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PARLIAMENTARY OMBUDSMAN - MALTA

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Foreword

The way foreword

This 42nd Edition of Case Notes published in the second year of my extended term that lapsed in March 2021, will be the last to be compiled under my watch. These publications are understandably one of the most effective outreach initiatives that my Office has undertaken since it was set up. It followed the lead given by Ombudsmen in other countries who took similar initiatives to bring the complex work of their institutions to the attention of the public.

Mr Joseph Sammut, the first Maltese Ombudsman, immediately realised that he could not deliver an effective service to aggrieved citizens unless he gained the public's confidence by providing regular information on when aggrieved persons could have recourse to his Office, to seek redress against injustice, abuse, improper discrimination and acts of public maladministration. The public needed to know how the Office of the Parliamentary Ombudsman functioned, how it conducted investigations, what were their limitations and what benefits one might expect from their outcome.

These Case Notes are an exercise in transparency meant to bring citizens closer to the institution. They are vital to gain the trust of complainants who feel that they can safely utilise the services provided by the Ombudsman to seek redress without the need to go through costly and lengthy judicial proceedings. More importantly, the publication of the facts that give rise to a complaint, the considerations made, the final opinion and the recommended remedies often involving the naming and shaming of those responsible for the injustice, are also an effective means to hold the public administrators accountable for their actions or inactions.

It is therefore not surprising that from the outset of these publications very often trigger reactions and debate that go beyond the complaint investigated and focus

on situations of general interest that need to be addressed by the public authorities. The publication of these Case Notes also has the added advantage that persons can identify themselves with complainants who allegedly suffered the same injustice and sought redress through the services provided by the Office of the Ombudsman.

Throughout the years these Case Notes have developed from a modest publication recording the facts of the complaint and the outcome of the investigation to a fully-fledged bi-lingual booklet that gives a comprehensive summary of the final opinion of the Ombudsman and his Commissioners, that provide the details of the investigation, the considerations that led to its outcome and any recommendations made to public authorities to redress an injustice or to improve procedures to ensure more transparency and accountability.

This improvement in the quality of this publication reflects the increased complexity of many complaints that arise from the introduction of new services by the public administration, the setting up of new public authorities to promote and manage new sectors of economic and financial sectors and an increased focus on the defence and protection of fundamental human rights. All these elements have contributed to the appointment of specialised commissioners in the Office of the Ombudsman. A development that improved the quality of the service which this Office provides to aggrieved citizens that is undoubtedly reflected in their final opinions, many of which have been recorded in separate sections in these Case Notes.

These publications have from the outset been created entirely in-house through the efforts, commitment, and contribution of our dedicated hardworking staff. Credit goes to the experienced team of investigators and their invaluable input in the conduct of investigations, and all those who are in many ways involved in their production. These include the Communications Office for coordinating, editing and publishing them, the Secretariat for proof-reading the texts, and the Office Administrator for translating the original text from English to Maltese. It was necessary that the Case Notes served their purpose as an important outreach initiative to bring the services of the Parliamentary Ombudsman closer to the people. The publication of these case notes is therefore the fruit of a team effort that one augurs will be continued in the future.

Along the years the content, compilation, format, and production of these Case Notes have changed and improved but the objective remains the same. My successor will undoubtedly pursue these goals with renewed vigour continue the tradition of the publication of these case notes, reflecting his own style of management. I am confident that he will introduce novel ideas to improve their content and layout, making them even more accessible to the general public.

Anthony C. Mifsud
Parliamentary Ombudsman

Note: Case notes provide a quick snapshot of the complaints considered by the Parliamentary Ombudsman and the Commissioners. They help to illustrate general principles, or the Ombudsman's approach to particular cases.

The terms he/she are not intended to denote whether complainant was a male or a female. This comment is made in order to maintain as far as possible the anonymity of complainants.

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CASE NOTES

Parliamentary Ombudsman

Public Service Commission

Termination of Employment Justified

The complaint
A detention officer in the Detention Services complained that he had been unjustly treated when his employment had been terminated because he had failed to declare that he had a criminal record. The complainant maintained that he had been discriminated against because the employment of other detention officers who held a criminal record had not been similarly terminated.

The facts
Complainant had successfully applied for the position of a Detention Officer. However, his appointment had not been confirmed because he had failed to declare that in the past he had been subjected to criminal proceedings and found guilty. Complainant alleged that there were others who had been employed in this position and who had a criminal record but their appointment had not been withdrawn. He therefore submitted that he had been discriminated against.

Complainant sought redress from the Public Service Commission that closely investigated his grievances. The Commission observed that complainant was obliged to make a specific declaration that he had not been subjected to criminal proceedings that led to the infliction of a penalty. The Manual on Industrial Relations and the selection and appointment process under delegated authority in the Malta Public Service stipulated "*before they are appointed selected candidates (internal and external) should be required to sign a declaration stating that they have no pending criminal case and have no convictions other than that stated in their application*".

Moreover, the Permanent Secretary had the discretion to ask for the criminal conduct sheet of employees as he had done in this case while complainant was on a training course. It was at this juncture that the Ministry decided that his appointment should be withdrawn. The Public Service Commission decided that the decision not to confirm complainant in the post of Detention Officer was justified.

Considerations

The Ombudsman considered the complaint from two angles; the relations between the Public Service Commission and the Office of the Ombudsman and the allegation of unjust termination. Both the PSC and the Office of the Ombudsman are constitutional authorities. The Ombudsman will only as a rule evaluate the procedures before the Public Service Commission to establish whether its decision was within its powers and the laws applicable and whether binding regulations and the rules of due process had been correctly followed. The Ombudsman was satisfied that this had been done in this case and there was no need for any recommendation on his part.

Regarding the allegation of discrimination, it was submitted that there were other persons who had a criminal record and who were still retained in their position. It is true that the Public Service Commission did not investigate this aspect. However, the fact remained that complainant had not conformed to what the public service regulations required. Complainant was bound to give the necessary information on his criminal record immediately.

The fact that others who had a criminal record like complainant were retained in employment in no way diminished his responsibility. The allegation he made would be brought to the attention of the competent authorities. It would be up to them to ensure that in all cases the correct procedures were applied and that no two weights and two measures were used for identical situations.

Conclusion

The Ombudsman concluded that in his opinion the Public Service Commission had correctly dealt with complainant's grievance. His recommendation was addressed to the Ministry for Home Affairs, Security, Reforms and Equality to enquire if those persons who allegedly had a criminal record and were employed with the

Detention Services had been given their appointment according to applicable regulations and the law.

Sequel
The Ministry has initiated its enquiries into whether detention officers were employed with a criminal record as complainant alleged. This investigation has not yet been completed.

Ministry for Justice

Unfair Deduction of Sick Leave During Quarantine

The complaint
A public officer in the Ministry for Justice who had been stricken by the COVID-19 virus felt aggrieved that the ten days during which she had been certified to be suffering from this illness had been deducted from her sick leave instead of being granted quarantine leave. She requested the Ombudsman to investigate her complaint also on the grounds that she had been discriminated against since other public service employees suffering from COVID-19 had been treated differently.

The facts
Complainant was entitled to 15 days sick leave a year. The Agency insisted that the days she had been certified to be suffering from COVID-19 had to be deducted from her sick leave and could not be considered to be quarantine leave. When complainant was paid her salary and allowance for the months of January and February, she discovered that an amount was deducted because the department maintained that she had exceeded her sick leave entitlement.

Complainant insisted that the whole period when she was absent from work including those days in which she had Covid 19 should have been considered to be quarantine leave. Complainant alleged that the department had acted incorrectly in her regard when it deducted the days she spent in quarantine following her diagnosis as sick leave and not as quarantine leave. As a result she had exhausted her sick leave limit and consequently suffered unnecessary prejudice in the assessment of overtime allowances due to her.

The Ombudsman sought the Agency's reaction to complainant's contention that it had acted incorrectly when it deducted the days she spent in quarantine as sick leave and not as quarantine leave.

Agency's reaction
The Agency contested the complaint. It referred to the article in the Manual of allowances of the PSMC that specified that allowances are given without any reduction for the first 15 days during which the employee was on sick leave. Complainant had in fact taken up all this allotment of sick leave during the year 2021 and the Agency had therefore to calculate her allowance pro rata as set out in that regulation.

The Agency's contention was that an employee who tested positive for COVID-19 was deemed to be on sick leave until the patient recovered. If after that the employee had to remain under quarantine, he would do so on quarantine leave.

The Agency insisted that the decision has been taken following the information provided by the Department for Industrial and Employment Relations (DIER). The DIER that held employees who tested positive for the virus were to be considered *"sick"* and so they had to avail themselves of sick leave. If the employees were under quarantine order and were infected by the virus they would be put on sick leave until they recovered. This meant that the Agency had put the complainant on sick leave rather than quarantine leave despite the fact that she caught the Covid-19 virus.

Considerations
The Ombudsman did not agree with the definition of quarantine leave which was being given by the authorities.

Quarantine was not limited to COVID-19. Its intention was to prevent the spread of contagious diseases. It was for this reason that isolation was imposed whether a person was sick with the disease or not. The situation was different with other illnesses because a person on sick leave was not one who was suffering from a contagious illness.

Besides this, quarantine was mandated by the authorities and enforced by penalties. A person under quarantine had no alternative other than to remain indoors.

Conclusions and recommendations
The Ombudsman found that the complaint was justified. He recommended that the Agency should refund complainant the amount that was unjustly withheld.

Sequel
Notwithstanding further exchanges following the Ombudsman's Final Opinion the Agency continued to insist that its interpretation of the rules was correct and that his recommendation could not be implemented.

Institute for the Public Service

Unfair Discrimination in Career Progression

The complaint
A complainant alleged improper discrimination and unfairness in the manner in which a selection had assessed the eligibility or otherwise of Senior Technical Officers (STOs) who had applied to follow a training course following the launching of a pilot Project on Recognised Learning (RPL).

The facts
Complainant claimed that a pilot project had been launched by the Institute for the Public Services (IPS) in collaboration with the Ministry for Transport, Infrastructure and Capital Projects offering public officers in the grade of Senior Technical Officer (STO) the possibility to progress in their career by providing them with the training and the knowledge necessary to compensate for the lack of qualifications stipulated in vacancies issued by the public service for career advancement. The Circular launching the scheme had set out among the eligibility requirements that applicants for this exercise should "*have been working as a Senior Technical Officer for the last four years*".

Complainant alleged that when assessing the applicants' eligibility, the selection board had strayed away from this criterion by proceeding to accept an application from an applicant who presented a favourable decision of a Grievances Unit when he did not satisfy the four-year experience requirement stipulated in the Circular. Complainant stressed that the Circular had not stated that applicants could submit a Grievances Unit decision instead of the stipulated eligibility requirement.

He complained that the fact that the Selection Board had decided that he was ineligible to follow the course as he "*did not possess the number of years of experience as an STO*" led to his being treated in an unfair manner. He too was in possession of a favourable decision by a Grievances Unit but had not presented it by the closing date of the Circular since the call had not mentioned anything in this regard. He therefore claimed that the decision of the Selection Board had prejudiced him since he would not be able to apply for any call for applications that might be issued for a higher position once the training given to the first batch of applicants is completed.

Moreover, although being aware that he had not been in the grade of STO for four years, complainant was in a position to present a letter issued by the Measures Implementation Coordinator at the Ministry for Foreign and European Affairs attesting that "… *he has been performing the same duties as the other STO deployed in the Projects Monitoring Unit since August 2017*." He had therefore been performing the duties of STO for more than four years, though not in that grade.

Complainant elaborated that when he had become aware that another applicant, who had been in the grade of STO for about a year, had been accepted by the Selection Board on the strength of a favourable decision from a Grievances Unit he had asked the Selection Board to review its decision. He argued that once the Board had taken such a decision when shortlisting applicants, it should have contacted all the applicants it had deemed ineligible and verified whether they were in possession of such a decision, thus ensuring a fair opportunity for all.

The Selection Board however reconfirmed its previous decision and informed complainant that it was up to him to provide any necessary documentation to meet the requirements of the call and that it could only evaluate applications on the material provided by applicant. It further observed that at that point the course was already in the third stage of its programme.

Upon receipt of the complaint, the Office of the Ombudsman directed complainant to bring his grievance to the attention of the Principal of the Institute for the Public Service at first instance. The Principal informed complainant that a second call would be issued in a matter of days and urged him to apply. Complainant confirmed his intention to do so but expressed his dissatisfaction with the decision of the Administration to issue a second RPL call in order to remedy his grievance

arguing that he would not be able to apply for any course that might be published pending his training. Complainant was however informed by the Principal that the decision was final. Complainant therefore sought the assistance of the Office of the Ombudsman.

The investigation

The Ombudsman sought the comments of the relevant authorities and was informed by the People & Standards Division within the Office of the Prime Minister that the decision not to allow complainant to present additional documentation following the closing date of the call was a standard practice implemented in all application processes. Accepting documentation beyond closing date would undermine the fairness of the selection process. It claimed that complainant's allegation that he would be prejudiced by a later application issued in respect of the RPL programme if vacancies referring to that Programme were issued while he had yet to obtain certification, was based on assumptions and the vague possibility of a future injustice. Complainant had not as yet suffered an injustice.

Considerations

The Ombudsman considered that it was an established practice that any qualifications or eligibility requirements had to be satisfied by the applicant by the closing date of the call for applications. It is the call for application which established the parameters of the selection process and therefore candidates had to satisfy the requirements contained therein by the closing date of the call. Complainant accepted the Board's decision on this point, but felt aggrieved when he became aware that one of the chosen applicants possessed even less work experience in the grade and had been allowed to proceed with the Programme on the strength of a favourable decision of the Grievances Unit and even though he had not been working as an STO for the previous four years. Complainant's assertions about the other applicant were not contested by the Chairman of the Selection Board, who however maintained that each applicant was responsible to provide the documentation necessary to meet the requirements of the call adding that the Board's evaluation was made on the basis of the documentation presented.

