"Comparing the effectiveness of remedies available to Maltese Trade Union members to those of shareholders under Maltese Company Law"

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ABSTRACT

Maltese Trade Unions have a sui generis legal nature which imbues them with unique characteristics, features and attributes. The external dealings of Trade Unions with third parties are both legally regulated and squarely within reach of the judiciary, but what about their inner dealings? National jurisprudence seems to suggest that most of the latter are to be self-regulated by the trade union internal mechanisms. This situation is quite debatable and begs the question as to whether it is indeed an effective alternative to a form of fully-fledged special administrative regulatory body as is the case in other foreign jurisdictions such as the UK, the US and Canada.

In furtherance of this objective can parallels be drawn in the field of trade-unionism with the legal and juridical evolution in company law with regards to minority rights of equity owners, and can any of the lessons learned in the long and rich history of Maltese corporate law be applied to buttress the institution of trade unions?

Albeit there may be some fundamental differences between these two institutions, a lot in common still exists to the extent that it may well be opportune to add further to the already existing shared principles and practices used by one institution to the other.

Whilst there are a multitude of other institutions which like companies and trade unions are regulated by special laws and which may also be of a national interest, none of them can have a socio-economic impact of the same magnitude as these two institutions.

Both institutions are organised in a democratic manner in the sense that they both adopt processes which allow their members to vote for the administrators or directors of their choice according to the fundamental notion of majority rules. However, notwithstanding this rule, it is also imperative to evaluate what happens when the minority suffers abuses of power.

A critical comparative analysis with some foreign jurisdictions will also be undertaken in order to be in a position to first identify any potential shortcomings in the Maltese Industrial Relations system and finally offer practical recommendations as to how such shortcomings can be addressed. A qualitative form of research will be adopted to tackle this paper.

Trade Union – Industrial Relations – Judicial Remedies –Company – Minority rights

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ABBREVIATIONS

IBU – Independent Bankers Union

MUBE – Malta Union of Bank Employees

EIRA – Employment and Industrial Relations Act

GWU – General Workers Union

ILO - International Labour Association

UN –United Nations

CJEU - Court of Justice of the European Union

EU – European Union

TULR(C)A) - Trade Union and Labour Relations (Consolidation) Act 1992

UK – United Kingdom

EEC - European Economic Community

EC - European Communities

TFEU- Treaty on the Functioning of the European Union

ACAS - Advisory, Conciliation and Arbitration Service

INTRODUCTION

The author aims to analyse a very important area in the overall Industrial Relations picture namely the relationship between a trade union and its constituents. In comparison with other areas very little has been written about the internal dealings and affairs of a trade union, its organization and functioning, and its relations to its members, and the methods by which internal discipline and the rights of members are enforced.[1]

But why is the author so especially concerned with the relationship between the trade union and its members? Isn`t a Trade Union like any other voluntary association such as social clubs, political parties, sports associations or religious groups? Why single out unions from the rest of the associations? The answer to these questions will no doubt determine the direction of our whole line of inquiry.

For the reader to get a better understanding of this subject matter, it is imperative to examine the trend of judicial and legislative interference with the internal functioning of trade unions whilst also understanding the underlying motivations and objectives of this interference. In the past, Courts have generally permitted union interpretation and enforcement of their own constitutional provisions even though the result may be to limit a trade union member's freedom of action or his own union's constitutional rights. Is this the case in relation to all aspects or are there areas such as dismissal of members which are so fundamental that they are treated differently than others?

[1]Morris D. Forkosch, Internal affairs of unions: Government control or self-regulation? [1952] *39*, *Labour Law Journal* 729

The chances that a union's conduct *vis-a-vis* its individual members will turn into domination increases as various union practices are found to be wanting in the over-all picture, and yet are not modified or discarded. Some of these will be discussed; whilst others can be inferred; and still others are unknown possibilities.[2]

The author also aims to draw parallels between the remedies available under company law to those available under Industrial Law to company shareholders and trade union members respectively. The reason for this is that these areas of law, albeit having some fundamental differences, still have quite a lot in common, starting from the fact that they are both special laws and regulate areas which can be deemed as being in the national interest in view of their far-reaching socio–economic effects.

Additionally, the very fact that industrial law, as is also the case in many other areas of law involving other associations point out to principles drawn out from company law (like for example the notion of majority rules, the registration requirements, the distinct legal personality and more), makes the comparison of the remedies available between the two institutions a very interesting one indeed. Further principles, concepts or remedies which worked well in Company Law can perhaps be introduced to Industrial law in situations where a grey area or a lacuna may exist.

Notwithstanding that these institutions have a number of common factors, Maltese company law seems to have evolved and kept pace with what is happening in other jurisdictions by also granting special remedies and providing added

[2] Ibid 743

protections to company shareholders *vis-a-vis* the controllers of the company, whilst in the case of Industrial law the situation has remained pretty much as it was in 1976 in terms of legislation and this may be negatively impacting the progress if any in respect of the remedies available to trade union members *vis-a-vis* those who administer a Trade Union.

The overall objective of the Term Paper is to first raise awareness of the serious consequences which may ensue as a result of the issues identified and to finally be able to present practical solutions to address such issues effectively perhaps by applying additional remedies which have been adopted by other foreign jurisdictions and/or by other comparable institutes to Industrial Law in order to buttress the institution of trade unions.

Literature Review and Research Methodology

The existing literature on Maltese Trade Unions does not comprehensively cover the subject or covers only certain parts of the legal aspects pertaining to a Trade union without delving in the remedies available to its members. On the other hand, the subject matter of shareholder protection and minority rights has been extensively covered by a number of works, albeit the comparative analysis of the remedies available for trade union members versus the Trade Union and the remedies of shareholders versus the Company was never covered before making this term paper quite original under the leading premise of 'work which has never been ancovered by other researchers before'.

This study purports to present an awareness of the importance for remedies to be made available for Trade Union members in view of the significant consequences which may ensue from a lack thereof which could be very detrimental not only to any individuals who may be involved in an issue with the Trade Union but also to the Industry and the general public. This differs significantly from a comparison between shareholders and trade union members themselves as the study is only concerned with the remedies which are available to their constituents and not with the fundamental differences which may exist between the two institutions themselves other than describing their legal nature and some factual major differences.

A qualitative approach was adopted during this work[3] involving an in-depth examination of a number of domestic and foreign jurisprudence and case studies in order for the author to be able to compare and contrast the remedies of trade union members and shareholders respectively, and to also be able to establish the significantly different positions which exist between the UK , Malta and potentially other jurisdictions, from a point of view that the position obtaining in Malta does not seem to reflect the intentions of the Maltese legislator in 1976 who seems to have wanted to achieve a very similar position to that obtaining in the UK.

[3] Sema Unluer, Being an Insider Researcher While Conducting Case Study Research, [2012] *17*(58) *The Qualitative Report,* 1-14.

CHAPTER 1

THE LEGAL NATURE OF TRADE UNIONS

According to the definition given to a Trade Union in the Employment and Industrial Relations Act[4] (from now onwards referred to as the EIRA) a trade union is an organisation. Although it is not a co-operative or a company, it nevertheless can still own property and enjoys the attributes of a body corporate.[5]It can be described as being a collectivother e force which an employer must deal with. As a matter of fact, the EIRA[6]says that a trade union must be treated as an association of persons. Trade Unions are imbued with a special and particular form of mandate which allows for a Collective Agreement to be signed by a trade union and made applicable not only to its members but even to non-union members as well as members of another union including people who may have entered into employment after the Collective Agreement was signed.

