Case Notes 2023

PARLIAMENTARY OMBUDSMAN - MALTA

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Foreword

It is with great satisfaction that I introduce the first edition of Case Notes during my term as Ombudsman, marking the 43rd iteration since this pivotal institution was established in Malta in 1995. This edition continues our esteemed tradition of illuminating the array of complaints addressed by the Office of the Ombudsman and the dedicated Commissioners, offering insights into the fundamental principles and methodologies guiding our resolutions.

In this publication, we have meticulously selected 36 case notes that captivate a broad audience and reflect our office's diverse spectrum of grievances. Each case note is concisely summarised, capturing the crux of the issues and the logic underpinning our determinations. These summaries underscore the outcomes and any subsequent actions stemming from our recommendations, where relevant.
I extend my profound appreciation to everyone involved in crafting this publication. Your dedication to upholding the principles of fairness and justice is the cornerstone of our collective mission.

In this edition, we explore a range of issues that underscore the complexities and responsibilities inherent in public service and governance. From the cases presented, we delve into scenarios such as the challenges faced by residents in social housing, scrutinising the inconvenience and safety risks due to prolonged idle construction works. The fairness of promotion processes within the Armed Forces of Malta is examined, illustrating our commitment to meritocracy and transparency. In the educational sector, issues from the pegging of calls for post-secondary teachers to the progression challenges at MCAST are addressed, showcasing our dedication to ensuring fairness in academic and professional advancements.

The health sector case notes highlight our interventions where essential medical treatments were not provided, or communication was broken, emphasising our

role in advocating for patient rights and healthcare quality. Environmental and planning issues are also tackled, where our efforts to mediate urban planning challenges and promote sustainable community development are demonstrated. These cases reflect our active role in addressing individual complaints and our broader commitment to influencing positive changes in public administration.

Through this publication, we reaffirm our commitment to promoting transparency, accountability, and best practices in public service. It serves as a resource to inform and inspire ongoing dialogue and improvements in public administration and advocate for justice and equity across Malta.

Judge Emeritus Joseph Zammit McKeon
Parliamentary Ombudsman

Note: Case notes offer a brief overview of the complaints reviewed by the Parliamentary Ombudsman and the Commissioners. They aim to highlight key principles or the Ombudsman's approach to specific cases.

The term 'he/she' does not indicate the complainant's gender. This wording is chosen to preserve the complainants' anonymity as much as possible.

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Housing Authority
Own Initiative

Removal of inconvenience and safety risks caused by works left idle for more than a year in a social housing block

The facts
On 9th April 2023, The Sunday Times of Malta published an article titled 'Social housing block left with a gaping hole and piling rubble for a year.'

It was reported that four families living in a social housing apartment block situated on Republic Street, Valletta, had to withstand a gaping hole and a pile of rubble at the foot of their stairwell for a year after a planned electric lift was not installed.

The apartment block is home to 11 people, including young children and persons in their 70s.

The Housing Authority who is responsible for this building informed the residents that the work was underway to install a lift as part of an ongoing upgrading exercise in older social housing units.

The article highlighted the safety concerns and inconvenience experienced by the apartment block residents.

After having read the article, the Ombudsman, in accordance with Section 13(2) of the Ombudsman Act 1995, decided to conduct an own initiative investigation, mainly because of the fact that the article had highlighted not only the inconvenience that the residents of the apartment block were sustaining but also risks to their safety.

The investigation

The Office of the Ombudsman made contact with the Housing Authority to establish the following:

i. The reasons for the delay in the satisfactory completion of the works.

ii. What immediate and effective steps did the Housing Authority intend to undertake in order to address the plight of the residents?

In response to the Ombudsman's request, the Housing Authority stated that it was necessary to find the rock face beneath the building before commencing any work for the lift installation in that particular social housing unit.

The Authority submitted that a depth of two (2) meters - above and beyond the usual depth – had been reached during the excavation works without successfully finding the rock face. This necessarily brought about a change in methodology and the use of alternative methods, including a core test which had to be ordered and carried out. This test identified the rock face at a depth of five (5) meters.

The Authority confirmed that the procurement process was finalised and that work would continue.

The on-site inspection

Following a site visit by a representative from the Office, the Ombudsman insisted that, as an immediate measure, the Housing Authority had to resolve all health and safety concerns together with blatant inconvenience to the residents.

The Housing Authority had to make provision for the immediate removal of rubble and other hazardous materials until the works commenced.

Furthermore, the Housing Authority had to cover the gaping hole.

The outcome

The Housing Authority followed the recommendations of the Ombudsman by clearing the rubble at the bottom of the stairwell, shutting the hole safely and securely, and placing a safety fence around the perimeter of the hole.

Gozo Channel Limited
Own Initiative

Vehicles parked in the hold of Gozo Channel Ferries with their engines running

The complaint
On the 2nd of August 2023, the Times of Malta published a letter from a Mr Emanuel Galea of Victoria where he complained that the users of several vehicles when parked in the hold of Gozo Channel vessels were keeping the engines of their vehicles running throughout the crossing, exposing passengers and Gozo Channel crew members to potentially toxic emissions in a zone with limited ventilation. The writer also stated that when Gozo Channel crew members attempted to address this abuse, they were ignored by vehicle owners.

The investigation
Considering the issue raised by Mr Galea as a matter of grave concern, the Ombudsman started an own initiative investigation according to law.

Contact was made by the Office of the Ombudsman directly with Gozo Channel for a reaction. The Office wanted to know what policies, standards and/or measures the service provider had with regard to such occurrences. Furthermore, the Office sought clarity on the Gozo Channel's Shipboard Operating Procedures and any other related guidelines that address the issue of vehicles on board vessels during transit and passengers staying on the car deck.

Gozo Channel sent in its response. The company confirmed the existence of Shipboard Operating Procedures, whereby passengers are expressly forbidden from remaining on the car deck when the vessel leaves port until its arrival at its destination. The company also provided a Fleet Letter that instructs crew members

to inform passengers about the inherent risks and company policy violations when they stay inside their vehicles with engines running.

Outcome
To further address the matter and ensure the safety of all aboard, Gozo Channel disclosed with the Office a pro-active initiative on its part namely that with effect from the 18th August 2023, police officers would board the ferry vessels between 8.00 am and 6.00 pm to inspect the vehicles on the car decks and ensure strict observance of company procedures by way of enforcement in the interest of health and safety of the public and the crew.

The Office monitored the effect of this procedure.

Sequel
On the 17th October 2023, the Office of the Ombudsman brought to the attention of Gozo Channel that police officers were not being present on its vessels as previously advised.

On the 9th November 2023, the Ministry for Gozo relayed a response from Gozo Channel on this matter. Gozo Channel acknowledged that engine idling had been a persistent problem, and the most effective control method seemed to be the presence of a police officer on board. This police officer's role was to remind passengers not to remain in the garage or leave engines running, primarily during the hot months when passengers were inclined to keep on the air conditioning of the vehicle.

However, the cost of maintaining a permanent police presence on the vessels was considered to be a significant challenge. The cost factors and calculations provided by Gozo Channel showed a substantial financial commitment required to sustain this method of enforcement. Additionally, it was noted that Gozo Channel crew members faced verbal and physical abuse when attempting to enforce the engine shutdown policy, leading to the necessity of police presence and involvement.

In the absence of the police, compliance was minimal.

Recommendations
The Ombudsman acknowledges the financial burden Gozo Channel has to sustain to enforce the engine shutdown policy effectively. Yet Gozo Channel must adhere to maritime transport rules and regulations that prohibit engine idling in the interest of public and crew safety. Responsibility for enforcement lies with the Company. The Ombudsman made the following recommendations:

Police Spot Checks:
Rather than a permanent police presence, unannounced spot checks by police officers could be implemented, especially on days of heavy traffic movement between the two islands. Non-compliant passengers found during these checks could be subject to prosecution.

Increased Signage and Awareness Campaigns:
Given the limited effectiveness of existing signage on company vessels, a more robust awareness campaign is advised. This would include repeated audio and video messages on the vessels, emphasising the health hazards caused by engine idling and the repercussions for non-compliance.

Alternative Enforcement Strategies:
Because of the financial and practical challenges of maintaining a police presence on board, alternative enforcement strategies should be considered, including the training of Gozo Channel employees in conflict resolution and legal enforcement of rules the recording of vehicle registration numbers of non-compliant passengers and relative coordination with police authorities.

Implementation of recommendations
The Office of the Ombudsman continued monitoring the implementation of the recommendations and received updates from Gozo Channel regarding the introduction of safety measures.

No Access to Enclosed Decks: By Gozo Channel's Shipboard Operating Procedures, passengers are now prohibited from accessing enclosed decks while the vessel is underway. This policy is strictly enforced by the vessel's master or a designated officer to ensure that all passengers are informed and adhere to this regulation.

Crew Responsibilities: Crew members are tasked with verifying that no passengers remain in their vehicles once the vessel is prepared to depart. This includes a comprehensive inspection of the vehicle deck and guiding passengers to the upper decks. To reinforce compliance, announcements are made via the PA system, emphasising the need for passengers to leave the car deck.

Informational Monitors at Marshalling Areas: To enhance communication and raise awareness, informational monitors are installed at Cirkewwa and Mgarr. These monitors will consistently display reminders about the policy prohibiting passengers from staying in their vehicles and the necessity of deactivating car alarms during the voyage.

Public Awareness Campaign: A press release has been disseminated to educate the public on the hazards of remaining on the vehicle deck during crossings, highlighting potential dangers in scenarios like vehicle fires.

The Office of the Ombudsman acknowledges the adoption of these measures as an essential step toward ensuring a safer and more secure travel experience for all passengers and crew members on Gozo ferries.

Commissioner of Police
Claim sustained. No recommendation from the Ombudsman

Complaint for unfair treatment

The complaint
The complainant alleged that the Commissioner of Police had not supported him during his grave illness and that he had failed in his duty of care towards him. In particular he was not allowed to benefit from the three months pre-retirement leave applicable to public officers.

The investigation
Complainant joined the Police Corps in 1976 as a Probation Police Constable and retired in the rank of Superintendent. In November 2015, he was informed while being treated at Mater Dei Hospital, that he was suffering from pancreatic cancer. He was discharged from hospital in December 2015. The treatment to eradicate the cancer or traces of it continued for the following six months. He underwent chemotherapy and radiotherapy on a weekly basis. He was subjected to a stringent medical regime which required an almost hermitical existence to avoid any contact which could trigger illness and infection. His immune system was battered by the cancer treatment.

He was periodically examined by the Police Medical Officer at Police General Headquarters. In May 2016 he was notified that his sick leave had expired and he would not be receiving any salary. At this stage he had another two months of chemotherapy and radiotherapy to undergo. This decision left him without regular income except for periodic payments from the Department of Social Security. Complainant made a request to avail himself of his outstanding vacation leave and the accumulated off-duty days and time off in lieu (in Police parlance "*vices*"). These were granted.

In February 2017, he called at the Human Resources Branch at the Police General Headquarters to enquire about the retirement procedure. He was asked to tender a letter requesting retirement. However, he was not authorised to receive three

months pre-retirement leave. Complainant was stunned as he had completed forty (40) years of service. Nonetheless he retired from the Police.

Complainant wrote several times to the authorities to rectify what he saw to be an injustice in his regard. The tread of correspondence with the authorities started on the 7 February 2017 and ended on the 2 March 2022. His claim for pre-retirement leave was rejected. On the 9 January 2023 he filed his complaint with the Ombudsman.

Complainant requested the Ombudsman to recommend that he be paid the salary for three months pre-retirement leave and the salary arrears for the period 15 May 2016 - 21 February 2017 less social security benefits, vacation leave and time off in lieu.

The Office communicated the complaint to the Permanent Secretary - People and Standards Division - Office of the Prime Minister; the Permanent Secretary at the Ministry for Home Affairs; and the Commissioner of Police.

With regard to the claim for salary arrears, the People and Standards Division (PSD) could not understand why complainant was requesting payment when he was on sick leave and therefore not working, and at a time when he had exhausted his sick leave entitlement.

With regard to payment of salary during the three-month pre-retirement leave period, the Division stated that complainant did not have an automatic right. Such leave could be authorised in case of those public officers having accumulated "an average of 50% unutilised sick leave on full pay throughout their career in the Public Service" (Manual on Special Leaves, Section 1.1.). Once complainant could not satisfy that condition, he was not eligible. Furthermore, entitlement could only be confirmed by the complainant's departmental head on condition that the appropriate regulations were respected.

On their part the Ministry for Home Affairs (including the Commissioner of Police) rejected the allegation of unfair treatment. Complainant was on sick leave on the 17 November 2015. He did not resume his duties. He then retired on the 21 February 2017. This meant that complainant availed himself of fifteen (15) months of sick

leave. While on sick leave, complainant was informed that his six months of paid sick leave had been exhausted and that henceforth, he would regress to unpaid sick leave. Therefore, he could not be paid for sick leave he was on.

Complainant then requested that his accumulated vacation leave and "*vices*" be converted to sick leave, meaning that though strictly speaking, he could not be paid for his absence due to sickness, he would still receive payment equivalent to the vacation leave and other accrued hours. He was informed that his request was being approved on a humanitarian basis.

Complainant was advised of the proper procedure for applying for pre-retirement leave of three months. He had to have applied for it three months prior to taking it, that is six months before retirement date. This application was deemed to be a formal notice that the officer would be definitely retiring after the three months leave period elapsed. He was also told that the application could not be considered once he was on unpaid sick leave. His paid sick leave had been exhausted. Complainant was advised that the procedure could not be changed.

The Ministry advised the Office that complainant was not entitled to his salary between 15 May 2016 and 21 February 2017 because he had been paid for the period 16 August 2016 to 20 December 2016 through the vacation leave and "*vices*" owed to him, and he had gone back on unpaid sick leave after the 20 December 2016. The Ministry added that the Commissioner of Police did not pressure the complainant to present himself before a Medical Board which would have probably resulted in a fast exit from the Police Corps, instead his accumulated vacation leave and "*vices*" were authorised. Complainant received his service pension from his first day of retirement.

Considerations

Pre-retirement leave is considered to be a "*special leave*" and is regulated by the "*Manual on Special Leaves*" issued by the Office of the Prime Minister.

Section 1.1 states that:

> *"Public Officers are entitled to avail themselves of unutilised sick leave on full pay as pre-retirement leave on the basis of one (1) day's pre-retirement leave for every four (4) days of unutilised full pay sick leave, immediately preceding their retirement from the service".*

The eligibility criteria say that:

> *"In order to qualify for pre-retirement leave, public officers need to accumulate an average of fifty (50%) unutilised sick leave on full pay per year, throughout their career in the Public Service".*

The application procedure states:

> *"Public Officers are to complete the e-form and submit it to the respective Director at least three (3) months before the commencement of such leave".*

Complainant could not qualify for pre-retirement leave in terms of Section 1.1. (supra) because he did not have unutilised sick leave on full pay, and, consequently, he did not and could not accumulate 50% unutilised sick leave full pay days per year and he did not apply for that special leave three months before the commencement of his retirement.

It was evident for the Ombudsman that complainant had serious and justifiable reasons for taking sick leave. He was undergoing medical treatment with chemotherapy and radiotherapy sessions for a grave illness which were debilitating. Sick leave was a must. He used the full complement of paid sick leave. Complainant did acknowledge that because his sick leave entitlement had been exhausted, his outstanding vacation leave and "*vices*" should be authorised. In fact, he did not receive any salary after his paid sick leave was exhausted on the 21 November 2016. From then onwards he was on unpaid sick leave.

Complainant made various representations. No one was willing to overturn the decision which had been taken by the Police authorities that he was not entitled to take the pre-retirement leave. He petitioned the One-Stop-Shop for Public Officers too. This did not bring him any favourable outcome. On the 25 September 2020 he was informed by P&SD, inter alia, that "*public officers are encouraged to keep abreast with the pending policies, rules and regulations applicable to them*". The issue of whether he was entitled to this special leave was not entered into.

Conclusion

Complainant was in the difficult and unenviable position of having to be treated for cancer without receiving a salary. He joined the Public Service in 1976 and was thus entitled to full pay sick leave for a period not exceeding six (6) months

in aggregate during a period of twelve (12) months. If this sick leave exceeded one-year (365 days) during a period of four (4) years, the public officer concerned would not receive any salary as stipulated in Section 3.2.1.1. of the Public Service Management Code (PSMC).

Complainant took four hundred and sixty-three (463) days of sick leave from the 17 November 2015 to 21 February 2017 thereby exceeding the stipulated three hundred and sixty-five (365) days and therefore his salary was no longer paid.

The course of action taken by the authorities cannot be said to be incorrect.

Administratively, the non-authorisation of the pre-retirement leave cannot be said to be objectively wrong.

This Office could not find that the Police authorities neglected their duty of care to the complainant. No restriction was put on complainant's sick leave.

Whether the period of sick leave determined by the PSMC is sufficient is another question altogether. It is also a matter which should be considered by the Office of the Prime Minister.

On the basis of facts in hand, the complaint cannot be sustained in the sense that there have been no administrative or procedural errors in this case.

Despite this fact, and given the particular circumstances of the case, the Ombudsman recommended that complainant be recompensed for the three-month pre-retirement leave which he was entitled to but could not take. The reason for this is objectively justified because the complainant was undergoing serious and intensive medical treatment for a cancer which is hard to treat. Complainant's concern was primarily to get better. For this he should not be unduly penalised.

Sequel
On 27th December 2023 the Final Opinion was sent to the Prime Minister for his attention but to-date this Office is not aware if the recommendation is to be accepted and implemented.

Armed Forces of Malta

Claim sustained. No recommendation from the Ombudsman

Injustice claimed in a promotion process in the Armed Forces of Malta

The complaint

A Major in the Armed Forces of Malta (AFM) complained that he had suffered an injustice after he was not promoted to the rank of Lieutenant Colonel pursuant to a call. The promotions were officially promulgated by means of a Government Notice published in the Government Gazette.

The facts

A selection process was set in motion by the Human Resources Management of AFM for the promotion of Majors to the rank of Lieutenant Colonels. Eligible candidates were to submit an 'Expression of Interest'. The eligibility criteria were a medical examination by AFM doctors and a National Security Clearance certificate. The complainant registered his interest by letter and attached his *curriculum vitae*. Twenty-three applicants for the post, including the complainant, were informed that interviews would be held on two dates. Each interview had an allotted time of thirty minutes.

A report from the Senior Ranks Appointments Advisory Committee was submitted to the Minister.

The Commander AFM informed the Minister that AFM had a vacancy for eleven applicants. Therefore the first eleven Majors in the order of merit were chosen and promoted to the rank of Lieutenant Colonel. The complainant was not one of them. The Minister gave his approval for the eleven officers' promotion. The official notice with effective date of promotion was published in the Government Gazette.

The complainant requested redress from the Commander AFM in accordance with Section 160(1) of the Malta Armed Forces Act. The Commander met the complainant, where he requested that he be informed of his placing in the order of merit, to have sight of the rank's appointments report, the marks he obtained in the interview and the exact reasons why he was not promoted. Complainant was not satisfied with the Commander's explanations and he complained with the Ombudsman.

The complaint was communicated to the Ministry, and a request was sent for comments and relevant information to be submitted by the Permanent Secretary to the Ombudsman. The Ministry replied that the promotion exercise had been conducted according to the official policy, and in accordance with the provisions of the Malta Armed Forces Act.

The officer promotion process

Section 4 (2) (d) of the Malta Armed Forces Act (Chapter 220) empowers the President of Malta, through the Minister, to issue regulations, *inter alia*, to "*regulate the appointment, rank, duties and numbers of the officers and men of the force.*" In Section 8, Chapter 220 mentions the terms and conditions of service.

Regulation 6 of Legal Notice 91 of 1970, issued by virtue of Chapter 220, sets out how officers and men of the force are promoted and appointed. The regulation specifies that a promotion must be based on a recommendation based on efficiency; seniority; and a selection to fill a vacancy. There are no exceptions, bar one – accelerated promotions, which require the following requisites: exceptional circumstances; the interests of the service; recommendation of the Commander; and ministerial approval.

The government is empowered to lay down the requirements of a selection process that cannot be dispensed with. A formal and official selection process was initiated by the Government, and new AFM promotion procedures were promulgated. An 'AFM Officers' Career Handbook' was published by the Office of the Prime Minister. The purpose of this handbook and the policy on the promotion and selection process was: "*… to develop and manage AFM officers' careers in an open, transparent and objective way so as to raise standards and, so far as possible, to provide officers with a challenging and balanced career structure*". The Handbook contemplated a selection process that necessitated written and oral examinations to advance to

a higher rank. This policy had garnered opposition from officers who were in line for promotion and who had even complained to the Ombudsman. The complaints were, however, dismissed.

The selection process following the implementation of written examinations was followed year after year by lieutenants and captains for their promotion to captains and majors, respectively. This apparently was not the case for promotion to Lieutenant Colonel and Colonel ranks until 2011.

In 2007, a promotion exercise was carried out whereby several Lieutenant Colonels were promoted to Colonel and Majors to Lieutenant Colonels. The Office of the Ombudsman's documented information consists of a memorandum recommending the promotions with the authorisation of the Prime Minister of the time.

The Office of the Prime Minister issued a policy establishing an AFM Senior Ranks Appointments Advisory Committee (SRAAC) after these promotions. This policy viewed the Commander of the Armed Forces and Senior Ranking Officers as providing strategic direction, drawing up policy and overseeing the smooth running of the Army. These important tasks demanded that: "*… the most suitable persons are selected for appointment to these sensitive and high responsibility senior posts. … such appointments are to be the result of a transparent, fair and just process based on meritocracy. This process should also be perceived by AFM personnel and the public in general to be fair and just*".

The manner how Prime Minister's Secretariat and the officials involved in drawing up the policy considered the three objectives could be achieved through the appointment of the AFM Senior Ranks Appointments Advisory Committee (SRAAC), which was given the remit to advise the Minister with regards to: "*candidates for promotion to the ranks of Lieutenant Colonels, and Colonels and the appointment thereof; oversee succession planning for such ranks*". A selection procedure was established. A detailed report of the interview sessions had to be submitted to the Prime Minister, together with the recommendations.

Promotion process (2011)

This procedure was first adopted in 2011. The AFM Commander issued a policy with respect to the promotion of Majors to the rank of Lieutenant Colonel. This

policy was meant to regulate the promotion process of Majors wishing to advance to the next higher rank. The policy stipulated specific eligibility requirements and the assessment criteria that the SRAAC was bound to observe. The criteria were efficiency (military knowledge, military qualifications, command experience, staff experience, civilian educational qualifications and overseas operational deployments), seniority, and selection to fill a vacancy. The said three criteria of the selection process had marks allocated to them, totalling 500.

The report on the selection process and the successful candidates was submitted to the Prime Minister by the Director (Defence Matters) at the Office of the Prime Minister. The selection process was carried out as outlined in the policy mentioned above, with the emphasis being on the objectivity of the process and observance of the requirements of the law.

Promotion process (2013)

Another promotion process was carried out in 2013. A circular was issued to all Unit Commanders and the Commander DS on the policy outlining the promotion process from Major to Lieutenant Colonel. The policy was new and was established by the Ministry for Home Affairs and National Security. The promotion exercise was subject to an exhaustive investigation by the Ombudsman and was found to be wanting. The Ombudsman declared that: "*the selection process was vitiated and the complainants and indeed all other eligible candidates suffered an injustice as a result of an act of maladministration*". The Government did not accept the recommendations of the Ombudsman.

Promotion process (2016)

The Ombudsman became aware of steps that were being undertaken to organise a new selection process. This was during the lawsuit that the Ombudsman had instituted against the Government. The Ministry was questioned on whether it was advisable to hold a new selection process following the Government's appeal against the judgement of the First Hall of the Civil Court, which had found in favour of the Ombudsman.

The new policy totally swept away the written complement of the promotion process carried out in 2011 and introduced radical differences. Twenty-two majors submitted their curriculum vitae. Contrary to what happened in 2011, there was no

set and specified format, and each applicant sent in his own personalised, that is, non-standard curriculum vitae.

The 2016 selection process was based on an interview. There was no record of what exactly the applicants were asked. The SRAAC report stated that "*a set of standard questions were put forward to each candidate*" without specifying what these were.

The Permanent Secretary chaired the 2016 SRAAC. It established 'Seniority' and 'Efficiency and Selection to Fill a Vacancy' as the criteria for assessment. 'Efficiency and Selection to Fill a Vacancy' was subdivided into four sub-criteria: 'Communication Skills', 'Appearance and Bearing', 'Experience in the AFM' and 'Interview'. The rubric 'Interview' was subdivided into finance, International Affairs, Operations and Administration. The total marks were 200, with a pass mark of 100. After all interviews were concluded, sixteen Majors passed the selection, but only eleven were promoted to Lieutenant Colonel.

Critique of the selection process

The complainant alleges unfair treatment when he was not selected for promotion from Major to Lieutenant Colonel. His complaint required an examination of the selection process itself, which had been drawn up in a way similar to that conducted in 2013.

The processes which the Ombudsman investigated, that is, the 2013 and 2016 promotions, departed from the objectivity that the 2011 exercise tried to impart and were different from the policy originally formulated by the Office of the Prime Minister in 2009.

The aim of a selection process, especially with regard to the promotion of senior ranks in the disciplined forces, must be based, as far as possible, on objective grounds or criteria. The Ombudsman noted a marked preference for subjectivity in the 2016 process compared to 2011.

Looking at the assessment criteria of the 2011 selection process, the SRAAC tried hard to reduce the element of subjectivity of the assessment: the criteria identified for 'Efficiency', namely 'Military Knowledge', 'Military Qualifications', 'Command Experience', 'Staff Experience', 'Civilian Educational Qualifications' and 'Overseas Deployments' were objective criteria. So also were the other criteria.

That does not mean that all subjectivity was eliminated. That is very hard to achieve. Thus, the questions the officer candidates were asked regarding their understanding of military, international, and other matters would naturally reflect the candidates' opinions and views. This would also apply conceivably to the points awarded on the attributes of each candidate in connection with the criterion 'Selection to Fill a Vacancy'.

The opposite happened in 2016. The written component was totally eliminated. Any opportunity for objectivity in testing the candidates was dismantled apart from the academic and military service aspect of the selection process. The candidates themselves received no guidance on the topics or questions the SRAAC intended to ask them. This was a marked contrast to the 2009 policy objective that stipulated the criteria on the basis of which the applicants were to be tested.

This was unfair.

The Ombudsman could not decipher any justifiable rationale for the elimination of such a basic element in the selection process. The Office was not given a record of the questions that the SRAAC asked. The only notes given were by the Permanent Secretary and another board member. Unfortunately, these questions do not bear any indication as to why points were awarded.

The idea the Ombudsman had on how the complainant fared in his career was through a so-called "*pen picture*" submitted by the Commander. This, it must be said, was not encouraging since this was the Commander's personal and subjective opinion. In actual fact, complainant passed the selection process but placed thirteenth in the order of merit, and only eleven Majors were chosen for promotion to Lieutenant Colonel.

Considerations

The Ombudsman refrained from giving an opinion on whether the successful applicants merited a promotion. The 2016 SRAAC made the choice. What the Office tried to determine was whether the decision of the Committee was within the parameters of scrutiny of Chapter 385 as these result from Section 22.

The Ombudsman is entitled by force of law to examine the discretionary power relative to the administrative act complained of and whether that discretionary power was exercised for an improper purpose or on irrelevant grounds, whether irrelevant considerations were used, or whether reasons should have been given. This matter gives ample scope for investigation in order to assess whether there was reason for complainants to feel justly aggrieved by an act of maladministration that caused them injustice.

The first question to be addressed is whether the promotion exercise itself was in accordance with the applicable legal provisions. The subject of "*promotion*" is specifically provided for in Regulation 6 of the 'Appointments and Conditions of Service of the Regular Force Regulations' (Legal Notice No 91 of 1970).

Promotions may be normal - through a selection process or accelerated - due to exceptional circumstances. The complaint under review concerns the first type and, as such, required a "*… recommendation based on efficiency, seniority and selection to fill a vacancy*". The first element one must consider is whether, prior to the selection process *per se*, there were vacancies to be filled. The vacancy is a prerequisite of the selection process. In the 2011 exercise, four posts had to be filled. In fact, the call for applications issued by the Army clearly notified the available vacancies which necessitated the promotions.

The case was different in 2016. Only after the results did the Commander inform the Minister what vacancies needed to be filled.

The Office cannot look away from the wording of the law itself. It has invariably maintained that its mission is to afford justice to those who lodge complaints with it. The law itself can create situations which are unjust. On the other hand, in the matter of promotion and selection processes, the objectivity of the law must guide selection.

Regulation 6 of the Legal Notice, which specifically regulates the modality of promotions in the Armed Forces, cannot be subject to any interpretation other than what is contained in the provision itself. The Maltese version of Sub-Regulation (1) is clear: "*… promozzjonijiet għar*-ranks *… għandhom isiru skont rakkomandazzjoni bażata fuq effiċjenza, anzjanità u għażla biex timtela vakanza*".

The words "*biex timtela vakanza*" show the scope of a selection process in the officer ranks. Where a vacancy materialises, then a selection process must be initiated to fill that vacancy. In other words, the vacancy comes first, not the promotion. Promotions cannot justify vacancies because the law requires otherwise. This is not subject to discretion since where the law speaks, discretion stops.

The integrity of the selection process

It was determined that there were discrepancies in the selection processes of 2011 and 2016 as there were between the one of 2011 and that conducted in 2013. Now, the method of assessment needs to be examined because this bears direct relevance to whether the selection process was sound.

The objective element of the 2011 selection process was discarded. The candidates were subjected to an interview only and were not required to project their knowledge, principally military knowledge, during the selection process. The 2011 process required the officers to present a written exposition on a "*professionally relevant subject*". The aim was that: "… *Candidates are expected to show coherent structure with an introduction, argument and conclusions, without significant error of grammar, syntax or spelling. This will be a timed exercise, followed by a short question and answer session during which the candidates are expected to demonstrate their full understanding of the same document to the SRAAC*".

There were verbal questions which the candidates were required to answer. These related to the paper on military knowledge itself, national and international affairs, security, defence, and on their attributes to fill the advertised vacant posts.

In 2016, the candidates were not advised in the communication sent to them notifying them of the promotion process and what was required of them. There was no indication of what the selection panel would be looking for and what would be examined, as happened in 2011. Not even the vacancies were advertised. In the opinion of the Ombudsman, this was a serious fault since there should not have been any promotion process unless important information is given with the notification of the process itself.

The process for promotion in the AFM is regulated separately from the Public Service Commission procedures. Members of the Armed Forces are not deemed to

be public servants. They do not form part of the public service because they do not serve the Government in a "*civil capacity*", but in a military capacity. The requisites of the Public Service Commission for selection processes do not apply.

The body that selected the officer candidates was the Senior Appointments Advisory Committee, an organ contemplated by the Public Administration Act (Chapter 497). This law applies to the public service, that is, those employees of the Government who work in a civil capacity. Nevertheless, it was an *ad hoc* SRAAC which was intended to be established in 2009.

Conclusions

The selection of Army officers at any level, but especially at the level of command, calls for a strong, robust and impartial selection process. This has been recognised for years.

In 1998, the Government of the day decided to introduce written and oral tests in the promotion process from Lieutenant to Captain and from Captain to Major. Even at the time, complaints were filed with the Ombudsman alleging unfairness, impropriety, and undue burden on the officers who had admittedly been trained and qualified before commissioning. The Ombudsman rejected these allegations. The Ombudsman cannot be contrary to a selection process which is used fairly and objectively to choose officers who have the grave responsibility of administering and commanding the Army in defence of the country's security. All those involved in the administration of this country must serve every citizen impartially, respectfully and dutifully.

The responsibilities incumbent on Army officers are higher. They must be prepared to defend the country, and for this to happen, they must be of the highest order. Their standard of care can only be gauged by stringent testing. What happened in the past, and especially the period before the new SRAAC policy was implemented, went contrary to the objectivity based on meritocracy that the Ombudsman advocated. Events have unfortunately shown that what was deemed a fit selection process in 2009 and the subsequent SRAAC selection process in 2011 was turned on its head in 2013 and 2016 when the written tests and associated interviews on military and technical subjects were dispensed with.

The Ombudsman expressed the opinion that this selection process was conducted unprofessionally and did not achieve the necessary rigour. The fact that the major part of the objectivity test was lacking and the lack of a record of how the candidates answered militate towards the Ombudsman's view that this selection process lacks integrity and has given cause to an injustice.

The Office has consistently acknowledged that the Executive is entitled to lay down the policies of the Armed Forces and to define and determine the structures within which they are to operate to implement those policies. The Executive also retains a determining say in any restructuring needed to secure efficient and effective Armed Forces. On the other hand, the Office has always recognised that the Armed Forces are not at the service of the Executive. They have to serve the nation as a whole. The Armed Forces are the ultimate safeguard of the country's security against internal strife and external aggression.

Allowing the Armed Forces full freedom to act does not, of course, mean that they are at liberty to act capriciously or that there are no limits to the exercise of their discretion. They remain accountable and bound to observe the rules governing a good public administration as applicable and consonant with the exigencies proper to a disciplined force.

It is precisely for this reason that Chapter 385 provides that the Ombudsman has jurisdiction to investigate complaints regarding the Armed Forces of Malta "*in respect only of appointments, promotions, salaries and pension rights of officers and men of the force*". The legislator rightly wanted to ensure that actions or inactions by the Armed Forces in these areas of management that directly impact the lives and expectations of members of the Force would be subject to an overseeing, independent authority that would determine whether decisions taken were just or unjust, improperly discriminatory or motivated by undue considerations or abuse of power.

The complaint that the Ombudsman investigated refers specifically to a promotion exercise. It does not refer to appointments. It needs to be stated that the Office has always distinguished clearly between appointments and promotions. It recognises that the Armed Forces have a wider discretion in matters of appointments, though the core issue remains that appointments, too, have to be made fairly and without manifest improper discrimination.

The higher the rank, the higher the level of discretion of the executive. The Armed Forces have a much wider discretion in determining who should do what within the Force. On the other hand, in matters of promotion and especially when these are subject to a selection process, the investigation of complaints by the Office needs to be more stringent. It has to ensure that procedures regulating the process are rigorously observed, that issues of eligibility, qualifications and merit are closely examined, and the pre-established objective and subjective criteria are justly and uniformly applied to all candidates.

In this context, the Ombudsman has consistently insisted that promotion exercises in the Armed Forces must be open and transparent. Selection boards appointed to conduct promotion exercises have to adopt procedures that are verifiable to the extent that it is possible to determine whether the selection process was just and fair. Transparency has always been a guiding rule of this Office to determine the validity of promotion exercises in the Armed Forces.

This investigation aimed not to determine whether the chosen candidates were qualified for the rank to which they were promoted. Nor could it verify whether other candidates were more or less qualified than them. That assessment can only result from a selection process that is fair and just, open and transparent and conducted impartially.