The Ombudsman acknowledged that it was an applicant's responsibility to ensure that all the documentation necessary to meet the requirements of the call were presented by its closing date. He also agreed that it was standard practice that

no further documentation should be accepted by the Board following the closing date of a call for applications. The Ombudsman considered that the stand taken by the Board to consider a favourable decision delivered by the Grievances Unit as an alternative to the four-year work experience requirement stipulated in the Circular in regard to one or more applicants, was erroneous and led to the creation of an uneven playing field between the applicants. The Board could not exercise its discretion and ignore the eligibility requirements stipulated in the call, by considering instead a document presented by some applicants, namely a favourable decision by the Grievances Unit, which had no bearing whatsoever on the eligibility requirements spelt out in the Circular. Once the call for applications was silent about this matter, the Selection Board's decision was mistaken and amounted to improper discrimination as it gave an undue advantage to one applicant over another.

The Ombudsman concluded that the decision taken by the Selection Board was erroneous and not in line with the eligibility criteria stipulated in the call. Complainant had not been allowed to proceed with the training unlike another applicant/other applicants who were in his situation. He was therefore treated unfairly as a result of the improper discretion exercised by the Selection Board. The Board's decision had given rise to an inequitable situation which brought about an uneven playing field.

Conclusion and recommendation

The Ombudsman therefore sustained complainant's grievance as he considered that the decision of the selection board to proceed with the processing of the applications of applicants who did not satisfy the eligibility criteria on the strength of a favourable decision of the Grievances Unit was mistaken, inequitable and unjust.

During the course of this investigation complainant had informed the Ombudsman that although he has submitted an application under a new call for a similar scheme under the same Pilot Project, the process had not as yet commenced notwithstanding the lapse of several weeks. The Ombudsman therefore recommended that immediate steps be taken by the IPS so that the training process under the new call be expedited in order that it be brought on a par to the training being currently given under the first scheme. The Ombudsman further recommended that the Administration considers the possibility of suspending the publication of vacancies

in the grade which refer to the RPL Programme until the completion of the training offered under both calls for application.

Sequel

The People and Standards Division subsequently informed the Ombudsman that it was in agreement with the recommendation made and that it would be implementing it.

Malta Police Force

Claim for Stand-by Allowance upheld

The complaint
A senior police officer in charge of a highly specialised unit complained that his persistent request for the payment of the *Stand-by Allowance*, alternatively the *On Call Allowance* had been refused by the Commissioner of Police. Complainant requested the Ombudsman to investigate his complaint and to recommend the payment of the amount due to him if his complaint was justified.

The facts
Complainant's grievance refers to the period between 2012 and 2018, before the introduction of the Sectoral Agreement regulating the Conditions of Service for the Police Force, during which complainant submits that he was not paid the On Call Allowance which is an allowance payable to public officers who are "*on call*" after normal working hours. Complainant submits that during that period he was practically the only police officer in his rank who had to be available for duty on a 24-hour basis on all days because of the nature of his work and the complexity of the investigations he was in duty bound to conduct.

When he was assigned to head the department, he was the only Inspector assisted by a Sergeant and two constables. They worked on a shift basis like other police officers stationed in other departments of the police corps. However, he was the only senior police officer in charge of all investigations under his watch in his department and as such he had to be constantly on stand-by.

In simpler terms he was required to be on duty at all hours, day in day out, even when he was on vacation leave and off duty. He was obliged to be available not only

because of his responsibilities but also because the Commissioner of Police in a circular had directed that "… *all gazetted officers should have their personal mobile phones registered with HR Branch switched on, fully charged and carried at all times including when the officers are on off duty or on vacation leave. Moreover, gazetted officers are expected to answer all calls received on their personal mobile phone from any official police telephone line*". Gazetted officers were warned that any breach of this order would result in disciplinary action.

The Ombudsman also established that the Police Act provides that *"every police officer shall be deemed to be a police officer at all times and shall devote all his time to the service of the Force and shall not perform any other work, unless an authorization has been obtained in advance and in writing".*

A police officer is never off duty especially someone like complainant who was required to be available at all times. These facts were not disputed. It was agreed that the specialised nature of the department headed by complainant was extremely taxing, laborious, time consuming, unpredictable and required attention at all times. Complainant felt unfairly prejudiced by the state of affairs which meant that he could literally not find enough time to have adequate rest since he could not effectively and serenely delegate his work. He was the only senior police officer in his department.

Recourse to the Police Board
Complainant felt compelled to lodge his complaint with the Police Complaints Board to investigate his claim.

The Police in their defence submitted that complainant was being paid a disturbance allowance and was therefore not entitled to the *Stand-by Allowance* because all police officers were "*on stand-by at all hours*". The Police authorities did not accept that complainant was *"on stand-by at home"*. Moreover, the policy was that officers paid a disturbance allowance could not also be paid the stand-by allowance.

Decision of the Police Board
The Board concluded that the complaint was not justified. It understood that complainant had satisfactorily shown that his situation was such that it could really lead to exhaustion, especially considering that it had lasted for years. The Board

therefore requested the Commissioner to take all those necessary steps, including that of appointing another senior police officer, to allow complainant to enjoy adequate free time.

Following that decision, a second senior officer was posted in this squad to assist complainant but this welcome decision did not adequately resolve the situation since the situation remained substantially the same.

The investigation

The Commissioner of Police informed this Office that the issue of stand-by allowances was being negotiated with the Police Unions. Those negotiations eventually led to the Sectoral Agreement which however was outside the scope of the investigation since the claim referred to a time before the date when the Sectoral Agreement came into force, that is from 2012 when complainant became Head of the department, to October 2018 when the agreement came into force.

Considerations

Police Officers are Public Officers

The bone of contention in this complaint that has dragged on for years was that the Police authorities interpreted the Public Service Management Code as not being applicable to complainant as a senior police officer. That Code refers to "*public officers*" and the interpretation of the police authorities was tantamount to saying that Police Officers were not public officers.

The Ombudsman opined that the police are subject to the rules of the Public Service Commission precisely because they are public officers and, as such, should be treated as other public officers as a minimum. The definition of "*public officer*" in the Manual of Allowances is "*the holder of any public office or a person appointed to act in any such office. The appointment of a public officer in a substantive post or contractual position is endorsed by the Public Service Commission*" (Paragraph 1.3). The situation of senior police officer therefore contrasts with that of officers in the Armed Forces which has its own set of separate rules.

Complainant was therefore, in the opinion of the Ombudsman, a public officer. The conditions of public officers should therefore apply to them too. This meant that the complainant would have the benefit of the stand-by allowance contemplated

in the Public Service Management Code and the Manual of Allowances Payable to Public Officers.

This is regulated in Paragraph 3.2.10 of the Public Service Management Code applicable at the time when the complaint arose. It lays down *"3.2.10.1. Officers who are required to be stand-by at home outside normal hours of work are eligible for payment of a stand-by at home allowance at the following rates:* [the Clause then stipulates the rates for weekdays, Saturday, Public Holidays and Sundays during Winter and Summer Time]".

Conclusion and recommendation

The Ombudsman found that the complaint was justified. There was no contestation that complainant was burdened with grave responsibilities at times outside normal working hours and consequently, he had the right to be adequately compensated. His request for the stand-by allowance which is the right of every public officer should be accorded. He recommended that complainant be paid retrospectively the stand-by allowance from the time he became head of his department in 2012 to October 2018 when the Sectoral Agreement came into force.

Sequel

The Police authorities accepted the Ombudsman's recommendation. The backdated on-call stand-by allowance was eventually paid to complainant in settlement of his claim.

Public Service Commission

Selection Process upheld

The complaint
The Ombudsman investigated a complaint regarding a selection process for the post of Farmer conducted by the Ministry for the Environment, Sustainable Development and Climate Change.

The facts
Complainant felt aggrieved because his application for this post was deemed to be ineligible and he was therefore not allowed to sit for an interview.

Representations before the PSC
Complainant proceeded to make representations before the Public Service Commission (PSC) wherein he argued that he was a Maltese citizen, able to communicate in both Maltese and English and was in possession of a qualification in Horticulture pegged at MQF 3. He therefore satisfied all the eligibility criteria and should have been granted the right to sit for an interview.

The PSC however, maintained that the qualifications eligibility criterion demanded that applicants be in possession of a Journeyman's Certificate in the calling of a Farmer/Livestock or a relevant comparable qualification. A qualification in Horticulture such as the one complainant possessed, was not deemed to satisfy the requirements and therefore the Commission confirmed complainant's ineligibility.

Complainant was not satisfied with this outcome and filed a complaint with the Ombudsman. He submitted that he disagreed with the PSC and argued that a

qualification in Horticulture is a farming qualification. He requested that the decision be reversed and that he be allowed to sit for the interview.

Preliminary considerations

The Ombudsman considered that when investigating complaints involving the PSC, the following guidelines had to be borne in mind:

a. the Office should only investigate a complaint if there is proof to the satisfaction of this Office that complainant had sought redress from the Commission; and
b. the Office will not recommend a change in the PSC's decision if complainant's petition had been treated fairly, that is:
    i. the PSC had given due attention to the points raised in the petition;
    ii. all relevant information had been considered; and
    iii. there was nothing in the process of deliberation on the petition that should lead the Office to conclude that any provision of Article 22 of the Ombudsman Act, applied in his case. These provisions relate to any decision, recommendation, act or omission which appears to have been contrary to law; or was unreasonable, unjust, oppressive, improperly discriminatory; or was based wholly or partly on a mistake of law or fact; or was wrong.

It was within these parameters that the Ombudsman investigated the complaint.

The investigation

The call for the post of Farmer was issued with a number of eligibility requirements meant to ensure that applicants satisfied a number of criteria which included being in possession of the Journeyman's Certificate in the calling of a Farmer/Livestock or a relevant comparable qualification in the field at MQF Level 3.

The call also listed duties that the successful applicant Farmer would be required to fulfil. The Office noted that out of the ten duties listed, four referred to 'field work', which in and of itself implied work associated with the growth and tending of plants and crops, four referred directly to the management of livestock, while the rest were more generic in nature. It observed that the possession of skills and competences relating to the management of livestock were indeed crucial to the role.

As was standard practise, the Ombudsman requested and was provided with the PSC file on complainant's grievance. The Commission had asked the Selection

Board's comments on complainant's representations requesting that it be provided with ancillary documents connected to his application. The Selection Board had replied that the complainant was not in possession of an MQF level 3 "*Farmer or Livestock*". The PSC following further consideration, eventually informed complainant that whilst he was in possession of a qualification in Horticulture he did not possess a qualification in Farmer/Livestock and added that horticulture was not comparable to livestock or farming. For these reasons he was not eligible to be considered for the post.

The Ombudsman noted that the main contention regarded the interpretation of the phrase "*in possession of the Journeyman's certificate calling of a Farmer/Livestock*" found in the call for applications. In his view the description of the subject matter of the qualification was somewhat ambiguous. The wording could have been interpreted in one of two possible ways either: a) a qualification exclusively certifying that the applicant was competent in farming/livestock (farming related exclusively to the management of livestock); or b) or applicants have a choice to provide either certification that they were competent as farmers (in the generic sense thus encompassing both farming streams) or certification showing competence in livestock management.

The Ombudsman therefore asked the PSC to clarify the interpretation of this eligibility requirement. The Commission informed the Ombudsman that the qualification in horticulture did not address the management of livestock and therefore did not satisfy the eligibility requirements.

Considerations

The Ombudsman considered that he had been provided with adequate evidence that complainant had brought his grievance to the attention of the PSC and therefore there existed no impediment for him to investigate the complaint. However, following the guidelines set out above, the investigation conducted by his Office was limited to establish whether the procedure adopted by the Commission in considering complainant's petition was fair and just.

In this case the root of the issue lay in the interpretation of the eligibility criteria found in the call. As was standard practice, on receiving the petition, the PSC asked for the feedback of the Selection Board's reaction on complainant's grievance. On

analysis of the said feedback and ancillary documentation the PSC proceeded to reach its conclusions. The Ombudsman was of the opinion that there was no evidence that the process had been unfair or unjust.

The Ombudsman felt that he had to draw attention to the Commission's choice of words in its reply to complainant wherein it stated that "*horticulture was not comparable to livestock or farming*". The Ombudsman felt that the choice was somewhat unfortunate as it did not reflect the true nature of farming – which is not limited to the management of livestock but also encompasses the growing of crops/plants.

That said, he recognised that in its conclusions the PSC noted that the complainant's qualification was not comparable to a Journeyman's Certificate in the calling of Farmer/Livestock since it did not deal with the management of livestock. Despite the obvious ambiguity of the '*Farmer/Livestock*' wording, the duties listed in the call itself placed a significant emphasis on the management of livestock. This Office therefore noted that any comparable qualification had to deal with the management of farm animals. While complainant's qualification satisfied the required level rating (MQF 3), it did not have the required content on livestock management.

Conclusions and recommendations

The Ombudsman concluded that he was satisfied that the PSC had given due consideration to all points raised by complainant in his petition and all factors were taken into account when reaching its decision. The PSC was indeed correct in reaching its conclusions and this Office will therefore not disturb its decision.

The Ombudsman however, observed that it may be opportune for the PSC to provide guidance to the Ministry concerned to ensure that future calls were worded clearly and unequivocally, thus avoiding analogous issues in the future.

Water Services Corporation

Recommendations on how to Improve Selection Processes

The complaint
The Ombudsman investigated a complaint regarding a selection process for the post of Operations Manager conducted by a Selection Board set up by the Water Services Corporation. Though the Ombudsman did not find the complaint justified he made a number of interesting considerations on the conduct of such a process by a Board appointed by a public corporation. In such cases the Ombudsman is not bound by the same constraints his Office is bound to follow when investigating similar complaints on selection processes subject to PSC regulations.

The facts
Complainant had been ranked 5th out of 5 eligible candidates. He felt aggrieved by the result and brought his grievance to the attention of the CEO of the Corporation. He also filed an internal appeal in which he claimed that the result was unjust given his qualifications and long years of experience in the section in which he sought a promotion. He further challenged the composition of the Selection Board and questioned why no human resources representative was present during the interview.

