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EUROPEAN SOCIAL CHARTER

7th National Report on the implementation of the European Social Charter

submitted by

THE GOVERNMENT OF MALTA

(Articles 2, 4, 5, 6, 21, 22, 26, 28 and 29)

for the period 01/01/2009 – 31/12/2012)

Report registered by the Secretariat on 3 February 2014

CYCLE 2014

EIGHT REPORT ON THE

EUROPEAN SOCIAL CHARTER (REVISED)

submitted by the

Government of Malta

(1 January 2009 – 31 December 2012)

2013

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Group 3 – Labour Rights

* N.B. No reports on Articles 2(4), 21 and 22 were provided since these have not been ratified by Malta.

Report made by the Government of Malta in accordance with Article 21 of the European Social Charter, on the measures taken to give effect to the following accepted provisions of the European Social Charter, the instrument of ratification of which was deposited on the 4th October, 1989:-

Articles 2, 4, 5, 6, 26, 28, and 29 for the period 1 January 2009 to 31 December 2012.

No observations have been received from the organisations of workers and employers regarding the practical application of the provisions of the Charter, of the application of legislation, or other measures for implementing the Charter.

I. INTRODUCTION

This Report by Malta is drafted within the context of the form for submission as adopted by the Committee of Ministers on the 26th March 2008.

The following information is to supplement previous information submitted by Malta with respect to the same provision under the European Social Charter and should be taken as additional information. Where a new provision of the Revised Charter has not been reported upon in previous Reports from Malta, full details of the situation of the respective Article in Malta will be provided.

II. PROVISIONS OF THE EUROPEAN SOCIAL CHARTER (revised)

Article 2 – The right to just conditions of work

With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:
1 to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit;
2 to provide for public holidays with pay;
3 to provide for a minimum of four weeks' annual holiday with pay;
4 to eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations;
5 to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest;
6 to ensure that workers are informed in written form, as soon as possible, and in any event not later than two months after the date of commencing their employment, of the essential aspects of the contract or employment relationship;
7 to ensure that workers performing night work benefit from measures which take account of the special nature of the work.

Appendix to Article 2.6

Parties may provide that this provision shall not apply:
a. to workers having a contract or employment relationship with a total duration not exceeding one month and/or with a working week not exceeding eight hours;
b. where the contract or employment relationship is of a casual and/or specific nature, provided, in these cases, that its non-application is justified by objective considerations

Article 2.1 - Reasonable working time

Minimum rest periods are provided in the Organisation of Working Time Regulations including also compensatory rest etc. The employer is obliged to keep a register regarding the hours of work, which register is to be made available to the inspectors during inspections.

No statistics are available regarding how many employees are engaged in work exceeding 48 hours per week and the details on the number of hours worked by such employees.

The only circumstances are those where workers give consent in writing to his/her employer to work more than the average of 48 hours weekly.

Wage Regulation Orders provide for the maximum normal weekly hours and daily hours. The Organisation of Working Time Regulations provide for the limit of 48 hours weekly average with the possibility of employees giving their written consent to exceed such average. These regulations provide also for minimum daily and weekly rest periods and rest breaks.

Information pertaining to statistics is still to be provided.

Article 2.2 – Public holidays with pay

Information to be submitted at a later stage.

Article 2.3 – Annual holiday with pay

Regulation 8(3) of the Organisation of Working Time Regulations stipulates that a proportion of the vacation leave entitlement not exceeding 50% of the annual leave entitlement may by mutual agreement between the employer and the employee, be carried over once to the next calendar year. Such vacation leave carried forward from the previous year will be utilised first, and may not be carried forward again.

Article 2.4

(Not accepted)

Article 2.5 – Weekly rest period

Workers working in those sectors which are excluded from the scope of Regulation 6 of the Organisation of Working Time Regulations are still safeguarded by virtue of Regulation 14 of the same Regulations where it is stated that the employer is obliged to ensure that workers are allowed such compensatory rest periods that can be reasonably considered as equivalent to the weekly rest period. In exceptional cases where, for objective reasons, it would not be possible for objective reasons for the employer to grant such a period of rest, the employer shall give the workers such protection as may be appropriate in order to safeguard the workers' health and safety.