Additionally, Trade Unions enjoy legal standing (*locus standi judicio*), whereby they can sue and in turn be sued, whether in proceedings related to property, or founded on contract, tort or quasi-tort. The standing which they are given is not limited to civil proceedings only but to any other course of action whatsoever, to the extent that a trade union is recognised as a plaintiff even in constitutional proceedings.[7]In the 1960's,Trade Unions had no *locus standi judicio* to sue on behalf

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

[5] Francis Sare`vs Salvatore Cacciattolonoe et, Kollezzjoni ta' decizjonijiettal-QratiSuperjuri ta' Malta, VolXXVII (1953) Pt. ii, p. 616

[6]EIRA (n5) s 49

[7]Tony Zarb nomine vs. Avukat Generali, Civil Court, First Hall (Constitutional Jurisdiction),14th December 1999.

of their members in view of section 1886 of Chapter 12 of the Laws of Malta – Code of Civil Procedure and Organisation which lays down that a mandatory cannot sue on behalf of a mandatory if the latter is on the island. As a matter of fact, case-law until the early 1970's was to the effect that the trade union was very much like a band club where there was no *locus standi*.

The nature and personality of a trade union can be determined from the definition given to it in the EIRA with reference to the Interpretation Act[8]. One can state that it is similar to that of a civil partnership as defined in the Civil Code[9]. Before the incorporation of the notion of commercial partnership, it was the only type of recognised partnership and if it were not for the five areas mentioned in the EIRA[10], a trade union would be equivalent to a civil partnership. The turning point on this subject matter was a 1991 judgement by the court of appeal[11] in which the court declared that a Trade Union has a right to sue on behalf of its members. In another subsequent judgement[12] the court declared that a Trade Union was indeed able to sue for a breach of fundamental human rights too.

Statutory progress was also made in this respect by means of Equal Treatment in Employment regulations[13] which provides for the possibility of associations, organizations or any other legal entity which has an interest in the adherence of the regulations to enter into any judicial procedures in its own name, on behalf and/or in support of others in relation to such observance of the regulations. It is the

[8]Interpretation Act, Chapter 249 of the laws of Malta, art 4, art13.

[9]Civil Code Chapter16 of the laws of Malta, s1644.

[10]EIRA (n1) s 49(1)

[11]Alfred Buhagiar pro.Et. noe vs Minister of Education, Kollezzjoni ta' decizjonijiet tal-Qrati Superjuri ta' Malta, VolumLXXV(1991)Pt.ii,p.350.

[12]Zarb vs AG (n4)

[13] Equal Treatment in Employment Regulations 2004, S.L.452.95

opinion of the author that this provision is also extended to the EIRA and all its related regulations by means of section 2(3) of the EIRA. [14]

Trade Union immunity is dealt with under the EIRA[15] and it is a key factor for Trade Unionism since without such immunity not much can be realistically achieved by a Trade Union and its officials who are endowed with a very comprehensive level of immunity. Immunity also extends to any person who follows a legitimate union directive in contemplation or furtherance of a trade dispute and in such an instance, one does not even have to be a union member to benefit from such immunity.

Due to their distinct legal nature, the sources of Law applicable to a Trade Union differ from those of company law. Industrial Legislation is primarily regulated by the EIRA[16] which is a special law, and in view of the fact that unions are an association of persons they are also regulated by the Second Schedule of the Civil Code[17] unless it is specified otherwise in the EIRA[18].

Although not the only source, most of our industrial legislation is inspired from British statute. Nevertheless, general principles were also brought in from International Labour Association (UN agency) conventions, being international statutes. Another important source of our law, is European Law which in the main is incorporated almost *ad verbatim* in view that as a member state Malta is duty

[14]"Any provision of this Act requiring compliance with or observance of any provision of this Act (however such requirement is worded), or making provision with respect to any contravention thereof, shall be construed as requiring compliance with and observance of, or as equally applicable to, any provision of any regulation or rule made under this Act."

[15]EIRA (n1) s 63-64.

[16]EIRA (n1)

[17]Civil Code (n10) Second Schedule

[18]EIRA (n1)

bound to incorporate the European directives concerning employment law. When it comes to interpreting Industrial legislation deriving from foreign sources the issue has been judicially monitored and it is safe to say that the Maltese Industrial legislation is based on British law parts which have been either completely repealed and / or amended a long time ago.

Nevertheless, based on the notion that Parliament is supreme, the Court established in a judgement[19] that when it comes to interpreting the provisions of our law we have to interpret them in the manner they would have been interpreted when the Industrial Relations Act came into being and therefore any other interpretation given to the British statute subsequently to 1976 would not bind the interpretation given by a Maltese Court. In another judgement[20] it was said that when interpreting the provisions of Maltese law, one must look at their origin and interpret them in the spirit which the laws held at that relevant time.

[19] *Freeport Terminal Malta PLC vs. UĦM*, Court of Appeal, 30th May 2001,http://justiceservices.gov.mt/courtservices/Judgements/search.aspx?CaseJudgmentID=1487&func=judgementdetail

[20] *Malta Shipyards Ltd vs. GWU, Court of Appeal,* 10th of October 2005, *pg 5,http://justiceservices.gov.mt/courtservices/Judgements/search.aspx?CaseJudgmentID=29813&func=judgementdetail*

CHAPTER 2

THE LEGAL NATURE OF A COMPANY

A Company is regulated under the Companies Act[21] and is one of the most common forms of partnership which is deemed to be a trader under the provisions of the Commercial Code[22]. As a matter of fact, the majority of traders in Malta are limited liability companies.

A company has a separate juridical personality from its members and has to have a share capital divided into shares of a fixed amount which is held by its members who are also referred to as the shareholders. The members' liability is limited to the amount, if any, unpaid on the shares respectively held by each of them.

Since a company is a separate legal person it is capable of undertaking obligations that are its own obligations and of acquiring rights that are its own rights and not the rights of the members of the company. Notwithstanding the fundamental rule of separate legal personality, the law does, by way of exception, occasionally ignore the separate identity of the company and its members. This is known as the lifting of the corporate veil. There are two categories of instances when the corporate veil is lifted which are referred to as statutory exceptions and judicial exceptions[23].

[21]Companies Act, Chapter 386 of the Laws of Malta.

[22]Commercial Code, Chapter 13 of the laws of Malta.

[23]Prof. Andrew Muscat, *Principles of Maltese Company Law* (University of Malta, 2007).

The core rights of the shareholders are three:

- The right to attend and vote at general meetings of the company.
- The right to receive dividends from the company if it is making profit and if the directors find it is appropriate for the company to distribute dividends.
- Right to a share of the assets upon liquidation

1.1. The Notion of Limited Liability

A company can sue and be sued in it its own name. If a company is to be sued, you can only sue it and not its shareholders. On the other hand, if the company wants to make a claim it is the company itself, and not the shareholders, that sue. The company is liable, with all its assets, present and future to make good for any claims made against it. In reality, limited liability refers to the limited liability of the shareholders not of the company per se.[24]

Some Common Law lawyers argue that limited liability can be regarded as the greatest invention in commerce of the 19th century. With limited liability, it is possible for people to feel relatively safe in investing part of their assets and if people feel safe to do so, then globally huge amounts of capital can be raised, and those amounts will be enough to transform the economy from one that is flat to one that is able to develop.

