PARLIAMENTARY OMBUDSMAN | MALTA

Case Notes 2015

JANUARY - DECEMBER 2015

Edition 35

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Address: 11/12, St Paul Street, Valletta, VLT1210
Email: office@ombudsman.org.mt
Tel: +356 2248 3200, 2248 3216

Office opens to the public as follows:

October – May	08:30am – 12:00pm
	01:30pm – 03:00pm
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Website: www.ombudsman.org.mt
Facebook: Ombudsman Malta

Foreword

This 35th Edition of the Case Notes coincides with my appointment as the new Parliamentary Ombudsman on the expiry of the second term in office of my predecessor. I am aware that I have been entrusted by Parliament to fulfil the functions of one of the most important and prestigious constitutional authorities that carries with it the onerous duties to be the defender of citizens and the conscience of the public administration.

I appreciate that for the institution to perform well it was essential for my Office to engage with the public to make its activities known and to make it aware of the practices and procedures that had to be followed to fully utilise the services that the Ombudsman provides. Aggrieved individuals have not only to be made aware that the Office is there to help them, but also and more importantly, when they could utilise its services and how to proceed to vindicate their rights.

I appreciate that the regular publication of case notes is one of the best means to outreach the public. I intend to continue this practice that the Office has followed practically from the first year that it was set up. I shall be compiling and publishing annual summaries of selected cases, possibly in bilingual format, as has been the custom in recent years.

A Case Note should clearly, correctly and concisely contain the substance of the complaint, the nature of the investigation conducted by the Office, the considerations of the Ombudsman and Commissioner that led to their final opinion and recommendation. It should highlight the essential points of the opinion to enable the reader to understand not only the investigative work carried out, but also the efficiency of the Office of the Ombudsman as a mediator and honest broker between the aggrieved citizen and the public administration.

A Case Note should enable the reader to identify himself with the situation that gave rise to the complaint. In this respect, there is room for improvement. Case reports

could in some instances be simpler and more concise, though great care need to be taken not to sacrifice quality for the sake of brevity. It is fundamental that the correct message be conveyed to the public that the primary function of the Ombudsman and the Commissioners remains to ensure good governance, the proper observance of codes of good administrative conduct and the interpretation and application of laws and regulations in a just, reasonable and equitable manner.

The case notes also serve another important purpose that of setting standards and encouraging uniformity in the method of investigation and the way in which the findings and consideration of the Ombudsman and Commissioners in their final opinions are communicated to complainants and public authorities. More importantly, by giving publicity to the most important opinions, the Ombudsman and Commissioners set out their interpretation of the rules of good administration, their equitable approach in the application of legal provisions and the principles they expect public authorities to apply in the exercise of their administrative discretion. That interpretation applied in the investigation of individual complaints serve as a guide to investigators and administrators on how similar situations should be approached and tackled.

It can safely be said that these case notes are surely proving to be an invaluable point of reference to aggrieved citizens who wish to avail themselves of the services offered by the Ombudsman institution. Though published case notes cannot according to our legal system, be considered to constitute precedent for future similar cases, well-motivated final opinions correctly backed by administrative law and practice have along the years, developed and are still developing into a compendium of principles and systems of conduct that public authorities need to follow to ensure a just, transparent and accountable public administration.

In a way these case notes are creating basic jurisprudence that can help public administrators to take correct and just decisions in the day to day conduct of public affairs. A welcome development that manifests the secondary though not less important function of the institution of the Ombudsman, to act as the conscience of the public administration.

This publication provides an insight into the wide variety of complaints that are filed with the Ombudsman and Commissioners by aggrieved individuals who seek redress.

It also sheds light on the different investigative techniques adopted and the difficulties encountered by the Ombudsman and Commissioners during their investigations. Readers can assess to what lengths they go to convince the public authorities to adopt their recommendations to redress identified injustices. They can arrive at an informed assessment on the usefulness of the Ombudsman institution as an effective tool in the defence of citizens and in the promotion of the essential principles that should govern a good and sound public administration.

This Office needs to be guided by that assessment.

Anthony C. Mifsud
Parliamentary Ombudsman

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

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

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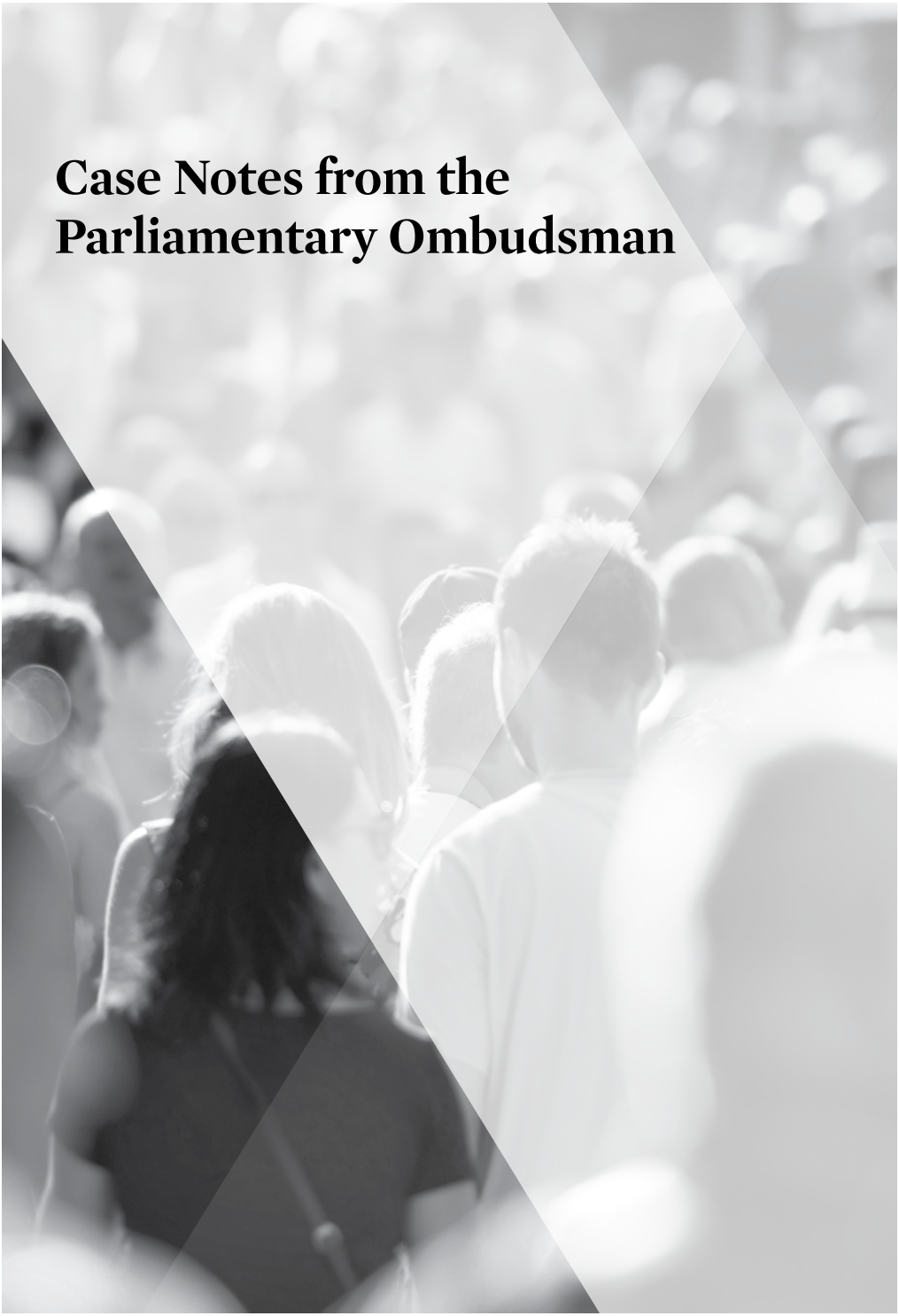


Case Note on Case No O 0176
Aġenzija Sapport

Termination of a definite contract of employment during probation

The complaint
A Professional Support Executive, employed on a one year definite contract with A enzija Sapport, alleged her employment was terminated without being given a valid reason, and when it was customary for such contract to be renewed. Complainant felt aggrieved also at the way by which her employment was terminated having been ordered to leave her office with immediate effect.

The investigation
The Ombudsman established that, in terms of her contract, complainant was subject to a probationary period of one year. She had been employed on 1 July 2013 and was ordered by her superiors to pack her things and go home with immediate effect on 13 June 2014, within the one year probationary period and before the expiry of the term of her employment contract.

The Foundation for Social Welfare Services (under whose remit the Sapport Agency falls) confirmed that complainant's contract of employment was a definite one for a period of one year, with a probationary period covering the whole term in terms of its policy for Professionals. In line with the same policy, during the probation two reports on the employee had to be carried out, one after four months and the second one during the tenth month of employment.

The Foundation listed a number of problems in the performance of complainant's duties, both in the first report as well as in the second one –specifically referring to incidents in the discharge of her duties, as well as in her relations with her colleagues. The Foundation considered these failures not to be in line with the Foundation procedures.

The Ombudsman investigated the contents of both reports that essentially highlighted alleged difficulties of complainant to carry out her professional duties not only when communicating with clients but also with her colleagues. Complainant had been made aware of her failings after the first report but there wasn't much progress despite the guidance provided through formal supervision sessions, team meetings and other regular consultations. However, complainant still found difficulty in applying work knowledge according to the needs of the clients, including difficulty to understand her role as a Professional Support Worker and act as a bridge between management and support workers. Difficulties in complainant's relations with her colleagues persisted. The probationary report concluded that despite the opportunities given to complainant, the challenges encountered in the first report persisted and additionally there were team problems which made it difficult for the team to function properly. The situation had become intolerable and the report therefore recommended that the probation period be terminated and the contract not renewed.

The Foundation informed the Ombudsman that since complainant was entitled to two weeks' notice period and since it had legal advice that when a contract is terminated while on probation, such period had to be on payment, complainant was informed by letter dated 13 June 2014 that her employment was being terminated while on probation, "... *She (was) nicely told to pack up her belongings and leave immediately*". The Director found out that complainant was still at the Office after almost two hours since being given the letter and he had ordered her to leave.

Complainant's reaction

Complainant submitted that according with the Employment and Industrial Relations Department the one year probationary period in her contract was illegal since, on the basis of the Employment and Industrial Relations Act, that probation should not have exceeded six months. She strongly objected to the way in which her employment had been terminated. She had asked for the reason behind the termination letter since she had done nothing wrong. The Director had told her that no reason needs to be given in case of termination of a contract of employment during the probation period. He had summarily told her to pack up and leave.