The Corporation rejected his appeal and confirmed the result of the Selection Board. He then proceeded to file a complaint with the Ombudsman claiming that the result of the selection process was unjust and irregular. He also maintained that it was discriminatorily meant to favour other applicants. He claimed that the results of the Selection Board had been pre-determined before the call was even issued.

Preliminary considerations

As an introduction to his Final Opinion the Ombudsman made a number of considerations that applied to any investigation made by his Office regarding the conduct of selection processes. He explained that his Office could not conclude that a result of an interview was unfair, mistaken, discriminatory or otherwise unjust if it resulted that the selection process was a valid one and there was no clear, objective evidence that the process had not been conducted fairly or was not in line with the established criteria.

His Office did not itself decide on the setting of these criteria even if for the sake of argument, it was not in agreement with the choice of particular criteria/sub criteria that had been applied in the selection process, unless it resulted that these had been intended in advance to favour a particular candidate. The Ombudsman stressed that his Office did not substitute a subjective assessment/decision taken by a selection board by its own. For this reason, unless there was clear and objective evidence of any irregularity in the process, or that any action/decision of the selection board was manifestly wrong in respect of the interview of the candidate involved, there was no room for a different opinion from his Office.

The investigation

Complainant questioned how the first ranked individual was awarded the highest mark given that he had far more experience and in addition was in possession of qualifications that were over and above the eligibility requirements. He claimed that the call was issued twice resulting in a change in eligibility criteria, to favour some applicants over others. He also questioned the absence of an HR representative on the Selection Board that discriminated against him.

The Ombudsman made an in-depth inquiry into these grievances. Since the complaint did not refer to a selection process subject to the review of the Public Service Commission, he did not limit himself to establishing whether the rules of due process and the correct procedures had been followed by the Selection Board. He investigated the merits of every grievance in the light of the information that resulted from the records of the selection process and other evidence. The results of that investigation are recorded in the Ombudsman's Final Opinion that gives both the complainant and the Corporation a balanced and objective assessment of the evidence that led the Ombudsman to his conclusions.

The Ombudsman could not uphold complainant' submission that the outcome of the selection process had been predetermined and that he had been discriminated against and that his experience and qualifications were not given due consideration. On the contrary, the Ombudsman observed that the Selection Board had chosen to adopt standard assessment criteria and made use of pre-set questions which were put to all candidates. It could not therefore be said that the assessment criteria had not been applied uniformly across the board. The marks awarded to candidates were the result of their own performance during their respective interviews and their subjective assessment of their performance by the Board.

The Ombudsman, therefore, concluded that, on analysis of the documentation provided he did not find clear and objective evidence that the selection process was discriminatory. Neither could he conclude that the process as a whole was manifestly unjust or irregular. The Ombudsman, therefore, could not disturb the result of the said process.

However, a number of interesting points considered by the Ombudsman in his considerations deserve to be noted:

- *Language and other conflicts*

The call documentation comprised a total of four documents, the call itself and the job description which were both provided in English and Maltese. It transpired that there were discrepancies amongst the various documents. The selection process file revealed that the Maltese version deferred from the English one on a number of counts. These conflicts and discrepancies were identified in time by the Corporation and the individual documents were amended and brought in line with each other and re-issued. The Ombudsman noted that the discrepancies found in these documents were down to an administrative error that was quickly rectified. He stressed, however, that this mismatch did not materially prejudice complainant and the other applicants.

It did, however, show the need to have a clear written policy in place that provides unequivocal direction in case of conflict between documents. This not only applied when there was a conflict between the call and job description but also when a conflict arose between different language versions.

- *Composition of the Selection Board*

The Selection Board as composed did not breach any of the provisions found in the applicable collective agreement. He observed that there could be advantages to having an HR representative present for the interview process (such as for example taking notes of each candidate's individual performance), however his presence is, on the face of it, optional.

- *Marks and eligibility criteria*

The Corporation could not provide information concerning the grounds on which candidates were deemed eligible. The Ombudsman could only therefore conclude that a superficial assessment was made and if the candidate was found to be eligible under one or more criteria then he/she was allowed to proceed to the interview stage. The Ombudsman noted that as a general rule marks should not be awarded for experience, qualifications or other requirements that were used to satisfy eligibility criteria. The basis of eligibility could impact the evaluation of qualifications or experience at the interview stage. Not giving importance to the ground on which any candidate is deemed eligible could therefore be prejudicial to those satisfying multiple criteria.

The Ombudsman noted that in this instance such prejudice had been averted and appeared that the way the eligibility was assessed had little impact on the overall outcome. However, he stressed the importance of clearly indicating under which eligibility criterion each candidate was considered to be eligible – this both in the interest of transparency and fairness to the candidates.

- *The assessment criteria*

The Ombudsman could not but express his reservations on the fact that in this case all criteria were subjectively assessed. Assessing qualification by taking into account other subjective concerns (such as suitability of the individual) could be prejudicial to those individuals who would have invested time and resources in obtaining further qualifications to improve their skills and competences. The Ombudsman was of the firm view that relevant qualifications should be assessed objectively and exclusively on their own merit. He noted that in this particular

instance all applicants had a number of qualifications and yet all were assessed in a similar fashion – all were disadvantaged equally.

- *Evaluation of a number of criteria*

Complainant challenged the marks he was awarded and in particular stated that in his many years of experience had not been given due consideration. The Ombudsman noted that while experience was important, it was not the only factor that employers need to take into consideration when evaluating candidates for a particular post. Experience did not always mean competence and/or skill to carry out the duties in question. That was why there was a need to evaluate candidates on a number of criteria to identify the most suitable individual to take on the vacant role. Moreover, there was often a mismatch between the candidate's performance during the interview and how he himself perceived his performance. This mismatch did not necessarily equate in the results being unfair or unjust unless the pre-set criteria were not assessed in a uniform manner.

- *Keeping notes on interview performance*

In view of the importance given to the performance of each candidate in their respective interviews the Ombudsman noted that he would have expected the board to have kept minutes or notes of these interviews. As a general observation he said that, whilst public sector entities such as the Corporation were not obliged to keep such notes, it was good practice both in the interest of transparency and fairness that they be recorded on file. This was all the more important in those cases where the selection process was later challenged. In this case the Ombudsman had already brought this to the attention of the Corporation which in turn gave assurances that in future, minutes will be kept in regard to each individual performance during the interview process.

Final recommendations

While the Ombudsman concluded that he could not disturb the result of the selection process and therefore, he could not uphold the complaint, he did identify areas that could be improved and made the following recommendations:

a. appropriate care should be taken to ensure all documents dealing with the same call were homogeneous and in line with each other before issuing the call;

b. a clear written policy should be put in place to determine which documents should take precedence in case of conflicts and discrepancies;
c. where calls were issued with multiple eligibility criteria, information detailing the specific criterion each candidate is found to be eligible under, should be included in the selection process file. This information should also be taken into consideration when awarding marks with respect to the assessment criteria during the interview stage; and
d. qualifications will be assessed on their own merits using objective and quantifiable parameters.

Sequel

Following consideration of the recommendations made, the Corporation informed the Office that:

- Call documents/job description templates were in the process of being standardized to eliminate all inconsistencies;
- Moving forward, every call will contain a new provision whereby it is made clear that in case of discrepancies, the English version will take precedence;
- Qualifications are to be assessed objectively according to grading and relevance of job description;
- Members of selection boards are to keep notes of the interview proceedings.

As far as the recommendation concerning the eligibility criteria is concerned, this Office was informed that selection boards have been instructed to document the reasons why a candidate fails the eligibility test and also document the specific eligibility criterion the candidate is deemed to satisfy. The Corporation, however, failed to unequivocally confirm that any qualifications or experience used to satisfy an eligibility criterion will not be assessed once again at interview stage.

EU Funds & Programmes

Refusal of Applications for EU aid justified

The complaint
In April 2020, a complainant submitted two applications with the Managing Authority European Agricultural Fund for Rural Development (EAFRD) within the Funds and Programmes Division (FPD) under the responsibility of the Parliamentary Secretary for European Funds. He had applied for 50% co-funding on two agriculture projects he intended to realise and that qualified for financial assistance under European Union Schemes. Complainant felt aggrieved that his two applications had been unjustly refused.

The facts
The reason given by the Managing Authority for refusing the applications was that during the process of administrative controls, it had identified risks in the implementation of the proposed projects. Before attempting to appeal this decision the complainant sought information on what were the risks that provoked this refusal but was however given the same unmotivated reply. He had therefore appealed from that decision to the Project Selection Appeals Board (PSAB) but that appeal had been rejected.

Complainant maintained that it was only during the appeals stage that he got to know that the reason for the refusal was that he had not yet obtained all the necessary permits from the Planning Authority. When giving evidence before the Appeals Board, the representative of the Managing Authority had referred to a number of matters that had to be addressed during the processing of the applications before the Planning Authority. Complainant submitted that most of these matters had been resolved and other concerns were based on wrong or irrelevant considerations.

Complainant felt mostly aggrieved by the fact that the Managing Authority had allowed him to apply even though he did not yet have in hand the necessary permits from the Planning Authority to develop the project and argued that it was because of this fact that the Authority had decided to refuse the applications. He submitted that such a condition had to be laid down as an essential requisite before one could apply for such projects and that he should not have been allowed to apply for funding and incur expenses unless he had the necessary permits.

Complainant requested that the decisions taken by the Managing Authority as well as the Project Selection Appeals Board should be declared "*administratively unfair*" and that this should be accompanied by a recommendation that the injustice he allegedly suffered should be redressed.

Official reactions

The Managing Authority maintained with the Ombudsman that it was not correct to say that it had not given reasons for its refusal and that it had always been made clear to complainant that his applications were considered too risky to commit funds for the implementation of his projects. The reasons for its refusal had also been communicated to complainant's advisors who had been informed of the high risk that the projects presented.

The Managing Authority explained that every decision taken by it was based on a number of factors. These included guidelines published together with the applications, the rules regulating the Fund, particularly those applicable to projects similar to the ones submitted by complainant, the Programme for Rural development of Malta, as well as information related to the application that the Authority would have requested from government entities including those to which applicant himself had referred.

The Managing Authority also submitted that in order to ensure a level playing field between all applicants and the widest possible participation, it had never requested that applicants had to produce, with their application, approved permits for the building and execution of the project. Such a measure however did not preclude the applicant from making the necessary evaluation of the projects from this aspect. Nor did it preclude the Managing Authority from investigating on the

progress which such an application could make before the Planning Authority and to assess it in this light.

The Managing Authority considered all the circumstances relating to the projects submitted by complainant and noted that the site on which these projects were to be constructed had, at the time, been subjected to an enforcement action by the Planning Authority, which action was still in force and subject to the penalty of daily fine payments while the necessary permit had not yet been approved. The Managing Authority had decided to refuse complainant's applications because of the risk that the projects could not be realised in good time. Explaining the reasons for its decision, the Authority submitted to the Ombudsman that European Funds were intended to be spent within a definite time frame. Both the projects as well as their valued expenditure had to be executed, paid and concluded within a definite period as approved and regulated by the European Commission.

The Managing Authority had therefore a triple duty. It was bound to see that the projects for which funds were allocated were doable, that they could be well implemented on time and that the expenditure during the required period was correctly made. It was clear that, even considering the delay in the processing of PAPB applications, it was risky to commit European Funds for the proposed projects. In this scenario, the Managing Authority had also acted on the advice of the Project Selection Committee (PSC). It concluded that while it realised that the projects submitted by applicant could have been valid candidates for European funding, it was of the opinion that the risk in their implementation was such that they could not responsibly be considered for assistance. For these reasons, the Authority had no other option but to refuse complainant's request.

Considerations

The Ombudsman considered complainant's aggravation that the Managing Authority should not have accepted his applications once he did not have in his possession the necessary Planning Authority permits and that it should have included this condition as an essential requirement for any application. He would have been spared unnecessary expenses and loss of time.

The Managing Authority submitted that, if it imposed a condition that an applicant had *a priori* to have the necessary permits of the Planning Authority to be eligible

to apply for co-funding, all those who did not have in hand such permits would automatically have been excluded from applying. This even if the procedures before the Planning Authority were in their final stages or in an advanced stage. Every case has its own particular circumstances. It was up to the persons applying for co-funding to assess the situation and make their own decisions on how best to proceed.

In such cases, there was always the risk that because of the lack of the necessary permits, the request for financial aid might not be acceded to. However, the choice of whether one could take the risk or not rested with the applicant himself, having closely examined the situation and taking into consideration all factors relevant to his case.

These submissions were recognised as valid by the Ombudsman.

Further considerations

The Ombudsman also considered that he could not sustain complainant's claim that the decisions taken in his regard were "*administratively unfair*". On the contrary, he noted that the reasoning that led the Managing Authority to consider that the projects advanced by him could not be considered for financial aid, as was also confirmed by the Board of Appeal, were very reasonable. Both decisions had been taken with the utmost responsibility and were based on sound arguments. Considering the circumstances of the case relating to the Planning Authority and the risks that such a situation could give rise to if the projects had to be accepted, one could not maintain that the refusal of complainant's applications could be qualified as acts of maladministration and/or were unjust.

Conclusion

The Ombudsman was of the opinion that in this case, it was not the fact that the necessary permits from the Planning Authority had not yet been issued that prejudiced complainant's application for funds. The Managing Authority, with the utmost responsibility, felt that the circumstances surrounding his applications with the Planning Authority put at risk the loss of European Funds.

On the other hand, the fact that the Planning Authority permits were not yet forthcoming did not mean that complainant should have failed from making a

proper assessment of the situation prior to filing his applications. He knew very well what his situation regarding the Planning Authority was and could understand that such a situation could be of hindrance in the evaluation of his application for funds. The Ombudsman concluded that one could not say that the Managing Authority had been guilty of maladministration or had unjustly treated his application. In the circumstances of the case, the complaint was not justified and could not be sustained.