A company is operated through a Board of Directors that has a lot of discretionary power, duties and obligations. To counter the wide powers of the Directors, shareholders have remedies that enable them to intervene in the management of

[24]Companies Act (n18) s 67

the company by sanctioning one or more directors who they deem has/have acted against the interest of the company. The Directors are entrusted with the management of the company.[25] They can do just about anything and have all the powers of the company unless a reservation in favour of the shareholders exists at law or is stipulated for. The executive directors run the company hands on and the non-executive directors sit on the board in an advisory or supervisory capacity. The latter are not vested with the day-to-day running of the company. The Courts have, in certain cases, drawn a distinction between these two types of directors, particularly when it comes to criminal responsibility despite there being no mention of the terms 'executive' and 'non-executive' when our law talks about directors' responsibilities.

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The director owes his duties solely and exclusively to the company and he has no duties towards the other directors or the shareholders. Hence, he must perform his duties for and on behalf of the company, and in the interests of the company.[26]

[25] Companies Act (n18) s.137(3)

[26]Charles Sant Fournier vs Dr. Phillip Attard Montaldo, Civil Court, First Hall,7th November,2001
http://justiceservices.gov.mt/courtservices/Judgements/search.aspx?CaseJudgmentID=5427&func=judgementdetail

CHAPTER 3

DIFFERENCES ARISING FROM THE DIFFERENT LEGAL NATURES

As a result of their different legal natures as explained above, a major difference between the remedies available to trade union members and shareholders is the fact that the former has the option to have his union sue on his behalf whilst he is still present in Malta, whilst the latter doesn't. This of course has to be viewed in the context that a trade union has a duty to protect its members whilst a company has no such duty towards its shareholders. As a matter of fact, as already stated earlier on in this paper the director owes his duties solely and exclusively to the company and not its individual shareholders. Hence although a company may sue, when it does, it does so for the benefit of all its shareholders and not on behalf of a particular shareholder or a group of shareholders only as in fact can be done by a trade union on behalf of its member or group of members.

Another difference arises under the right to freedom of association which has now also been recognised and acknowledged in employment law by means of a regulation introduced in 2016.[27]This protection also extends to actions of trade unions themselves such as in the case of when a trade union has a discriminatory clause in its statute or to discriminatory actions of trade union officials against existing members or even in respect of new applicants.

[27]Recognition of Trade Unions regulations, S.L.452.112, reg.10

As a matter of fact, a number of anti-discrimination protections and remedies for trade unions and/or their officers against other existing union members are available and these also extend to prospective union members. Under the Equal Treatment in Employment Regulations[28], a person claiming to be subjected to discriminatory treatment may refer the matter to the Industrial Tribunal or even more interestingly refer the matter to the court in order for the defendant to be ordered to desist from such unlawful action. This strongly suggests that this provision is intended as a type of interim measure which is not normally conceded in other situations and it is a much wider measure allowing for orders of *di fare* as opposed to just *di non fare* as in the warrant of prohibitory injunction which is also available in other situations which are not related to employment.

Although the provision is intended to put into effect the principle of equal treatment in relation to employment by laying down minimum requirements to combat discriminatory treatment on the grounds of religion or religious belief, disability, age, sex, sexual orientation, and racial or ethnic origin, in the opinion of the author this provision is further extended to all types of discrimination catered for under the EIRA and all its regulations by means of art 2(3) of the latter.[29]An interesting judgement which extended this provision to discrimination on the grounds of trade union membership was delivered in 2005 at first instance and subsequently confirmed on appeal in 2007[30].Both a company and a Trade Union must be run by the will of the majority, which ultimately determine what is to happen with the company or a Trade Union. Notwithstanding the notion of

[28]Equal Treatment in Employment Regulations, S.L.452.95, reg.10.

[29]EIRA (n11)

[30]*Attard Joseph Et Vs Busuttil Dr Ray Noe Et*, Court of Appeal, 6th July 2007
http://justiceservices.gov.mt/courtservices/Judgements/search.aspx?CaseJudgmentID=44233&func=judgementdetail

majority rule which is established in both Common Law and Maltese Law, minority shareholders enjoy protection against situations when the majority abuses of the power given to them and performs acts not in the interest of the company. Thus, over the years statutory and judicial protection has been afforded to the minority shareholders whilst maintaining the majority rule and an inter-balance between the two rules. On the other hand, no such protection is afforded to minority trade union members.

The Companies Act protects minority shareholders because it grants the remedy of seeking dissolution of a company if there are grounds of sufficient gravity. It provides for different ways a company may be wound up. A company *shall* be dissolved by the Court if it is of the opinion that there are grounds of sufficient gravity to warrant the dissolution and consequent winding of the company.[31] Under English law, this is referred to as the *just and equitable remedy*.

Another powerful remedy providing protection to minority shareholders is also provided under the companies act[32]if one of the following two scenarios is taking place:

1. If the affairs of the company have been or are being or are likely to be conducted in a manner that is oppressive, unfairly discriminatory against or unfairly prejudicial to a member or members or in a manner that is contrary to the interests of members as a whole.
2. If any act or omission of the company has been, is or is likely to be, oppressive, unfairly discriminatory against or unfairly prejudicial to a

[31] Civil Code (n10) s.214

[32] Ibid s.402

member or members or in a manner that is contrary to the interests of the members as a whole.

The common terminology used for both options is 'oppressive', 'unfairly discriminatory against' and 'unfairly prejudicial'. The above remedies are very effective and are essentially intended to have proceedings and remedies which are by nature *ad hoc* and *sui generis*. Although the possibility of issuing interim orders is not expressly included in the list of remedies provided in the legislation, they have been granted and used as an effective means of protecting shareholders' rights in situations where although they might have already started a judicial action, they would still be suffering prejudice while proceedings are taking place.[33]

[33] *Joseph M. Vella Et v. Vella Brothers Limited Et*, Court of Appeal, 9th March 2007

CHAPTER 4

MALTESE JURISPRUDENCE IN TRADE UNION MATTERS

As already briefly intimated earlier on, the situation seems to be quite different for minority trade union members. As a matter of fact, the relationship between a Trade Union and its members has been dealt with judicially and our courts have established on more than one occasion that such matters are not for the court to interfere with but should be addressed through the internal mechanisms established under the provisions of the union statute instead. In order to provide a clearer picture of the situation the author will be giving a brief overview of different cases which progressively lead us to the current day situation in this regard.

This subject matter was dealt with by the courts even as far back as 1953. In a judgement[34],the court had decided against the plaintiff Mr Sare who was employed in the Royal Air Force and who was claiming that notwithstanding that he had requested the assistance of the general workers union in respect of a claim which he had against his employer, the union did not assist him adequately in pursuing such claim which led him to suffer financial detriment.

Basing itself mostly on teachings of foreign authors and local jurisprudence the Court stated that notwithstanding that in the General Workers Union (from now onwards referred to as the GWU) statute it is not specifically stated that the

[34] *Sare vs Cacciatolo* (n6)

decision of the national executive of the union is final, it is still not subject to an appeal because in case of a grievance the procedure to be followed is explicitly laid out in the union statute and specifically stops at the point that a decision from the national executive of the council is reached.