At that stage, the Ombudsman could only conclude that during the selection process, the complainant suffered an injustice that originated from the fact that the selection process was not grounded in a true objective manner. The persistent intromission of subjectivity cannot give even the semblance of impartiality and an even-handed result.

In conclusion, the Ombudsman recommended that the Armed Forces of Malta revise its selection process and endeavour to use the policy which had been used in 2011.

Whilst the Ombudsman acknowledged that the complainant had suffered an injustice, no rectification could be recommended because the complainant was not assured of promotion, even if the selection process was beyond reproach.

Department of Commerce
Claim sustained, recommendations made by the Ombudsman.

The outcome of national competition

The complaint
The complaint was related to the outcome of the result of Category 1 of the Competition "*Premju Ġieħ l-Artiġjanat Malti 2018*".

The Competition catered for prizes in four categories. Category 1, 'Crafts Product,' was subdivided into seven subcategories (A to G). Candidates had the possibility to submit a piece/product under one of seven subcategories. The complainant, an artist, chose to submit one of her pieces under Subcategory C – "*Most Innovative Product: Glass Works and Ceramics*". Following the conclusion of the evaluation process, she was ranked second and was awarded a €1000 cash prize. Another Individual, (X), was awarded the first prize for a large project/product composed of various sizeable handcrafted pieces. The cash prize amounted to €5000. The complainant objected to X winning the first prize, claiming that X did not satisfy the Competition conditions as set out in the application.

She filed a complaint with the Commerce Department and requested that X be disqualified and that she be awarded the first prize under Subcategory C.

The complainant was informed that whilst the Department had the power to disqualify an applicant and revoke prizes in the eventuality that an applicant was found to have made false declarations and did not adhere to the conditions found in the application, the Department found no such breaches.

As the complainant was dissatisfied with the outcome, she filed a complaint with the Ombudsman. She challenged the final result of the Competition on the same grounds and further argued that the Commerce Department's rejection of her complaint was not properly justified. She requested that she be declared the official winner of Subcategory C of the Competition and that she be awarded the trophy and prize money accordingly.

Facts and findings

The 7 subcategories of Category 1 (Crafts Products) of the Competition are listed hereunder:

- Subcategory A – Most Innovative Product: Textiles;
- Subcategory B – Most Innovative Product: Modelling;
- Subcategory C – Most Innovative Product: Glass Works and Ceramics;
- Subcategory D – Most Innovative Product: Precious Metals and Jewellery;
- Subcategory E – Most Innovative Product: Painting and Sculpting;
- Subcategory F – Most Innovative Product: Non-precious Materials; and
- Subcategory G – Most Innovative Product: A Group of Crafts Persons.

The complainant submitted an application under Category 1, Subcategory C - reserved for pieces crafted by not more than two crafts persons/artists. Groups consisting of three crafts persons or more could only participate in Subcategory G. X was awarded the first prize, while complainant was the runner-up. The day after the award ceremony, the complainant requested the Commerce Department to provide clarifications in writing as regards the award of the first prize, given that it was evident that the winning product was not the result of the work of one craftsperson but a number of them – and therefore in direct contravention of the Competition conditions.

The complainant submitted evidence in the form of news articles and social media posts which clearly depicted the first ranked product - as one created by a number of craftsmen at Company Z. It was further publicly announced that the winning product was crafted by a commercial entity consisting of a number of crafts persons.

Given the scale of the winning product, complainant expressed severe doubts on how one or two crafts persons could have completed such a large product within the time frame specified in the conditions. The Commerce Department took note of the complainant's concerns and informed her that the Director General was investigating the matter.

A few months later, the complainant, through her lawyer, formally wrote to the Commerce Department and submitted further evidence in the form of links to sites and social media posts showing that the winning entry was not the result of a one/two person effort. The Department was, therefore, requested once again to investigate the matter and reconsider its decision (with respect to the winning entry), and thus disqualify the winner of the category and award the first prize to the complainant. Following the conclusion of its internal investigation, the Commerce Department wrote to the complainant, rejecting her claim.

As the complainant was dissatisfied with this outcome, she filed a complaint with the Ombudsman, listing various instances where allegedly the winning entry breached competition conditions. For the purposes of this case note focus will be placed on the primary issue being that the winning product was included in the wrong subcategory. With reference to this issue, complaint argued that the winning entry breached two conditions:

- Condition 1 – X should never have competed in Subcategory C but should have competed in Subcategory G which is reserved for businesses, organisations and groups of three crafts persons or more; and
- Condition 8 – This condition once again referenced the need for organisations to submit an entry through Category G.

The complainant also provided excerpts of online articles and social media posts by Company Z, indicating that more than three individuals worked on the winning project. One article which was published two months before the competition deadline, referred to the project being manufactured by six crafts persons. Complainant also provided a minute of a meeting held with officials from the Commerce Department. Worthy of note was the explanation of how applications were processed. The officials explained that upon receipt of the applications by the Department, these were anonymised with the result that only the first two

pages and attached photos were forwarded to the Selection Committee. Prior to the opening of the exhibition of the products submitted to the Competition, the Selection Committee privately toured the exhibits.

This Office noted that the application listed a total of 21 conditions. The most pertinent are reproduced hereunder:
"*1. Applications may be submitted by a craftsperson or a group of crafts persons, by an organisation or by a business (from now on referred to as the Applicant). Businesses, organisations and groups consisting of three crafts persons or more can only participate under Subcategory G.*

…

3. The applicant must choose for which Sub-category he/she wants to participate and ensure that the appropriate Subcategory is chosen. Each Product will compete in only one Subcategory.

…

8. The Applicant must be the person/persons who manufactured the Product. Organisations can present a Product (under Subcategory G only) as long as it was manufactured by the members of the same organisation. Commissioned works are not accepted.

9. Applications submitted by groups (Subcategory G) must include the names and identity card numbers of all the crafts persons involved in the manufacturing of the Product.

…

18. The Organisation Committee can move a product from one subcategory to another. This would be done only in agreement with the applicant.

…

21. The Commerce Department reserves the right to disqualify applicants and revoke prizes if the Applicant is found to have made a false declaration and did not adhere to one or more of the above conditions".

This Office observes that the application form referred to three separate 'bodies' – the Commerce Department, the Selection Committee and the Organisation Committee. The Organisation Committee was mentioned only once in Condition 18. No further explanation was given as to its role or function apart from what is stated in Condition 18.

As part of its investigation, the Office requested and was provided with the original application as submitted by Individual X, as well as the file dealing with the Department's investigation into the complainant's claims. The said application had a number of sections that provided information on the applicant and the product submitted. Worthy of note was that the applicant described the product as being made by a business organisation and crafted by talented and dedicated artists. The scale of the project was evident from the description provided.

The application also included a section that required the applicant to include the names and ID card numbers of the individuals who worked on the project. The wording found in the application specifically stated that said details **only** needed to be completed in the event that that submission was being made under Subcategory G: Most Innovative Product by a Group of Crafts Persons. X left this section blank. The application form also included a declaration section, which reads as follows: "*I hereby declare that: 1. The Product being presented is entirely my work and/or the work of the business/organisation/group of artisans as indicated above (delete as applicable).*" This remained untouched, and no deletions were made. Included in the application by Individual X were a number of photos (in excess of the required three) showing the product's manufacturing process. Said photos clearly indicated two individuals, none of whom were the applicant, working on the different pieces.

The Office had the opportunity to peruse the Commerce Department's investigation documentation, including its final report on the matter. The Department's conclusions as regards the breach of Condition 1 were that the application itself was devoid of any statement declaring that three or more individuals worked on the project. The evidence collected after the completion of the Competition,

however, strongly suggested the winning project was completed by more than two individuals (without confirming the exact number), resulting in a possible breach of Condition 1.

The question of whether the Commerce Department could take action in light of the conditions listed in the application form was considered. The possibility of disqualification (as requested by the complainant) was immediately discarded, as this was only possible while the competition was still running. The Department, therefore, took into consideration a further option provided by Condition 21, the possibility of 'revocation'. Both language versions were scrutinised:

"*The Commerce Department reserves the right to disqualify applicants and revoke prizes if the Applicant is found to have made a false declaration and did not adhere to one or more of the above conditions.*

Id-Dipartiment tal-Kummerc jirriserva d-dritt li jiskwalifika applikant u jirrevoka premju jekk l-Applikant jinstab li għamel dikjarazzjoni falza jew kiser xi waħda mill-kundizzjonijiet msemmija hawn fuq."

The English version made revocation subject to the satisfaction of two cumulative conditions - that the applicant made false declarations and that there was a breach of conditions. On the other hand, the Maltese version made revocation a more straightforward proposition, as only one condition needed to be satisfied. There was, therefore, a conflict with no clear indication as to which version should take precedence. Legal advice was sought, which resulted in the Department deeming that the English version should take precedence. At this juncture, it considered whether X made any false statements in the application as submitted – none were identified. Revoking the prize was, therefore, not possible.

It is to be noted that the subsequent edition of the competition sported a new and revised application form. Various changes were introduced in a bid to address the issues that were uncovered as a result of the complainant's grievance. The changes that were of particular note are listed below:

a. The Organising Committee which previously featured only where a change of categories was considered, was given properly defined functions including the vetting of applications. The possibility of changing categories was, therefore, given proper context.

b. A complaints and reporting procedure was introduced that allowed participants and the public to flag any irregularities in the participating products which might be in breach of the regulations.

c. The circumstances leading to the revocation of a prize were clarified. The Commerce Department was given the faculty to revoke prizes and take any other action it deems necessary if applicants are found in breach of conditions or have made false declarations.

Considerations

In her complaint, the complainant challenged the award of the first prize to X on the basis that the product entry breached a number of Competition conditions.

The complainant argued that the winning product was the result of a collective effort of three or more crafts persons. She provided the office with a press release that specifically stated that six crafts persons manufactured the whole project. Social media posts and press releases following the win also referred to the winning product being manufactured by a number of individuals but stopped short of stating the number. Furthermore, the sheer scale of the project rendered it impossible for it to be completed within the prescribed time frame without the direct involvement of people. On analysis of the documentation extraneous to the application, it was evident that the winning product was manufactured by a number of crafts persons – in excess of two. The question was whether the Organising Committee, receipt officers and Selection Committee could have concluded that fact from the application alone and that, therefore, the submission of Individual X was in the wrong category. Officers within the Commerce Department were assigned the task of receiving the applications, sending an acknowledgement, assigning a reference number to each application and anonymising all personal details for onward transmission to the Selection Committee. It is unclear whether these officers were part and parcel of the 'Organising Committee'. In terms of Condition 18, the Organising Committee was given the right to move a product from one sub-category to another - as long as this was in agreement with the applicant. No time

limit was given for this possible change. The Office assumed this option was only available during the competition and not once it was concluded. It was, however, obvious that the Organising Committee had to have access to the full unredacted application in order to exercise this function. On analysis of the complete and integral application, it is evident that more than two persons performed the work. The sheer scale of the project (which was referenced in the application form) and the fact that the photos submitted showed two individuals (none of which were the applicant) working on the pieces, should have at least *prima facie* raised questions as to the number of individuals who worked on the project. Nonetheless, no questions were put on the matter. The Office concluded that either the Organising Committee did not have sight of this application (as it should have) or that this was not adequately studied.

The Selection Committee was presented with an anonymised application so as to ensure its impartiality. This process, while necessary, rendered it more difficult to scrutinise the application form in terms of the 'correctness' *vis-à-vis* the subcategory chosen. However, by looking at the submitted photos, the Selection Committee would have noted that two individuals were working on the product. Without access to the applicant's details, it was not possible to discern that none of the individuals in the photos was the applicant. The words used in the application indicating a plurality of individuals could have plausibly referred to two individuals – which was permitted in the particular subcategory. That said, the application made a clear reference to the scale of the project, which in and of itself should have raised questions on the feasibility of it being manufactured by two individuals. Once again, the Selection Committee did not consider the possible logistic difficulties of producing such a large product and, therefore, the possibility that the submission was in the wrong category was not flagged.

Regarding the application submitted by X, no false statements appear to have been made. The scale of the product was made clear, and so was the fact that the pieces making up the said product were manufactured by more than one person – stopping short of stating the number of individuals involved in its manufacture. As the entry was submitted under Subcategory C and in line with the instructions on the application form, the details of the individuals who worked on the product were not included in the application. It is further observed, however, that X failed to complete the end of application declaration wherein applicants were required

to declare that the submitted work was entirely their own or completed by more individuals. Overall, the application form, as submitted, had the unfortunate effect of muddying the waters for receipt officers and evaluators alike.

As regards the alleged breach of Condition 1, Condition 18 stipulated that the Organising Committee could change the submission sub-category provided the applicant also agreed to this. It also had the unfortunate effect of seemingly shifting the responsibility of 'spotting' said error onto the organisers. Moreover, once said 'error' was determined, the shift in subcategory had to be agreed to with the applicant. The Office found this somewhat problematic. It should have been the applicant's responsibility to exercise care and diligence when submitting an application – any repercussions for errors should have been borne exclusively by the applicant and not by the organisers. In terms of the Competition rules, the only possible negative repercussion on the applicant which could be objectively identified was where an agreement between the Organising Committee and the applicant not being reached. In such an eventuality, one would have to assume that disqualification would have been considered. In this instance, the applicant erroneously submitted the product in Subcategory C (products manufactured by one or two individuals) when the submission should have been made under Subcategory G (products manufactured by groups). The error, however, was not noted by recipients or evaluators, which meant that the application was 'approved' as submitted.

The error was subsequently uncovered once the Competition had run its course and the Commerce Department investigated a complaint made by the complainant. Whilst the claims made by the applicant in the application form were found to be truthful the Commerce Department acknowledged that it was highly likely that more than two individuals completed the submitted project – as such, it considered the prize revocation.

A further issue did, however result that is the conflict between the different language versions of the application form. This discrepancy, though small, had a significant impact on the overall outcome of the Competition. The Office did not find fault with the Commerce Department for seeking legal advice and acting upon it. While the Office did not consider the winning product's merits or otherwise, there was a case of unfair competition. It was highly likely that the intention behind the

creation of different subcategories, one for one/two individuals and one for groups, was to prevent just that. One certainly could not say that the winning product was competing on the same level as the piece submitted by the complainant. The winner had the advantage of a business set up employing a number of crafts persons, whilst the complainant submitted her piece without the benefit of these significant resources.

The structure of the application form itself left room for misinterpretation and possible abuse. The Commerce Department identified the issues within the said application and issued a new and revised application form for the subsequent competition edition, seemingly addressing these problems. Apart from the application form itself, there were failures in the processing of the application at the receipt and evaluation stage that resulted in an unfair outcome. Had the product submitted by X been placed in the correct category, the complainant's piece would have undoubtedly ranked first in Subcategory C.

Conclusions and recommendations

A series of failures in how the application form was structured and the winning submission was evaluated produced an unfair and unjust outcome against the complainant. Any possible remedy was seemingly also nullified due to inconsistencies in the different language versions of the application form. The Ombudsman cannot fault the Commerce Department for seeking and following the legal advice it was provided even though the Ombudsman could not endorse said advice. The bottom line remains that the complainant unfairly lost out on the first prize.

The Ombudsman recommended that out of fairness and equity, the complainant would return the €1000 monetary prize reserved for the second-ranked product and be awarded the €5000 monetary prize reserved for the first-ranked product.

Outcome

The Ministry responsible implemented the Ombudsman's recommendation.

Infrastructure Malta

Complaint rejected. Recommendations made.

Damages claim rejected on the merits but still a recommendation was deemed to be due

Complaint

On 21 May 2019 complainant was driving a vehicle and allegedly hit a pothole, which although he had seen, could not avoid due to oncoming traffic. By driving into the pothole, he allegedly damaged irreparably the front left tyre of the vehicle. He had to replace the tyre at a cost of €71. He eventually filed a police report, followed by a claim with Infrastructure Malta (IM), where he submitted all the requested documentation (including a photo of the pothole) and a receipt of the new tyre. His claim was rejected on the basis that the pothole could not have generated the damage in question. A complaint was filed with the Ombudsman wherein complainant requested a refund for the damage he had sustained.

The investigation

On the day of the alleged incident complainant was driving his son to work. The weather on the day was sunny with no issues of visibility. Complainant stated that he spotted the pothole but could not avoid it due to the oncoming traffic (a 'swerving manoeuvre' was not possible) and as a result drove into it and claimed that he damaged the front left tyre irreparably and had to purchase a replacement.

Complainant informed the Office that he had replaced all four tyres in the months prior to the accident in 2019. He could not, however, produce the receipts in proof of purchase.

The Office had sight of the two 'receipts' that were presented as evidence for the cost of the replacement. The first receipt (notebook type) whilst sporting the name

and vat number of the sales outlet where the purchase was made did not include a description of the item purchased. The document only stated: 'cash sale' for €71. The second receipt was a cash register receipt. Unfortunately, the latter document was not fully legible due to it only being partially printed. The receipt provided showed that '*rts*' (one assumed referred to the word '*parts*') were purchased for €71. The receipt partially showed the date of purchase – 6-2019 (this Office assumed that it referred to the month of June); the back of the cash register receipt was stamped with the name and contact details of the particular service station and included a hand written note stating *'Nexen Tyre'* followed by a tyre number (not fully legible).

The report to the Police was filed six days after the accident. Complainant was advised to file a claim with IM which he did the next day. IM acknowledged the claim and requested complainant to submit a number of documents including the car licence and the original fiscal receipt of the repair works. The claim was eventually rejected by IM. Complainant requested IM Claims Committee to reconsider. IM agreed to the request but confirmed its refusal to effect payment "*due to the fact that the pothole in question could not have resulted in the damage sustained.*"

Complainant lodged a complaint with the Ombudsman and provided photos of the pothole that allegedly caused the damage to the tyre as well as a photo of the road taken after the repairs were carried out. On analysis of the evidence provided the pothole did not appear to be deep and was filled with gravel. Moreover, no significantly sharp edges could be observed inside the said hole or its periphery. No photos evidencing the damages allegedly suffered to the tyre in question were provided by complainant.

As is standard practice, IM was requested to provide its views and comments on complainant's grievance. In its reply to this Office IM explained that the complainant's claim was rejected for two reasons:

"i. Damage is not conducive with the pothole in question

"In fact, the pothole in question is not even deep enough to cause such damage and thus, it is highly questionable how ... [omissis] has damaged his front left side tyre if he was really and truly *driving diligently."*

ii. Wear and tear of the vehicle's parts

"One must also take cognisance of the wear and tear of the vehicle's parts. This is because it is highly doubtful that a car, which is maintained in good condition, would suffer the alleged damages by merely hitting such pothole."

IM's obligations regarding roads that fall under its remit are laid out in Article 5 of the Agency for Infrastructure Malta Act. The specific provision states that IM's responsibilities include the repair, improvement, reconstruction, upkeep and management of those roads not falling within the responsibility of Local Councils. IM did not deny that the maintenance of the road in question fell within its responsibilities.

Potholes develop as a result of wear and tear or due to some particular event that may impact the road surface. Significant rainfall is known to cause damage to road surfaces over a short period of time. Bearing this in mind, the Office noted that the last significant rain event prior to the alleged incident occurred five days before the incident when thunderstorms were recorded during the night and morning.

The Ombudsman considered that drivers using public roads have obligations they must abide by. They are bound not only by the specific rules and regulations set out by law, but must also drive prudently taking into account all variables present on the road and its immediate environs, in other words, they must maintain a 'proper look out'. The notion of a 'proper look out' has been dealt with by our courts on numerous occasions. In Joseph Zammit vs Joseph Bonello et the First Hall of the Civil Court[1] explained the following:

"*Illi, fir-rigward ta'* 'proper lookout' *dan il-kunċett ifisser ferm aktar milli sewwieq ikun qed iħares 'il quddiem jew li jkollu viżwali* **ċara**, *iżda s-sewwieq irid ikollu "*an awareness of his immediate vicinity*", u* **ċioe** *li s-sewwieq irid ikun jaf x'qed jiġri madwaru u mhux sempliċiment iħares 'il quddiem b'mod* **ċass** *jew isuq bil-mod …. Għalhekk kull sewwieq irid jirregola s-sewqan tiegħu skont il-kundizzjonijiet u* **ċirkostanzi** *li jkun fihom, bħal ma huma l-***ħin** *tal-ġurnata, il-viżwali ostakolata bid-dlam u bix-xita, l-istat tal-art, il-volum tat-traffiku …"*

1 1 March 2011.

The Ombudsman considered further that the photos provided by complainant confirmed the fact that the road had multiple potholes in the stretch of the road in question, the most severe being the one complainant allegedly drove through.

Considerations

In incidents like the one in question police reports are of primary relevance. In the absence of other evidence, the police report containing the declaration of the person concerned describing the events provides the necessary link between the damage suffered and its alleged cause. Complainant filed a police report six days after the incident. A delay without reason in filing the report with the Police, introduces a measure of doubt as regards the narrative of events as described by complainant.

Setting aside this particular matter, the Office identified other issues during the course of the investigation. Complainant did not provide any photographic evidence neither to the Office nor to IM attesting to the actual damage suffered (such as a photo of the ruptured tyre). Moreover, the receipts produced were questionable. The first 'receipt' bearing the date of the alleged accident was issued by a service station for the value of €71 as a 'cash sale' with no actual description of the object bought or services received. Following the submission of his claim to IM, complainant was requested to provide a fiscal receipt covering the repair works (in this instance the replacement tyre). The second receipt forwarded to IM was a partially printed cash register receipt. The printed receipt also sported the handwritten name of a tyre and its size. There were no guarantees that the note was written by staff of the service station or that the receipt actually referred to a replacement tyre. Moreover, it appears that said receipt was issued after complainant received IM's request for a fiscal receipt. In a claim for the refund of damages, receipts constitute the best evidence and are therefore of primary importance. IM is duty bound to ensure that public funds are disbursed prudently and diligently, and just as any other public entity is accountable to the taxpayer. Damages should only be reimbursed when proven. The receipts presented were at best dubious. It would have been up to the complainant himself to ensure that the receipts for a replacement tyre were properly issued.

In its reply to the Ombudsman, IM stated that the pothole was simply not deep enough to cause the damage allegedly sustained by complainant had the latter been driving diligently. In that particular stretch of road there were various other

potholes but there were no issues of visibility on the day of the incident. In those circumstances, prudent drivers would have reduced their speed ahead of reaching the damaged section of the road, thus significantly reducing the possibility of damage to the vehicle. A 'swerving manoeuvre' to the other side of the road is very dangerous and should generally be resorted to only if a driver becomes aware of the state of the road at the very last minute. The fact that complainant referred to this manoeuvre as the only possibility to avoid the said pothole was indicative of lack of a proper look out. Objectively the pothole itself did not appear to be of such severity that would damage a tyre beyond repair (as claimed by complainant), indicating that he was either driving at excessive speed considering the state of repair of the road or/and his tyres were not fit for purpose. Complainant informed this Office that he had recently changed all his tyres (prior to the incident) but could not produce the requested receipts.

In terms of Article 5 of the Agency for Infrastructure Malta Act, IM are duty bound to repair, maintain the upkeep of, improve, etc. any road falling within its remit. This duty entails that the Agency should engage in active monitoring of the roads falling within its responsibility. The photographic evidence provided by complainant clearly shows that the road was patched up sometime after the alleged incident. The Office observed that generally speaking potholes do not develop overnight. That said, adverse weather conditions could cause significant damage to roads over a very short period of time. In this instance the last significant rain event was registered days before the incident in question. If damage had been caused due to said event, active monitoring of the roads would have resulted in prompt repairs being carried out. The Office could not precisely determine how the potholes developed. What is certain is that the potholes were not repaired when the damage first occurred.

Conclusions and recommendations
The Ombudsman concluded that complainant did not produce evidence that could objectively prove his claim for damages allegedly sustained.

Nonetheless, the Ombudsman recommended to Infrastructure Malta the adoption of a more pro-active approach in the execution of its obligations at law, by means of active monitoring, and prompt and proper road maintenance of roads within its remit.

Ministry for Social Policy
Complaint sustained, recommendations made.

Improper discrimination: The non-granting of a service pension

The complaint
A group of thirteen (13) teachers filed a complaint together where they alleged to have suffered improper discrimination in not being granted a service pension and requested the Ombudsman to investigate the matter.

The investigation
In 1978, the Government introduced the Worker-Student Scheme. Complainants were following a teacher's training course, which commenced in 1976 and ended in 1981. They were, in fact, the second group of students who were still carrying out their studies when the Scheme started, but they joined **together** with another group who had started their teacher's training in 1975 and ended in 1980.

The first group, that is, the 1975-1980 cohort, were appointed to the teacher grade a year earlier than the complainants because their University course finished earlier. Both groups, however, were given their letters of appointment after the cut-off date of the 15 January 1979, being the date established by the Pensions Ordinance for a public officer to receive his service pension, or as is commonly known, the Treasury Pension.

Yet, only the first group of teachers were given this pension *ex gratia* following an administrative decision.

The complainants made attempts so that those who had retired would receive this pension and so that those who had not yet reached pensionable age to be

qualified for it but this was to no avail. They alleged that the Government had discriminated against them.

The facts

The Pensions Ordinance was amended in 1976 by Act XXII, whereby the service pension was restricted to public officers whose letter of appointment, that is, the date when they were effectively employed with the government, was before 15 January 1979.

In 1977, the Government announced widespread reforms in tertiary education. One of these reforms was the introduction of a Worker-Student Scheme where University students would alternate five and a half months of work with five and a half months of study at University.

The actual ushering in of the Scheme came about in 1978. In fact, the complainants alleged that the two cohorts on a teacher's course at the time, the 1975 class and the 1976 class, were transmuted into the new system on 2 May 1978. Both cohorts became Worker-Students on the **same date.** The prospective Worker-Students received a letter to this effect on 27 April 1978 from the then Director of Education.

The complaint was communicated to the Ministry responsible for Social Services and the Department of Social Security, which had absorbed the functions of the Pensions Office from the Treasury on this matter. Their opinion was that the pension arising from the Pensions Ordinance was given by right to public officers who received their letter of appointment before the appointed date.

The Ministry for Education confirmed that the complainants had commenced their studies in 1976 and ended them in 1981. It also confirmed that each of the complainants had received their letter of appointment on 14 February 1981 and that they graduated with a Bachelor of Education (B. Educ).

Ministry documents also confirmed that the two groups started their studies before the Scheme came into effect one year apart. Yet they agreed to enter the Scheme at the same time. The group which acquired their Treasury Pension had, in fact, raised a complaint with the Social Security authorities. The Ministry investigated their allegations and drew up a report favoring their request.

The Ministry reported that the complainants, who included the person who wrote on his own behalf and in the representation of thirty colleagues who, for the purposes of anonymity, will be termed GB, had started their teacher training course in 1975 in the Malta College of Arts, Science and Technology (MCAST). Following the introduction of the Worker-Student Scheme, they transferred to the new B.Educ course at the University of Malta. This group started their work phase in September 1978, which led to the study phase commencing in February 1979 and ending in July 1979. Their last work phase was from September 1979 to February 1980, when the course ended.

One of the conditions of the Worker-Student Scheme was that on the termination of the course, the student worker would be immediately employed within the Public Service without the necessity of passing through a selection process. So, GB was appointed Teacher II with effect from 16 February 1980. In the normal course, this meant that GB would not have been eligible for the service pension but for the National Insurance pension. The Ministry Board emphasised that GB could not have known of the amendments to the Pension Ordinance, viz the important cut-off date. Others who had continued with their MCAST course and not joined the Scheme had qualified earlier and received their letter of appointment before 15 January 1979, thereby safeguarding their pension.

The Board acknowledged that GB did not have a legal right to the Treasury Pension. However, the Board opined that he had lost the opportunity to benefit from this pension because joining the Worker-Student Scheme had been to his advantage and also to the advantage of the educational system in Malta. He was also deemed to have been prejudiced by the fact that those students who had not enrolled in the Worker-Student Scheme had qualified before him and had been appointed to the Public Service before the cut-off date, thus safeguarding their pension. The Board maintained the view that it was necessary that GB and his cohort joined the Scheme because, otherwise, the Scheme would have failed.

It was also of note that the Board stated that GB did not realise the implications of his decision to enrol into the Scheme; that is, he did not realise that joining the Scheme, thereby taking longer to graduate and enter the Public Service, would entail the loss of his pension rights.

Considerations

The GB group and the present complainants started their teachers' training courses of studies one year apart. Both groups signed the enrolment agreement into the Scheme and the new B. Educ course, and converged into one group, that is to say, the very first group of students to enter the Scheme until it was discarded in 1987. The GB group graduated in 1980, and the complainants graduated in 1981. Both groups were confirmed as public officers on the strength of the Scheme conditions. They did not pass through any selection process.

The two sets of Letters of Appointment were both issued after the 15 January 1979. The GB group was awarded the Treasury Pension *ex gratia* while the complainants were not. This constitutes the difference between the two groups.

Undoubtedly, the complainants were not entitled to the Treasury Pension. The law, as it is, has definitely laid down that no public officer can have a Treasury pension or allowance if he or she did not receive his or her appointment before 15 January 1979. This is not subject to interpretation.

The GB group complained about this state of affairs to the Ministry for Social Policy, which purposely established a board to rule on this. The Board accepted that they had a grievance. The then Principal Permanent Secretary authorised the *ex gratia* pension on the strength of the Board's recommendation.

The Ombudsman could not dismiss the claim made by the present complainants. The reasons cited by the Board apply equally to the complainants. They did not even know that the Pensions Ordinance was going to be amended. They, too, wanted to improve their status in the teaching profession, and, by extension, their enrolment in the Worker-Student Scheme was beneficial to this country. Both groups were the initiators of the Scheme in the educational sphere. There was no reason why one group should have been treated differently from the other. There was no underlying justification for the complainants not to benefit in the same way as the GB cohort.

A precedent was set.

The Pensions Ordinance does not give the Permanent Secretary, any public officer or even the Minister a right to use his discretion to award the Treasury Pension. A maxim of Administrative Law is that discretion must be used limitedly if discretionary power exists. In this particular case, that is, disregarding the cut-off date, the Ordinance does not give any discretionary powers.

The Ombudsman cannot sanction illegality, although it is not within the function of the Ombudsman to pronounce on the legality or illegality of an administrative act. That is the sole preserve of the Courts of Justice. On the other hand, the Ombudsman must view the administrative act from the standpoint of equity. An administrative decision granting the right to a pension must benefit all persons in similar circumstances. The operative word here is 'similar' which is different from 'same'. The complainants were in circumstances similar to those of the GB group, and, in fairness, they should have the right to a pension. The Administration saw fit to use its powers to grant a pension to individuals who, in the ordinary course, would not have been entitled to it. Once it was decided that a pension be authorised *ex gratia,* the Administration could not, in justice, refuse to authorise this pension to the complainants.

Recommendation
The complaint was declared to have been sustained. The complainants suffered discriminatory treatment when they were not given the same rights as others who were granted the Treasury Pension. They should have, therefore, been accorded the same benefit from the date of retirement.

As the Ministry for Social Policy did not implement the recommendation, the Ombudsman sent the report to the Prime Minister under Section 22(4) of Chapter 385.

As the Prime Minister did not implement the recommendation, the Ombudsman sent the report to the House of Representatives by virtue of Section 22(4) of Chapter 38.

Lands Authority
Complaint not upheld. Recommendations made.

Complaint on an internal call rejected but with recommendations

The complaint
The complainant, an employee with the Lands Authority (the Authority), applied for a post with the same Authority following an internal call. His application was not accepted because he was found to be ineligible to apply as he did not possess one of the eligibility requirements listed in the internal call. He stated that he had already applied to attend the course leading to the said requirement before the call was issued, but the course had been suspended without a future date being set due to the COVID-19 pandemic.

The complainant appealed the decision of rejection of his application to the Authority's Management and was asked to meet with the Interview Board for the purpose of his appeal. The Board confirmed that his application did not comply with all the requirements in the call as he did not have the requisite in question.

In his complaint, the complainant argued that he had applied for the position in question because he had more than thirteen (13) years of experience in the relative field. He explained that before being assigned to the Section under which the position applied for falls within the Department of Lands (now the Authority), he had spent five (5) years with two entities respectively, always in the relevant sections, and thus he had vast experience in the field.

The complainant stated that the candidate who was selected for the position had been with the Authority since the replaced official's transfer to another Authority. The selected candidate had joined the Authority on loan from another entity

with the same grade as his and was given the responsibility to allocate different assignments to people. He alleged that the selected candidate was given the post applied for without having had any experience in the field and was stamping, signing, and sending emails with the designation of the position applied for before the call for applications for the position in question was issued.

The complainant also alleged that he had previously suffered other injustices related to a lack of promotions. He said that he had joined the Department of Lands with the lowest grade in the Section of his placement, and that he had never been given a higher grade or any form of allowance despite performing work higher than his grade, as well as training other employees who had no experience in the field applied for, including those with a higher grade than his.

As a remedy, he requested to be promoted to a senior position, to be given retroactive financial compensation for all the injustices he had allegedly suffered, and for the Selection Board to be investigated.

Preliminary

The Final Opinion on this complaint only addressed the complainant's complaint about the selection process for the position in question and which he had applied for. This Office did not delve into the merits of the allegations of injustices that the complainant claimed to have suffered before the issue of ineligibility for the post applied for arose because, according to Article 14(2) of Chapter 385 of the Laws of Malta, such alleged injustices were time-barred as they referred to issues that occurred more than six months before the complainant brought his complaint to this Office.

The investigation

According to the internal call-in question, an applicant had to be in posession of a specific requisite to be eligible and proceed to the interview by the Selection Board. In his application, the complainant made a note about this requisite, stating that the course leading to it and which was postponed due to the Covid-19 situation was going to take place shortly. He had also provided the date as well as proof of his acceptance for the said course. It turned out that the complainant's Certificate of Attendance for the course in question was issued after the application deadline and the qualification some time later.

The Authority informed the complainant that he was not eligible to apply for the post. Feeling aggrieved, the complainant filed an appeal and asked for his application to be reconsidered.

In his appeal, he argued that he had many years of experience in the field applied for, during which he meticulously handled the most delicate situations, and that this experience made him an ideal candidate for the position, especially since he was the most experienced in this field.

In his appeal, he further stated that according to the frequent calls for applications to fill vacant positions in the public sector and other government entities, those who are in the process of obtaining specific requirements mentioned in the call can still apply.

The Authority informed the complainant that his appeal was going to be heard by the Selection Board appointed by the Chief Executive to interview applicants. The hearing took place. Subsequently, the Authority informed the complainant of the outcome of the appeal:

"The Selection Board after hearing your arguments wishes to point out that:

On the date of closure, as well as on the day of your hearing by the Selection Board, you were not in possession of … [omissis] *which, according to the attached Internal Call for Applications, was listed as being an essential requirement in order for an application to be deemed as being Eligible to Apply.*

In view of this, the Selection Board cannot but confirm its original evaluation that your application did not comply with all the Essential Requirements listed in the Internal Call for Applications, a copy of which is attached to this email for your ease of reference."