Enemalta

Domestic or Commercial Garage Meter

The complaint
The owner of a garage felt aggrieved by a decision taken by Enemalta insisting that he should continue to pay rental and consumption rates applicable to a commercial garage even though he had changed it for his own personal use. Enemalta was unjustly refusing his request to recognise that he had changed the nature of the garage and that he was now using it exclusively for domestic purposes.

The facts
Complainant had for ten years been using a large garage, in which he had previously conducted his business, solely for domestic purposes. He had decided to cease his business and convert the garage solely for his own personal use. As proof that he had definitely stopped to conduct commercial activities from this garage, he had even renounced to his VAT Number. However, when he asked ARMS Ltd to register his premises as one for domestic use and start charging him the rates applicable for such use, he was informed that because the size of the garage exceeded 50 square metres, his request could not be accepted. Notwithstanding complainant's insistence that he should not continue to be charged commercial rates when he was not making any commercial use of the premises, Enemalta had continued to charge him the rates applicable to commercial premises.

The investigation
Enemalta Corporation did not contest the fact that complainant had ceased to use the garage for his business activities and was now using it solely for domestic use. It however confirmed that commercial rates for meters and consumption of water and electricity had still to be levied because of the size of the premises.

Complainant strongly contested this decision, insisting that Enemalta Corporation and ARMS Ltd had no right to enact laws and regulations and that this was the prerogative of Parliament.

The Ombudsman took the matter up with the appropriate authorities. ARMS informed him that their decision had been taken in terms of Regulation 36(10) of the Electricity Supply Regulations that had come into force by Subsidiary Legislation 545.01. This Regulation established the tariff relating to garages used exclusively for private, non-commercial purposes, providing that "*unless otherwise authorised by the Chairman, for good and sufficient cause, a consumer shall only be entitled to register as a Domestic Premises Service, a Service to one Primary Residence, a Service to one Secondary Residence and a Service to one Garage which does not exceed 30 square meters in area and is used exclusively for private, non-commercial purposes*".

In line with this provision and in order to reflect today's reality, the Executive Chairman of Enemalta had directed that "*The area of the garages falling under this provision shall be extended from 30 square meters to 50 square meters. The requirements of use – exclusively for private, non-commercial purposes – shall remain*".

Conclusion

The amendment to increase the size of a garage that could be registered for domestic use from 30 to 50 square metres was made in 2015. The Chairman of Enemalta had acted on the strength of an administrative discretion given to him by subsidiary legislation approved by Parliament, and the Ombudsman concluded that neither ARMS Ltd nor Enemalta Corporation had exceeded their powers. They had not committed an act of maladministration, injustice or improper discrimination against complainant. The imposed tariffs were those applicable according to regulations and, thus, correct.

Complainant's garage satisfied one of the two conditions that qualify for the payment of domestic rates in that it was being exclusively used for private and non-commercial purposes but did not satisfy the other condition relating to the size of the garage as this was in excess of the stipulated 50 square metre limit.

The Ombudsman could not therefore sustain the complaint.

Identity Malta

Renaming of Zebbug street

The complaint
A resident in Triq Frans Sammut, Zebbug, Malta formerly named Triq l-Isqof Francesco Saverio Caruana, complained that his street had been renamed notwithstanding opposition from the majority of its residents in 2014.

The facts
Complainant stated that he and two other residents, had in July 2021 filed a petition with the Local Council requesting that their street reverts back to the original name it had used since 1901. They had requested that another street in Zebbug be named in honour of Mr Frans Sammut. In complainant's opinion the renaming of the street should not have occurred in the first place. He however remarked that if the renaming of the street was found to be correct then "*the residents of the street should be allowed to revert to its original name*" since their will was one of the preponderant considerations to be kept in mind when taking that decision.

The Zebbug Local Council submitted complainant's application for the change of name to the consideration of the Street Naming Committee. That Committee however decided that no change should be made as this would have resulted in unnecessary inconvenience and disruption in postal services, as well as in the rendering of other services to residents who had already passed through the same upheaval in 2014.

The Local Council had therefore encouraged complainants to identify streets in Zebbug which did not bear an official name, so that one of them could be named in honour of Bishop Francesco Saverio Caruana.

Considerations

In the first instance, the Ombudsman clarified that his Office could not investigate the original renaming of the street as this occurred in 2014 and was therefore time barred by the provision of the Ombudsman Act that required complainants to file a complaint within six months from the date when they became aware of their grievance. His Office considered that there were no special circumstances which could have prevented complainant from filing a complaint at the appropriate time.

The Ombudsman however considered complainant's grievance that his request that the street should revert to its original name had been unjustly refused. It was noted that the decision being contested was taken in line with the Local Councils (Street Naming) Regulations, as well as the Code of Police Laws. The former subsidiary legislation provides that such a decision did not pertain to the Local Council but to the Minister responsible for the Electoral Office, in this case the Prime Minister, who must seek the advice of the Street Naming Committee. That Committee fell within the remit of the Electoral Office, the administrative arm utilised by the Electoral Commission to fulfil its obligations according to law.

The Ombudsman pointed out that the exercise of street naming carried out by this Committee was intimately connected with its function in relation to the organisation of elections. He stressed that the Electoral Commission was an autonomous body set up by the Constitution and his Office was precluded by law from investigating grievances relating to the said Commission. Consequently, his Office would only intervene should there be conclusive and undisputed evidence that the Committee when giving its advice, exercised its discretion in an unreasonable manner and not in line with applicable legislation.

Adhering to these principles, the Ombudsman sought the comments of the Chief Electoral Officer to verify the correctness of his refusal to accept complainant's request in the light of the proper exercise of his administrative discretion. The Chief Electoral Officer clarified that in 2014 the Street Naming Committee fell within the responsibility of the then Ministry for Home Affairs and hence the Electoral Office was not cognizant of the discussions and decisions taken at that time.

He explained that the current Committee did not consider that there was a valid reason for the street name to revert to Triq l-Isqof Caruana. However, following consultation with the Notary for Government, it was suggested that the Local Council names a street without an official title, for Bishop Caruana; a proposal that the Chief Electoral Officer reiterated in correspondence with the Ombudsman.

Conclusion

The Ombudsman informed complainant that after having reviewed his complaint, the replies provided by the Committee, as well as the documentation provided and applicable legislation, he could not but conclude that the decision to refuse to accept his request for Triq Frans Sammut to revert to the name Triq l-Isqof Caruana was not taken in accordance with applicable legislation or that it was unreasonable. He noted that the legislator did not require consultation with the residents and, while acknowledging that the residents' opinions should be considered in the case of street name changes, their opinions could not be the main consideration for such decisions.

Having regard to the circumstances of the case the Ombudsman further concurred with the Committee that another change of name to the street in such a short period of time would result in unjustified upheaval and inconvenience to all those residing in the street, who would be required to once again change official documentation and notify third parties with another change of address.

The Ombudsman was therefore of the opinion that he could not conclude that the decision was unreasonable. He could not substitute the discretion granted by law to the Committee to advice the Minister, with his own. He therefore regretted that he could not be of further assistance to complainant.

San Ġwann Local Council

Council's duty to maintain roads – Driver's duty to keep proper look out

The complaint
The Ombudsman investigated a complaint against the San Ġwann Local Council that was refusing to reimburse damages caused to complainant's vehicle whilst driving. Said damages were allegedly caused by the lack of maintenance of a road in that locality.

Complainant stated that while driving in San Ġwann he hit a raised water valve cover and as a result damaged his front right tyre and wheel rim as well as his rear right tyre. Later that same day he filed a police report indicating the damages sustained consequent to him having hit the said water valve cover that was not covered in tarmac. He informed this Office that he had replaced the vehicles tyres and wheel rims two weeks prior to the incident.

The Council rebutted the allegations of complainant as unfounded. It stressed that it had always maintained the road in a diligent manner. The Council ensured that its streets were safe and free from any potential danger. In fact, it had maintenance staff (through a contractor), that worked to eliminate any potholes or other possible dangers to the roads for which it was responsible. It submitted that local councils were financed through public funds and "*could not simply issue payments to anyone and everyone who sends us an email with a damaged tyre/s*".

The investigation and Ombudsman's conclusion
During an on-site inspection, it was observed that the road in question was indeed in bad shape. It was evident that it had been touched up a number of times, rendering the surface very uneven. Following the incident that gave rise to the complaint,

repair works were carried out on that section of the road where the water valve was situated. As a result it was rendered 'level' (as far as this was possible considering the general state of repair of the road) with the rest of the road surface.

The Ombudsman based his considerations on the premise that the Council was bound to provide for the upkeep, maintenance and improvement of roads falling within its remit as well as to provide and maintain proper road signs and road markings in conformity with national and international standards. Such maintenance included the patching and resurfacing of these roads but did not include their reconstruction.

The Ombudsman observed that obligations were also imposed on drivers using public roads. Drivers must not only observe all rules and regulations set out by law but must also drive prudently, taking into account all variables present on the road and its immediate environs. In other words, drivers must maintain a 'proper look out'.

The photos provided by complainant did evidence significant wear to the surface of the road resulting in the water valve being exposed at the time. Atmospheric conditions prevalent during the month when the incident occurred were verified and no significant rainfall was recorded that could have damaged the road surface in the two weeks prior to the incident.

Having analysed all the evidence resulting from his investigation including the police report, complainant's own account and the on-site inspection, the Ombudsman concluded that he was not in a position to state with certainty whether the damage suffered was indeed caused by the exposed water valve lid. Moreover, even if the link between the events as recounted by complainant and the damage suffered were firmly established there remained the issue of complainant not maintaining 'a proper lookout'. The Ombudsman was not therefore in a position to recommend that the Council should pay for the replacement of the tyres and wheel rim.

Considerations of general interest

The Ombudsman made a number of considerations that are of general interest and are worth recording.

- **Police Report**: He observed that in incidents such as these police reports are of primary importance. In the absence of any other evidence, the police report containing the declaration of the individual describing the events provides a necessary link between the damage suffered and its alleged cause.

- **Reimbursement of damages**: He pointed out that costs for repairs could only be claimed where the expense was incurred. Local Councils are in duty bound to ensure that public funds were disbursed prudently and diligently. Just like any other public entity, they are ultimately accountable to the tax payer. One could not expect the public administration to settle a claim in anticipation of the costs to be incurred. In such cases there would be no guarantee that a recipient would use the funds to make good for the damage suffered. Spending funds in such a manner would go counter to the principles of good administration.

- **Duty to maintain 'a proper look out'**: He highlighted the drivers' obligation to maintain 'a proper lookout' at all times. It appeared that in this case there were no issues with visibility since the incident occurred in the late morning and the weather was clear. The issue in this instance lay with the road itself that was not in a good state. It was established that due to wear and tear, various potholes had developed over the years and these had been subsequently patched up, resulting in a very uneven surface. He, however, stressed that the '*proper lookout*' principle dictated that a diligent driver took into account (amongst other things) the state of a particular road and adjust driving speed accordingly. A diligent driver would have driven down this particular stretch of road at a significantly reduced speed in order to minimise the possibility of causing any damage to the tyres and wheel rims of the vehicle. The fact that complainant claimed that he did not see the exposed water valve lid indicated at the very least, that he did not keep a proper look out and did not adjust his driving speed taking into account the state of disrepair of the road.

- **Duty of Local Councils**: The Local Government Act binds Local Councils to maintain roads falling within their remit. The Council did not contest that the road was its responsibility. Neither was there any contestation that the water valve was not level with the road in question at the time of the alleged incident. The Council appeared to have taken remedial measures only as soon as it was made aware of the protruding water valve lid. The Ombudsman observed that the repair had not been carried out on the Council's own initiative but it had to

be alerted to the damage by third parties – pointing towards lack of monitoring. As much as its resources allowed, the Council is in duty bound to monitor the roads under its jurisdiction and proactively (as opposed to reactively following a complaint by a third party) remedy any significant damage to the roads.

The Ombudsman noted that the Council's obligation at law did not only refer to repairs but also to improvements, stopping short of reconstruction. It was evident that apart from the said monitoring and short-term repairs, the road required a more holistic approach addressing the overall state of the street which went beyond mere maintenance and would therefore go beyond the Council's obligations at law.

The Ombudsman understood that the resources available to Local Councils were limited. This, however, did not mean that any claim of this nature should not be examined and treated on its own merits. The obligation to maintain roads brought with it the obligation to properly and judiciously consider claims for damages resulting from the failure to abide by its obligations.

Recommendation to Local Council

The Ombudsman felt it was opportune to make these recommendations to the Local Council:

1. that each claim of this nature should be examined on its own merits and not dismissed summarily *a priori*; and
2. that as far as resources allowed, a more proactive as opposed to a reactive approach be adopted to road maintenance, including active monitoring of the roads when the state of the roads so required.

Sequel

The Local Council thanked the Ombudsman for his investigation. It took note and appreciated the recommendations made. However, it insisted that the complaint had been duly examined and not dismissed forthwith. Indeed, several of the facts and findings outlined in this Office's Final Opinion had also been considered by the Council. It stressed that it has always been proactive regarding road maintenance and this could be verified by site visits to other streets in the locality.

The Local Council assured the Ombudsman that within its allocated resources, it would continue to ensure a safe locality for all.

CASE NOTES

Commissioner for Education

University of Malta

University's lack of diligence with regard to the composition of an examination board

The complaint
The complainant was a mature student registered with the Islands and Small States Institute of the University of Malta. His complaint was lodged on the 8th January 2022, and was decided by a Final Opinion dated 4th March 2022.

In substance, he complained about the composition of the board of examiners assessing his Master's dissertation.

The investigation
In his Final Opinion, the Commissioner reiterated that it was not his function to re-examine the grades or marks awarded to students but only to ensure that in the process leading up to that grading or marking there was no element of maladministration as defined in Article 22(1) and (2) of the Ombudsman Act (Cap. 385) read in conjunction with Article 13(1). This delimitation of powers was highlighted in particular by Rule 18(1) of the Commissioners for Administrative Investigations (Functions) Rules 2012 (as subsequently amended) which provides that: "*The Commissioner for Education shall have no functions relating to the exercise of academic jurisdiction unless there is evidence of maladministration*" (emphasis added).