She argued that she felt traumatised with this approach because she had never had a verbal or a written warning. She refuted allegations that she had difficulties in building positive relationships with colleagues. She never had clashes during the period covered

by the first probationary report and she contested point by point the negative comments regarding her professional conduct and the quality of her performance contained in both reports.

She challenged the finding that she had not been keeping professional boundaries. She submitted she respected everyone and her Team Leader had always praised her for the support and understanding she (and another colleague) gave to support workers. As far as she knew her behaviour was always appreciated by the whole agency.

Further submissions

Further submissions were made to the Ombudsman both by complainant and by the Foundation alleging reciprocal inaccuracies. The Office did not consider it to be in the best interest of the investigation to open fresh wounds by requesting complainant to comment on each and every point raised again by the Foundation and on which she had already commented. During a meeting with the Foundation she was informed that in essence, the Foundation was sticking to its version of facts as opposed to hers.

Considerations and comments

Having concluded his laborious investigation on a complaint that was highly contested and emotionally charged, the Ombudsman made the following considerations and comments:

1. The contractual probation period was invalid at law. Complainant's definite contract included a probation period of one year, which meant that the whole period of the contract was on probation. Complainant had sought the advice of the Department of Employment and Industrial Relations and she was informed that once her emoluments did amount to, or exceed twice the minimum wage, the probation period should not, in terms of the law, have exceeded six months. In other words, after six months, the probation period should have been ended and she was entitled to continue the contract until its termination (one year). The condition of probation beyond the sixth month was therefore null and void at law. This Office has also been informed that it was contrary to the Collective Agreement applicable in complainant's case.
2. As a result, complainant's dismissal without being given any reason at the time of the termination notice, was also mistaken at law. In fairness to the Foundation, it had acknowledged the mistake and has taken corrective action to amend its probation policy to be in line with the law.

3. The events leading to the letter of termination. The Foundation submitted that it had in a separate case, received legal advice that an employee was entitled to two weeks' notice if the employment was terminated during the probation period. In order to make sure that complainant's contract was terminated with full respect for the required notice period, the Foundation decided to inform complainant on the last working day prior to the two weeks before the end of the contract, that her contract was being terminated. Complainant was informed of that decision by word of mouth and by the letter of termination on the last day. She was also told to pack her things and go home. This had been done at a time while her office colleagues were on outside duties. The Director insisted that he had taken reasonable steps to ensure that her office colleagues were not present at the time to avoid more embarrassment than was necessary, and also that he had spoken to her very politely and calmly.
4. The Ombudsman noted that irrespective of the actual way in which messages were conveyed to complainant on that day, the fact remains that she was directed to pack her things and go. This Office could not find justification for complainant being told to pack her things and go as if she had committed a serious offence which warranted such expeditious action. Proper administration warranted that in such situations, the employee is given the termination notice letter, if necessary informing her that that was her last day at work. She could also have been offered – not ordered - to pack and go home before the end of the working day. Such latter approach would not have in any way have jeopardised the Foundation's interests. While attracting criticism from this Office, this consideration is not meant to imply that the Foundation did not act in good faith, but that the method used was, to put it mildly, not a good example of proper employer/employee approach in staff relations.

5. The termination of complainant's employment. Having established that complaint's contract could not be terminated on the grounds that this was done during the probation period, it had to be stated that in effect complainant remained in employment and was paid right up to the end of her definite contract. This contract did not include any provision for renewal after its expiry, and the Foundation was in no way obliged to renew it, even if, as argued by complainant, this was the Foundation's practice.

The Foundation was within its rights not to renew such a contract, especially if it felt that it was in its best interests. However, good administration requires that a citizen be given reasons for administrative decisions that affect him or her negatively. This is well within the parameters of interpretation of the fundamental right of European citizens to good administration. It was a fact that because of the mistaken probation policy, the Foundation refused to give such reason on the grounds that at law, an employer is not bound to give reasons for its decision to terminate an employment during the probation period. However, the Foundation, subsequently and after complainant sought recourse to the Office of the Ombudsman, explained at length the reasons why it decided to terminate complainant's employment.

Irrespective of any other consideration, the facts remain that the net result was that the Foundation did pay complainant for her services right up to the last day of her definite contract. Even if, for the sake of argument, the Ombudsman were to harbour any doubt one way or another on whether the Foundation acted in its best interest or whether complainant had the right to feel aggrieved, its decision in fact remains that the Foundation acted within its own rights when it did not renew complainant's definite contract. The Ombudsman did not find solid grounds to consider the Foundation's decision as one which amounts to maladministration.

Conclusions and recommendations

On the basis of the above considerations the Ombudsman concluded that:

i) Complainant's employment could not be terminated on the grounds that she was within the probation period, and therefore without her being given reasons for that decision. The Ombudsman noted that the Foundation had recognised its mistake and took steps to change its probation policy to one which in this respect complies with the law. Moreover, the reasons for termination of employment were subsequently given to complainant through this Office.

ii) The sequence of events on complainant's last afternoon at her office did not conform to good employer/employee relations and practices. Even if the Ombudsman believed that there was no bad intent on the part of the administration, he was of the opinion that complainant could have been given the termination notice letter and offered, but not directed or ordered, to go home straightaway.

iii) In effect, complainant was paid up to the last day of her one year contract. Even if the practice at the Foundation was that such contracts were as a rule renewed, there was no obligation at law for its renewal. The fact remained that whatever the truth

was in respect of the diametrically opposite versions given by the two parties prior to the Foundation's decision to terminate the contract of employment, such doubt did subsist and the Ombudsman was not therefore in a position to declare that the Foundation's decision amounted to maladministration.

iv) Without prejudice to the above conclusions, there was no reason to suspect that what complainant argued was a genuine expression of her honest belief. Moreover, in this case the Foundation mistakenly declared her as having her contract terminated during the probation period – both in the termination notice as well as in its report to ETC submitted in terms of law. Such a statement seriously prejudices her chances of future employment. Since the reason for the termination was not valid at law, the Ombudsman recommended that the reason given to ETC be withdrawn and replaced by one which stated that the reason for termination was expiry of the definite contract.

v) The Ombudsman further recommended that the Foundation send a letter to complainant explaining that her employment was terminated on expiry of her definite (one year) contract. This would be less damaging than a statement to the effect that her contract was terminated during the probation period.

The Ombudsman was subsequently informed by the Foundation for Social Welfare Services that his recommendation had been accepted and implemented.

Case Note on Case No P 0178
Commissioner of Police

Elements of improper discrimination

The complaint
A senior police officer objected to a decision by the Commissioner of Police not to authorise the inscription of his name and rank on a commemorative plaque in the police depot. The complainant felt aggrieved because he had always performed his duties responsibly, honourably and with competence. He submitted that the Commissioner's hasty decision not to authorise the inscription of his name on the plaque was due to personal pique and rumours that put the police corps in a very bad light. He also alleged he was a victim of improper discrimination.

Commissioner's reply
The Office of the Commissioner of Police strongly objected to these allegations. It submitted that the Commissioner's decision was solely based on the context, tradition, precedent and loyalty towards historical correctness of what is usually registered on similar plaques. He further submitted that there was no doubt that complainant did not occupy the position that entitled him to have his name engraved on the plaque.

The investigation
This Office investigated the complaint in detail. It examined the documentation submitted by the Commissioner of Police, including research studies made by experts in the history of the Police Corps. The research was correct and trustworthy. The Ombudsman concluded that the decision of the Commissioner was well founded and that the complaint was not justified on the grounds of historical precedent.

The Ombudsman then examined the allegation that the Commissioner of Police has improperly discriminated and was therefore guilty of maladministration motivated by pique or personal manoeuvres.

The Ombudsman made the following important observations on the elements of improper discrimination:

1. There cannot be improper discrimination, resulting from an act of maladministration, if the decision that aggravated complainant was taken in an objective manner, was reasonable and well-motivated. It was established that the commemorative plaque had been and was being used according to constant and uniform practice. One had necessarily to conclude therefore that the decision was objectively correct. There was no evidence that the decision was taken with the aim of aggravating complainant or for any reason dictated by prejudice or other ulterior personal motivation.
2. The decision was also well motivated. The reasons for the Commissioner's decision were objectively valid and unequivocal.
3. In examining whether a decision was improperly discriminatory, one had to establish whether it was reasonable. One had to analyse whether complainant had suffered prejudice that was disproportionate to the administrative decision taken. The facts of the case were not such as to sustain the test of "*unreasonableness*". It did not result that it was motivated by irrelevant considerations or ulterior motives. It was a decision taken by the competent authorities through a correct exercise of their discretion, to determine whose name should be inscribed on the commemorative plaque that ultimately only registered a historical fact.

Conclusion

The Ombudsman therefore concluded that the decision of the Commissioner of Police could not be qualified as an act of maladministration or of improper discrimination. The complaint was therefore dismissed.

Case Note on Case No O 0240
Enemalta Corporation

Disciplinary sanction excessive and discriminatory

The complaint

A professional officer employed with the Enemalta Corporation (now Engineering Resources Limited) complained that he had been discriminated against because he had been accorded a punishment by management which was, in his opinion, too severe. He had been transferred to another section when a verbal warning or a fine would have been adequate, especially considering that the offence that he was charged with was the only one he had committed since he had joined the Corporation. Complainant also felt aggrieved that the Corporation did not respect the time limits imposed in the Collective Agreement to allow him to put forward justifications in his defence. He also insisted that the action taken in his regard was discriminatory since other employees who had committed far more serious abuse, had not been similarly punished but had merely been given a warning.

Complainant therefore requested that:

1. his transfer be reversed;
2. he will be compensated for the shift allowances and overtime lost because of his vindictive transfer, possibly politically motivated; and
3. he is compensated for the unjust transfer he received because of the small infringement he committed.

The infringement

Complainant admits that, while he was working from home, he had mistakenly sent a Corporation internal email to a friend's email address. That email, containing information relating to work practices, ended up in a journalist's blog, allegedly without complainant's knowledge. The Corporation considered this fact to be in breach of the Collective Agreement and a serious offence since it constituted divulgation of

Corporation information without authorisation. It strongly objected, his claim of improper discrimination and not being given a chance for a fair hearing.

The investigation

From enquiries carried out by this Office it resulted that Enemalta had concrete proof from the IT records that the email in question originated from complainant's email account. Confronted with this evidence and given adequate time to defend himself, complainant admitted his guilt and excused himself for forwarding an internal email outside the Corporation although he had just forwarded it to a friend and not to the media. He submitted that, whilst the act was deplorable and to be condemned, he thought his punishment in terms of a transfer was a way too harsh.