Dissatisfied with the decision of the appeal, the complainant lodged a complaint with the Ombudsman.

In its comments to this Office on the call, the Authority contended that the practice adopted by it when an applicant does not possess all the qualifications required to apply for a particular post is that such applicant is considered to be ineligible and, therefore, is not called for an interview. In fact, by the day the applications had closed, the complainant did not possess one of the requirements in the call subject of this complaint.

As regards his allegation that the selected candidate was already signing, sending emails, and using a stamp with the designation of the position applied for before the call was issued, the complainant presented documents as evidence.

Asked for an explanation, the Authority contended that when the selected candidate joined the Authority, it recognised his competencies and saw that he was in the best position to carry out much of the work performed by the official who eventually went to another entity, and therefore appointed him in an acting position in the directorate responsible for the field in question. The Authority added that if the selected candidate was signing with the new designation before his official appointment to that position, this was done inadvertently as he should have been signing in an acting position.

Regarding the selected candidate, the Selection Board explained that when the Authority was informed of the eventual departure of the person who was replaced, the Authority's Human Resources Office conducted an exercise to identify a potential candidate who had the licences, skills, and capacity required to be given the responsibility of an Acting position and assist the Chief Officer of the Directorate in question in the daily operations of the Directorate. However, none of the officials at the relevant Office was found to have the skills required to effectively and efficiently manage employees to get the best out of his subordinates. In this exercise, the management considered the following skills: "*report writing skills, leadership skills, good communication skills, good organisational skills, delegation, strategic thinking and ability to deal with changes effectively.*"

Moreover, none of the officials of the said Directorate possessed that specific requirement listed in the call for the post in question.

The Board, therefore, explained that the Authority had no alternative but to seek an immediate solution and find someone available, suitable, and with the required skills to perform Acting duties within the Directorate in question. The candidate selected following the call-in question was the person identified as having the essential skills and competencies required to be given this responsibility. Thus, he was serving with the Authority in an Acting position.

This Office felt that the explanation given by the Authority was not plausible and deplored Management's failure to immediately draw the attention of this Official's superiors to the fact that he was using an incorrect nomenclature, something which justifiably had led the complainant, and possibly other officials of the Authority, to believe that the call was made specifically for him. Similar circumstances should be avoided.

Furthermore, the appointed person, who had been performing the functions and duties of the position for several months in his acting capacity was given an undue advantage over other prospective applicants for the post in question. This should have been avoided, and a call should have been issued when the vacancy arose.

Nevertheless, this Office did not find concrete and conclusive evidence to support the complainant's allegation that the interview process was not conducted according to established procedures.

During its investigation, this Office requested the Authority to provide documents relating to the selection process in question, including the Selection Board Report. The Authority provided the interviewing scoring sheet, but the Selection Board Report was not included. The Authority maintained that the scoring sheet in itself constituted the report that was presented to the Chief Executive.

It is to be noted that there is a distinction between the official result/scoring sheet on the one hand and the Selection Board Report on the other.

A Selection Board Report specifies the total number of applicants, the number of eligible and ineligible applicants respectively, the reason for the respective ineligibility, where applicable, and explains why the selected applicant was chosen.

Such report gives a clear picture of what happened during the selection process and is transparent. This is more important in cases like the one under examination, where all the criteria that were used were subjective and, therefore, dependent on the Board's evaluation of the answers given during the interview.

Conclusion

The complainant felt that his experience in the field applied for was sufficient to be considered eligible, and that, therefore, the requisite in question was not necessary. Moreover, he felt that since he was already in the process of obtaining it, he should have been given the chance to participate in the selection process.

It should be noted that in the case of top positions, one should not expect to be appointed simply on the basis of years of experience, as although experience is important, it is not the only factor that an employer needs to consider when evaluating candidates. Experience does not always bring about competence and/or ability to perform the duties associated with the position.

The Ombudsman does not recommend promotions or appointments to a particular position. Nor does he decide or comment on what should have been the criteria established in a selection process, even if, for the sake of argument, he disagrees with the requirements that were established in a particular selection process.

Moreover, when selecting applicants, the Selection Board is bound to respect and follow the requirements stipulated in the call, and every applicant must meet the eligibility criteria and be in possession of the requirements established in the call by the application deadline.

In the case under review, the fact that when he submitted his application for the position, the complainant was not yet in possession of one of the requirements listed in the call was not contested.

While this Office acknowledged there was a lack of administrative attention and that the Selection Board could have acted more transparently in the selection process if a report had been prepared, it could not be concluded that the internal call for the position in question with the criteria as established was issued to favour or prejudice a particular candidate or to exclude the complainant.

For the reasons stated above, the Ombudsman did not uphold the complaint.

Recommendations
However, this Office found that administrative and practical shortcomings in the selection processes undertaken by the Authority could be corrected.

Therefore, this Office put forward these recommendations:

i. In selection processes, the Selection Board should prepare a report on the process, even when, as in the current case, only one candidate is found to be eligible to proceed to the interview. The Board should explain, in its report, the reasons for the marks awarded to each candidate during the interview or keep notes on the performance of each candidate so that, in case a complaint arises about that selection process, it would be able to explain in detail what led the Board to the decision to appoint one candidate and not another. This is to ensure that the process is transparent.

ii. Management should ensure that members of a directorate/Authority are immediately informed about any acting appointments made to ensure transparency and accountability. It should also ensure that any nomenclature used by the Authority's officials is the correct one and that if it is otherwise, Management should see that the necessary steps are taken to regularise the situation. This is to avoid speculation about preferential treatment to particular officials and not to give rise, as happened in the case under examination, to situations where one might conclude that the choice of an appointed candidate could have been predetermined before the call for applications for a particular position was issued.

Outcome
Recommendations accepted and implemented by the Lands Authority.

Public Service Commission
Complaints rejected with Recommendations

Complaints regarding employment issues relating to officers in Technical Grades

First complaint
An official in the technical grade of Assistant Technical Officer in what was the Ministry for Education and Employment (MEDE) explained that in 2011, an agreement had been reached between the Union, the Directorate within MEDE, and PAHRO regarding a structure for MEDE's technical officers and on the number of promotions that had to be issued for lab technicians working in state school laboratories. Subsequently, in 2012, several vacancies were published to fill vacancies for senior technical officers (STO – scale 11), technical officers (TO – scale 12), and assistant technical officers (ATO – scale 13). These calls indicated the responsibilities of each position and the number of hours each technical grade would work in schools. The complainant applied for the ATO position and was indeed appointed to the grade and posted to a particular school.

Complainant elaborated that in 2013, following the establishment of Grievance Units in the various Ministries, the Grievance Unit within MEDE recommended that several technical officers who had applied for the 2012 calls be appointed Officers in Scale, with a backdated appointment. This recommendation was accepted by the Public Service Commission (The Commission) and several technical officers had been appointed Officers in Scale 11, 12, or 13, even if they had not submitted a grievance to the Grievance Unit and had been satisfied with the appointment they had received as a result of the selection process. Due to the appointments of said Officers in Scale, the Ministry ended up with a significantly higher number of officers in scales 11, 12, and 13 than that stipulated in the structure previously agreed upon with the Union.

The complainant felt aggrieved by this decision and contended that he had applied for the ATO grade after considering the conditions and working hours stipulated in the 2012 call for applications. He noted that those appointed Officers in Scale while continuing to perform the responsibilities of their previous grade, were receiving the salary attached to their appointment as Officer in Scale, backdated to the date of said appointment, without performing the duties related to the higher scale awarded. He claimed this violated the principle of equal pay for equal work. He also complained that as a result of this decision, his career advancement was hindered because the Ministry, having several Officers in Scale would not issue calls to fill vacancies that might arise in the TO and STO grades, but would use those appointed Officers in Scales 11 and 12.

The complainant observed that the Union had raised the issue with the Ministry and asked for an explanation from the Commission. He had also requested clarification from the Commission in March 2016 and was informed that the Commission had upheld the recommendation of the Grievance Unit in November 2015 for several officers to be appointed officers in scale, following an investigation carried out by the Commission. The Commission further explained that in line with the Manual on Resourcing Policies and Procedures Director Generals/Directors are to ensure that upon promotion officers falling within their responsibility were assigned duties appropriate to their higher grade. The Commission added that it had been informed that action has been taken accordingly.

Another complaint

A second complaint was submitted by several officers in the technical grades of MEDE. Since both complaints dealt with the same issue and had a common subject-matter, they were investigated and concluded together.

The investigation

From an examination of the documentation received by the Office, it transpired that the Union had requested clarification about the role of the said Officers in Scale, contending that despite not having a change of duties said Officers in Scale were receiving the salary attached with the higher scale without an increase in their responsibilities.

The Union informed the Director General that an anomaly subsisted since while technical officers in the grades of Senior Technicians, Assistant Technical Officers, and Technical Officers were responsible for laboratories in schools, a college or various colleges as stipulated in their respective job descriptions, technical staff appointed as Officers in Scale were receiving pay equivalent to, or greater than, those in the technical grades without being however given the responsibility associated with the technical post, undermining the principle of 'equal pay for equal work'.

According to the Union the Director General had informed that the decision about these appointments was not his and that the responsibility for the work grade rested with those who held the technical grade, not those appointed as Officers on scales 11, 12, and 13.

The Union had referred the matter to the Commission in February 2017 and had been informed by the Commission that when the Commission had taken the decision that an additional number of officials deserved to be appointed Officer in Scale and thus made its recommendation to the Prime Minister, it intended that those accepting the promotion should also assume higher responsibilities according to the scale they were placed in. It instructed the Director General to ensure that the Public Service Commission's decision is implemented.

The Director General subsequently informed the Commission and the Union that instructions had been given to adjust the role and work of the Officers in Scale to conform with the Commission's guidelines.

All complainants expressed concern that the appointment of these Officers in Scale disrupted the structure established by the agreement between the Ministry and the Union that had specified the number of workers necessary in each grade and had formed the basis for several job vacancies issued. The complainants argued that the appointments of these Officers in Scale did not only dismantle the structure, but also eliminated their future opportunities for career progression, as once there are a significant number of Officers in Scale the Ministry would not issue calls to fill future vacancies in the grades of Technical Officer, Senior Technical Officer or Principal Technical Officer, but would utilise the services of the Officers in Scale.

The complainants felt discriminated against because they consistently performed the responsibilities and functions associated with the job description of their technical position. Conversely, those appointed Officers in Scale received equal or higher pay, while continuing to perform the duties of their previous lower positions. Moreover, the Officers in Scale received the salary corresponding to their new appointment retroactively, as their appointments had been backdated.

Correspondence exchanged

When requested to provide feedback in respect to the complaints, the Permanent Secretary of the Ministry commented that the cases raised date back to 2012 when interviews for the mentioned positions were held. Some applicants, dissatisfied with the outcome, appealed to the Grievances Board. The Board's decision went through the entire grievance process and as a result of the Board's recommendation, the Ministry appointed several technical officials as Officers in Scale.

i) this situation led to the Ministry having more technical officers in the Senior Technical Officer and Technical Officer Grades than needed according to the structure agreed upon in the collective agreement with the Unions. As per the Job Description of these officers, they could not be assigned to laboratory work, but a Senior Technical Officer oversees several Colleges (usually 3 or 4), while a Technical Officer oversees one College (under the guidance of a Senior Technical Officer). Consequently, the Ministry ended up with additional Officers in Scale 11 (equivalent to Senior Technical Officer) and Scale 12 (equivalent to Technical Officer), who continued serving in laboratories during lessons.

   The Ministry aims to ensure that these officers start working according to their scale as soon as possible. However, before this transition, Technicians in the Assistant Technical Officer, Senior Technician, and Technician grades must be employed to replace these officials. A premature transition could leave several schools without adequate laboratory support during lessons. Currently, preparations are underway for calls to be issued to hire staff for these roles. I assure you that even the Officers in Scale are dissatisfied that they are not performing all the tasks pertaining to their scale.

As an interim solution, in schools where, for example, there is an Officer in Scale 12 (equivalent to a Technical Officer), the Technical Officer of that College has been asked not to undertake the tasks required of a Technical Officer in this school, allowing the Officer in Scale 12 to take on these duties in addition to their usual laboratory work during lessons in the laboratory. This approach attempts to strike a balance.

Furthermore, the Ministry is also developing a plan through the Principal Technical Officer. This plan aims for almost all Officers in Scale to transition out of laboratory work during lessons, potentially starting from the next academic year. We are hesitant to implement this change immediately, as it could disrupt school operations when only a few weeks remain until the end of the scholastic year.

ii) the complaint that this situation limits career advancement opportunities, is not entirely justifiable, considering that none of these individuals applied for the available Principal Technical Officer position.

iii) if the Grievances Board identified any injustices in the interviews, and both the Ministry and the PSC accepted the recommendation, then backdated payments were warranted. Those who suffered injustice were not performing the relevant work, not out of choice but due to the circumstances. Therefore, as in any similar situation, the pay should reflect what these people would have earned had they been working in the higher grade they could potentially have been appointed to had no injustice occurred.

The Union's submitted that:

i. after conducting interviews in 2012, several dissatisfied applicants petitioned the Commission, but the Commission had confirmed the published results. This raises the question of why the Commission did not identify the mistakes that the Grievance Board later found in its investigations, some of which were concluded in 2014, delaying the appointments in the technical grades until then;

ii. the structure agreed upon between the Permanent Secretary and the Union was disrupted following the said appointments. This led to a shortage of technical officers in the lower scales, substantially reducing the chance for technical workers to receive promotions;

iii. following the PSC's direction, the Ministry met with the workers and informed them that they would perform tasks associated with their pay grade once a week. This decision created an anomaly, as those in technical grades fulfil their job description duties daily and bear related responsibilities, especially regarding school health and safety. In contrast, the Officers in Scale avoid specific tasks as they lack a job description. Thus, although there will technically be two Technical Officers only one will perform Technical Officer duties once a week;

iv. it seems unlikely that the candidates hired following the Ministry's calls will suffice to replace the many appointed Officers in Scale as very few technicians had applied between 2012 and 2017;

v. the Ministry's temporary solution is impractical, as one person cannot perform the work of two. In practice, Officers in Scale work once a week, relieving the ATO, TO, or STO who are technical officers, resulting in the TO being transferred to another school;

vi. according to the published call for the Principal Technical Officer position, only Senior Technical Officers with five years' experience or a Higher Technical Diploma were eligible for the Principal Technical Officer grade. No STO met the experience requirements specified in the call; and

vii. while those who suffered an injustice in previous selection processes were given backdated remuneration, this decision created an injustice in respect of the technical officers who have always shouldered workplace responsibilities. The appointed Officers in Scale did not bear these responsibilities, as they were not given a job description.

Given the workplace difficulties between officers in the technical grades and those appointed Officers in Scale this Office called a meeting between Department officials and the Union so as to discuss the complainants' requests and potential steps to improve the situation. It was clear that the immediate action required related to: a) the structure agreed upon before the calls were published; and b) actions by the Department to ensure that those appointed Officers in Scale begin to perform higher duties and responsibilities according to the scale they were placed in, in compliance with the Commission's instructions.

Department officials explained that efforts were being made to employ the personnel required to rebuild or modify the structure as needed, as there were not enough workers to staff school laboratories. Those who applied and were employed were insufficient to fill the vacancies created by the significant number of Officers in Scale appointed. During the meeting, it was unanimously agreed that the situation could be improved if job descriptions were provided to the Officers in Scale. Consequently, it was decided that the Department would issue job descriptions to the Officers in Scale, clearly defining the responsibilities associated with the higher scale they were placed in following the Commission's decision, enabling them to fulfil these duties.

Despite the agreement reached at the meeting, no significant progress was made after a considerable time had elapsed. The Officers in Scale had not been issued with a job description by the end of the 2018/9 scholastic year.

The Department continued to face challenges in hiring technical officers in the technician grade to fill existing vacancies. However, it assured the Ombudsman that efforts were being made to employ said employees. The Department clarified that technical officers do not perform all the duties indicated in the job description associated with their position.

In July 2019, the Office received the job descriptions prepared for Officers in Scales 11 and 12. It was explained that the job description for officers on Scale 11 was parallel to that of the Senior Technical Officer and that for scale 12 was parallel to the Technical Officer's role. The Department also stated that these job descriptions would be distributed in mid-September 2019 to be utilised from the 2019/2020 scholastic year onwards. Unfortunately, the educational system and the school situation, including that of educators and workers like the complainants, were significantly affected by the COVID-19 pandemic, impacting the Ministry's plans and priorities.

When the situation normalised, the Office enquired with the complainants about whether their situation had improved, whether Officers in Scale had been provided with the job descriptions related to their positions and whether work was being distributed amongst all employees.

Some complainants, especially those in the Senior Technical Officer grade, reported that the job descriptions had been distributed to Officers in Scale 11, and the workload was being shared among all officials in this grade.

Others noted that since the Department had not employed enough technical staff in the lower grades, some Officers in Scale continued to perform laboratory technician duties despite being paid the higher salary linked to their higher appointment. The agreed structure had not been reestablished, resulting in a high number of employees in the higher technical grades and too few in the lower ones. Some Technical Officers contended that in colleges where a Technical Officer and an Officer in Scale 12 coexisted, the position's responsibility fell primarily on the technical staff, not the Officer in Scale. Consequently, these Officers in Scale received the same salary as that of Technical Officers without bearing the same responsibility, violating the principle of equal pay for equal work.

On November 8, 2021, the Ministry informed the Ombudsman about the steps taken to improve the situation of the technical officials. All complainants confirmed that this exercise was indeed being implemented. However, they insisted that despite the Ministry's efforts to remedy the situation, several Officers in Scale 10/11 (equivalent to STO) and 12 (equivalent to TO) continued to work in school laboratories, but were still being paid the higher salary attached to the scales to which they were appointed following the Commission's decision. The complainants opined that it was unjust for them to receive lower pay than these Officers in Scale.

Considerations

The complaint arose following a decision by the Public Service Commission to accept a recommendation made in 2015 by the Ministry's Grievance Unit to the Central Unit about selection processes initiated in 2012 to fill various vacancies in the technical grades of what was then MEDE. After investigating complaints from officials in these grades and examining the promotion exercise, the MEDE Grievance Unit recommended that several officers in the technical grades be appointed as *"Officers in scale in the highest grade they had applied for and in which they were successful."*[2] After reviewing documentation from PAHRO and considering the cases presented to the Grievance Unit, the Commission concluded that "*in view*

2 Memorandum addressed to the Central Unit, dated 27.02.15.

of the sound justifications put forward by the Grievance Unit which indicated flawed selection processes, all successful candidates in the selection processes concerned should be appointed to the higher post applied for"[3]. This led to the Commission recommending to the Prime Minister the appointment of several Officers in Scales 11, 12, and 13, with these appointments being backdated to the date of appointments given to candidates appointed in the same selection processes. As the Commission had recommended that all applicants who had been successful in these selection processes be appointed, technical staff who had not filed complaints with the Grievance Unit were also appointed.

This decision significantly impacted the structure established between the Ministry and the Union which represented the technical grades before the 2012 calls were published, resulting in insufficient staff occupying lower technical grades (Assistant Technical Officers, Senior Technicians, and Technicians).

In the first instance, it must be clarified that the Ombudsman's Office cannot investigate the Commission's decision regarding the selection processes, as this decision was taken well before the complaint was filed. From a review of the documentation perused by this Office, it transpires those serious flaws subsisted in the promotion exercise, which led to the Commission's recommendation to appoint all who had obtained a pass mark in these processes.

All complainants felt aggrieved by the Commission's decision. They felt discriminated against because they always fulfilled the responsibilities attached to the job description of their technical position. At the same time, those appointed as Officers in Scale were paid the same or more, even though they continued to perform duties of their previously held position, which was a grade or two lower. The complainants sought compensation, partly because the Officers in Scale were given backdated appointments (and thus paid the salary associated with the new scale retroactively for a period when they had not fulfilled the responsibilities attached to that scale) when they were still carrying out the same work that they performed before the Commission's appointment due to insufficient staff in the lower scales. They believed this violated the principle of equal pay for equal work.

3 Minutes of the Commission of 12.11.15.

The complainants also argued that the Commission's decision hindered their future promotion prospects as a significant number of Officers in Scale had been appointed, meaning that when technical staff in the grade of Technical Officer, Senior Technical Officer, or Principal Technical Officer retired, the Ministry would not issue a call because of the surplus of staff in these scales.

While the Ombudsman understands the complainants' frustration, as they had always fulfilled their technical grade responsibilities and functions, he cannot conclude that there was any maladministration. Those appointed Officers in Scale had their appointments backdated to the same date as those technical officers who had been appointed following the publication of the result of the selection process, and therefore they received the backdated pay attached to the respective position.

After the Grievance Board highlighted injustices in the technical grade promotion exercise and the Commission recognised the exercise as flawed, the decision to backdate these appointments was reasonable. It was not the fault of the subsequently appointed Officers in Scale that they did not perform the duties attached to the technical position they had applied for.

As correctly submitted by the Ministry, in such cases, the officers are entitled to receive the pay they would have received had no injustice occurred. Moreover, given the flawed nature of the promotion exercise, the Office could not criticise the Commission's decision to appoint all the applicants who passed the selection processes. The alternative would have been to cancel all appointments made subsequent to the conclusion of the selection process, including the complainants' appointments. Moreover, nothing prevented the complainants from applying for more than one technical position at the time of issue of the job vacancies.

All complainants argue that because the structure was disrupted and there were not enough technical workers to assist teachers, the Officers in Scale continued to perform responsibilities associated with their previous scale but were paid a salary attached to the higher scale. They complain that while they were carrying out the duties associated with technical posts, such as safety in school laboratories and colleges, Officers in Scale avoided responsibilities as they did not have a job description. Hence, they sought compensation, believing this situation violates the principle of 'equal pay for equal work'.

The 'equal pay for equal work' principle is established to ensure fair treatment of employees performing the same duties and functions. It is incorporated in Article 27 of the Employment and Industrial Relations Act (Cap 452 of the Laws of Malta) which provides that:

"Employees in the same class of employment have the right to the same rate of remuneration for work of equal value: Provided that a principal and worker or workers' union, as a result of negotiations for a collective agreement, may agree on different scales of salaries, annual increases, and other working conditions for workers employed at different times, which scales shall have a maximum to be reached after a set period; and Provided further that any distinction between classes of employment based on discriminatory treatment otherwise than by the provisions of this Act or any other law shall be null and void."

As explained in a previous Ombudsman report, the principles established in Cap 452 have a somewhat restricted application to public officers. Article 27 is one of those provisions that do not apply to public officers. This, however does not mean that this fundamental principle of employment legislation can be ignored. Every employee, whether employed in the private sector, public sector, or the public service, has the right to be treated fairly and equitably.

The Office believes this is not a case of employees in the same class/grade of employment being discriminated against because they are not being paid at the same rate. The complainants seek additional compensation because they argue that the Officers in Scale, who have equal or higher pay, are not fulfilling all the functions and responsibilities attached with their appointment and continued being posted in the laboratories, thus being paid more for the same work they used to perform prior to their appointment.

The Office could not uphold the complainants' request for additional payment. The complainants did not claim that they were not paid the financial package attached to their technical grade or that they were performing other functions/ responsibilities not included in their job description. Instead, they contend that they had to carry the technical grade responsibility because the Officers in Scale continued to perform duties of their previously held lower grade while receiving

pay attached to a higher grade pay as they remained posted in laboratories. The complainants seem to disregard that it was not the decision of the Officers in Scale to continue performing laboratory duties without being given a job description and work conforming to their scale and that the complainants are not performing additional responsibilities beyond their job description.

The situation encountered by the complainants, the appointed Officers in Scale and the Ministry was problematic, creating considerable stress and tension between the complainants and their colleagues. Indeed, the Ministry, which found itself with more technical staff in the Senior Technical Officer and Technical Officer grades than needed according to the structure agreed with the Union, had an obligation to take immediate steps to implement the Commission's direction that those appointed should be assigned duties associated with the higher grade awarded as stipulated in the Manual on Resourcing (Policies and Procedures). However, despite the Department's efforts, it struggled to engage employees in the Assistant Technical Officer, Senior Technician, and Technician grades to replace those appointed Officers in Scale. This resulted in the Officers in Scale not being assigned responsibilities associated with their new appointment and remaining posted in laboratories during classes.

The Office emphasised that the Department should have been more proactive in solving this matter and ensuring that those appointed performed work according to their scale as soon as possible. During this investigation, it was evident that the temporary solutions implemented by the Department were not yielding the desired result. There was an excessive delay in giving the Officers in Scale 11 and 12 their job descriptions to define their responsibilities definitively, particularly those related to workplace safety. It transpires, that it was only in January 2021, after many years, that the Ministry launched a significant exercise to address this situation and the career stagnation of staff in the technical grades. This resulted in the appointment of several technical officials, including STOs and TOs, thereby creating vacancies in ATO positions. The Ministry continued to employ several Technicians and Senior Technicians to mitigate the consequences of appointing several Officers in Scale 11, especially the lack of career advancement opportunities for technical staff.

Conclusion
Considering the facts in their entirety and for the reasons explained above, the Ombudsman could not uphold the complaints as submitted.

At the same time, the Ombudsman noted that the Ministry for Education began implementing an exercise to address the issues and ensure that technical staff could advance in their technical grades. The Ministry was encouraged to persist with this exercise to rectify any irregularities that may have arisen due to the said appointments.

Commissioner for Revenue
Recommendations made

Non-registration of transfer of immovable property due to non-payment of stamp duty by Notary Public

The complaint
Complainant was informed by the Chief Notary to Government that immovable property she had acquired could only be registered if the stamp duty and capital transfer taxes due in respect of the transfer were repaid to the Commissioner for Revenue (CFR), as the Notary Public who had published the deed, and to whom the stamp duty and the capital transfer tax had been given by complainant and the vendor respectively, had failed to pass on the funds deposited with him to the CFR.

The facts
Complainant had entered into a promise of sale to acquire an apartment and had passed on 1% stamp duty due to the CFR to the Notary Public who had drawn up the promise of sale, who then passed said funds to the CFR. A contract of sale was subsequently published. The remaining stamp duty due by complainant as purchaser and the capital transfer tax due by vendor were passed on to the Notary Public in accordance with applicable legislation for the latter to pass on to the CFR and register the transfer.

As she had not received a receipt from the CFR for the stamp duty paid (i.e. the DDT Form) complainant enquired with the Department and became aware that the Notary Public was in financial trouble and had failed to deliver the funds collected to the CFR and register the title of the property in her name.

As her attempts to contact the Notary Public were futile, she sought to establish what had happened to the actual deed published and what steps she was required

to take for the registration to be carried out. The Chief Notary to Government informed her that the original contract had been traced and was at the Office of the Notary to Government and Notarial Archives. She was however informed that as per standard practice, the contract of sale could only be registered following payment of the respective stamp duty and capital transfer tax, as the CFR does not allow registration unless said dues are settled.

Complainant insisted that the practice adopted by the CFR was unfair as both she and the vendor had paid the amounts due to the CFR. She contended that Notaries Public, as public officers, represented the government in the execution of various duties and responsibilities, including those arising out of the Notarial Profession and Notarial Archives Act. They were bound to act with utmost good faith and according to law. Once a Notary Public collects monies due to the CFR on the latter's behalf, the CFR should take responsibility and allow the registration, without requiring innocent parties to repay any further dues if the notary fails to deliver the said funds to the CFR. She also claimed that in terms of the Home Loan Regulations 2016, all money collected by way of stamp duty and taxes are to be paid to the Notary not to the CFR.

Complainant sought the Ombudsman's assistance for the situation to be rectified and the CFR be required to assume responsibility for the notary's misconduct. She insisted that the CFR should be required to waive the request for repayment of amounts already paid by her and the seller to said notary, so that the consequent registration of the transfer could be carried out.

The investigation

Commissioner for Revenue
CFR took an uncompromising position which is reflected in a letter sent to complainant wherein it is stated *inter alia:*

"… the Commissioner for Revenue does not have the power to waive the payment of taxes in cases where a notary fails to register a deed, even if such taxes would have been given to the notary by the parties. Therefore, if a different notary files a notice of a deed published by a defaulting notary, the tax still needs to be paid since it would be due to the Government. There is no provision in the law which allows a waiver from payment of taxes in such cases.

Our position in such cases has always been that the clients' remedy is through court proceedings against the notary. The amounts are still due to the Government and it is up to the client to pay amounts and then to claim them from the notary. This position is based on the Court judgment in the names Carmel Galea et vs Nutar Pubbliku Dott. Pierre Falzon decided on the 9th October 2009 by the Court of Appeal …".

Complainant contested the line taken by CFR by reaffirming her position regarding the duty of a Notary Public as mandatary of CFR (*supra*) and insisted that CFR cannot shift the problem onto the purchaser merely because it has the muscle and act as if the mandate is inexistent – such action is in breach of the principles of good faith and of legitimate expectations.

The Office sought comments from the Ministry for Finance and the CFR, the Ministry for Justice, Equality and Governance and the Ministry for Home Affairs, National Security and Law Enforcement, as these were responsible for the entities involved in complainant's predicament.

The Ministry for Home Affairs, National Security and Law Enforcement
The Ministry explained that its involvement in the case was limited to the role of the Public Registry in the registration of public deeds. It explained that the duties of the Public Registry are regulated by the Notarial Profession and Notarial Archives Act, the Public Registry Act, and the Duty on Documents and Transfers Rules. With regard to Notaries Public, the Ministry made specific reference to Section 50(1) of the Notarial Profession and Notarial Archives Act and Regulation 8(1) of S.L. 364.06. It clarified that the Public Registry Searches Unit cannot accept a note for enrolment unless the tax and/or duty have been duly paid to the CFR. The Public Registry Act does not provide for the eventuality of a Notary Public not fulfilling his obligations according to law.

The Director (Property Tax) - Capital Transfer Duty Division
The Director made further reference to the judgement of the Court of Appeal (*supra)* in C Galea et vs Nutar Pubbliku Dott. Pierre Falzon.

The Ministry for Justice

The position taken by the Ministry was as follows:

- In line with Section 17(2) of Chapter 55 of the Laws of Malta, the notary keeper (in this case the Chief Notary to Government) is not responsible for the payment of any registry fees, duty, tax, impost or penalty due by, or which could have been imposed on the notary who drew up the contract of sale in terms of past or current fiscal legislation or any other law, unless and until such time as the notary keeper is put in funds to be able to pay the same. Therefore, the Chief Notary to Government must first receive any pending taxes and duties from the parties before proceeding to enrol the contract at the Public Registry as the latter does not allow the enrolment of public acts unless all taxes and duties have been settled with the CFR.

- The State has provided an adequate and effective remedy to complainant as Article 10A of Chapter 55 obliges notaries to be adequately insured against all risks of professional liability during the time they are exercising their profession. This Article is further complimented by Regulation 3 of the Notaries (Compulsory Insurance) Regulations which requires notaries to be adequately covered by a policy for a minimum of €250,000 or such other sum as may be determined by the Minister from time to time, against any breach committed by the notary and, or the notary's employees in a policy year.

- Regulation 2 gives a wide definition of what constitutes a breach, by providing that a breach which gives rise to an indemnity includes "… *any negligent act, error, breach of confidentiality, omission, loss of documents, committed or happening during the exercise of the notary's functions under any law at any time in force in Malta, and for any preparatory, ancillary or consequential work done with respect to same, by the notary or by his employees, and includes any act which causes damages resulting from a criminal or fraudulent act by any of the notary's employees in the performance of their duties if they are in his employment, or in furtherance of the notary's functions if they are third parties engaged by him*".

  The notary's failure to pay the taxes and duties collected from the contracting parties to the CFR amounted to an omission, which falls within the aforementioned definition. The complainant therefore had an effective remedy as she could have submitted a claim for indemnity with the insurance company with which the notary was insured, which indemnity should be sufficient to

cover the amounts paid by the clients. Should the insurance company refuse to honour its obligations under the insurance policy complainant can sue the company; and

- It is the client who engages the notary and Government cannot be held responsible to waive tax/stamp duty if the notary has failed to exercise professional diligence in the exercise of his profession. Complainant described the reply as frivolous, pitiful and demeaning.

Complainant insisted that when collecting taxes and duty due on the publication of a contract the notary was acting as a mandatary of the Department and that therefore the CFR should waive the payment of the dues already paid by the contracting parties to the Notary Public.

It was further pointed out by complainant that payment from the Notary Public's insurance cover had to be ruled out as no claim for reimbursement could be submitted directly as a claim could only be made by the insured that is the Notary Public. Moreover, the insurance policies in question were professional indemnity policies not client-money protection insurance policies. The insurance company would only process the claim if the subject matter related to the ordinary professional conduct of the Notary Public and most certainly not in relation to claims where the Notary Public acted fraudulently and knowingly misappropriated funds entrusted to him.

The complainant further remarked that the judgement of the Court of Appeal quoted by the Government was being cited out of context and did not relate to the facts and circumstances of the complaint.

Further comments requested by the Ombudsman
Having taken into consideration the arguments raised by all parties involved, the Ombudsman submitted the following observations:

"*This Office observes that the replies provided to this Office did not address the concern expressed in our letter dated 4th August 2020 namely, that contracting parties acting in good faith and in accordance with the law are being prejudiced and subjected to undue hardship because they are unable to register property legally*

acquired by them as a result of a failure of the notary public (who is carrying out the functions of a public officer when collecting funds in the name and on behalf of the Commissioner for Revenue) to abide by the legal obligations imposed by law. While, there might be no legal provision allowing the CFR to waive the repayment of the tax and duty already paid by the contracting party to the notary, the principles of fairness and reasonableness dictate that the Public Administration implements policies so as to ensure that the failure of the notary does not prejudice those acting in good faith and in accordance with the law. This Office, regrettably notes that the authorities seem to be completely insensitive to the hardship being imposed upon innocent contracting parties by requiring them to re-effect payment and advising them to seek remedy through court action – action which involves additional expenses which the parties might not afford, additional time during which the parties cannot fully exercise their rights of enjoyment on the property acquired and which might not lead to the recovery of the amounts repaid if the notary does not have the necessary funds. Innocent parties are currently being penalised as a result of procedures applied by the relevant departments when they committed no breach on their part. Claiming that the notary was chosen by the parties and that therefore government cannot be held responsible is illogical in the opinion of this Office as the notary is a public officer and the parties could not have foreseen that the notary would not deposit the funds with the CFR. It also appears that the insurance which notaries are required to have in line with the legislation introduced does not cover cases where the notary has fraudulently and intentionally misappropriated funds.

This Office therefore encourages the Ministries and the State Advocate to consider the difficulties and hardship encountered by those in complainant's situation and to discuss what can be done to implement procedures to protect and limit the prejudice suffered by contracting parties through no fault of their own."