Article 4 – The right to a fair remuneration

With a view to ensuring the effective exercise of the right to a fair remuneration, the Contracting Parties
undertake:
1. to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living;
2 to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases;
3 to recognise the right of men and women workers to equal pay for work of equal value;
4 to recognise the right of all workers to a reasonable period of notice for termination of employment;
5 to permit deductions from wages only under conditions and to the extent prescribed by national laws or regulations or fixed by collective agreements or arbitration awards.

The exercise of this right shall be achieved by freely concluded collective agreements, by statutory wage fixing machinery, or by other means appropriate to national conditions.

Appendix to Article 4.4

This provision shall be so understood as not to prohibit immediate dismissal for any serious offence.

Appendix to Article 4.5

It is understood that a Contracting Party may give the undertaking required in this paragraph if the great majority of workers are not permitted to suffer deductions from wages either by law or through collective agreements or arbitration awards, the exception being those persons not so covered.

Article 4.2 – Increased remuneration for overtime work

Article 45 (10 of the Employment and Industrial Relations Act (Cap 452) stipulate that any employer who contravenes or fails to comply with any recognised conditions of employment , including irregularities related to the payment of overtime, on conviction be liable to a fine of not less than € 232.94 and not exceeding € ,2329.37. The court may also, besides imposing the fine, also order the employer to pay the outstanding amount of overtime to the employee.

Article 4.4 – Reasonable notice of termination of employment

It should be noted that an employee, during the notice period, has a right to apply for vacation leave.

Article 4.5 – Limits to deduction from wages

It should be noted that authorisation for the employer to impose fines is not an automatic right. Every request by the employer to impose fines on the employee is vetted and if found to be excessive, the request is refused. Fines are to be kept at a minimum and resorted to as a means of disciplinary action only when other means of persuasion prove to be of no avail. The amount deducted in the form of fines shall not exceed in any four consecutive weeks 10% of the wage based on four weeks in respect of each employee.

Article 5 – The right to organise

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

It should be noted that to date, no rules have been laid down as regards the inspections of registers. However, by virtue of Art 52 (1) of EIRA, in cases where a union claims that it has majority of membership in a particular category of employees or in a particular workplace, the Registrar requests that the union substantiates its claim by submitting a list of members. Such lists are treated as strictly confidential by the Registrar. To verify such lists, officials of the Registrar may also ask employees in confidence to confirm or otherwise whether they are members of that union. Employees are not obliged to disclose such information to the officials but is done on a voluntary basis. Officials of the Registrar are bound by EIRA to keep any information on union membership of individuals as confidential.

A trade union which is not the recognised union can approach the employer or the authorities in the individual interest of the employee and may assist an employee on an individual basis.

(There is a Government Commitment to grant union representation rights to all Police Officers. In fact a draft legal notice to this effect has been prepared and is being discussed with the social partners.)

Article 6 – The right of workers to bargain collectively

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
1 to promote joint consultation between workers and employers;
2 to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3 to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes; and recognise
4 the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously
entered into.

Appendix to Article 6§4

It is understood that each Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article G.

Article 6.1 - Joint consultation

In companies which employ 20 or more employees, the employer is required to consult with the employees' representatives in cases of transfer of businesses and in cases of collective redundancies.

It is confirmed that issues of interpretation of collective agreements are dealt with within the framework of joint consultation between the employer and employees' representatives. If such consultation fails, the parties can use the voluntary consultation mechanism provide by EIRA. If this fails also, the parties can refer the issue to the Industrial Tribunal.

Article 6.2 – Negotiation procedures

It is confirmed that the predominance of collective bargaining at enterprise level results from industrial relations practice and that EIRA does not exclude that bargaining may take place at other levels. Collective bargaining and eventual collective agreements at enterprise level are tailored and adapted to the strengths and weaknesses of the particular enterprise. To date employers and unions have not felt a particular need to extend a particular collective agreement to cover all enterprises in a particular sector. However, as already stated, there is nothing to stop employers and unions from doing so.

Article 6.3 – Conciliation and Arbitration

No court of inquiry has been appointed from the date when the EIRA was first enacted in 2002. As EIRA is up for review, consideration will be given as to whether this provision is going to be retained in view of the non-utilisation of this court.

It is confirmed that the conciliation and arbitration procedure under EIRA applies to all employees in the public sector.

Article 6.4 – Collective action

As regards disputes between employers and or employers' organisations and trade unions regarding recognition can be referred to the Industrial Tribunal by either party to the dispute.

