CASE NOTES 2021

PARLIAMENTARY OMBUDSMAN - MALTA

FOR THE PERIOD
JANUARY - DECEMBER 2021

Edition 41

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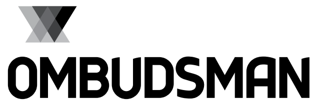

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October – May	08:30am – 12:00pm
	01:30pm – 03:00pm
June – September	08:30am – 12:30pm

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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.

Foreword

The periodic publication of Case Notes introduced by the first Parliamentary Ombudsman, Mr Joseph Sammut, highlights complaints by aggrieved individuals seeking redress from the Office of the Ombudsman for injustices suffered as a result of the conduct of the public administration or of a systemic failure that was unfair or unjustly discriminatory.

This initiative has proven to be positive in many respects. It brings to the attention of the general public the nature of the complaints that fall within the jurisdiction of the Ombudsman and the specialized Commissioners within his Office; provides an inkling on how these complaints are investigated; the procedures followed as laid down by laws and regulations, to establish the facts, the way final opinions are crafted; what recommendations could be expected when a complaint is sustained and its possible outcome.

These publications bring the institution closer to the people. They are an effective outreach exercise that helps make the services that the Ombudsman provides more accessible. Moreover, persons who find themselves in situations similar to those of reported cases can identify themselves with the outcome of the investigation and are encouraged to avail themselves of the services that the Office of the Ombudsman provides to obtain redress.

Case Notes however only review those complaints that need to be fully investigated, leading to a final opinion. Many other complaints are resolved through a process of active mediation between the Office and public authorities. This forms a crucial part of the work performed by the Ombudsman and the Commissioners in the exercise of their functions. A process that often results in providing aggrieved citizens with redress after long and painstaking discussions in search of truth, fairness and justice – though this is not always the case.

In promoting and securing the right to a good public administration it is the duty of my Office in the first place, to do its best to convince both the complainant and the public authority on the need to consider the facts objectively in the light of applicable norms, tempered by the principles of justice and equity. Reconciling contrasting positions and resolving complaints in an amicable manner without the need for a final opinion is a core, satisfying element of the work performed by my Office.

Regrettably recent public exchanges on the nature of the Ombudsman institution, critical of the manner in which investigations were being conducted, have shown a lack of appreciation if not outright ignorance of the added value of the mediatory work carried out by the Ombudsman, the Commissioners and the Investigating Officers who often succeed in building effective bridges that promote understanding between aggrieved citizens and public authorities. It has been incorrectly suggested that by so doing the Office of the Ombudsman could be assuming the role of a customer care facility while ignoring its true function to scrutinize the public administration.

Unlike customer care services and grievances units set up to consider complaints within the public administration, the Office of the Ombudsman does not have the function to implement and promote government programmes and policies. It is not an institution in the service of government. It is at the service of citizens and the House of Representatives. It has the duty to provide redress in those cases where the action or inaction of a public authority appears to have been contrary to law, or was unreasonable, unjust or oppressive or improperly discriminatory or was based wholly or partly on a mistake of law or fact. It will also seek to provide redress where it considers that the decision of the public authority was simply wrong.

When correctly managed by well-intentioned persons seeking redress for administrative mistakes within the limits of applicable guidelines, customer care and grievances units are a useful tool to rectify injustice for the individual and for the common good. When however, they are not so managed, because they are not independent and autonomous bodies they can easily develop into mechanisms which generate cronyism, clientelism and political patronage that are the antithesis of good public administration.

It is clear that the legislator when unanimously approved the Ombudsman Act intended to set up a strong, independent and autonomous institution, accountable to Parliament with the widest possible powers to scrutinize the public administration. It has the function not only to formalize final opinions on the exercise of administrative discretion that negatively impact individuals but also to determine whether that decision was sanctioned by law or taken in accordance with a law that was unjust or unreasonable or was simply wrong.

While it is therefore obvious that the Ombudsman and Commissioners need to ensure that laws and regulations are observed by public administrators, their work in the pursuit of justice and good public administration goes well beyond strict legality. Principles of correct administrative behaviour, reasonableness, fairness and equity should motivate and determine their actions in the exercise of their functions.

It is a fallacy to opine that the Ombudsman institution has throughout the years in its internal management procedures failed to behave in the same way that it obliges other authorities to do or that it did not embrace the principles of good governance and practice by operating according to the same standards it set for others. Nothing is further from the truth.

It is not proper for me at the end of my tenure to point fingers at the failures of others. These Case Notes like its predecessors, illustrate the thoroughness and quality of the investigations carried out by my Office. They witness their objectivity and dedication in the search of truth and justice when exercising its functions as defender of citizens' rights and promoter of a good public administration.

I firmly believe that the mission statement of the Ombudsman extends to a commitment to its proactive role as the public conscience of the public administration that needs to be constantly alerted to its obligations not only to do what is legally right but also that which is intrinsically correct and just.

Experience has shown that there is a need to educate people, including persons in authority, on the real values that the Ombudsman institution stands for as an independent and autonomous authority in the service of Parliament. Rather than promoting any attempt at redefining the institution, society should ensure that

while recognizing the need to improve procedures where needed, the Ombudsman institution is not in any way weakened.

It should be strengthened not only through legislative provisions that further secure its autonomy and independence but also and perhaps more importantly, by a change in mentality that it is not an extension of the public administration but a valid instrument at the disposal of Parliament to hold the Executive accountable for its actions at all times.

This is my heartfelt hope for the future.

Anthony C. Mifsud
Parliamentary Ombudsman

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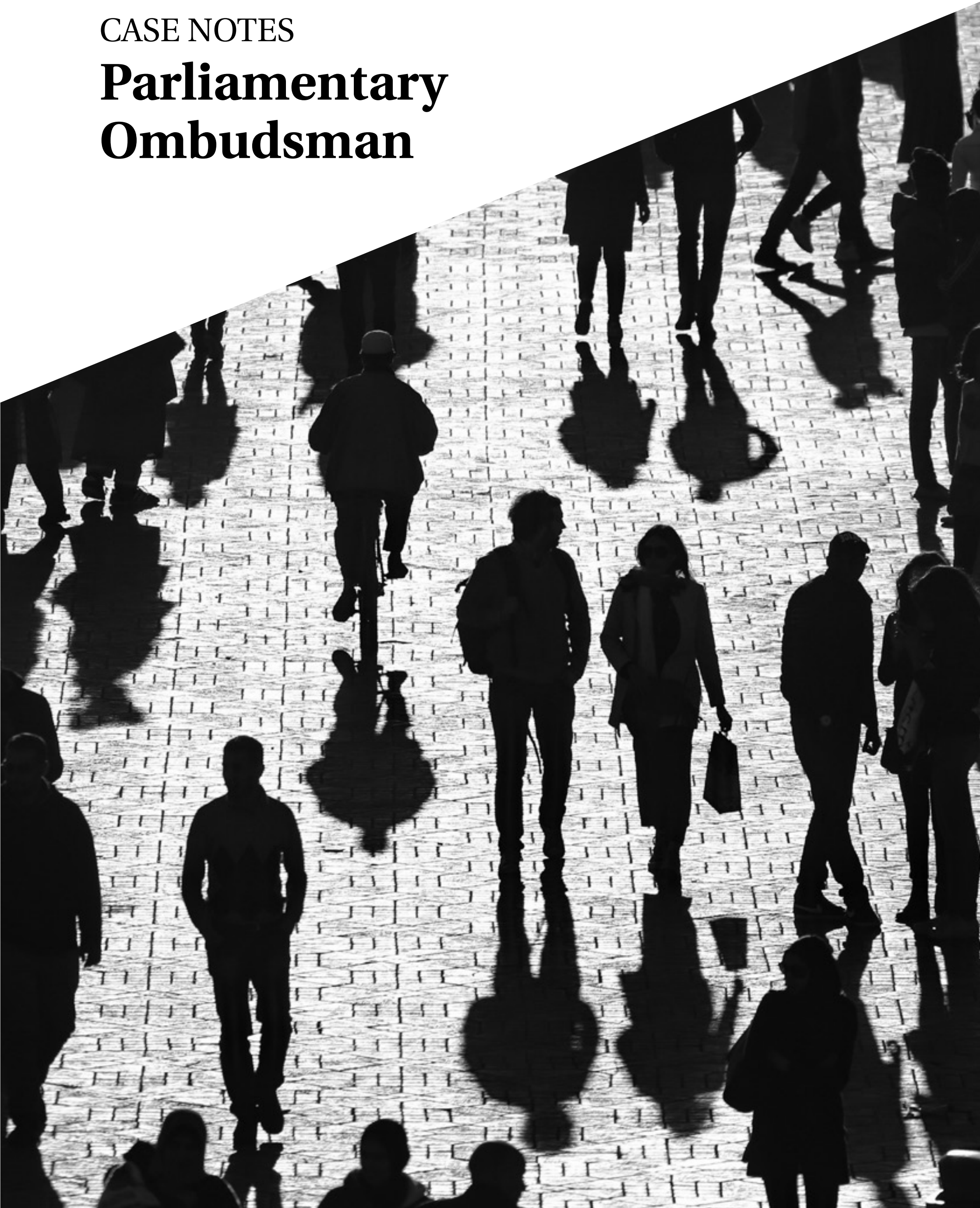
CASE NOTES

Parliamentary Ombudsman



Review by Ombudsman of Commissioner's Final Opinion is an Exceptional Procedure – Not an Appeal

The complaint

A teacher employed with the Department of Education felt aggrieved by a Final Opinion given by the Commissioner for Education on a complaint lodged following the refusal of the Education Directorate to pay arrears in pay following the signing of a Collective Agreement. Complainant submitted that she was discriminated against since other teachers had received these arrears. She therefore requested the Ombudsman to re-examine the grievance to establish "*on which legal framework was this decision undertaken and which legal aspects differentiate my case from others who did get the arrears*".[1]

Final Opinion of Commissioner

After having reviewed the material submitted by complainant and the feedback received from the then Ministry for Education and Employment, the Commissioner had noted that in terms of the Ombudsman Act : "*A complaint shall not be entertained … unless it was made not later than six months from the day on which complainant first had knowledge of the matters complained about;*". The evidence showed that that said time limit had lapsed months before the complaint had been filed. The Commissioner however considered that he could investigate the complaint since there were special conditions which made it proper for him to do so. He therefore exercised the discretion endowed upon him by the Act to further investigate the complaint.

1 Email by complainant addressed to the Ombudsman dated 22 April 2021.

The Commissioner however did not uphold the complaint. The investigation on its merits of the case showed conclusively that both the Sectoral Agreement, as well as the Bridging Agreement to which complainant referred, had come into effect well after complainant's move to the State's School system. Furthermore, both agreements were not retroactive.

Complainant files Objection with Ombudsman

The complainant felt aggrieved by the Final Opinion of the Commissioner for Education. She requested the Ombudsman to inform her about the legal grounds which had led to her complaint being dismissed, insisting that she had been discriminated against when she had not been given arrears in pay which her colleagues had received.

The Ombudsman's considerations

In his Final Opinion, the Ombudsman confirmed the findings and conclusions of the Commissioner for Education and made a number of interesting considerations of general interest on how the Ombudsman Act should be interpreted and applied, particularly those provisions that govern the institutional relationship between the Ombudsman and the Commissioners for Administrative Investigations in the exercise of their respective functions.

Commissioner's exercise of discretion

The Ombudsman noted that the Commissioner for Education had correctly observed that the complaint was time-barred in terms of Article 14 of the Ombudsman Act. This provides that as a rule, a complaint filed beyond the established time limit of six months would not be entertained by the Ombudsman or the Commissioners. The Ombudsman remarked that it was not the function of the Office to investigate past instances of maladministration indefinitely. It was imperative that a distinction is made between the act of maladministration that caused the aggravation and the consequences of the said act which might have a lasting or permanent effect.

This notwithstanding the Commissioner had in this case exercised his discretion according to law to further investigate the merits of the complaint, carefully examining all the material at his disposal. The Ombudsman should not in such cases question the correctness or validity of the exercise of the administrative discretion competent to the Commissioners.

Commissioner's jurisdiction

The Ombudsman noted that the Commissioner for Education was given by law a specific jurisdiction to investigate complaints alleging maladministration within the education sector. He was a sectoral ombudsman entrusted by law to oversee a specialized area of the public administration in which he was competent. The Parliamentary Ombudsman must therefore recognize and respect his autonomy. He should not substitute the Commissioner's discretion by his own or unduly interfere in the exercise of his functions.

Recourse to the Ombudsman by a complainant who was not satisfied with the investigation conducted by a sectoral ombudsman should not be considered to be an appeal from the Commissioner's final decision or anything that was consequential thereto. It should rather be considered to be an effective means of review of those proceedings primarily aimed to establish that the rules of due process meant to ensure a fair hearing have been duly observed. Such a review should be considered to be an exceptional procedure. The Ombudsman referred to Article 17A (7) of the Ombudsman Act which provides that "… *the Ombudsman shall not accept complaints asking him to review the report of any Commissioner once such repot has been communicated to the Government, or other authority, body or person to whom this Act applies and to the complainant, if any, except in cases where the Ombudsman considers that there are issues relating to breach of the rules of natural justice.*"

Request for review to be filed without undue delay

The Ombudsman considered that although the Ombudsman Act and the Commissioners for Administrative Investigations (Functions) Rules did not provide for a time-limit within which a request for review was to be made to the Ombudsman, the exceptional nature of this procedure necessarily required that such requests be referred to the Ombudsman immediately and without unnecessary delay. A complainant who felt aggrieved by a decision of a Commissioner or an investigation conducted by him must promptly raise his concerns with the Ombudsman. He should not allow several months to pass before asking for a review of his complaint.

Conclusion

The Ombudsman noted that the complainant had only objected to the decision of the Commissioner for Education and requested clarifications from the Ombudsman seven months after the said decision had been communicated to her. In the Ombudsman's opinion there were no grounds to justify this excessive delay in asking for a review. There was therefore no reason to warrant a reconsideration of the Commissioner for Education's Final Opinion.

Guidelines on the Investigation of Selection Processes

In a Final Opinion following an investigation of a complaint on the conduct of a selection process the Ombudsman made a number of important considerations that define the parameters within which he and his Commissioners conduct investigations on complaints by persons who felt aggrieved by the way selection processes were conducted in the public service and the public sector. These considerations merit to be recorded because they lay down the guidelines that are followed by investigators enquiring into the correctness and validity of these processes.

The complaint

A complainant who had been in employment with a government agency applied for the position of junior administrative officer following an internal call, but was not successful. He felt aggrieved by the result. He sought internal redress claiming that he had been discriminated against since he was fully qualified for the post and colleagues who were his junior had been promoted instead. The agency had informed him that while he met all the criteria required in the call for applications, he had failed the interviewing process.

He therefore filed a complaint with the Office of the Ombudsman requesting a review of the selection process. He expressly asked to be given an explanation for his failure to obtain the promotion since he had always given good and loyal service to the agency and was qualified for the position.

The investigation

The Investigating Officer handling the complaint thoroughly investigated the selection process. It was established that complainant was found to be eligible since he satisfied all the requirements in the call for applications and had been interviewed by the selection board. The Office had the opportunity to peruse

documentation relative to the process. It determined that the assessment of all eligible candidates had been carried out in line with criteria and weightings which had been established before the commencement of the selection process. This assessment formula had been applied uniformly by the Selection Board in respect of all applicants.