Following the aforementioned, the Director (Property Tax) within the Capital Transfer Duty Directorate informed the Office that the CFR was discussing a number of remedies to address similar situations. It elaborated that in collaboration with the Notarial Council, the Office of the CFR planned to organise an educational campaign to educate the public about what to look for in such situation. For instance, if the parties to the contract do not receive a receipt from the CFR within three weeks from the date of the deed, they are to inform the Department that will then take prompt action against the Notary Public.

Having taken note of the concerns raised by the Office of the Ombudsman regarding the additional expenses which currently need to be incurred by the contracting parties in order to take criminal and civil action against the Notary Public, internal discussions were set in motion to find more effective remedies. The Directorate however observed that such a process necessarily takes time, since it involves planning, carrying out necessary amendments to legislation, as well as implementation.

The CFR submitted further observations:

- while it is true that the notary as per Chapter 55 of the Laws of Malta is a public office and is expected to exercise his/her profession with due diligence and full responsibility, it is also the responsibility of every tax payer to: a) diligently choose the right professionals to whom they delegate their power to pay on their behalf the tax due; and b) to take the proper precautions to avoid the risks of such failure;

- the statements made in the Ombudsman's correspondence that the authorities "*… seem to be completely insensitive to the hardship being imposed upon innocent contracting parties by requiring them to re-effect payment and advising them to seek remedy through court action …*" and that "*… innocent parties are currently being penalised as a result of procedures applied by the relevant departments when they committed no breach on their part*" are factually and legally unfounded. Chapter 364 of the Laws of Malta stipulates clearly the rights and duties of the taxpayer, notaries and the CFR and reverting the aggrieved parties to seek court action is not an insensitive approach but the correct option for these cases to be independently and impartially investigated and adjudged by the Courts. In a democratic society those accused of a crime or contravention are deemed innocent until proven guilty beyond reasonable doubt before a court of criminal jurisdiction, or proven to have acted contrary to law on a basis of probability before a court of civil jurisdiction. It is therefore inconceivable that the CFR assumes the role of judge and decides beyond what the law provides by waiving the taxpayer's obligation to pay the tax due – this will create a precedent and ignite a scenario where the alleged offender is denied a fair trial;

- suggesting a waiver of the payment of taxes in these circumstances is very dangerous as this can instigate room for abuse by those who wilfully intend to evade paying the tax due. Such a precedent would lead to a situation

where people will ultimately expect to acquire ownership notwithstanding the tax is unpaid;

- the proposal made would inevitably lead to abuse of power and the initiation of law suits by all parties involved for a breach of laws and the fundamental human rights involved throughout the said process, particularly the right to a fair and impartial hearing;
- the remedy to be sought in these cases is that of the institution of civil and criminal proceedings against the notary who allegedly acted negligently or with the intent to defraud his clients. The Judiciary is the guardian of human rights and the Constitution and ensures that victims are compensated for the damages suffered from those who breached the law and possibly re-instate these latter to their *status quo ante*;
- This unfortunate situation stems from the lack of knowledge the public has about the law and how the tax system works and not from how the law is enacted or implemented. The public who delegates a notary as their mandatary to pay the duty or tax due, should not hand over cash. They should use a cheque or bank draft as this serves as evidence of how and when the money was passed on to the notary. Moreover, the general public should know that one can verify with the office of the CFR whether the tax was fully paid after 15 working days from the signing of the contract. Chapter 364 imposes penalties on notaries who fail to comply with the obligations imposed upon them by the Act; and
- ultimately this is not a question of why the authorities do not co-operate with the public when faced with similar situations, but rather why the public still blindly trusts their chosen notary without taking the proper precautions, notwithstanding other known cases of notaries who failed to pay tax due on behalf of their clients. For this reason, the CFR and the Notarial Council are working to promote an educational campaign to educate the public about the workings of the procedure of duty on documents and transfers, including information about the duties of notaries and those of the tax payer.

The Ombudsman sought feedback in regard to this grievance from the Notarial Council, that explained the following:

- Notaries, as public officers, are entrusted by the State to attribute public faith and ensure legal certainty for citizens and businesses requesting their

services. Anything that tarnishes or appears to tarnish their independence and impartiality or diminishes legal certainty is taken seriously by the Notarial Council and relevant authorities. Article 88 of Chapter 55 requires the Council to "*… inquire into the professional conduct of any notary which is considered to be repugnant to the decorum of his profession, or into any charge of negligence or abuse made against any notary in the exercise of his profession …*" unless the power to take cognizance and deal with this conduct is vested in another authority by the legislator. The law strictly regulates the procedures to be followed in such cases. In the case under examination, there is a clear element of fraudulent misconduct and the power to take action and prosecute rests with the police and the office of the Attorney General. The Council intervenes to direct these entities to make representations to the Court for the suspension or revocation of the notary and for the appointment of a notary keeper.

- While exercising their profession, notaries are obliged to keep an indemnity insurance in line with Article 10A of Chapter 55 and S.L. 55.07. This insurance will not cover instances of criminal activity or fraud, leaving aggrieved parties in a limbo as to how they are to have their rights redressed in case of fraudulent misconduct.

- Currently Government insists that the rights of the aggrieved parties can only be registered if all the amounts due for property transfer tax and duty on documents are remitted. This in essence requires a double payment on the part of the purchasers, which in itself creates an added burden on the juridical system as the purchasers would then have to sue the fraudulent notary civilly. The prejudice is aggravated when there are insufficient assets to satisfy the outstanding amounts.

- The Council has repeatedly made its submissions to the Government for the situation to be addressed by having an adequate system of timely redress, whereby the deed will be registered through the Office of the Chief Notary to Government (Keeper of the Acts of the defaulting notary) and Government reserves the right of action against the notary, as in any other case where money is owed to the public exchequer. One needs to balance Government's fiscal requirements with the interest of safeguarding the juridical order and the rights of property of private citizens, which outweigh fiscal considerations. This especially in the light of the fact that had the modern adequate systems

suggested been properly implemented, such abuse could have been detected and stopped upon inception.

- there was a lack of action or delay by aggrieved third parties, which although exposed to instances of similar abuse never formally brought their case to the Council's attention or to that of other competent authorities for proper investigation-. Had such action been taken at the first occurrence or suspicion, the instances of such fraudulent misconduct could have been mitigated. And
- The Notarial Council has formulated a clear agenda for the digitisation of all notarial services, in particular for a paperless property tax payment and a registration system. This aims to achieve a more efficient, secure and transparent system using a combination of decentralised technology, smart contracts and self-executing tokens having built-in features and verification, like escrow and KYC mechanisms, also through the use of Distributed Ledger Technologies (DLT).

Complainant explained her concern with this Office that despite the wide interest which the complaint had raised, the transfer was still unregistered. She therefore sought assistance from the Ombudsman to help achieve a financial compromise with the CFR which would enable the registration of the transfer without being required to pay the entire amount of duty and tax due on the deed.

The proposal was referred to the CFR that informed that the contract was still valid and would eventually be registered by the Chief Notary to Government. CFR expressed willingness to accept that the market value of the property remained that declared on the date of signing of the deed, without any increase in market value, but complainant would still have to pay tax and duty due on the declared value of the transfer.

Considerations

This Office noted that in a case with similar merits, the Court of Revision of Notarial Acts had described the difficulty as a legal anomaly and made the following observations:

" … *Illi huwa ċar li de lege lata u sakemm il-liġi tibqa' kif inhi l-uffiċjali pubbliċi involuti ma jistgħu jagħmlu xejn fir-rigward ta' dawn il-każijiet ħlief li jissolevaw dawn il-każijiet mal-Ministeri li huma jaqgħu taħthom biex jgħarrfuhom dwar din l-anomalija u jissoleċitaw xi forma ta' rimedju jew palattiv li għall-inqas inaqqas mill-konsegwenzi tal-aġir abbużiv tan-nutar ...*"

After having taken account of the position taken by complainant and the representatives of Government involved, the Office did not concur with the interpretation given by the Ministry for Justice and the State Advocate of the term '*breach*' contained in Regulation 2 of the Notaries (Compulsory Insurance) Regulations. It considered that the term '*omission*' in Regulation 2 did not include acts of a criminal or fraudulent nature committed by a notary, but referred to other omissions of the notary in the carrying out of the duties connected or ancillary to the publication of notarial acts and other functions specified by Chapter 55 (as opposed to 'acts which cause damages resulting from criminal or fraudulent acts' committed by third parties in the notary's employment or engaged by him', which are specifically mentioned in the said definition and which appear to be covered). It added that as rightly pointed out by the Notarial Council, the professional indemnity which notaries are obliged to keep does not cover instances of criminal activity, thus leaving aggrieved parties in a limbo as to how they are to obtain redress in cases such as the one under consideration. Moreover, the contracting parties cannot claim payment from any professional indemnity insurance subscribed to by the notary, as a claim could only be submitted by the insured – that is, the defaulting notary - who in this case could not be expected to submit a claim, when he had renounced from exercising the profession of Notary public and reported his actions to the Police, who charged him with aggravated misappropriation. The insurance policies issued to notaries are not client-money protection insurance policies, and the insurance company would process a notary's claim only if it is related to his professional work. No indemnity would be due if the notary fraudulently and knowingly misappropriated funds entrusted to him.

The Ombudsman could not find fault in the stand taken by the Public Registry. Existing provisions of law do not allow the Searches Unit to accept a note of enrolment for registration unless notice and duty due have been paid to the CFR. Chapter 55 does not provide for the contingency of a notary not fulfilling his obligations in terms of the law.

The Office acknowledged the present state of the law, in the sense that the law does not provide for a waiver of the payment of taxes or/and stamp duty in instances when a notary fails to register the contract and convey the funds entrusted to him by the parties to the CFR as required to do by law.

As far as the duties at law of Notaries Public, due reference was made to the judgement of the Court of Appeal of the 9th October 2009 in 'Galea et vs Nutar Pubbliku Dott. Pierre Falzon' referred to by the CFR where the following was stated:

"*14. Il-funzjoni tan-Nutar Pubbliku Malti hija doppja: dik ta' uffiċjal pubbliku, fejn in-nutar għandu l-funzjoni illi jagħti fidi pubblika lil atti jew dokumenti li jirrediġi u li jirċievi, u dik ta' professjonist liberu u indipendenti, li għandu responsabbilità lejn il-partijiet li jkunu talbu s-servizz tiegħu u jkun allura parteċipi fl-att minnu redatt. Dawn iż-żewġ funzjonijiet jipproteġu żewġ interessi separati iżda li huma intrinsiċi fil-professjoni ta' nutar pubbliku; in-nutar għandu r-responsabbilità li jissalvagwardja l-interess pubbliku kif ukoll l-interess privat. In-nutar pubbliku jissalvagwardja l-interess pubbliku billi jirrediġi bil-formulatajiet (*recte formalitajiet*) kollha skont il-liġi, atti fost il-ħajjin u testmenti, jagħtihom fidi pubblika, jippreservahom u jagħti kopja u estratti ta' dawn l-atti u testmenti (art. 2(1) tal-Kap 55 - Att dwar il-Professjoni Nutarili u Arkivji Nutarili). In-Nutar huwa obbligat li jissalvagwardja l-interessi tal-partijiet illi jkunu inqdew bis-servizz tiegħu billi, inter alia, jassigura ruħu li jistabbilixxi l-volontà tal-partijiet u wara li jkun irrediġa l-att jaqrahulhom u jfissirulhom, isaqsihom jekk dan hux skont il-volontà tagħhom (art. 25(4) Kap 55) ...Il-funzjoni pubblika u l-funzjoni ta'* libero professionista *tan-nutar pubbliku ma tistax tiġi separata u tali dottrina hija ormai aċċertata minn diversi ġuristi prominenti Taljani...*

15. Il-funzjoni pubblika tan-nutar pubbliku ġġib magħha responsabbilitajiet li jaqgħu taħt l-isfera pubblika rregolati mill-Kapitolu 55 tal-Liġijiet ta' Malta. Jekk nutar pubbliku ma josservax il-forma li biha huwa għandu jirrediġi l-atti notarili kif ukoll il-proċeduri preskritti, allura jkun qed jivvjola dan l-Att, fil-kapacità tiegħu ta' uffiċjal pubbliku. Tali responsabbilità normalment titqies bħala waħda extra-kontrattwali. Min-naħa l-oħra, in-Nutar Pubbliku għandu wkoll responsabbilità kuntrattwali,

fil-kapaċità tiegħu bħala libero professionista, *u dan a bażi tal-mandat mogħti lilu mill-partijiet.*

...

16. Jekk imbagħad jirriżulta minn xi liġi oħra, barra dik notarili, illi n-Nutar Pubbliku kellu d-dover li jaġixxi b'ċertu mod f'ċirkostanzi partikolari jew li kellu xi obbligu impost fuqu minn xi liġi partikolari, allura jekk jonqos minn dawn id-dmirijiet, titwieled ir-responsabbilità akwiljana li hija msejsa fuq il-prinċipji tad-delitt u kwaži delitt fil-Kodiċi Ċivili."

The Office reflected on the arguments raised by the CFR. Some submissions were considered unfounded, particularly the point that a waiver of the payment of taxes could lead to abuse by those who wilfully intend to evade paying the tax due, and also the point that a waiver could bring about a situation where people will ultimately expect to acquire ownership even when tax and duty due are unpaid. Complainant's request for a waiver of tax and duty due to the CFR and passed to the Notary Public referred to the specific circumstances under examination, and intended to alleviate hardship caused by the actions of a public officer. While there is no doubt that parties to a contract must act diligently in the choice of a Notary Public and that they should take proper precautions to avoid risks, particularly payment in cash, the general public's chances of becoming aware of questionable behaviour by a Notary Public are in practice very limited, and generally depend on that behaviour being rendered public by the media. Furthermore, legal professionals can only exercise the notarial profession after having satisfied the requirements stipulated by the legislator for the attainment of a warrant that is granted by the State. Possession of a warrant to practice should be looked upon as a guarantee in favour of service users.

The CFR's standpoint basically obliges a purchaser, who acted in good faith and in accordance with the law, to affect not only a double payment of the amounts due, but also a payment of the capital transfer tax already passed on to the Notary Public by the seller, as the seller has no interest to effect payment twice.

The Ombudsman insisted that persons who find themselves in the complainant's situation are being prejudiced and subjected to undue hardship as they are unable to register property legally acquired by them, unless they incur a considerable expense and fork out the sums due to the public exchequer once again. Moreover, in cases like the one under investigation, a civil action by complainant against the defaulting Notary Public for recovery of amounts passed on to him would not lead to a retrieval of the amounts paid with any judicial costs, as the claims against the defaulting notary would be insufficient to satisfy dues.

While there might be nothing at law allowing the CFR to waive the payment of the tax and duty already tendered by contracting parties to a Notary Public, the principles of fairness and reasonableness, as well as the principle of legitimate expectations, dictate that the Public Administration implements effective policies and practices so as to ensure that the failure of the Notary Public, who is designated by the legislator to act as the official to whom the parties to the contract are bound to give the tax to the CFR, does not prejudice persons acting in good faith and in accordance with the law.

The Office stressed that Government has to address this anomaly without delay as the current state of affairs is causing stress and worry to contracting parties who fall victim to a defaulting Notary Public.

It referred to a recent judgement delivered on the 18th June 2020 in "*Il-Pulizija vs. Peter sive Pierre Falzon*" where the Court of Criminal Appeal stated as follows:

"34. L-obbligi tan-Nutar taħt l-Att dwar id-Dokumenti u Trasferimenti huwa wieħed oneruż tant li l-istess Liġi żżommu responsabbli, in solidum mal- benefiċjarju, li jħallas it-taxxa li tkun dovuta u nġabret fuq dak l-att. Anzi, bis-saħħa tal-artikolu 50 tal-Kapitolu 364 tal-Liġijiet ta' Malta, kull Nutar li –
jonqos li jħallas it-taxxa dovuta kollha jew parti minnha taħt id-dispożizzjoni ta' dak l-Att fuq xi att riċevut minnu; jew ...
ikun ħati ta' reat u jeħel, meta jinstab ħati, penali ta' mhux inqas minn ħdax-il euro (11) iżda mhux iżjed minn erba' mija u ħamsa u sittin euro (465), u l-proviso li hemm mal-artikolu 11 tal-istess Kapitolu 364 tal-Liġijiet ta' Malta għandu jgħodd għal dan l-artikolu.

35. Illi dan kollu juri li n-Nutar Pubbliku mhux biss ritenibbli Uffiċjal Pubbliku bis-saħħa tal-Liġi li tikkostitwixxi u tirregola l-professjoni tiegħu; iżda bis-saħħa tal-Att dwar id-Dokumenti u Trasferimenti, il-Liġi tafdalu wkoll rwol speċifiku fl-amministrazzjoni tal-ġbir ta' dik it-taxxa.

...

40. Meta Nutar Pubbliku jkun qiegħed jopera u jeżegwixxi l-obbligi tiegħu taħt il-Kapitolu 364 tal-Liġijiet ta' Malta, huwa jkun qiegħed jaġixxi bħala Uffiċjal Pubbliku. Meta Nutar jippublika att ta' dikjarazzjoni ta' trasferiment causa mortis, u b'mod partikolari meta jkun qed jiġbor it-taxxa dovuta bis-saħħa ta' dak l-att, huwa ma jkunx qiegħed jagħmel sempliċi att professjonali minn suġġett professjonali privat, iżda jkun qed jaġixxi fil-vesti tiegħu t'Uffiċjal Pubbliku inkarigat mill-ġbir ta' taxxa pubblika u li tkun trid tiġi konsenjata lill-Kummissarju tat-Taxxi. Ikun għalhekk qed jaġixxi fil-kwalita' tiegħu t'Uffiċjal Pubbliku, inter alia, kemm taħt l-Att dwar il-Professjoni Notarili u l-Arkivji Notarili kif ukoll tal-Att dwar it-taxxa fuq id-Dokumenti u Trasferimenti.

41. Il-klijent ikun qiegħed iħallas din it-taxxa lin-Nutar fuq l-att mhux fil-kwalita' tiegħu personali, jew bħala professjonist, iżda bħala Uffiċjal Pubbliku, b'Liġi speċifikatament delegat biex jiġbor dik it-taxxa u jikkonsenjaha, f'isem il-klijent tiegħu, lill-Kummissarju tat-Taxxi. ...

45 .... Meta l-benefiċċjarju jkun qiegħed jikkonsenja l-flejjes rappreżentanti t-taxxa lin-Nutar, il-benefiċċjarju jkun qiegħed jagħmel dan għax bil-Liġi obbligat li jħallas it-taxxa, u li din trid tingħabar minn dak il-professjonist diżenjat bil-Liġi li huwa n-Nutar Pubbliku, li jaġixxi fil-vesti tiegħu t'Uffiċjal Pubbliku fil-qadi tal-funzjonijiet leġittimi tiegħu, in kwantu huwa obbligat bis-saħħa tal-Liġi li jirċievi dik it-taxxa biex tiġi mgħoddija lill-Kummissarju tat-Taxxi."

Although the Ombudsman acknowledged that Government officials had met stakeholders in an attempt to find a solution, no tangible solution was found to mitigate the hardship of persons such as the complainant. While the CFR's proposal to organise, educational campaigns is well-meaning and commendable, it is certainly not resolutive of the core issue of the complaint. The Notarial Council has repeatedly insisted with the Public Administration that Government requires an adequate system of timely redress and has submitted proposals that are manageable and tangible.

Recommendations

The Ombudsman acknowledged that at present the law does not provide for a waiver of the payment of taxes or/and stamp duty in instances when a notary fails to register the contract and convey the funds entrusted to him by the parties to the CFR as required by law, as complainant requested. Chapter 55 does not provide for the contingency of a notary not fulfilling his obligations in terms of the law. Moreover, the Office could not fault the stand taken by the Public Registry.

The Ombudsman forcefully insisted that the Public Administration should not ignore the plight of persons in complainant's situation. The position taken by the CFR basically obliges a purchaser, who acted in good faith and in accordance with the law, to make not only a double payment of the amounts due, but to pay also the capital transfer tax already passed on to the notary by the seller.

The Administration cannot allow persons to suffer prejudice, especially those who enter into a contract in good faith. Notaries Public should fulfil fully their obligations and bear the consequences when they default. When Notaries Public act on behalf of the State, the State has to make good when Notaries Public default.

The tenets of fairness and reasonableness dictate that the Public Administration implements effective policies and practices so as to ensure that failures of Notaries Public are adequately addressed.

The Ombudsman therefore recommended that:

i) the Public Administration, without delay, provides adequate and tangible redress to complainant;

ii) persons in the position of complainant should be allowed to register their proprietary rights without being required to pay taxes and/or duties which have already been passed on to the notary as required by law. In this regard the Ministries might consider the proposal of the Notarial Council that the deed is registered through the Office of the Chief Notary to Government without further expense and Government reserves a right of action against the defaulting notary;

iii) the Public Administration should actively intervene to promote the introduction of legal provisions and policies that provide more robust protection for the service user. Online systems whereby tax and duty payments are made directly to the Department on the same day of the publication of the contract, with the consequent registration of the deed should be considered, as this would provide contracting parties with an instant confirmation that the amounts due to the public exchequer have been in fact passed on to the CFR; and

iv) the Notarial Council together with the Ministry for Justice discuss the possibility of the Council being provided with the resources necessary to adequately and effectively carry out its functions stipulated by law, particularly its powers to "*… inquire into the professional conduct of any notary which is considered to be repugnant to the decorum of his profession, or into any charge of negligence or abuse made against any notary in the exercise of his profession*".

Outcome

In February 2023, the Ministry for Justice informed this Office that consultations with key official stakeholders were being carried out with a view to possibly establishing viable options to address the recommendations made in this Final Opinion. It was further submitted that said consultations required also the involvement of external stakeholders and may involve legislative amendments. As no further feedback was provided to this Office, in July 2023 the report and relevant correspondence were referred to the attention of the Prime Minister, however no tangible reply indicating a way forward was provided. The Final Opinion was therefore referred to the Speaker of the House of Representatives in line with Article 22(4) of the Ombudsman Act.

Commissioner of Police
Complaint sustained – Recommendations made

Removal of parked vehicle

The complaint
Complainant parked his car in a public road. At the time, construction work was underway in that particular street and complainant claims that there were no signs or other road markings on the particular stretch of road in question. Complainant`s vehicle appears to have obstructed access to a garage across the street and as a result it was towed away by the Police. The day after, complainant paid the €200 towing penalty to have the vehicle released. He claimed to have done so because had he left the car at the storage facility, he would have incurred a further €15 per day in storage fees. Complainant made a refund request to the Commissioner of Police stating that the car was illegally towed away.

As complainant did not receive a substantive reply from the Police Commissioner, he, consequently filed a complaint with the Ombudsman, where he argued that his vehicle was unfairly towed and requested a refund of the €200 penalty which he disbursed to have his vehicle released.

The investigation
The vehicle was towed at some point between 9.30pm and 10.30pm. Complainant provided a night time photo of a section of the street. The photo showed that the road was in a bad state of repair with what appeared to be just remnants of a pavement on the side of the road. The ground was devoid of any markings. Details were not very clear as the street was not well lit. Complainant subsequently provided daylight photos of the section of the road in question (taken almost three months after the incident) which evidenced that the road was still in a bad state of repair with no clear ground markings.

Complainant challenged (through his lawyer) the towing action carried out by the Police and requested that he be refunded the €200 paid to release the vehicle – he,

however, failed to receive a reply to his request. Upon receiving the complaint, this Office requested the Police Commissioner to provide his views and comments on complainant's grievance and that it be provided with the police report on the incident.

A few days following said request, complainant received a reply from the Commissioner dealing with his original challenge. It was evident from the date of the letter of the Commissioner that the reply had been prepared two months before its receipt by the complainant but for some reason or another it was not sent out at the time.

The Commissioner rejected the claim for a refund. He explained that in order to take action Police Officers on site had to confirm two points. The first that the garage was clearly sign posted with a 'Garage in Use, No Parking' sign (S.L. 65.11 Regulation 77) and secondly that the vehicle was impeding access to the garage in question. As both conditions were satisfied, the Police Officers took enforcement action and had the vehicle removed.

Subsequently, this Office received a copy of the police report which essentially confirmed what the Commissioner stated in the reply provided to complainant. In his reply to this Office, the Commissioner further explained that in terms of Regulation 3 of the Clamping and Removal of Motor Vehicles and Encumbering Objects Regulations (S.L. 65.13), the Police are empowered to remove obstructions to garages in use.

Reference is made to the following:

- Regulations 2 and 3 of the Clamping and Removal of Motor Vehicles and Encumbering Objects Regulations (S.L. 65.13) which read as follows:

"*2. In these regulations, unless the context otherwise requires –*

…

"encumbering objects" means any motor vehicle, seacraft or any other thing obstructing or otherwise causing any nuisance or inconvenience in any street, road, quay, wharf or other place;

…

3. (1) The Commissioner or the Authority or the Council or the Agency may remove, store and dispose of any encumbering object which is causing any nuisance, inconvenience or obstruction and is in a place or space which is not lawfully permitted to be used for such purpose, or if such place or space is specifically indicated as a towing zone"

- Regulation 77(2) of the Motor Vehicles Regulations (S.L. 65.11) which states that:

  "No person shall park or leave unattended any motor vehicle in such a manner as to impede any motor vehicle of another person from having free entrance to or exit from any premises used and clearly marked as a garage by the word "GARAGE IN USE". "

Reference is also made to the 'Permanent Traffic Management Policies and Guidelines'[4] issued by Transport Malta and in particular section 5.3 of the document which deals with 'Unimpeded Access to Garages'. The main aims of the policy are:

"*i. to ensure unimpeded access to a garage;*

ii. to address the circumstances which may result in an impeded access to a garage;

iii. to regularize on-street car parking; and

iv. to ensure that turning movements and visibility are not impaired during access to garages and during parking on-street."

The guidelines provide helpful recommendations to address common issues including the situations such as the one at hand:

"5.3.9.2 Vehicles parked on the opposite side of the road in relation to the garage access

(a) The access of a garage may be impeded by vehicles parked on-street due to inadequate maneuvering space.

(b) In this respect, it is recommended that a double yellow line is marked on the other side of the road opposite the garage. The length and exact location of the line depends on the site-specific circumstances."

4 Revised in June 2016.

The guidelines also provide the 'centre-line turning radii' required for different classes of vehicles. The table indicating the various radii is reproduced here below:[5]

Vehicle Type	Centreline Turning Radii (meters)
Refuse Truck	8.48
Private Car	5.00
Small Rigid Vehicle	6.12
Long Rigid Vehicle	9.98
Articulated Bus	5.61
Furniture Van	9.34

According to these guidelines, the request for the implementation of line markings must be submitted by the Local Council to the Transport Authority.

The Office made use of the online tools (Google Streetview) available to analyse the state of the road prior to the incident. Whilst one could not determine precisely when the street photos on the app were taken, one could however safely surmise that in the last few months or year – the site directly in front of the garage in question was developed from what appeared to have been a walled garden to a block of flats. Similarly single storey garages a few meters down the road on the corner with another road were also demolished and replaced with another block of flats. It was highly likely that there was a direct correlation between the state of the road as evidenced by the photographs provided by complainant at the time of the incident and these construction projects.

An onsite inspection was also carried out a few months after the incident in question, where the following was noted:

- The construction projects appeared to be completed and a new pavement was put in place.
- The side of the road starting with the garage in question until the next corner street is mostly lined with garages. One could see double yellow lines painted on

5 Permanent Traffic Management Policies and Guidelines. Document No: DOP/ITSD/RDU/001, Pg 22.

the other side of the street except for the stretch of road directly in front of two entrances to residences adjacent to each other.

- The width of the road is approximately (excluding width of pavement) 6 mt 60 cm.

As far as the availability of a remedy to the imposition of a towing penalty is concerned, the Ombudsman observed that the act of settling the financial penalty is deemed at law to be an admission of guilt with the result that the vehicle's owner immediately forfeits the right to contest the charge. The right to file a petition before the Board of Petitions is similarly forfeited as Regulation 4(4) of the Petitions (Local Tribunals) Regulations (S. L. 291.04) which specifically states that "*No petition may be allowed once the financial penalty has been paid*". Thus, if the owner of the vehicle wants to challenge the forced removal of the vehicle, the initial €200 penalty cannot be paid and the car needs to be kept in 'storage' at an extra charge of €15 per day.

Considerations

Complainant challenged the correctness of the towing carried out by the police based on the fact that there were no road signs indicating that parking was prohibited on a particular stretch of that particular road. The Commissioner, on the other hand, maintained that the vehicle created an obstruction hindering the exit of a vehicle from a garage and consequently the Police was in terms of the law bound to tow the said vehicle.

One must point out that Regulation 77 of the Motor Vehicles Regulations states that the parking of a vehicle cannot take place in such a manner that would impede the entrance or exit from a garage. It is common knowledge that one should not park directly in front of a clearly marked garage entrance. Such action would clearly and unequivocally impede the entrance or exit of a vehicle to/from the garage. The situation becomes somewhat uncertain if one were to park a vehicle across the street from the entrance to a garage. In this latter case determining whether the exit or entrance would be 'obstructed' depends on a number of factors, some evident, others not. If the street in question is exceptionally narrow, it would be very evident without the need of any additional markings that one could not park a car across the street as this would clearly impede the entrance or exit of a vehicle (of whatever size) from the garage. Where the street, however, is not exceptionally narrow or exceptionally wide, the matter becomes somewhat equivocal. Moreover, one must also factor in the size of the vehicle kept in a clearly marked garage. A

driver would not be privy to that information and it would not be unreasonable for him or her to assume that the vehicle so stored was a private passenger car and not a larger commercial or passenger vehicle needing a far wider turning radius.

The Office observed that the local car stock is mostly composed of private passenger cars. If the vehicle stored in the garage is a larger vehicle, then it is crucial that additional street signs/road markings be put in place, as a reasonable and prudent driver would not be in a position to determine (based strictly on what can be observed) whether his/her vehicle would create an obstruction. The road in question is not exceptionally narrow nor exceptionally wide. A cursory visual assessment leads one to conclude that a passenger car would succeed in entering or exiting a garage even if another passenger vehicle were parked across the way. The lack of proper road markings would further cement such a conclusion.

In his reply to this Office, the Police Commissioner stated that the vehicle was towed on the basis of Regulation 3 of the Clamping and Removal of Motor Vehicles and Encumbering Objects Regulations (S.L. 65.13), which provides that an encumbering object may be removed if it is causing "*any nuisance, inconvenience or obstruction and is in a place or space which is not lawfully permitted to be used for such a purpose*".

Two cumulative conditions must therefore be satisfied - that an encumbering object is causing an obstruction and that the object (in this case a vehicle) was unlawfully parked. The wording of the law allows for two possible interpretations. On the one hand the very act of parking a vehicle that obstructs a garage could be construed as making said parking unlawful. On the other hand, one could argue that the space itself must be designated as a 'no parking zone' *ab initio* rendering any parking under whatever circumstance (whether or not the vehicle causes an obstruction) unlawful. The latter situation is normally evidenced with road markings, signs or by the creation of a temporary 'Tow Zone'. The former interpretation allows for action to be taken expeditiously in favour of the garage user but is to the detriment of the vehicle's driver who on the face of it parked the vehicle legally. The latter interpretation places the onus on: a) the garage user to ensure he/she bring the matter concerning the access to the garage to the attention of the Local Council; and b) the authorities to ensure that streets are properly sign posted.

The Ombudsman noted that it is up to the garage user to ensure that the entrance to said garage is properly sign posted in terms of the law. Without said signs, drivers would not be in a position to determine whether or not they would be obstructing the entrance to a garage. The garage user, therefore, has the responsibility of making what is not apparent – apparent. Without said signage – the towing away of the obstructing vehicle would not be possible.

Arguably the same principle would apply with regards to possible obstructions created by vehicles parked *across* the street from the entrance to a clearly marked garage. The driver of the vehicle would not be in a position to know: a) what type of vehicle is kept in the garage; b) the turning radius required; and c) whether the street is wide enough or not. That said, the interpretation of Regulation 3 of S.L. 65.13 adopted by the Police Commissioner results in drivers of vehicles being effectively punished despite the fact that they are unable to determine whether they are actually causing an obstruction. Whilst this interpretation of the law is not strictly speaking 'wrong' it is grossly unfair on the driver of the vehicle.

This Office notes that the onus of ensuring that any vehicle parked in a garage has adequate space to manoeuvre both in and out of the said garage should be on the garage user. The garage user must follow proper procedure to ensure that sections of the street are properly sign posted and thus, inform drivers that it would be unlawful to park in said sign posted area.

In this particular instance, the road was in a bad state of repair due to the ongoing construction work. The onsite inspection revealed that double yellow lines were painted in front of the completed blocks of flats, meaning that at some point the garage users did take appropriate action.

This Office acknowledges that when a road is undergoing repair or there is ongoing construction work, paintwork on the road itself may be lost or completely obscured – leaving would be 'parkers' once again without the necessary information indicating that any parking action would cause an obstruction. Adding additional information to the 'Garage In Use' sign affixed to garage doors indicating that a long vehicle is kept inside the garage would be immensely helpful in such a scenario.

As regards the availability of a remedy, the law does not provide an effective remedy to those drivers who wish to challenge the towing penalty. This state of affairs was already brought to the attention of the Ministry responsible for Home Affairs by the Ombudsman in connection with a towing incident consequent to the creation of a temporary no parking/tow zone area which officers of the Local Enforcement Systems Agency (LESA) proceeded to enforce. At the time the unfairness of the situation was acknowledged and LESA created an internal appeal mechanism for vehicle owners wishing to challenge the towing penalty (after it was paid and vehicle released).

While one notes that this was a step in the right direction, there were obvious limitations to this 'internal remedy' including the fact that this would not be applicable to enforcement actions taken by other lawfully authorised entities including the Police.

Conclusions and recommendations

Regulation 3 of the Clamping and Removal of Motor Vehicles and Encumbering Objects Regulations grants certain authorities, including the Police Commissioner, the power to remove obstructing vehicles. It is indeed unfortunate that the law is somewhat unclear and allows for multiple possible interpretations as to when the 'removal' is allowed. The Commissioner of Police adopted one of two plausible interpretations which on the face of it provided an expedient solution to garage users. Whilst the towing action was not illegal or 'incorrect' *per se*, the result was, however, unfair and unjust on complainant on two counts: 1) that he was subject to a penalty when *prima facie* he parked his vehicle in a lawful manner as it was not apparent that said vehicle obstructed the entrance to a garage; and 2) the lack of a proper effective remedy.

The Ombudsman made these recommendations:

1. that in the interest of fairness and equity given the particular circumstances of this case, complainant be reimbursed the towing penalty;

2. that the wording of Regulation 3 of the Clamping and Removal of Motor Vehicles and Encumbering Objects Regulations (S.L. 65.13) be reviewed and possibly amended with the view of eliminating any uncertainty and thus permit only one possible interpretation;

3. that changes to the signs affixed to garage entrances be considered to cater for instances when long vehicles are kept inside garages;
4. that amendments to the law be considered to provide an effective and fair remedy to motorists who wish to challenge a towing action;

Outcome

As is standard procedure, the Ombudsman's opinion and recommendations were sent to both the Commissioner of Police and Ministry concerned. The recommendations were, however, rejected in the first instance in their entirety.