Considerations

The Ombudsman considered that there was no issue as to complainant's guilt. His admission was freely made after he had been given the opportunity to put up a defence. In the circumstances there was no need for the Corporation to refer complainant to a Disciplinary Board since the merits of the incident and complainant's responsibility had already been clearly established. The Ombudsman noted that the Corporation was correct in maintaining that the sending of an internal email outside the Corporation constituted a serious breach of the Collective Agreement which lays down that all officer, irrespective of grade, are expected to be loyal to the Corporation. They should not at any time, during or after termination of their employment, divulge any information pertaining to the Corporation to anyone except during the ordinary course of their employment. The gravity of any breach of these basic rules is underlined by Article 11.3.2 of the Agreement that provides that "*Officers not observing rules of confidentiality will be liable to disciplinary action which may include dismissal and/or prosecution in terms of the law*".

Consequently, once complainant himself had confessed to having committed the unauthorised disclosure, the Ombudsman could not criticise the decision of management to transfer him from his current position to another posting. The transfer could not be considered as punitive or vindictive. The Ombudsman could not criticise management, who was obliged to ensure that similar instances did not occur and was therefore required to remedy the situation immediately. The position occupied by complainant was one of great responsibility, requiring a certain amount of trust and reliability. The higher the post occupied by an employee, the greater will be the level of trust and degree of reliability that would be expected of him.

Complainant had alleged that he was a victim of political discrimination, even though no evidence was forthcoming on this score. The Ombudsman however made it clear to him that his Office could not investigate such allegations and, if complainant was convinced that the transfer was politically motivated, he had to raise the matter with the appropriate authorities.

The Ombudsman similarly could not embark on a comparative exercise of penalties imposed on employees for different misdemeanours. The appreciation of the gravity of the offence and of the punishment that should be meted out to offenders, lies within the discretion of the Corporation as employer. The Ombudsman would not interfere in the exercise of that discretion once it is clear that the punishment meted out to complainant was well within the maximum penalty of a discharge from employment laid down in the Collective Agreement for such an offence.

The Ombudsman declared that complainant had not sustained his complaint and therefore dismissed it.

Case Note on Case Note No O 0329
Armed Forces of Malta

Discharge from AFM challenged

The complaint

A member of the Armed Forces of Malta filed a complaint with the Ombudsman alleging that he suffered an injustice when he was discharged after he had served his term in prison following a court judgement. He maintained that the discharge was unjust.

Considerations and conclusion

1. The Ombudsman informed complainant that the Ombudsman Act gave the Ombudsman jurisdiction to investigate complaints that were filed by members of the Armed Forces only in respect of appointments, promotions, salaries and pension rights as laid down in the First Schedule of the Act.
2. One cannot in any way conclude that the complaint fell within these limits of the Ombudsman's jurisdiction. It was within the discretion of the Commander of the Armed Forces to terminate complainant's army service because of the court proceedings and the eventual judgement against him.
3. Such cases are regulated by Legal Notice 91 of 1970 that contains regulations on the Appointments and Conditions of Service of the regular forces of the Armed Forces of Malta. Regulation 45(1)(e) lays down that:

   "*Service with the force can be terminated in cases and manner herein provided:- a man of the force that during his service is condemned*
   (1) from the Civil court or a court martial to prison; or
   (2) from a civil court to detention; or
   (3) from a court martial for a period of detention that when confirmed, is for twelve months or more;

shall be discharged from service except if in the opinion of the Commander his retention in the service is necessary in the interest of the service."

4. Complainant had been condemned to prison by a Civil Court therefore he was liable to be automatically discharged from the service. It appeared that the Commander did not feel the need to make an exception in his case and therefore complainant could not remain in the service.
5. The Office sought to help complainant to seek redress through the Department for Employment and Industrial Relations. However, it transpired that, since he was a member of a disciplined force, he could not be considered to be an "*employee*" within the definition of the Employment and Industrial Relations Act. In fact Article 2 of that Act defines an "*employee*" as including a person who is employed or who is normally employed or who is seeking employment with any government department, *except if he is a member of a disciplined force*. Complainant could not therefore contest his discharge from the Army before civil tribunals because legislation governing industrial relations did not apply to members of the Armed Forces.

For this reason the Ombudsman could not proceed with the investigation.

Case Note on Case No P 0097
Housing Authority

Claim for payment of gratuity justified

The complaint
A public officer detailed with the Housing Authority felt aggrieved that he had not yet been paid the gratuity due to him in terms of the Collective Agreement applicable to employees of the Authority, notwithstanding that he had been assured in writing in April 2014 that following his retirement he would be entitled to it.

Complainant alleged that subsequent to that letter, the Authority requested him to sign a declaration accepting the status of permanent employment with the Authority that would result in an improvement of his pension rights. This however on condition that he renounces to the gratuity payable. He argued that he was caught up in a situation of uncertainty and pressure and consented to sign that renunciation "*on faith*". As a matter of fact he later withdrew his consent to such renunciation. In doing so he felt comforted by the Attorney General's opinon that the issue of payment of the gratuity and the grant of permanent employment with the Authority were two separate issues, and that as a result, he was entitled to both.

Facts and findings
During the investigation the following basic facts were established:

Since 1975 complainant was a public officer in a substantive grade in Salary Scale 10 when in 1983 he was officially detailed in terms of the law to serve at the Authority where he had worked for 31 years. He reached retirement age on 18 July 2014. As a public officer who started providing a service to Government prior to 1979, he was entitled to a Treasury Pension.

By letter of 17 April 2014 the Chief Executive Officer and the Chairperson of the Authority informed complainant that as a detailed public officer he was subject to the remuneration and conditions of services pertaining to Housing. They stated *inter alia* "*Therefore according to the conditions of the Housing Authority's collective agreement, on retirement you are entitled to a gratuity sum which is based on one week's pay per year of service. This means that you will receive a gratuity sum amount to €12,396.44 on retirement being 31 years of service with the Authority, given that such service has been provided since 1983*".

Employees of the Authority, including detailed public officers could also seek to become permanent employees of the Authority. This is beneficial to the public officers since in terms of sections 8A and 8B of the Pensions Ordinance, it offered them the chance of a possibly enhanced treasury pension, higher than that to which they would otherwise be entitled to on the basis of their substantive grade in the public service. Complainant therefore expressed his interest to become a permanent employee of the Authority with a view to claiming this additional benefit.

Following complainant's request to be recognised as a permanent employee of the Authority, he was called at the Office of the Authority where he was informed that it would offer him the grant of permanent employment on condition that he renounces his right to the gratuity.

On 15 July 2014, that is three (3) days prior to his retirement, complainant accepted to be considered as having permanent employment with the Housing Authority and renounced the gratuity sum that had previously been offered to him. He also declared that that acceptance should be considered in full and final settlement of any other percunary rights pertaining to him.

Complainant subsequently withdrew his renunciation and continued to insist on having both the gratuity and the permanent employment since according to the advice of the Attorney General, these were separate issues. He maintained that he had been summoned to the Office of the Authority at short notice, that he was not represented by a lawyer and that he had had signed the document renouncing to the gratuity under pressure because he feared he would lose the opportunity of permanent employment with its benefits.

The Authority categorically denied all allegations made by complainant and in particular that he had renounced to the gratuity to which he was entitled under pressure.

The Authority and the OPM took divergent positions on the issue of gratuity. This results clearly from an exchange of letters between them. On 18 March 2014, three (3) months prior to complainant's retirement, OPM informed him that necessary action was being taken from its end so that he would be granted permanent employment with the Authority. Complainant was subsequently (on 10 April 2015) informed by email by the Authority as follows:

> "*I was directed to inform you that the Housing Authority has taken note of your acceptance of permanent employment and will inform PAHRO accordingly.*
> *With reference to the gratuity sum, please refer to the attached document which you have signed.*"

This document was of course the renunciation letter.

On 21 April 2015 OPM reiterated to the Authority as follows:

> "*This Office is also aware that the issue regarding the terminal benefit due (to complainant) has not yet been resolved. May I point out once more that according to our legal advice, which was communicated to you by means of an email dated 30 January 2015, the issue of the terminal benefit and the issue of (complainant's) permanent employment are two distinct matters and one does not necessarily exclude the other.*
>
> *As you will no doubt appreciate, this issue has now been outstanding for a very long time and therefore it would be appreciated if the necessary action is taken so that this matter will be concluded as soon as possible.*"

The Authority's reaction

On its part, the Authority insisted that complainant already had a treasury pension and had he not opted for permanent employment, it was willing to pay him the gratuity. It stressed that it had never argued that eligibility to a treasury pension and to the gratuity were mutually exclusive. As clearly agreed to by PAHRO, the discretion as to whether complainant should be paid the gratuity once he had accepted the offer of permanent employment, lied exclusively with the Authority. On its part, the Authority had made it clear that if it had instructions to pay the gratuity in addition to the grant of permanent employment, it would have done so. However, PAHRO left this decision to the Authority at its (the latter's) discretion.

The Authority considered that it had a moral and a legal duty to manage its funds according to law. It queried how it could pay a gratuity sum to one of its permanent employees when complainant was not legally considered to be its official employee and who had only acquired the status of a permanent employee one day prior to his retirement. The Authority further reminded that as a result of granting complainant his permanent employment status, it will have to fork out, on a monthly basis, the resulting difference in his higher treasury pension.

Considerations and comments

The Ombudsman identified that in this case the issue was whether the Authority was justified in withholding the gratuity, which it had originally committed itself to grant complainant, on the grounds that he had renounced to it in order to be granted permanent employee status.

The exercise of discretion

In his final opinion the Ombudsman discussed the arguments that he considered to be relevant and determinant to the outcome of the investigation in the exercise of discretion by the public authority. The Ombudsman first considered the submission by the Authority that it was only exercising a discretionary power when it decided whether complainant should be paid the gratuity once he had accepted the offer of permanent employment. PAHRO declined to take the decision itself and left this matter to the discretion of the Authority.

Discretion is a right that management often has, but which carries with it the responsibility for it to be exercised properly that is fairly and objectively with full respect for the principles of good administration. Indeed it would appear that the Authority recognised this principle when it pleaded that it had a legal and moral obligation to utilise its funds according to law.

The Authority's difficulty in accepting complainant's claim was that it was in a situation where there was no precedent. It was being made to contribute to complainant's treasury pension and at the same time grant him a gratuity normally given to the Authority's employees who were not public officers and who therefore were in no way entitled to a treasury pension.

Essentially the question was whether complainant, as a permanent employee with the Authority, was entitled to either one or the other benefit or, as claimed by him to both.