A very important principle was laid out by the court when it stated that no doubt exists that the General Workers Union was a Civil Society which is recognised or allowed at law and hence anyone who becomes a member of it enters into a contractual relationship with it and is deemed to have accepted the rules contained in its statute which are a social pact between the members, making such rules acquiring the force of law between its members. The court referred to a previous judgement[35] in support of this conclusion. Nevertheless, the court further stated that it seemed that it would have been possible for someone to appeal the decision of a national executive like that of the GWU before a tribunal if it involved a cause which is recognised at law in order to cancel a contract, or in the case of breach of regulations, or even in the case of an application of the regulations in a manner which breaches the principles of natural justice. However, even in the aforementioned hypothetical instances, the courts can never judicially review the deliberation of the national executive as to whether or not it was opportune or expedient and/or the intrinsic motive which determined it. It also held that neither can the court judicially review whether the opinion expressed in such deliberation was correct or otherwise, as long as it was made in good faith.

As we have seen from the above judgement, way back in 1953, trade unions were considered as civil partnerships which could perform certain functions with the

[35] *Vassallo vs Iron,* Kollezzjoni ta' decizjonijiet tal-Qrati Superjuri ta' Malta, Volum XXVIII (1933) Pt. ii,p.488

will of the legislator. One such function is the possibility of the trade union to enter into contracts. As a natural consequence of the capacity to enter into contracts, a union is bound by its contractual undertakings under the principle of *pacta sunt servanda*. Additionally, every member becomes bound by the union statute upon becoming member under the same principle.

Fast forward 35 years to 2006 and we find another decision[36] which once again reconfirms the position which was outlined in the 1953 GWU judgement but this time translated into the granting of a precautionary warrant of prohibitory injunction until the merits of the case could be decided. The injunction effectively stopped the convening of a general meeting which was allegedly being organized in breach of the union statute to the detriment of the applicants who were also employed by the GWU.

This brings us to our last and most recent decision taken by the court in 2017[37]which dealt with an internal dispute between the officials of another union namely the Malta Union of Bank Employees (from now onwards referred to as the MUBE) and which also involved a request for the granting of a warrant of prohibitory injunction *inter alias* to stop a general meeting. The applicant also alleged discrimination and that he was being abusively dismissed from the union in breach of the internal regulations.

[36] *Josephine Attard Sultana Et vs Tony Zarb Et*, Civil Court, First Hall, 3rd August 2006.https://ecourts.gov.mt/onlineservices/Warrant/Search

[37] *Mark Muscat vs William Portelli noe*, Civil Court, First Hall, 9th December 2016 http://justiceservices.gov.mt/courtservices/Judgements/search.aspx?CaseJudgmentID=103986&func=judgementdetail

Although the court once again referred to the same reasoning mentioned in the three GWU cases mentioned earlier, namely that it wasn`t the function of the court to interfere in the internal matters of any juridical organisation such as a Trade Union unless a right at law was potentially being undermined, it went on to state that amongst other things the manner in which procedures are regulated during an extraordinary general meeting and the modalities by which the voting upon such motion is made are all internal matters which fall squarely in the hands of the administration of the union and are subject to the scrutiny of its members.

Whilst remaining consistent with the position obtained in the previous GWU cases in respect of breaches of the principles of natural justice the Court unequivocally declined to review the allegations which were being made that the actions referred to above were being done in breach of the union regulations. Needless to say this position delivered a big blow to the effectiveness of remedies available to trade union members.

CHAPTER 5

COMPANY AND TRADE UNION REGISTRATION

So far, we have established that both Trade Unions and Companies are allowed to engage in dealings with third parties in pretty much the same manner as any other legal persons and with the ordinary civil and criminal remedies available for everyone in other circumstances. What is important in both situations, is that they need to have been validly registered before being able to engage in any dealings with third parties. This requirement for registration is also an important aspect which will be examined in greater depth, and the conclusions of which may form part of the author's final recommendations. At this junction the author will limit himself merely to a brief overview as to what is required in both cases initially.

In the case of Trade Unions, the registration process is regulated under the EIRA[38]. In essence this involves that a trade union has to submit various documents so that they can be scrutinized and approved by the Registrar of Trade Union. The registrar is the authority vested at law[39] to register or de-register a trade union, once the application has been made. When you look at conditions that are required to have a trade union validly registered, one realises the similarity between these and those in the Companies Act[40]. Nevertheless, there are other conditions such as the provision of the statute to third parties, and other forms of control, including in respect of the expulsion of members and other items for which the statute has to have provisions in this regard.

[38] EIRA (n1) s.50, s.54

[39] Ibid s.55(1)

[40] Companies Act (n18)

Like Trade Unions, Companies have to register with the Registrar of Companies the Memorandum and Articles of Association. Although they appear as one document, they are two documents bound as one. They must both be subscribed or signed by the shareholders and together with some other formalities must be registered with the Registrar of Companies in order to incorporate the company with an initial registration fee. As a rule, once you have those, a company may be registered. The law tells us what should be contained in the memorandum of association but not what should be contained in the articles of association. In the latter case, what the law does is recommend what should not go in the articles of association and not what must go in. The main difference between the two is that the memorandum is the document that is of interest not only to the shareholders but also to the public at large that may deal with the company. On the other hand, the articles of association, is that set of provisions that regulate the internal management of the company in particular matters in relation to meetings, quorum, notices, dividends and appointment of directors.

CHAPTER 6

ANTI-DISCRIMINATION LEGISLATION

This is of interest to the author because it is also connected to the subject-matter of this term paper in view that even when Union officers refuse an application for membership in the union, or if their statutes are discriminatory in themselves there is discrimination. The officers are also liable if they discriminate between people who are already members. For discrimination to qualify under the 2003 Equality for Men and Women Act[41], it needs to be based on sex or because of family responsibilities or sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity, gender expression or sex characteristics.

Furthermore in the Equal Treatment in Employment Regulations it is also stated that it shall be unlawful for a person to subject another person to discriminatory treatment, whether directly or indirectly, on the grounds of a particular religion or religious belief, disability, age, sex, including discriminatory treatment related to gender reassignment and to pregnancy or maternity leave as referred to in the Protection of Maternity (Employment) Regulations[42], sexual orientation, or racial or ethnic origin in any situation referred to in regulation 1(4).

The question which we now need to answer is whether in practice the remedy made available by means of the abovementioned article and regulation are only being applied by the courts exclusively in the specific instances mentioned therein,

[41] Equality for Men and Women Act, Chapter 456 of the laws of Malta

[42] Protection of Maternity (Employment) Regulations S.L.452.91

or whether they are also being extended to any form of discrimination encompassed within the EIRA and the regulations issued there under on the basis of section 2(3) of the EIRA?[43]

The argument in favour of this extension finds support in the fact that whilst Maltese law adopted the EU legislation related to equality and discrimination, it offers an even wider protection during employment than that found in the EU law. This protection is also applicable for Trade Unions to protect against any acts committed by the Trade Union itself against its members. As for EU law, in 1976, the Court of Justice of the European Union (CJEU) decided in the *Defrenne* case by establishing an overriding EU principle as provided for in (Article 119 EEC, then 141 EC, now Article 157 TFEU)of the EU treaty exists and which states that domestic courts:

"*have a duty to ensure the protection of the rights which that provision vests in individuals, in particular in the case of those forms of discriminations which have their origin directly in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public*".[44]

[43] EIRA (n1) s 2(3)

[44] Gabrielle Defrenne v.Societe Anonyme Belge de Navigation Aerienne Sabena [1976] C-43/75.C.R. 455, 2 C.M.L.R. 98

Under the Right to Organize in the revised EU Social Charter[45], it is further stated that:

"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 Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom" and also that "the enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race (...)"