The selection board recorded that complainant had improved in his work output but had still some way to go to reach the expectations required for the position. The Head of the Section in which complainant was currently posted and who chaired the Selection Board, expressed the views that he had no doubt that complainant would be selected in the future for the higher post applied for. He however concluded that complainant had not as yet acquired the necessary skills and competences required for the proficient performance of the duties attached to the position.

Ombudsman's final opinion

In his final opinion the Ombudsman stated that in the light of the evidence produced he could not conclude that the selection process was flawed or that the decision of the Selection Board was unreasonable, unjust or improperly discriminatory. He had found no clear, objective evidence indicating that the assessment criteria were not applied uniformly or that the selection process was manifestly unfair. He could not therefore disturb the results of the process. He felt however that he should make a number of recommendations that the agency could follow in future selection processes. These recommendations were applicable to all selection processes and would not only ensure that procedures were fair, just, non-discriminatory and transparent but also be manifestly seen to be so.

Ombudsman's recommendations

The Ombudsman recommended that in future selection processes the agency should:-

a. include qualifications as a criterion in selection processes at all levels and ensure that qualifications are assessed using objective parameters, thus providing a system whereby qualifications could be quantified in terms of marks awarded;
b. ensure a balance between objective and subjective criteria in the selection of applicants. The Office noted that although it did not find evidence that the selection criteria established for the process under review were applied irregularly or that they were fashioned so as to favour particular applicants, the

application of a completely subjective approach was worrying even in the case of internal selection processes/promotion exercises. A completely subjective assessment considerably reduced the possibility on a fair and impartial view of the selection process and diminished transparency, a crucial element in a selection or promotion exercise; and

c. ensure that selection boards prepare a Selection Board report in respect of every selection process and retain interview notes or minutes on the candidates' individual performance for a reasonable period after the conclusion of the selection process. Such notes are of particular importance when results are challenged.

Important considerations

Guidelines

These recommendations were made by the Ombudsman following a number of important considerations that illustrate the guidelines that investigating officers follow when dealing with complaints on selection processes. These guidelines are meant to determine the parameters within which such investigations should be conducted. This not only to ensure a just, fair and transparent process but also when correctly and properly taken to secure the autonomy of selection boards and the authority of their decisions. These considerations are of general interest and merit to be recorded since they provide a useful insight into the principles that guide the Ombudsman and his Commissioners in the investigation of such complaints and their method of approach.

Ombudsman respects the autonomy of the Selection Board

The Ombudsman clarified that his Office could not conclude that the result of an interview was unfair, mistaken, discriminatory or otherwise unjust when it resulted that the selection process was a valid one and there was no clear objective evidence that the process was not conducted fairly or was not in line with the established criteria. The Office did not itself decide or comment on how criteria/sub–criteria are set, even if for the sake of argument it were not in agreement with how they were applied in a selection process unless it resulted that these were intended in advance, to favour a particular candidate.

Moreover, the Ombudsman should not be considered as an appeals mechanism from the decision of a selection board and should not substitute his/her discretion

to that of the board. This is so because members of a selection board are chosen for their expertise in the area covered by the application. Their integrity and the validity of their judgement should not be doubted unless there was clear evidence that they had not performed their duties in the selection process scrupulously.

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 candidates involved, there was no room for a differing opinion from the Office of the Ombudsman.

Neither the Ombudsman nor for that matter any office of review should challenge or substitute the subjective evaluation of the selection board about the applicants' performance by his own, without good cause. Subjective criteria are dependent on the individual opinion of the members of the selection board, on the replies provided by the applicant to questions posed and on his/her performance during the interview. The Ombudsman who was not even remotely involved in the process, cannot therefore comment on how a candidate demonstrated his or her claimed merit during the interview.

Completely subjective approach a matter of concern

The Office of the Ombudsman has consistently maintained that a subjective approach, more so a completely subjective one, is a matter of concern in that it allows little, if any, scope for review and lessens the transparency of a selection process. This subjectivity can however be justified if it is motivated and guided not by arbitrary preferences but by proficient, professional knowledge and expertise. In this regard it is vital to remember that members of selection boards are chosen for their expertise in the area covered in the application. They are fully conscious of the demand of the position and of the qualities required for the proficient and performance of the selected candidate.

The Ombudsman further noted that when the performance of the candidates during the interviewing process could have a determining effect on the result, the keeping of notes became of particular importance. The Office noted that the "*Manual on the Selection and Appointment Process under Delegated Authority*" applicable to the public service, made it compulsory to keep notes on each candidate's interview performance when filling any vacancies. This same obligation however did not

apply to public sector entities. It was however good practice to keep such notes as they become especially useful when a result is challenged.

Qualifications should be one of the selection criteria

The Office was also of the opinion that qualifications should be included as one of the selection criteria so as to reward those applicants who strove to improve their skills and competences by attending training courses and completing programmes of studies. The fact that the selection process was not for a managerial position but a promotion from one administrative grade to another and that therefore selection was more focused on the employee's working experience at this place of work did not justify the complete disregard of an applicant's qualifications.

Sequel

The Final Opinion was duly notified to the agency involved and the Office sought information on its reaction to the recommendations made. The agency informed the Ombudsman that during a meeting the previous year regarding a similar case, it had taken note of the recommendations made by the Office and had taken immediate steps to implement them. Its human resources unit had revised the internal calls policy and amended the relative template in line with the recommendations made.

Board of Local Public Examinations – Ministry for Education

Timely action by Ombudsman secures appointment

The complaint
Complainant had applied to sit for the selection process for the position of Second Secretary within the Ministry for Foreign and European Affairs which includes an exam component conducted by the Department of Examinations within the Ministry for Education under the authority of the Board of Local Public Examinations. Complainant submitted a complaint in connection with the decision of the said Board that declined his request to be granted an opportunity to sit for the examination component of the selection process on alternative days since he was in mandatory quarantine and could therefore not attend on the scheduled dates.

The facts
Following a call for applications for the position complainant was invited by the Director, Examinations of the Department of Examinations within the Ministry for Education to sit for Part I of the process consisting in a written exam in Maltese and English. On a date very close to that on which the exams were to be held a relative of complainant tested positive to COVID-19 and was therefore issued by the Superintendence of Public Health with a ''*Notification of Self-Isolation and Mandatory Quarantine*" in line with Legal Notice 99 of 2020. Those residing in the same residence, including complainant, were also ordered to remain in self-isolation and mandatory quarantine for a period that extended beyond the day on which the exams were to be held.

Complainant immediately notified the Director, Examinations forwarding a copy of the official notification issued by the health authorities, seeking guidance as to what rules were applicable in similar situations and what actions he could take in

the circumstances. He was initially informed by an official of the Examinations Department that the dates of the examinations could not be rescheduled. Complainant reverted commenting that the call had been issued during a pandemic and that the Department should thus be aware that similar circumstances might occur and provide for arrangements to enable eligible candidates to sit for examinations and not stall their career progression. Complainant had been advised to refer his request to the Board of Local Public Examinations. Complainant did so pointing out that MATSEC had in September 2020 given students who wanted to take up Medicine and who were in quarantine the opportunity to sit for their MATSEC exams by providing invigilators. Secondary schools had also organized online examinations and/or designed additional papers for such cases.

Request declined by the Board
Complainant's request was declined by the Board of Local Public Examinations that insisted that:

"1. the Board follows and adheres to the measures set in the Covid-19 Conditions and Guidelines for Examinations; and

2. during this pandemic there were other instances where the Board received requests from candidates who were unable to sit for an exam, because of their direct or indirect exposure to COVID-19 coronavirus, to provide them with on-line supervision or a supervisor at home. However the Board for logistic reasons and health and safety measures never applied this policy and will continue to do so for the time being."

Complainant seeks waiver from quarantine
The complainant meanwhile, sought to explore the possibility of obtaining a waiver from quarantine from the health authorities for the duration of the exams, subject to his having a 24-hour negative swab test result. Meanwhile, complainant was informed by the Board that it had reconsidered its original decision and that in view of the regulations and guidelines issued by the health authorities and since he was in quarantine, he would be able to sit for the exams provided he takes a swab test and obtains a waiver letter from the Superintendent of Public Health. The Board further elaborated that should such a waiver be granted, the health authorities were to inform the Department of the arrangements required for complainant to be able to sit for the exams. Complainant was eventually informed by the Superintendent

of Public Health that it was not possible for the Department to exempt him from mandatory quarantine.

Motivation of complaint

In his complaint to the Ombudsman complainant expressed his disappointment at the decision taken by the Board of Local Public Examinations arguing that this led to his missing out on the selection process in question since no alternative measures were in place to address his predicament. He insisted that the Board's reasoning that since no solutions had been provided to similar previous request the Board would continue following that policy was not forward-looking. It showed that the Board did not adapt to the new challenges brought about by this pandemic. He argued that the decision in effect blocked his career progression, observing that the position had not been offered by the Ministry for two years and he had been waiting for the issue of the call for several months.

In his opinion, although there was no guarantee that he would be successful in these exams and that he would eventually be selected for the position, he should have been given an opportunity to compete in the selection process. He opined that institutions need to update their procedures and regulations as COVID-19 had brought about considerable changes.

The investigation

In view of the urgent nature of the grievance the Ombudsman immediately communicated the complaint to the Permanent Secretary of the Ministry for Education as per normal procedure and a meeting was held with the Permanent Secretary and other Ministry officials, including the Director of Examinations and a member of the Board of Local Public Examinations representing its Chairman. During this meeting it was clarified that although the Board was one of the entities falling within the portfolio of the Ministry for Education, it was autonomous and was endowed with the remit to decide on all issues connected with Public Local Examinations. It was therefore agreed that the complaint be brought directly to the attention of the Board for its comments and further consideration.

The Office of the Ombudsman promptly referred the matter directly to the Board that reconsidered the case in an effort to find a solution, mainly considering the possibility that an additional session of the exam be held especially for complainant.

The Board informed the Ombudsman that during the discussion objections had been raised against this proposal on a number of grounds including what could be the effect of such a measure on past, present and future candidates, as well as, possible negative repercussions on the Board itself. The Board insisted that it had never given preferential treatment to anyone or created any form of precedent and would continue to conduct itself as it had done in the past following the principles of justice, transparency and consistency in its decisions.

Reaction of the Public Service Commission

Before proceeding with its final opinion, the Office of the Ombudsman brought the grievance to the attention of the Public Service Commission and the Ministry for Foreign and European Affairs for any comment or action that they might deem appropriate.

Although the Commission informed the Ombudsman that it did not have authority over the Board of Examinations it remarked that the ensuing developments were not within complainant's control. The Commission considered that complainant was obliged to abide by the direction of the Superintendent of Public Health who had absolute authority with regard to matters concerning Public Health. It was noted that the outbreak of the COVID-19 pandemic had presented opportunities across all levels for organisations, including in selection processes, to adapt and adopt technological tools in the delivery of their services, which opportunities had not necessarily been utilised in this case.

Ombudsman's considerations

The Ombudsman considered that the Board's decision was primarily motivated by the fact that it did not want to set a precedent by allowing complainant's request as no arrangements and procedures were in place for cases where an applicant was precluded from sitting for local examinations conducted by the Examinations Department due to **exceptional and unforeseen circumstances which were beyond the candidate's control**. The Board further contended that complainant had filed his complaint with the Ombudsman, appealing its decision when he was aware that the decision that he could not sit for the examinations had been taken by the health authorities. It remarked that during the pandemic the Board had always acted on the instructions of the health authorities and abided by their decisions. It had done so also in complainant's case.

While not doubting that throughout the COVID-19 Pandemic the Board had always acted in line with the instructions, guidelines and decisions of the health authorities, the Ombudsman remarked that the Board's claim that the decision that complainant could not sit for the examinations had been taken by the health authorities was incorrect. The decision taken by the Superintendent of Public Health referred **exclusively** to the fact that complainant, being a close contact of a positive person, could not be allowed to leave his residence as the health authorities could not waive mandatory quarantine. In effect complainant had been forcefully confined to his residence, something quite different from cases, for instance, of when a person was ill.

Board should have been proactive

When the Board proposed that complainant should obtain a waiver letter from the health authorities, it should have foreseen that it was probable that such a waiver would not be granted. It should therefore have been proactive and provided a reasonable remedy so as to enable complainant, or any other applicant in identical circumstances, to proceed with his application for the position he was aspiring to. Taking a blinkered approach to prevailing circumstances and opting to follow blindly what is erroneously perceived as being 'binding' precedent led as in this case, to manifest injustice.

While the Office of the Ombudsman acknowledged that complainant might not have obtained the minimum mark stipulated in the call for the written exams for him to be able to proceed to the second part of the selection process – the interviewing process – the lack of positive action of the Board and its insistence that it did not want to *create* a precedent because of its earlier refusal to provide a remedy to other candidates who were unable to sit for an exam because of direct or indirect exposure to COVID-19, necessarily stultified complainant's career prospects. It denied an eligible candidate the possibility of proceeding with his application. When complainant had applied for the position he could not have foreseen that he would not be able to sit for the examination due to mandatory quarantine because of circumstances that were exceptional and completely beyond his control.

Special and exceptional circumstances

On the other hand the Board, that had been conducting examinations for more than a year during a pandemic which had presented challenges across all levels should

have pre-empted similar situations by implementing procedures to be followed in extraordinary circumstances and beyond an applicant's control. Complainant, who was obliged to abide by the directives issued by the Health Authorities, had taken immediate steps to inform the Examinations Department and the Board of his situation. He had provided them with ample proof of his circumstances and should therefore have not been denied the possibility of proceeding with his application. He should have been granted the possibility of sitting for special or *ad hoc* papers.

The Ombudsman considered that experience taught that special and exceptional circumstances might arise which require, out of a sense of justice and equity, a departure from established procedures and the creation of specific procedures and regulations to provide for such circumstances. This even more so when established procedures had failed to address issues arising from such special circumstances. There is no inherent arbitrariness, unfairness or lack of transparency, as the Board seemed to suggest, in granting an *ad hoc* special paper, even if to one or a limited number of applicants, if justice and equity so demanded. The logistical or administrative problems mentioned by the Department of Examinations were in the Ombudsman's view not unresolvable.

Conclusion and recommendations
For these reasons the Ombudsman upheld the complaint and concluded that it is only just and fair that complainant be given the opportunity to sit for the exam component of this selection process.

He recommended:
i. that the Board of Local Public Examinations grants a special session to complainant as soon as possible and that the result of his written examination be published together with the result of the other candidates who sat for the examination;
ii. that such a remedy should also be provided to other applicants who were in an **identical** situation to that of complainant, including any in this selection process; and
iii. that the Board for Local Public Examinations in collaboration with the Director, Examinations issues guidelines and procedures to address the

circumstances complainant had found himself in as a result of the outbreak of the COVID-19 pandemic.

Sequel

The Ombudsman's Final Opinion was notified to the Board of Local Public Examinations on 7th May 2021. Five days later the Board informed the Ombudsman that it would implement his recommendations. Complainant eventually confirmed that he had sat for a special session of the examinations organised by the Board and proceeded with the selection process. He expressed satisfaction at the way the Office handled his case speedily. What was important at that stage was that the case had been settled and that the entities involved would in the future follow the Ombudsman's recommendations to avoid further complaints. He later informed the Office of the Ombudsman that he had been successful in the selection process and was appointed to the post.

Malta Police Force

Vitiated selection process within the Malta Police Force

The complaint

A number of police Superintendents felt aggrieved by a selection process for the position of Assistant Commissioner following a call for applications to which they had responded alleging that the process was unfair and discriminatory. They complained to the Ombudsman seeking redress for their perceived injustice.