Complainant entitled to gratuity

There is no doubt that as a public officer detailed with the Authority, complainant was entitled to the gratuity based on his years of service with the Authority. The Authority, accepted that *de facto* he was on its books. As such the right to such gratuity had all along been accepted by the Authority and this entitlement has never been challenged.

It is regarding the issue of grant of permanent employee status that the exercise of discretion by the Authority, if such discretion did in fact exist, came under deeper scrutiny. Here the Authority was treading on virgin soil since complainant's case was the first one of its nature. Moreover, it was also possible that there would be other employees who could claim such status and gratuity at the same time.

PAHRO had "*asked*" the Authority "*to offer*" permanent employment to complainant and this was before complainant was due to retire. PAHRO confirmed to the Ombudsman that, when it used the term "asked" it was in effect giving a direction to the Authority. It was the policy for such detailed officers to be offered permanent employment by their respective agency.

Question to be resolved

The question remained whether the Authority was correct in imposing such condition. It defended its conditional grant on the following grounds:

(a) how could it justify the issue of a gratuity sum for the period in which complainant was not considered to be one of its employees; and

(b) whether it made sense that complainant's service between 1983 and 2014 be reckoned by both the public service and the Authority and how could he benefit from both institutions, when he had given the service to one institution only.

There is conclusive evidence in the letter of 17 April 2014, only three months before complainant's retirement, that the Authority recognised that complainant even if not yet a "*permanent employee*" with it, was entitled to the gratuity. There was no condition attached to this declaration. The Authority was correct in giving this matter serious consideration in respect of which it had moral, administrative as well as legal responsibilities to ensure proper utilisation of resources. However, the Ombudsman considered that while there were undoubtedly administrative and financial obligations on the part of management, these were not to be used as a means to deprive an employee of any entitlement to any benefit or benefits unless there were specific, inherent conditions attached to such

entitlements that needed to be satisfied. In this case, it was manifestly clear that neither the right to a terminal gratuity nor the potentially enhanced service pension resulting from permanent employment in terms of the Pensions Ordinance, were subject to any conditions other than what was stated in the memo to the Collective Agreement applicable to all the employees of the Authority. In April 2014 the Authority granted this entitlement to complainant without any condition whatsoever.

Official policy

The investigation showed that it was official policy of Government to direct entities (with whom a public officer has been detailed in terms of the law) to offer permanent employment to these officers so that they might, if this was the case, benefit from a possible enhancement of their Treasury Pension. Again it did not result that any conditions were to be attached to such permanent employment. In fact in terms of Section 8B of the Pensions Ordinance, the employee would be resigning from the public service to take up permanent employment with the entity. As such, the practice was that all such employees, if they so wished, had the right to benefit from such provision of the Pensions Ordinance[1]. The Ombudsman therefore concluded that he had serious reservations on the position taken by the Authority when it requested complainant to renounce to the gratuity if he were to be granted permanent employment.

The Ombudsman found no evidence to support complainant's statement that he had signed the letter renouncing to his gratuity under duress. He had no reason to doubt that complainant was fully aware of what he was doing but he signed because of fear of losing his right to a potential enhancement of his Treasury pension. Indeed on realising the consequences, he withdrew his renunciation very soon afterwards.

Administrative shortcoming

The Ombudsman finally considered the allegation that complainant felt pressured by the way he was summoned to call at the Office of the Authority and presented with the document renouncing to the gratuity if he wanted to be granted permanent employee status.

1 In fact it results that years earlier (in 2001) the Authority had requested complainant to indicate whether he was interested in terminating his employment in the public service and be employed directly with the Authority. At this time, complainant declined this offer.

The Ombudsman considered that, though legally in order, this was not the fairest administrative way to do things especially when important financial matters which have a serious impact on the future of an employee had to be decided. Good administration demanded that in such situations management could have given an advance copy of the document that the employee was requested to sign and invited him to send it back or present it later. Though the Ombudsman saw no reason to doubt the Authority's version that it had explained fully to complainant the implications of his signature, and that complainant understood or should have understood them, it was in his opinion a fact that he was not given adequate and reasonable time to reflect prior to signing the declaration renouncing to the gratuity.

The Ombudsman did not doubt that the Authority acted in good faith but certain things should have been done in a better and fairer way.

Conclusion
The Ombudsman therefore recommended that the Housing Authority pays complainant the gratuity due to him in terms of the collective agreement in addition to the permanent employee status which had since been approved.

That recommendation was without prejudice to the Authority's rights to withdraw its offer to pay complainant *in lieu* of his not having gone on pre-retirement leave as a public officer. This because this did not constitute an entitlement in terms of the conditions of service of the Authority's employees under the same agreement through which the gratuity was payable.

Case Note on Case No P 0224
Ministry for Gozo

Multiple complaints successfully addressed

The complaint
An employee within the Ministry for Gozo complained with the Ombudsman regarding various problems he was facing following his transfer from the Gozo Culture Office to the Central Salaries and Pensions Section within the same Ministry.

The facts
The complainant stated that his transfer had resulted in excessive stress and on the advice of his psychiatrist consultant he went on sick leave, having been certified of suffering from symptoms of anxiety and depression. His consultant advised that he be assigned to perform other duties, possibly in a different department. Complainant went on sick leave and requested to be transferred to another department. Subsequently, he also put in a request to be transferred to a Non-Governmental Organisation (NGO) in Gozo in line with OPM Circular 5/2015 - Expression of Interest from public employees to be released to work in voluntary organisations.

Complainant stated that he did not have a reply to his request to be transferred to another department while his application to work with the NGO could not be approved unless a replacement was provided. As a result he had exhausted his sick leave entitlement on full pay and had to avail himself of his vacation leave. Eventually he requested to utilise his unutilised time-off entitlement. Complainant's request was at first refused despite his insistence that he was applying on health grounds. He appealed that decision but was informed that there had been no official approval of the work carried out by him which entitled him to time off in lieu.

The investigation

The Ombudsman tackled the multiple issues raised by complainant when investigating his complaint during discussions with Public Administration HR Office (PAHRO). The issue of time off in lieu was resolved and complainant was allowed to utilise his entitlement in this respect and could remain on full pay. This left the outstanding issue of complainant being refused a transfer to another department/release to work with an NGO. The Ombudsman sought the reaction of the Gozo Ministry and requested to be informed of the reasons why complainant's request had been refused. The Ministry replied that the back office unit within the Central Salaries Section where complainant was presently deployed was at that time short staffed. That section was responsible for salary emoluments in respect of all employees serving in the various government departments in Gozo. The function that that section was required to perform was of a critical nature and the impact of things going wrong in the payroll process could potentially be huge.

The Ministry informed the Ombudsman that the operations of the Central Salaries Section were governed by a service level agreement entered into between the Ministry for Gozo and PAHRO. That agreement articulates a clear statement of intent between both parties to provide the fine level of service against the set service deliverables. In particular, the service level agreement specified in the HR complement of the section stipulated that changes thereto could not be effected by either party. Substantial amount of specific training had been provided to the staff attached to this section so as to reach current service levels. For these reasons complainant's request to be transferred from the Central Salaries Section and to be released to work with a Voluntary Organisation, in terms of the PAHRO Circular quoted by him, could not be entertained unless a proper replacement was provided.

The complainant rightly queried whether such a request for a replacement had been made by the Ministry to PAHRO. Moreover, at that stage complainant raised a new issue namely the refusal to accept his request to utilise unutilised sick leave, a refusal that was motivated by the assertion that his medical condition did not qualify as one of the conditions listed that would entitle him to such a concession. A motivation that complainant considered to be totally incorrect and not in conformity with his consultant's opinion on his medical condition. The Ombudsman requested the Gozo Ministry to further investigate these submissions.

The Office of the Director General (Operations) at the Ministry sought medical advice on the matter and on the strength of that opinion, reiterated its position since complainant's condition did not qualify as one of the conditions to allow an employee to utilise unutilised sick leave. The Ministry maintained that on the basis of the medical advice, complainant's request in this respect could not be entertained. The Ministry informed the Ombudsman that it has received a request from an officer who was currently attached to the Inland Revenue Department in Gozo and which fell under the Ministry for Finance, to be transferred to the Ministry for Gozo. The Director General (Operations) asked complainant whether he would be willing to be swapped with this officer and the complainant replied in the affirmative. The main pending issue of complainant's transfer had been resolved.

To complete the investigation the Ombudsman also sought an independent opinion of an eminent Psychiatrist to resolve the conflict in interpretation about complainant's medical condition. That opinion in substance confirmed that the advice given by the expert consulted by the Ministry was correct.

The Ombudsman therefore considered the various complaints raised to have been positively resolved. In his conclusions he noted that he considered that the authorities should have exercised more diligence and carried out proper investigation, prior to their original rejection of complainant's request to avail himself of unutilised time off in lieu. In this respect the complaint was justified and the matter had been immediately rectified following the intervention of this Office.

The Ombudsman reflected that the authorities should be more pro-active when faced with requests based on health grounds, even if the exigencies of the service and related situations would at first sight indicate that there are major difficulties in acceding to similar requests. This was not to be interpreted that such requests should be granted to the detriment of the service. The authorities had the right in the first place to verify sickness absenteeism in terms of public service policies and procedures. However, they should act as promptly as possible to reach fair and equitable decisions in the face of illness of employees in full respect of the exigencies of the service.

Case Note on Case No P 0242
Transport Malta

Unfit to drive

The complaint
Complainant sought the Ombudsman's intervention to contest a request by Transport Malta asking him to provide medical evidence of his continued fitness to drive a motor vehicle. That request had been made following an anonymous report to the authority drawing its attention to complainant's physical condition.

The facts
Complainant contested Transport Malta's handling of his case on the following grounds:

1. Transport Malta was not consistent in respect of whether one or more reports had been lodged with it;
2. He objected to Transport Malta's decision to place the onus of proof regarding his fitness on him;
3. Transport Malta did not state what verification it had made on the report/s; and
4. Transport Malta did not state what it meant by a "*satisfactory*" medical certificate.

Complainant further queried who would foot the bill if it was proved that he was medically fit and what steps would be taken by Transport Malta if the report proved to be false.

The investigation
The Ombudsman considered the complaint. He informed complainant that his Office understood that it was an important function and the responsibility of Transport Malta to ensure road safety for all road users including that of ensuring the medical fitness of all persons to whom it grants a driving licence. Paragraph 2 of Regulation 33 of the Motor Vehicles (Driving Licences) Regulations (Legal Notice 191/2002 as amended) provides that:

> *"A national driving licence holder may periodically be required to produce further medical certificates as may be prescribed".*

While Transport Malta has its responsibilities, a driver is morally and also legally responsible to abstain from driving if, following the issue of a driving licence, he/she develops a condition which in terms of existing criteria bars him from driving. The Ombudsman alerted complainant regarding the legal implications if an applicant for a driving licence failed to declare to his doctor any medical condition which could bar him from the issue of a licence or if he/she submitted any declaration which he knew did not correspond to the truth.

