

**Każ Nru CEDUC-24-4468**

Referenza Tagħkom: MEYR/11/2024/8

30 ta' Ottubru 2024

Lis-Segretarju Permanenti

Ministeru għall-Edukazzjoni, Sport, Żagħżagħ, Ricerka u Innovazzjoni

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Għażiż Sur Vella

**Dwar ir-Rapport Finali tal-4 ta' Ottubru 2024**  
**Każ Nru CEDUC-24-4468**

Nirreferi għall-ittra tiegħek tat-28 ta' Ottubru 2024 dwar il-każ fl-intestatura.

Il-każ in dizamina, kif spjegat fir-rapport tal-4 ta' Ottubru 2024, m'għandu x'jaqşam xejn ma' negozjar kollettiv jew ma' materja kollettiva, iżda jirrigwarda esklussivament u intimament il-libertà ta' shubija trejdunjonistika.

Dan l-Uffiċċju ha nota tal-fatt li l-Ministeru għadu jikkampa interpretazzjoni żbaljata tar-Regolament 5 tal-Legislazzjoni Sussidjarja 452.112. Kif jgħid il-qawl f'diversi ilsna, il-persistenza fl-iżball tattira aġġettiv ta' dannazzjoni.

Nieħu l-okkażjoni biex niġbidlek l-attenzjoni għar-Rapport Finali tat-18 ta' Mejju 2021 fil-Każ Nru UU 0020 (kopja annessa). Dak il-każ ukoll kien jirrigwarda l-libertà trejdunjonistika, kemm mil-lat ta' shubija kif ukoll mil-lat ta' interazzjoni bejn unjin u l-membri tagħha. F'dak il-każ, il-preċedessur tiegħek, Dott Frank Fabri, kien aċċetta fil-prinċipju r-rakkomandazzjoni kontenuta fil-paragrafi 13 ta' *dak* ir-Rapport Finali, tant li fl-email tiegħu tas-17 ta' Awwissu 2021, kiteb hekk lil dan l-Uffiċċju:

*“B’hekk il-UPE, kif rifless fl-opinjoni finali tiegħek, tkun qed tingħata l-istess faċilitajiet bħalma tingħata l-unjin l-oħra, għajr għal dak li huwa marbut ma’ negozjati dwar ftehim kollettiv”.*

Dik l-email kienet minnu ikkupjata fost nies oħra lil allura Ministru Dott Justyne Caruana. Jidher, sfortunatament, li dik l-armonija industrijali u *modus vivendi* li



għalihom kien sar aċċenn f'Awwissu 2021, wieħed issa qed jitbiegħed minnhom bl-iskuża tar-Regolament aktar 'l fuq imsemmi.

Fiċ-ċirkostanzi dan l-Uffiċċju m'għandu ebda triq oħra għajr li jkompli bil-proċedura delineata fl-Art. 22(4) tal-Kap. 385.

Inselli għalik

Vincent A De Gaetano  
Kummissarju għall-Edukazzjoni

Kopja: Is-Sa Josephine Magro – Senior Principal - MEYR

## Final Opinion Case No UU 0020

### *The complaint*

1. The complaint was lodged with this Office on 3<sup>rd</sup> June 2020, against the Ministry for Education and its subordinate directorates, notably the Directorate for Educational Services.
  
2. Complainant – a registered trade union representing teachers in, among others, Government service – couched his complaint in the following terms:

*“A systematic denial of facilities for the Union of Professional Educators by the MEDE and/or the DES to carry out its trade-unionistic work including, but not limited to, the denial or otherwise lack of timely authorization or permission for Union Officials:*

- 1) *To visit places of work of its members;*
- 2) *To hold meetings for its members at the place of work during break or recess time;*
- 3) *To otherwise communicate with its members at the place of work;*
- 4) *To transmit its union materials/communications to the places of work, and*
- 5) *To display such union materials and communications at the places of work;*
- 6) *To be afforded the same exposure and facilities afforded to other trade unions as a matter of course.”*

### *The investigation – preliminary issue*

3. By communication, under the signature of the Permanent Secretary at the Ministry for Education, dated 30<sup>th</sup> June 2020 the Ministry objected to this 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 only to physical persons, whereas in this case the complaint, although lodged by a physical person was in effect on behalf of a moral person.