The facts

The basic facts common to all complainants, included the following:-

1. Complainants had applied to be considered for the post of Assistant Commissioner for Police following a call for applications open to Superintendents, issued in August 2016. They submitted themselves to the selection process and had been interviewed by a selection board that considered them to be eligible for the post. The Board, that was chaired by former Police Commissioner, Lawrence Cutajar and two members Assistant Commissioners, Mr Josie Brincat and Mr Joseph Mangani, interviewed twenty one candidates, seven of whom including complainants had failed.
2. The call for applications did not stipulate how many Assistant Commissioners were required by the Police Corps. Some complainants had been informed that apparently only three Superintendents would be promoted to Assistance Commissioners. However subsequently ten were promoted to this post. No reason had been given for this substantial, unexpected increase. The Ombudsman was informed that the decision was taken following a major reorganisation of the Police Corps' sturctures.

3. On 11 January 2017, the Permanent Secretary of the Ministry for Home Affairs, National Security and Law Enforcement informed the Commissioner of Police that he had approved the results and the report of the selection process.
4. The complainants and others who had failed, were not satisfied with the result. They availed themselves of the Public Service Commission Regulations that allowed them to petition to the Public Service Commission (PSC).
5. Complainants were given an opportunity by the PSC to make submissions explaining their grievance and during an interview, were given their marks allotted to them by the Selection Board and the notes kept during the interview. They were not however given the opportunity to produce witnesses.
6. The Public Service Commission expressed serious concern on some aspects of the process that eventually decided that there was no reason for the result of the selection process to be disturbed and confirmed the conclusions of the Selection Board.
7. An attempt was made to contest the decision of the Public Service Commission with a request to the Courts to issue a prohibitory injunction to prevent the promotions to Assistant Commissioner which proved unsuccessful. Complainants then sought redress from the Ombudsman.

The investigation

While keeping in mind the particular circumstances of each complaint, the Ombudsman established those facts which gave rise to the alleged injustice. The Ombudsman's Final Opinion made a detailed analysis of the results of the interviews.

A comparative study of the marks allotted to each complainant and those allotted to other successful candidates who in their opinion did not merit to pass and be promoted to Assistant Commissioner was made. The details of those comparative exercises which were undoubtedly of interest to the complainants are not so relevant to the general public. As such, this case note will be limited to the important issues dealt by the Ombudsman in his final opinion regarding:-

A. the relations between the Office of the Ombudsman and the PSC;
B. the unjust, irregular and discriminatory selection process; and
C. the liquidation of monetary compensation.

A. The Ombudsman and the Public Service Commission (PSC)

Following his thorough investigation, the Ombudsman concluded that this selection process approved by the Public Service Commission was vitiated. This Office was legally bound and had been given the right and the function to investigate complaints which concerned selection processes. However, the Ombudsman cannot annul the selection process. This does not preclude the Ombudsman from finding that some applicants did not really merit promotion whilst others had worked diligently and deserved to be promoted.

In selection processes which were conducted under the PSC Regulations, there was the added difficulty that the whole process had been scrutinised by the PSC and any recommendation by the Ombudsman running counter to its decision could impinge on the constitutional authority of the Commission.

The Ombudsman stated that in fact he had no intention to exclude or ignore the decision of the Commission in the essence of its functions and powers since this would run counter to the spirit if not the letter of the Constitution. On the other hand, the Ombudsman could not endorse or accept the exercise of administrative discretion by a Selection Board when it acted in an arbitrary and discriminatory manner.

The Ombudsman stated that he was not lightly taking a position that ran counter to that of the PSC. The procedures conducted by the PSC and the Ombudsman were completely separate and distinct from each other. The investigations of complaints by the Office of the Ombudsman did not lead to recommendations for promotions or the filling of vacancies as was the case with petitions dealt by the PSC, which is the constitutional authority set up with the express function to regulate appointments in the public service according to Article 110 of the Constitution.

The PSC also has the function to receive petitions from public officers who do not agree with a decision taken by any selection board on appointments. Complainants had correctly petitioned the PSC following the publication of the results of the selection process. The PSC had examined their complaint and decided that the result of the Selection Board was to stand.

The Ombudsman cannot reverse or substitute the regulatory and constitutional functions of the PSC. He could only enquire into the workings of the Commission after all existing remedies had been exhausted. The Ombudsman's functions in such cases was not to arrive at decisions that were different from those of the Selection Board or the PSC but to ensure that correct procedures were followed according to law and justice.

B. Unjust, irregular and discriminatory selection process

Following a careful enquiry into procedures followed by the Selection Board and their subsequent review by the PSC, the Ombudsman concluded that the complainants had suffered an injustice when they were failed the selection process for the post of Assistant Commissioner. The procedures followed by the Board were not correct and were intentioned to lead to the choice of individuals some of whom were not suitable to occupy the position. The facts that resulted from the investigation showed conclusively that the selection process was tainted with defects that had contributed to the grave injustice suffered by complainants.

While complainants did not have a vested right to be promoted, they certainly had the right to be treated in a dignified manner through a transparent and regular process. In these cases the Ombudsman does not and cannot decide who should be chosen or whether complainants should be promoted. The principal task of this Office was to investigate whether the Selection Board had acted correctly during the process and especially with regards to the complainants.

The Ombudsman considered the rank of Assistant Commissioner of Police Force to be an important one. It followed that the selection process had to be a serious and rigorous one, if anything because of the fact that while in the past not more than two were appointed to the rank, in the 2016 process fourteen from twenty one officers had passed, out of which twelve had been appointed.

The detailed considerations that led the Ombudsman to an inevitable conclusion that the whole selection process was a parody can be followed in his final opinions which have been posted online on this Office's website following their laying on the Table of the House of Representatives. For the purpose of this case note, it is sufficient if the main points of concern that led the Ombudsman to uphold the complaints are indicated.

i. Eligibility

The Ombudsman queried the fact that the only eligibility criteria laid down in the circular calling for applications for the post was that, by the closing time and date of the call, applicants had to be public officers in the rank of Superintendent of Police. All Superintendents in the Police force could therefore apply for promotion to Assistant Commissioner.

In fact, the Selection Board informed the Permanent Secretary in the Ministry for Home Affairs, National Security and Law Enforcement that all applicants were considered to be eligible and were asked to attend the required interview. Though there was no doubt that it had been approved by the Permanent Secretary, the Ombudsman queried whether this simple and basic eligibility formula was correct. It was preoccupying that as a result, one of the applicants who had been subjected to a series of disciplinary procedures as well as to criminal proceedings instituted by the police and found guilty, had not been declared from the start to be ineligible to apply for the post of Assistant Commissioner. He had been promoted to the position of Superintendent barely a year before he had been appointed Assistant Commissioner in the call for applications that gave rise to this complaint.

The Ombudsman observed that the irregularities in this selection process had started before the applicants were interviewed. Had the process been correctly made by excluding candidates who were not suited for this position, complainants could conceivably have been chosen for promotion. Everyone should be aware of the fact that an Assistant Commissioner of Police did not only have the duty to protect citizens but he must inspire trust as well.

In these cases the Public Service Commission, selection boards and officials charged with examining applications had the duty to disqualify candidates who had a proven criminal record.

ii. Vitiated Selection Process

The Ombudsman made a careful consideration of all the circumstances that led to the report of the Selection Board, the manner in which the process was handled and the particular circumstances of each of the four complainants who were failed. The Ombudsman identified serious defects in the procedure which corrupted the

selection process. This was qualified as a sham and a parody of what should have been a fair and just contest.

He concluded that the selection process had been preordained from the start to ensure the promotion of some applicants to the exclusion of others including applicants. It was defective and irregular in so far as it lacked the essential element of objectivity necessary for the promotion of candidates to fill this responsible position. There was no objective explanation which justified why complainants had failed from the interview. Actually the then Commissioner of Police intimated that he considered the choice of Assistant Commissioners to be a personal prerogative. The only justification he brought was that "*he trusted them*".

iii. Defective criteria used for the interview

The criteria used for the interview that led to the promotions were approved by the Permanent Secretary of the Ministry after having been vetted by the Public Service Commission. Yet, there was a marked difference between what the Manual on the Selection and Appointment Process under Delegated Legislation in the Malta Public Service required for determining the selection criteria and weightings and what the Selection Board actually determined. In fact it established criteria that were completely different from those stipulated in the Manual. The manual that applied to the selection of officers in the public service clearly laid down that at least three criteria had to be objective namely 'Related Knowledge', 'Relevant Experience' and 'Qualifications'. This did not happen in this case. Even the objective criteria of "Qualifications" was removed. This was a serious failure that not only prejudiced those applicants who possessed qualifications but also rendered the exercise completely a subjective one.

iv. Unexplained and unreasonable markings

The Ombudsman could find no reason to explain this serious departure from established criteria and for the marks that were given to complainants who failed to pass the interview. Complainants who had qualifications and who had years of experience as Superintendent surprisingly failed the interview while other applicants including those which put the Police Corps in serious disrepute were successful.

The Ombudsman was not convinced that the selection process was fair and just. The Constitution and the Regulations enacted under it govern selection processes and the relative Manual had sufficient safeguards to ensure that such processes would be conducted correctly. Yet this did not happen to the prejudice of the complainants.

v. Suspicious criteria give rise to concern

Of even greater concern for the Ombudsman was the fact that the only eligibility criteria to apply for promotion was that an applicant had to have the rank of Superintendent. The call for applications did not require any other qualification that would have restricted selection to those applicants who were potentially competent and qualified for such a high position. As a result applicants who had only been promoted to Superintendent for a year or less could compete with others who had to their credit long years of service in that rank. Experience and years of services in the rank of Superintendent were surprisingly not considered as criteria that merited consideration.

Moreover, the Selection Board did not require applicants to have a clean conduct sheet with the result that an applicant who had a criminal record was allowed to successfully compete in the selection process. As a result applicants who did not merit promotion had been preferred to complainants who had long years of service in the rank of Superintendent with excellent record of service and a clean conduct sheet.

Conclusion and recommendations

C. Liquidation of monetary compensation

Having concluded that complainants had suffered an injustice that needed to be remedied the Ombudsman considered how it could be redressed. The Ombudsman opined that since he could not recommend that complainants be promoted to the rank of Assistant Commissioners nor could he recommend the annulment of the entire selection process since that would be unfair on those selected candidates who were qualified and competent for the position, this injustice could be partly redressed by the payment of a lump sum monetary compensation.

In his final opinion the Ombudsman opted for a hybrid solution that in the circumstances could satisfy complainants' aspirations. This solution would respect the decision of the PSC to confirm the selection process notwithstanding the

severe reservations that it had on the conduct of the then Commissioner of Police, Lawrence Cutajar.

The Ombudsman recommended that a fresh call for applications for the post of Assistant Commissioner should be issued that would take into account and rectify the negative aspects of the prior call. Complainants and others would be given the opportunity to compete in a just and trasparent process.

If this recommendation could not be implemented also because some complainants might meanwhile have retired from the Police Corps, the Ombudsman recommended the payment of a one time lump sum monetary compensation of €15,000. The Ombudsman qualified the payment of this amount as "*moral damages*" due to the fact that the findings of the investigation showed that complainants had not been given the opportunity to compete in a fair and just manner with other candidates who were appointed and who did not merit such appointment. This compensation would not be given because there was any certainty that complainants in that selection process were going to be promoted but because there had been the certainty that in the way the process was conducted they were destined to fail.

Sequel

The reports of the complainants were communicated to the Ministry for Home Affairs, National Security and Law Enforcement which in turn stated that it would not accept the Ombudsman's recommendations.

In view of this, the Ombudsman decided to submit the reports to the Speaker of the House of Representatives for them to be laid on the Table of the House and thus be available to the public at large.

Office of the Prime Minister

Ombudsman recommends grant of service pension

The complaint and relevant facts

1. Twenty serving and former Customs and Excise guards and officers at the Customs Department successfully applied to fill these posts following a call for applications published in the Government Gazette of 7 July 1978.
2. These calls for application expressly specified that they were on pensionable establishment and that the result of the examination remained valid for a period of twelve months from the date of its publication.
3. The Prime Minister acting on the advice of the Public Service Commission, appointed those candidates who had satisfied the established criteria and successfully sat for the required examinations to the advertised posts. Guards within the Department of Customs and Excise were appointed with effect from 9 February 1979 while officers with that department were appointed as from 5 March of that year.
4. Shortly after their appointment and precisely on 16 March 1979 Parliament approved Act XII of 1979 amending the Pensions' Ordinance (Chapter 143). That law that was given retroactive effect, decreed that no pension, gratuity or other allowance shall be payable under the Pensions' Ordinance nor shall any other payment be made hereunder to any person who was not in the public service prior to 15 January 1979. This law directly negatively impacted on complainants who had been appointed to their posts after 15 January 1979 but before 16 March 1979 when this retroactive Act came into effect.
5. When some of the complainants approached retiring age they sought assurances that they would be paid the service pension to which they felt they were entitled. Faced with negative replies they asked the Principal Permanent Secretary to intervene so that the issue could be clarified. However the Principal

Permanent Secretary by letter of 20 July 2017, maintained that essentially the employment of these employees was regulated by legislation applicable when they started working and not by that when the application was issued. He insisted that notwithstanding what was stated in the call for applications, applicants' employment had come into effect after 15 January 1979 that was the cut-off date established by law beyond which no service pension was payable.

6. Complainants also had recourse to the Grievances Board for Public Officers but had the same reaction, insisting that according to its terms of reference it could not go beyond what the law specified.

Considerations

The Ombudsman noted that this complaint arose from a situation in which the government had failed to honour a commitment it made in the call for applications for a post in the public service after which a law was introduced that removed the right of successful applicants to receive what has been promised to them. It should be noted that prior to the enactment of the law introducing the cut-off date at 15 January 1979 for service pensions a major reform had taken place in Malta in the field of social services with the introduction of the so-called two-thirds pension and other benefits meant to support those who had never paid national insurance contributions or who did not have enough paid up contributions.

Government's objective was to ensure that the majority of people in need should enjoy a pension benefit. Government officials in the public service on the pensionable establishment had up to that date the right to a service pension in the form of a pension payment and gratuity. These benefits were of course better than those that other employees not on the pensionable establishment received on the strength of their national insurance contributions.

When complainants responded to the calls for application in 1978 the government had at that time been offering a packet to those who were interested in following a career with Customs. That packet specifically stated that the posts to which complainants applied would be on "*the pensionable establishment*". Other positions like for example the industrial grades, did not enjoy such a benefit.

The government had included this benefit as part of the conditions of employment bound to the advertised positions. The least government should have done was

to ensure that the cut-off date introduced by the amendment to the Pensions Ordinance should not apply to all those officers who had successfully sat for the examinations and who were awaiting the letter from the Public Service Commission officially recognising them as government employees according to the Constitution. Certainly one could say that these officers had legitimate expectation to be treated no more no less than what they had been promised in the call for applications.

The Ombudsman considered that the Pensions Ordinance clearly stated that those who had been appointed and given the letter of appointment by the Minister following a recommendation from the Public Service Commission had the right to receive a service pension. However, even though the appointment letter was not formally delivered until the individual physically received the letter, it remained a fact that once an applicant had passed the exams and satisfied all requirements he had the right to be appointed to the post.

It is clear that complainants had the legitimate expectation that government would honour its commitment to keep the promise it made in 1978 that the posts to which they were appointed would be on the pensionable establishment. The 1979 amendment meant a reduction in the income of complainants who were now suffering the consequences of a bad administrative decision and a faulty law when they were close to retirement or have already retired.