On the other hand, Transport Malta stated its position very clearly as follows-

> *"In view of the fact that the driving licence is not renewed on an annual basis, it is more than possible that licence holders state of health changes during the course of time prior to the renewal of the said driving licence and the Authority is in duty bound to make the necessary verifications in order to ensure that the good state of health enjoyed by the licence holder which has permitted him/her to be issued with a driving licence, continues to prevail during the term of the validity of the driving licence and that the continued use thereof poses no threat neither to himself nor to others."*

Moreover, Transport Malta confirmed that in the continuous exercise of its functions to ensure road safety-

> *"There have been numerous cases in the recent past of traffic accidents which have occurred (amongst them unfortunately with fatal consequences) which have been determined to have been caused by the poor state of health/peculiar medical conditions of some drivers. Hence it is the duty of the Authority to treat all reports received with regards to the state of health of driving licence holders with the utmost seriousness, especially where, in the light of the circumstances of the case, the Authority has reason to believe that such a report is well-founded."*

Transport Malta underlined that the report lodged with regard to complainant fell under this category. It assured this Office that it has given due consideration as to whether the report on complainant was genuine and it had concluded that it was so. Transport Malta had also confirmed that the person who filed the report is known to the Authority and

that the necessary verification had been made. It was further ensured that the report had been made in good faith.

The Office informed complainant that he would not enter into the issue of who was responsible to pay the expenses if the report filed against him proved to be not confirmed, once it has been established that the action taken by Transport Malta was deemed to be administratively correct.

No counter comments were received by complainant to the position taken by Transport Malta and the Ombudsman closed the case.

Case Note on Case No O0239
Malta Film Commission

Irregular employment with Public entities

The complaint
A part-time cleaner with the Malta Film Commission filed a complaint with the Ombudsman stating that her employment with the Commission, a public entity, had not been regularly registered with the Employment and Training Corporation (ETC) and that it had failed to send in a Commencement of Employment Form. As a result of this failure, she was not receiving any pension even though she had regularly paid the National Insurance contributions. She further complained that the new Film Commissioner appointed after March 2013 was refusing to regularise her position.

The facts
During the investigation it was established that complainant was correct when she maintained that there was no regular, written contract of employment when she was engaged. In fact the present Film Commissioner informed the Office that-

> *"1. Her employment did not follow proper Government procedure, since there was no approval from the Permanent Secretary of the relative Ministry, no approval from PAHRO (OPM) and ETC were not involved.*
> *2. I found no contract related to her employment.*
> *3. Her employment was never registered with ETC."*

The internal investigation had established that the previous Commissioner "*did not follow proper procedure when he employed (complainant)*".

Considerations and conclusions

The Ombudsman reviewed the laws and regulations governing employment with public entities. He referred to Sub article 6 of Article 110 of the Constitution that stipulated expressly that "*recruitment for employment with any body established by the Constitution, or by or under any other law, or with any partnership or other body in which the Government of Malta or any such body as aforesaid, have a controlling interest or over which they have an effective control shall, unless such recruitment is made after a public examination duly advertised, be made through an employment service as provided in sub article 2 of that Article*". That employment service to which the Constitution refers is the ETC.

There is no doubt that complainant was employed in the public sector and her engagement should therefore have been done through the ETC following established procedures.

Those procedures required a formal method of employment irrespective of whether the person was to be employed on a whole time or a part time basis, or a definite or indefinite period, or on probation. It resulted that complainant had not been regularly employed. Her employment was deemed informal and therefore irregular, even though her National Insurance contributions had been regularly paid.

The Ombudsman found that the Film Commission had failed to observe established procedures and as a result, the rights of complainants to receive a national insurance pension might have been prejudiced. This failure that violated the Constitution, was considered by the Ombudsman to be a serious one and drew the censure of his Office. The Ombudsman concluded that the present Film Commissioner had the duty to remedy the situation. It was not right that an employee, who had given years of faithful and responsible service, should have her employment and her right to a decent pension prejudiced.

Recommendation

The Ombudsman recommended that the present Commissioner should take steps to remedy the situation. He recommended that the employment of complainant should be duly registered with the ETC and that she is given a formal contract of employment with all conditions and benefits due to her at law, backdated to the day when she was first engaged. Her pension rights should be fully safeguarded and guaranteed.

Case Note on Case No 00260
Public Service Commission

PSC - Monitoring of Faulty Selection Process

The complaint
A complainant sought the intervention of the Ombudsman after that she had unsuccessfully petitioned the Public Service Commission following the outcome of the call for applications for the post of Head of a particular area within the Department for Educational Services. She had failed the interview for the post by 1.5% of the marks and all the candidates who had passed had been appointed. Had she obtained a pass mark she would have been appointed as according to her there was still a vacancy to be filled.

The facts
When she originally submitted her petition to the Commission she presented numerous and voluminous arguments why her marks for the criteria and sub-criteria on which the interviews were conducted should have been higher, adding that in a previous interview for the same post she had obtained 66.5%. She did not accept that after two years of further experience her potential had diminished. She also alleged bias in the award of her marks which she considered were offensive and humiliating.

The Commission examined her petition but found no valid reasons to justify a change in the result of the selection process. However it offered complainant the opportunity to present material facts which relate to the points already made by her in her original petition which facts might warrant a change in the Commission's conclusions.

The Commission also gave her a detailed reply to most of her arguments in respect of marks awarded to her for the criteria/sub-criteria and justified the Selection Board's conclusions in this respect.

Complainant wrote back reiterating her original arguments. She presented to the Commission a number of testimonials which were highly laudable in support of her claims to her skills and competencies relevant to the post. She queried why certain achievements in her substantive post were recognised for some criteria but not for others.

She also queried why other candidates who did not have her experience were given marks for the relative sub-criterion.

PSC sustains selection process

The Commission did not accept the petitioner's[2] argument regarding her better result at the previous interview arguing that one cannot compare the marks obtained in a previous interview for the same criteria and for the same post – this because the methods and standards of assessment applied by different boards may differ. Moreover the applicant's performance may vary from one selection process to another. The Commission challenged one of complainant's arguments that in the performance of her duties there were never any complaints against her. The Commission referred to a transfer which complainant had received because of complaints. The Commission also refuted complainant's claim to her role and achievement in respect of a particular programme. Her claim in this respect had not been corroborated by her superior officers.

The Commission, besides rejecting the petitioner's claim for higher marks for each of the sub-criteria, also refuted another claim regarding the composition of the Selection Board. The Commission found that the composition of the Board was in accordance with the relevant policies and regulations. It also rebutted complainant's claim regarding an alleged conflict of interest of a member of the Selection Board in respect of one of the selected applicants, also arguing that since that applicant had not placed first, and there was only one vacancy, this was of no consequence.

The Commission also informed complainant that it could not accept new arguments which were not mentioned in the original petition. Nor could it accept a re-statement of objections to which the Commission had already replied. The Commission considered that the arguments raised by the petitioner in her counter reply represented issues of a subjective nature which had already been addressed by the Commission. It added as follows:

2 The terms 'complainant' and 'petitioner' refer to the same person.

"The Commission would request particular justification to substitute the assessment of the Selection Board with the self-assessment of candidates. Such justification is not present in this case."

The Commission also refused to accept the testimonials presented by the petitioner arguing that in terms of the call for applications these should have been submitted with her application before closing date of the call for applications. On these bases the Commission confirmed its preliminary decision and closed the case.

The investigation

During a meeting at this Office, complainant requested the Ombudsman to call as witnesses the official who had mentioned that she had been transferred because of complaints, as well as the person who had provided the programme on the basis of which she had additional marks – in order to attest her vital contributions to the programme, contrary to what had been stated by her superior officers.

Complainant's former Head confirmed that there was nothing in complainant's files which indicated that there had been complaints against her. Even if in the Head's opinion, complainant was assertive, she had not requested that complainant be transferred.

Regarding the particular programme in respect of which her superiors had downplayed the importance of complainant's role, the Ombudsman obtained reliable written confirmation that complainant's role in this programme was crucial and it was through this programme that this was provided free of charge by the suppliers to the Education authorities.

Further clarification requested

The Ombudsman also received two separate written declarations from third parties (who were ready to confirm on oath) who attested to the negative attitude of the Chairman of the Selection Board towards complainant. One of these was to the effect that the Chairman had advised a colleague of complainant to beware of her company. The other attested to the same Chairman shouting at her.

The Ombudsman brought the above information to the attention of the Commission and requested it to clarify these issues since the new evidence did not corroborate what had been presented to the Commission and moreover raised doubts on the alleged conflict of

interest on the part of the Chairman of the Selection Board. In addition the Ombudsman referred to the Commission's statement that, in so far as one of the successful applicants, any potential conflict of interest would have been immaterial since this applicant had not placed first and there was only one vacancy. Subsequent facts proved that complainant had been correct when she stated that there were additional vacancies such that all those who passed had been appointed, while she had failed by only 1.5% of the total marks. Had she obtained a pass mark she would have been appointed.

The Ombudsman also sought further clarifications from the Commission regarding its refusal to consider the testimonials presented by petitioner since complainant had presented these testimonials to justify her arguments to rebut those presented by the Selection Board and which led the Commission to reject her original petition. The Ombudsman noted that the petitioner could not have had any previous knowledge of the Selection Board's justifications of the low marks awarded to her. In this respect the Ombudsman also informed the Commission that his Office could not understand the Selection Board's statement in respect of the testimonials, that it was not in a position to distinguish "*between positive evaluations and polite good byes*". The Ombudsman considered that the very highly positive statements made in the testimonials could not by any stretch of imagination be dismissed as polite goodbyes since even a layman can see the difference – the Selection Board's statement did not reflect positively on the person/s who made it.

The Ombudsman further requested the Commission to clarify why the Selection Board opted to ignore complainant's experience outside the duties of her substantive post but the same Board had at the same time pleaded such experience to justify marks given to other applicants. Nor had there been a rebuttal of the petitioner's claim in respect of lack of experience of some of the successful candidates. Clarification was also needed in respect of how marks had been awarded for the sub-criterion '*Other qualifications relevant to the post*' since complainant had submitted several additional qualifications, copies of which were presented with her application (as verified by this Office). The Ombudsman added that a great majority of other applicants were given a higher mark than complainant for this sub-criterion.