In terms of Article 22 of the Ombudsman Act, the opinion and recommendations were subsequently brought to the attention of the Prime Minister. The first three recommendations were rejected. As far as the fourth recommendation is concerned, there was disagreement on the nature of the towing fine – this was considered by the Office of the Prime Minister to be a fee and not a penalty. It was therefore held that a challenge to the towing action is still possible even where said fee is paid. That said, this Office was informed that a new regulation will be introduced in the *Clamping and Removal of Motor Vehicles and Encumbering Objects (S.L 65.13)* clarifying that a remedy may be sought before the Administrative Review Tribunal. A streamlined appeal system will, therefore, be adopted for all towing cases.

The Ombudsman considered the action taken as unsatisfactory, as such, his opinion, recommendations and relative correspondence were tabled in Parliament.

Ministry for Social Policy and Children's Rights
Complaint rejected

Claim for non-payment of a Treasury or Service Pension

The complaint
The complainant had entered service with the Government of Malta on the 2 November 1977. He received his letter of appointment from the Public Service Commission on 30 November 1977 with a backdated effect. His grade was that of Custodian and Guide I in the Department of Museums within the then Ministry of Employment, Social Welfare and Culture.

From 1981 to 1991, the complainant served in the Armed Forces of Malta in the specialised capacity of Air Traffic Controller. He entered the Army on 19 October 1981 at the rank of Sergeant and left the service on 1 January 1991 at the rank of Lieutenant.

On 15 November 1991, the complainant, at the time an Air Traffic Control Officer, was transferred from the Active List of the Armed Forces of Malta to the Regular Reserve of Officers. This had been done following his resignation from the Army, that is, from military service, effective 29 November 1991. Complainant started working with Eurocontrol in Brussels in the same year until he reached retirement age and returned to Malta.

Upon retirement, complainant began receiving his National Insurance Pension. He requested that his entitlement to the Treasury or Service Pension be paid. The Department of Social Security refused this. This fact led to his complaint.

The investigation

The complaint was communicated to the Ministry by the Office of the Ombudsman. The Department of Social Security sent its comments on the matter on 31 August 2022. The Department stated that the complainant had been employed with the Department of Museums and then transferred to the Army, where he resigned on 29 November 1991. The Department referred to Section 7 of the Pensions Ordinance, which states that no service pension can be given to any public officer if he does not fall within the parameters expressly set down by the law. In the event of resignation, the individual could not be paid a service pension. The Department's position was that once the complainant resigned from the Armed Forces of Malta, he could not receive the pension he claimed.

This information was shared with the complainant, who insisted that he was entitled by right to that pension and mentioned several ex-colleagues who were receiving the pension.

Clarifications were sought from the Department.

The Office was advised that the persons the complainant had referred to had all completed twenty-five years of service, which was not his case as he had resigned with no mitigating circumstances. Had he, for instance, been medically boarded out, that fact would have safeguarded his entitlement.

Another issue was whether the complainant was eligible for a pension in terms of the Pensions Ordinance, which applies to public officers who work with the Government in a civilian capacity. It was resolved that the complainant could only claim a pension in terms of Military Law because he was an ex-serviceman, though even here, he could not qualify.

The position of the Department that the complainant was not entitled to a service pension was confirmed on 23 November 2022.

Considerations

Public Officers who join the Civil Service[6] must do so using a formal letter of appointment that the Public Service Commission authorises. The Public Service Commission confers the appointment. The Pension or Treasury Service Pension is paid to public officers if they enter the public service before 15 January 1979[7]. They also have to be employed in the public service, defined as a "*… service of a civil capacity under the Government of Malta …*"[8].

Complainant could not qualify under this provision.

He had entered Government service in 1977, but he had transferred to the Armed Forces of Malta. Army personnel are not public officers, and they are not deemed to be in government service in a civil capacity. Regulation 20 of the Appointments and Conditions of Service of the Regular Force[9] which states that:

"*Officers commissioned on or after the 15th January, 1979 shall be eligible for a pension as may be granted in accordance with the Articles and Rules contained in the Third Schedule*".

The Third Schedule and the rules therein lay down the grounds when an ex-serviceman can have his service pension[10]. These are:

i. attaining the age of fifty-five years or the completion of twenty-five years of service;

ii. the abolition of his office;

iii. compulsory retirement in cases of inefficiency, unsuitability, misconduct; or

iv. termination of service due to ill health after being found unfit for military service by an approved medical authority.

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6 Article 110(1), Constitution of Malta: "*… power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in any such offices shall vest in the Prime Minister, acting on the recommendation of the Public Service Commission*".

7 Section 21, Pensions Ordinance; Chapter 93, Laws of Malta.

8 Section 2, Pensions Ordinance; Chapter 93, Laws of Malta.

9 S.L. 220.03., Legal Notice 91 of 1970.

10 That is the pension arising out of *military service.*

Therefore, no pension is attached to a serviceman who voluntarily resigns.

The voluntary resignation of the complainant is attested by a letter he wrote on 7 October 1991 to the Commanding Officer of the First Regiment, where he requested permission to resign his commission in the Armed Forces of Malta and to transfer to the Regular Reserve of Officers. This was duly accorded. He also stated that he was taking up employment with Eurocontrol in Brussels.

The complainant has been a specialised operator in air traffic control in Malta and with Eurocontrol in Brussels since 1991. He pursued this occupation until retirement in Malta. The pension he received was the National Insurance sourced one. His request for a service pension, which would have entitled him to a higher one, was not accepted because he had resigned voluntarily from military service before starting work abroad.

The state of the law is clear. The law does not permit resignation, albeit voluntary resignation, to count as going towards receiving the service pension.

Conclusion
The Ombudsman cannot sustain this complaint. There have been no administrative or procedural errors in this case.

The complainant has no legal basis for the service pension, and the competent authorities acted correctly.

San Gwann Local Council

Complaint sustained and followed by recommendations

Complaint for non-payment of personal injury damages

The complaint

Complainant explained that while walking with his wife on a pavement in San Gwann, he had a nasty fall due to a pothole situated right under the kerb. As a result of this fall, he had to be taken to the Health Clinic, where he was diagnosed with a fracture on his left foot, which was subsequently supported by a plaster cast. As a result of the incident, his spectacle lenses were scratched and required replacing. His mobility was moreover restricted and he had to rent a wheelchair for a number of weeks, as none were available free of charge at Mater Dei Hospital. He sought a refund of the expenses incurred from the San Gwann Local Council, claiming that the Council should be held responsible for the accident and reimburse him for all expenses incurred.

On its part, the Local Council informed the complainant that the Council does *"not adhere to such requests for compensation"* because it administers public funds and cannot accede to the request upon the mere presentation of photos of a so-called 'pothole' as this was not evidence of the cause of the fall.

The investigation

Following a review of the complaint, this Office sought further details and documentation from complainant, and was provided with the following:

- the order form, as well as fiscal receipts, issued in respect of the cost for the replacement of the lenses of complainant's glasses, together with evidence that the lenses ordered were of the same quality as the ones which had to be replaced following the accident;

- the medical report issued by the doctor who had examined complainant upon his arrival at the Mosta Health Clinic;
- a Police Report, filed following the submission of the complaint with this Office. Complainant had informed this Office that he had not been aware that a Police Report should be filed in similar cases and had thus not filed said report. Complainant therefore filed a police report and presented a copy to the Ombudsman.
- a statement made by complainant's wife, who witnessed the accident; and
- an invoice for the wheelchair which he rented.

The Office sought the feedback of the Local Council, and was informed by the Executive Secretary that complainant had indeed contacted the Council regarding the alleged fall. The Executive Secretary elaborated the following:

"… [Omissis] *sent us a picture of his glasses and his foot. He also sent us a picture of a small defect in the road surface claiming that this was the cause of his fall. We went on site and found that the alleged pothole was not really a pothole but a small defect in the surface. Unfortunately, these types of defects cannot all be fully eliminated as there are so many private contractors and public agencies carrying out works in the streets.*

It was not possible for the Local Council to verify if such a minor flaw was the actual cause for a fall. A link could not be established between the said defect and the fall ... Local Councils are duty bound to ensure that public funds are disbursed prudently and diligently as they are ultimately accountable to the tax payer. In fact … [Omissis] *did not lodge a police report until …* [Omissis] *over a month after the alleged incident, after he was advised to do so by the Office of the Ombudsman.*

….

Finally, I assure you that we do our best to keep our streets safe."

The Council was subsequently requested to confirm:

- that the street in question fell within its responsibility;
- to provide any photos taken during the site visit carried out by Council officials; and
- to inform whether the said defect in the road surface had been repaired by the Council after the submission of complainant's request for reimbursement.

In response, the Executive Secretary stated that he did not recall taking photos of the site. He confirmed that the location where the alleged accident had occurred fell within the confines of the locality and that workers had been sent on site to remedy any possible defects "*and not only the one in question*".

Considerations

The Local Council refuted liability for the payment of damages suffered by complainant, claiming that the photos sent to the Council were insufficient to prove that the "*small defect in the surface*" of the road, which it claimed could not be completely eliminated as street works are carried out by many private contractors and public agencies, were the cause of the damage. The Executive Secretary also implied that complainant was not keeping a proper lookout.

A Local Council's obligation to maintain roads falling within its remit arises from Article 33(1) of the Local Government Act (Cap 363 of the Laws of Malta). In particular, in terms of Paragraph (b) of the same provision, local councils are required to ensure that roads are accessible to all persons, including wheel-chair users. The obligation of accessibility has been interpreted widely by our courts that recently held that notwithstanding the specific reference made by the law to wheel chair users "*abbażi tal-prinċipju ta'* ad iusem generis (recte *ad iusdem generis*) *u anke dik tal-ekwipollenza din il-parti tal-liġi tapplika ukoll għall-użu ta' biċikletta. Il-leġislatur ma jridx li l-aċċessibilità għat-toroq tkun limitata għal xi mezz ta' trasport kemm jekk mekkanizzat u kif ukoll jekk le. Minn dan isegwi li l-aċċessibiltà ma għandha toffri ebda perikolu jew ostakoli għaliex inkella ma tkun aċċessibilità xejn.*"[11]

11 Timo Kawalzik vs Kunsill Lokali Birkirkara (Application no 637/19TA) decided on the 27th June 2023.

The Office noted that the maintenance and upkeep of streets is one of the most important functions of the local councils. Councils are legally bound to keep the locality, its streets, pavements, and passageways in good condition for the common good of all and to take all the steps necessary to ensure that roads within the confines of the locality are properly maintained and accessible to all, unless the responsibility of said road vests in Infrastructure Malta or where the said road or footpath has to be reconstituted. This necessarily implies that the use of such roads should be safe for all road users whether these are driving a vehicle, cycling, wheel chair users or pedestrians, and are to be kept free from obstacles and perils caused by lack of road maintenance, which might render the use of roads insecure and unsafe. Should a local council fail to fulfil these obligations, it may be liable to the payment of damages ensuing as a result of its actions, omissions or negligence, in line with the general principles of tortuitous liability incorporated in our Civil Code. The said principles have been construed by our courts as applying also to the public administration[12], (including Local Councils). Consequently, councils can be subject to liability when they act imprudently, negligently or fail to fulfil their legal obligations with the expected level of care and diligence, provided that whoever seeks a refund of damages incurred "*jipprova mhux biss l-att jew ommissjoni kolpuża iżda li dak l-istess att jew ommissjoni għandhom konnessjoni ta' kawża u effett mad-danni sofferti.*"[13]

In this regard our courts have pointed out that:
"*Issa in tema ta' dritt jingħad, skont l-Artkoli 1031, 1032 u 1033 tal-Kodiċi Ċivili, li hi l-liġi komuni applikabbli għal kulħadd indistintament, li 'kull wieħed iwieġeb għall-ħsara li tiġri bi ħtija tiegħu', u 'jitqies fi ħtija min ma jużax il-prudenza, id-diliġenza u l-ħsieb ta' missier tajjeb tal-familja'. L-istess hi mbagħad daqstant ieħor kategorika u ċara dwar il-punt illi 'kull min...mingħajr ħsieb li jagħmel danni...b'nuqqas ta' diliġenza, ta' prudenza jew ta' ħsieb...jagħmel jew jonqos li jagħmel id-doveri imposti mil-liġi, huwa obbligat għall-ħsara li tiġi minn hekk.' Tali prinċipji jabbraċċjaw l-attijiet ta' kommissjoni kif ukoll ta' omissjoni.*

12 Carmelo Micallef vs Direttur tax-Xogħolijiet (Court of Appeal, 28/02/2001).
13 Kollezz. Vol XXX.I.142.

*Applikati għal każ hawn trattat il-Qorti tara li kien jinkombi b'dover fuq awtorità pubblika, u dan jgħodd ukoll għal enti pubblika, responsabbli minn ċertu xogħolijiet, illi tassigura li l-użu tat-triq u l-*flow of traffic *jiġu żvolti mingħajr perikoli jew insidji. Dan bl-operat ta' dawk il-miżuri prekawzjonali li jħarsu l-inkolumità tal-utenti jew tal-*pedestrians *li jkunu qed jagħmlu użu mit-triq.... L-istess awtorità, jew enti pubblika għandha ukoll id-dover li tħares, b'indukrar suffiċjenti, illi fl-eżekuzzjoni ta' xogħolijiet stradali kuntratturi inkarigati jkunu qegħdin huma ukoll jieħdu l-miżuri protettivi għal aħjar ħarsien tat-terzi. Jekk l-awtorità jew enti pubblika tonqos f'dan tista', u għandha, issib ruħha rinfaċċjata minn domanda għar-riżarċiment tad-danni...*"[14]

Although 'culpa' is not defined by statute law, the judgements of our courts have explained that 'culpa' arises where "*vi ha la violazione di un dovere ed una volontaria omissione di diligenza per cui non si prevedono le conseguenze della propria azione od omissione, e si viola il diritto altrui, senza volerlo ed anche senza avvedersene.*"[15] Moreover, "*si dice, che l'inadempimento dell'obbligazione dipende da colpa, quando sebbene la causa dell'inadempimento sia stata l'opera del debitore medesimo, costui non ne abbia avuto la coscienza, e solo abbia mancato di quella diligenza, che egli era tenuto di usare.*"[16]

As explained earlier - "*Hu prinċipju konsolidat kemm fid-duttrina kif ukoll f'ġurisprudenza affermata, illi l-entitajiet pubbliċi li lilhom hi afdata ċerta mansjoni huma, bħal kull ċittadin privat, marbuta li josservaw, fil-kors tal-attivitajiet tagħhom, il-prudenza, diliġenza u ħsieb ta' missier tajjeb tal-familja dettata mir-regola fl-Artikolu 1032(1) tal-Kodiċi Ċivili. Regola din ta' korrettezza, bon sens u ta' żvolġiment għaqli f'kull parti tal-operat, kemm jekk si tratta minn esklużżjoni* (recte eżekuzzjoni) *ta' xogħolijiet, manutenzjoni ta' opri pubbliċi, viġilanza u kontroll. L-enti pubblika li ma tosservax dan titqies fi ħtija li jkollha allura tissubixxi l-konsegwenza ta' dak sanċit fl-Artikolu 1031 tal-Kodiċi Ċivili.*"[17]

14 Martin Bonello Cole vs Kummissarju tal-Pulizija et (First Hall of the Civil Court, 3/10/2003).
15 Kollezz. Vol XXIV.I.172.
16 Giorgio Giorgi, 'Teoria delle Obbligazioni nel Diritto Moderno Italiana', ed. 1903, Vol II # 18 p 32-33.
17 Hugh P Zammit noe vs Direttur tat-Toroq et (Court of Appeal (Inferior Jurisdiction), 23/01/2004).

The Office noted that the Local Council's initial reply to the complainant was that "*we do not adhere to such requests for compensation*" indicating that the Council *a priori* does not entertain claims of this nature. Taking into consideration the principles of good administration, which all public entities should apply in their dealings with the public in general, this position is in principle not acceptable.

The Office acknowledged that the resources available to local councils are limited and that it is undisputed that public funds are disbursed diligently. Nonetheless a local council cannot disregard claims for damages allegedly caused by defects in the roads or lack of maintenance of roads falling within its responsibility, or take the attitude that it is never to blame. Councils must investigate claims diligently and ensure that road users do not have to bear expenses as a consequence of the poor state of the roads for which a Local Council is responsible, should a particular claim for damages be found to be justified. The obligation to maintain roads necessarily involves the duty to properly and judiciously consider claims for damages for non-fulfilment of obligations.

The Office observed that complaints should be examined on their own merits and not dismissed *a priori* by a local council simply because of a final report given in a case unrelated to the complaint in question.

On the basis of the facts that resulted from the investigation of the complaint in question, the Council did not reject responsibility for the road in question. Nor did it contest the existence of what it referred to as a minor flaw in the road surface. The Executive Secretary defended the Council's outright rejection of complainant's request for reimbursement by contending that it " … *was not possible for the Local Council to verify if such a minor flaw was the actual cause for a fall*", further claiming that similar defects cannot be "*fully eliminated as there are so many private contractors and public agencies carrying out the works in the streets*". Furthermore, in his reply to the Office, the Executive Secretary seemed to suggest that complainant had not been keeping a proper look out and was therefore solely to blame for the incident.

This Office noted that the road where the accident occured was within the responsibility of the Local Council and therefore "*soġġett għall-istess obbligi tad-depożitarju għal dak li hija kustodja u konservazzjoni tal-ħaġa fdata lilu. Li jfisser illi, la t-triq kienet fid-disponibilita` tiegħu, u allura soġġetta għal viġilanza tiegħu, kien impellenti fuq il-Kunsill li hu jżomm kontroll kontinwu u effikaċi biex jimpedixxi l-ħolqien ta' kawżi ta' perikolu għal terzi. Jikkonsegwi illi hu għandu b'dover l-obbligu li jmantni t-triq fi stat tajjeb ta' manutenzjoni f'kull rispett u jiskansa lill-utenti mill-insidji li jistgħu jeżistu jew jiżvillupaw fit-triq.*"[18]

The Council, cannot therefore seek to elude responsibility by raising the defence that others carry out work in the steets of the locality. The maintenance of streets in the locality falls squarely within the responsibility of the Local Council that is required to be vigilant and exercise control on those carrying out works in the locality which might adversly affect the flow of traffic and the safety of all road users, including pedestrians making use of the locality's streets and pavements. On the other hand, although public authorities/entities are required to guarantee the proper upkeep of roads so as not to expose road users to unnecessary dangers, "*iċ-ċittadini għandhom id-dover sabiex ikunu attenti waqt li qed jagħmlu użu mill-istess bankini u toroq pubbliċi.*"[19]

On the basis of the proven facts of this case, the Office found that the Council failed to pro-actively monitor the safety of, and maintain the streets and pavements within the locality, and that it was only after complainant submitted a request for reimbursement of damages that the Council sent workmen on site to repair the pothole (referred to by the Council as a 'small defect' or 'minor flaw' in the road surface), as well as, other possible defects in the said street.

Furthermore from a review of the photo of the pothole provided by complainant (none were provided by the Council) it transpired that the hole which was the cause of the accident was a consequence of the cracking/deterioration of part of the material that had been used to patch up or level the street. Photographic evidence showed that the pothole had already been patched on previous occassions (by the

18 Vivian Charmaine Mizzi vs Carmel Mizzi (Court of Appeal, 13/07/2001); Joseph Falzon vs Kunsill Lokali Iklin (Court of Appeal (Inferior Jurisdiction), 22/11/2006).

19 Joseph Saliba vs Is-Sindku Kunsill Lokali San Pawl il-Baħar et (Court of Appeal decided 28th January 2008).

Council or some other entity) and that chunks of the material used were breaking off, with the consequence that a hole had formed beneath the kerb.

Undoubtedly, a pothole at the kerb of a certain depth, as the one pictured in the photos provided by complainant may well constitute a hazard to those descending the pavement, particularly elderly persons and young children, and increases the possibility of pedestrians falling and/or twisting their foot or ankle, as in the case under consideration.

While it is relevant to state that those using the road should keep a 'proper lookout' when walking along the road, and that they should be aware of the state of the road and the vehicles passing through it, the required degree of care to be exercised is that of a *bonus paterfamilias*. Pedestrians cannot be expected to continually look at the road surface to ensure that there are no holes or defects in the road surfacing that might cause them injury.

The Office was morally convinced that the pothole caused complainant's injury and that the complainant was not at fault for the incident. The hazard that was occasioned by the existence of the pothole should not have been there in the first place. Local Councils are to ensure as their top priority that roads within the locality are properly and regularly maintained, and not repaired after accidents take place.

Conclusions and recommendations
The complaint was upheld and the Ombudsman recommended that complainant was to be reimbursed the expenses he incurred and duly attested by the documentation he presented to the Council and/or the Office.

The Ombudsman noted that Councils must ensure that no expense is incurred due to negligence or bad workmanship of roads which fall within their responsibility. It is a reasonable expectation of every taxpayer that the use of public roads is safe and does not involve the expense and bother which was occasioned by the incident under consideration.

The Ombudsman recommended that the Council:

i) properly considers, with good judgement, claims for reimbursement of damages allegedly caused by the bad state of repair of roads falling under its responsibility in terms of applicable legislation; and

ii) as far as resources allow, be more pro-active by carrying out regular monitoring to ensure that the roads, pavements and passageways falling under its responsibility are kept in a state of good repair and maintenance. Moreover, where repairs are necessary these are to be carried out without delay.

Commissioner of Police
Complaint sustained. Recommendation made

Complaint of unfair treatment and discrimination

The complaint
The complainant joined the Police Corps on 10 December 1984 and left the Corps on 28 April 1998 after fourteen years of service. He claimed to have left due to mistreatment, harassment and discrimination by the authorities during the period when he was working part-time with an Italian firm and making frequent trips to Libya. He alleged that he was humiliated and even strip-searched by customs officials whenever he arrived at Luqa Airport but was never charged with any criminal offence. This course of events led to psychological problems and he had to leave the Force.

Following the introduction of the Grievances Units and the attendant grievance procedures, the complainant filed a petition with them. He was awarded €5,000 for his unjust treatment but was not granted his requested deemed service of twenty-five years, which would qualify him for the service pension.

The complainant was reinstated in the post of Police Officer in the Police Corps with effect from 11 August 2014[20].

In 2017, the complainant submitted another complaint with the Grievances Unit pleading that he had evidence showing that an ex-serviceman who had left the Army before the twenty-five years' service had been given the service pension besides backdated promotions and arrears.

20 This was not the result of any decision of the Grievance Unit.

The Grievances Board found that his new complaint was not justified. In its decision of 1 March 2019, the Board said that *"... ma hemmx xebħ bejn il-każ ta' … [omissis] … u dak ta'* … [AZ], *anzi hemm differenza fundamentali bejn iż-żewġ każi."*

The complainant then lodged a complaint with the Ombudsman alleging that the Grievances Unit had not treated his case fairly and that the new evidence he produced had not been given the proper attention it should, thus perpetrating the discrimination against him.

The investigation

After the complaint was communicated to the People and Standards Division at the Office of the Prime Minister, the Ombudsman received a reply indicating that the cases of the complainant and AZ were different. While the complainant had resigned from the Police Corps, AZ had been unjustly dismissed from the Armed Forces of Malta (AFM). The award given to AZ had been recommended by the AFM Injustices Board and approved by the Minister at the time[21]. Unlike the Grievances Unit, which the OPM Circular set up, the AFM Injustices Board had been set up by General Orders. The official opinion of the Division was that the complainant had not suffered any act of discrimination, and his situation did not warrant a grant of the service pension when he did not actually work for the stipulated period.

Considerations

AZ enlisted in the Army on 27 November 1976. He was discharged on medical grounds on 20 September 1989. His service in the Army tallied to thirteen years. Following the establishment of the AFM Injustices Board[22], AZ petitioned the Board, claiming that he had suffered an injustice when his engagement in the Army was terminated. On 28 March 2015, the AFM Board decided in his favour, considered his case "*genuine*", and recommended that he be granted backdated promotions. However, the Board did not recommend that he be given the service pension ***as if*** he had spent twenty-five years serving in the Army when actually he spent thirteen years.

21 The Hon. Carmelo Abela.

22 General Order 88 of the 5 July 2013; General Order 18 of the 4 March 2014 and General Order 99 of l6 August 2017.

The Ombudsman`s enquiry elicited a reason for this through an email sent by the Army to the Ministry:

> "*... given that …* [AZ] *made clear reference that he was unfairly discharged from the Force, and as a result never benefitted from a service pension (not through fault of his), the then Minister decided that his pension should be adjusted once he would have completed 25 years of service had he stayed in the Force and not made to be unfairly discharged on medical grounds*".[23]

This meant that twelve (12) years were latched to the thirteen (13) years he actually served, thereby rendering him eligible for a service pension.

It should be noted that AZ had already submitted a complaint to the Tribunal for the Investigation of Injustices[24]. The Tribunal found that[25] AZ had suffered an injustice when the Army Medical Board had been precipitous in declaring him unfit for duty. The Tribunal did not say that he had suffered an injustice. The Tribunal was not competent to rule on matters of unjustified dismissal. AZ was awarded Lm3,000 as compensation.

Years later, in 2015, AZ was found to have suffered an injustice on the same merits. He received a promotion, a backdated appointment to various ranks and arrears. His service was then augmented to twenty-five years[26].

The authorities decided to grant a service pension to an ex-serviceman who did not serve the whole period, which usually qualifies him or her for this type of pension.

The two persons in question served in separate branches of the disciplined services – the Police Corps and the Armed Forces of Malta. Persons in service in both branches are entitled to receive a service pension after twenty-five (25) years of service.

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23 Email dated 14 August 2018; AFM to Ministry for Home Affairs.

24 Established by Act VIII of 1997 on the 5 May 1997 *"for the hearing of complaints of certain injustices occurring between 1987 and 1995"*.

25 Application No 1206/1997/1; 24 March 2003.

26 Regulation 12(l), *Appointments and Conditions of Service of the Regular Force Regulations*; S.L.220.03.

In the case of AZ, the Ministry decided to award the pension. In the case of the complainant, it did not. The Ministry knew fully well that AZ had not spent twenty-five years (25) in the Army and that the Board did not recommend the grant of pension. It recommended that AZ "*be considered for promotion ….*"[27]. The Minister[28] "*also approved that …* [AZ's] *pension be amended ... he will be considered for full pension rights as if he had completed the 25 years' service*"[29].

The People and Standards Division and the Grievances Unit were at pains to import upon this Office the difference between AZ and the complainant. They said there was a fundamental difference between the two cases, *viz* unjustified dismissal in the AZ case and voluntary resignation in the complainant's case.

The fact of the matter is that the complainant was labouring under such persistent and, as it turned out to be, unwarranted surveillance and interference with his rights that he suffered so much mentally that his psychiatrist counselled his boarding out. The complainant had to leave. If anything, his case could be tantamount to constructive dismissal.

The difference which this Office finds is the differential treatment between them. Suppose the Administration decided to use its discretion to pay service pensions outside the time limits imposed by law. In that case, it should have applied equal standards and, if necessary, amended the relevant regulations.

Conclusion

The Ombudsman found in favour of the complainant. It was declared that the complainant had suffered an act of injustice consisting of discriminatory treatment.

The Ombudsman recommended that the complainant's service be augmented to qualify him for the service pension.

Outcome

The Government accepted the Ombudsman's recommendation and implemented it.

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27 26 March 2015.
28 At the time the Hon Carmelo Abela.
29 Email dated 14 August 2018; AFM to Ministry.

People & Standards Division - Office of the Prime Minister
Complaint rejected with recommendations

Collective complaint regarding salary

The complaint
The complainants alleged that they were suffering an injustice regarding their salary tied to their position in the then Ministry for Education and Employment (MEDE), now the Ministry for Education, Sport, Youth, Research and Innovation (MEYR), due to an alleged anomaly between their salary and that of other employees in the same position in the then Ministry for Digital, Maritime and Services Economy (MCDMS).

In their complaint, the complainants maintained that they were the first employees to be engaged in the position in question in the Public Service, following two separate calls, one in 2015 and the other in 2016. For this position, they were given a salary starting from the minimum of Scale 8 and progressing to the maximum of this Scale. In the call that was issued by the MCDMS, those officers in the same position as complainants were also placed in Salary Scale 8, but with the difference that they were given the maximum of this Scale from the beginning of their employment.

The investigation
The call that was issued by the MEDE on 26 August 2015 for the position in question stipulated that:
"3.0 Salary Pegged to the Position
3.1 The salary attached to the position of … [omissis] *is equivalent to Salary Scale 8, that is € …* [omissis] *in 2015 per annum, rising by annual increments of € …* [omissis] *up to a maximum of € …* [omissis]."

The other call issued by the same Ministry on 28 April 2016 stipulated that:
"3.0 Salary Pegged to the Position
3.1 The salary attached to the position of … [omissis] *is equivalent to Salary Scale 8, that is € …* [omissis] *in 2016 per annum, rising by annual increments of € …* [omissis] *up to a maximum of € …* [omissis]."

In the call for the same position issued by the other Ministry (MCDMS) on 31 May 2016, it was stated:
"Salary pegged to the position.
3. The salary attached to the position of … [omissis], *is equivalent to the maximum point of Salary Scale 8 (currently € …* [omissis]*)."*

The complainants had submitted a request on this issue to the MEDE by email dated 2 August 2017, but received no official response. On 25 January 2018, they submitted a request to the Grievances Board. On 31 January 2018, the People & Standards Division (P&SD) informed them that the Board would contact them. On 15 June 2018, the same Division gave them a negative response, stating that:

The call for applications for the position of … [omissis] within the Ministry for Education and Employment contained specific duties and a salary of scale 8, as indicated in the same call. Therefore, this case is considered closed.[30]

On 27 August 2018, the complainants appealed to the Grievances Board, stating that:
1. We would like to be given a clear and detailed explanation as to why our request was not accepted, as well as the criteria that led to our case being closed in this manner;
2. We kindly draw attention to the Employment and Industrial Relations Act – Chapter 452 Part IV titled 'Protection against Discrimination related to Employment' point 27 sub-titled 'Work of equal value', which states that 'Employees in the same class of employment are entitled to the same rate of remuneration for work of equal value';
3. We also kindly remind that the Government's Electoral Manifesto on page 31 point 3 clearly stipulates the following:

30 Translated by author.

The concept of equal pay for equal work is a fundamental value of justice that we believe in. No one should, for any reason, be exploited and paid less than those who are performing the same work.

We have based our case on this concept of equal justice;

4. We were not given the opportunity to appear before a competent Board to explain our case, despite our several phone calls and being informed by [omissis] that we would be interviewed by a Board for this purpose.

Therefore, we appeal the decision and request that our case be revised.[31]

The complainants were informed by P&SD through an email dated 27 August 2019 that their appeal had been rejected.

The complainants argued that they suffered an injustice since, although their position and duties in the Ministry for Education were identical to those of officers in their same position in the other Ministry, they were being paid a lower salary for the same work in the Public Service. They therefore asked the Ombudsman to intervene so that their salary would be adjusted and they would be given the difference in salary retroactively from the date of their appointment.

In response to the complaint, the P&SD stated that the calls for applications for the position in question issued by the MEDE and MCDMS respectively had specific duties linked to the respective Ministry.

The Division explained that the duties pertaining to the position in question with the MEDE were mostly related to providing support to superiors and daily work in HR Management, Accounting, Procurement and Inventory in the place of work where they were posted.

According to the P&SD, the duties attached to the same position with the MCDMS, in addition to support and daily work, also included advising and making proposals to their superiors on how adopted methods could be improved, as well as making

31 Translated by author.

recommendations, based on analysis, to improve the Ministry's performance and administrative procedures. They could also be assigned the role of Freedom of Information and Data Protection Officer. The P&SD also added that although the said positions in both Ministries carried the same nomenclature, the duties were not identical and that those with the MCDMS were in fact more onerous.

The MEDE maintained that it was the first Ministry to have issued a call for officials in this position, as approved by the P&SD. It stated that the Ministry had no control over calls issued by other ministries and how these are approved by the P&SD. Moreover, it could not carry out a revision of the salaries of its officials unless instructed to do so by the P&SD.

The complainants pointed out that although in every government post, one may have the same grade/position, the work involved would be different because each ministry/department has its own specific job, but this does not detract from the fact that the salary is the same. Moreover, they maintained that their work with the MEDE involves much more than what was listed in the call and mentioned a number of other duties that they perform, among which was giving advice and drawing up reports on behalf of the Chairperson regarding (HR) calls for the engagement of various people with the MEDE as well as respond to appeals received from the Public Service Commission (PSC).They also insisted that the officials who worked at the MCDMS kept the same grade and salary even though their Ministry no longer existed and, therefore, it was assumed that they were transferred to another Ministry and probably assigned different duties.

They also clarified that their request was not for an increase in salary but for what was due to them from the beginning and throughout the years that they had been in the position in question until they reached the maximum of Scale 8, to be on par with officials of the same position under the other Ministry.

They reiterated that according to the Government's Electoral Manifesto, the concept of equal pay for equal work is a fundamental value of justice that we believe in. No one should, for any reason, be exploited and paid less than those who are performing the same work.

In response to the list of extra duties referred to by complainants, the Ministry for Education gave explanations justifying how and why work which they perform and which was not listed in the call forms part of their duties, adding that approval for the first step of Scale 8 was given by the P&SD and that the P&SD considered that the duties pertaining to the officials at the MCDMS were of a higher responsibility. The Ministry also pointed out that according to Directive 9, it is the chairperson who should make the report when a result is to be published and remarked that there is nothing wrong with the officials assisting the chairperson, but leaving the reporting and, much worse, the Public Service Commission's answers to appeals in their hands is very dangerous. This, according to MEDE, is a very serious matter.

The Ministry for Education further explained that when the call for applications was published, the officials concerned did not have qualifications but were still given the opportunity to apply on the basis of their related work experience.

This Office considered this comment to be incorrect because, according to the eligibility requirements for the position in question listed in both the respective two MEDE calls as well as in the one issued by MCDMS, an applicant had to be either in possession of the qualifications specified in the said calls or on a scale not less than Scale 12 with five years of relevant work experience. Therefore, if the eligibility requirements were either qualifications or, alternatively, experience, it should not have been stated that the complainants were 'given the opportunity to apply' because they were, in actual fact, eligible to apply. Moreover, these requirements in the case of the two respective Ministries were identical, apart from the fact that the eligibility of the employees concerned was never the issue and should not have been entered into the merits of the case under examination.

The Ombudsman asked the P&SD to explain why the complainants' request to the Grievances Board was passed on to it instead. The P&SD maintained that this was the procedure adopted in every case to make the best use of resources and facilitate the fast transmission of responses to public officials.