4. By a preliminary decision of 9<sup>th</sup> July 2020, this objection was jointly dismissed by the Ombudsman and the Commissioner (the previous Commissioner, who sadly later in the year died in office). In this decision it was stated, *inter alia*:

In your communication you stated that in terms of Article 13 of the Ombudsman Act, the Ombudsman, and consequently the Commissioners established within his Office, can either conduct an own initiative investigation or carry out an investigation consequent to a written complaint of any person having an interest, who claims to have been aggrieved by any action of the administration. You maintained that from a reading of the law it transpires that it is only natural persons, as opposed to moral persons – unions, companies, societies etc. – who can seek an investigation from the Ombudsman in terms of the Ombudsman Act. According to your legal advisors by definition, “... *an ombudsman is a state official appointed to provide a check on government activity in the interests of the citizen and to oversee the investigation of complaints of improper government activity against the citizen.*” [and] “*A citizen is a citizen, a person and not a trade union.*” You further support your view by referring to Collins dictionary that defines the term Ombudsman as “... *an independent official who has been appointed to investigate complaints that people make against the Government or public organizations.*”

In the first instance it must be stated that the Office was somewhat troubled with the restrictive interpretation being given by your legal advisors to the term ‘person’. This Office has over the years investigated, and is currently investigating, complaints submitted by moral persons that felt aggrieved by the decisions of the public administration and the wide public sector and therefore sought the assistance of this Office, to obtain redress from decisions, actions or omissions of the public administration that may have negatively impacted that moral person. The Public Administration never brought up the plea being currently raised by the Ministry and has cooperated and still cooperates with this Office by providing the information and documentation necessary for the investigation of such complaints. This Office acknowledges that often the Ombudsman, as an institution is described as a defender of citizen’s rights, especially the right to good administration, but observes that limiting access to the Ombudsman institution to citizens would be far too restrictive and would in effect stultify

and defeat the aim behind the creation of the institution. Moreover, the term 'citizen' is far more restrictive than the term 'person' and should one limit access to the Ombudsman to citizens, then one would be implying that the Ombudsman cannot investigate complaints filed by EU nationals whether residing here or in another member State (who in terms of EU legislation should enjoy the same rights as citizens of Malta when residing here), residents of Malta (not being citizens), non-residents, refugees and those seeking international protection – all these categories fall within the term 'person' as interpreted by your legal advisors - that is physical persons - and undoubtedly enjoy a right of recourse to this Office. In fact, the term citizen is never used in the Ombudsman Act.

The Ombudsman Act does not define the term 'person'. Article 13 stipulates that the Ombudsman may conduct an investigation on any administrative action of the Public Administration and the wider public sector "*... on his initiative or on the written complaint of any person having an interest who claims to have been aggrieved by any action as aforesaid ...*" or of his heir or representative. Subsequently, the term 'complainant' is utilized throughout the Act without any restrictions or qualifications.

This Office would like to bring to your attention the Interpretation Act, Chapter 249 of the Laws of Malta, which was enacted so as "*To make provision in respect of the construction and application of Acts of Parliament and other instruments having the force of law and in respect of the language used therein*" stipulates the following in Article 4:

*"In this Act and in every Act whether passed before or after the commencement of this Act, unless the contrary intention appears -*

...

*(e) the expression "person" shall include a body or other association of persons whether granted legal personality in accordance with the provisions of the Second Schedule to the Civil Code, or not."*

In terms of the aforementioned Act therefore, unless the contrary intention appears in an Act, the term 'person' refers not only to physical/natural persons but includes bodies of persons, associations or organizations independently of whether these have a legal personality or otherwise – the UPE, a trade union, established in terms of the requirements of applicable legislation, is such a body.

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.*"

5. The undersigned subscribes fully to this decision, and would only add that even apart from the provisions of the Interpretation Act, a teleological interpretation of Cap. 385 would necessarily lead to the same conclusion, namely that even a moral or juridical person may, in the appropriate circumstances, file a complaint with this Office.

### ***The investigation – the merits***

6. The Commissioner at this point wants to make it pellucidly clear that it is 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 in terms of delegated functions under Rule 8 of S.L.385.01. Sub-article (5) of Article 13 of the Ombudsman Act would, in fact, proscribe such an investigation (saving always that "an investigation may be proceeded with in respect of problems of general interest contained in the complaint" – see the *proviso* to that sub-article).