The Ombudsman stressed that he had no intention to encourage persons to evade laws. However he had to ensure that equity was respected and in this case that the law itself, which government had undoubtedly introduced for social reasons, would not impose any extraordinary burden on complainants. They were certainly not at fault that the administration issued their letter of appointment after that the cut-off of 15 January 1979 was decreed by a law that came into effect on 16 March 1979.

Conclusion and recommendation

The Ombudsman found that these complainants had suffered an injustice. He noted that his Office could not change the law since this was the function of the people's elected representatives in Parliament. However the Ombudsman Act gave the Ombudsman the right to recommend a remedy.

In this case he recommended that complainants should be given the service pension and all benefits inherent to the positions to which they were appointed. This on the strength that the Government Notice in the Government Gazette of 7 July 1978 specified that the posts were to be on the pensionable establishment. Government was bound to act on his promise to these employees and if necessary, also on *ex gratia* grounds. He recommended that the administration should make a list of all those officers in the public service that had applied for any call for applications and successfully completed the selection process before 15 January 1979 but who had been given their appointment after that date. Their situation should also be remedied in the light of the recommendations made by him in his final opinion.

Sequel

On 12 October 2021 the Ombudsman's final opinion was presented to Parliament after the administration did not accept his recommendation.

Local Enforcement System Agency – LESA

Right to appeal towing fee and fine secured

The complaint

A complainant felt aggrieved that he was forced to pay a hefty towing fee and fine to retrieve his car that he had correctly parked after that it had been towed to a depot on the direction of law enforcement officers. He complained that he had not been given the opportunity to contest these charges since the release of his vehicle could only be made against payment.

The facts

Complainant parked his car in a road in Sliema at a time when one could freely park without any restrictions. Due to construction works, the road was subsequently designated as a no parking area and as a "*tow zone*" for those contravening this order. The authorities were within their powers to remove any encumbering vehicle and complainant's car was therefore duly towed under the direction of LESA officers to a parking depot.

Once the vehicle was towed no attempts appeared to have been made to notify complainant of its removal. It was only six days later that complainant noticed that his vehicle was missing. At first he thought his vehicle was stolen and went to the Sliema Police Station to file a report. At that stage, he was informed that his vehicle had been towed.

Complainant went to the LESA offices in Fgura where he was informed that he could submit a petition <u>prior</u> to paying the towing fine but would incur an additional cost for storage (of the vehicle) of € 15 per day. Complainant opted to

collect his vehicle and pay the towing fine, plus additional costs amounting to €290. When he collected his car he noted that the contravention ticket was affixed to the windscreen of his car.

Complainant contended that the removal of his vehicle was abusive and that the daily running storage costs were unfairly levied given that he was not notified of its removal. He was therefore requesting that he be refunded the €290 he was made to pay.

The investigation

The investigation established that the facts as stated by complainant were correct. LESA informed this Office that complainant's vehicle had been towed away after he had ignored the no parking towing zone sign which was placed on site two days earlier. The area needed to be clear of parked vehicles due to works on a construction site.

LESA was asked by this Office whether any attempts had been made to contact the owner of the car before and after it was towed. The Ministry responsible for LESA informed this Office that since the vehicle had been parked in the same street where its owner was registered, physical attempts to contact him were made but it was all in vain.

This information was however incorrect as complainant produced conclusive evidence that he never resided on the street where his car was parked and had always lived in the same residence in a different road in Sliema.

This Office requested further information from the Ministry as to notification procedures analogous to cases such as these. It was informed that the registered owner is notified by means of a letter within ten days of the vehicle being towed. The Ministry further added that procedures were being reviewed to expedite said notification process.

Considerations

It was established that a "*no parking tow away zone*" sign was placed on site two days before the area was designated as a "*tow zone*". Encumbering "*a tow zone*" is deemed to be a scheduled offence under Article 2 of The Commissioners for Justice Act and is subject to a € 200 penalty.

The act of towing the vehicle in question and imposing the financial penalty was therefore in accordance with the law.

The Ombudsman noted that the primary issue of the complaint lay with the fact that complainant had not been notified of the removal of his vehicle. It appeared that the officials charged with the removal of the vehicle were in possession of the wrong information and therefore attempts to contact the registered owner at the wrong address prior to the vehicle being towed were unsuccessful. This Office notes that affixing a contravention notice on the windscreen of the towed vehicle was distinctly unhelpful.

Moreover this Office observes that the notification procedures that ensured that the owners were informed within ten days of the vehicle being towed, was also prejudicial to car owners. This especially in view of the fact that said owners were charged €15 per day in storage fees.

In this case, complainant had incurred an extra charge of €90 (in storage fees) which had been levied not in consequence of his action but due to the inaction of the authorities. Individuals should not be made to suffer the consequences of omissions by the public administration.

The Ombudsman considered the availability of a remedy as regards the imposition of penalties. He observed that the act of settling the financial penalty was deemed at law to be an admission of guilt with the result that the vehicle's owner immediately forfeited the right to contest the charge.

The right to file a petition before the Board of Petitions was similarly forfeited since Regulation 4 (4) of the Petitions (Local Tribunal) Regulations specifically stated that "*no petition may be allowed once the financial penalty had been paid*". This meant that if the vehicle's owner wished to challenge the forced removal of the vehicle, the

initial €200 penalty could not be paid and the car needed to be kept "*in storage*" at an extra charge of €15 per day.

It is unreasonable to expect the owner to be denied the use of the vehicle for days or even weeks until the case is heard by the Local Tribunal or for a petition to be decided upon. In both instances registered owners are "*constrained*" to pay the penalty to secure the release of their vehicle and in so doing lose the remedy provided at law.

The Ombudsman observed that the law as it stood was unfair and unjust as it in effect denied the vehicles' owners of an effective remedy.

Conclusion and recommendations

The Ombudsman therefore concluded that the vehicle in question was towed away in consequence of the creation of a tow zone and as such its removal was not abusive or illegal. Complainant's request that he be refunded the €200 penalty could not be sustained.

The storage fees amounting to €90 were incurred as a direct consequence of the inaction of the public administration to ensure correct notification of the contravention notice. He recommended that complainant be refunded these storage fees.

Moreover, the Ombudsman opined that the law as it stood did not provide a remedy to owners of towed vehicles. He therefore recommended that amendments to the law to provide an effective and fair remedy to car owners be considered.

Sequel

The Ministry for Home Affairs, National Security and Law Enforcement informed the Ombudsman that his recommendations were accepted and were implemented. In fact the amount representing storage fees was refunded.

This Office was informed that the Clamping and the Removal of Motor Vehicles and the Encumbering of Objects Regulations did not specify a remedy for owners of towed vehicles. LESA therefore introduced an internal mechanism which considered such towing appeals.

This Office was informed that if a registered vehicle owner showed an interest in appealing from the fines consequent to the towing of the vehicle, the owner would be directed to submit a written request for consideration. These are then evaluated by management taking into consideration any evidence submitted by the vehicle's owner and collected by the community officers. If it transpires that the owner is not at fault the agency will reimburse him accordingly.

The Ombudsman recommended that these procedures be formalized and brought to the attention of the general public so as to ensure an effective remedy. The Ministry agreed and in fact updated its website accordingly.

Transport Malta

Payment of Arrears of Driving School fees halved

The complaint
The owner of a driving school that had been inoperative for a number of years felt aggrieved by a decision of Transport Malta that refused her request to revoke the authorisation to operate the said driving school unless she paid outstanding fees due for the years during which the school was inoperative. She filed a complaint with the Ombudsman asking him to investigate her grievance since she felt that this decision was unfair and unjust.

The facts
Complainant had been running a motoring school which was duly registered with Transport Malta. As a matter of fact that school ceased its operations in 2014. Complainant informed the Ombudsman's office that she had at that time informed Transport Malta that she was not going to continue operating as a driving instructor.

Five years later in July 2019, she received a notice from the Authority requesting her to renew her licence as a driving instructor. She consequently visited the offices of Transport Malta to renew the instructor's tag and at that juncture she was informed that she owed €720 in arrears of driving school fees covering the period when the school was inoperative. These fees were due in accordance with Regulation 65 of the Ninth Schedule of the Motor Vehicle (Driving Licences) Regulations. She was also informed that the permit covering the running of the motoring school could not be cancelled before arrears of fees due were duly paid.

Complainant insisted that she had never received any notice for payment of these fees and it was for this reason that they had accumulated. Complainant submitted

that she should not be made to pay these arrears once she had never been informed that she had the duty to continue paying the fees notwithstanding that she had stopped operating the driving school. Transport Malta informed complainant that the authorisation renewal notices were not sent by post and could only be obtained personally from its offices.

Transport Malta insisted that the regulations clearly stated that persons authorised to run a driving school could at any moment notify the Authority that they did not intend to continue operating the school. The Authority maintained that it had no procedural or legal duty to notify operators to pay the annual fees. Unless a formal request/communication from the operator was made that such a pre-approved and agreed operation was to be stopped, Transport Malta was obliged to keep requesting these fees and arrears on the assumption that the driving school had never ceased operating.

The Authority informed the Ombudsman that it would be prepared to take into consideration the notice that complainant alleged to have sent in 2014 notifying the Authority of her intention not to continue operating the school provided it was provided with a copy of said notice. Complainant was not however in a position to do so.

Considerations

The Ombudsman considered that the operator was by law bound to notify the Authority that she did not intend to continue operating the driving school covered by the authorisation. He noted that complainant maintained that she had notified the Authority of her intention not to continue working as a driving instructor. Such a notice was not the same as a notice that the operator did not intend to continue operating a driving school.

Since neither complainant nor the Authority had produced a copy of the notice given by complainant, the Ombudsman was not in a position to conclude whether that document included a notice that the school would not continue to function. It was the duty of complainant to ascertain that such notice was made according to law and that the Authority actually received it. It must be pointed out that lack of knowledge of the law can in no way be used as an excuse for failure to observe its dictates or to avoid its effects as willed by the legislator.

On the other hand, Regulation 65 provided that the authorisation to run the school was subject to an annual fee. It therefore follows that if that fee was not paid, there was a real risk that such authorisation would not remain valid. Furthermore, though it was true that the law did not oblige the Authority to notify the operators to pay the annual fee due, the law gave the Authority the right to suspend, withdraw or cancel this authorisation "*on reasonable grounds*".

The Ombudsman was of the opinion that if an operator repeatedly fails to pay this annual fee and was therefore in violation of a condition imposed by the regulations, such failure could be considered to be a "*reasonable ground*" for the Authority to take action to revoke the licence.

The Ombudsman noted however, that such a measure could only be realised if there was some sort of monitoring by the Authority as regulator on the activities of operators. In the case under review, almost five years had lapsed before the Authority demanded payment from the operator of the driving school and this only after that complainant had started proceedings to renew her instructor driving tag.

The Ombudsman could only conclude that in this case there had been no monitoring of the payment of fees. The fact that the Authority maintained that it had no legal or procedural duty to send notices to operators to pay their annual fees led the Ombudsman to conclude that the Authority had no procedures in place to ascertain that these fees were being paid. This meant that there could be other similar cases and that as a matter of fact, the more time lapsed the more difficult it became to collect arrears.

Conclusion and recommendations

The Ombudsman was of the opinion that while complainant had failed to ensure that it had duly notified the Authority according to law that she had ceased to operate the school, the Authority had on its part also failed to carry out the necessary monitoring to ensure that fees which were due according to law were being paid. He therefore concluded that the predicament in which complainant found herself was the result of failure on her part as well as on the part of the Authority. The Ombudsman therefore recommended that, by applying principles of equity, complainant should pay half of the arrears due according to law and this

in final settlement of the balance still due and that consequently the authorisation for running the driving school was to be cancelled.

The Ombudsman also recommended that the Authority conduct a review of all operators to ascertain that every one of them complied with the conditions stipulated in the authorisation including the payment of the annual fees. The Ombudsman further recommended that the Authority also establish procedural guidelines so that similar cases to that of complainant be avoided.

Sequel

This Office was informed that the Authority would be implementing those recommendations that are administrative/procedural in nature. As far as the arrears are concerned, however, this Office was informed that summary proceedings in terms of Article 466 of the Code of Organization and Civil Procedure (Chap 12 of the Laws of Malta) were initiated against complainant to collect all outstanding dues.

Accountancy Board

Change to maiden surname after divorce must be acknowledged

The complaint

A complainant who obtained a warrant from the Accountancy Board while she was married was issued with a certificate in her husband's surname which she had adopted after her marriage. After her divorce she requested the Accountancy Board to reissue her warrant certificate in her maiden surname to which she had reverted.

The Accountancy Board, while stating that it had updated the register of warrant holders to reflect complainant's new status and change of surname, refused her request since it argued that the Accountancy Profession Act did not grant it the power to make changes to warrant certificates that were only issued once.

Complainant stated that the stance adopted by the Accountancy Board was unfair and was causing her a lot of distress. She mentioned that the warrant certificate should be changed to reflect her correct legal surname.

Facts and findings

Complainant's warrant certificate issued at the time when she was married stated simply "*This is to certify that xxx is qualified to practise the profession of Accountant (Chapter 281)*". The warrant number, identification card number and date of issue were also included. The Ombudsman noted that the name on the warrant has to essentially "*vouch*" for the skills and competencies of individuals holding themselves out as accountants. Warrants were issued subject to conditions such as Professional Indemnity Insurance Cover and Continuous Professional Education (CPE) requirements.

Complainant separated from her husband two years later and reverted back to her maiden surname shortly afterwards. The Public Registry Records were duly annotated both the separation and the complainant's change in surname. Complainant was issued with a new Identity Card showing her maiden surname. She requested the Accountancy Board to re-issue her warrant certificate in her maiden surname also because the original certificate had been disposed of.

A year later she was informed by the Board that her request could not be acceded to. The Board maintained that position notwithstanding that complainant had written to the Finance Minister, sought the assistance of the Malta Institute of Accountants and formally requested the Board by judicial letter to re-issue the warrant certificate in her correct legal surname.

Shortly after her marriage was annulled by a court judgement in 2021 complainant filed a complaint with the Ombudsman requesting him to provide her with an adequate remedy for the injustice she was suffering.

Submissions of the Accountancy Board

The Board stood by its position and reiterated that the law did not authorise it to issue a new and fresh warrant to an accountant once the original one had been issued in terms of the Accountancy Profession Act. Complainant's request had no legal backing. If her request were to be allowed this would set a dangerous precedent and might in future be utilised and abused by other persons for the wrong reasons to the detriment of the profession and the public interest.

Other public institutions like the University of Malta never issued new graduation certificates when for example a female student married, separated or had her marriage annulled. The graduation certificate was granted only once, at the time the student graduated. If the contrary were to be the case there would be havoc and confusion with the institution possibly losing control of the situation. The same also applied to certificates issued by Professional Public Regulatory bodies whose role is also to protect the general public from any possible misuse of said certificates. For complainant's request to be acceded to, the law would need to be amended to provide for such an eventuality empowering the Board to change the surname on separation, annulment or divorce and to issue an amended/new warrant on retrieval of the old one.

Finally the Board informed the Ombudsman that it had immediately taken steps to amend complainant's surname on its website and the Register of Warrant Holders. In fact complainant was shown on the website with her maiden surname, together with her registration/warrant number. The Board would also be ready to issue a clarification letter with reference to this particular warrant but not a new warrant and this for the justifiable and legitimate reasons it had stated. The Board proposed that in line with its practices, it would reissue a true copy of the original warrant to complainant together with any accompanying letter indicating the change of surname. Complainant however found this proposal unacceptable.

Ombudsman's considerations

Nature and relevance of Proposal warrants

The Ombudsman considered that individuals are issued with a warrant to practise as an accountant if they satisfied the minimum qualifications requirement as set out in the law. These qualifications proved that the individual had acquired the necessary skills and competences to practice their profession. The warrant therefore provided a guarantee to third parties that the individual had reached a certain level of competence to "*do the job*".