It is confirmed that strikes in favour of union recognition are possible prior to referral or in the event that parties do not agree to refer the dispute to the Industrial Tribunal, or in cases of collective redundancies.

Article 21 – The right of workers to be informed and consulted within the undertaking

(Not accepted)

Article 22 – The right to take part in the determination and improvement of the working conditions and working environment

(Not accepted)

Article 26 – The right to dignity at work

With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers' and workers' organisations:

1 to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct;
2 to promote awareness, information and prevention of recurrent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.

Appendix to Article 26

It is understood that this article does not require that legislation be enacted by the Parties.
It is understood that paragraph 2 does not cover sexual harassment.

Article 26.1

Liability of employers and means of redress

Following the Committee's comment on the possibility for "*employers to be held liable in cases where persons employed or no employed by them who have suffered sexual harassment from employees under their responsibility or, on premises under their responsibility, from person not employed by them*...", Chapter 456 of the Laws of Malta – Equality for Men and Women Act, states that:

> *(a)* Persons responsible for any work place, educational establishment or entity providing vocational training or guidance or for any establishment at which goods, services or accommodation facilities are offered to the public, shall not permit other persons who have a right to be present in, or to avail themselves of any facility, goods or service provided at that place, to suffer sexual harassment at that place.
>
> (*b*) It shall be a defence for persons responsible as aforesaid to prove that they took such steps as are reasonably practicable to prevent such sexual harassment.

Thus, in actual fact, Article 9(2) of this legislation prohibits sexual harassment on all the persons who have a right to be present at a workplace, educational

establishment or establishment at which goods, services or accommodation facilities are offered to the public. This article also highlights the obligation of persons responsible for these establishments to prevent sexual harassment within the respective establishments, including the work place.

The Committee also recalls that the "*protection against sexual harassment in the workplace or in relation to work, must include effective judicial remedies, comprising the right to appeal to an independent body in the event of harassment*". NCPE provides assistance to persons who are sexually harassed at the place of work by investigating their complaints. To this end, Article 17 of the Equality for Men and Women Act provides that NCPE's Commissioner may initiate investigations on matters involving an act or omission that are unlawful according to the Act, and he/she may also initiate investigations on the receipt of a complaint in writing. Besides, Article 18 of this legislation states that:

> in the case of an alleged discrimination by one person against another, the arrangements whereby the Commission may itself refer the matter to the competent civil court or to the Industrial Tribunal for redress:
>
> Provided that nothing in this sub-article shall prevent any person having a legal interest from himself taking action for redress or where action has been taken by the Commission, from joining in and becoming a party to the suit.

The Committee notes that despite "*the findings of the Commission are not of a binding nature unless the parties concerned expressly declare to be bound ... in the case when the violation constitutes an offence the Commissioner make a report to the Commissioner of Police for action on his part*". In fact, this is in line with Article 18(1) of the Equality for Men and Women Act.

Burden of Proof

"*The Committee notes from Chapter 456 that the plaintiff has to prove that he or she has been treated less favourably on the basis of sex or because of family responsibilities and it is incumbent on the defendant to prove that such less favourable treatment was justified in accordance with the provision of the Act on Equality for Men and Women*." This is in line with Article 19(2) of this Act.

Damages

The Committee recalled that "*victims of sexual harassment must have effective judicial remedies to seek compensation for pecuniary and non-pecuniary damage ... and act as a deterrent to the employer*". Article 9(3) of the Equality for Men and Women Act specifies that:

> Persons who sexually harass other persons shall be guilty of an offence against this article and shall, without prejudice to any greater liability under any other law, be liable on conviction to a fine of not more than two thousand and three hundred and twenty-nine euro and thirty-seven cents (€2,329.37) or to imprisonment of not more than six months or to both such fine and imprisonment.

Besides, Article 19(1) of this Act states that:

> a person who alleges that any other person has committed in his or her regard any act which under any of the provisions of this Act is unlawful, shall have a right of action before the competent court of civil jurisdiction requesting the court to order the defendant to desist from such unlawful acts and, where applicable, to order the payment of compensation for such damage suffered through such unlawful act.