Validity of selection process result extended

Finally in view of the seriousness of the claims involved, this Office requested the Commission to extend the validity of the result of the selection process until this case was concluded.

In its reply the Commission immediately agreed to extend the validity period of the Selection Board's result. While it informed the Ombudsman that it considered that the Selection Board had acted in a consistent manner and was diligent throughout the interviewing process, and moreover that it (the Commission) deemed that all relevant points raised by the petitioner had been addressed by the Selection Board, it had however requested the Board to give a detailed breakdown of how it had awarded marks under the sub-criterion '*Other qualifications relevant to the post*' for each of the first six placed candidates.

At this stage the Ombudsman perused the Commission's file and did not find any evidence of a discussion (if indeed there was one) within the Commission on the queries raised by this Office even if the Ombudsman's queries had been presented to its members. In fact in its letter to the Chairman of the Selection Board requesting the information referred to above, no mention was made of the queries raised by the Ombudsman. However, the Chairman of the Selection Board, in his reply alleged that the complainant had lied to the Board and that there was a big difference in the marks between complainant and the successful candidates. In respect of the marks for additional qualifications, the Chairman added that the Board gave weight to the average effect which a particular qualification would have on the service provided. The Ombudsman noted that in effect, this reduced a clearly objective sub-criterion into a subjective assessment. The Board had rated all complainant's additional qualifications at minimal level and gave her 5 marks when the other candidates were given marks ranging between 10 and 15.

Considerations and comments

The Ombudsman considered that the Commission gave due consideration to all the points raised in the petition addressed to it by complainant, whether all the relevant information been considered and whether there was anything in the process of deliberation on the petition that should lead the Ombudsman to conclude that it was contrary to law or unreasonable or unjust, oppressive or improperly discriminatory, or was based wholly or partly on a mistake of law or fact or was otherwise wrong.

Due consideration to all points raised in complainant's petition

The Ombudsman deemed that in line with its practice, the Commission had requested the Selection Board to give specific comments on the points raised by the petitioners and which pertained to decisions taken by the Board. The Commission had discussed internally the replies received from the Board's Chairperson and informed the petitioner

of its decision, giving its reasons for such decision. In rejecting the petition the Commission however gave her a second chance to present material evidence relating to the points originally raised by her.

One of the recurrent arguments made by complainant had been that in a previous interview for the same post and based on the same criteria she had obtained significantly higher marks. The Commission rightly explained that one cannot compare the two interviews.

The Commission had also replied to complainant's arguments, basing its reply on the statements made to it by the Selection Board. Noting that most of the criteria and sub-criteria were subjective in nature and that the marks awarded thereon depended on the subjective evaluation of the members of the Board on the performance of the candidate during the interview, the Commission had, at that stage, no reason to doubt the validity of the Board's statement. Therefore one accepts that at that stage the Commission gave due consideration to complainant's arguments.

Consideration of all information

The situation got complicated when the petitioner challenged the Board's statements and submitted evidence which put some of the Selection Board's statements into doubt.

The Ombudsman did not agree with the Commission's decision to refuse to consider the testimonials presented by complainant which were specifically intended to provide material evidence to rebut the Board's statements to the Commission. It moreover gave no reason why it did not consider the evidence presented by this Office which cast doubts on whether there was, in this case, a conflict of interest on the part of the Chairman of the Selection Board, besides also casting into serious doubt to one of the statements of the Board regarding complainant's role and achievement in respect of a particular programme relevant to the post. Neither was the Ombudsman satisfied that there was clear justification why the Commission did not further consider complainant's claim that the Board ignored her experience outside the duties of her substantive post in respect of some sub-criteria, but at the same time the same Board pleaded such experience to support marks it gave to another applicant. Nor was the Ombudsman satisfied with the explanation given by the Board regarding the sub-criterion "*Other qualifications relevant to the post*" through which the Board converted a clearly objective criterion into a subjective one.

In effect the Commission failed to give the requested clarifications on a number of other queries and closed the case stating that it (continued) to be satisfied with the performance of the Selection Board, without giving any reasons whatsoever as to why the clarification requested by the Ombudsman should not be entertained.

While agreeing that the Commission is entitled in terms of its mandate to reach its conclusions even if these are of a subjective nature, the Ombudsman considered that such mandate carries with it an obligation to be transparent in its decision and to give reasons which motivated such decisions while also observing its obligation at law to give the clarifications requested by the Ombudsman.

In this case the Commission failed to justify its decision to dismiss complainant's petition when faced on the objective evidence or queries which cast doubt on the credibility of some of the Board's statements on the bases of which the Commission had reacted its subjective decision to dismiss complainant's petitions.

Was there anything in the process of deliberations on the petitions that should lead the Ombudsman to conclude that it was contrary to law, unreasonable or unjust or improperly discriminatory or was mistaken at law or in fact or was otherwise wrong? The Ombudsman concluded that in this case, it was manifestly clear that in its consideration, the Commission continued to believe what the Selection Board told it while ignoring the Ombudsman's request for clarifications in respect of specific points, including objective evidence that challenged some of the Board's statements. This fact could not but lead the Ombudsman to conclude that he was not satisfied that the Commission's deliberations met the requisite of fair balance. The process was wrong. Among the failures, the Ombudsman listed the Board's statement regarding complainant's transfer because of complaints about her when her Head at that time denied such complaints. Yet when faced with this denial, the Commission still felt that the Board did nothing wrong. The same attitude was adopted by the Commission regarding allegations of bias/conflict of interest on the part of the Chairman of the Selection Board. The Ombudsman provided the Commission with solid evidence of a negative attitude of the Chairman against complainant, with two persons ready to confirm on oath about this. Again the Commission ignored this evidence which cast doubts on the total impartiality of the subjective decisions of the Board.

Again the same applies to evidence received by the Ombudsman regarding a negative statement made by the Selection Board regarding complainant's achievements in respect

of a programme which was very relevant to the post. Again the Commission refused to see anything wrong on the part of the Board.

The Commission also failed to address the Ombudsman's query as to why it refused to accept objective evidence (testimonials) to support complainant's counter-submissions to the Selection Board's comments on her original petition. The Ombudsman could not understand the Commission's logic in this respect.

Furthermore the Ombudsman did not agree with the Commission's rigid policy of not accepting new evidence if this was not presented with the original petition. The Ombudsman acknowledged the fact that new information may come to light which was not available before, and this all the more so, if the information was provided for the first time by the Selection Board itself and such information could be challenged as was done in this case. The Ombudsman considered that in deciding on whether to give consideration to such evidence, one must be beware of a rigid application of a policy when fairness or circumstances warrant otherwise, lest such rigidity contributes to perpetuation of an injustice.

The Ombudsman finally referred to his request to the Commission to explain why the Selection Board did not give any weight to complainant's query regarding the Board ignoring her experience outside the duties of her substantive post while at the same time the Board pleaded such experience to justify the award marks to another candidate.

Conclusion
For the above reasons the Ombudsman was not satisfied that the Commission carried out a proper investigation in this case. Complainant had not been given a fair hearing to the extent that this case merited a most in depth investigation rather than taking the Selection Board's statement as gospel truth particularly when serious doubts were cast on the corrections or otherwise of some of the Board's statements.

In upholding the complaint, the Ombudsman clarified that his opinion was not to be interpreted as meaning that the result should be changed. It was not his function to substitute the Commission's role in respect of whether complainant should have passed or failed. It was however his right in terms of the Ombudsman Act to insist on quality replies and clarifications on his queries – which he did not get from the Commission and to determine whether the petitioner was given a fair hearing.

The Ombudsman finally recommended that the Public Service Commission reconsiders anew its decision in the light of this report.

Sequel to this report

Following receipt of the Ombudsman's Report, the Commission informed the Ombudsman that after an intensive examination and analysis of the points raised by him and by complainant in her petitions, it had directed the Selection Board to revise the marks allocated to complainant under each criterion and to submit an additional report justifying its decision. The Selection Board concluded that complainant merited a pass mark, following which decision, complainant was appointed to the post, which appointment was eventually backdated to be in line with the date of appointment of the other successful candidates.

Case Note on Case No P 0096
Director of Citizenship and Expatriate Affairs

Migrants' family reunited

The Emigrants' Commission sought the help of the Ombudsman to speed up the process to reunify an irregular migrant with his family. The Commission complained of undue delay to issue the required permits.

The facts
An Ethiopian national who arrived in Malta on 16 June 2013 applied for refugee status and was given this status in 11 January 2014. This immigrant then wrote to the then Director of Citizenship and Expatriate Affairs requesting help to issue due permission to bring his wife, who he had married in Ethiopia in February 2007 to Malta. For almost a year no progress was made in the processing of the application. The department could only advance bureaucratic difficulties including a change of officials in charge, as justification for the delay. The Emigrants' Commission submitted that "*UNHCR gives fundamental importance to the principle of family reunion and we shall appreciate if your office intervenes with the department concerned and recommends that this couple be reunited without delay*".

Conclusion
The Office investigated the complaint and drew the attention of the Permanent Secretary in the Ministry for Home Affairs and National Security to the unwarranted delay and requested a formal decision on complainant's application.

The Ombudsman stressed that the immigrant had been granted full refugee status and therefore had the right to be reunited with his family also on the strength of the Directive of the European Union regulating such matters. A Directive that has been transposed into the law of Malta and was therefore enforceable as part of the domestic legislation.

Eventually the Permanent Secretary informed the Ombudsman that complainant's request had been acceded to and that he would soon be issued with confirmation in writing to this effect. That document would facilitate the process required so that complainant's wife could enter and reside in Malta.

Case Note on Case No P 0117
Grievances Unit

The Office of the Ombudsman and the Grievances Unit

The complaint
A person entitled to a service pension lodged a complaint with the Ombudsman because he felt aggrieved by a decision taken by a Grievances Unit on the way his Treasury (Service) pension was calculated.

The facts
Complainant did not indicate in his complaint his retirement date from the public service and hence the date when he started to receive his pension. However, it was established that his grievance goes back a number of years and complainant had only decided to bring it forward when the Grievances Unit was set up following the last general election.

Considerations
The Ombudsman drew the attention of complainant to the provisions of Sub-article 2 of Article 14 of the Ombudsman Act which states as follows:

> *"(2) A complaint shall not be entertained under this Act unless it is made not later than six months from the day on which the complainant first had knowledge of the matters complained about; ...".*

The law provides that the Ombudsman could at his discretion, conduct an investigation if the six months period prescribed by law had elapsed if there were special circumstances which made it proper for him to do so.