The warrant was however issued with specific obligations such as the obligation to be covered by professional indemnity insurance and the requirement to acquire a set amount of CPE hours per year. Many of the obligations were put in place to protect recipients of the warrant holders' services. Failure to abide by the obligations imposed on the warrant holder might result in fines and possibly suspension and even revocation of the warrant. One did not simply obtain a warrant and then forget about it. Positive action must therefore be taken by warrant holders to retain their warrant, it provided continuous proof that the individual was qualified (not only academically) to practice the profession.

This differed greatly from the diploma/degree certificate issued by an educational institution that attested to the fact that an individual completed a programme of studies. A diploma/degree certificate needed to be correct at the time of issue but no further maintenance was needed neither was the role of the said degree that of protecting third parties. As such the comparison drawn by the Accountancy Board equiperating a certificate attesting to the completion of a programme of studies and the warrant did not hold water.

Distinction between Warrant and Warrant Certificate to Practice

The Ombudsman noted that complainant did not request that she be issued with a new warrant but that the document attesting to the fact that she is a warrant holder be re-issued in her correct legal name. There is a marked difference between the issue of a warrant to practice and the document recording the fact that an individual is a warrant holder. The Accountancy Profession Act did not specify the medium to which the attestation of the warrant should be made. It was therefore up to the Accountancy Board as regulatory authority, to determine what form the attestation should take. The Act was however clear that an online Register of Warrant Holders had to be maintained and made available through the Board's website. Warrant holders had the legal obligation to notify the Board of any changes including a change in name and the Board in turn, had an obligation to update the register. The law is rather prescriptive in this regard.

Protection of third parties

The purpose of this register was two-fold, for the Board to have proper updated records of warrant holders and for the general public to have access to the register and thus be in a position to determine whether the professional they wished to instruct was qualified to practice. The latter purpose underscored one of the prime purposes of regulating a profession – the protection of third parties wishing to make use of the services offered by professionals. It therefore followed that it was of prime importance that third parties had access to correct and updated information.

When individuals legally change their name it followed that other documents would need to be changed to reflect this. Bearing in mind that the law was very prescriptive about having an updated online warrant holder register, logic would dictate that any document evidencing that an individual was a warrant holder would similarly need to be correct and up to date. One had therefore to balance the need to have legally correct documents with the possibility of dangers resulting from the circulation of two attestations to the same warrant written out in two different names.

Given the importance the law gives to having an updated and correct online register, it would seem that this need would take precedence over possible dangers associated with the issuing of an amended certificate. The Ombudsman observed that measures could be put in place to minimise such risks.

Finally, the Ombudsman considered that public registry documents form the basis of a significant number of legal/public documents that affected not only the individuals' daily life but also those who have dealings with them. Given the extensive legal ramifications of these documents it was not surprising that the law expressly stated that changes to an individual status must be made by Court Order. This however did not mean that all changes to documents issued by the public administration needed to be governed by similar provisions. This would result in gross inefficiencies. The law was silent on the medium to be used for warrant attestations, leaving it up to the regulatory body to determine the best way to evidence that an individual was a warrant holder. The decision to issue physical paper certificates could thus be seen as purely administrative.

The Ombudsman was of the opinion that the decision to re-issue that paper document because the original one was lost or destroyed or because it was not legally correct, would also be administrative in nature. A change in law would not be strictly necessary for the Board to re-issue, an attestation if this was deemed necessary or if for the sake of argument, the Board was to decide to withdraw all paper certificates and re-issue all attestations in a more durable format.

Conclusions and recommendations

The Ombudsman concluded that complainant's request that she be re-issued with an attestation in her legally correct name was reasonable, especially in view of the fact that such a change was the result of proper legal procedures. The Accountancy Board should ensure that documents issued attesting to the fact that an individual was a warrant holder should be legally correct and up to date. The Ombudsman therefore recommended that complainant's request be acceded to and that she be re-issued with an attestation of a warrant holder in her maiden surname.

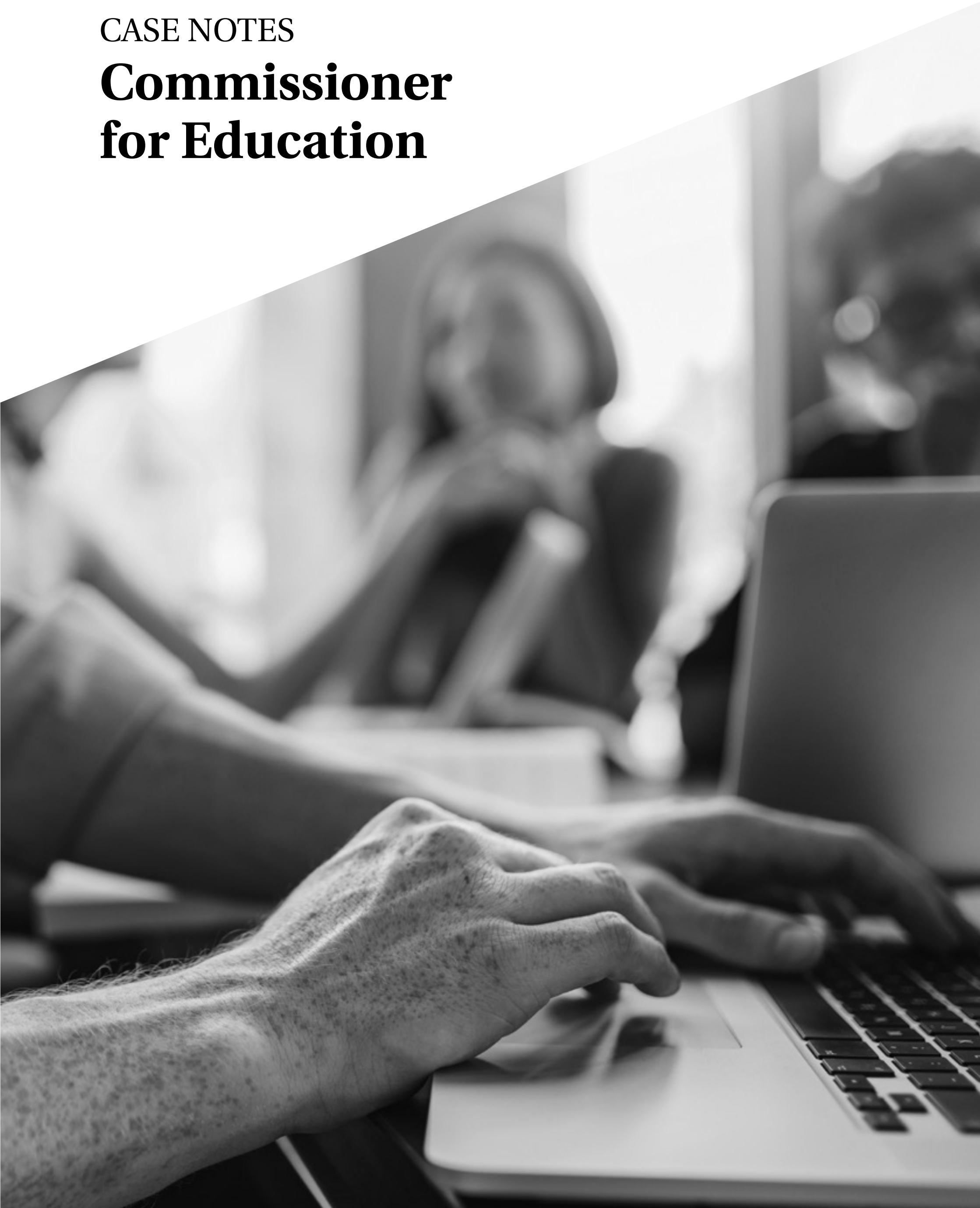
The Ombudsman further recommended that measures, legislative or otherwise, be put in place to deal with eventualities such as the loss or the destruction of attestations or the need to update attestations that are no longer correct.

Sequel

The Accountancy Board informed the Ombudsman that it would implement its recommendations.

CASE NOTES

Commissioner for Education



Malta College of Arts, Science and Technology (MCAST)

Misleading information to students by MCAST

The complaint
The complainant was one of about 27 students who graduated in 2020 from the Malta College of Arts, Science and Technology (MCAST) with the degree of Bachelor of Science (Honours) in Sport, Exercise and Health. The complainant alleges in substance that the information material issued by MCAST at the time he and his colleagues undertook the course in 2017 was misleading in that it suggested that, on completion, the successful graduates would be able to apply their skills in a clinical setting alongside other health professionals, and this through, among others, employment in hospitals and clinics. However, soon after graduation it became clear that this was not going to be possible since the course was not recognised by the Council for Professions Complementary to Medicine.

The complainant further alleged that the MCAST authorities knew about the problem caused by the misleading information but had done nothing to rectify the situation.

The investigation and findings
In this case there was, in reality, no disagreement between the complainant and MCAST as to the basic facts underlying the complaint; the disagreement lay in the interpretation to be given to those facts and to the consequences of such an interpretation.

After exhaustive enquiries carried out by the Commissioner, the complaint was upheld. While it is true that the complainant did not adversely comment about the content of the course – he and his peers, no less than the teachers and instructors, seem to have taken the content as ducks take to water – the complaint as formulated

was clear: the prospectus and the ongoing instruction throughout the three years gave inexorably the impression to the students that, once they successfully graduated, they would be able to work alongside physiotherapists as health care professionals. This necessarily implied a profession "*complementary to medicine*".

However, from information obtained from the Ministry for Health, it transpired that, unlike with other courses provided by MCAST, in the case of the course under consideration there was never any collaboration between the College and the Ministry for Health. An attempt to have the course under consideration recognised by the Council for Professions Complementary to Medicine was refused.

The Commissioner did not for one moment doubt that MCAST intended to provide, and did in fact provide, a first class course to meet European Health and Fitness Association standards. However between one's good intentions and what in fact happens in practice there is often an unintended chasm. In the Commissioner's considered view after examining all the evidence and information collected, it was clear that the complainant and his cohort were – no doubt unintentionally – completely misled when they commenced the three year course in 2017.

The promotional material for the course, by the use of expressions like "*clinical setting*" (since dropped from subsequent descriptions of the course) and "*suitably qualified professionals to work alongside medical and healthcare professionals*", more than suggested – in fact clearly indicated – that upon their successful graduation the students would fall within the ambit of paramedical professionals not unlike those who successfully completed the (lesser level) Advanced Diploma in Health and Social Care or the Advanced Diploma in Health Science.

It is true that, unlike in these two year courses, course placements did not take place in government hospitals or clinics, but elsewhere; nevertheless throughout the three year course the complainant and his cohort were inexorably led to believe that by the end of the course they would be professional "*rehabilitators or physiotherapists*", working alongside them in a clinical setting. No attempt appears to have been made by MCAST in three years to dispel this erroneous view that was inculcated in the students from year one. At the end of the day the complainant and his cohort ended up with a Bachelor's degree which is a credit to MCAST in terms of content, level and standard, but which is pretty much just a piece of paper

to be nicely framed by the graduates as far as the local scene and labour market were concerned.

Conclusion and recommendations
According to its Mission Statement, MCAST is to provide vocational and professional education and training which is responsive to the needs both of the individual and the economy. In light of this, the last thing one would have expected was for the College to promote, both through the promotional material and the very conduct and structure of the course, the idea that at the end of the day the successful graduates would invariably end up working as professionals alongside medical and healthcare professionals – in effect, working in a profession complementary to medicine – when it knew or should have known that this was not possible without proper liaison with the health authorities and in particular with the Council for Professions Complementary to Medicine.

It is significant that it was only in October 2020, in an email addressed, among others to the complainant and to the then Minister of Education, that the CEO of MCAST admitted that *"The Role Exercise for Health professional is not recognised locally however we are constantly striving to create awareness of this role so much so that students throughout the course are placed in elderly homes and in clinical settings."* One wonders, and seriously doubts, therefore what appropriate studies and market research was conducted before the first course was launched in 2017.

In light of the above, the actions and omissions of the College **were found to be both wrong and unjust** in terms of Article 22(1) of the Ombudsman Act. The Commissioner recommended **as a matter of urgency** that the College should offer (free of charge) an additional (top-up) course to the complainant and his cohort (and possibly to those who undertook the same course after 2017) the content of which should target the profession originally advertised by the College – that of "*suitably qualified professionals to work alongside medical and healthcare professionals*". In devising the content of this top-up/additional course MCAST was to actively engage with and consult the Public Health Authorities and in particular the Council for Professions Complementary to Medicine so as to ensure that the additional study units are adequate and suffice to ensure registration of students in the targeted profession. The Commissioner's final opinion to the above effect was delivered on the 29 July 2021.

By letter dated 30th August 2021 the Malta College of Arts, Science and Technology wrote to the Commissioner that "*MCAST is actively seeking to take on board and implement the recommendations made by the Commissioner*". Up to the time of preparing this note, no further progress in this direction seems to have been made.

Ministry for Education

Improper discrimination to the detriment of a teachers' union

The complaint

The complainant in this case was a registered trade union – one of two major teachers' unions. The complaint was made by its Executive Head on behalf of the union that he represented. The complaint was lodged with the Ombudsman's Office on 3rd June 2020 and was finally decided on 18th May 2021, with a partial decision (upon a preliminary plea lodged by the Ministry for Education) delivered on 9th July 2020.

The complainant basically alleged that it was being improperly discriminated by the Ministry for Education and its subordinate Directorates. It alleged that in matters not connected with collective bargaining – the complainant admitted that it did not represent the majority of teachers in Government service – it was not being given the same facilities accorded to the other union which represented the majority.

Preliminary plea

By communication, under the signature of the Permanent Secretary at the Ministry for Education, dated 30th June 2020 the Ministry objected to the Ombudsman's Office examining the complaint. The objection *ratione personae* was to the effect that Article 13 of the Ombudsman Act provides a right of access to the Ombudsman and to a Commissioner in his Office <u>only to persons</u>, whereas in this case the complaint, although lodged by a physical person, was in effect on behalf of a moral person. This plea was rejected by a decision jointly signed by the Ombudsman and the Commissioner for Education on 9th July 2020. In that preliminary decision it was noted, *inter alia*, as follows:

"*As you are aware the Ombudsman is an independent body charged with monitoring the actions of the public administration and the wider public sector. This Office is a constitutional institution tasked by the legislator to evaluate whether the actions or inaction of the public administration are right or wrong, unfair, just and reasonable, improperly discriminatory, contrary to law or in accordance with legislation which is unjust. The institution was set up in 1995 so as to provide a safe, secure, fast and independent channel of communication that could lead to an amicable resolution of disputes and in default, to a clear opinion on whether the disputed issue constitutes maladministration.*"

"*The right to complain to the Ombudsman seeking independent action against maladministration is in addition to the right to access to justice through the courts or other judicial fora. It would certainly not have been the intention of the legislator, that created a mechanism whereby the administrative functions of the Public Administration could be scrutinised by an independent body, to interpret the term 'person' so restrictively, thus excluding any moral person that is negatively impacted by an action or omission of the Public Administration or the public sector from being able to submit a complaint for investigation by this Office. Moral persons also deal with the public administration, they should be treated fairly and correctly by those who administer public affairs and are affected and can be prejudiced by the decisions or lack of action of the said Administration and should therefore be provided with the same remedies available to natural persons. One cannot expect that moral persons seek redress of alleged maladministration through the filing of costly judicial proceedings as would be the case if one were to accept the restrictive interpretation given by the Ministry's legal advisors.*"

The merits

The Commissioner began by making it clear that it was not his function to solve, or to intervene in, industrial disputes which are or may be pending between a complainant and an "*education provider*" or indeed between any complainant and the public administration. The Ombudsman's Office had only been informed (by the complainant on 7th May 2021) that notice of such a dispute has been given to the Minister responsible for Education. The function of the Commissioner was solely to see whether there is any act of maladministration – that is to say whether in acting or in failing to act in a particular way *vis-à-vis* the complainant the Education Authorities appear to have acted contrary to law, or unreasonably,

unjustly, oppressively or in an improperly discriminatory manner, or whether such act or omission is simply wrong.

