8 of the directive. The mechanism is crucial in allowing a victim to make his case given the power imbalance which is often a key element in discrimination cases.