Additionally, in the European Convention of Human Rights[46] it is stated that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority" and that "enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, (…)"

Furthermore, in the convention of the International Labour Organisation (from now onwards referred to as the ILO) namely the Freedom of Association and Protection of the Right to Organise convention[47] it is stated that "Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."

[45]Council of Europe, *European Social Charter (Revised)*, 3 May 1996, ETS 163 <http://www.refworld.org/docid/3ae6b3678.html>[accessed 10 April 2018]

[46]Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5<http://www.refworld.org/docid/3ae6b3b04.html>[accessed 10 April 2018]

[47]International Labour Organization (ILO), *Freedom of Association and Protection of the Right to Organise Convention, C87*, 9 July 1948,C87<http://www.refworld.org/docid/425bc1914.html>[accessed 10 April 2018]

In another ILO convention namely, the Right to Organise and Collective Bargaining Convention[48] it is stated that:

"Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.' and that "Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration."

Hence, from the different aspects which derive from this legal doctrine and jurisprudence it is amply clear that the scope of the EIRA and the numerous regulations and provisions issued there under are undoubtedly to give a wide protection to all forms of discrimination and to guarantee a just retribution to the individuals concerned by offering an adequate and effective remedy on any ground against discrimination.

A review of a 2007 judgement can help us answer this question. [49] In this judgement, the Court of Appeal seems to have applied an anti-discrimination remedy as referred to above and ordered the Government to desist from continuing to disqualify the plaintiffs from being able to work overtime like the rest of their colleagues. Hence the remedy laid out in the Equality for Men and Women Act and in the equal treatment in employment regulations was extended to other forms of discrimination and granted also to protect against anti-union discrimination.

[48]International Labour Organization (ILO), *Right to Organise and Collective Bargaining Convention, C98*, 1 July 1949, C98<http://www.refworld.org/docid/425bc23f4.html>[accessed 10 April 2018]

[49]Attard vs Busuttil (n28)

Whilst the author believes that this judgement is definitely a step in the right direction to providing an effective remedy to workers and trade union members who may be subjected to all forms of employment-related discrimination, it is nevertheless still far from a desirable situation in view of the length of time it took for the judgement to be pronounced.

In this case, it took the plaintiffs nearly five years to get a judgement from the court of first instance and it is also not clear what happened in the interim until a final judgement was delivered by the Court of Appeal circa two and a half years later.

What the author considers to be another step closer to addressing the issue of lack of adequate remedies for trade union members (even in a situation which does not involve discrimination),was the 2006 decision already mentioned earlier on which was delivered by the First Hall Civil Court presided over by Judge Joseph R. Micallef.[50]In this decision the Court granted a warrant of prohibitory injunction against a trade union on the basis that an internal union regulation was being breached or that such internal regulation was being applied in a manner which breaches the principles of natural justice (however restricted to judicial review without delving into the merits). It is to be noted that the court applied the principle of proportionality in view that it was deciding whether or not to grant a request for the issuing of the warrant of prohibitory injunction.

[50]*Attard Sultana vs Zarb (n35)*

CHAPTER 7

AUTHOR'S CONSIDERATIONS IN RESPECT OF THE CURRENT SITUATION

Based on all of the above, the author has no doubt that the remedies available for a minority shareholder in a company are broader in their remit and are applied by the courts more efficiently and consistently than those which are available for a minority trade union member. A major advantage for shareholders is undoubtedly the fact that the courts are readily prepared to issue interim orders when this is needed to safeguard the interest of shareholders.

On the other hand, we have seen the court interpret in different ways the legal provisions relating to trade union which in turn impacts significantly the efficacy levels of the remedies available to trade union members. Even worse, is the fact that the latest position reflected in the MUBE decision seems to provide the most inferior level of remedies in respect of the jurisdiction of the court in relation to the inner dealings of a trade union. Nevertheless, on a positive note a consistent approach seems to exist in relation to actions which may breach the principles of natural justice. Whilst some progress is being registered in this area, no concrete proof exists yet that the courts are willing to interpret the remedies which were introduced to combat discrimination and inequality as providing for a *sui generis* wide ranging interim remedy which can be availed of also by trade union members.

This is very unfortunate since in the opinion of the author, the legislator intended to increase and improve on the previously existing remedies by introducing a new one which empowered the courts to issue an order to an employer or a trade union as the case maybe to desist from doing a discriminatory act as specified in the Equality for Men and Women Act[51] and in the Equal Treatment in Employment Regulations[52]. Such an order goes very much further than the ordinary prohibitory warrants which are normally available in other non-discrimination related situations *inter alias* because such an order to desist is an order to do something *(di fare*) as opposed to an order to stop someone from doing something (*di non fare*) as is strictly contemplated in the case of ordinary precautionary warrants.

Nevertheless, as we have seen in the 2007 judgement above, the novelty and any intended improvement on the situation which existed prior to the introduction of the abovementioned Act and Regulations would all be lost and become nearly useless unless the time element is really and truly addressed to make the remedy efficient. The powers of the Court to accept requests made by an application after a due process already existed before the Act and Regulations mentioned above came into force. Had the intention of the legislator not been to provide an efficient remedy which is even more far reaching than that of a precautionary warrant as explained above, there would have been no need to include such remedy as this already existed in the first place. Unfortunately, as far as research has revealed so far, no judgement seems to have been given by the court applying such an interpretation.

[51] Equality Act (n42) s19(1)

[52] Equal Treatment (n 10) Reg.10(2)

When it comes to Constitutional remedies the situation is such that both EU and Domestic law are well-geared to deliver an ideal and adequate remedy *inter alias* to Trade Union members in respect of their constitutional rights. Nevertheless, it is very unfortunate that the Court's position so far is such that it chooses to grant an interim measure only very restrictively, hence by doing so, in the opinion of the author, defeating the intended scope of the legislation to truly offer an adequate remedy in many of the cases. In a recent case,[53]the Court seemed to be moving in the right direction by granting a temporary interim measure in respect of an alleged breach of the right to privacy until all the parties had the opportunity to present their submissions albeit no definite judgement was delivered in view of the sudden passing of the plaintiff and the subsequent revocation of the application by his heirs. A very similar application[54] was once again filed by the CEO of HSBC Bank Malta plc who also requested an interim measure due to an alleged breach of the right to his privacy in an ongoing case, which however was promptly declined by the Court on the basis that such a measure was not available in such situations.

The situation is even worse in respect of the Industrial Tribunal in view that everything seems to point towards what as a minimum may be described as a perceived lack of powers to issue interim orders which are such a powerful tool when dealing with many issues *inter alias* those relating to the inner dealings of a Trade Union. Nevertheless, it is safe to say that third parties have the same remedies available to them against a Trade Union as if they were dealing with any other type of partnership or legal person. One can also argue that the same can be said for members in relation to any contract they may have (such as an

[53]Gareth Williams vs Avukat Generali Et, Civil Court, First Hall (Constitutional Jurisdiction), 27th October 2017.

[54]Andrew C Beane vs L-Avukat Generali, Civil Court, First Hall (Constitutional Jurisdiction), 20th April 2018.

employment contract) with the union, other than the contract by which they become members of the same union.