After examining all the documents submitted by the complainant and by the University, and after hearing evidence, the Commissioner found serious fault in the composition of the board tasked with examining the dissertation in question. The subject of the dissertation was in sociology, with heavy ethnomusicological and performative arts components. Yet, for a reason that remained unexplained, two

of the three effective examiners (the fourth member, the Chairman of the Board and Head of the Institute, having ostensibly no formal say in the marking process) had no known expertise in the ethnomusicological and performative arts fields. One of these two examiners was an eminent economist; the other – the external non-visiting examiner – was an eminent political scientist with a specialisation in democratisation and comparative politics and in qualitative techniques. It was significant and, indeed, striking that out of the three effective members of the board of examiners the highest individual mark was awarded by the member of the board with expertise in ethnomusicology, particularly that of small states. The Commissioner compared the situation obtained in the case that was being investigated with that of a law student writing a dissertation on a particular institute of civil law (e.g., on hypothecs or on *retratto successorio*) where the Board of Examiners was then composed of an expert in civil law and two (eminent) professors one in maritime law and the other in public international law. The set-up would clearly be wrong in principle and, moreover, highly likely to lead to negative results in connection with the student's work being examined. To that extent, therefore, such a composition would be *a priori* unfair to the student.

In the Commissioner's considered opinion, the complainant's dissertation was doomed from the very moment that the Board of Examiners was approved by the Senate on the recommendation of the Institute.

The composition of the examining board was therefore wrong in principle and resulted, predictably, in a very low mark, contrasting sharply with the complainant's overall performance in the other component parts of the course as well as with the overall assessment of the dissertation by his supervisor.

In the official reply to the complaint submitted to the Ombudsman's Office on 1st February 2022, the Pro-Rector for Student and Staff Affairs and Outreach pointed out that the complainant had an *"ordinary remedy"* to his complaint, namely to apply for a revision of paper within one week from the publication of the result, and that the complainant did not resort to this remedy. The Commissioner took note of this fact, also in the light of the provision of Article 13(3) of Cap. 385. The Commissioner, however, was of the view that it was not reasonable to expect the complainant to resort to this "*ordinary remedy*" since even if an additional examiner had been appointed for the purpose of revision, the inherent prejudice of appointing the two original

members of the board with no expertise in ethnomusicology could not reasonably be expected to be remedied. Moreover, there was in the complaint an aspect of general interest which went beyond the personal interest of the complainant. This was the diligence that should be displayed by Faculties and Institutes in proposing to Senate the composition of examining boards, particularly for Master's and higher degrees, a diligence which was manifestly lacking in this case.

Conclusion, recommendation and follow up

The Commissioner allowed the complaint to the extent that the composition of the board appointed to examine the complainant's dissertation was wrong in principle and unfair, resulting in an *ab initio* prejudice to the ensuing process and final result. The Commissioner recommended that the Board of Examiners be reconstituted afresh (with or without the original chair and the examiner who had awarded the highest mark to the complainant) with persons with appropriate expertise, who were to re-evaluate the dissertation in question in its entirety.

By a communication dated 1st April 2022, the Pro-Rector for Student and Staff Affairs and Outreach indicated to the Commissioner that the University was not prepared to follow the recommendation, citing principally the autonomy of the University and the "*academic supremacy of Senate*" in academic matters. The Pro-Rector also stated that, in any case, the student in question (the complainant) "*chose to graduate on 23rd March 2022 and was granted a definitive certificate of graduation, with his final grade confirmed*".

By a communication dated 6th April 2022, the Commissioner pointed out that while the University's autonomy and academic freedom was clearly implied in Article 72 *et seq* of the Education Act (Cap. 327), the Ombudsman's jurisdiction to probe into alleged instances of maladministration stemmed from the Ombudsman Act and subsidiary legislation under that Act. He pointed out that to suggest that the "*academic supremacy of Senate*" was more unassailable than the doctrine of papal infallibility was not only contrary to the clear wording of the Ombudsman Act but was a disservice to the same University, fostering as it did at best a perceived culture of academic arrogance and at worst of institutional impunity. Moreover, it was not correct to say that the complainant had "*chosen to graduate*". Exchange of correspondence between the complainant and the Academic Registrar clearly showed that the complainant had no choice. He was in fact told that if he did not

present himself for the graduation ceremony, he would be considered as having graduated *in absentia*. Moreover, the Commissioner observed that graduation could not necessarily be considered as "*final curtain*", since even after graduation if the graduate is later found guilty of plagiarism, most universities provided for the revocation of the award.

On the 3rd of May 2022, the Ombudsman and the Commissioner referred the Final Opinion, together with the correspondence of the 1st April 2022 and 6th April 2022 to the Speaker of the House of Representatives to be laid on the Table of the House for the consideration of Members of Parliament.

University of Malta

Improper treatment of tenured academic by University

The complaint
The complainant is a fully tenured third-country national academic employed by the University of Malta.

He complained, in substance, that notwithstanding several requests made by him to the University to be supplied with the necessary letter that he was still on the books of the University – a letter needed to regularise his position with Identity Malta and to allow him to remain in Malta – such a letter was only provided months later, with the result of loss of salary besides suffering other related pecuniary damages.

The investigation and findings
As a consequence of the length of disciplinary proceedings that the complainant's former Head of Department had initiated against him – proceedings which ended with the complainant being reprimanded – the complainant began suffering from panic attacks and had to be hospitalised on three occasions. In March 2019 the complainant requested to be transferred to another Department within the University, allegedly because of the inability of his Head of Department to work with him. This request was acceded to, subject to the condition, imposed by the Dean of the faculty, that a replacement be found for the complainant within the Faculty. It took some 18 months for this replacement to be found.

Towards the end of May 2019, the complainant's medical condition had deteriorated and, upon medical advice, on 24th May 2019 he left Malta and returned to his country. He returned back to Malta, fully recovered, on the 22nd October 2019.

While he was abroad his work permit expired on 28th June 2019. He was last paid a salary by the University in August 2019.

From the 22nd October 2019 up to 8th February 2020 – a period of just over three months – the complainant called at the Human Resource Office regularly but was never issued with the necessary documents to allow him to regularise his position with Identity Malta and to renew his work permit. The University claimed that it was all this time trying to find a Department to which the complainant could be allocated (or relocated). What the University, and in particular the Human Resources Office, seemed oblivious to was the fact that the complainant was never fired or dismissed by the University, that he remained (as he still is today) on the books of the University as a Senior Lecturer, and that it was therefore the University's responsibility, in line with every employer's duty of care towards his/her employees, to issue such documents as were necessary so that he could regularise his position in Malta as a third country national. His request for a transfer from his original Department had been regularly approved and it was incumbent upon the University to find him a new Department. Until such time, he remained technically with his original Department. In fact, had not his work permit expired on the 28th June 2019 (while he was abroad) the complainant would have continued receiving his regular salary and allowed to continue carrying out research (possibly without being assigned specific duties by the Head of Department to which he was originally assigned and with whom there appeared to be some friction) until the necessary relocation. However, being a third country national his work permit expired and for almost two years he was left in the lurch, suffering consequences of a financial and other nature. The work permit could not be renewed without the positive assistance of the employer.

The Commissioner in his final opinion delivered on the 25th January 2022, expressly noted that he was struck by the number of emails sent by the complainant to the HR Office of the University which appeared not to have been even acknowledged.

The complainant's work permit was finally renewed – after the University undertook to provide the necessary documentation and assistance and after the intervention of the Ombudsman's Office – on the 29th September 2021.

Conclusions, recommendations and follow up

The Commissioner, in light of all the evidence gathered, came to the conclusion that the University of Malta had failed miserably in its duty of care towards the complainant, resulting in both loss of salary and other damages. Both in act and in omission, the University appeared to have acted contrary to law and in an unjust and oppressive manner in failing to assist in due time the complainant, and had acted throughout wrongly in his regard.

The Commissioner recommended that the University pay the complainant the basic salary and pension contributions due for the period September 2019 up to the 28th September 2021, without prejudice to any other damages which could be due to him according to law as a result of the improper behaviour towards him by the University.

The Final Opinion was communicated to the University on the same day that it was delivered – 25th January, 2022 – and, notwithstanding repeated requests sent to that institution as to how it proposed to give effect to the recommendations – Art. 22 (3) of the Ombudsman Act – The University never replied. As a consequence, on the 27th April 2022 the Ombudsman and the Commissioner referred the Final Opinion to the Speaker of the House of Representatives to be laid on the Table of the House for the attention of Members of Parliament.

Department of Education

Selection process for post of Assistant Head of School

The complaint
The complainant is a teacher in government service who holds a Master's Degree in Applied Language Studies. The complaint was lodged on the 1st of July 2022.

Her complaint arose out of an alleged anomaly or discrepancy between the grading systems in two consecutive calls for applications for the post of Assistant Head of School. In the first call and after the requisite interview, she was awarded full marks (64/64) by the selection board under the heading 'Relevant qualifications for post' – one of the various criteria for the selection procedure assessment and allocation of marks – for her Master's degree. In the second call for applications for the same post a few months later, no marks whatsoever were allocated (by a different selection board) for the same degree.

The investigation and findings
The point of departure in this investigation was Clause 29.2 of the Collective Agreement between the Government of Malta and the Malta Union of Teachers of the 21st December 2017.

This clause, relative to the filling of vacancies in the grade of Assistant Head of School (Salary Scale 6), provides *inter alia* as follows:

> *"Due consideration will be given to applicants in possession of MQF Level 7 qualifications in either one of the following areas: Educational Leadership/ Management, SEBD, Inclusion, Mentoring, Curriculum and Counselling or*

other comparable qualification as identified by Management from time to time …" (emphasis added)

The Commissioner noted that while in the instant case there was not even the slightest hint or indication of any abuse, the wording of this clause was unfortunate and could potentially give rise to abuse. He noted that the generic words "*or other comparable qualification as identified by Management from time to time*" could potentially be used to give an unfair advantage to pre-determined candidates. On the other hand, the Commissioner was quick to the fact that the exigencies of the educational sector in the public service could require at some juncture persons with qualifications (relative to the post of Assistant Head) in specific areas not expressly mentioned in Clause 29.2. The proper balance had to be achieved by ensuring due publicity to the "*comparable qualification/s*" to which due consideration would be given in the selection process.

The requirements as published in the first call for applications repeated almost word for word Clause 29.2 of the Collective Agreement, with the words "*jew kwalifika professjonali komparabbli*" replacing the words used in the Collective Agreement "*or comparable qualification as identified by Management*", thereby leaving it up to the selection board to determine what professional qualification was "*comparable*" to those specifically mentioned in the clause of the Collective Agreement. In this sense, the Education Department ("*the Management*") could be regarded as having (at least for the purposes of this particular call) relinquished its prerogative of identifying the comparable qualification. The mark sheet supplied by the PSC indicated that the members of that Selection Board were of the view that the complainant's Master's Degree in Applied Language Studies was a comparable qualification to be taken into account, and awarded her full marks for that segment of the assessment.

The second call for applications

The *iter* followed in the second call a few months later for applications a few months later was somewhat different. MFED Circular 40/2021, in Clause 6.2 thereof and under the heading "*Selection Procedure*" merely stated: "*Due consideration will be given to applicants who, besides the requisites indicated in paragraphs 4.1 to 4.4, have proven relevant work experience.*" No mention was made, even if indirectly as was done in connection with the first call, to Clause 29.2 of the Collective Agreement.

Yet this agreement was applicable also with regard to this second call. And in fact, when the Education Department submitted the proposed assessment criteria for approval by the PSC (which approval was granted) it indicated as "*Qualifications relevant for the post*" the seven subjects specifically mentioned in the Collective Agreement (to wit, Educational Leadership/Management, SEBD, Inclusion, Mentoring, Curriculum and Counselling) plus two additional subjects – to be regarded as the "*comparable qualification identified by the Management*" – namely Careers and Quality Assurance. The Selection Board, therefore, was no longer to have the free hand it had had with the first call. From all the documents made available to the Commissioner, at no point did it appear that the Department made public to prospective applicants that two subjects had been specifically identified in addition to those mentioned in Clause 29.2 of the Collective Agreement.

While the Department of Education (the Management) was well within its rights to identify additional (comparable) qualifications to add to those specifically mentioned in Clause 29.2 of the Collective Agreement – and to that extent there was no element of maladministration to the detriment of the complainant – the Commissioner noted that in matters of public calls for applications transparency should always be the keyword and accountability the byword. Had the complainant been informed – together with all the other possible candidates – of the specific "*comparable qualifications*" that were being identified, she would have been spared all the unnecessary anxiety because of the suspicion that she was being short changed.

Conclusion

The Commissioner in his Final Opinion of the 26th September 2022, dismissed the complaint in the limited parameters within which it had been formulated. However, he strongly recommended that in future calls for applications involving Clause 29.2 of the Collective Agreement or involving any other clause which grants discretionary powers to the Management to vary conditions which go towards the assessment criteria, the conditions/assessment criteria should always be clearly spelled out in the same call for applications.

By letter dated 11th October 2022, the Permanent Secretary at the Ministry for Education informed the Commissioner that the recommendation has been accepted, and that, as a consequence, future calls for applications for Assistant

Heads of Schools would clearly refer to the qualifications specified in Clause 29.2 of the Collective Agreement without any reference to "*other comparable qualification*[s] *as identified by Management from time to time*."

Department of Education

Reinstatement of teacher to participate in course

The complaint
The complainant – a teacher of European Studies in a government secondary school – applied for and was awarded a fellowship to follow an online course with Dublin City University as part of a Master's Fellowship Programme.

She complained that she was being unfairly treated by being made to undertake obligations beyond those provided in the relevant manual and that she had unjustly been stopped from continuing to participate in the online lectures.

The investigation and findings
The complaint was filed with the Ombudsman's Office on the 11th March 2022 and was dealt with as a priority case since with every passing week the complainant was missing out on her online lectures. The Commissioner's Final Opinion was delivered and communicated to the Permanent Secretary at the Ministry for Education on the 30th March 2022.