In fact there have been occasions when this discretion had been criticised to allow additional reasonable time during which a grievance which was under ongoing discussions

between the involved parties could be resolved. This did not however mean allowing for a number of years to go by without presenting the complaint. The Ombudsman further considered that in the case under review, there were insufficient grounds for invoking the special circumstances which would warrant the exemption from the prescriptive period specified in the Act.

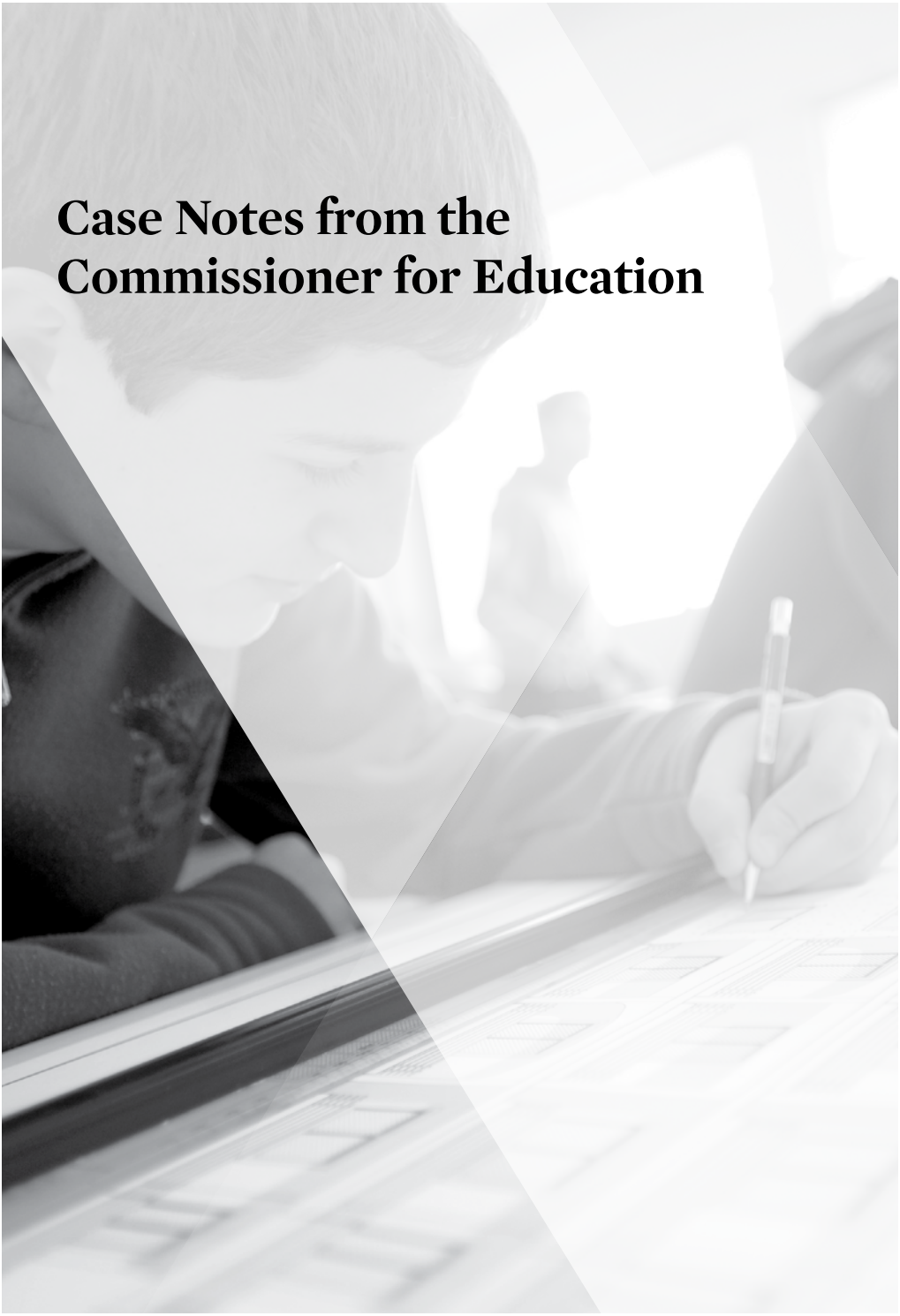
The only issue pertaining to the complaint which was admissible for investigation was whether, in considering complainant's application the Grievances Unit had carried out its mandate properly. In such cases, the role of the Office of the Ombudsman would be to consider the process and not the merits of the grievance since, as stated earlier, these were prescribed in terms of the Ombudsman Act.

An investigation into whether the Grievances Unit conducted proceedings in a fair and equitable manner meant that the Ombudsman would seek to establish whether- a) the Grievances Unit gave due consideration to complainant's petition and whether the principles of fair hearing were respected and; b) the Unit motivated its decision when this was communicated to complainant.

The Ombudsman considered that in this case there were no grounds to suggest that the Grievances Unit did not respect the principles of a fair hearing. In fact, in its reply it addressed the core element of complainant's petition and gave him its reason for its decision. The Ombudsman understood that, that decision was based on the interpretation of the applicable provision from the Pensions Ordinance which complainant himself had cited in his petition.

The Ombudsman concluded that, there was no result of any act of maladministration on the part of the Grievances Unit and he therefore regretted that the complaint could not be sustained.

Case Notes from the Commissioner for Education



Case Note on Case No UP 0003
Faculty of Education – University of Malta

Teaching practice effort underestimated by examiners

A student in the Faculty of Education at the University of Malta complained that the examiners underestimated his[3] efforts during Teaching Practice and he did not deserve to fail this component of the teacher education course.

The complaint

The student lodged a complaint against the University of Malta claiming that his tutors in the Faculty of Education treated him unfairly during his Final Year Teaching Practice (TP). He claimed that his examiners did not visit him during the last week of TP and therefore could not have noted his ultimate improvements with the result that he was failed unjustly in the TP component. He also claimed that one of his examiners was inexperienced as a TP assessor and consequently was not in a position to evaluate accurately his teaching performance.

The complainant further asserted that the written evaluations indicated that his overall teaching performance was of a satisfactory level, as confirmed by the External Examiner at the end of his visit to his class. The complainant argues that on the basis of the oral and written feedback related to the quality of his teaching as provided by the four examiners who observed him teach, his TP should have been marked a Pass.

Facts and Findings

The complainant joined the 2011-2015 student cohort in Bachelor of Education (Honours) (B.Ed. (Hons)) course run by the Faculty of Education at the University of Malta. He completed successfully the first three years of both the academic and practical components

3 In order to avoid the cumbersome use of masculine/feminine pronouns (e.g. him/her) the masculine version is used throughout, even when the complainant is not a male.

of the teacher education programme. The practical component, called Teaching Practice (TP) consists of from five-and-a-half to six weeks teaching in mainstream schools. Faculty tutors visit, observe and assess students' lesson preparation, classroom instructional techniques and lesson follow-up activities during this period. TP is both of a formative and summative nature with the First Year TP being mostly of a formative nature under the guidance of tutors, while the Fourth Year or Final TP is almost exclusively summative when tutors act as assessors or examiners. Since this case deals with a Final TP experience the tutors/assessors are referred to in this report as Examiners.

The complainant failed the Fourth Year or Final Year TP held in November and December 2014 at Naxxar Primary School. As a result he will be required to repeat and complete successfully this practical component of the course before he can graduate as a Certified Graduate Teacher. The fact that he failed and will repeat Final TP will impact negatively on his degree classification and his potential enrolment in higher education studies. Furthermore, the State's Education Division will employ him as a temporary, not a regular teacher from September 2015 up to the time he completes successfully all the requirements of the teacher education course. This factor may also impact negatively on his employment and his future promotion prospects.

Final Year students' TP commenced on 12 November 2014 and ended on 22 December 2014. During this period four examiners observed and assessed complainant's teaching on the following six occasions:

- Examiner A on 17 November 2014;
- Examiner B on 24 November 2014;
- Examiner A on 1 December 2014;
- Examiner B on 5 December 2014;
- External Examiner on 10 December 2014; and
- Examiner C (for a third opinion) on 11 December 2014.

Normally two examiners visit and observe each student; the Faculty seeks the opinion of a third examiner when the regular examiners do not agree on the final grade or when the student is a potential Fail. The External Examiner visits and assesses a cross-section of the Final Year cohort including all those students verging on a Fail grade.

The TP Board of Examiners met at the end of the TP session and was composed of the following members:

a. The TP Coordinator (who was also one of complainant's examiners), as Chairperson;
b. The second examiner, referred to as Examiner B;
c. The 'third opinion' examiner referred to as Examiner C; and
d. The Head of the Primary Education Department

The External Examiner was neither present at the Board of Examiners meeting nor did he present a written report of his observations and assessment of complainant's teaching. However, the TP Co-ordinator read a summary of the External Examiner's observations.[4]

The Board concluded that complainant did not reach the minimum standards expected of Final Year students and decided that his Final TP should be marked as a Fail. The Pro-Rector for Students' and Institutional Affairs following consultations with the Dean of Education cited the following reasons for the Fail mark:

> *"The reports presented by each of the examiners on every visit highlight strengths and progress shown by the student over time. However, there were several aspects amply indicated as weaknesses and which are crucial to effective teaching if there is to be effective learning. These aspects are crucial for any prospective practitioner and [complainant] was repeatedly given advice concerning where [he] needs to improve. Some of the shortcomings are rather serious and disconcerting when one considers that [complainant] was in [his] FINAL teaching practice and the examiners now were not simply faced with a decision of whether [he] should pass or fail but also had to consider whether [he] is ready to face the classroom as a fully-fledged, newly-qualified teacher who would be receiving very minimal support and guidance. I believe it was these concerns, which will be referred to below in this report and which echoed throughout the teaching practice, irrespective of which examiner visited, that convinced the examiners to award a failing grade to [complainant] in order to give [him] the opportunity for another supervised teaching practice period."* [5]

The Board will allow the complainant a Repeat TP in October-November 2015.

4 Email dated 17 June 2015 from the Dean Faculty of Education to the Commissioner for Education.
5 Letter dated 16 March 2015 from the Pro-Rector for Students' and Institutional Affairs to the Commissioner for Education.

Following the notification of the Fail result, complainant held meetings with his local examiners, the Faculty Dean and the Pro-Rector for Students' and Institutional Affairs. Unconvinced by these officials' reasons for his TP failure, complainant lodged a complaint with the Commissioner for Education claiming unfair treatment.