8.1. Micro and Macro Effects – Why Is It So Important to Have Effective Remedies for Trade Union Members?

The general lack of adequate remedies described in the previous chapter creates a situation of uncertainty, or yet even worse, of certainty that one can very easily end up with no remedies whatsoever when faced with a breach of a trade union's regulation by other officials or members. This is extremely worrying and should be a serious cause of concern to many stakeholders in the industry. The negative impact and consequences of such a situation can be very far-reaching mostly because of the very unique legal nature of trade unions itself.

Countries around the world ascribe varying degrees of Trade Union's control and rigidity levels with which they bind their members. Nevertheless, the decisions of any Trade Union movement worthy of the name can have a conclusive and immediate impact on its members in an equal manner as the government of its respective country. [55]

Whilst taxes levied by government may be a very important factor for an individual, the remuneration package negotiated by a trade union through collective bargaining at the individual's workplace may be even more important

[55] •Clyde W. Summers, Internal Relations between Trade Unions and Their Members [1965]. Yale Law Faculty Scholarship Series, Paper 3906, 176

for such individual. Additionally, the non-financial conditions negotiated by a trade union or the lack thereof may also create immense hardship to such individual or on the contrary help him in no small way.

The exercise of such powers over individuals in a democracy by any association of persons naturally raises pressing questions about the rights and remedies available for its members. The compelling question being researched by the author in relation to the effectiveness or otherwise of the remedies available to trade union members *vis a vis* the internal dealing of their trade union is reinforced by the fact that the trade union's power over such individuals is a deliberate product of government policy. Many governments in countries around the world chose to regulate the labour market through collective bargaining as an alternative to the government's own control. One must also not forget that through Collective bargaining a Trade union can also have the same impact on non-members at the workplace. Hence this makes certain aspects such as membership, expulsion, suspension, discipline and the adhesion to union regulations vital matters requiring special attention.[56]

In contrast with Trade Unions a Company has no such powers over individuals but has equal powers over the financial interest of its shareholders which have been vested by the latter in such company. The major fundamental difference which exist between the two is that whilst a Trade Union's assets are controlled by the administration of the union for the benefit of its members which may include the bettering of the financial remuneration of its members. However such members are not the ultimate beneficiaries of those assets even in the case of dissolution of

[56]Ibid

the trade union. On the contrary, the ultimate beneficiary of a company is indeed the ultimate beneficiary of the assets of the company and will receive such assets in the case of an eventual liquidation of the company. Hence whilst fundamentally different from each other, the author opines that in both instances the financial interests of an individual may be at stake. In respect of companies, legislators around the world have developed special remedies similar to the ones described earlier on in this paper purely because of the extent of the consequences which may arise from an abuse of power by the company in relation to the financial interest of the shareholder vested in such company.

Indeed, many authors opine that it would be a wise policy for courts to legally refrain from interfering in order for labour to actually be free to govern itself. Such authors are of the belief that any governmental or judicial interference frustrates the concept of collective bargaining and that only as a measure of last resort "must" the freedom of unions, as with the freedom of individuals and all groups, be circumscribed.

But once we have established the extent of the powers exercised by a trade union over an individual, what do we make of union statutes which deal with the serious matters mentioned above? Many a times the wording used in trade union statutes regulating such serious matters would be in the lines of "a member may be expelled or suspended if he acts contrary to the best interests of the union ", or where the member has committed acts which "discredit" the union or its officers, or where a member acts against the union's "policies".

Should these generic terms be allowed to prevail making them a tool in the hands of abusers? Should the court be able to judicially review these generic terms in

order not to allow them to be used as a tool in the hands of abusers or should the court allow trade unions to regulate themselves without the possibility of judicial review? Then again even when government regulates this area and union provisions are required to be clear as opposed to vague expressions, should the court be allowed to review the compliance or otherwise to trade union rules?

The most recent judgement quoted in this paper namely the MUBE judgement referred to above can help highlight the extent of the negative consequences which may ensue in a scenario in which the courts and the legislator opt to allow self-regulation without the possibility of judicial review. Without entering into the merits of the case or to whether or not the allegations made by the applicant are true or otherwise, if the judgement is analysed from the perspective of the applicant, the outcome of the judgement would have meant that thousands of union members were being literally held at ransom by a small group of members consisting of the incumbent administration and the Executive Council of the union. Notwithstanding that hundreds of members were unhappy with the disregard of the union's rules by its own administration and the passiveness of the council in this regard, they could do literally nothing to rectify the matter.

The union's internal mechanisms and organs were failing to deliver the expected results. Even if a majority (let alone a minority) of members wanted to do so, they couldn`t rectify the situation in view that the administration controlled the voting process (and hence the outcome of any vote) by practices which were in breach of the union statute. Such a scenario not only undermines minority rights but goes as far as defeating also the principle of majority rules.

Once such a situation develops within a Trade Union, the serious consequences which have already been described in this chapter could ensue and these could have a devastating effect on the lives of thousands of workers. Hence in the opinion of the author, the consequences deriving from an uncontrollable abuse of the powers belonging to a trade union can be immense and are comparable to, if not even greater than the consequences arising from a similar abuse of company powers.

CHAPTER 9

COMPARATIVE ANALYSIS

The traditional British common law concept of unions as voluntary organizations, and therefore *'assuming good faith and proper methods, its decisions are to be treated as conclusive and in the absence of capricious or arbitrary action'*[57] entitled to self-regulation, has long influenced many legislators and courts[58]. For example as was the case in Malta, the English and Canadian courts viewed the membership relationships of these organizations as purely personal and contractual, and they therefore would not review an internal decision of a union except on narrow procedural grounds.[59] Nevertheless, many legislators around the world have also provided for special additional safeguards exactly because of the potential consequences which may result from an abuse of trade union powers. This paper purports to illustrate this by reference mostly to the current situation obtaining in the United Kingdom (which contrasts significantly from the traditional situation described above) but to a very limited extent also to the US and the Canadian position.

[57] Forkosch (n1) 741

[58] Bartone v. Di Pietro, i8 N.Y.S. 2d 178 (S. Ct., 1939); Donovan v. Travers, 285 Mass. 167, i88 N.E. 705 (1934); Engel v. Walsh, 258 Ill. 98, 101 N.E. 222 (i913); Heasley v. Operative Plasterers, etc., Ass'n, Local No. 36, 324 Pa. 257, 188 Atl.2o6 (1936).

[59] Michael Lynk, Union democracy and the law in Canada [2002] *Journal of Labor Research,21*(1), 37-63

9.1. The Certification Officer

Under a 1975 legislative enactment,[60]the post of the Certification Officer was created originally to take over certain functions of an administrative nature related to Trade Unions and friendly societies. Nowadays however, the Certification Officer enjoys very wide-ranging supervisory and investigative powers over various matters such as breaches of industrial law and/or Trade Union internal rules, register of members, elections, accounting records and others. He is appointed by the Secretary of State and has to make an annual report to him and the Advisory, Conciliation and Arbitration Service (from now onwards referred to as ACAS). Even though the staff of the Certification Officer are provided by ACAS, he is still completely independent from such organisation. [61]A trade union can only refer any issues related to recognition at a workplace to the Central Arbitration Committee, after it has obtained a certificate of independence from the Certification Officer.

In order for a trade union to be granted a certificate that it is an independent trade union by the certification officer a union it could not be under the domination or control of an employer or groups of employers or an employer's association and it is not liable to interference by an employer or any such group or association arising out of the provision of financial or material support or by any other means whatsoever tending towards such control.