The official side maintained that it could not accede to the complainant union's requests because this would risk upsetting the "*other union*" representing the majority of the teachers in the public service. The Ministry kept insisting that *"…* [s]*ince the* [complainant] *Union is not the one officially recognised* [it] *cannot* [be] *allowed on school premises as this goes against normal industrial relations practices*". No mention was made of the complainant's other issues (that is, aside from presence on school premises).

After examining all the evidence, the Commissioner concluded that what was at stake in this case went beyond issues of mere industrial relations or potential industrial relations disputes. What was at stake went to the very heart of fundamental democratic principles and the rule of law.

The Commissioner did not for a moment doubt that for purposes of "*collective bargaining*" there was only one registered trade union which was effectively recognised by the official side, <u>and this union was **not** the complainant union</u>. The issue in the instant case was the positive obligation upon the State – represented in this case by the Education Authorities – to ensure that in the exercise of the right to freedom of association a union was not to be improperly hindered in the exercise of its function to communicate with its members, and, correspondingly, that its members were to be allowed to benefit from unhindered communication (within the bounds of reasonableness) with union officials. More critically, there was to be no official or unofficial improper discrimination between registered unions representing teachers. Discrimination would be improper if the differential treatment is not based on an objective and reasonable justification.

Collective bargaining with only the union representing the majority of workers in a particular place of work or in a particular sector was widely recognised as being both objective and reasonable, in so far as it pursues a legitimate aim in a proportionate manner. A differential treatment which fell short of that standard, however, tended to be both capricious and improper. The Commissioner pointed out that the State has signed and ratified Protocol No. 12 to the European Convention on Human Rights, which protocol prohibits all forms of discrimination in the enjoyment not

only of fundamental rights[2] but also of "*any right set forth by law*". Sub-paragraph (2) of Article 1 of that Protocol specifically provided that "*No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1*". The grounds of discrimination mentioned in both Article 14 of the ECHR and in Article 1 of Protocol No. 12 were not exhaustive but merely illustrative.

Conclusion and recommendation

The Commissioner found the complaint justified in so far and to the extent that improper discrimination had been exercised with respect to the complainant union by the Education Authorities. The Commissioner recommended that, except and in so far as a facility is strictly linked to collective bargaining, the complainant union should be accorded the same facilities as were accorded to any one or more other unions representing teachers in the public service.

By subsequent communication the Permanent Secretary at the Ministry for Education, while denying that any improper discrimination had ever taken place and suggesting that the whole issue was due to an erroneous perception by the complainant union as to how the *other* union was treated by the official side, nevertheless indicated that the Commissioner's recommendation was accepted and would be implemented in practice.

2 As in Article 14 of the ECHR read in conjunction with any of the other articles from 2 to 13.

University of Malta

Information to unsuccessful candidates

The complaint
The complainant was a graduate in music, with a Ph.D. in this field. He applied for the post of 'Resident Academic Full Time Post in Music in the Department of Music Studies within the School of Performing Arts, University of Malta.' He was not short-listed for the post. In the complaint form, the complaint was specifically made to consist in the following: *Highly qualified in the discipline applied for. However, not being shortlisted with no reason provided.* In a later communication with the Ombudsman's Office, the complainant 'added' a further complaint, that only one job position was advertised whereas as a matter of fact two people were appointed at the end of the selection process.

Investigation and findings
From the investigations carried out by the Commissioner it resulted that the established procedure was adhered to by the University. This procedure was outlined in the additional information attached to the call for applications. After an initial evaluation and experience of each applicant, a short-list of candidates would be approved by the Selection Board. The short-listed candidates would then be invited for an interview and requested to make a short presentation.

The short-list drawn up was approved by the Selection Board set up in accordance with the 'Guidelines for Members of Selection Boards in the recruitment of Resident Academic Staff'. In respect of the complainant, relevant and sufficient reasons were put forward why he was not shortlisted (these reasons were communicated by the Ombudsman's Office to the complainant in October 2020). However, the Commissioner continued to enquire further and requested from the University a list

of all those who were short-listed and of those who were not. From this list it clearly transpired that at least 29 out of the 55 applicants *not short-listed* had academic qualifications and experience equal or superior to those of the complainant.

The 9 applicants shortlisted were duly interviewed. Out of these, four were ranked in order of merit. The Department of Music made a case for *two* posts to be filled. The proposal was accepted by the University Council based on available workload and pursuant to confirmation from the Director of Finance that funds were available for the appointment of two instead of one resident academic full time post in music.

Conclusion and recommendations

The Commissioner concluded that everything in this case was carried out *rite et recte* in the selection process, and that the procedure outlined in the above-mentioned published guidelines was, in substance, followed. The Commissioner underlined the expression 'in substance' not only because these guidelines are exactly that – guidelines – and therefore intended to be applied with some flexibility in light of the particular circumstances of each case, but also because it transpired that these had been, in part, modified but such modification did not appear to have been reflected in the copy of the guidelines as they appeared online.

The complainant originally complained that he had not been given any reason/s why he had not been short-listed. The Commissioner was of the view that until the selection process is completed with the final decision of the University Council, it would be inappropriate to give such reasons to any applicant who either had not been short-listed or, if short-listed, not chosen or recommended by the Selection Board. However, once this process is terminated, there should be no valid reason why such reasons should not be communicated to the applicant. In any case, as already indicated, these reasons were communicated to the applicant (the complainant in the instant case) by the Ombudsman's Office in October 2020 after these reasons were received from the Rector's Office.

The Commissioner noted that it should not be necessary for him to act as a postman in this or similar cases, and therefore **recommended** that, unless this existed already, a clear system should be in place which enabled failed applicants to obtain the reason or reasons why they had not been shortlisted or selected. The laconic "*After reviewing all applications received by the deadline, your application*

was not selected for further consideration" sent by the Human Resources Office clearly did not suffice.

From the investigations carried out, it also transpired that the details of the **successful** candidate (or candidates, in the case) were no longer published on the University website because of GDPR-related issues. This meant that the penultimate paragraph of the abovementioned guidelines (under the subheading 'Clarification Process') was woefully outdated. In communication with the Ombudsman's Office, the University indicated that it was in the process of updating these guidelines. In the considered view of the Commissioner, this process was taking too long, and should be expedited in the interest of transparency, and therefore **recommended** that it should be concluded as soon as possible.

Finally, the complainant took umbrage at the fact that **two** posts were filled instead of the advertised one. While it could legitimately be argued that the complainant had no personal interest in this ('additional') complaint since he was in any case not short-listed (see Art. 37(2)(*c*) of Cap. 385), the Commissioner was quick to the argument – made by the complainant – that this was a matter of transparency, particularly in light of the fact that, after all, public funds were involved. The Commissioner, therefore, addressed this complaint *ex officio* in terms of Article 13(2) of Chapter 385.

It appeared to be standard practice for the University to issue calls for a 'post' – in the singular – but if the relative Selection Board proposes a number of possible candidates in order of merit (to obviate the need to reconvene the board should the single proposed candidate decide not to accept the post) and if the Department concerned makes a case for more than one post to be filled and finds the relative funds, two or more appointments are made. While there is, in substance, nothing contrary to law or otherwise unfair or discriminatory or untoward in such a procedure – after all the Department or Institute concerned should be allowed a certain degree of flexibility, even given the time that may intervene before the decision to recruit is approved and the time when the final appointment is approved by Council – it is understandable that this may cause some concern, particularly with candidates who have not been selected. Ideally, when there is the likelihood that more than one post is to be filled, the call for applications should clearly indicate that it is being made for the filling of "*one or more posts*". However, the Commissioner was

of the view that this was not the right case where such a specific recommendation should be made. The Commissioner only flagged the issue for the future.

By letter dated 19th July 2021, the University Rector informed the Commissioner that both the above-mentioned recommendations had been accepted and would be implemented.

Malta College of Arts, Science and Technology (MCAST)

Oppressive behaviour by MCAST towards a Senior Lecturer

The complaint

This complaint was lodged with the Ombudsman's Office on 6th October 2020. The complainant was a Senior Lecturer II in the Department of Building and Construction Engineering within the Institute of Engineering and Transport at MCAST.

He complained, in substance, against the fact that from the beginning of the academic year 2020-2021 he had not been assigned classes, was not given a timetable of lectures, was forbidden to contact students within the Institute above-mentioned and was removed from the Department's mailing list. Although he was still receiving his salary, he was, for all intents and purposes, ostracised by the College Administration (with all the attendant consequences for him) ostensibly while awaiting a decision from the Office of the Prime Minister (OPM) about the revocation of his detailing with MCAST and the reversion to his substantive grade within the Ministry for Education.

Investigation and findings

Following a number of disagreements over curricula, teaching units, teaching methods and operations (including the alleged absence of a regular Board of Studies) between the complainant and members of the Senior Management Team of MCAST, the latter decided some time before June 2020 that it should no longer make use of complainant's services and consequently decided to request the revocation of his detailing to MCAST. This course of action was approved by a Resolution of the Board of Governors of 18th June 2020. This resolution only endorsed the request for the revocation of detailing a request which had to be sought from, and granted or refused by, the OPM.

It was, however, only on 10th September 2020 that the Principal and CEO, and the Deputy Principal Administration, of MCAST jointly formally informed the complainant that his services were no longer required and that he was to report to Human Resources at MEDE (as the Ministry responsible for Education was then designated) for purposes of the scholastic year 2020-2021. Up to the date of the last act of the Commissioner's investigation – Friday 7th May 2021 – complainant's detailing to MCAST had not been revoked and he had remained assigned to this College as Senior Lecturer II with a gross annual salary of €40,378.

On 5th October 2020 the complainant – still on the staff of the Institute but with no proper lecturing duties assigned to him – received an email from the Deputy Principal for Science and Technology of MCAST which further placed him in an 'anomalous' situation. By this email, he was prohibited from contacting students either through email or through any other means of communication belonging to MCAST.

In late November 2020, the Commissioner contacted the People and Standards Division within the Directorate for People Support and Well Being at the OPM. Their initial advice was quite clear: "*It is obvious that until such decisions [the revocation of detailing] are taken, officers are to continue performing their duties as per the Management direction.*" Later the said Division – confronted with the fact that the complainant had simply been cast aside by MCAST – began to vacillate and attempted to pass on the buck to the Ministry for Education and the Ministry's Ombudsman Liaison Officer. No clarifications or further elucidations were received from the Ministry for Education, and this is understandable in view of the fact that in this whole affair the said Ministry could not act unless and until there has been the revocation of detailing.

In sum, therefore, the position was that for eight months plus the complainant had not only not been assigned any teaching duties but he had also been prohibited from contacting students of the institution (MCAST) to which he was duly assigned. Apart from the absolute waste of human resources and public funds, MCAST's action in ostracising a highly qualified teaching member of staff for such a long period of time was, in the Commissioner's view, an oppressive act tantamount to degrading treatment. The complainant had been treated in a degrading manner in this case by the MCAST Authorities because their action in not assigning him any teaching duties or other academic related duties, coupled with the prohibition

from contacting students, was capable of (even if *perhaps* not intended to) arousing in the complainant feelings of, among others, inferiority, insecurity and anxiety leading to his humiliation in his own eyes or in the eyes of others (MCAST students in particular). It was not shown that the MCAST Authorities did or attempted to do anything to mitigate this injustice.

One senior member of staff, in evidence given to the Commissioner, referred to what he called the complainant's "*difficult character*" when the possibility of assigning even some minor administrative duties was mooted to the witness. This reason, in the Commissioner's considered view, was however unacceptable. In a large tertiary educational institution like MCAST there are bound to be clashes of characters and personalities, but it was inconceivable that such an institution should not be able, or at least attempt, to reconcile such differences but should go straight away for the nuclear option. And in any case, no institution should ever resort to any act – of commission or omission – which, in the circumstances, is oppressive and degrading.

Conclusion

The Commissioner, therefore, upheld the complaint to the extent and in so far as it referred to MCAST's decision not to assign to the complainant any teaching duties and to his being prevented from contacting students for such a long period while still on the books of MCAST, and concluded that this was an act which was oppressive and tantamount to degrading treatment of the complainant by the said institution.

Given the time that has elapsed from the beginning of the academic year 2020-2021 to the date of the Commissioner's report (12th May 2021), no specific recommendation or recommendations were considered appropriate.

Ministry for Education

Lack of proper communication with student

The complaint
The complainant lodged his complaint with the Office of the Ombudsman on 8th October 2020. The complainant, who already held several academic degrees, including two Ph.Ds, enrolled with the Institute for Education for a Master's degree (in Education). One particular module in the course is devoted to research methods (MEDU204 – Research Methods II).

The complaint revolves around the final grading of this module. Complainant alleges that the lecturer responsible for the assignment in said module (and for eventually correcting and grading the same) was prevented by the Institute from sharing with him the marks she had assigned to his work and her comments thereon, after these were sent for internal verification (hereinafter, IV) by another examiner (and after being ultimately sent to an Academic Board of Examiners in view of the discrepancies between the marks/grade awarded by the responsible lecturer and the IV examiner).

The complainant lamented about a lack of transparency and suggested that the whole procedure, including the final (rather low) grading by the board, may have been a form of "*revenge behaviour*" on the part of the Institute because of previous disagreements that he had had with the same.

The investigation and findings
The Commissioner first disposed of the allegation regarding *"revenge" behaviour"*, an allegation which he found to be totally unsubstantiated.

As to the complaint proper, the Commissioner noted that his function was not to review academic assessments (marks and grades awarded for assignments, exams or other parts of the grading process leading to the award of a degree) but only to assess and ensure that such process is fair and not tainted by any malpractice or ulterior motive, or otherwise contrary to law or to the general principles of equity. In the instant case it transpired that everything was done *rite et recte* by the Institute as far as the grading process was concerned. The complainant had every right to disagree with the definitive assessment of the Academic Board. Complainant could have applied for a revision of paper, but he apparently did not.

From the investigation it appeared that he was not really interested in having the D+ grade for the module in question altered; rather he kept insisting that he should have been able to discuss with his lecturer the original marks awarded by her. To the extent that this insistence on a one-to-one feedback from his lecturer may be understood to refer to the period before the IV process, the Commissioner disagreed with the complainant, as <u>such communication with the student at that stage</u> could easily have tainted and could have derailed the whole grading process. However, after the final mark had been awarded by the Academic Board (and after the time for possible appeals for a revision of paper had expired), the *vetitum* which appears to have been imposed by the Institute on the free flow of information between his lecturer and himself not only defied all logic but flew in the face of all the nice words about "*engagement*", "*dialogue*" and "*critical thinking*" contained in the document 'Teaching, Learning and Assessment – Policy and Procedures – Version 1.9' published by the same Institute.

While the lecturer was willing to meet the complainant to discuss her original assessment with him "*as part of the board review process*", she was informed by the Institute that "*only the feedback of the board [could be] shared*". This hindrance was not only unreasonable and unjust on the student, but verged on the oppressive.