The P&SD explained that in cases of doubt about whether an issue is strictly a grievance or an administrative matter, a discussion and consultation between the Grievances Board and the P&SD are conducted before the case is investigated. It also

maintained that discussions and necessary research with the respective Ministries were undertaken to close the case, as it had resulted that the duties were different.

Regarding the rejection of the complainants' appeal, the P&SD pointed out that the duties the selected applicants were expected to perform in the respective Ministries were carefully analysed but it found no reason for a change in its position.

The P&SD indicated the duties in the MCDMS call which, in its opinion, were more onerous than those of MEDE.

The Ombudsman examined the two respective calls for the position in question issued by MEDE as well as the one issued by the MCDMS.

As regards the work which the complainants stated they perform but which was not specified in the MEDE calls, it should be noted that according to those same calls: "*4.1 The …* [omissis] *will be required to perform the following duties and responsibilities, amongst others*"

Moreover, the said calls also stipulated the following duties:

- *"Performing other tasks as directed by the Head …* [omissis];
- *Performing any other duties according to the exigencies of the Public Service as directed by the Permanent Secretary MEDE;*
- Performing any other duties according to the exigencies of the Public Service as directed by the Principal Permanent Secretary."

This means that the list of duties in the calls in question was not exhaustive.

Therefore, the concerned officials could be requested to perform other duties as required, which duties, although not specified in the respective calls, form part of and/or fall under and/or are ancillary to the responsibilities mentioned in the same calls.

In this context, it should also be said that even according to the MCDMS call, the officials concerned could be tasked with work that was not specified in their list of duties.

Conclusion

In their complaint, the complainants remarked that the MCDMS ceased to exist and that despite this, the officials under its remit retained the same grade and pay. They also assumed that these officials were transferred to another Ministry and probably given different work.

In this respect, it should be noted that the issue in this complaint deals with an alleged injustice towards the complainants because their salary started from the minimum of Scale 8, while the MCDMS officials in their same position were immediately placed on the maximum of Scale 8 from the beginning of their employment.

The scope of the investigation of this complaint was to establish whether the alleged injustice had occurred.

The complainants argued that their duties are identical to those of the officials with the same nomenclature in the other Ministry and referred to the concept of *"equal pay for equal work"* and to '*Protection against Discrimination related to Employment*' according to the Employment and Industrial Relations Act, particularly to what is stipulated in Article 27 of the same Act which mentions the right to *"... the same rate of remuneration for work of equal value."*

The case at hand deals with the P&SD's decision that the duties specified in the MCDMS call were more onerous and that, therefore, the immediate placing of the officials of that Ministry on the maximum of the same Scale 8 was justified.

Decisions of this kind are at the discretion of Management (P&SD in this case).

Even if particular employees fall under the same Ministry, if management deems in its discretion that, for objective reasons, the candidates/employees should not receive the same salary (the same scale step in this case), such a decision should not be reviewed by any review body unless for a serious reason.

The Ombudsman's opinion was that the P&SD was not unfair in its decision that the officials of MCDMS had more onerous duties than those of MEDE.

The P&SD's discretion was exercised in a legitimate manner.

The Ombudsman cannot intervene in such a decision unless there is conclusive evidence of some illegal act, injustice or discrimination against the complainants, which evidence did not result in this case.

For all these reasons, the Ombudsman did not sustain the complaint.

At the same time, the Ombudsman felt the need to make recommendations to both the Ministry for Education and the P&SD.

Recommendations

The recommendations were as follows:

i. As regards the comment made by the Ministry for Education in connection with Directive 9, that reports regarding calls for engagement of persons with the Ministry as well as responses to appeals before the PSC should be made by the Chairperson, the Ministry should take all necessary measures to remedy this situation, where needed, to ensure that the applicable procedure is being followed.

ii. In the acknowledgement issued to the complainant by the P&SD in the case of a complaint submitted to the Grievances Board, instead of informing the complainant that the Board will be contacting them, the P&SD should inform them that they will receive a response either from the Board or the P&SD, depending on the case. This is to avoid misleading situations or misunderstandings, as happened in the current case, where while the complainants were expecting to be called to appear before the Board, they unexpectedly received a decision from the P&SD instead.

iii. This Office is of the opinion that more information should be given to the complainant about the procedure adopted regarding whether the case is to be decided upon by the Grievances Board or by the P&SD. In the case at hand, the complainants were not given a clear reason why their request was not accepted. They were only informed that the case was being closed because the call for the position in question issued by their Ministry contained specific duties and a Salary of Scale 8. The P&SD here failed to specify that the duties in the calls of the respective Ministries had been compared and that it resulted that those of MCDMS were more onerous than MEDE's, as was explained to this Office following its request for relative information. There was also a lack

of information in the P&SD's response to the complainants' appeal, when they asked for a clear and detailed explanation for the rejection of their request and the response was simply that there is no change in the decision given by the Permanent Secretary (People & Standards Division) of 15 June 2018. In its response, the P&SD should have explained, in the same way as was explained to this Office, that the duties of the officers concerned in the respective Ministries had been compared again but no reason was found for a change in the decision that was taken in the first instance. This Office recommends that the P&SD should provide a clear explanation to complainants about why their request was not accepted, if that is the case, and why their appeal was not upheld.

Outcome

Recommendations were accepted and implemented by P&SD.

Malta Film Commission
Recommendations proposed

Complaint for improper discrimination

The complaint
The complainant alleged that the Film Commissioner and staff within his Office had been distributing a reduced and select list of film production service companies and individuals to enquiring foreign producers, deliberately omitting companies with extensive film servicing experience. The matter initially surfaced in February 2020 due to an expose on a local online media site which contained snapshots of the reduced list[32].

Complainant claimed that in 2018 the list of film production service companies stood at 22, but the list allegedly distributed by the Commissioner and his staff included only seven companies or individuals to the detriment of all the competing production service companies.

Complainant maintained that the Commissioner's role in terms of applicable legislation entails promoting Malta as a film location worldwide and that the decision to provide a reduced list was an intentional act of improper discrimination in favour of a select few, in breach of the right to engage in work and the freedom to conduct business of those excluded from the said list. The action of the Commissioner also breached the rules of fair competition, as it attempted to distort the market by not providing foreign producers/filmmakers with complete information about all local the production service providers, who could have

32 'The Shift News', 25th February 2020 – 'Film Commission pushes select local companies, excluding others' https://theshiftnews.com/2020/02/25film-commission-pushes-select-local-film-companies-excluding-others/.

thought that local service providers not included in the Malta Film Commission (MFC) list were not registered, and consequently not eligible, for available schemes or were unreliable.

The complainant further stated that while the removal of the online crew and company directory some years before had given rise to suspicion that removal was intended to exert control over the private sector, the online article provided clear evidence that work was being directed to a select few. The complainant claimed that the MFC's action resulted in a reduction in enquiries by foreign producers throughout 2018 and 2019. It further explained that the abuse of position by a public official was serious as the Malta's Film Incentive Guidelines require foreign producers to use a locally registered service provider.

Complainant explained that they had referred the matter to the Minister for Tourism and the Permanent Secretary at the Ministry and requested these latter to take immediate action and remove, or at least temporarily suspend, the Commissioner. A meeting was called by the Minister where complainants expressed their concerns and informed the Minister that they had further proof in support of the claims. They were advised that an internal operational review was underway. The Commissioner was however not suspended.

While conceding that the operational review was necessary to assess operations, and to correct and revise systems and procedures at the MFC, complainant contended that a review could not replace an independent investigation about alleged wrongdoing by public officers. Complainant further observed that although the online database (directory) was re-introduced, it was not freely accessible and could only be accessed after the MFC provided a username and password. This action was insufficient to rectify the damage and mistrust brought about by the misdeeds of the Commissioner. Moreover, since the Commissioner was still in office people were understandably reluctant to make public what they were aware of for fear of recrimination and economic reprisals.

Complainant resorted to the Ombudsman, requesting his immediate intervention so that the Commissioner could be suspended and the eventual removal of those who had been interfering in what should be a free market in an EU democratic state. Complainant contended that such action was necessary so as to preserve the

integrity and independence of any investigation aimed at confirming the accusations and the extent of the wrongdoing committed under the Commissioner's watch.
Preliminary comment

The Office explained to the complainant that its investigation would be limited to establish the existence or otherwise of alleged improper discrimination, abuse of power and malpractice. Furthermore, once it reviewed the terms of reference of the operational review commissioned by the Ministry, the Office limited its investigation to alleged improper discrimination arising from the distribution of the reduced list of production service companies published on the online media site.

The investigation
The Office sought the comments of the Minister and the respective Ministry about the complaint. The Ministry was also requested to provide detailed information regarding actions taken following the publication of the online report in 'The Shift News' on the 25th of February, 2020. Clarifications were requested about whether the complainant's request for a temporary suspension of the Commissioner had been considered and why this request had not been taken up, notwithstanding concerns expressed and identifying a possible interim appointee.

All emails and correspondence sent by the Film Commission and the Commissioner since 2018 to foreign producers who asked for information on local service providers, including any lists of local service providers sent to these latter, were further requested in terms of the powers afforded to the Ombudsman in terms of the Ombudsman Act.

Initially the Permanent Secretary did not address the requests put forth by this Office, but requested clarification on some aspects of the investigation. The Permanent Secretary requested the Ombudsman to identify the entity/persons subject to the investigation and whether the Office would be investigating the allegation of discrimination by the Commissioner or the missed suspension or removal of the Commissioner. The Ministry expressed the view that the complaint and the remedy sought might fall beyond the statutory remit of the Ombudsman and suggested that the Ombudsman could decline to investigate as there were specific remedies before competent fora to address the issues raised by the complainant.

The Office addressed the matters raised by the Ministry in the following manner:

- The subject-matter of the investigation would be limited to complainant's allegation that the Commissioner and his staff were improperly discriminating between film production service providers by channelling work to a select few within the industry, in breach of the Commissioner's role.
- The Ministry's missed suspension or removal of the Commissioner, the Ministry and the Minister, who is empowered to appoint and remove the Commissioner are not the subject of the investigation by the Office.
- The Commissioner's temporary suspension had been considered and why it had not been taken up, and about any actions taken in regard to complainant's allegations were requested so that this Office could have a comprehensive understanding of the circumstances which gave rise to the submission of this complaint, and the steps that the Ministry might have taken to look into the allegations raised in the media and by complainant, in the interest of good governance.
- The legislator tasks the Ombudsman to evaluate whether the actions or inaction of the public administration are unfair, unjust, unreasonable, improperly discriminatory, contrary to law or in accordance with unjust legislation. The Office was set up to provide a safe, secure, fast and independent channel of communication that could lead to an amicable resolution of disputes and, in default, to convey a clear opinion on whether the disputed issue constitutes maladministration. The right to complain to the Ombudsman seeking independent action against maladministration and violations of human rights and fundamental freedoms is an additional right to the right to seek a remedy through the courts or other judicial fora. The alleged discriminatory behaviour by the Commissioner falls squarely within the remit of this Office. On the other hand, the complainant has been made aware that the Ombudsman Office cannot intervene or use any of its powers to enable the immediate suspension and eventual removal of the Commissioner as requested by the complainant, as this decision pertains to the Minister.
- The "*wider operational review*" did not hinder an investigation by this Office.

The Ministry was thus enjoined to provide the information and documentation requested and to assist and cooperate with the Ombudsman's Office in the interest of transparency and good governance.

The Ministry subsequently replied but did not provide the documents requested. On its part, the Office reaffirmed its position.

Comments were also sought from the Film Commissioner, who insisted that since his appointment, he had worked closely with the Administration so as to strengthen the local film community and ensure sustained growth in the industry and continued work for those operating therein. He strove to encourage more people to join the industry and to build a stronger and more sustainable film ecosystem. He denied that work was being channelled to a restricted few insisting that under his administration the majority of service providers, including active executive members of the MPA, worked on more than 38 different productions. He remarked that previous administrations of the Film Commission had sought to keep the industry closed by channelling work to a privileged group of providers and suggesting specific service providers - including active members of the MPA - would request budgets and then negotiate directly with specific service providers.

The Commissioner refuted the allegation that the list of 22 providers had not been distributed in 2018 elaborating that enquiries by foreign producers are replied to by the MFC in line with the project needs and subject to the wishes expressed by the same foreign producers, without any interference at any level in the choice of a local service provider by foreign productions. He however stated that if and when asked for an opinion, the Malta Film Commission discusses local service providers but it is always up to the foreign production to do their due diligence and choose freely and accordingly. The Commissioner insisted that the complainant was giving the incorrect impression that the Commission decides who is chosen when this is not the case, as most foreign film production companies contact directly the service providers based on the latter's past performance or endorsements that would have been made by other producers.

When addressing the complainant's claim that the removal of the crew and company directory a few years before had given rise to the suspicion that it was being done so as to exert control on the private sector, the Commissioner remarked that when he was appointed, there was no real online crew and company directory. He had found a film industry that was closed to a select few, with the service providers as gatekeepers, deciding on who worked and who did not and where job opportunities depended on who you knew. The Commission had wanted a liberal market and sought to eliminate the monopoly enjoyed by few operators by the introduction of the 'Opportunity for All', a programme aimed not only at local producers and service providers, but also at all crew members working in the industry and those who wish to join the industry.

The previous directory needed to be removed because of the then-upcoming implementation of the GDPR,[33] and work on the new 'Opportunity for All' Programme had started immediately. The current programme, which is GDPR compliant and currently populated by more than 1204 companies and individuals working in the local film industry, operates as a consent-based data gathering application. Access is provided by the MFC to studios, producers and filmmakers based on their enquiries. The Commissioner claimed that "*certain individuals in the industry*" had tried to halt this Programme for their personal agenda, and this had disrupted the scheduled works and delayed the launching of the project by six months, but the Programme is currently up and running and gives all industry players a chance of getting the necessary exposure to work in the industry.

In November 2020 the Ministry was requested to provide further documentation and to update the Office about any further action taken in respect of the grievance.

The documentation requested was reviewed, and it was ascertained that although the list of 22 service providers had been sent to foreign film production companies that enquired with the Commission on various occasions, there were instances where the shorter list posted in the media and referred to by the complainant, had been sent to some foreign producers who appear to have made general enquiries with the Commission between 2019 and 2020. The Office further noted that there were two instances where the Commissioner had mentioned particular service

33 General Data Protection Regulation (EU) 2016/679.

providers when enquiring about foreign filmmakers. It further transpired that in emails sent in the second part of 2020, staff at the Office of the Commissioner had informed those requesting recommendations that, being a government entity, the MFC could not recommend specific production service companies. This Office, therefore, requested further clarifications in regard.

The Commissioner replied in January 2021 and explained that:

- requests sent by foreign producers are replied to by the Commission depending on a number of criteria. General requests were (and are) usually replied to in a generic manner;
- when asked for an opinion, the Commission discusses local service providers. However, the ultimate decision pertains to the foreign production that has to do its due diligence and decide on the local service provider. The MFC does not impose or decide on behalf of the foreign production company; and
- during his term as Film Commissioner, no allegations of interference in the choice of local providers were ever directed towards his administration.

Although further feedback was requested as the reply did not address all matters that had been raised by the Office, the Commissioner reconfirmed that there was market distortion or discriminatory treatment.

A brief overview of the Malta Film Commission Act

In terms of the Act, the MFC acts as an advisory body to the Minister "*on an audiovisual policy for the promotion, development and support of the audiovisual and film servicing industry, to determine the level of fiscal and other benefits in accordance with the provisions of Part V of this Act*". This Office held a meeting with the Chairperson of the Commission who explained that the functions of the Commission are principally two-fold: i) attracting foreign productions to Malta by promoting Malta abroad and marketing what it has to offer by way of locations, expertise and facilities, performing outreaches and attending film festivals and related events abroad with the Commissioner and/or his staff; and ii) strengthening the local industry by improving the quality of the service given, both to foreign productions interested in filming here, as well as those locals who work within the industry such as scriptwriters, crew members, film production service companies.

The Commission assists the Commissioner in the exercise of his functions[34], and advises the Ministry about novel initiatives that can support and boost the industry, thus ensuring that productions are attracted here and return to work here.

The Commission is composed of not more than five members appointed by the Minister "*… from amongst persons who are knowledgeable in matters relating to audiovisual or film productions, the services, marketing or financial sectors, public service procedures or in other areas related to the audiovisual or film servicing industries…*"[35]. The Commissioner, who is a member of the Commission *ex lege* is appointed by the Minister. The law does not require any specific expertise in the audiovisual industry or film servicing industry in the case of the appointment of the Commissioner. This Office considered that the Act should be revisited in this regard and that the approach adopted by the legislator in the case of the expertise pertaining to those appointed as members of the Commission should be extended to those appointed in the position of Film Commissioner. The Commissioner may be removed by the Minister "*… if, in the opinion of the Minister, such member is unfit to continue in office or has become incapable of properly performing his or her duties as Commissioner.*"[36]

The Commission is not an executive body, and the only executive function it performs is that of determining "*the level of fiscal and other benefits in accordance with the provision of Part V of this Act*"[37]. However, although the Commission is responsible for determining the amount of aid to be given to any qualifying production or qualifying company, the decision has to be taken after the Commission receives the written recommendation of the Commissioner[38], subject to the proviso to Article 26(2) which elaborates states: "*Provided that the Commission may adopt guidelines for the determination of the level and, or the amount of fiscal or other benefits.*"

In terms of the Act, the Commissioner is tasked "*… to adopt and implement measures for the development, support and promotion of the audiovisual industry in Malta, and, in general, to implement Malta's audiovisual policy.*"[39] The legislator

34 Article 3(1) Cap 478.
35 Article 3(2) Cap 478.
36 Article 5(6) Cap 478.
37 Article 4(1)(j) Cap 478 – Part V of the Act refers to Incentive Schemes and Financial Support granted to qualifying production or qualifying companies.
38 Article 26 Cap 478.
39 Article 6(1) Cap 478.

has endowed the Commissioner with significant powers so as to ensure that the industry and local resources, locations, skills and expertise are adequately fostered, developed, promoted and marketed so as to attract foreign investment to Malta and that those operating therein are supported and encouraged to devote more of their time and expertise in the industry and its growth. He is further empowered to appoint the staff within his office, subject to conditions of employment established by him, following the Minister's approval[40].

The Ombudsman noted that in terms of the Act there is an evident concentration of executive power in the Commissioner, who has unfettered discretion in the exercise of his functions. The role of the Commission is advisory, with a very slight oversight, if any, on the workings of the Commissioner and his office. As remarked in the Operational Review commissioned by the Ministry, there is no clear segregation between the promoter of the industry and the operational activities of the Commission, particularly as many activities revolve around the role of the Commissioner.

Facts and findings

The complainant states that it represents 75% of all film professionals and stakeholders in the film industry and, as of 2021, is a registered employers' association. It claims that although in 2018, the list of local film production service companies stood at 22, it transpired that the Film Commissioner and officers within his office had been distributing a reduced list of preferred local production service companies to foreign producers/filmmakers. It maintains that only two companies out of the seven included in the reduced list are experienced service providers, with the others being new or lacking proper experience. It, therefore, questioned the criteria utilised by the Commissioner and his Office to include particular companies and exclude others. Complainant elaborated that the Malta Film Incentive Guidelines require a foreign filmmaker to use a provider that is locally registered and that the reduced list forwarded by the MFC deters foreign film producers from working with the service providers not included therein because, in itself, non-inclusion might suggest that these latter are not registered, black-listed or unreliable. It explained that all foreign film productions choose to film in Malta because of the appealing audio-visual financial incentive offered, which,

40 Article 9 Cap 478.

since 2019, is up to 40% of all eligible expenditures. As a result, a film production will have to be in contact with the MFC and would not wish to fall foul of the Film Commissioner's suggestions, since a part of the Financial Incentive is awarded at the Commissioner's discretion as outlined in the official guidelines.

To further illustrate the gravity of the situation, complainant highlighted that in the past, the MFC had an online database listing all those involved in the film industry, including production service providers and film crew, which was removed prior to the appointment of the current Commissioner on the pretext that it would be revamped. It remarked that in a proper business scenario, the sole online directory of the sector is not taken down and left offline for more than two years, but is replaced with an updated version within the shortest possible time. This decision resulted in the Commission becoming the only port of call for any enquiring foreign producers who were not familiar with the local industry or had no local contacts or colleagues who had already filmed in Malta.

The MFC subsequently launched the 'Opportunity For All' Programme[41] in February 2018, aimed at developing a comprehensive directory so that foreign producers could have a complete, easily accessible, categorised and searchable inventory of all the local companies and crew providing services to the Film/TV industry. The database was to include details of the individual's/company's credits and filmography experience, which is necessary to allow for a certain amount of vetting. However, despite the launch of the OFA Programme and the MFC's website no online database was introduced until the 7th March 2020 following their meeting with the Minister. According to the complainant the database launched is unsearchable and included the crew's I.D. card numbers in breach of data protection legislation, remarking that it had to be removed once again for an interval of time so as to be rendered compliant with applicable legislation. When the database was eventually put online, local producers and crew were not informed.

The complainant noted that the said database can only be accessed through a username and password provided by the Office of the Commissioner to foreign producers who request access, rather than being freely accessible to the public and the stakeholders themselves, as is done in the industry worldwide. The link on the

41 OFA Programme.

Commission's website that is meant to direct one to the online Directory is broken and was not repaired, notwithstanding that this had been brought to the attention of the Commissioner's office. Complainant contends that this was intentionally done by the MFC so as to direct productions interested in filming in Malta without any local contacts to contact the service providers the Commissioner and his Office want to promote.

Moreover, in 2019 and 2020 the Film Commissioner spent a considerable amount of time overseas personally meeting foreign producers in an effort to bring productions to Malta. Complainant observed that he had various opportunities to verbally promote certain providers whilst dissuading the use of others. In this regard, it claimed that foreign producers had come forward, corroborated the evidence in the public domain and further affirmed that in one-to-one encounters, the Commissioner had verbally dissuaded them from using certain providers whilst promoting others included in the select list.

The complainant provided the following proof:

i) a written statement by a local film service provider who stated that he/she had been informed by foreign film producers that when they had mentioned the said provider to the Commissioner, the latter had said that he could advise them on who to work with and that on a particular occasion, the Commissioner had mentioned two specific service providers who are amongst those included in the shortlist revealed in the media; and

ii) a written submission from a foreign filmmaker who provided information about his/her interaction with officers at the Commission and the Commissioner himself when making enquiries in regard to a production he/she was interested in shooting in Malta. Said filmmaker stated that officers of the Commission had provided very useful, informative and objective information about the locations available in Malta, the filming logistics and details on the best manner in which to co-produce and service in Malta. In fact, as a result of the information provided, he/she was able to make some good connections with various servicing companies and could, therefore, make an informed decision about who to work with. He/she had subsequently contacted and discussed the prospective project with a particular service provider (X) on various occasions and regarded this particular service provider as a first choice. The filmmaker, however, expounded that in a subsequent conversation with

the Commissioner, when mention was made of X, the latter "*was dismissive of the idea*" and remarked that if the project materialised, he would provide "*a list of the real people to work with – the real professionals…*". The filmmaker elaborated that although confident in the assessment previously made, he/she had decided to carry out further due diligence as the Commissioner had given him/her the impression that he was offering a list of more reputable individuals or companies.

The complainant insisted that such verbal promotion is unfair as it interferes with the market, giving an undue advantage to some operators and impacting the livelihood of those working in the sector.

From an examination of the replies and documentation[42] provided by the Commissioner and the Ministry, and the documentation made available by the complainant, it transpired that the snapshot of the list published on the online media site on the 25th February 2020 was, in fact, sent to enquiring foreign film producers on a number of occasions between July 2019 and February 2020 by the officer whose duties comprised the handling of such enquiries at the time.

The Office further noted that during the period between February 2018 and May 2019, when another officer dealt with these enquiries, a list of around 22 service providers was supplied to enquiring producers as the directory was no longer online. This Office, therefore, held separate online meetings with both officers so as to obtain clarifications about the procedures and practices implemented by the Commission in respect of these enquiries and to seek to establish what led to the change in the approach adopted by the MFC.

The first officer, who had been handling enquiries for several years, until his duties were changed following a restructuring in May 2019 explained that the Commission is the first point of contact for foreigners interested in filming here, and emphasised that several foreign productions engage a local service provider without approaching the Commission, as service providers build a reputation

42 This Office was provided with the emails that had been exchanged between the Office of the MFC/Commissioner and enquiring foreign film producers requesting information about local service providers between February 2018 and August 2020.

through the work they are entrusted with and many projects are brought to Malta through the local service providers themselves.

He explained that in 2012, the then commissioner removed the online directory of service providers from the Commission's website as he wanted to revamp it, but it had been put back online soon after following representations of the service providers. Since then, the directory has been a portal on the Film Commission Homepage and any person/company could register therein and include their expertise, experience and accomplishments without any vetting being carried out by the MFC about the veracity or otherwise of the information inputted. At the time, the Commission was not aware whether those listed in the directory possessed the necessary qualifications, expertise and licences. The current Commissioner had, therefore, decided to revamp the directory and create a system whereby the MFC would be able to monitor the crew and service providers therein included and ensure that the information inputted was factually correct in January 2018. This would also enable the Commission to determine what additional training crew members might require and aid in the continuous professional development of those working in the industry. While the Directory was still online, he used to provide foreign producers with the link of the online directory, direct them to carry out their due diligence and contact the Commission should they require further information. When the Directory was removed, he had copied the entire list of production service companies and started sending this to enquiring producers. The procedure described by this Officer is corroborated by the emails provided to this Office by the Ministry and the Commissioner. When he realised the revamping of the new directory was taking longer than expected, he removed those who had stopped operating and started fine-tuning the list by including also a brief comment about the work the specific provider specialises in – for instance, mainly services high-end commercials. He expounded that since the service providers could no longer update the productions in which they had been involved themselves, he had asked them what credits they preferred, including to illustrate their experience/ expertise in the industry.

He refused to make any recommendations, even when requested to do so by the foreign producer, so as to ensure a level playing field, remarking that foreign producers could look through the International Movie Database which is accessible to all, and match their needs with the expertise possessed by the local service providers.

He remarked that in meetings with foreign producers where he had been present both with the current Commissioner and with his predecessor, there had been instances where foreign producers sought the opinion of the Commissioner and his office about a service provider. They obviously discussed the particular needs of the project during said meetings and would give general advice – such as, for instance, that one should look at those service providers that had already worked on similar projects or that had serviced productions with similar or comparable budgets, as the online directory comprised companies with varying expertise. Where producers were still undecided after having been provided with the entire list, he would then go over each service provider and explain what their credits involved and what experience and expertise said providers possessed.

The Office also discussed the procedure adopted with the officer assigned the task of processing enquiries following the May 2019 restructuring exercise (second officer). He emphasised that networking is central in the industry where the past experience of crew and recommendations made by other producers is crucial.

According to the second officer, requests for information addressed to the Commission are handled according to the specific exigencies of the project. He maintained that the list of local service providers sent to enquiring producers is not a fixed list but depends on the specific needs of the prospective project, which would have been discussed in previous meetings/communications – for instance, a production might require a service provider with a good crew base or those who have already handled big budget productions. In this regard, he clarified that where, for instance, the production involves the shooting of a commercial, the list of service providers sent would include all production service companies, as all of them service such productions.

When the Office pointed out that a review of the available documentation revealed instances where enquiries which appeared to be general - for instance, a request for

a provider that could assist in the compilation of budgets or one that could service the shooting of a TV series – were supplied with the shortlist published in the media, he iterated that in so far as he could remember the service providers included in the lists sent varied in line with the specific needs of the enquiring producer/ production company. He remarked that the enquiry should not be considered in isolation, as there would have already been discussions between the enquiring producer and the Commission, and the reply would have taken into consideration the information already obtained from said discussions. He also assured this Office that in meetings or conference calls held with foreign productions interested in filming here, various service providers are mentioned, and their work and expertise are discussed, depending on the nature and requirements of the particular project.

The second officer commented that the Commission is a first point of contact and does not interfere in the choice of the service provider as the foreign producers carry out their own diligence when deciding which service provider is most suitable for their project and seek second opinions from their connections and other operators in the industry that might have already filmed similar projects here. The MFC aims to be efficient and encourages productions to come to film in Malta by facilitating their filming experience here as much as possible, but it does not discriminate between service providers. He opined that any lists sent by the Commission do not give the service providers therein included additional weight or advantage with the foreign productions, and sometimes it is the local providers themselves that recommend other local service providers if they are unable to service a foreign production due to other commitments during that particular period.

He clarified that once the directory was back online, the Commission started providing those enquiring with a link, a login and a password to enable them to make their own vetting. If the producer reverts to the Commission seeking additional information about any specific service provider/s and/or the work that they have carried out and their area of expertise, the Commission will discuss the work, expertise and reputation of the service providers and narrow the list, in line with the specific requirements of the particular production. The Officer, however, remarked that when the request by the producer is too generic no specific providers are indicated, but in the case of specific requests additional factual information is provided.

The grievance was also discussed with the Chairperson of the Commission who expressed the opinion that when a foreign producer makes a request for specific factual information, even after having been provided with the entire list – he might be interested in working with service providers that have already serviced lower-budget productions or requests a list of those service providers that had been involved with productions with budgets running into 10 or 20 million – there is nothing irregular in the Commission providing the desired information as the data provided will be based on facts. She remarked that it would be nonsensical for the Commissioner and his Office to provide the entire list in such cases. On the other hand, where the enquiry made is general in nature, the entire list should be provided as addressing the enquiry made would lead to the provision of information which is not based on facts. She further remarked that whenever similar questions were put to her and the Commissioner in meetings they had with foreign producers, they always informed the latter that the Commission would provide them with the list of service providers for them to make their own vetting and decide who they want to work with. Moreover, foreign producers often contact directly a local service provider without involving the Commission, as local service providers carry out their own outreach.

The Chairperson elaborated that the 'Opportunity for All' Programme was aimed at encouraging more people/entities to work in the industry. The Commission, however, wanted to ensure that those included in the directory were in possession of the necessary licences, certifications, and expertise. This involved a lengthy process of vetting applications submitted online and in person, assisting applicants unable to compile an application form themselves and inputting data in the database, which was further extended as a result of proceedings in front of the Office of the Information and Data Protection Commissioner. The directory was consequently offline for a longer period of time than that originally envisaged. She further clarified that it had been decided that the directory, which is regularly updated so that it reflects the situation in the local industry, should not be freely accessible to everyone but only to those who actually require the data contained therein, as it is a database with information regarding different stakeholders working within the film industry, who might not want to expose themselves. It is, therefore, accessible through a login and password provided upon request by the MFC.

Considerations

The Film Commissioner rejected the complainant's allegation insisting that he strove to strengthen the film industry and that the majority of service providers has been involved in more than 38 different productions under his administration. He affirms that allegations about discrimination and market distortion are unfounded, elaborating that the MFC accepts all applications for rebates and any other funds from all foreign or local applicants if these are compliant with the applicable regulations and guidelines.

The Commissioner claims that replies sent to enquiring foreign producers are dependent on a number of different criteria, such as prior communications between the parties. Enquiries are tackled in line with the requirements of the particular project and the demands of the enquiring producer, who is generally conversant with the local film industry. General requests are usually replied to in a generic manner. However, when asked for an opinion, the MFC discusses local service providers but does not decide about who ultimately works on foreign production, as the complainant alleges, neither does it hinder any contractual relationships between foreign production companies and local service providers. It is up to the foreign production to carry out its due diligence and take a final decision, generally based on the former's previous experience and referrals from contacts it has in the international film industry – a statement which was echoed by officers of the MFC.

The complainant did not contend that eligible applications for the rebate or other available incentives had been unreasonably and unjustly refused. Neither was the fact that the ultimate decision about which local production service company to engage is taken by the foreign producer/production company challenged. The complainant acknowledges that enquiring producers carry out their own due diligence and that they often engage local production service companies on the basis of the past performance of these latter or endorsements made by other producers without any contact being made with the MFC. The complainant, however, maintains that, given that the online crew and company directory had been removed in January 2018, the reduced list sent by the MFC to enquiring foreign producers unduly favoured the companies therein included to the detriment of all the others, thus distorting fair competition. The complainant further argues that exclusion from the list might suggest that the service provider is not registered, unreliable or black-listed.

Considering the powers granted by the Act to the Commissioner to oversee, promote and implement measures and processes aimed at further upgrading the local film industry and to assist the production of films and the setting up of companies for the production of said films, and in view of the fact that there is an imbalance of power between the role of the Commissioner and that of the MFC, it is imperative that the Commissioner, as well as officers employed within his Office, act impartially and in a transparent manner, treating all those involved in the industry fairly and equitably. The Commissioner and his staff who are employed by and answerable to the Commissioner and whose actions fall within his responsibility - are not only required to implement all the measures necessary to ensure that their actions or omissions do not improperly discriminate between those involved in the industry, but must further ensure that their conduct and actions do not appear to favour any particular film production service company (or another stakeholder).

As Lord Hewart, Lord Chief Justice of England, affirmed in the case Rex vs Sussex Justices,[43] "*It is not merely of some importance but is of fundamental importance that justice must not only be done but should manifestly and undoubtedly be seen to be done*".

This is more so in the light of the fact that in terms of the MFC Film Incentives for Audiovisual Productions Guidelines, which aims at attracting foreign film productions to film in Malta by covering up to 40% of all eligible expenses, a foreign production that is not registered in Malta is required to use a locally registered production service company as Production Coordinator.

While the Ombudsman acknowledges that in line with his functions at law and as a point of contact, the Commissioner and his office endeavour to provide information which is, as much as possible, in line with the needs of enquiring productions so as to assist them and encourage them to bring additional projects to Malta, it is indispensable that the Commissioner and his staff, do not cross the fine line between providing appropriate official assistance and giving some service providers an improper and undue advantage. This Office appreciates that in communications and/or meetings that the Chairperson of the Film Commission, the Commissioner and/or his staff have with foreign producers, the latter while discussing prospective

43 9th November, 1923, King's Bench.

projects, might request recommendations, enquire about and/or discuss the expertise, reputation and work performed by specific local service providers. This Office, however, believes that the feedback provided (whether written or verbal) by the Commissioner and officers of the MFC should be restricted to factual information and that said officers should refrain from expressing personal opinions about the merits or otherwise of individual service providers and their ability or otherwise to service a particular production. These officers should provide those enquiring with complete information about all service providers operating locally, and where more specific information is requested, limit themselves to providing data which is factual and verifiable. This approach will ensure that some service providers are not promoted at the expense of others and avert suspicion of discriminatory treatment. This is even more important during any period when the online directory, which comprises the entire list of those involved in the sector, is not available for some reason or another (as happened in this case).

The Office agreed with the view expressed by the Chairperson of the Commission, who opined that providing additional information to those requesting specific factual information is acceptable, as the feedback provided is verifiable from the data available - such as, for instance when the Commission is requested to indicate those local providers that have already serviced productions with budgets running into millions or those that already serviced/worked on German productions. On the other hand, the entire list/link to the online directory[44] should be provided in the case of generic enquiries - such as when the MFC is requested to identify the best production service companies - as any short list supplied by the MFC would be tainted, to some extent or another, by the subjective opinion of the MFC officials and can be construed as a recommendation.