From the investigation it resulted that on the 1st of October 2021 the complainant signed the relative contract with the Ministry for Education (represented on the contract by the then Permanent Secretary), and she commenced the course.

On the 19th January 2022 she was asked to sign a hypothecation to cover the costs, or part thereof, of the course in the event that she did not comply with all the conditions stipulated in the contract of 1st October 2021. She refused to sign this document. A few days later she was barred, on instructions from the Ministry, from

participating in the online lessons, the course organisers in Dublin informing her that they had specific instructions to that effect from Malta.

The Commissioner first undertook to try and solve the issue amicably. In the course of this process, it transpired that the Education authorities were, inexplicably, going against a specific provision of one of the public service manuals. Formal notice of the investigation was given to the Permanent Secretary (in terms of Article 18(1) of the Ombudsman Act) on 24th March 2022. Notwithstanding the deadline indicated by the Commissioner for a formal reply, and the fact that the communication of the 24th was also clearly intended as an interim recommendation, no formal reply was received within the time stipulated. The short time limit for a reply was necessitated by the fact that with every Thursday the complainant was being deprived of a module of the course she has undertaken.

The hypothecation, upon which the Ministry was insisting, is envisaged in Clause 9 of Appendix III of the Sponsorships and Study Leave Manual, 2018. The provision reads:

> *"For this purpose the scholarship holder may be required to enter into a formal act of hypothecation with the Government before the commencement of the course if the costs to the Government amount to more than €4,100" (emphasis added)*

The purpose ("*this purpose*") referred to in the abovementioned clause is the rule governing the award of the scholarship to the effect that if the scholarship holder fails to successfully complete the course due to his or her negligence, or if he/she fails to serve the Government for the required number of years, he/she "*may also be required to refund all or any part of the expenses incurred by the Government*" in connection with the scholarship (Clause 8).

From the investigation it also resulted that the complainant had undertaken all the obligations and responsibilities to which she had subscribed both in the application form for the scholarship and in the contract of the 1st October 2021. It was only when she was prevented from participating in the online lessons that she was obstructed from complying with her responsibilities.

The Commissioner noted that the complainant was never requested to sign the formal act of hypothecation mentioned in Clause 9 *before* the course commenced; this insistence by the official side came only *after* the course had commenced, in fact more than two months after.

As he had indicated in the interim recommendation of the 24th March 2022, the Commissioner could not understand by what contorted logic the Administration could pretend to be legally, contractually or otherwise entitled to foist the act of hypothecation upon the complainant months after the course commenced, when the wording of Clause 9 was clear. In unilaterally and abusively terminating the complainant's access to the course, it was the Ministry that was in breach of the agreement of 1st October 2021 by pretending to be able to act contrary to a manual – the Sponsorships and Study Leave Manual, 2018 – devised by the same Administration.

Conclusions, recommendations and follow up

The Commissioner allowed the complaint as well-founded and held that the decision to prevent the complainant from continuing the course online was unjust, oppressive, contrary to law and wrong in principle.

The Commissioner recommended that the complainant should immediately be allowed to resume the course online with Dublin City University and that the Ministry instruct the course provider to give all the necessary assistance to the complainant to catch up with the modules she was wrongly prevented from following or participating in.

On the 5th April 2022 the Commissioner was informed that, upon instructions from the Ministry for Education, both the complainant and another teacher who was in exactly the same position as the complainant (but who had not lodged a formal complaint with the Ombudsman) had been re-admitted to continue the course online, and that the recommendation had been accepted and fully implemented.

Department of Education

Unfairness and discrimination in the context of "*work-life balance*" measure

The complaint

The complainant is a Primary School teacher residing in Gozo but deployed to work in Malta. With her elder daughter approaching compulsory school age, she applied for a career break in conformity with the Government's Manual on Work-Life Balance Measures (MWBM) which was duly granted.

In order to keep in touch with the education sector and also because the career break entailed a substantial diminution of income for the family, the complainant sought temporary part-time employment on a definite contract with a church school. Permission was repeatedly refused by the Education Authorities. She claimed that this refusal was in breach of Article 22(1) of the Ombudsman Act. The complaint was lodged on the 6th December 2021.

The investigation and findings

The Commissioner for Education delivered a Final Opinion on this case on the 23rd February 2022. The Commissioner noted that as a Primary School teacher in Government service and with very young children, the only work-life balance measure available to the complainant was the "*career break*", specifically intended (according to the same MWBM) to enable the public officer concerned to care for a child or for children under the age of 10. The officer concerned stops working, and stops receiving a salary, for a maximum of five years.

The Commissioner further noted that such a break, however, entails collateral downsides. The most obvious is the financial one. Moreover, for a professional person, such as a teacher, it is of paramount importance that he or she keeps

abreast with developments in the field of education during the career break since the ultimate aim is to return to the classroom at the end of the break. It is trite knowledge that, at least for a truly dedicated teacher, every day in the classroom helps to hone didactic skills, and long periods away from the classroom may blunt those skills. The Commissioner was of the view that if a career break is really envisaged by the establishment as a way of helping a parent to take care of very young children, every reasonable effort must be made by the administration for that goal to be achieved without undue hardship, financial or otherwise, for the public officer.

Administration's objections

The Commissioner dismissed the Administration's arguments that allowing the complainant to work on a definite contract after she had already been granted the career break would exacerbate the shortage of Primary School teachers in the public service. He also pointed out that the People and Standards Division of the Office of the Prime Minister (to whom the complainant had initially appealed following the refusal by the Ministry for Education of the requisite permission to undertake limited work in a church school) in coming to the conclusion that the complainant had suffered no injustice when that permission was refused, had failed to take account of the specific and concrete circumstances of the complainant. He chastised the "*one-size-fits-all*" approach taken by the aforementioned Division.

Discrimination

It was also noted that the Public Service Management Code, quoted by the People and Standards Division, contained a provision which allowed for part-time work to be undertaken by a person in the complainant's position, provided this part-time work was "*in government employment*". This created a clear and manifest improper discrimination: a person in the complainant's position could work part-time in government employment (notwithstanding the unpaid career break and the fact that such career break is intended primarily to enable a public officer to care for very young children) but there was a blanket prohibition on seeking such employment in the private sector. This was not only discriminatory but, in the Commissioner's view, also unreasonable; and in the circumstances of the complainant, where part-time work in the Government sector in her line of work was practically impossible in Gozo, it was also oppressive.

Recommendation rejected

The Commissioner after holding the complaint to be well-founded, recommended (***1***) that the complainant be allowed to work at least part-time and on a definite contract in the private sector in the educational field in Gozo, even though benefitting from a career break, and (***2***) that the last two paragraphs of item 6.2.3.1 of the Public Service Management Code be revisited to ensure that they do not undermine the whole purpose of the various work-life balance measures and in particular of the career break.

By letter of the 16th March 2022, the Ministry for Education rejected the recommendations.

On the 21st April 2022 the Commissioner's Final Opinion in this case was referred to the Speaker of the House of Representatives to be laid on the Table of the House for the attention of Members of Parliament.

Malta College for Arts, Science and Technology

Abusive and illegal behaviour by MCAST towards employee

The complaint

The complainant was, and still is, an employee of the Malta College of Arts, Science and Technology (MCAST). Her complaint was lodged on the 27th July 2018. The complaint centred on the alleged abusive nature of her forced leave and suspension from duties on full pay. Unfortunately, following a judicial protest filed in Court by her against the CEO of the College, the then Commissioner for Education (who sadly passed away in October 2020) erroneously stopped the investigation and archived the case. This was only re-activated pursuant to a request made by the complainant's lawyer to the Ombudsman's Office on the 16th of August 2021 "*to move forward*" with the complaint. Moreover, on the 20 December 2021 the current Commissioner for Education, following the necessary consultation with the Ombudsman in terms of Rule 6 of the Commissioners for Administrative Investigations (Functions) Rules 2012, converted the investigation into an "*own initiative*" one. The Final Opinion was delivered on the 16th February 2022.

Timeline

On the 23rd of July 2018, the complainant was summoned to the office of the then President of the Board of Governors of MCAST and was verbally accused by him of various instances of improper behaviour in connection with her function and office. On the same day she was served with a letter, under the hand of the Principal and CEO of the College, ordering her to take leave with pay up to Friday 27th July 2018, until the College properly assessed the situation. This decision does not appear to have been backed by a decision or resolution of the Board of Governors of MCAST. In his Final Opinion the Commissioner emphasised the word "*appear*" because, as stated in that opinion, the "*entire investigation was characterised by*

evident reluctance both on the part of the College, in the person of its CEO, and on the part of the Ministry for Education, in the person of the Permanent Secretary who was in office until … December [2021] to provide concrete, clear and timely information for the purpose of this Office's investigation."

On the 30th July 2018, twenty-nine (29) separate charges were drawn up by MCAST and served upon the complainant, to which she replied in detail in a 159 page document. Up to the time of the delivery of the Final Opinion (on 16th February 2022), that is more than three years and four months after complainant's response, no disciplinary proceedings had been initiated by the College against the complainant. On 1st January 2022 the complainant was placed on half-pay, ostensibly for the reason that disciplinary proceedings were going to be initiated against her in terms of the Public Service Regulations. Although it was this very long period of suspension – first on full pay and, from the 1st of January 2022, on half pay that was the subject of the complainant's grievance, with the investigation having been converted into an "*own initiative*" one, other issues had, of necessity, also to be addressed.

The Bonello Report

Throughout the long period of more than three years and four months, MCAST always claimed by way of rebuttal and justification, that it did not proceed with the disciplinary proceedings against the complainant because (1) the Ministry had, in 2018, opened its own investigation under the Inquiries Act, and (2) the police were still investigating the outcome of that internal investigation. In July 2018 the then Minister for Education had appointed a Board of Inquiry under the Chairmanship of Mr Paul Bonello principally to examine allegations made by the complainant regarding the operations and administration of MCAST. The Board concluded its report and presented it to the Ministry on the 5th March 2019.

Since this report – the Bonello report - was always being brought up as the reason by MCAST for the prolonged forced leave/suspension (at the time, on full pay), the Commissioner requested both the CEO of MCAST and the then Permanent Secretary at the Ministry for Education for a copy. The former stated that he did not have a copy, a fact which was borne out by an email of the CEO of the 3rd December 2021 addressed to the then Permanent Secretary (the Commissioner noted that it was very odd how the CEO of an institution like MCAST was never provided with a copy by the Board of Governors of this important document). The latter – the Permanent

Secretary – outrightly refused to provide the Commissioner with a copy. This refusal was in clear and flagrant breach of Art. 19 of the Ombudsman Act. In spite of this clear obstruction by the then Permanent Secretary, the Commissioner did eventually manage to obtain a certified true copy of the Bonello Report from other sources.

In his Final Opinion, the Commissioner stated that he was struck by the rampant culture of impunity and clientelism prevalent at the College – all leading to various forms of abuse – which the Bonello Report revealed for the period covered by that same report. Implicated in all this were people at various levels in the administration and in the running of MCAST at the time.

General findings

The Bonello Report commended the complainant for insisting that the allegations made by a member of staff in connection with a number of issues be investigated, and for subsequently drawing the attention of the then Minister for Education that no action had been taken by MCAST as had been recommended by a previous report. However, this Report also examined allegations specifically directed against the complainant.

After examining all the evidence, including email exchanges between the Ministry for Education and the CEO of MCAST as well as copies of minutes of the Board of Governors of MCAST, the Commissioner came to the ineluctable conclusion that no one wanted to handle what was considered to be, in view of the persons singled out in the Bonello Report, "*a hot potato*".

As a result, every effort was made to put off under one excuse or another, the purported disciplinary proceedings against the complainant. When at one stage the Ministry for Education, through the then Permanent Secretary, suggested re-instating the complainant to her former post, the Board of Governors of the College recommended, in January 2022, that disciplinary proceedings under the PSC Regulations be initiated against the complainant, and that she be now put on half pay. The Commissioner noted that it did not appear that the procedure outlined in the PSC Disciplinary Regulations was followed before placing the complainant on half pay. But even if this decision of the Board of Governors had been taken pursuant to and in accordance with the appropriate regulations, a precautionary suspension was, as the name implied, intended as a precaution which was considered to be

"*necessary and in the public interest*", and it was inconceivable how what was known by the Board of Governors about the complainant ever since the Bonello report was referred to the police for further investigations, could now, after almost three years, suddenly become "*necessary and in the public interest*". The reason, advanced by the College, that only recently had it come to its attention that the police Economics Crimes Unit was actually investigating the complainant, even if true, was, in light of all the facts and circumstances, spurious and was just a convenient excuse for the College to continue to drag its feet over the disciplinary proceedings.

Conclusions, recommendations and follow up

In sum, it was clear to the Commissioner beyond any reasonable doubt that in handling the matter of certain allegations made against the complainant, the College acted abusively (unreasonably and oppressively) and wrongly by (i) not proceeding with disciplinary action within a reasonable time; and (ii) by wasting public funds by paying the complainant for years while forcing her to remain home thereby not contributing anything useful to the College.

The Commissioner, entirely without prejudice to any other rights pertaining at law to the complainant, recommended:

i. that the suspension on half pay be rescinded until the PSC and the Prime Minister should have expressed themselves in line with Regulation 12(2) of L.N. 66 of 2017, as amended; and
ii. that if any disciplinary proceedings were contemplated against the complainant these should be proceeded with *sans plus de délai*, without prejudice to any investigations, and the possible results thereof, which the police had supposedly been conducting for years.

On the 17th March 2022, the Commissioner was informed by the College that an agreement had been reached between the College and the complainant for the latter's reinstatement (albeit in a capacity and post different from the one she had held when first suspended on full pay in 2018). This agreement was to be proposed to the Board of Governors for approval. On the 29th April 2022 the complainant informed the Commissioner that she had signed a comprehensive agreement with the CEO of MCAST "*resulting in the final resolution of the long pending matter between MCAST and myself*", and involving her reinstatement as a member of the administrative staff of the College.