Recommendations accepted by the Institute

In light of his findings, the Commissioner (**a**) sustained the complaint only to the extent that the lecturer was prevented, after the final determination of the marks and grade by the Academic Board, from discussing her original assessment of the assignment with the complainant; (**b**) recommended that the lecturer be allowed, without let or hindrance, to discuss with the complainant the original marks she

assigned to his work for the module in question, and further recommended that any policy or regulation which is an obstacle to such an exchange of information be revised or changed; and (**c**) dismissed the complaint as to the remainder.

By letter dated 16th March 2021 under the joint signature of the CEO of the Institute for Education and the Permanent Secretary at the Ministry for Education, the Commissioner was informed that his recommendations had been accepted.

University of Malta

Improper treatment of foreign academic

The complaints
The complainant, an academic domiciled in Canada, was an Associate Professor in one of the Departments of the Faculty of Media and Knowledge Sciences of the University of Malta. He applied for promotion to Full Professor, for a sabbatical and also for an extension of his appointment as Associate Professor beyond the statutory retirement age.

His complaints were, in substance, that (1) the sabbatical was granted unconditionally and should not have been withdrawn once the extension beyond retirement age was not granted; and (2) that his application for promotion, which had been pending for 27 months, should have been decided earlier and not terminated upon the non-extension beyond the retirement age.

The investigation and findings
From a careful examination of all the provisions governing the granting of sabbatical leave as found in the Collective Agreement then applicable (that of 2014-18) and in the Manual of Conduct and Procedures, the Commissioner concluded that such leave *necessarily implied* that it could only be availed of (apart from other conditions laid down in the aforementioned Manual) if the academic in question was still on the payroll of the University and was to remain so for at least a year after the termination of the sabbatical leave. One could not speak of full pay much less of leave on full pay if one were no longer employed by the institution. There was therefore nothing unreasonable, unfair or improperly discriminatory in the fact that complainant could not avail himself of the sabbatical leave because his appointment had not been extended beyond the statutory retirement age.

This conclusion, however, begged another question: was the decision not to extend the complainant's appointment beyond the statutory retirement age in any way tainted by some irregularity as envisaged in Article 22(1) of the Ombudsman Act?

From the inquires conducted it transpired that the complainant was a highly respected member of the Faculty in question, with an impressive academic track record, who brought to the said Faculty a wealth of experience. However there was also general agreement within the Faculty, and particularly within the Department in which he worked, that there were issues with his "*style*" of teaching which, as became apparent over time, did not completely fit with or into the style preferred by the Department. When, according to procedures, the views of the Head of Department and of the Dean of the Faculty were sought in connection with the application for extension, another issue – not insignificant in the Commissioner's view – kicked in, namely the wish of the Department to recruit younger members of staff and to slowly shed its older members. For all these reasons, the Committee which considers requests for the extension of appointments decided to recommend to the Council not to extend the complainant's appointment. The Commissioner found nothing irregular in all this.

The application for promotion

The same could not be said in connection with the application for promotion from Associate to Full Professor.

On 29th March 2018 – and therefore well before reaching the statutory retirement age and the statutory retirement date in December 2019 and September 2020 respectively – the complainant had applied for promotion to full professor. This application was never ruled upon by the appropriate University bodies by the simple but dubious expedient that it was decided, on 18th June 2020, not to extend his appointment beyond the statutory retirement age and at the same time to stop processing his application for promotion.

Apart from the fact that ceasing to consider the application for promotion was inconsistent with provisions in the Collective Agreements of both 2014-2018 and that of 2019-2023 – both of which envisage the backdating of promotions – the Commissioner was of the firm view that the very fact that an application for

promotion hovers in limbo for 27 months is indicative of a very serious malaise in the handling of these applications. It is true that, strictly speaking, there was no statutorily imposed maximum time limit within which such an application must be determined; however both Collective Agreements abovementioned indicate 18 months as the appropriate duration of the promotion process from the date of application to the date of communication of the final decision thereon.

The Commissioner was of the view that holding an academic, as it were, to ransom beyond 18 months was a measure of the ineptitude shown over the years by the University in handling some of these promotion applications. Such delays, whatever the final outcome, were not only detrimental to the applicant in question – a period which, as in the case of the complainant, could be considered as oppressive verging on the degrading considering the approach of his retirement – but also to the image of the University, both locally and abroad.

The University attempted to justify the delay by arguing that in the case of promotions to certain grades (like in the case of the complainant) it requires two independent peer assessments which the Association of Commonwealth Universities (ACU) had been tasked with providing to it. In the Commissioner's view, however, shifting the blame onto the 'contractor', could not absolve the University in this respect.

In fact from a reply to Parliamentary Question no. 17865 given by the Minister responsible for Education on 11th January 2021, it transpired that the problem of excessive delays in the promotion process involving the grades of associate professor and full professor dates back at least to 2013, with some applications having been pending even three or four years. The University has not shown to the Commissioner, either with respect to complainant's application specifically or with regards to applications in general, that it has taken robust and consistent steps to shorten the delays where the ACU was involved. More critically, the University, having chosen the ACU to provide certain services, could not wash its hands of responsibility – the principle of *culpa in eligendo* kicked in.

The complainant, therefore, had both a legitimate expectation to have his application determined within 18 months of his applying for promotion and, in any case, there was no justification for not continuing to process the application

after the 18th June 2020 in light of the fact that he remained on the University's books up till 30th September 2020 and in light of the retroactive application of promotions.

Proposed remedy not accepted by the University
For the above reasons the Commissioner, by means of a final opinion delivered on 3rd May, 2021, upheld the complaint in so far as it referred to the length of time that the complainant's application for promotion to full professor was pending and to the fact that it was not processed further beyond June 2020, but dismissed the complaint as to the remainder, that is with regard to the extension of the appointment beyond retirement age and the cancellation of the sabbatical.

The Commissioner recommended that the University pay to the complainant on an equitable basis and to remedy for the injustice to which he had been subjected the difference in salary between associate professor and full professor from the 29th September 2019 (the date upon which – after 18 months – the application was legitimately expected to be decided) to the 30th September 2020 (the date when the complainant ceased to be on the University's books). The Commissioner further recommended that the University or, in default, the Ministry for Education through appropriate legislation, should undertake to ensure that similar applications are, other than in special and extraordinary circumstances to be narrowly and clearly defined, always decided not later than 18 months from the date on which the application for promotion is submitted.

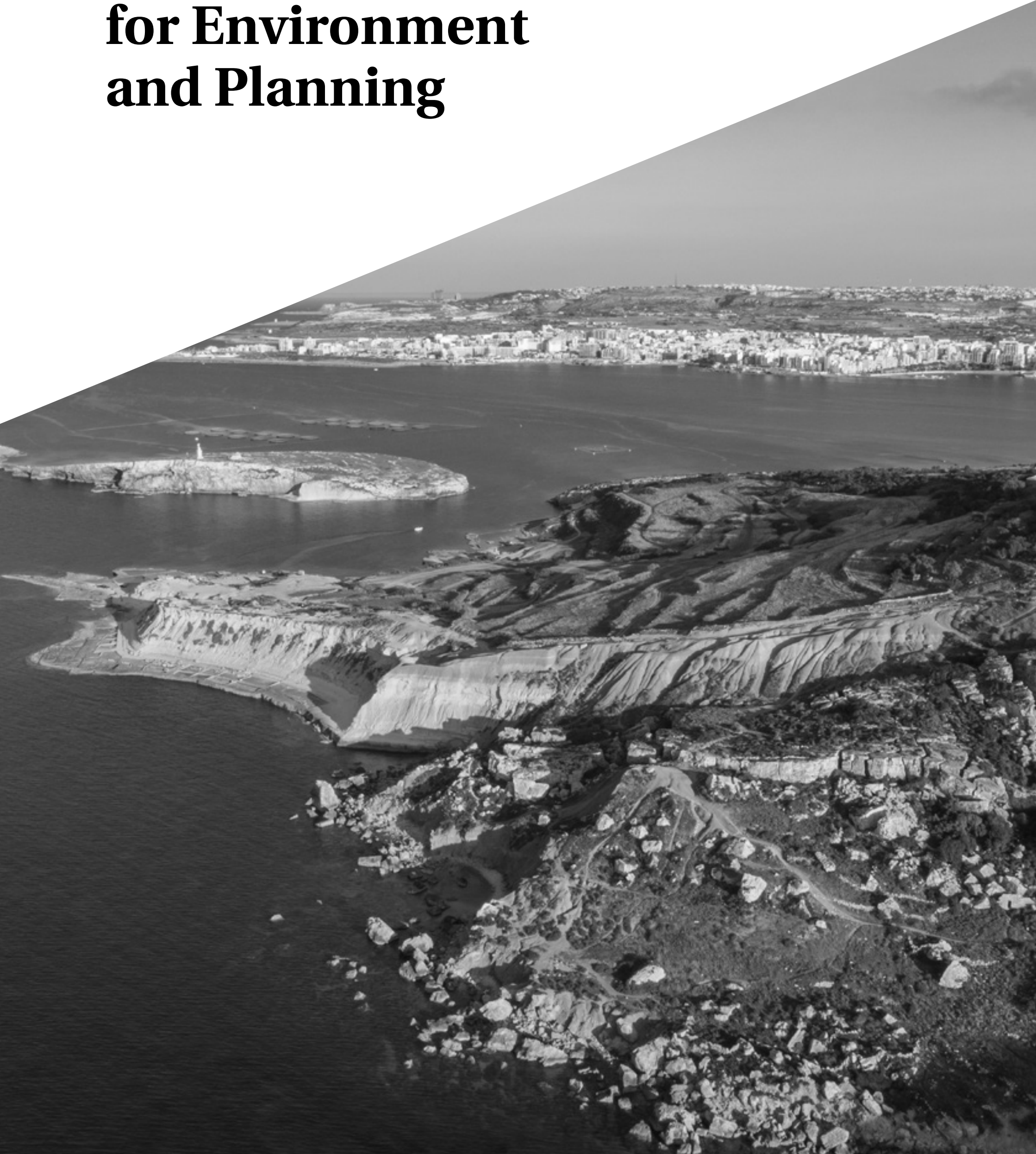
By letter dated 21st May 2021, the University informed the Commissioner that his recommendation for an equitable remedy as far as the specific complainant was concerned was not being accepted; and that it did not wish to alter its relationship with the Association of Commonwealth Universities and have a mandatory 18 month time limit for similar applications to be decided. It however undertook to reopen the complainant's application for promotion to Full Professor. On 1st June 2020 the Commissioner wrote to the University. He noted that the University was, albeit indirectly, acknowledging that it had wrongly halted the complainant's promotion process. The Commissioner pointed out that the equitable remedy he had proposed was intended to make good for the long delay in the promotion process and for the unwarranted termination of said process. He noted that what the University was now proposing – the reopening of the promotion process –

meant that the final decision now would be taken by the same entity which, in light of all that had transpired, was likely to have a jaundiced view of the complainant. The Commissioner described the University's proposal as risible.

By letter dated 29th November 2021, the University informed the complainant that his application for promotion to Full Professor had not been successful.

CASE NOTES

Commissioner for Environment and Planning



Planning Authority

Irregular amendment to permission

The complaint
Investigation on a complaint alleging unfair treatment by the Planning Authority in the processing of a minor amendment to a development permission.

The investigation
The Commissioner investigated the approval of a minor amendment to a development permission that was not published even though the amendments affected third-parties considerably since the changes included new interventions onto the party-wall up to a height of five floors. The complainant only got to know about these interventions when the actual works were under way.

The Planning Authority was asked to confirm whether this approval is in line with clause 15(3) of Subsidiary Legislation 552.13 (Development Planning Regulations - Procedure for Applications and their Determination) when the approved drawings show that the amendments extend beyond the building boundaries and an increase in the area of all the four units by more than 10%.

The Planning Authority replied that the approved extensions are within the site boundary and do not extend beyond the approved site plan nor beyond the approved plans and that the 10% is calculated collectively in relation to the whole approved development.

Whilst the reasoning put forward by the Planning Authority that the proposed extension does not constitute more than 10% was accepted if one were to consider the collective area of the whole approved development, the other reason that the

approved extensions are within the site boundary and the approved plans could not be accepted as Subsidiary Legislation 552.13 clearly excludes development that goes "*beyond the building*" and not only beyond the site limits.

Conclusions and recommendations

The allegations of unfair treatment by the Planning Authority in the processing of a minor amendment to an approved development was found to be sustained since the extension in question should not have been accepted as a minor amendment and should have been processed through a full application and published, thus allowing for the submission of representations.

Revocation procedures related to this case were not in order and the Commissioner recommended that similar minor amendments should be processed in strict accordance with Subsidiary Legislation 552.13 and whenever minor amendments extend beyond the approved building envelope, the applicants should be referred to seek a full development permission.

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.

Environment and Resources Authority

Suspension period on environmental permits

The complaint
Investigation on the issuing of environmental permits without a suspension period, thus allowing implementation of certain works during the time window for the submission of an appeal.

The investigation
A particular environmental permit authorising the uprooting and pruning of trees was issued by ERA with a seven-day notification procedure when the same permit could be appealed within thirty days. As some works, particularly the uprooting of trees, are irreversible, ERA was asked to confirm whether the imposition of a suspension period on all environmental permits, similar to the condition imposed on the development permits, is in order.

ERA submitted that unlike the Development Planning Act, the Environment Protection Act does not provide for the suspension of environmental permits, however ERA took note of the situation and is drafting a proposal regulating similar permits for more public participation and for providing for the suspension of permits similar to that established in the Development Planning Act.

Conclusions and recommendations
Although the Commissioner found that the issuing of environmental permits without a suspension period might have negative environmental repercussions due to the futility of submitting an appeal against already implemented irreversible works, the Environment Protection Act does not allow the introduction of this condition.

Outcome

The relative amendment readings to the Environment Protection Act were initiated in front of the House of Representatives.

Planning Authority

Illegal pedestrian bridge at Marsa

The complaint
This case relates to an investigation into allegations about works carried out without planning permit by the agency Infrastructure Malta.

The investigation
These works consist of the construction of a pedestrian bridge suspended from a steel arch resting on three-storey access towers on each side. This bridge spans thirty metres and crosses five carriageways. This bridge was constructed whilst a full development application for the construction of the same bridge was still pending at the Planning Authority.

Infrastructure Malta stated that this application was submitted before the start of works and that it had to carry out these works in urgency under Article 70 of the Development Planning Act which excludes similar emergency works in relation to public safety carried out by the Government from being considered as development and hence does not require a development permit. The Agency also stated that the fatal incident that happened following the start of these works further confirms this urgency.

The Commissioner raised the points with Infrastructure Malta and the Planning Authority that they should show more sensitivity towards the interpretation of Article 70 in the sense that this legal provision should be used as a last resort especially when other non-intrusive measures such as pelican lights can be implemented and when an existing pedestrian crossing is located a mere three hundred metres down the road. The Commissioner also highlighted the contradiction that whilst

the Planning Authority did not consider this pedestrian bridge as a development in line with Article 70, the same Authority processed an application for development permission for the same bridge.

The Commissioner lauded the fact that although there is no requirement for Government Agencies to obtain authorisations from the Planning Authority to utilise Article 70, Infrastructure Malta informed the Authority with its intention to embark with these works. However, this communication was carried out with the Executive Chairperson whereas the Development Planning Act clearly establishes that similar decisions on whether works can commence without a full development permission rests with the Planning Board and not the Executive Chairperson in line with Article 71(3) of the same Act.

