

## **EMPLOYMENT LAW: OVERTIME?**

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This article will shed light on what should be considered as the general understanding of overtime in terms of Maltese Employment Law.<sup>2</sup> The author shall be delving into the salient articles of the law, its applicability within the industry,<sup>3</sup> along with an understanding of its interpretation by the Courts.

The legislator has provided a clear definition of what is to be considered as overtime, by explaining that the word ‘overtime’ is to be interpreted as referring to ‘any hours of work in excess of the normal hours of work’.<sup>4</sup> Hence it can be said that once the employee<sup>5</sup> works extra hours, over and above the weekly compulsory hours, this automatically implies that he has worked overtime. The Employment and Industrial Relations Act (EIRA) does not define or quantify what should be considered as normal hours of work. Such information is provided in Subsidiary Legislation 452.87. The Organisation of Working Time Regulations, quantifies normal hours of work as nothing in excess of forty hours per week.<sup>6</sup>

Before delving further into the subject, one should understand how the employee is informed with regards to what the applicable overtime remuneration is. It is customary to provide for the applicable rate of overtime within the employment contract. There are instances where the overtime rate is also included in the collective agreement, however this only applies to those firms which have such agreements in place.

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<sup>2</sup> Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta.

<sup>3</sup> 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.

<sup>4</sup> Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 2.

<sup>5</sup> The word “employee” for this article is to be understood as applicable for both genders, hence any reference for made to one gender shall be considered as applicable for both male and female.

<sup>6</sup> Organisation of Working Time Regulations, SL 452.87 of the Laws of Malta, Article 7 – ‘Saving as otherwise provided in these regulations, the average working time for each seven-day period of a worker, including overtime, shall not exceed forty-eight hours’.

It is noteworthy to refer to Article 4 of Subsidiary Legislation 452.83.<sup>7</sup> This regulation provides an exhaustive list of mandatory information to be included within a contract of employment, and amongst others, one finds that the contract of employment should also include the rate payable to the employee of any overtime. Nevertheless, this is not the only regulation which provides information for employees with regard to overtime.

The Employment and Industrial Relations Act delegates the authority to the Minister <sup>8</sup> to prescribe the maximum weekly working hours, by means of subsidiary legislation which should also include information on overtime.<sup>9</sup> Subsidiary Legislation 452.110<sup>10</sup> provides the legislative framework for the industry as regards general overtime principles.

The Overtime Regulation<sup>11</sup> explains that whole-time employees<sup>12</sup> shall work any overtime as stipulated by their employer. Nonetheless there is a limit to be considered. The average weekly hours shall not exceed an average of forty-eight hours.<sup>13</sup> Therefore, the Organisation of Working Time Regulations<sup>14</sup> indirectly limits the hours of overtime which can be added to the forty hours per week to eight hours.

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<sup>7</sup> 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 (emphasis made by author); (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 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; (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.'

<sup>8</sup> Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 2 "Minister" means the Minister from time to time responsible for Employment and Industrial Relations'.

<sup>9</sup> *ibid* Article 6 'The Minister may, after consultation with the Board, prescribe the maximum weekly working hours, including overtime, for employees, minimum periods of daily rest, weekly rest and annual leave, and may make different provisions for different classes of employees including any incidental, supplemental or consequential provisions as may be deemed necessary'.

<sup>10</sup> Overtime Regulations, SL 452.110 of the Laws of Malta.

<sup>11</sup> *ibid*.

<sup>12</sup> Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 2 "whole-time employee" means an employee who is deemed to be a whole-time employee in terms of any recognised conditions of employment.'

<sup>13</sup> Organisation of Working Time Regulations, SL 452.87 of the Laws of Malta, Article 7 'Saving as otherwise provided in these regulations, the average working time for each seven-day period of a worker, including overtime, shall not exceed forty-eight hours'.

<sup>14</sup> Organisation of Working Time Regulations, SL 452.87 of the Laws of Malta.

The legislator pursues to safeguard employees from being subjected to disproportionate working hours on a regular basis. The reasoning behind this is not to preclude productivity or limit income to employees. The underlying impetus is that of occupational health and safety. On the other hand, the legislator leaves this contract of employment in the hands of the employer and the employee. Article 3(2) of Subsidiary Legislation 452.110 explains that the employer and the employee can mutually agree to do without the legislative prescribed limitation posed on the employee's working hours.<sup>15</sup>

Hence the employee is given the opportunity to opt-out from the *ipso jure* limitation imposed on his average weekly working hours. Therefore, any such mutual agreement between the employer and the employee will automatically authorise the employer to allocate more than eight hours, hence more than the average of forty-eight hours per week, if so required.

The law does not expressly provide for any notice period as to any overtime to be given to the employee by the employer. Normally this period is expected to be of at least twenty-four hours, however there is no legal obligation to provide the employee with such. From the wording of the law, the employee cannot refuse to work overtime which is within the forty-eight hours weekly average.<sup>16</sup> The only exception to the rule is found in Article 9A of the Subsidiary Legislation 452.91.<sup>17</sup>

On the same lines it can also be said that the overtime is not guaranteed, it is merely at the discretion of the employer. This point was highlighted in **Yordan Shterev vs. Vassallo Builders Group Limited**<sup>18</sup> where the Court held that '*Is-sahra m'huwiex garantit u jinħadem skond il-ħtieġa tal-prinċipal*'.<sup>19</sup> Notwithstanding such pronouncement, it is industry practice to provide the employee with some form of adequate notice as to the amount of overtime to be worked. Furthermore, it is customary for unions to request that management have a proper notice period given to employees, which is to be stipulated in collective agreements.