Following a review of the documentation provided by the Commissioner spanning between February 2018 and August 2020, the Ombudsman found that there were instances where the response provided by the MFC to enquiries made (even general enquiries from those who had no previous discussions with any official of the MFC) was incomplete and not limited to the provision of objective, factual information. There were instances between July 2019 and February 2020 where the shortlist published in the media was attached with replies sent by the MFC, notwithstanding

44 As the online directory was back online in mid-2020, replies can refer to the online directory.

that the enquiry was general, and it was evident that there had been no previous communications between the MFC and the enquiring producer.

Sending an abridged list instead of attaching the entire list of service providers when addressing said enquiries could have given the impression that the production service companies therein mentioned were the most reliable or professional in their field of expertise or, as rightly remarked by the complainant, that any unnamed companies were not registered and therefore ineligible for the incentives offered by the MFC.

The Office noted a manifest change in the manner in which such enquiries were tackled during this period of time. One officer ensured that once the online directory had been taken down in January 2018, the entire list of production service companies was sent to anyone enquiring about foreign producers. He updated the list by including brief comments about past productions in which the production service companies had been involved so as to assist the foreign producers in making an informed choice. He also ensured that the list included all the active operators to ensure transparency and avoid claims by service providers that they had been omitted from the list by the MFC. This Officer specifically stated that he refused to make recommendations, observing that foreign producers could access the International Movie Database and match their needs with the expertise possessed by particular service providers.

These duties were subsequently assigned to another officer in April/May 2019. Initially, this officer continued to attach the entire list of production service companies, directing enquiring producers to look through the credits indicated in the list and contact those who they consider best fit their requirements – this was done even when discussions had already been ongoing with the Commissioner and/or MFC officials. However, after some months, there was an evident shift in approach, with instances where the reduced list was sent or the names and contact details of specific service providers supplied to enquiring producers. From a review of the replies sent between July 2019 and February 2020, it transpired that the reduced list published on the media was sent to six different producers, some of whom appear to have had no previous communications with the MFC and/or made enquiries which were rather general in nature. Moreover, there were instances where recommendations were made indicating specific production service companies.

The Commission is duty-bound to provide complete information about all service providers and to avoid any interference with the market, which might negatively impact the livelihood of those operating in the industry. Extra care should have been taken by the MFC once the online directory had been taken down so as to avoid suspicions of foul play and allegations of preferential treatment. In this regard, this Office notes that following the expose in the media and the lodging of this complaint, when the online directory was re-introduced, officers of the MFC refused to make any recommendations, even when asked to do so, informing enquiring producers that "*being a Government entity, we not (sic) be able to recommend specific production service companies*" and referring the producer to the production service companies' credits on IMDb[45].

Being a government entity, the Commission should strictly adhere to its role of promoting, enhancing and marketing the audiovisual and film servicing industry and aiding all those operating therein. The Commissioner and his staff must thus ensure that the MFC promotes and supports all those working within the industry without giving undue advantage to any local provider. This Office does not doubt that foreign producers carry out their due diligence and make a final decision after having evaluated information provided both by the Commission as well as other sources or contacts they have in the industry. It, however, concurs with the complainant in its contention that not being included in the list provided by the MFC deters foreign film producers from working with the excluded service providers because, in itself, non-inclusion might suggest that these latter are not registered, are black-listed or unreliable. This is confirmed in the written submission provided to this Office by a foreign producer who explained that while being still confident in the assessment previously carried out by the local production service provider that mostly matched his/her project, he/she felt it was necessary to carry out further due diligence once given the impression that a list of more reputable service providers would be provided by the MFC.

Another issue raised by the complainant referred to the removal of the online directory in 2018 and current access to the revamped directory. The complainant expressed the view that said directory had been removed so that the MFC could exert control over the industry and that on its re-introduction it could only

45 Emails of the 10th April, 14th and the 26th May 2020.

be accessed following contact with the MFC, which provides a link, login and password. It further observed that the link in the MFC's website, intended to lead to the online directory, is broken and has not been fixed claiming that this was intentionally done so that foreign producers are bound to go through the MFC to obtain access, thus reducing the level of transparency. The complainant further stated that the Directory was not properly categorised, thus making it very difficult to search through the information available.

The Commissioner explained that at the time of his appointment, there was no real online crew and company directory, elaborating that the industry was closed to a select few, with the service providers deciding on who works or not. The 'Opportunity for All' Programme was devised so as to liberalise the market. The process used in updating the online Directory was explained in detail by the MFC officer tasked with this responsibility, and appears to have been a long-drawn one because of the limited human resources available at the MFC, the amount of data which had to be vetted and inputted in the database and some issues which arose in connection with data protection and matters raised with the Office of the Information and Data Protection Commissioner. While this Office believes that the idea behind the initiative was paved with good intentions, its implementation might have given rise to unintended consequences, particularly as it appears that prior to its introduction, there was no consultation with the stakeholders in the industry, who having first-hand experience can contribute considerably to the holistic growth of the industry. Furthermore, the fact that the online directory is not freely accessible to all and that an unauthenticated user of the site is unable to access and search through the list of local production service companies defies the objective of the Programme – that of enabling more professionals to work in the industry and of developing a comprehensive crew directory so that foreign producers can have a complete, easily accessible and searchable inventory of all those providing a service to the industry. The justification provided by the Chairperson of the Commission for the decision not to make the online directory available to all does not hold water. Those recorded in the online directory are included therein because they want to work in the industry. From the clarifications provided by the officer who manages the online directory, the directory does not contain details that would fall foul of the GDPR requirements and includes credits which will enable those interested in engaging a service provider to decide whether the latter is a good match for their prospective project. It is therefore not understandable why this database should not be accessible to all, when Film Commissions in other countries include a freely accessible database on their website.

Conclusion and recommendations

The Office established that following the removal of the online directory, the shortlist published in the media (and referred to by the complainant) was, in fact, supplied to enquiring foreign producers, some of whom did not appear to have had any previous, ongoing communication with the MFC and/or made enquiries which were rather general in nature. There were also instances where recommendations of specific production companies were made.

The Commissioner and his staff did strive to assist foreign productions interested in filming in Malta and to provide information compatible with their demands and needs so as to entice them to bring more productions to Malta. However, an appropriate balance had to be ensured. It is indeed indispensable that the MFC does not cross the fine line between providing official assistance and giving some local operators an improper and undue advantage. This is even more crucial in the light of the fact that there is an imbalance of power between the role of the Commissioner and that of the MFC, whose role is advisory in terms of the Act. The MFC is duty-bound to provide complete information about all service providers, treating all those involved in the industry fairly and equitably.

The Commissioner and his staff have to avoid any interference with the market and ensure that that their actions (or omissions) do not improperly discriminate between those involved in the film industry.

Extra care should have been taken by the MFC once the online directory had been taken down so as to avert suspicions of foul play and allegations of preferential treatment. Although a final decision about who to engage pertains to the enquiring producer, this Office cannot exclude that foreign producers provided with the abridged list by the MFC might have been discouraged from working with service providers not included therein.

Following its reintroduction in 2020, the online directory was no longer freely accessible and therefore, unauthenticated users of the MFC's website are not able to access and search through the list of local production service companies. This defied the aim of the Programme 'Opportunities for All'.

The following were the recommendations of the Ombudsman:

i) the Ministry should undertake a detailed review of current legislation so as to ensure an adequate balance between the role of the Commissioner as promoter of the industry and that of the MFC. The Act should require that persons appointed to the position of Film Commissioner should possess sufficient knowledge in the areas of audiovisual and film productions – the industry has particular characteristics and requirements which necessarily require specific competencies and skills acquired through experience and qualifications in the sector.

   In its reply of the 9th December 2020 to this Office, the Ministry stated that it was carrying out an analysis to determine whether Cap 478 required amendments to reflect a better governance structure, as concern had been expressed in the Operational Review that the legislative framework "*presents certain anomalies that may lead to a weak governance structure irrespective of the individual assuming the role of Film Commissioner*". In actual fact, the Act was not amended. Therefore, the issue had to be given priority;

ii) following the exposure in the media and the lodging of the complaint, enquiries were processed in a different manner by the MFC. Those enquiring with the MFC were provided with a link, login and a password to access the online directory, and when recommendations were sought, the MFC informed the producer that no recommendations were made as the MFC is a government entity.

   The MFC should ensure transparency in its operations and on how information relating to work in the industry is handled. The Commissioner should introduce guidelines and/or protocols specifying how requests for assistance by foreign producers/production companies (verbal and written) are to be processed by all MFC officials. The said guidelines/protocols should be available on the Commission's website so as to ensure transparency and accountability; and

iii) the Online Directory should be freely accessible to those who want to look through the companies and service providers included therein and should include a proper search engine so as to facilitate its use. While this Office commends the practice adopted by the MFC of vetting data provided by prospective service providers and stakeholders before inclusion in this database, it cannot justify the decision to limit access to those who contact the MFC; and regular meetings are to be held between the Commissioner, the

Commission and stakeholders in the industry to discuss the manner in which the local film industry can be improved and the creation or enhancement of existing initiatives aimed at assisting and facilitating the work of those operating within the film industry. The complainant, a registered employer association that represents several senior-level producers who operate locally and possess years of experience, has contributed a lot to the holistic growth and improvement of the film industry in Malta. They should, therefore, be duly consulted in the interest of the common good.

CASE NOTES

Commissioner for Education

Ministry for Education

Unjust situation arising from pegging of calls for post-secondary school teachers in private and church schools with those issued by the Ministry for Education

The complaint

Two sixth-form teachers employed at a church school, lodged a complaint with the Ombudsman. Despite having been in full-time teaching at a church school for several years, possessing several university degrees and also having taught part-time at the G.F. Abela Junior College, at MCAST and at the University of Malta, they were facing an issue due to an anomaly in the employment/recruitment system in Government schools for post-secondary and higher-level teachers. Their salary, funded by the Government through the Education Division at the Ministry responsible for Education (in line with Malta's Agreement with the Holy See), was pegged at the level of a supply graduate teacher, even though they effectively performed duties as regular teachers.

The investigation and findings

The Commissioner conferred with various persons in the education sector. He was also provided by the complainants with the correspondence they had had with various ministers responsible for education in Malta in the five years prior to the complaint, all of whom either acknowledged that there was a problem or an anomaly in their regard and in regard to teachers in analogous situations as theirs and promised to look into the matter, or had referred the matter to the Permanent

Secretary for the time being in office (presumably for some form of remedial action to be taken). Nevertheless, nothing changed over these years.

Prior to 2008, a person was automatically eligible for a permanent teacher's warrant if in possession of a Master's Degree or a Doctorate obtained at any time and in any subject. Subsequently, but without prejudice to permanent teacher warrants already obtained or which could be obtained prior to the amendment, the law was changed: from 2008 onward a full teaching (pedagogical) degree was required for a permanent teacher's warrant. The complainants do not have this pedagogical component as part of their B.A. (B.Sc.) or M.A. However – and this is the crux of the issue – a permanent teaching warrant is by law only required to teach at compulsory education level. For teaching at sixth form level in any school, or at the Junior College or at MCAST or at the University, no teaching warrant whatsoever is required.

By law, calls for teachers in all non-government schools – private and church – must reflect the Ministry for Education's calls. When issuing its call for the Higher Secondary Sixth Form – the Giovanni Curmi Higher Secondary School and the Gozo Sixth form – Government requires that the applicants be in possession of a permanent teaching warrant. The reason for this is simply one of convenience, namely so that the Education Division can have a pool of teachers it can move around from secondary to post-secondary places as may from time to time be required. This was confirmed in the Permanent Secretary's communication of the 17th August 2022:

"*The call for entry into both grades [regular teachers – supply teachers] is regulated by the sectoral agreement between the Government of Malta and the Malta Union of Teachers. The call for teachers or supply teachers for subjects that are taught in secondary and post-secondary schools denotes this (these are entitled e.g. "Call for the Post of Teacher (Secondary/Post-Secondary)") and does not make a distinction, persons employed may be required to teach in a secondary or in a post-secondary according to vacancies. Calls for subjects which are only taught at post-secondary level have identical requirements.*"

It was patently obvious to the Commissioner that that the amendment or change in the law which was originally intended to safeguard pedagogical standards in "*compulsory*" education was now being used as a tool by the Education Division of

the Ministry in question to ensure the availability of a pool of teachers which, like pawns on a chessboard, can be moved as the Division pleased or required.

In the Commissioner's view the current practice of having a "*combined*" call for teachers for both secondary and post-secondary levels, and requiring a permanent teaching warrant for both (when at law teaching in a non-compulsory education stage does not require such a warrant) was abusive. It created an unfair disadvantage, particularly when the subject to be taught is not one that is offered at secondary/compulsory level (such as philosophy, psychology, marketing or sociology) as well as an unlevel playing field between different institutions (those which have to follow the Ministry's calls for applications, on the one hand, and those, like the Junior College, which do not) and their ability to attract and retain staff.

Conclusion and recommendations

The Commissioner found the complaint lodged by the two teachers, and in so far as directed at the Ministry responsible for Education, to be fully substantiated and justified in terms of (**a**) Article 22(1)(*b*) of the Ombudsman Act – unjust practice (verging on the oppressive with the passage of time) – and (**b**) Article 22(2) – discretionary power exercised for an improper purpose.

The Commissioner recommended (**1**) that calls for applications for the post of teacher in post-secondary education (i.e. post-compulsory education stage) should be separate and distinct from calls for the post of teacher in secondary education, and should reflect the current law and therefore not require a permanent teaching warrant; and (**2**) that with immediate effect the money transferred by the Education Division within the Ministry to the school employing the complainants should be the salary commensurate to that of a regular teacher and not of a supply teacher.

Sequel

The Commissioner's Final Opinion was communicated to the Permanent Secretary at the Ministry responsible for education on 2nd February 2023. By May, no reaction had been received from the Ministry as to the recommendations made, and on the 11th May 2023 the Ombudsman and the Commissioner for Education, in compliance with the requirements of the Ombudsman Act, sent a copy of the Final Opinion together with a brief report thereon to the Speaker of the House of Representatives for the attention of the members of that House.

It was only on the 2nd of June 2023 that the Principal Permanent Secretary at the Office of the Prime Minister wrote to the Ombudsman and the Commissioner for Education indicating that the Ministry responsible for education was not prepared to follow the recommendations. In his letter the PPS basically confirmed the finding of facts by the Commissioner – notably that in the pertinent sectoral agreement secondary and post-secondary teachers are grouped in one category, that the calls issued for this one category requires a permanent teaching warrant, and that this is done to enable movement between secondary and post-secondary schools. He further argued that "… *If calls are issued separately, and a post-secondary teacher becomes redundant, they would:*

a. either be placed in a secondary school as a supply teacher, thus incurring a decrease of salary… or;

b. have their appointment terminated."

With reference to the particular complainants, he suggested that their salary could be "*topped up*" by the church school in question, or that they should obtain the necessary qualification in pedagogy.

The Commissioner for Education replied to the PPS to the following effect:
"*The whole purpose of the exercise conducted by this Office was directed towards establishing whether or not an injustice was or is being suffered by the complainants because of the combination of two decisions attributable to the Administration: the decision (in 2008) requiring a full teaching (pedagogical) degree for a permanent teachers' warrant (which <u>at law</u> is not required for post-secondary level teaching), and the current <u>practice</u> (which must be followed by the private sector) of having a 'combined' call for teachers for <u>both</u> secondary and post-secondary levels and requiring a permanent teaching warrant for <u>both</u>.*

This Office's finding was in the affirmative (see para. 11 of the Final Opinion). This finding is in no way contested in your letter aforementioned.

The argument advanced in your letter about possible redundancies of post-secondary teachers is, with all due respect, somewhat spurious. The first of the two recommendations in para. 12 of the Final Opinion is clearly intended to be applicable ex nunc, and therefore without affecting calls and appointments already made. Surely it should be possible for MEYR to anticipate and calculate its future needs for

the next five years in its limited post-secondary sector, and to make provision for the appropriate re-deployment of the teachers in the event of redundancies. This is not rocket science. It is also clear that individual post-secondary educators teaching in certain schools, but not in others, should not be made to carry the burdens of shifts in trends, a situation which is endemic in the educational sector.

Be that as it may, this Office fails to see the necessary link between the first and second recommendations made – the second recommendation's acceptance is in no way conditional upon the acceptance of the first. The second recommendation is only intended to compensate the two complainants for an injustice created, albeit arguably unintentionally, by the Administration. Shifting the burden onto the church school in question or requiring the complainants to undertake unnecessary courses only serves to highlight the unjust situation into which the complainants have been thrust. The complainants are being made to carry a disproportionate burden for a situation not of their making. Moreover, church schools' sixth forms provide a valid service to the community and the current situation is already causing them to lose valid elements as sixth form teachers opt to move to greener pastures at the Junior College and MCAST.

Finally, as already pointed out in the Final Opinion, it is not possible for persons teaching certain subjects at post-secondary level to obtain a full pedagogical qualification in that subject (e.g., philosophy, psychology, sociology, Latin) because no such courses are available."

This exchange of correspondence was also sent to the Speaker for the attention of Members of Parliament.

Malta College of Arts, Science and Technology (MCAST)

Progression from Senior Lecturer I to Senior Lecturer II at MCAST – no evidence of maladministration – procedural issues

The complaint

The complainant was a Senior Lecturer I at the Malta College of Arts, Science and Technology (MCAST). She sought progression to Senior Lecturer II in line with the relevant procedures and collective agreement, but this was refused. Her complaint was essentially based on the interpretation and application of clauses 18.3 to 18.3.4 of the Collective Agreement between MCAST and the Malta Union of Teachers (MUT) of the 17th July 2018. In particular the complainant insisted that in her case, being an "*exceptional*" one in terms of clause 18.3.4 given her various scholarships and experiences, the management of MCAST has not given due attention to her part-time experience.

Investigation and findings

After a thorough evaluation of all the evidence submitted, the Commissioner for Education began by observing that it was undoubted that the complainant had an excellent academic track record and an impressive *curriculum vitæ*. Witnesses heard attested to her dedication and commitment to her work and teaching duties, and to her valuable contribution to the College and to the particular institute to which she was attached.

The Commissioner, however, also noted that from the evidence it transpired that the complaint was technically time-barred in terms of Article 14(2) of the Ombudsman Act, because this had been filed with the Ombudsman's Office after the lapse of six months from the date when the final decision of the MCAST authorities had been communicated to the complainant. Although the Commissioner did not consider

that there were any "*special objective or subjective circumstances*" in the case which would have justified examining a time-barred complaint, for the avoidance of doubt he nonetheless sought the necessary documents and information to see whether there was any form of maladministration by MCAST in their handling of the request for progression.

The Commissioner also pointed out that the complainant's appeal to the MCAST Progression Appeals Board was also out of time (as per clause 5.5.2 of the MCAST Manual of Administrative procedures). Whether one took as the *dies a quo* the date of the first letter informing the complainant that her application for progression had been rejected, or the subsequent letter containing a more detailed explanation of why her application had been rejected, for the purposes of the computation of the 10 working days referred to in the Manual, it was clear that her in-house appeal was manifestly out of time. Nevertheless, MCAST had bent over backwards and referred the case to the Appeals Board set up in terms of clause 5.4.1 of the aforementioned Manual. As required by this clause, the board contained a person – whose name was made known to the Commissioner – external to MCAST and with a wealth of knowledge about progression matters, Human Resources, and trade union matters. This showed that MCAST has always been willing to give the complainant the benefit of the doubt and to ensure fair procedures throughout.

The Commissioner noted that the basis of the complaint was rooted in clause 18.3.4 of the Collective Agreement. In his opinion, the complainant was reading the clause as a "*stand alone*", with the word "*exceptional*" understood as referring to the person applying for progression and to his/her qualities and experiences *in vacuo*. The Commissioner could not agree with this interpretation. As was clear from the wording of clause 18.3.d, clause 18.3.4 was intended to be the exception to the rule set out in 18.3.d to the effect that "*as a general rule only Full-Time relevant experience is considered for progression*". Admittedly, clause 18.3.d was not the best piece of drafting, especially for hermeneutic purposes, but it was clear that, provided "*part time*" experience was relevant and quantifiable in days, months or years, it could be taken into account. The expression "*will look into exceptional cases*" in clause 18.3.4 gave a wide margin of appreciation to the management. The Commissioner found nothing to suggest that that margin of appreciation had in any way been abused.

Conclusion

From an examination of all the documents he requested from, and was provided by, MCAST, the Commissioner for Education found no compelling reason to depart from the decision of the MCAST Progression Appeals Board. There was no evidence of maladministration whatsoever. The fact that one disagreed with the initial decision of the H.R. Department or of the Progression Appeals Board did not mean that the decision was wrong or otherwise tainted with maladministration.

The complaint was therefore rejected.

University of Malta

Inordinate delay in promotion process, but the refusal of the promotion disclosed no maladministration

The complaint

The complainant – an Associate Professor at the University of Malta – lodged his complaint with the Ombudsman's Office on the 20th February 2023. He had applied for promotion to full professor in March 2020. By letter dated 7th October 2022 under the hand of the Rector, the complainant was informed that the Promotions Board – for the reasons summarised in the same letter – could not recommend his promotion to full Professor, and that the Council had ratified the negative recommendation. He applied for reconsideration on the 16th October 2022. By letter dated 17th February 2023, he was again informed by the Rector that the Promotions Board, after "… *a detailed analysis of [his] request and claims …*" was still of the view that it could not recommend to Council his promotion to full Professor, and that this (second) decision had been ratified by Council the previous day, 16th February.

The complainant had basically three complaints. The first referred to the "*inordinate delay in processing [his] application*". According to the Gregorian Calendar, between the date of the complainant's application (22nd March 2020) and the first decision by the Council (6th October 2022) more than 30 months had elapsed. This exceeded by far the recommended period of 18 months in the Collective Agreement. The second and third complaint honed in on the "*merits*", as it were, of his application for promotion. Complainant alleged that the Promotions Board "… *did not provide a fair representation and assessment …*" of his work and of the assessments made by the external peer reviewers and by the Dean of his work and his publications. He maintained that the Rector's letter of the 7th October misrepresented the facts that

were before the Promotions Board and, moreover, that a discriminatory procedure was applied with regard to his application.

The investigation and findings

As regards the first complaint, the Commissioner for Education noted that the length of time taken by the Promotions Board to make its recommendation to Council was simply deplorable. He noted in particular that from the unredacted copies of the two reports of the Association of Commonwealth Universities (ACU) appointed peer reviewers, it resulted that one document was completed on 29th March 2021, but the other was only completed on 9th July 2022, that is 28 months after the application was submitted. Notwithstanding some improvement in the rate of disposal of pending applications, as indicated in the Rector's communication to the Commissioner of the 6th March 2023, it was still unclear why such delays continued to plague the issue of promotion to full Professor. The Commissioner noted that the system – intended to ensure external objectivity in the assessment of a candidate's performance – was clearly failing both the University and its staff. This issue had first been addressed by the current Commissioner in the Final Opinion of 3rd May 2021 in Case No UU 0045 (see Case Notes for January – December 2021, Edition 41, p.72). The Commissioner opined that it may be time for the University to consider some other system of obtaining independent peer reviews to ensure objective handling of requests for promotion instead of the current one which relies too heavily on the co-operation of the ACU.

As for the second and the third complaint, the Commissioner examined all the documents submitted both by the University and by the complainant, including the unredacted copies of the reports of the two independent peer reviewers appointed by the ACU (not "*chosen by the University*", as the complainant wrongly stated in his complaint of the 20th February 2023), as well as the official extracts, supplied by the complainant on the 3rd of April 2023, of the Promotions Board's meetings of 14th September 2022 and 19th December 2022. The Commissioner also received the evidence of members of the Promotions Board, and sought clarifications in writing on certain issues from the Rector, who chairs the said Board.

After examining all the evidence and documents produced, the Commissioner was of the firm conviction that these are two legs of the complaint that were manifestly ill-founded. Apart from what has already been referred to, above, in connection with the appointment or choice of the two external peer reviewers, it was not correct to say that the Dean's recommendation was on a par or equal footing with the reports of the two external peer reviews. The impression given in the complaint was that one peer reviewer did not provide a proper analytical assessment of the complainant's work, whereas the other reviewer was positive in glowing terms. This was far from being the case. Both reviewers, in their different way, had expressed their views on the quality of the applicant's research and publications; one came down clearly for a negative recommendation, whereas the other went for a cautious positive recommendation ("*… There is more limited published output on [the subject in question], but nonetheless Malta is always set in wider geographical context and with that in mind I think the case for promotion is reasonably well made.*"– emphasis added).

Nor was any discriminatory procedure adopted by the Promotions Board. Faced with one negative peer review and one cautiously positive, the Promotions Board could, indeed, have sought a third assessment by another reviewer appointed by the ACU – exacerbating, of course, the time factor – but it could also quite legitimately and properly make its own assessment and recommendation on the documents and other information available to it.

Conclusions

The Commissioner found the complaint justified only in so far as concerned the inordinate length of time taken to have the complainant's application finally determined, but dismissed as manifestly ill-founded the remainder of the complaint. No specific recommendation was made.

Ministry for Education

Unjust and oppressive behaviour by education authorities towards Head of a Primary School

The complaint

The complaint was lodged on the 9th of March 2023 by the Head of a Primary School. The Commissioner for Education delivered his Final Opinion on the 15th September 2023.

In substance, the complaint refers to the way in which the complainant was, on the 23rd September 2022, without the customary prior consultation, ordered to report, as from the 26th, to another Primary School. The complainant contended that her sudden deployment to a new school only days before the start of the new scholastic year, although under the guise of the "*exigencies of the public service*" was in fact a retaliatory measure for having stood firm to departmental and ministerial attempts to undermine her authority as Head of School, and for expressing her disagreement with ministerial instructions to allow part of the school hall to be leased to, or utilised by, the band club attached to one of the parishes in the area where the school was located.

The investigation and findings

When giving notice to the Permanent Secretary, as by law required, that an investigation was to be launched, the Commissioner for Education did indicate that, at least at a *prima facie* level, the complainant's deployment was "*unorthodox*". The Commissioner requested the Permanent Secretary to provide him, among other things, "… *with the reason/s why* [the complainant] *was transferred in what appears to be* prima facie *an unorthodox way, …*". Other things requested *were* supplied to the Commissioner, but, significantly, the Permanent Secretary never

provided in writing the reason or reasons for the redeployment of the complainant barely a week before the start of the scholastic year. On the 22nd March 2023, the Commissioner wrote again to the Permanent Secretary indicating that while the complainant's personal file had been transmitted to the Ombudsman's Office, this contained no relevant information "… *as to why* [the complainant] *was summarily and suddenly transferred, on the 23rd September of last year from* omissis *to [another school]*". The Commissioner, therefore, again requested "… *to know why she was transferred, and why the procedure adopted which [appeared] to be very unusual*". Again, no explanation in writing was forthcoming. This left the Commissioner with no alternative but to receive the evidence of countless persons – teachers, clerical and other staff of the school, officers from the Education Department and parents among others – to try and see whether there was anything else behind the veil of "*the exigencies of the service*". From the evidence of these persons, no less than from reams of email exchanges and other documents, it became clear to the Commissioner that there was more than meets the eye in the transfer of the complainant.

The complainant was promoted from Assistant Head of School to Head of School (HOS) in 2018 and deployed to the Primary School from which she was summarily transferred in September 2022. Up until January of that year, her performance at her new post was, by all accounts, exemplary. She was well regarded by parents and teachers alike, and during her headship the school participated in a number of local and international events with commendable results. A report, dated 11th December 2020, by the Directorate for Quality and Standards in Education on the Covid-19 implementation measures at her school was full of praise for the Senior Leadership Team's (SLT) handling of the situation at the time, noting in particular that "*Interviewed teaching staff commented positively on the SLT's organisation skills and claimed that they feel safe at school*". From all the evidence heard and examined by the Commissioner, it was clear that the school's achievements were in large measure due to the leadership skills of the complainant and her ability to maintain strict discipline, both vertically and horizontally.

Problems

Unfortunately, at the beginning of 2022 problems began looming in the relationship of the complainant with important others in the line relationship within the Department of Education, notably with the College Principal and with one of

the Directors General, both relatively new in their posts. What clearly evolved from January 2022 to the very end of September was an ever-increasing strained situation which, inexplicably, was completely mishandled by the two officials abovementioned. Instead of taking the proverbial bull by the equally proverbial horns and sitting down with the complainant to trash out the problems in detail, the above two officials resorted to the more impersonal exchange of emails or formal meetings, thereby exacerbating the frustration and anxiety of the complainant. In his Final Opinion in the instant case, the Commissioner drew a parallel to a similar situation outlined in his predecessor's report of the 2nd October 2020, a report which had been referred to the Speaker of the House of Representatives on the 28th May 2021. In *that* report the late Commissioner for Education, Charles Caruana Carabez, had remarked about the spinelessness of the Service Management Team of the school in *that* case for acquiescing "*to obviously wrong and possibly tainted decisions*". In the instant case, the situation was perhaps not as dramatic, but, like in that other case, the situation was left to fester unnecessarily, and the final decision to redeploy the complainant in September of 2022 was taken with a degree of insensitivity which beggared belief.

The written warning and the union

Early in January 2022, the complainant, with the concurrence of the SLT, issued a (final) written warning to a teacher at the school for failing to ensure that a pupil wore the protective face mask. The written warning was issued after several verbal ones. The trade union representing the teacher threatened industrial action, and instead of backing the Head of School, the Education Authorities ordered the complainant to withdraw the written charge. She refused, as, in her view, this would undermine all authority and school discipline. Eventually this final warning was withdrawn by the College Principal on direct instructions from the Director General abovementioned. This was a clear undermining of the complainant's authority as Head of School, and the issue continued to feature in email exchanges between the complainant, the College Principal and the Director General.

The complainant continued insisting on trying to find out what the correct procedure was for final written warnings. On the 25th April 2022 she wrote to the Principal Permanent Secretary at the OPM. She got no reply, and therefore she sent a "*gentle reminder*" on the 13th June 2022. The reply from the Principal Permanent Secretary's Office, dated 11 July 2022, was a curt one liner to the effect that the matter

had already been discussed (by her) with the Permanent Secretary at the Ministry for Education and that therefore "*Il-każ huwa magħluq*". This was, of course, no reply but a form of "*shut up*". In the meantime, an online meeting between the Director General, the College Principal and the complainant held on the 27th April 2022 on an unrelated issue revealed the increasing tension between the Principal and the complainant. The minutes of that meeting, kept by one of the Assistant Heads and a member of the SLT, contain the following entry:

"[The Principal] *asked whether this was the reason for the meeting.* [The Director General] *stated that the matter could have been resolved between both parties.*

[The complainant] *stated that a discussion regarding these matters in front of an objective third party was necessary.*

[The Principal] *stated, "*Issa inqegħdek jien*".*

[The complainant] *directed the attention to* [the Director General] *stating, "*qed tisma' u dan quddiemek qed ikellimni hekk*".* [The Director General] *cautioned* [The Principal] *about the language used.*"

In the meeting with the Commissioner, the Principal, while admitting that he was somewhat frustrated with the attitude of the complainant, said that he did not recall uttering those words. Likewise, the Director General did not recall those words. The Commissioner was of the view that jaculatery expressions noted down by a third party *a tempo vergine* carry more weight and are to be relied upon when confronted with contagious lapses in memory.

The Band Club affair

Around Easter time of 2022, a request was made by a lawyer on behalf of a band club attached to one of the parishes in the area for the use of the School Hall, or part thereof, to store statues and other decorations used in the festivities connected with the feast of the titular saint of the parish, and also for placing the statue of the Risen Christ at the entrance to the school hall. Both the College Principal and the Director General were in favour of both initiatives, with the Principal even informing the lawyer (in an email dated 11th April 2022) that "*Our College has always supported the mutual understanding through which our public schools and*

other entities/NGOs create a better link for better synergy between both". However, the procedure then obtaining required the full concurrence of the Head of School as the person responsible for the day-to-day management of the establishment. The complainant, who in the past had acceded to requests by groups and NGOs for temporary use of the school premises, and had signed, as per procedure, the contract granting use of the school facilities, strongly objected to the use of the School Hall to store feast decorations belonging to the band club, arguing that the hall was to be enjoyed to the full by the students, parents and staff, and that a band club had no business occupying school premises (there was no objection from her to the temporary placing of the statue of the Risen Christ on the outside of the entrance to the School Hall for Easter Sunday). However, it would appear that the Education Authorities were determined to let the Band Club have its way. In August, while the complainant, was on leave, instructions were given "*from above*" to a member of staff of the school to make the keys to the hall available to members of the band club, ostensibly for them just to have a look.

On the 18th August 2022, the complainant wrote to the Minister responsible for Education urging him not to rent the School Hall:
"*As Head of omissis Primary together with the school's SLT we urge you not to rent out the space for storage purposes. We worked hard throughout the year to remove the furniture stored* [during covid] *in the Hall so that this year we will be able to use it for physical activities during rainy days, prize days, concerts, etc. The Hall is already too small to hold these celebration activities and we limit the number of guardians who may attend. I was not included in the stated site meeting as I would have voiced my concern immediately*".

Further exchanges (18th and 24th August) followed between the complainant and the Minister, with the latter insisting school operations would not be effected by the request of the band club, while the complainant stood her ground. "*As educators and SLT members we dutifully defend the interest of our students. Learning opportunities and celebration events will be missed if these plans go ahead*" (complainant's email of 24th August 2022 to the Minister).

Not only was the "*site visit*" (of the hall) conducted without the approval or presence of the complainant as Head of School, but a copy of the key to the school hall was made, because between the 1st and 2nd of September a number of statues found

their way surreptitiously into the hall! The complainant duly lodged a report with the Police, and the statues were hastily removed. The Education Authorities, in their meetings with the Commissioner, attributed this to a "*misunderstanding*". Contributing to this alleged "*misunderstanding*" may also have been the fact that on the 2nd September 2022 the lawyer acting for the band club sent an email to the College Principal enclosing the "*finalised agreement from our end*", the proposed terms of which included, among other things, the use of the school premises for 365 days a year, commencing from the 1st September 2022 to the 1st September **2062** (40 years) against a yearly donation of €600. Needless to say, the complainant, who was put in copy of this email, never signed such an outrageous contract.

The furniture

Another incident illustrates the strain and stress under which the complainant was working by mid-September 2022, something which could not have escaped the attention of her immediate superiors within the Education Department. Before the summer vacation, plans had been made to clear the school hall of all the accumulated furniture and other material which had been put there during the Covid-19 pandemic. One of the Assistant Heads had been charged with this task. He duly marked the items which had to be disposed of, and those which were in a good enough condition to be retained. In summer he had to undergo medical treatment, with the result that he was not present when the hall was actually cleared. A proper inventory appears to have been kept of the items disposed and those retained. However, when the complainant got to know that the hall had been cleared of furniture, she erroneously assumed that this had been done to facilitate the leasing of the School Hall, and she filed another report with the Police.