CASE NOTES

Commissioner for Environment and Planning

Lands Authority

Lack of maintenance of Government property

The complaint
This case concerns damages in the underground drainage system of an apartment block allegedly caused by deficiencies in the floor of a garage belonging to the Government.

The investigation
The Lands Authority did not counter these allegations but rather confirmed that maintenance works are required in the Government property in question. The authority also stated that it was finalising a framework agreement with a number of contractors in order to maintain similar Government properties and that once these agreements are finalised, the authority will execute the works required. Nevertheless, in six months these works were not done and the authority informed the Commissioner that the property in question was transferred to the Housing Authority in line with a Legal Notice issued in the year 1992.

The Commissioner checked this Legal Notice and found that actually this was not the case. This is gross negligence from the authority's part who first accepted responsibility and promised to carry out the works and then, after six months, it retracted on the erroneous premise that the property in question was transferred to another authority.

Conclusions and recommendations
The Commissioner found serious negligence in the way the Lands Authority acted on this matter, definitely in conflict with its function established by law to correctly administer properties belonging to the Government.

The Commissioner recommended that the Lands Authority should immediately carry out the works. If eventually damages are found to have increased, the authority shall take appropriate measures so that any additional expenses resulting from maladministration are not borne by the public coffers.

Outcome

The Lands Authority did not reply to the Commissioner's recommendation and the case was referred to the Prime Minister and to the House of Representatives in line with the Ombudsman Act.

Lands Authority

Allegations against misappropriation of public land

The complaint
Investigation following a complaint alleging lack of action by the Lands Authority against illegal occupation of public land at Swieqi.

The investigation
After the Lands Authority released official certificates showing the extent of public land close to a site originally occupied by a hotel and where construction works were underway and following no action from the authority when alleged public land appropriation was flagged, the complainant approached the Office of the Ombudsman for an investigation. Although an appeal was filed in front of the Environment and Planning Tribunal against the development permit in question, the Commissioner decided to investigate these allegations owing to them being of general interest in nature.

The investigation found that the original footprint boundary wall conforms with the boundaries of the approved plans and that the Lands Authority never registered a title adjoining this development. The Lands Authority also commissioned a survey that showed that the current development as approved by the Planning Authority shall retain the same footprint previously occupied by the development in question. Further examination of facts guided the Lands Authority to conclude that there is no conclusive proof that the development was built on land registered as Government property and that there is no intention to encroach beyond the limits previously occupied by the same development.

The certificates in question issued by the Lands Authority follow what is known as a GLA20 application (request for information on Government property) that is submitted by the applicant. The applicant submits a base plan that is then marked upon by the authority and attached to the certificate issued by its Records Section. It was found that the submitted plans are based on the 1968 survey sheet that however includes buildings that actually did not exist on the 1968 official survey sheet. Hence, the plan submitted in the GLA20 application was based on an unofficial survey sheet that was more than fifty years old. Therefore, the Lands Authority should have been more considerate before its Records Section issued the certificates in question since these were based on unofficial and old survey sheets and without considering a public deed in which the Lands Authority was also party.

The Lands Authority cannot immediately issue a notice and/or proceed with action against alleged misappropriation of public land before ascertaining that such an action is legitimate. The public deed, in which the public authority was party, recognised the existing boundaries as non-Government property and there was no evidence that these boundaries were being expanded. Furthermore, the Lands Authority cannot act only on the basis of the plan attached with the developer's predecessor deed both since such a plan is not sacrosanct and also since a similar action has to be based on the title of the party proposing the action (in this case the Lands Authority) rather than on the title of the receiving party.

Notwithstanding the above, the Lands Authority is still in a position to take action since any misappropriation can still be addressed following full legal considerations. There is no evidence leading one to consider that the authority is refraining from taking any action for any illicit reason whatsoever. The authority acts well when it acts diligently in similar instances as any miscalculated actions may lead to counter requests for damages that will ultimately have to be suffered from the public coffers.

Conclusions and recommendations

The allegations against lack of action by the Lands Authority on illegal occupation of public land at Swieqi were found to be unjustified.

Nonetheless, the Commissioner recommended that declarations issued by the Lands Authority Records Section are to be based on recent official site plans and/

or surveys of the lands in question and that the same declarations are to seriously consider public deeds and address any anomalies that result therefrom.

Outcome

The Lands Authority accepted the Commissioner's recommendations and added that the Records Section has been advised to refer all similar requests to the Chief Officer Estates Management, who shall, after conducting a thorough investigation, bring the matter to the attention of the Chief Executive Officer for final deliberation and communication with the applicant.

Planning Authority

Rejecting Submissions by Interested Parties

The complaint
Investigation following a complaint against the rejection of written submissions by the Planning Authority following fresh plans submitted at the request of the Planning Board.

The investigation
The Planning Directorate did not accept written representations that are submitted by recognised interested parties against fresh plans that are submitted following the Planning Board hearing and to this effect the representees are being requested to make their submissions orally during the hearing.

There are certain instances where the Planning Board defer an application to allow the applicant to revise the proposal and address the concerns raised by the Board. Although, following new submissions, the registered interested parties are informed by the Planning Authority that fresh plans have been submitted, representations that are eventually submitted by the registered interested parties against these new submissions are automatically rejected by the system.

The Development Planning Act does not specify that such representations should be rejected but rather that representations should be in writing and that they shall include submissions received by post, by hand or electronic submissions. Furthermore, even the regulations do not allow the rejection of representations but rather state that submissions should be received at least fifteen days before the hearing.

Submissions on fresh plans following the hearing that are in writing - rather than orally - are in line with the provisions for a fair hearing and also beneficial for a better understanding by the Planning Board in its deliberations on applications.

Conclusions and Recommendations
The complaint against the rejection of written representations following the filing of fresh plans at the request of the Planning Board was found to be justified.

The Commissioner recommended that following authorisation of fresh submissions by the applicant, the Planning Board also establishes a reasonable period of time within which the registered interested parties may also file their written representations.

Outcome
The Planning Authority did not implement the Commissioner's recommendation and the case was referred to the Prime Minister and to the House of Representatives in line with the Ombudsman Act.

Planning Authority

The shading structure that was never approved

The complaint
Investigation following a complaint alleging irregular approval of a structure on the pavement at The Strand, Sliema.

The investigation
The Commissioner investigated the permit for a metal and glass structure taking up a substantial part of the public footpath at the Strand in Sliema and found that the approved drawings show an outside catering area linked to a gelateria that is fixed in nature whereas the Planning Authority processed and published the relative application as a retractable canopy. This was a gross error from the authority's part especially considering that the Malta Tourism Authority had insisted that the retractable canopy should not be an enclosed structure and also since the application advert misguided the general public. The relative Policy, Guidance and Standards for Outdoor Catering Areas on Public Open Spaces itself distinguishes between a canopy and an enclosure and hence it is paramount that the Planning Authority, as guardian of the same policy, should also distinguish between processing an application for a retractable canopy and processing that for an enclosure as eventually approved.

Conclusions and recommendations
The allegations against the Planning Authority that it irregularly approved a structure on the pavement at Sliema were found to be justified. The only two legal and right options for the Planning Authority were to process the proposal as a retractable canopy in line with the Policy, Guidance and Standards for Outdoor Catering Areas on Public Open Spaces or else ask the applicant to change the proposal to a shading structure and advertise it and process it as such. The Planning Authority did neither

and chose to approve the proposal after advertising it as a retractable canopy when in actual fact it consists of an enclosure and shading structure.

The Commissioner recommended that the Planning Authority invokes Article 80 of the Development Planning Act and revoke the permit in question based on the very evident error on the face of the record with respect to that part of the permit that approved a retractable canopy. This application should then be reverted back to pre-publication stage so that the application is correctly advertised and processed in line with the Development Planning Act and the Policy, Guidance and Standards for Outdoor Catering Areas on Public Open Spaces.

It was also recommended that the Final Opinion should be uploaded in the relative Planning Authority file for view by the general public.

Outcome
The Planning Authority did not implement the Commissioner's recommendation and the case was referred to the Prime Minister and to the House of Representatives in line with the Ombudsman Act.

Planning Authority

Irregular development on promenade

The complaint
The Office received a complaint against the acceptance of a Development Notification by the Planning Authority for the erection of an ATM machine and booth on the St Julians promenade.

The investigation
The Planning Authority issued the authorisation for an ATM machine room with adjacent booth under Classes 4(ii) and 4(iii) of the Development Notification Order. The endorsed plans show development at promenade level whereas the site is actually deeper, reaching the lower shore level. When asked whether this situation was taken into consideration before it issued its authorisation, the Planning Authority only replied that it is the sole responsibility of the Architect to indicate all the proposed works and that the Authority will take action against any works that go beyond this authorisation.

Although Class 4(iii) of the Development Notification Order limits the booth external area to one square metre, this authorisation shows a booth with an area that is more than triple in size. Considering also that the Planning Authority failed to request clarifications or change in plans in order to align the proposal with the actual situation on site, these errors on the face of the record committed by the Planning Authority trigger revocation procedures against this authorisation that is considered a permit according to case law

Conclusions and recommendations

The allegations against the Planning Authority that it irregularly approved a development at St Julians were found to be justified and the Commissioner recommended the revocation of this permit. It was also recommended that the Planning Authority should take enforcement action against any unpermitted constructions below promenade level.

Outcome

The Planning Authority did not react to the Commissioner's Final Opinion and following lack of implementation of the recommendations therein, the case was referred to the Prime Minister and to the House of Representatives.

Local Council

Timed road closure blocking garage access

The complaint
The Office received a complaint against the fixing of signs blocking access to a street during certain times on school days, thus making it difficult for the complainant to access her home with a young child.

The investigation
The Commissioner found that this closure actually affects about fifty car parking spaces within garages in the affected part of the street and that the closure of this street was only introduced during the pandemic in order to separate children exiting the school at the same time. For another similar situation in another locality, signs allowed access not only for school transport but also for residents.

The investigation found that Transport Malta did not issue this road closure approval and that these signs were installed following discussions between the Education Department and the Local Council when the school started using three gates on three different streets to ensure that bubbles are respected for the safety of the children.

Conclusions and recommendations
The Commissioner concluded that no other entity, except Transport Malta, could have consented the timed road closure in question. The Local Government Act only allows the Council to provide signs and for their upkeep, but not to decide on lengthy road closures, not even for emergency cases.

Given the sensitivity of the case and for the safety and well-being of both the school children and the children residing in this part of the street and given that the end of the school term was approaching, the Commissioner recommended the removal of these no-entry signs unless there is prior approval from Transport Malta. If the school administration continues to use the gate on this part of the street, railings along the pavement should be installed unless there is the road closure approval by Transport Malta.

Outcome

This case was solved with the removal of the no-entry signs in question before the start of the new scholastic year.

Infrastructure Malta

Pavement extension onto parking spaces

The complaint
Investigation following a complaint against works consisting of the extension of a pavement encroaching onto public parking spaces in front of the Siġġiewi Football Club.

The investigation
Following a development application for the extension of an outdoor catering area that was refused by the Planning Authority for reasons related to reduction in parking spaces, Infrastructure Malta carried out the same pavement extension whilst performing other works nearby.

The Agency submitted that these works were covered by a roadworks permit and by a no objection from the Siġġiewi Local Council. The Commissioner also found that the Development Notification Order Class 3(i) clearly authorises the Agency to carry out this pavement extension without the need for a development permit or consultations except for the authorisation by Transport Malta which the Agency complied with. Nonetheless, the Commissioner questioned the action taken by the Siġġiewi Local Council when in the year 2017 it objected against the development of a timber demountable pavement extension on the same site that would also have resulted in the loss of parking spaces when compared to the no-objection letter sent by the Mayor to the Agency stating that he finds no objection to the pavement extension in question similar to other establishments in the area.

Conclusions and recommendations

Without reaching any conclusions against the Siġġiewi Local Council since this complaint and final opinion were directed against Infrastructure Malta, the Commissioner found that Infrastructure Malta acted as it would have been expected to act when it received a request for the pavement extension in question whilst it was doing other works in the area.

Outcome

In line with the principles of natural justice, whilst absolving Infrastructure Malta from any maladministration issues, the Commissioner opened a new case against the Siġġiewi Local Council to address these findings.

CASE NOTES

Commissioner for Health

Department of Health

Navigating bureaucracy: A patient's struggle for adequate insulin treatment

The complaint
The father of a 22-year-old Diabetic Type 1 patient complained that the Department of Health was not providing the insulin prescribed by his daughter's Consultant Diabetologist.

The Exceptional Medicinal Treatment Committee (EMTC) had approved this type of insulin, as the patient had experienced adverse reactions from three other types prescribed by the consultant. The father had spoken to various persons and sought redress but to no avail.

As the Central Procurement Supplies Unit (CPSU) had lost hope of finding a supplier, the father asked the Office of the Ombudsman to investigate the matter. The Ombudsman referred the case to the Commissioner for Health for investigation.

The investigation
The Commissioner for Health immediately requested the Department of Health's comments. The CPSU replied that they had tried everything, but the insulin could not be sourced.

The Commissioner also received feedback from the Office of the Permanent Secretary within the Ministry for Health, stating that resolving this matter was proving difficult as no offers for that particular brand of insulin had been received. The Permanent Secretary added that, given the circumstances, the CPSU was providing a generic alternative to all patients requiring such treatment. This was the crux of the problem because the generic was not the solution.

Trying to find a solution

As a next step to find a solution to assist the patient, the Commissioner for Health contacted a representative of a well-known UK pharmaceutical company known to CPSU and asked if they could be of help. The representative replied, informing the Commissioner that they could supply the particular insulin and asked if the patient needed "*pens or vials*". The correspondence was forwarded to the CPSU so they could proceed with the procurement.

Even though they had not been able to find a supplier, CPSU still decided to issue a call for quotations, thus wasting more time.

It is worth noting that there was divergence of opinion between the CPSU, the Medicines Authority, and the Superintendent of Public Health. These are essential players in importing medicines as the Superintendent of Public Health issues the license and the Medicines Authority does the registration.