Another important dictum of the court is that found in **Joseph Vella vs. Steel Structures Company Limited**<sup>20</sup> where the Court held that '*Dħul minn sahra*

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<sup>15</sup> Overtime Regulations, SL 452.110 of the Laws of Malta, Article 3(2) 'The provisions of sub-regulation (1) limiting the overtime worked to a weekly average of forty-eight hours during the applicable reference period shall not apply where the employee has given his consent in writing to work more than a weekly average of forty-eight hours.'

<sup>16</sup> *ibid* Article 3(1) '[omissis] whole-time employees shall work any overtime as required by their employer provided that the average weekly working time, including overtime, does not exceed an average of forty-eight hours over the applicable reference period in terms of the Organization of Working Time Regulations' (emphasis made by author).

<sup>17</sup> Maternity (Employment) Regulations, SL 452.91 of the Laws of Malta, Article (9A) 'Notwithstanding anything stated to the contrary in any other law, regulation, order, collective agreement or in any contract of service, employees shall not be obliged to work overtime: (a) during pregnancy; (b) for a period of twelve months from either the birth of his or her child or from the effective date of the adoption of a child: Provided that the right granted in this regulation shall be a non-transferable right.'

<sup>18</sup> 1319/2010 [First Hall, Civil Court] Justice Anthony Ellul 8 October 2014.

<sup>19</sup> *ibid* p 6 Translation: Overtime is not guaranteed and it is at the discretion of the employer.

<sup>20</sup> 685/2011AE [First Hall, Civil Court] Justice Anthony Ellul 7 October 2015.

*m'huwiex garantit galadarba jsir skond l'bzonn.*<sup>21</sup> This means that overtime is not a right of the employee but it is purely at the discretion of the employer.

There are several Wages Council Wage Regulation Orders which explain the applicable rate of overtime payable for particular sectors of the industry, however where there is no such applicable Regulation for a particular employment sector, the general applicable guide shall be the Overtime Regulations.<sup>22</sup>

Article 4 of Subsidiary Legislation 452.110<sup>23</sup> explains what the remuneration shall be for any overtime worked above the forty hours per week. The employee shall be remunerated at a rate being one and a half times the normal rate for any work carried out in addition to the stipulated forty-hour week. Hence if the employee earns minimum wage,<sup>24</sup> earning €4.20 per hour, the overtime rate shall be €6.30.

However as with any other contractual obligation, the parties in a contract of employment can stipulate anything which is not contrary to law. To this effect, the Employment and Industrial Relations Act gives *carte blanche* to the employer and the employee to contract a higher wage than that prescribed under the Minimum Wage National Standard Order for normal time or for any overtime worked.<sup>25</sup>

There are situations where the employer and the employee include clauses that exclude overtime, and offer a remuneration package which would be more lucrative. This practice is commonly used in employment contracts of executive or technical or professional personnel. Their role usually dictates odd working hours which would surely be in excess of the forty hours per week. In such cases it is customary to include clauses within the employment contracts which stipulate that the remuneration is to cover any extra hours which are necessary to be executed to fulfil one's role.

In conclusion it is important for the reader to keep in mind that according to the 2012 Labour Cost Survey, carried out by the National Statistics Office (NSO), the basic remuneration tallied for 84.9 per cent of the total wage bill borne by firms employing ten or more employees. The statistics further showed that 4.2 per cent of the wage bill is made up from overtime, whilst another 10 percent reflects allowances and other perks paid to employees in various sectors.<sup>26</sup>

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<sup>21</sup> *ibid* p 5 Translation: income deriving from overtime is not guaranteed considering that it's only required if the workload so dictates.

<sup>22</sup> Overtime Regulations, SL 452.110 of the Laws of Malta

<sup>23</sup> *ibid* Article (4) 'An employee [omissis] shall be paid one and a half times the normal rate for work carried out in excess of a forty hour week, averaged over a four week period or over the shift cycle at the discretion of the employer.'

<sup>24</sup> Minimum Wage National Standard Order, SL 452.71, Schedule The weekly minimum wage in Malta 'Effective from 1st January, 2016: age 18 and over; €168.01 per week'. (€168,01/ 40hours = €4.20 per hour)

<sup>25</sup> Employment and Industrial Relations Act, Chapter 452 of the Laws of Malta, Article 18 '*Nothing in this Act shall prevent the making of any contract by an employer with an employee for giving to him food, a dwelling place or other allowances or privileges [omissis], in addition to the minimum wages prescribed by a national standard order or a sectoral regulation order, or to a higher stipulated wage, for normal time and overtime, as a remuneration for the employee's services.*'

<sup>26</sup> NSO, 'News Release Labour Cost Survey (2012)' (Nso.gov.mt, 4 March 2015) <[https://nso.gov.mt/en/News\\_Releases/View\\_by\\_Unit/Unit\\_C2/Labour\\_Market\\_Statistics/Documents/2015/News2015\\_043.pdf](https://nso.gov.mt/en/News_Releases/View_by_Unit/Unit_C2/Labour_Market_Statistics/Documents/2015/News2015_043.pdf)> accessed 3 September 2016.

The NSO statistics explain the importance to sum up the above-mentioned in a concise but informative paragraph: -

The word 'overtime' refers to those extra hours which the employee actually worked in excess of the contracted working hours. When referring to normal working hours of employment automatically one is referring to the compulsory forty hours per week. Hence it can be said that overtime hours are the extra hours above the contracted weekly hours which are to be paid extra.