Conclusion and recommendations

Following the eventual approval of the construction of this pedestrian bridge by the Planning Authority, a recommendation for enforcement action was not in order. As an improvement to current procedures and in order to avoid a recurrence of the same the Commissioner recommended that every Government entity wishing to carry out similar works of such magnitude should ask the Planning Board (and not the Executive Chairperson) whether these works require a development permission and then the Planning Board should decide within a few days whilst taking into account the provisions of the Development (Removal of Danger) Order. The Commissioner also recommended that any eventual requirement for a development permit should be fast tracked considering that the development will be carried out for the benefit of the public in general and also since the relative entity would usually already have obtained the consent of other regulatory entities.

Outcome

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

Planning Authority

Revocation of permission

The complaint
Investigation on a complaint alleging irregular processing of an application in terms of the height limitation policy.

The investigation
The Commissioner investigated the development permit allowing a development to exceed the height limitation of an area, with particular reference to approved drawings and the case officer report that showed the height limitation on both sides of the site as three floors when according to the Local Plan the site is located in between two different height limitations of two and three floors.

Although the Planning Commission oversees all the documents and the case officer's report, the Commissioner noted that the Planning Commission cannot be expected to verify all the information submitted by the applicant, architect or case officer in relation to similar Local Plans material and essential details for all applications that the Commission considers.

Conclusions and recommendations
The Commissioner concluded that the Planning Commission could have taken a different decision in relation to the treatment of the transition between the two different height limitations had the correct information been made available at the time of the decision and recommended the modification of this permit in line with Article 80 of the Development Planning Act.

Outcome
The Planning Authority accepted the Commissioner's recommendation and the Planning Board referred back the application to the Planning Commission to consider a revised proposal respecting the height limitations of the area.

Planning Authority

Illegal pavement at Għajnsielem

The complaint

This case concerns an alleged lack of action by the Planning Authority against works on a pavement in front of a commercial outlet.

The investigation

The level of the pavement in question was raised with the consequence that a change in level was created on each side of the raised platform. When an enforcement complaint was submitted, the Planning Authority had replied that this modification does not constitute development in line with Article 70(2a) of the Development Planning Act.

Following a request for information and after the Commissioner outlined that these works constitute development as they are not maintenance works carried out by a Government entity that are permitted under the Development Notification Order, the Planning Authority reconfirmed that these works do not constitute development and added that it does not have any guidelines related to the height of the pavement and that these matters are within the remit of other entities.

The Commissioner insisted with the Planning Authority that these works constitute development and also referred to policy P11 of the Development Control Design Policy, Guidance and Standards 2015 that not only confirms that similar works require a permit but also that similar works should not be approved. The Commissioner also stressed the fact that it is not right to accept similar changes in level to public pavements to accommodate accessibility requirements for commercial premises. Whilst the Planning Authority then agreed that these works constitute development, it insisted that this issue does not fall within its responsibility and that

modifications in pavement levels do not require a development permit according to the Development Notification Order.

Whilst noting that the development in question is not permitted under the Development Notification Order since the works were not carried out by an entity of the Government, the Commissioner referred the Authority to an inconsistency in its reaction to this case when it took action in connection with a simple step on a pavement in another locality.

Conclusion and recommendations

The Commissioner found the complaint against the Planning Authority's lack of action against the concrete platform on the pavement in question to be justified and recommended enforcement action to be followed with the applicable fines and direct action.

Outcome

The Planning Authority implemented the Commissioner's recommendation and issued an Enforcement Notice that was followed with a Full Development Application to sanction the modifications in the pavement.

Transport Malta

Un/loading bay against planning permission

The complaint
Investigation regarding the administrative act by Transport Malta following the implementation of an un/loading bay on a public road.

The investigation
The Commissioner investigated the authorisation of an un/loading bay for eight hours daily in front of a development approved on condition that un/loading activity shall take place solely within the premises and not on the public pavement or street. A similar request was initially dismissed by Transport Malta on the basis of the same development permit condition.

Transport Malta submitted that the first decision was taken on the fact that the un/loading bay was painted without the prior approval of Transport Malta and added that the second decision was taken following a meeting with the applicant who explained that they were facing a number of problems, including large delivery vans not being able to enter the development's car parks due to the low ceilings.

After the Commissioner asked Transport Malta to justify how this authorisation was issued infringing the Development Planning Act and how Transport Malta ignored the management of servicing and un/loading report presented to the Planning Authority by the developer (wherein certain mitigations are mentioned so that large delivery vans can actually enter the car park and that the servicing will take four hours daily) in its reply Transport Malta did not address the issues raised by the Commissioner.

Conclusions and recommendations

As the development permit in question was issued by the competent authority on the condition that un/loading shall take place solely within the premises, and not on the public pavement or street (which condition was included after the competent authority consulted with Transport Malta) and considering the relative thematic objective in the Strategic Plan for the Environment and Development and even the Traffic Impact Assessment requiring the service area to include a sufficient internal service bay to be sufficient to fulfil its intended purpose, the Commissioner found that the authorisation in question is irregular, also considering that this bay is providing for an activity that cannot be carried out under the Development Planning Act.

The Commissioner also considered that whilst Transport Malta justifies its decision on the basis of its own policy, it is relevant to note that the main aim of the same policy require that new developments are effectively incorporating parking bays in order not to further impact on on-street parking availability whereas according to the same Transport Malta policy, authorisations are accepted in certain instances only when an agreement has been reached with all effected entities (such as the Planning Authority) when the relative development permit condition shows otherwise.

The Commissioner recommended the withdrawal of the authorisation in question and the reversion to the parking bay as it was before and that Transport Malta only issues authorisations for similar requests after it ascertains that similar conflicting development permit conditions are first overturned by the competing authority.

Outcome

Transport Malta did not accept the Commissioner's recommendation and the case was referred to the Prime Minister and to the House of Representatives.

Planning Authority

Illegal works at Comino

The complaint

This case concerns an investigation into allegations of works by the Government contrary to law in Comino.

The investigation

These works consist of the construction of a service culvert underlying the road leading to Blue Lagoon bay and the deposit of construction material left exposed to the elements. The works included the excavation of a trench to accommodate the service culvert constructed with concrete blocks and slabs. As the works were still underway and owing to the fact that these works are located in an area of exceptional value (Natura 2000 site), this case was fast-tracked in order to limit any irreversible damages, especially considering that one could have easily avoided this service culvert by using clean energy.

The Planning Authority submitted that these works were authorised under Article 70 of the Development Planning Act which excludes emergency works carried out by the Government in relation to public safety from being considered as development and hence do not require a development permission. On further investigation it resulted that the Ministry for Gozo started corresponding with the Planning Authority in early 2020 for the authorisation to carry out works on the retaining wall and the surface of this road. The service culvert did not figure in these early discussions and it was only eventually brought up in early 2021, months after the Planning Authority recognised that the works discussed do not constitute development. The Environment and Resources Authority stopped the works that were unsatisfactory and issued a nature permit for the works to proceed. However, the issue of compliance with the Development Planning Act remained.

The Commissioner commended the preparation for underground services before surfacing works avoiding unnecessary costs and also the fact that although there is no requirement for the Government to obtain authorisations from the Planning Authority to utilise Article 70, the Government adopted this procedure for such a sensitive site. However, the Commissioner found that the Planning Authority was not informed about this intervention that would significantly disturb the natural habitat of such a sensitive site and that although the retaining wall and the road surface may qualify as emergency works it does not necessarily mean that the service culvert qualifies as well for the simple reason that it has to be carried during the same period.

Conclusion and recommendations

It was concluded that the works on the service culvert carried out during February and March 2021 by a contractor commissioned by the Ministry for Gozo infringes the provisions of the Development Planning Act and it was recommended that the Planning Authority should immediately issue an Enforcement Notice and impose fines to be used for the benefit of the environment of Comino. Similar service culverts should require a full development permit after carrying out the relative consultations according to law.

Outcome

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

CASE NOTES

Commissioner for Health

Case Notes from previous years

The Commissioner for Health regrets to have to report that he received no reply to the cases reported last year and which have been pending for years, namely:

1. Discriminatory and unlawful protocols;
2. Reimbursement of expenses incurred to purchase medicines not available on the Government Formulary list;
3. Hepatitis C patients not refunded money spent to buy medicines;
4. Salary scale discrimination;
5. Written warning to civil servant unjustly issued;
6. Indiscriminately not given allowance;
7. Loss of remuneration following unfair transfer; and
8. Request for refund of expenses incurred for treatment abroad.

Another case was reported regarding "*the effect on patients because of Industrial Actions ordered by Unions*", unfortunately directives to this effect by the Clinicians are still being resorted to, to the detriment of the patients.

Recommendations accepted

The recommendations of two Case Notes reported last year namely the right to treatment abroad and the State's duty to care for actions by its employees when it results that they have caused damages to citizens have been accepted by the Health Authorities.

Department of Health

Discriminatory treatment during selection process

The complaint

Seven Allied Assistants filed a complaint with the Ombudsman because, although they were to be promoted to Cardiographers (ECG Technician) after successfully completing their studies, they are still occupying the post of Assistants after six years. Moreover, when a call for application for the position of ECG Technicians was issued, the complainants were told that they were not eligible to apply.

The investigation

The Ombudsman referred the case to the Commissioner of Health for investigation. During the investigation, it transpired that in 2014 and 2015, the Department of Health had sent the complainants to the UK to sit for an examination to be certified as Cardiographers. The Department of Health paid for all the expenses related to the accomodation, trip and examination.

Once the Call for Application for ECG Technicians was issued, the complainants had applied and their application was accepted. They were also placed in the top places in the order of merit. However, they were later informed that their application was not accepted because they did not possess the qualifications requested in the Call for Applications. The Public Service Commission confirmed this.

The Commissioner for Health asked the Department of Health for their comments on the matter. In their representations, the Department of Health said that it was never the intention to be given an appointment as ECG Technicians but as Assistants to ECG Technician. The Department asked for *"tangible proof"* proving that the complainants were told to be appointed Cardiographers. The Commissioner sent

the Department of Health an email that the complainants had received from the Chairman of the Cardiology Department stating that "*once you pass the exam, you will be a cardiographer.*"

From further investigation made by the Commissioner, the Certificate given to these seven Allied Health Assistants is identical to the one given to the ECG Technicians already in employment. Therefore, since the ECG Technicians had the same Certificate, and since the Department of Health chose the Institute where the examination was done and paid all expenses, the said Assistants could not but believe that they had the necessary qualifications as the Technicians.

It was up to the Department to find the appropriate Institute which offered the required standard.

Moreover, the assertion that the course for which the Assistants were sent abroad was "*to be in a better position to assist the ECG professionals*" is incorrect. The truth is that complainants are not assisting but doing the ECGs independently. Anyone who had to undergo an ECG test can say that ECG Technicians do not need an assistant to help them.

The Department of Health also implied that the complainants did not have the necessary qualifications required by the Call for Applications, and therefore they were disqualified. The Commissioner for Health reviewed the Call for Applications and discovered that the Call was for ECG Technicians. However, under the "*duties*" and "*eligibility,*" it was stated that applicants should qualify for Physiological Measurements. The Commissioner argued that the two subjects – ECG Technicians and Physiological Measurements – needed different levels of education. A Call for Applications for Scientific Officer in Physiological Measurement was recommended to be issued separately.

The Commissioner also informed the Department that while a Scientific Officer is competent to do ECG studies, an ECG Technician is not competent to do studies in Physiological Measurements. The Commissioner added that those qualified in Physiological Measurements were given an Appointment as ECG Technician, which created demotivation, and it can also be considered exploitation. Also, the two different positions had different Sectorial Agreements.

Conclusion and recommendations

The Commissioner concluded that since those who successfully passed a couple of years earlier were appointed ECG Technicians, there is no justification to treat the complainants differently.

The Commissioner for Health recommended that the Allied Assistants who are doing the ECG studies be promoted to ECG Technicians on a personal basis because they have the qualifications needed, identical to the qualifications of those ECG Technicians already in employment, of course with PSC's approval.

If this is not possible for some specific reason, then a Call for Applications should be issued soonest and include a clause that makes them eligible to apply. Another Call for Applications to be issued for the post of Scientific Officer in Physiological Measures.

The Commissioner is still awaiting a reply from the Department of Health.

Department of Health

Discrimination in the Sectorial Agreement

The complaint

Three Scientific Officers working in the Department of Health (Mater Dei Hospital) filed a complaint with the Ombudsman because they were not assimilated among the beneficiaries recognised in the Sectoral Agreement, which was signed on 15 October 2020 between the Government and a Union. Five other specialties of Scientific Officers benefitted from this Agreement, but they were the only three employees omitted from this Agreement.

The complainants felt that they were unfairly left out of the Sectoral Agreement, and consequently, they were suffering discrimination.

Facts and findings

The Commissioner for Health started the investigation by asking the Department of Health to react to the complaint. The Department of Health replied that "*professions not listed in the AHP Allied Health Professionals Class Agreement are not eligible for assimilation. It should be further added that the Scientific Class Agreement already covers the Scientific Officer category*".

The Department of Health's reaction was sent to the complainants for their comments, who replied that it is true that all Scientific Officers have an *ad hoc* Agreement which was separate from the Allied Health Professionals Class. In fact, the Scientific Officers holding the registration with the Council for the Professions Complimentary to Medicine (CPCM) in non-allied Health Professional duties were assimilated. However, the three complainants who also possess CPCM registration "*were left out for no logical reason.*"

Furthermore, the complainants added that the Union "*decided to select some of the Scientific Officers and accept them for assimilation while ignoring*" them.

The Commissioner for Health decided to hold a meeting between the Department of Health and the complainants to try to mediate and find a solution. The meeting at the Ombudsman's Office was followed by another meeting between the Commissioner and the Union.

Following these meetings, the Department of Health informed the Commissioner that the Union concerned disagreed with any changes to the sectoral agreement and therefore no amendments to the Agreement could be made. The Union insisted that since the Ministry for Health regularly published calls for applications for Medical Laboratory Scientists within the Allied Health Class, as applicants are registered with the CPCM, these officers had every opportunity to apply for these calls.

This was rebutted by complaints who explained why they could not apply.

The Commissioner held another meeting with the Union which replied that the Scientific Officers were given the choice to either wait until the Allied Class Agreement was finalised so that they would enjoy the same benefits or to treat their case separately. The Scientific Officers decided to choose the second option.

Sequel
Complainants were informed of the above and decided to close the case but were considering legal proceedings.

Department of Health

Request for Continuous Glucose Monitors

The complaint

The Malta Diabetes Association had requested the Department of Health to supply a Continuous Glucose Monitor to all Type 1 Diabetics. The Association maintained that such monitors could be lifesaving. The Continuous Glucose Monitor warns when one's glucose levels are low, which, if untreated, the person can lose consciousness and even die. The monitors are necessary, especially for people living alone.

The investigation

As a pilot study, the Department of Health gave monitors to all people with diabetes up to the age of sixteen, and this year the age limit will be raised to twenty-one. As the Association stated, the monitors should not be limited to children and adolescents but extended for all persons living with type 1 diabetes, irrespective of age. The Association maintained that the pilot study should have also targeted various persons from different age groups.

In their reaction, the Department of Health said that the Continuous Glucose Monitor would gradually be given to all type 1 patients as soon as funds are available.

Conclusions and recommendations

The Commissioner for Health concluded that limiting this initiative by age could lead to discrimination.

The Commissioner recommended that the matter be seen with urgency because elderly Type 1 diabetics will never benefit due to the slow pace at which the age limit is being raised.

Sequel

This issue is compounded because such monitors cannot be purchased in Malta. They are only available on lease at quite an exorbitant cost.

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