To date, however, this Office has only been informed (by the complainant on 7<sup>th</sup> May 2021) that notice of such a dispute has been given to the Minister responsible for Education. Indeed, the Ombudsman Liaison Officer at the Ministry of Education, replying on 14<sup>th</sup> May 2021 to this Office's email of 3<sup>rd</sup> March 2021, made no reference to any such case pending before any court or tribunal covering the same subject matter of the instant complaint. The function of the Commissioner is 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.

7. In substance the complainant union is claiming that it is being hindered in exercising its proper functions as a trade union representing a minority of teachers in the public sector in the ways indicated in paragraph 2, *supra*, of this report; and that moreover it is being discriminated against because preferential treatment with concomitant facilities is accorded to another union representing the vast majority of teachers in the public service.

8. The official side maintains that it cannot accede to the complainant union's requests because this would risk upsetting the "other union" representing the said majority of the teachers in the public service. Indeed, in its communication of the 14<sup>th</sup> instant, already referred to above, 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 is made in this almost telegraphic letter of the various other complaints or of

the issues raised in the complainant's memorandum of 1<sup>st</sup> March 2021 and transmitted to the Ministry by this Office on 3<sup>rd</sup> March 2021.

9. After examining all the evidence, including the correspondence exchanged between the complainant and the Ministry and which was attached to the original complaint filed in June of last year, it is the Commissioner's considered view that what is at stake here goes beyond issues of mere industrial relations or potential industrial relations disputes. What is at stake here goes to the very heart of fundamental democratic principles and the rule of law. The Commissioner does not for a moment doubt that for purposes of "collective bargaining" there is only one registered trade union which is and which should be recognised by the official side, *and this union is not the complainant union*. What is in issue here, however, is the positive obligation on 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 is not improperly hindered in the exercise of its function to communicate with its members, and, correspondingly, that its members are allowed to benefit from unhindered communication (within the bounds of reasonableness) with union officials. More critically in this case, there should not be any 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 is 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 falls short of that standard, however, would tend to be both capricious and improper.



10. It should also be recalled 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<sup>1</sup> but also of “any right set forth by law”. Sub-paragraph (2) of Article 1 of the said Protocol specifically states 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 are not exhaustive but merely illustrative.

11. All this is not to say that any union representing teachers has a “right” *stricto sensu* to any of the six activities mentioned in paragraph 1 of this report. However *from an equitable point of view* it is evident that if a union representing teachers is treated in one way by the official side, another union, even if not enjoying recognition for the purposes of collective bargaining, should, in relatively similar circumstances, be treated in the same manner.

12. One of the functions of the Ombudsman and of the Commissioners appointed under the Ombudsman Act is to attempt to resolve issues where maladministration or nascent maladministration is detected in any of the forms described in Article 22(1) and (2) of the said Act. From the investigations carried out, which included a very cordial and informative meeting with the (current) Minister responsible for Education and with the Permanent Secretary at the Ministry for Education, it transpires that the main bone of contention is the hesitance on the part of the official side to extend to the complainant union (a minority union) the same facilities

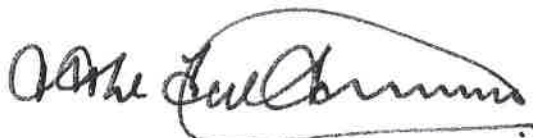
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<sup>1</sup> As in Article 14 of the ECHR read in conjunction with any of the other articles from 2 through to 13.

that are accorded to the main union which has official recognition for purposes of collective bargaining. While this hesitancy is understandable it should not be allowed to trump what should be fair and equitable. Freedom of association, including the freedom to join a minority union and the corresponding right and duty of a union (including a minority union) to interact with its members, should not be sacrificed on the altar of expediency.

### ***Conclusion***

13. For the above reasons the Commissioner finds the complaint justified in so far and to the extent that improper discrimination has been exercised with respect to the complainant union by the Education Authorities; the Commissioner recommends that, except and in so far as a facility is strictly linked to collective bargaining, the complainant union be accorded the same facilities indicated in paragraph 1, *supra*, as are or may be accorded to any one or more other unions representing teachers in the public service.



Vincent A De Gaetano  
Commissioner for Education

18 May 2021