[60]Employment Protection Act 1975

[61] Astra Emir, Selwyn's Law of Employment, 19th Edition , Oxford University Press 2016, 5 [1.18]

To understand the arguments about certification, it is necessary to make a short excursus into industrial relations. Some years ago there was an expansion of unionization, particular among the so called 'white-collar' workers and management. A considerable number of staff associations sprang up in order to exercise the sort of industrial pressure hitherto reserved for the blue-collar workers. These staff associations are looked upon as not being proper trade unions, and are sometimes referred to in a derogatory tone as being the sweetheart unions or house unions. The test of independence for certification purposes is to permit through the net those unions which can demonstrate that they are truly independent and not just the tame adjuncts of management."[62]Needless to say, a number of significant advantages and protections are enjoyed by those trade unions which are declared as an independent trade union by the Certification Officer.

The Certification Officer can make orders and declarations on a variety of matters which may be enforced as an order of the courts and his decisions are subject to an appeal on a point of law to the Employment Appeals Tribunal.[63]A very important power which was vested in the Certification Officer as from the very inception of the post in 1975,is that he can grant to a registered trade union a certificate that the union is independent. The Certification Officer is also responsible to maintain a record showing details of all such applications and to keep it available for public inspection.[64]

[62]Ibid 581 [22.11]

[63]Ibid

[64] Ibid 580 [22.7]

The Certification Officer has the custody of amongst others all the annual returns, accounts, copies of rules and other documents submitted by Trade Unions, Employers' Associations and Friendly Societies with a responsibility to keep available for public inspection as required by the applicable law. This function is very similar to those of the Trade Unions registry in Malta.[65]As we have seen earlier on, even the International Labour Organisation felt the need to regulate this very serious aspect of the independence of trade unions in order to try and avoid certain abuse due to the potential serious repercussions which can be suffered as a result thereof.[66]Amongst the many powers the UK Certification Officer has available to carry out his duties, he also has the power to investigate the financial affairs of a trade union in respect of adherence or otherwise to the applicable laws and the trade union rules themselves.[67]

Interestingly, a member of a trade union can also apply to the court for permission to institute or continue an action on behalf of the union at the union's own expense when such union fails to do so when it was required.[68]A remedy before the UK Certification Officer is granted to any member who claims that there has been a breach of the trade union rules in respect of the appointment or election of a person to an office or his removal from such office. The remedy is *inter alias* also applicable in relation to any disciplinary proceedings which were undertaken by the union (including expulsion), the balloting of members on any issue other than industrial action and the constitution or proceedings of any executive committee or of any decision-making meeting.[69]

[65]Ibid [22.5]

[66]ILO C87 (n48)

[67]Selwyn's law (n57) 592 [22.62]

[68]Selwyn's Law (n57) 593 [22.65]

[69] Trade Union and Labour Relations (Consolidation) Act 1992, s 108(a)(b)

9.2. U.K. Courts and Tribunals

In stark contrast to the position held by the Maltese Court in the previously mentioned MUBE decision, the UK courts have exercised the power to interpret trade union rules in respect of discipline in accordance to their own understanding as opposed to the understanding of the union[70], especially when provisions are somewhat vague[71] . Nevertheless, the legitimate interests of the union are still upheld[72].Most importantly, the procedure stipulated in the union rules in disciplinary cases must be strictly adhered to without fail. Contrary to the local judgements, the UK courts hold that the rules cannot be framed as to oust the jurisdiction of the courts by declaring that the decision of the union shall be final and binding.[73]

A member who believes he was wrongly excluded or expelled from the trade union may present a complaint before an employment tribunal even before an internal appeal has been exhausted. Not only that, but a member who believes he was wrongly dismissed may apply for a declaration that he is still a member as well as for an injunction restraining the union and its officials from acting on the purported expulsion besides claiming for any damages.[74] In part the local Court, even in the least accommodating decision which involved the MUBE did address this aspect too, however it did so in vain since it fell short to address the breach of

[70]Lee vs Showmen's Guild [1952] 2QB 329, [1952] 1All ER 1175,96 Sol Jo 296, [1952] 1 TLR 1115, CA.

[71]Kelly v National Society of Operative Printers' Assistants (1915) 84 LJKB 2236,59 Sol Jo 716, 113 LT 1055, 31 TLR 632, CA.

[72]Evans v National Union of Printing, Book Binding and Paper Workers [1938] 4 All ER 51.

[73]Chapple v Electrical Trades Union [1961] 3 All ER 612, [1961] 1 WLR 1290, 105 Sol Jo 723.

[74]Bonsor v Musicians' Union [1954] Ch 479, [1954] 1 All ER 822, 98 Sol Jo 248, CA; revsd [1956] AC 104, [1955] 3 All ER 518, [1955] 3 WLR 788, 99 Sol Jo 814, HL.

regulations which inevitably have the power to bring about an abusive dismissal in any case.

Moreover, any member in the UK who has a dispute in relation to any of the trade union's rules should first pursue the internal dispute procedures but if he is still not satisfied he may subsequently seek recourse to the courts.[75]Membership in a trade union confers rights and privileges on the members who are entitled to claim damages if such rights and privileges are not forthcoming. If a trade union fails to apply for a protective award in appropriate circumstances or negligently delays the presentation of a claim which ends up time barred, a member can claim any resultant damages from the union.[76]

Officials of a trade union can act only within the confines of the union rules. In Weakley v Amalgamated Union of Engineering Workers[77]the President of the union exercised a casting vote on a motion when the committee was equally divided, and an injunction was granted restraining the union from acting on the motion in view that on a true construction of the rules the president did not have a casting vote. This aspect was also raised in the MUBE case when the applicant alleged that he was not reappointed as a chairperson of the committee as a result of a casting vote taken by the Council which was not stipulated for in the statute. Even in this instance the Maltese Court failed to recognise this as a wrongdoing which warranted its intervention.

[75]White v Kuzych [1951] AC 585, [1951] 2 All ER 435, 95 Sol Jo 527, [1951] 2 TLR 277, PC.

[76]Buckley v National Union of general and Municipal Workers [1967] 3 All ER 767, 112 Sol Jo 292.

[77]Weakley v Amalgamated Union of Engineering Workers (1975) 125 NLJ 621.fdsdffdd

Elections of the principal executive committee are also heavily regulated under TULR(C)A in sec 46 and any member has a right to apply to the high court or the Certification Officer (but not both) for a declaration that a trade union did not adhere to such regulations. Amongst the requirements under these regulations is the requirement to have a qualified independent person as a scrutineer. The court may make an enforcement order and specify the action which the trade union will have to take upon confirmation of any breach.

9.3. Author's conclusions from the Comparative Analysis

Similarly, to the Canadian position, Malta's approach has been one of statutory abstinence in respect of many areas of trade union activity such as union elections, dismissals and/or the functions of union officers. This was not the case in the US and the UK as both the U.S. Congress and the British Parliament have enacted stringent legislation governing these areas. Comparatively speaking, Maltese and Canadian unions enjoy greater institutional freedom of association than their American and British counterparts. On the other hand, it seems that the particular culture and social role of trade unions have commonly been misunderstood by a largely conservative judiciary.