The most acceptable suggestion was to procure the insulin on a named-patient basis, but CPSU strongly objected and preferred an Article 20 concession from the Medicines Authority. After one and a half months of discussions, the latter had to be accepted.

Following this, another hurdle was encountered as the Medicines Authority could only approve a three months' supply of this treatment under Article 20. This meant that the patient would have to go through the bureaucratic procedure again after a short period of time.

Another futile hurdle

The supplier eventually sent the insulin to its representative in Malta, but a delivery problem arose as the local firm, representing the UK company, did not have a distribution license. This meant that transport licensed to carry refrigerated medicines had to be hired to transport the insulin from the company's premises to CPSU in San Gwann.

The transport charges created another problem as there was a dispute about who would pay for the transport charges of €118. CPSU wanted the insulin to be sent back to the UK and then re-sent directly to CPSU. This is bureaucracy at its best.

The Commissioner for Health could not understand or accept such nonsense but fortunately someone offered to pay the transport charges of €118 out of his own pocket. That same day, the insulin was delivered to CPSU and sent to POYC; the following day, it was in the hands of the patient.

The Commissioner for Health expressed his disappointment that, notwithstanding the assistance of his Office, it still took 54 days for the insulin to reach the patient from when the supplier was found.

Conclusions

From this and previous investigations, it is clear that the procurement process is very laborious. Additionally, there is a conflict between CPSU, the Superintendent of Public Health, and the Medicines Authority regarding the procedure to be followed, that is, whether to use Article 20 or apply on a named patient basis. The least problematic option is on a named patient basis, but CPSU is firmly against it. This issue prolongs the process to the detriment of patients. The consultant of the complainant had stated that the request for this particular insulin was made because the patient had developed severe adverse reactions following treatment with the other three types of insulin prescribed.

It is noteworthy that a year passed, despite the patient being at risk of adverse complications, from the approval date given by the EMTC and the Chief Medical Officer to the actual delivery of the insulin to the patient.

The issue of branded medicines

This investigation revealed that CPSU has introduced regulations of its own, in addition to the statutory ones, for the procurement process. These regulations are hindering its operations to the detriment of patients. CPSU continues to resist providing branded medicines to patients, even in the most genuine cases. Although the Commissioner for Health agrees with the use of generic medicines, it cannot be denied that some patients are resistant to them. The term 'one size fits all' is not the answer.

The issue of branded medicines was raised with the Director General of Contracts three years ago, who advised that branded medicines may be procured by direct

order in exceptional cases. Surely, there must be legitimate ways to take action in such circumstances.

CPSU stated that it could not find a supplier for this particular insulin. However, the investigation revealed that the chosen supplier was never contacted, and it was only after the intervention of the Ombudsman's Office that a supplier was found.

Recommendations

In view of all considerations and facts that emerged from this investigation, the Commissioner for Health recommended that:

a. an urgent meeting be held between the two respective Ministers, that is, the one responsible for Health and the one responsible for the Medicines Authority, together with the Chief Medical Officer (CMO), the Superintendent of Public Health, the Chairman of the Medicines Authority and the Managing Director of CPSU to find a way to simplify the procedure, especially for medicinals that are urgently needed;
b. after a branded medicinal has gone through the stringent procedures already in existence and is finally approved by CMO, CPSU should proceed with procurement. If possible, the procurement process should not be so prolonged i.e. whether the procurement is carried out on a named patient basis or under Article 20; and
c. CPSU needs to be more client oriented.

Outcome

The Office of the Permanent Secretary assured the Commissioner that the patient will continue to receive the treatment indefinitely without any further hassle. They also renewed their commitment to continue serving public health service users to the best of their abilities.

Department of Health

Patient's surgery in jeopardy due to lack of funds

The complaint
The Office of the Ombudsman received a complaint from a patient who had to undergo brain surgery by a UK neurosurgeon brought to Malta by the Ministry for Health to operate on a number of patients.

The patient stated that he had undergone all the required pre-operative investigations, but 15 days before the set operation date, he was informed that the surgery had to be cancelled due to lack of funds.

The patient explained that, in addition to the medical difficulties, the cancellation of the operation caused psychological hardship.

The investigation
The Ombudsman referred the case to the Commissioner for Health for investigation. The Commissioner for Health sought an explanation from the Ministry for Health, which stated that the reason for the cancellation was not due to a lack of funds but rather to the procurement of implants and consumables. The Ministry, however, confirmed that the operation would be performed as planned.

Outcome
Following the representations made by the Commissioner for Health, the operation was carried out as planned. The Commissioner noted that the Department of Health should have predicted the procurement issue and taken immediate action to solve the problem.

Ministry for Health

Unjust deprivation of allowances and overtime notwithstanding a commitment by the Principal Permanent Secretary

The complaint
In the 2019 Case Notes, the Commissioner for Health published a case note regarding a public health employee who was suspended from work and arraigned in Court following a report filed at the police station regarding an issue related to his duties. During the duration of the Court Case, he was on half-pay. The Court exonerated the complainant from all charges, and after ten months, he returned to work.

The complainant also requested that the Department of Health pay him for the remunerations he would have been entitled to on Sundays, public holidays, and overtime while he was suspended.

Facts and findings
Following the court judgment, the Chief Executive Officer of Primary Health Care *"informed the Public Service Commission that in view of the court's decision, disciplinary action (against the complainant) would no longer be pursued."*

Moreover, the People and Standards Division (P&SD) of the Office of the Prime Minister informed the Ministry for Health that half the salary withheld during the period of precautionary suspension be refunded.

The Commissioner for Health, who was investigating the case, sought the reaction of the P&SD – OPM on the issue of other remunerations. In their reply, the P&SD – OPM referred to the PSC Disciplinary Regulations 2017 and the Manual of Allowances and reaffirmed their position that allowances are only paid for actual work performed.

The Commissioner countered by stating that "*the PSC Disciplinary Regulations do not mention any allowances which an employee might have been receiving. Only the salary is mentioned*". He said he believed the complainant should also be refunded the monies due to him by virtue of his duties, as he should not suffer injustice because of something the Court had not found him guilty of. The Commissioner continued that the employee was given the full salary even though he had not been working.

Moreover, the Manual of Allowances stated that *"all automatic and fixed allowances which are specifically incorporated in the pay package will not be deducted..."*.

Following the representations made by the Commissioner, the P&SD – OPM agreed that the complainant *"should not forfeit the Class Allowances withheld from him during the period of precautionary suspension"*.

He added that during the period of his suspension, he would have worked on twenty-two Sundays and five public holidays.

Conclusions and recommendations

After reviewing all the facts and findings that emerged during the investigation and consulting the various manuals regulating public service, the Commissioner for Health concluded that:

i. although the Ministry for Health felt justified in proceeding with precautionary suspension, once the employee was not found guilty by the Criminal Court, he should not suffer any consequences and be deprived of his regular income in terms of allowances, shift work, and overtime;
ii. the Court exonerated the employee from any wrongdoing. Therefore, to deprive him of his full remuneration would mean that the government would be going against the court's decision by imposing another punishment;
iii. there is no doubt that in such cases, the employee should be placed in the same situation he had been in before his suspension, that is, he should not suffer the consequences of actions taken by his superiors. Such action, that is suspension from work, was found by the Criminal Court to be unwarranted because he was liberated from all the accusations;
iv. the employee should not only not forfeit half his salary, but he should also not forfeit any other remuneration that he had been receiving regularly before his suspension;

v. the employee and his family passed through a hard time for ten whole months to make ends meet with half of the salary. The complainant stated that his son had to interrupt his studies to find employment and help the family; and
vi. suspension from work is a severe disciplinary action and should only be taken after a thorough examination of the circumstances of the alleged offense.

Given these conclusions, the Commissioner for Health recommended that:
i. the complainant be paid for all the Sundays and public holidays and overtime he would have worked had he not been suspended for 293 days;
ii. when an employee is suspended and given half his/her salary, it should be ascertained that the half wage would at least be equivalent to the National Minimum Wage;
iii. the Manual of Disciplinary Procedure be amended to read 'the refund of the full amount of remuneration that would have normally been earned'; and
iv. before a precautionary suspension is decided to be taken, an employee should first be summarily suspended for a maximum of eight working days during which time the department will obtain as much proof as possible to justify the precautionary suspension. It is also recommended that the Investigating Board be composed of three senior civil servants.

Outcome
Following the recommendations (2019) of the Commissioner for Health, the People and Standards Division (P&SD) of the Office of the Prime Minister informed both the complainant and the Commissioner that they were considering the recommendations.

After some time, the P&SD informed the Office of the Ombudsman that it was not in agreement with the recommendations. Therefore, the case was referred to the Prime Minister as provided for by the Ombudsman Act.

The Commissioner for Health did not receive any reply from the Prime Minister. However, the complainant managed to speak to the then Principal Permanent Secretary (PPS) at the Office of the Prime Minister. The latter agreed that the complainant should be refunded the money he would have earned had he not been suspended.

In fact, the PPS wrote to the complainant in this respect where he informed him that after internal discussions, the Public Service Commission had to amend the disciplinary code through a legal notice. Then this policy was to become effective from the date of publication of the Legal Notice, however in this case the policy had to include also those individuals who had sought a remedy by lodging a claim with an established Authority such as the Law Courts, tribunal or the Ombudsman.

Following the commitment by the Principal Permanent Secretary, the Commissioner requested P&SD to inform the Department of Health of the decision, but P&SD, after consulting the State Advocate refused the request.

The Office of the Commissioner for Health is still following this case with the relevant authorities.

Department of Health

Healthcare Professionals demand recognition for Physiological Measurement Field

The complaint
The complainant, a healthcare professional who works in the public health sector as an officer in the field of Physiological Measurement, requested that the profession of Clinical Physiologist (Physiological Measurements) be accepted for registration with the Council of Professions Complimentary to Medicine (CPCM). The complainant alleged that the process was being delayed unnecessarily, to the detriment of patient safety.

The investigation
The Commissioner for Health took up the case and initiated the investigation by requesting comments from the Health Authorities. The Department of Health informed the Commissioner that the process of establishing a register for Physiological Measurements was underway and pending a change in legislation. The public health sector can employ only healthcare professionals specialising in Physiological Measurements through a Call for Applications for the Post of Electrocardiogram (ECG) Technician, even though the roles are entirely different. Incidentally, ECG Technicians are also not yet registerable by the CPCM.

The Commissioner explained that the roles are two distinct occupations that require different specializations. In fact, Malta College of Arts, Science, and Technology (MCAST) offers a three-year course that leads to a BSc degree in Physiological Measurements.

The role of an ECG Technician, as defined by the Society of Cardiological Science and Technology of the UK, entails competency to record safely and accurately a

12-lead testing electrocardiogram and being able to understand the features which distinguish an abnormal from a normal electrocardiogram (ECG). The Society of Cardiological Science and Technology issues the certification in Electrocardiography competency. On the other hand, the role of Physiological Measurements concerns studies of the brain, for example, Electroencephalogram (EEG), Electromyography (EMG), studies of sleep disorders, and spinal cord monitoring, among others.

Conclusions and recommendations

Following a series of correspondence, the Commissioner recommended, in the interest of patient safety, that both professions be made registrable with the CPCM and that a Call for Applications for Scientific Officers is explicitly issued for those who specialize in Physiological Measurements.

Outcome

The Commissioner was informed that the Council was actively considering this matter. If the Council approves, then the Superintendent of Public Health will have to prepare a Proportionality Study, which is referred to the EU for approval. Following approval, the Superintendent of Public Health will issue a Legal Notice, and the CPCM can proceed with the Registration.

Sir Anthony Mamo Oncology Centre

Unions' Intransigence in the dispute at Sir Anthony Mamo Oncology Centre Outpatient Department

The complaint
A healthcare professional at the Sir Anthony Mamo Oncology Centre (SAMOC) lodged a complaint with the Ombudsman, alleging that she was not being allowed to work overtime at the SAMOC Outpatient Department. The complainant stated that she was being discriminated against, as colleagues with identical duties were being asked to work overtime.

The investigation
Since the case pertained to the public health sector, the Ombudsman asked the Commissioner for Health to investigate the complaint. The Commissioner requested the Permanent Secretary of the Ministry of Health to provide the necessary information and comment on the matter.

The Commissioner for Health received an email from the President of a union that represents a sector of the healthcare professionals in question, explaining the reasoning behind the allocation of overtime. He explained that the practice, which has been used for years, is that priority for overtime is given to staff working in that particular section. When no one is available to work overtime, it is offered to staff members from other sections.

Further investigations by the Commissioner revealed that there are five employees at SAMOC with a similar position as the complainant, two of whom work in the wards and three at the Outpatient Clinic. The two who work in the wards finish their work very early in the morning and are requesting to continue their duties at the Outpatient Clinic. However, the Outpatient Clinic staff did not agree with

this. During the course of the investigation, the union representing the healthcare professionals involved issued a directive to its members. Another union representing the complainant alleged that the directive issued was tantamount to bullying and against the interest of its member.

The Commissioner informed the CEO of Mater Dei that the feud between the two unions does not fall within the jurisdiction of the Office of the Ombudsman. However, in the interest of the service, he appealed that a solution be found.

Conclusions and recommendations
The Commissioner therefore recommended that the two healthcare professionals working in the wards continue their duties at Mater Dei Hospital, where their services are much needed, as soon as they finish their duties at the SAMOC. Likewise, the Commissioner recommended that the three staff members at the Outpatient Clinic should also perform their duties at Mater Dei Hospital when they finish their work.

Outcome
The recommendations were strongly refused by the unions that represent these employees. One union showed agreement on the *proviso* that the other two healthcare professionals also agreed to go. On the other hand, the other Union objected as it stated that Mater Dei hospital had in fact given in to the threats made by the other union.

The situation remains the same: all five are not fully occupied, and yet, because of the unions' intransigence, the hospital cannot deploy them according to the exigencies of the service. The Mater Dei Hospital administration is urged to solve the problem as soon as possible.

The hospital administration should not be at the mercy of the trade unions which expect to dictate matters.

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