Conclusion and recommendations

In his Final Opinion the Commissioner stated that it was, as should have been, clear to everyone that the complainant was, by mid-September, working under severe strain due to the various attempts made to undermine her authority from above. Notwithstanding this severe strain, she undertook all the necessary preparatory meetings in anticipation of the new scholastic year. On the 23rd September 2022 she had a series of online meetings with parents lined up for the day. When, on that day, she received a telephone call from the Director General's secretary asking her to attend his office at 13.30 hrs that very same day, she informed the secretary that it was impossible for her to make it from her residence – from where she

was working – to Floriana in time, and that moreover she was reluctant to cancel the online meetings with parents which had been scheduled weeks before. The "*response*" came in the form of an email sent later that day informing her that as from the 26th September she was to report as Head of School at another primary school. The shock "*transfer*" understandably precipitated a severe form of anxiety and she could not report for work at the new school. It was only around Easter time of 2023 that she was medically certified as able to attend to her duties at the new school, which she did.

The Commissioner noted that while there appeared to be no hard and fast procedure for the deployment of teaching staff from one school to another, the standard procedure was that these deployments are concluded by the beginning of August to enable everyone to plan ahead and proceed with the necessary hand-overs.

The Education Authorities attempted to justify the transfer of the complainant by claiming that there had occurred a sudden vacancy *in the other primary school* which had made it imperative for the complainant to be sent there. The evidence, however, showed otherwise. The Education Authorities knew as early as the first week of September 2022 that the Head of School of the other primary school had secured a teaching post with the Institute for Education. If they had genuinely believed that the complainant's presence was necessary at that other school, they had had ample time to contact the complainant to prepare her for the necessary transfer. This was not done, opting instead for the sudden transfer at the very last possible minute. Significantly also, the other HOS was only formally detailed to the Institute for Education on the 14th October 2022, and the attendance sheet showed that she was still attending the school in the week ending 11th November 2022. On the other hand, the primary school from which the complainant was removed remained without a Head for the entire scholastic year 2022-23, with the College Principal assuming Acting Headship.

The Commissioner concluded that it could not be seriously argued that the complainant's sudden transfer was motivated by the exigencies of the public service. The way it was carried out was a clear indication that she was being punished for standing up for the school and its pupils and for not "*towing the line*".

The Commissioner emphasised that transfers ostensibly made in the interest of the public service but which were in effect a form of punishment **were invariably unjust and oppressive within the meaning and for the purpose of Article 22(1)(b) of the Ombudsman Act**. Punishment should only follow upon proper disciplinary proceedings. Moreover, the Education Authorities knew, or ought to have known, that the way in which the transfer was being effected was likely to cause mental anguish and anxiety to the complainant. **They acted in clear violation of their duty of care towards their subordinates and in violation of the cardinal principle of civil law of** *neminem lædere*. When the complainant could not report for work at the new school, no credible attempt was made by any of her superiors to try to contact her to resolve, or help resolve, any problems. She was left to fend on her own. It was just like saying to her, "*good riddance*".

For all the above reasons the complaint was justified and well substantiated, and was therefore sustained.

The Commissioner recommended that the Education Department pay for all the medical expenses that the complainant had incurred due to the unjust and oppressive action against her, and that she should also be paid the salary which she had had to forgo when she was on sick leave for a long time.

Sequel

On the 25th of October 2023, the Ombudsman and the Commissioner for Education referred the Final Opinion to the Speaker of the House since no indication had been forthcoming from the Education Authorities that they accepted or that they would give effect to the recommendations.

Institute for Education

Late submission of dissertation – refusal by the Institute for Education to apply the Extenuating Circumstances Policy

The complaint

The complainant was enrolled in a Master's course offered by the Institute for Education (IfE). A significant component of the course was a dissertation which was to be submitted by a certain date. She claimed that when she had tried to upload the dissertation on the appropriate platform minutes before the expiry of the deadline, she had encountered technical difficulties, with the result that it was effectively submitted after the expiry of the deadline. Although she applied, under in-house procedures, for the Extenuating Circumstances Policy to be applied, the IfE considered her dissertation as an unauthorised late submission and was awarded a maximum mark of 45%.

The complaints were essentially two: (i) that due procedure was not followed to consider her "*extenuating circumstances*" because of the non-convening of the Student Affairs Committee owing to industrial action; and (ii) that notwithstanding her submission "*at the last possible point in time*" the Institute lacked "*the flexibility*" to take into consideration what the complainant considered to be extraordinary circumstances, and continued to consider her dissertation as a late submission, with all the consequences in grading that that brought about.

The investigation and findings

Regarding the second point, the Commissioner for Education noted that policies and regulations in matters of dissertations and their submission deadlines were meant to be observed. Any departure therefrom generally created an injustice *vis-à-vis* those who would have adhered scrupulously to those requirements and

deadlines. After receiving and examining all the evidence, the Commissioner was of the view that the complainant was, or should have been, aware that all course work was to be submitted on Turnitin before 23.00 of the date due (Clause 11.2.3.3 of the Teaching, Learning and Assessment Policy and Procedures). In the instant case, the complainant had attempted uploading just minutes before 23.00 on the appointed date, or possibly at the very moment that the uploading window was shutting down with the 23.00 deadline. There was no evidence of any malfunctioning of the Turnitin system. The decision to leave the matter to the very last couple of minutes was entirely the complainant's. This was a classic case of *imputet sibi*. The Commissioner, therefore, considered that this leg of the complaint, that is to say that the Institute "*lacked the flexibility in these extraordinary circumstances*", was manifestly ill-founded.

As regards the first point, the Extenuating Circumstances Policy document did not apply to her case. From a careful reading of this document, and especially of Clauses 4 and 5.1 thereof, it was clear that the extenuating circumstances there envisaged were those circumstances which could be considered to be independent of the will of the student (reference was made specifically the third bullet point in Clause 3.1.3). In the complainant's case, the submission minutes before the 23.00 deadline was an act entirely dependent upon, and the result of, the exercise of her will, and which could have been prevented with a modicum of diligence. In fact, and as a rule, the request for an extension of the deadline had to be made five business (i.e. working) days before the relevant coursework submission date. In light of all this, whether the Student Affairs Committee met or otherwise was irrelevant, since the policy in question did not apply to her case. For the avoidance of doubt, the Commissioner pointed out that in the dissertation process the Student Affairs Committee would only be involved in the exceptional cases when a formal request for extenuating circumstances is made – this was not the complainant's case – or when a request for an extension to the duration of studies was submitted – as the complainant had already submitted in March of the previous year.

Conclusion

When all was considered, it was clear that the case disclosed no maladministration as envisaged in, and within the meaning of, Article 22(1)(2) of the Ombudsman Act.

Malta College of Arts, Science and Technology (MCAST)

Pre-retirement leave – applicable only before actual date of retirement

The complaint
The complainant had been detailed by the Ministry for Education to work at the Malta College of Arts, Science and Technology (MCAST). Upon reaching retirement age, he sought pre-retirement leave from MCAST, but this was turned down. He alleged that his request had been rejected for no valid reason.

The investigation and findings
After examining all the evidence, the Commissioner for Education noted that after his initial detailing with MCAST the complainant had become subject to two sets of regulations, not in themselves contradictory, but with independent time-frames and conditions depending upon the matter in issue.

The complainant's contract of service with the College dating back to 2002, as subsequently renewed and finally extended beyond his 64th birthday up to August of 2023, with its various amendments and appendices, regulated primarily his responsibilities and remuneration as a member of the lecturing staff of the College. However, for purposes of pension and pre-retirement leave, the rules applicable to the civil service continued to apply to the complainant. In fact, the relative MCAST collective Agreement did not even contemplate pre-retirement leave.

As the term itself – *pre-retirement* – clearly indicated, this leave is intended to be availed of *before* someone actually retires. It cannot be converted into *post-retirement* leave. Since the complainant was due to retire very early in 2023, he could have applied for such leave before his retirement date and before requesting an extension of his detailing to MCAST. In that case, after August 2022 he would have reverted to his substantive grade in the civil service and benefitted from three months fully paid leave in the run-up to his 64th birthday early in January 2023. Since, as the Commissioner was informed, the complainant had hardly ever made use of his sick leave entitlement, he would in all probability have been granted the full pre-retirement leave. However, the complainant opted to continue to provide a service to the College. By extending his services to MCAST, he forfeited his right to the pre-retirement leave under the rules governing the civil service. The Commissioner also expressed his view that in light of the complainant's impeccable track record as a lecturer at MCAST, had he requested further extensions as a lecturer there, his request would have been acceded to.

Conclusion

In sum, the Commissioner for Education concluded that there was no evidence of any maladministration in the sense of Article 22(1)(2) of the Ombudsman Act. There *may* have been some misunderstanding – on the part of the complainant, or on the part of the MCAST administration, or on both – as to the modalities and conditions with which pre-retirement leave was to be availed of in the civil service, but in any case, this did not amount to maladministration.

The complaint, therefore, could not be entertained.

Ministry for Education

Noise during MATSEC examination leads to document on noise management measures

The complaint

During the listening comprehension component of a German Language advanced level resit examination held on the 31st of August 2023 at a school in Naxxar, a mechanical digger began excavating not far from the room where this listening and comprehension component was being conducted. The students complained to the invigilators, who alerted the Department of Examinations and the MATSEC authorities. Eventually the disturbance ceased, but not after most of the examination had to be conducted with this ongoing interference. The complainant failed overall in her examination. In her complaint to the Ombudsman, the complainant sought an investigation into the whole affair, and hoped that the "*revision of paper will consider this incident and [that] generous marks will compensate*".

The investigation and findings

From the investigation conducted, is resulted that works had been commissioned by the Foundations for Tomorrow's Schools (FTS) on the school property, but that these had been in abeyance for a number of weeks and there was no indication whatsoever from the contractor when they would be resumed. In spite of all efforts by the invigilators and other members from the Department of Examinations, the digging ceased only around eleven in the morning.

For its part, MATSEC took note of the incident, and given that it constituted disturbance at the examination venue, applied a post assessment adjustment (when considering the marks awarded to the students sitting for that examination) according to international standards. In spite of this adjustment, the complainant

failed overall in her German Language advanced resit. She sought a revision of paper, but her mark remained unchanged.

The Commissioner was satisfied that the Education Authorities, notably the Department of Examinations and the head of the examination centre, could not have reasonably anticipated the disturbance, given the number of weeks during which the works had been in abeyance. As for the complainant's final result, the Commissioner noted that MATSEC had taken the necessary compensatory measures with regard to all students attending the "*disturbed*" examination. This notwithstanding, the complainant had failed to get an overall pass mark, and this situation remained unchanged even after she sought a revision of paper.

In view of the measures taken by MATSEC, and in light of the provisions of Rule 18 of the Commissioners for Administrative Investigations (Functions) Rules 2012 (S.L.385.01), the Commissioner informed the complainant that there was nothing further that could be done as far as her failure in the subject was concerned.

Noise management measures

The Commissioner, however, noted that more could be done by the Education Authorities to anticipate and prevent, as far as is humanly possible, disturbances similar to those experienced by the complainant and her cohort, as well as other disturbances experienced by students, especially during the May session of MATSEC, when most exam centres are still being used as regular school. In an Interim Opinion preferred to the Permanent Secretary at the Ministry responsible for education on the 18th October 2023, the Commissioner recommended that clear protocols be drawn up to prevent or minimise noise disturbance during MATSEC examinations. This recommendation was taken up and one comprehensive document was drawn up by the Department of Examinations dealing specifically with noise management measures during MATSEC examinations. This document, which was made available online, complements the more general and comprehensive guidebook (also available online) drawn up in 2022 by the MATSEC Examinations Board of the University of Malta to all invigilators, no less than the specific exam-related requests made by MATSEC to the Examinations Department, particularly in connection with sound checks.

CASE NOTES

Commissioner for Environment and Planning

Mosta Local Council

Access restriction following one-way system

The complaint
Following changes in the two-way traffic system at Triq San Silvestru Mosta to a one-way direction, garage owners complained that now they cannot make full use of their garage since they have to manoeuvre the vehicle from the narrower part of the road.

The investigation
Although the Local Council replied that this was only a temporary measure while other roadworks in Mosta were being carried out, this one-way system persisted even following these works completion. The Commissioner found that the garage in question is located in a part where the street narrows from a width of about 5 metres to a width of 3.3 metres and now the garage in question had to be accessed from the narrower part of the road. This with the result that this garage can now only house three vehicles instead of four.

Whilst it is understandable that there might be certain safety issues that can lead one to consider a change in the street traffic direction to a one-way system, one shall also take into consideration that this change will not compromise the use of private properties, particularly when there are other ways and means to control similar situations by introducing traffic calming measures and/or intelligence systems.

Conclusions and recommendations

The Commissioner recommended that the traffic direction at this part of Triq San Silvestru be restored to a two-way system whilst implementing additional safety measures.

Outcome

This recommendation was not implemented and the case was referred to the Prime Minister and to the House of Representatives in line with the Ombudsman Act.

Siggiewi Local Council

Pavement extension onto parking spaces

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

The investigation
Following another investigation against the Agency Infrastructure Malta, the Commissioner found that this pavement extension was carried out after the Agency sought the required authorizations from the Planning Authority, Transport Malta and the Siggiewi Local Council. However, during this investigation it transpired that the no-objection was only issued by the Mayor, without following normal Local Government procedures, thus not in line with the Local Government Act. To this effect, neither the Mayor nor the Executive Secretary gave appropriate reasons why established procedures were not followed.

Conclusions and recommendations
The Commissioner found that the Mayor and the Executive Secretary of the Siggiewi Local Council committed a maladministration act when the recommendation for the extension of the pavement in question was not done for the interests of the residents and against the primary principles of the Local Government Act. The Commissioner recommended the removal of this pavement extension at the expense of the Mayor and the Executive Secretary.

Outcome
The Siggiewi Local Council did not implement the Commissioner's Final Opinion and the case was referred to the Prime Minister.

Lands Authority

Delineating concessions for tables and chairs

The complaint
The Office of the Ombudsman received a complaint alleging that establishments with tables and chairs were constantly encroaching onto public roads and pavements, with the Planning Authority ignoring the relative Outside Catering Areas Policy, which requires specific visible markings for such areas.

The investigation
The Commissioner for Environment and Planning opened an investigation against the Lands Authority, responsible for providing such markings, and invited the other entities, namely Malta Tourism Authority, Planning Authority and Transport Malta, to submit comments. Neither the Lands Authority nor anyone of these entities cooperated during this investigation.

Conclusions and recommendations
The lack of cooperation, particularly from the Lands Authority, has made it difficult to find a way to enhance its administrative role, particularly on sensitive issues where commercial interests are prevalent.

The Commissioner recommended that the Lands Authority formulates rules and procedures for fixing markers to physically define all concessions for outdoor catering areas thus aiding enforcement in line with the terms of each concession.

Outcome

The Lands Authority reacted to the Commissioner's Final Opinion by stating that it is not a regulatory authority and cannot be described as a "*permitting authority.*" Its role is limited to granting consent for submitting development permission applications on public property and issuing encroachment concessions to the areas granted permission by the permitting authorities.

As the Lands Authority disagreed with the Commissioner's recommendations for unjustified reasons, the case was referred to the Prime Minister and then to the House of Representatives.

Planning Authority

No action on irregular tables and chairs

The complaint
The Office received a complaint against the irregular placing of tables and chairs on the promenade at Marsaxlokk that were obstructing fishermen operating in the area. The complaint referred to an enforcement notice issued in the year 2013 against the same irregular development.

The investigation
The Planning Authority first decided to suspend this enforcement action following the submission of a development application and then eventually went even further and this year, withdrew the same enforcement notice after it noted that from the aerial photos dated 2016 and 2018 there were no tables and chairs on site. The Planning Authority also submitted that there was an agreement that the Local Council marks the relative encroachments on site so that action may be taken with assistance from the local enforcement agency.

The Commissioner for Environment and Planning found that the Planning Authority made two errors when it first suspended enforcement action following an application that did not sanction the irregularities on site and then when it withdrew the enforcement notice on the basis that years before the irregularity was not visible from the aerial photos when a simple site inspection would have revealed that the irregularity still persists to the present day.

Conclusions and recommendations
The Commissioner recommended fresh enforcement action and that the Planning Authority verifies the situation on site close to the day when the enforcement notice is being withdrawn.

Outcome
The Planning Authority replied that the merits of the enforcement notice were exhausted since there was a period of time when the irregularity did not persist and that the disposition of the Act with regards to similar enforcement action are not effective enough since it involves mobile elements such as tables and chairs.

The Commissioner did not accept this reply as it is very unfair that those who operate by the book and pay for the relative permits and encroachments are treated in the same manner as those who operate under irregular circumstances for free and continue to do so without any enforcement action whatsoever.

The case was then referred to the Prime Minister and to the House of Representatives in line with the Ombudsman Act.

Planning Authority

Noisy percussion exhibits in public garden

The complaint
Various residents complained against noise from percussion instruments that were even being played at odd hours. These instruments were installed close to their residences by the St Paul's Bay Local Council at Ġnien il-Millenju.

The investigation
After the Local Council replied that these instruments were installed following Council and Planning Authority approvals and that signs were erected indicating times when they could be played, the residents' complaints persisted and the Commissioner brought up this case with the Planning Authority.

The Commissioner highlighted that the relative permit was only issued for the installation of percussion exhibits rather than playing instruments and that the relative regulations do not allow the approval of similar instruments in public gardens.

Conclusions and recommendations
The Commissioner recommended the revocation of the relative permit and any eventual enforcement action.

Outcome
Following the Final Opinion, the Planning Authority accepted the recommendation to initiate permit revocation procedures and the Local Council approved a motion to remove these percussion instruments.

The percussion instruments were eventually removed from Ġnien il-Millenju by the St Paul's Bay Local Council and the Planning Authority revoked the relative permit thus fully acceding to the residents' pleas.

Planning Authority

Reverse vending machine blocking water inlet

The complaint
Farmers complained against the positioning of a bottle return machine that blocked the water pipe that directed rainwater to their reservoir at Mqabba.

The investigation
The Commissioner found that the permit for this machine has not yet been issued by the Planning Authority and asked for common sense to prevail by moving this machine a few meters in order to allow the easy flow of rainwater to the farmers' reservoir. Following weeks of inaction during the rainy season, the Commissioner suggested the shifting of this machine away from the inlet as soon as possible or by else by temporarily raising it on masonry blocks in order to allow the free flow of water.

After the farmers' right to collect water from the street was raised by the Local Council, the Commissioner highlighted that it is not right to question the farmers' water-collection rights when the farmers in the area were doing the right thing and collecting and re-using rainwater. The Local Council should rather promote and aid similar initiatives.

Conclusions and recommendations
The Commissioner reiterated again that this machine should be moved and even recommended compensation for the farmers' loss of water and enforcement action by the Planning Authority and the Police.

Outcome

Following immediate intervention by the Police the machine was moved and the Planning Authority imposed the introduction of sanctioning in the relative permit application.

Transport Malta

Incorrect positioning of a loading bay

The complaint
A commercial operator on a main thoroughfare complained about the incorrect positioning of an un/loading bay located away from the outlet, thus not being fit for purpose.

The investigation
The Commissioner found that the actual permit issued by Transport Malta approved an un/loading bay closer to the complainant's commercial outlet. Furthermore, the Commissioner also highlighted the fact that the current position is very close to another un/loading bay on the same thoroughfare.

Since any repositioning of this bay would also involve alterations to an existing frequently used bus bay, the public service operator was roped in in order to find the most adequate solution. Since the bus bay would thus be located closer to a corner, it was agreed that there was no cause for safety concerns due to the side road being a cul-de-sac.

Outcome
Transport Malta repositioned the un/loading bay closer to the commercial outlet in question following an agreement with the Public Transport operator and the Commissioner for Environment and Planning at the Office of the Ombudsman.

Planning Authority

Irregularly suspended sanctioning application

The complaint
The Office investigated the lack of action by the Planning Authority against an irregular enclosure for tables and chairs occupying parking spaces at the Strand, Sliema.

The investigation
After the Planning Authority issued an enforcement notice in the year 2013 and allowed this irregularity to persist, it was only in June 2022 that a sanctioning application was submitted. During the first hearing of this application that was recommended for a refusal, the Planning Commission suspended this application for six months notwithstanding the irregular commercial activity on the road.

The Commissioner found that the Planning Commission committed cardinal mistakes when it suspended this application for a period of six months since the Development Planning Act only allows the Planning Commission to suspend an application for six weeks following a request for further clarifications and the Commission seems to have missed that Transport Malta highlighted safety issues in relation to the same irregular structure, denoting an injury to amenity.

Conclusions and recommendations
The Commissioner recommended that the Planning Commission immediately establishes a date for the second hearing during which it shall determine this application.

Outcome

Although the second hearing was brought forward to 7 November 2023 from the suspension term of 4 January 2024, the Planning Commission failed to decide this application and went on to afford a third deferral against the Commissioner's recommendations and against the Development Planning Act.

The case was then referred to the Prime Minister and meanwhile the Planning Authority approved the sanctioning application during the third deferral.

CASE NOTES

Commissioner for Health

Ministry for Active Ageing

Failure to Respond

The complaint

The complainant, an employee within a regulatory authority, encountered issues with his annual performance appraisal. He reached out to the management of the authority, seeking clarifications and requesting a review of his performance appraisal. Despite sending various reminders, he received no response. Consequently, he lodged a complaint with the Office of the Ombudsman concerning the authority's failure to reply.

Investigation

The authority in question was contacted and a meeting with its top management was convened. It was confirmed during this meeting that, despite several emails from the complainant over a short period of time, no response had been provided by anyone within the authority. The meeting underscored the importance of providing adequate and timely responses to public and employee communications. This Office specifically highlighted the necessity of adhering to communication protocols, referencing Directive No. 4-2[46] issued by the Principal Permanent Secretary on 3 October 2022 under the Public Administration Act, which aims to elevate service standards within public administration. It mandates prompt, professional and courteous communication across various channels, including email, traditional mail, social media, and in-person interactions.

46 https://publicservice.gov.mt/en/people/Documents/Directives/Directive-4.2.pdf

Specific timeframes are delineated for acknowledging and responding to public and employee inquiries, emphasising the importance of clarity, efficiency and accessibility. This directive reinforces the commitment to high-quality service delivery, accountability and continuous improvement in public service operations.

Recommendation

This Office recommended that the time frames outlined in Directive No. 4-2 should be strictly followed. The management of the authority agreed to comply with this recommendation.

Mater Dei Hospital

Breakdown in Communication

The complaint

The Office of the Ombudsman received a complaint concerning the treatment of a patient's family when the patient was hospitalised and eventually passed away.

The patient's daughter lodged a complaint with this Office regarding an incident that occurred while her father was hospitalised for a terminal disease. In her complaint, this lady informed this Office that her mother, the patient's wife, was not allowed near her husband due to restrictions on visiting times at the hospital, which were related to the General Elections in Malta. The daughter claimed that the mother was turned away from the ward in an arrogant manner and, in the following days, when they queried the authorities about this, they were informed that the hospital staff was merely following regulations set out by the Electoral Commission. The relatives wrote to the Electoral Commission, which confirmed to them that, in fact, no such restrictions were in place on that day. When questions were sent to the Customer Care Unit, the responses were unhelpful and even suggested that the hospital staff had attempted to contact the family, who were purportedly unreachable.

Facts and findings

Communications on the matter were made with the Ministry for Health by the Commissioner for Health. The Ministry provided their comments on the matter. Various meetings were held with the interested parties separately, and it transpired that the sequence of events as described by the patient's daughter were accurate. Data logs of telephone calls to the relatives' telephone numbers were requested, showing that four calls were indeed made to the relative's landline registered with the ward in the contact details of the next of kin. It also emerged that there was not just one notice regarding the regulations pertaining to visitors due to the election

circumstances, but at least three. The staff duly noted the first, but the subsequent notices may not have been properly communicated to all staff members.

A very cordial meeting between the hospital management and the daughter and son of the patient was held, during which the Commissioner for Health explained the findings of his investigation to all present.

The situation as it evolved in the days leading to the elections was clarified to everyone's satisfaction. The hospital management acknowledged that the information regarding the election process could have been better communicated to the entire staff, and the manner in which the Customer Care Unit handled the issue might not have been entirely satisfactory. The family was made aware that an attempt to communicate with them via telephone had indeed been made, but unfortunately, as it was a landline, this contact was not successful.

At the end of the meeting, the hospital management and the Commissioner for Health inquired if the daughter's mother would like to meet with the management so that the situation could also be explained to her. The daughter promised to ask her mother if she wished to do so, and indeed, another meeting with her mother was held at the hospital. The unfortunate circumstances surrounding her husband's last days were explained to her, and clarifications were offered regarding how things evolved. A fruitful discussion ensued. This was a very positive meeting and all participants were satisfied with the final outcome.

Recommendations

Two recommendations were made at the end of this case:

i. The Customer Care Unit should be provided with further training on how to handle such delicate issues and communicate in a more empathetic way with patients and their relatives; and

ii. When special circumstances are operating within the hospital environment, such as General Elections, the rules and regulations pertaining to such events should be carefully and effectively communicated to all staff in a timely manner to prevent any such unfortunate circumstances in the future.

Outcome

Since the Ministry for Health accepted both recommendations, this case was closed.

Ministry for Health

Failure to provide medicine that was needed after the patient suffered a complication after surgery

The complaint

The complainant, who suffered a complication after surgery, needed a specific form of medicine to alleviate the effects of the complication. As the medicine in question was not part of the Government Formulary List, the complainant was refused such treatment.

The investigation

The Ministry for Health was contacted and it was noted that the complainant had a history of an ear operation due to hearing loss some years previously. Immediately after the operation, the complainant developed weakness and partial paralysis of the right side of the face. This did not resolve with time. This weakness also affected the right eye in that the complainant could not close the right eye properly. Artificial tears were required to alleviate the effects of the inability to shut the eye properly. These artificial tears were not included in the Government Formulary and so the complainant had to buy them.

A request made to the Exceptional Medicines Treatment Committee was turned down because *"there was a high potential for further similar cases"*. This Office questioned this reply, as the possibility of having such a complication after this type of surgery was hopefully very small. This Office could not envisage that a great number of similar complications would occur, particularly when this complication is considered to be a rare event in the international literature (less than 0.5%).

Recommendation

This Office recommended that this complainant should be provided with the required treatment, the artificial tears, since this is to be considered a rare case that occurred as a complication following an ear operation performed in the government hospital.

The Ministry for Health is discussing the issue with the complainant to try to solve this situation. The discussion is still ongoing.

Ministry for Health

Lack of provision of specific eyedrops for a 2-year-old child suffering from glaucoma

The complaint

This complaint was lodged by the parents of a 2-year-old child who suffers from an eye condition, glaucoma (raised pressure in the eye). As part of his treatment, he requires eyedrops so as to control the glaucoma that can potentially cause blindness. In this particular case, it is a very aggressive form of glaucoma, which if not treated carries a high risk which might lead to blindness. These eyedrops that have to be used on a daily basis are an essential part of his treatment.

Only one particular eyedrop preparation was effective in controlling the condition. This preparation contained two different medicines in combination.

This particular combination of medicines does not form part of the National Government Formulary. The two products are included in the National Government Formulary as two separate eyedrops.

The parents had applied through their consultant for these combined eyedrops both through the Government Formulary List Advisory Committee (GFLAC) and the Exceptional Medicinal Treatment Committee (EMTC), and in both instances the requests were refused. The letters of refusal state that "*These medicines are not in the Government Formulary List*" and "*The request is not according to the evaluation criteria of EMTC policy*," respectively.

The investigation

The Commissioner for Health contacted the Department of Health once the parents lodged the complaint and the responses of the GFLAC and EMTC were once again quoted.

The consultant taking care of this child was also contacted. He confirmed that this child was suffering from a rare congenital eye problem. This child had already been operated upon twice in the UK because of the aggressive nature of his glaucoma which did not respond to medical treatment.

Various eye drop preparations were used to try to control the glaucoma. The only combination of topical treatments that worked adequately included this combined preparation that the parents had requested. The two components separately were not as effective as when used in combination. This could be verified objectively since the eye pressures are something that can be and was, in fact, measured by his consultant.

Our investigation also evidenced that this 2-year-old was not suffering just from congenital glaucoma, but in reality, this was part of a rare medical syndrome (a group of symptoms which consistently occur together or a condition characterised by a set of associated symptoms). For these reasons, the consultant applied for this young boy to be given the combined preparation, a request which was eventually turned down.

Facts and findings

This was a case of:

- Rare disease.
- This condition is well established as rare in the international medical literature since it is reported to affect 1 in 200,000 people. Being a Rare Disease, this would fall under the remit of the EMTC as per Subsidiary Legislation 528.08.
- There is objective evidence that the separate eyedrop preparations were less effective at controlling aggressive glaucoma than when presented together in the same formulation.

The consultant caring for this young child provided proof that when the two active medicines were used separately, the results were not as effective as when the combined preparation was used.

One also had to keep in mind that in young children, combination drops are preferable because:

- There is less risk of toxicity from preservatives; the combined preparation is preservative-free.
- It is hard enough to put one eye drop in a child's eyes, let alone multiple eyedrops on multiple occasions every day.

Conclusions

Unfortunately, in this case, one is dealing with a condition, glaucoma, that can potentially cause blindness, and in this particular case, one is dealing with a very aggressive form of glaucoma so that if not treated properly the risk of blindness is high. There are many patients suffering from glaucoma, but this case definitely falls into the Rare Disease category in that it usually affects 1 in 200,000 people. (A condition is classified as a rare disease if it affects no more than 1 person in 2,000.)

The attending paediatric ophthalmologist certified that, according to him, the glaucoma was not properly controlled when the two active ingredients in the combined eyedrops were used separately. This was what was actually available through POYC.

The fact that this medical condition was not classified as exceptional by the EMTC was also strange, as the international literature quotes an incidence of 1:200,000 people (the American Academy of Ophthalmology). Possibly, EMTC was considering this case to be a case of childhood glaucoma (1 in 5000 children) and not part of a rare syndrome.

Recommendations
This Office strongly recommended that this case would be reviewed once again by the EMTC with a view of approving the combined preparation in this exceptional case. This is not an ordinary case of glaucoma but is part of a rare disease.

Outcome
The Ministry for Health accepted the recommendation, and the child was provided with the combined preparation.

Mater Dei Hospital

Claim for reimbursement for a COVID-19 test that was redone after no result was issued by the Health Department

The complaint

The complainant was the father of a teenager who was due to travel abroad. They were both booked for a Covid-19 swab test at one of the official swabbing hubs. The swabs were duly taken, and the father's result was issued within 24 hours. The son's result was never received despite various telephone calls to the call centre and several emails. The father and son had to reschedule the travelling (postponed by 24 hours) and redo the test privately.

The complainant asked the Ministry for Health for a reimbursement of the costs incurred in doing the test privately due to the failure by the Health Department to provide a result of the Covid-19 test. In spite of various attempts, the health authorities failed to engage in any communication, so a complaint was lodged with the Office of the Ombudsman due to the lack of response and the fact that the result of the test was never issued.

The investigation

This Office sought information regarding this complaint from the Ministry for Health. The Ministry for Health replied that they could not be held responsible for personal travel arrangements and any "*consequential losses or inconvenience ...*". They also referred to the statement that the *"authorities cannot be held legally responsible for any delays in the issuing of test results".*

The health authorities also confirmed that "*details of the complainant were not available on their system. Thus the test result was not available to the results team or to the Public Health helpline.*"

This points to the fact that the swab test result was somehow lost.

Considerations

The COVID-19 pandemic brought about a series of problems that were unique in nature and which had never been experienced before. A number of these problems concerned travelling abroad and this claim revolves exactly around one such issue.

Having travel documents in a timely manner is the responsibility of the traveller and that is precisely why the complainant and his son did the test three days prior to departing. Had they done it before, the 72 hours would have passed and so the test would not have been valid.

The department had a 72-hour policy for issuing rapid test results. The claimants called 4 times enquiring about their results but were never given a clear answer about what had actually happened. If the patient's particulars were not on the system as confirmed by the department, why was he not informed immediately that the swab test was lost? Had he been immediately alerted that the sample was lost, he could have easily been offered another test and would have probably received the result in time for travel. The Public Health helpline chose to ask the claimant to phone later on several occasions instead of checking properly what had happened to the sample. Had someone tried to check, it would have immediately been obvious that his particulars were not on the system, indicating that no swab sample belonging to the claimant was available for testing.

This Office is sure that all the Healthcare staff did their utmost and even more in the difficult times brought about by the Covid-19 pandemic. It is to be expected that there is a percentage number of tests that can go wrong as everything else in life, but a contingency plan should be in place. In this case, a recall when the claimant's son's details could not be found would probably have sorted the matter.

One must also appreciate that the laboratory was working to full capacity, but that does not exonerate the department from its legal responsibilities.

Once the department took the sample, it also took the responsibility that goes with it, that of providing a result, whatever it may be. It could be that the sample was lost, but in that case the patient had to be so informed. There were various instances when this could have been done since the claimant phoned 4 times.

In this case, thankfully, there was no effect on the health of any individual. This was more of a systems failure. However, the claimants incurred expenses in having had to redo the test privately.

This Office believes that the principle that applies here is that the Department of Health had, by accepting the sample, **promised** to provide a service, that of checking for COVID-19 infection, a service which, in fact, the Department **failed to render** due to various reasons.

In summary, the pertinent facts included:

1. The Department of Health was providing a COVID-19 testing service free of charge to all citizens in the interest of public health.
2. There was no travel ban at the time the claimants were travelling.
3. There were definite requirements regarding COVID-19 status attached to travel regulations. A negative test that was done not more than a certain specified number of hours before travel, was needed.
4. The claimant was not informed that his sample was lost.
5. This is not a case of **delay** in issuing the result, but actually, no result was ever issued as it seems that the sample was **lost**.
6. From the documentation available, it seems that the Department of Health had not replied to the claimant for a number of months. This may have been due to the fact that the Department at the time was working under severe conditions due to the huge amount of work brought about by the Covid-19 pandemic, so that not giving this issue high priority, can somehow be understood in the prevailing circumstances.

There is no doubt that the pandemic created a very complex and stressful situation for all concerned, including the health system, but losing a test cannot be considered as a fortuitous event. Having tried to get the results several times and repeatedly not being given the right information further compounds the problem.

Recommendations

The Office of the Ombudsman recommended that the costs incurred by the claimant in order to repeat the test at a private facility, due to the loss of the sample by the Health Department, should be reimbursed against proof of payment.

This recommendation was, in fact, accepted by the health authorities and the expense incurred for repeating the swab test was refunded.

In the prevailing circumstances, this Office could not agree that there was an unjust delay in response from the Department of Health, considering the huge burden of work that resulted from the Covid-19 pandemic.

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