Our Industrial law derives mainly from the legislation which was in place in the UK in 1976 and is in the main modelled on the UK Industrial Relations Act 1971 and the subsequent Trade Union and Labour Relations Act 1974 which both repealed and replaced the Industrial Relations Act of 1971. The Maltese 1976 Industrial Relations Act also consolidated the 1945 Trade Disputes and Trade Unions Ordinance and the Conciliation and Arbitration Act 1948 which were

applicable in Malta in addition to new amendments, which as stated earlier was modelled mostly on the legislation which was in place in the UK in 1976.[78]

Once it has already been established that the intentions of the legislator at the time were very much clear in trying to mimic the position obtaining in the U.K., Malta's similarity to the Canadian position is in the opinion of the author quite anomalous. Whilst the reasons for the Canadian approach towards the law governing union democracy centre very much on the fact that as described by the 1996 federal task force reviewing the Canada Labour Code which before stated that: "Canadian trade unions exhibit a high level of internal democracy and genuinely represent the interests and wishes of their membership.", the reasons for the Maltese situation seem to be more related to the fact that it almost seems that for some reason or another, in 1976 the legislator missed out on an important piece of legislation which was enacted in the UK on the12th November 1975[79],namely the Employment Protection Act which provisions continued to exist till today by virtue of the Trade Union and Labour Relations (Consolidation) Act 1992 (from now onwards referred to as TULR(C)A). Furthermore, it seems that the Maltese legislator subsequently also failed to fill in the *lacunae* created by such an omission thereafter and the situation remains pretty much the same until today.

When one looks at the UK situation it becomes immediately evident that what is deemed by the Maltese Courts as not subject to further review by any other organ apart from the union's own internal organs would have all been reviewable in the UK by either the Certification Officer or judicially, and in some instances, even by both.

[78] *Norman Mifsud et vs Simon Debono*, Civil Court, First Hall, 30th March 1995

[79] The Employment Protection Act,1975

When one looks at the extent of the wide ranging regulation which the UK legislator deemed fit to enact in respect of the inner dealings of a Trade Union and the specific remedies made available to its members, one immediately notices that it matches the level of regulation and the specific remedies made available to shareholders of a company around the world (including Malta). The UK legislator went as far as to make available even an action similar to the derivative action available to shareholders for trade union members which allows any such member to apply to the court for permission to institute or continue an action on behalf of the union at the union's own expense when such union fails to do so when it was required.

The author has no doubt that a lacuna in Maltese law exists in respect of Maltese trade union members and the remedies they have available. Whilst the courts in Malta could have taken a different approach for trade unions by looking at a more holistic view of the situation in the UK, the situation now requires a legislative intervention in order for this very serious issue to be addressed. The repercussions brought about by keeping things as they are at present can be so great that one wonders how Trade Union members have coped so far. In the MUBE decision, the members who were impacted negatively by the judgement had to resort to registering a new union with all the hardship that such a decision brings with it. Many argue that a proliferation of trade unions only serves to weaken the strength of trade unionism but if no remedies are made available to the members of trade unions there isn`t much else that they can do. Hence, one can safely argue, that the current stance taken by the courts not to interfere with the union's inner dealings cannot be correct unless accompanied by another mechanism by which a union member can enforce the union's statute and regulations when such are being abused by other members or union officials even if these are in a majority.

CONCLUSION

RECOMMENDED SOLUTIONS

Once we have established that some sort of action is required to address this lacuna, we now need to explore the best way how to address it, namely as to whether it would be best by the creation of an administrative office such as the Certification Officer in the UK or by empowering the Tribunals and the Courts to review the inner dealings of a trade union, or perhaps both?

The remedies available for a shareholder in a company have proved to be very effective overall with the two key factors being their wide remit and the possibility of an interim relief. Nevertheless, when there was lack of clarity in a certain area such as the interim relief the remedies weren`t as effective and many shareholders suffered unnecessary prejudice at the time. In fact, before the Maltese Companies Act was enacted, there was no specific remedy for the abuse by the majority regarding decisions affecting the company. However, in a previously mentioned judgement,[80] the Court noted that the matter had already been dealt with by other countries, despite Maltese law's shortcoming.[81]

In line with the general principles of equity however, the Court should be allowed to 'subject the exercise of legal rights to equitable considerations'[82].

[80] *Falla vs. Sorotos*, Civil Court, Court of Appeal, 12 March 1976

[81] Abela (n32)19

[82] Ibid 31

1)A legislative intervention to address the areas which were covered in the UK law but aren`t covered under Maltese law is in the opinion of the author the best solution in order to avoid any misinterpretations and/or misunderstandings. Such amendments should cater for a *sui generis* remedy before the Court or the Industrial Tribunal which would also be empowered to give an interim order of both *di fare* and *di non fare* similar to what is provided for in anti-discrimination scenarios as already outlined earlier and to the remedies available for a company shareholder.

Additionally, the powers conferred to the UK Certification Officer should be conferred to the Registrar of Trade Unions with a facility to appeal before the Industrial tribunal and subsequently to the Courts of Appeal inferior jurisdiction. Whether an appeal from decisions of the Registrar should be restricted to points of law only very much depends on whether interim relief is made readily available or otherwise. Only if the law is clear about such availability and the Courts and Tribunals are prepared to allow applicants to make use of such availability in a manner which is at least at par with the situation which exists for other precautionary warrants, appeals should be restricted to points of law only before the Court of Appeal inferior jurisdiction.

2)Another solution by means of a legislative intervention could be to transpose article 402 of the Companies Act 1995 in the Industrial law in order for the lessons learned in the long and rich history of Maltese corporate law to also be applied to buttress the institution of trade unions.

3)Alternatively, if the legislator doesn`t see fit to pass such legislation, or possibly even until such time that the above-mentioned legislation is passed, one can hope

for a more efficient and consistent judicial interpretation of our existing provisions as follows:

At worse, the position held by the Court in the 1953 GWU case should prevail over the latest position held in the 2016 MUBE decision. For the sake of clarity, in the 1953 GWU judgement[83], the court relying on both Italian and English teachings and jurisprudence stated that in light of such teachings and judgements, it seemed that it would have been possible for someone to appeal the decision of a national executive like that of the GWU before a tribunal if it involved a cause which is recognised at law in order to cancel a contract, or in the case of breach of regulations, or even in the case of an application of the regulations in a manner which breaches the principles of natural justice.

Moreover, it then proceeded to further qualify the aforementioned hypothetical instances, by stating that the courts can never judicially review the deliberation of the national executive as to whether or not it was opportune or expedient and/or the intrinsic motive which determined it. Additionally, neither can the court judicially review whether the opinion expressed in such deliberation was correct or otherwise, as long though, that it was made in good faith. However, and this is being said especially in the light of EU law and the fundamental basic principles that have been introduced in Maltese law as a result thereof, such qualifications need to be assessed in all cases (and not just for prohibitory injunctions) in accordance with the principle of proportionality as was in fact done in the previously mentioned 2006 GWU decision (albeit solely because of the fact that it was a decision related to the issuing of a warrant of prohibitory injunction), and in

[83]Sare vs Cacciattolo (n6)

light of any element and extent thereof of any potential public interest, as opposed to simply reviewing the good faith aspect only.

This approach would bring under judicial review many of the matters which were deemed by the Court in the MUBE decision as not being subject to review by the Courts and which are matters which weigh on the public interest as already explained earlier on in this term paper and/or subject a party to disproportionate prejudice compared to the prejudice suffered by the other party. The prevailing situation which exists in the UK also continues to support in no small way the need for a more consistent and efficient judicial interpretation and approach as outlined above and strongly suggests that a very dangerous situation with potential serious repercussions to many stakeholders exists at present.

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