Initiatives carried out for the period 2009-2012 in line with Article 26.1

NCPE carries out various initiatives to raise awareness on rights and responsibilities related to equal treatment, including on sexual harassment, including:

- training on sexual harassment at the workplace to entities in the private and public sector, employees, employers, managers, NGOs and other groups that request such training. NCPE provides training on sexual harassment with the aim of disseminating information on what is sexual harassment and what should be done to prevent or combat sexual harassment at the place of work. The provision of training is an ongoing commitment, and training sessions are adapted to the needs of the respective group.

- consultation on policy drafting provided to private and public entities for drafting or updating equality and sexual harassment policies. NCPE provides feedback and consultation to private companies and public entities and organisations who ask for their policies to be reviewed from an equality perspective. NCPE ensures that these policies are not only relevant to the needs of the company and that they truly foster equality, in line with legislation on equal treatment.

- the 'Equality Mark' certification. This certification is awarded to organisations whose management is based on the recognition and promotion of the potential of all employees irrespective of their gender and caring responsibilities. The 'Equality Mark' is awarded following the assessment of a set of criteria, one of which includes that companies have in place policies and initiatives on equality and sexual harassment. Throughout the application process, companies or entities are helped by NCPE to reach the necessary standards and have all the necessary requirements for the certification in place. This initiative was initially launched as part of an EU co-funded project ESF 3.47 – Unlocking the Female Potential, and following its successful uptake by companies, NCPE continued working on this initiative following the termination of the project. In fact, the 'Equality Mark' is an ongoing commitment, and by 2012 there were 51 certified companies resulting in 15,253 employees working under gender certified conditions.

The investigation of complaints of sexual harassment at the place of work. NCPE is empowered to investigate such complaints by virtue of Chapter 456 of the Laws of Malta – Equality for Men and Women Act. NCPE follows an established procedure for these investigations and ensures confidentiality throughout. Between 2009 and 2012, NCPE received 15 cases of alleged sexual harassment at the place of work.

Article 28 – Right of Workers' representatives to protection in the undertaking and facilities to be accorded to them

With a view to ensuring the effective exercise of the right of workers' representatives to carry out their functions, the Parties undertake to ensure that in the undertaking:

a they enjoy effective protection against acts prejudicial to them, including dismissal, based on their status or activities as workers' representatives within the undertaking;

b they are afforded such facilities as may be appropriate in order to enable them to carry out their functions promptly and efficiently, account being taken of the industrial relations system of the country and the needs, size and capabilities of the undertaking concerned.

Appendix to Article 28

For the purpose of the application of this article, the term "workers' representatives" means persons who are recognised as such under national legislation or practice"

Apart from trade union representation, in undertakings employing 50 or more employees and in cases where there is no recognised union, employees can be represented by a representative elected or appointed by means of a secret ballot from amongst employees. In cases of transfer of business or collective redundancies, the employees have the right to be represented by a representative elected or appointed by means of a secret ballot from amongst employees in undertakings employing 20 or more employees.

An employer does not need the approval from the trade union to dismiss an employee who is a member of that trade union. However, it should be noted that an employees' representative has the right not to suffer any detriment including dismissal because of any activity that he has undertaken in his function as an employees' representative. If he considers that he has been victimised, discriminated or harassed in any way, he can seek redress at the Industrial Tribunal.

Article 29 – Right to information and consultation in procedures of collective redundancy

With a view to ensuring the effective exercise of the right of workers to be informed and consulted in situations of collective redundancies, the Parties undertake to ensure that employers shall inform and consult workers' representatives, in good time prior to such collective redundancies, on ways and means of avoiding collective redundancies or limiting their occurrence and mitigating their consequences, for example by recourse to accompanying social measures aimed, in particular, at aid for the redeployment or retraining of the workers concerned.

Appendix to Articles 28 and 29

For the purpose of the application of this article, the term "workers' representatives" means persons who are recognised as such under national legislation or practice.

The employer (and not the Director) is required to call a secret ballot to elect an employees' representative in cases of collective redundancies and transfer of businesses in cases where there are no worker representatives already active in the enterprise.

Trade union representatives or the employees' representatives have always the possibility to have recourse to judicial proceedings to suspend the redundancies if the employer fails to inform or to consult adequately on collective redundancies. In such circumstances, the Director responsible for Employment and Industrial Relations may prolong the period before which redundancies may not take place.

One has also to keep in mind that any person contravening the provisions of the Collective Redundancies (Protection of Employment) Regulations shall be guilty of an offence and shall on conviction be liable to a fine of not less than € 1,164.69 for every employee that is declared redundant.