Observations

The complainant first complained that none of the Examiners visited his class during the last week of TP and consequently they could not have evaluated him at the peak of his performance. This line of argument is not valid. As a Final Year student, the complainant should know that contrary to the previous TPs, Final TP is much more of a summative than a formative exercise. In the Final Year, student-teachers should be able to demonstrate their skills from day one, rather than wait until the last week to demonstrate their optimum performances. Furthermore, the last week of TP coincided with the schools' last week of the Christmas term when pupils are engaged in all types of Yuletide activities such as practice sessions for the school concert and the Nativity Play, the Christmas Party, etc., than in formal teaching and learning sessions. If visited and assessed during the Festive week, most students would cry foul and claim that they were treated unfairly. In view of the above, the complainant's argument that his examiners could not have seen him at his best teaching in the last week of TP is not a valid one.

In his second complaint the student expressed his doubts whether Examiner B had the teaching experience to evaluate his performance. The TP Board appointed Examiner B on the basis of his teacher qualifications, his teaching experience in Primary Schools as well as his work as an Educational Psychologist in Primary and Secondary schools. There he had twelve years experience observing and evaluating numerous teachers operating under varying conditions. It is correct to state that this was the Examiner B's first B.Ed. (Hons) TP, but one notes that his written insights and comments on the complainant's teaching performance provided ample proof of his proficiency as a tutor and an examiner. He demonstrated this proficiency and experience further during our discussion on the case. In this respect, the complainant's second claim is not justified.

Complainant's third claim was related to the written feedback he received from his Examiners following their visits to his class. He argued that the standardised evaluations on the marking sheets overwhelmingly showed 'satisfactory' categories rather than 'unsatisfactory' ones. He further argued that the Examiners' written comments supported the positive standardised markings.

The complainant is correct on the first assertion, not so precise on the second. When one takes into account all the 270 marked assessments[6] recorded during the five visits, the tally amounts to 184 'satisfactory', 83 'needs to improve' and 3 'unsatisfactory' markings. The examiners' open-ended feedback tends to reflect an equal amount of negative and positive comments, however, none of the negative comments were so damning as to indicate or forecast a Fail grade. If the Examiners intended to give the complainant a warning that he was in the possible Fail category, they did not do so.

Before proceeding further, a brief explanation will help to understand better the TP assessment procedure. TP is a multifarious and complex component of the B.Ed. (Hons) course. It is also a unique experience for every student since the variables that come into play are many and interrelated. This renders TP difficult to assess. Examiners have to take into account the quality of the school, its location and its leadership style, as well as the pupils' motivation to learn. The subject being taught and the time when the lesson is being conducted are other variables. For example, pupils tend to prefer hands-on experiences; lessons just before the lunch-break tend to be more demanding because pupils become hungry and anticipate play-ground games; after-break sessions require time for the pupils to settle down, etc. Other important variables relate to student-teachers' lessons preparation, their commitment and ability to communicate with and motivate pupils. Students' classroom management and correction methods constitute important instructional techniques, as is their ability to deal with the myriad of unexpected occurrences that crop up during lesson time, incidents that may even tax the abilities of experienced teachers.

In order to bring a modality of uniformity and reduce the subjective nature of assessing the many teaching and learning activities involved, the Faculty of Education has converted the aptitudes and competences required during TP into a number of verifiable instructional tasks. Examiners assess each of the tasks and grade them on a four-point scale Liker-type rating, namely 'Highly Satisfactory', 'Satisfactory', 'Needs to Improve' and 'Unsatisfactory', as explained earlier. The Faculty adopted the four-point scale model specifically to ensure that the assessments would fall either on the positive or on the negative side of the continuum and thus avoid middle or 'on the fence' evaluations. Examiners amplify their markings with open-ended comments to explain where students performed well or poorly, often offering suggestions on how to improve their techniques.

6 Unmarked or 'Not Applicable' markings are not taken into account.

This assessment scheme has been successful and has helped to reduce much of the ambiguity previously contained in TP examiners' evaluations. However, problems persist. One such problem arises from the fact that students tend to give equal one-to-one values to each of the competencies marked, regardless of their actual importance and contribution to the teaching-learning process. Thus, if their marking register ten 'Satisfactory' and three 'Unsatisfactory' assessments, they conclude that they are doing well, when in fact they may be performing poorly. For example, the ten 'Satisfactory' markings may be important but not crucial to the teaching process (such as Organisation of Lesson, Notes File or Dress Code, etc), while the 'Unsatisfactory' markings may deal with such essential elements as Classroom Management, Mastery of Teaching Content and Questioning Techniques. It would be a mistake to give equal values to each of the competences when the last three far outweigh the ten in the 'Satisfactory' category. This factor is a major source of misunderstanding and contention for students, and has recurred in this student's complaint.

Coming back to this case, it will be noted that the three 'Unsatisfactory' markings out of a total of 270 were not of such a grave nature as to outweigh the rest. Indeed, these same three items were awarded a better rating during other lessons observed by two other examiners. Furthermore, as observed earlier, although there are several negative comments in the open-ended sections of the evaluations, there was nothing to indicate a clear or even a possible Fail grade. One also notes that in his previous three TPs, complainant had shown the qualities of a good teacher.

The verbal feedback provided to the student by the Third Examiner and the External Examiner following their visits, was also significant. The complainant sent the TP Coordinator his version of the Third Examiner's appraisal as follows:

> *"[Examiner C] visited me today. I delivered a Maths lesson about sorting using Carrol diagrams. [He] could note that I followed-up the suggestions that were given to me during the visits as I am thinking very hard about the actual lessons, my teaching practice file is updated and the evaluations are longer. Furthermore, I gave a lot of importance to the explanation of the lesson and demanded more of the pupils .... The lesson took a bit longer as I had to explain... . [Examiner C] suggested that I make use of more group work and pair work during the lesson and provide some differentiated work for those pupils who need it most. ... This visit went well and I will follow-up on [Examiner C] suggestions."* [7]

7 Email from the complainant to the TP Coordinator, dated 11 December 2014.

One can argue that the complainant's version of the Third Examiner's comments were selective to show himself in a positive light. However, the TP Coordinator replied:

> "*This is good news.*
> *It seems that your visits were positive. I am glad.*
> *My colleague was satisfied with the lesson that you delivered and that [is] real good.*"[8]

Similar exchanges occurred following the External Examiner's visit. The complainant interpreted his evaluation of his teaching as follows:

> "*He acknowledged my positive attitude in class. He was pleased that I have displayed more of the pupils' work in class and that my file is updated. Regarding the lesson, [the External Examiner] told me that he could clearly notice that I was trying my best and that I gave a lot of importance to the explanation of the lesson. Furthermore, I tried to ask a variety of both lower order and higher order questions and asked the pupils to justify the answers. He suggested that I need to think a little bit more deeply about the explanation of the lesson and that I could have used flashcards showing the words Venn diagram for example, rather than just saying what it is as some Mathematical concepts are not easy for the pupils to comprehend. Overall, it think that this visit went well. [The External Examiner] told me that many of my aspects of teaching are very good.*" [9]

Once again, the TP Coordinator confirmed his interpretation of the External Examiner's observations. The Coordinator replied:

> "*Exactly what he told us.*" [10]

These exchanges do not indicate or even hint that complainant's classroom performance was of the failing quality.

A rather unclear feature in this case was the role of the External Examiner who visited complainant's class. He observed him teach, commented on his performance to him and to the TP Coordinator, but did not present a written evaluation of what he had observed. Neither was he present during the final Board of Examiners meeting when it was decided that the complainant should fail. The Dean, through the Pro-Rector for Students' and

8 TP Coordinator's reply to the complainant, dated 11 December 2014.
9 Email from the complainant to the TP Coordinator, dated 16 December 2014.
10 TP Coordinator's reply to the complainant, dated 16 December 2014.

Institutional Affairs, explained this procedural omission by stating:

> "*Please note that it is the policy of the Faculty of Education that the external examiner does not draw up any reports about the students. Some years ago, the Faculty had decided on this course of action for a number of reasons, including*:
> *(a) the external examiner does not visit ALL the students on Teaching Practice;*
> *(b) the fact that students are forewarned about the date and time of the external examiner's visit to their classroom; this has to be done because of the limited time the examiner has available, the various activities going on in schools in the week when external examiner's visit, just before Christmas and therefore fitting into the timetables of different schools. Consequently, students can really prepare and plan for a very good plan/lesson/activity;*
> *(c) the Faculty does not wish to be in a situation where the external examiner's report or verdict,* ***on its own,*** *determines the final result. The external examiner would have only seen the student once, in a context for which the student would have prepared thoroughly. On the other hand, the local examiners would have seen the student for a minimum of 4 visits over a period of time and thus they would be in a position to conclude whether what the external examiner saw was typical, had or could actually be sustained over a period of time. This is especially important when dealing with final year students and where the ultimate, very serious decision is "can these newly qualified teachers provide quality learning experiences on their own, with minimal supervision?"* [11]

During our meeting, the outgoing Dean also explained that the Faculty Board of Education had decided not to make External Examiners' reports available to students. These lines of arguments are flawed for the following reasons:

i. All the TP examiners visit and assess a handful of students, none visit all the students, and yet they are required to write reports on each of their visits. Furthermore, the 'third opinion' examiner visits a particular student only once, and s/he is required to write an evaluation report. The External Examiner should not be exempt from this requirement.

ii. The active participation of External Examiners in the decision making process of Examining Boards is stipulated in Article 20 (2) (c) of the University's Assessment Regulations, which states:

11 Letter from the Pro-Rector for Students' and Institutional Affairs to the Commissioner for Education, dated 17 April 2015.

> "*(c) [External Examiners] moderate the results and/or recommend changes to unpublished marks of all compulsory final year Study-Units assessed at the end of the last semester, including the dissertation study-unit when one is required, provided that when the number of students is too large or in postgraduate programmes, it shall be sufficient for the External Examiner to moderate the Examination by seeing a reasonable sample of the assessed work, including assignments and/or examination scripts from the top, the middle and the bottom of the ability range and including work of borderline students.*" [12]

iii. External Examiners are experienced educators and can factor in into their evaluations the fact that the student-teachers had been forewarned and therefore were prepared for the external examiner's visit. Furthermore, it is up to the Examination Board members to ensure that the External Examiner's comments and evaluations do not overwhelm those of the Local Examiners.

iv. The Office of the Ombudsman and the Commissioner for Education has repeatedly advised the University that it is the Institution's duty to provide individuals with data and feedback emerging from decisions that impact directly on their lives and future careers. Consequently in the name of transparency and accountability, complainant (and all other students) should be provided with the External Examiner's written comments as he was provided with those of Local Examiners.

During our discussion, the TP Coordinator explained that this particular External Examiner did not present a written report, but presented his feedback by reading from notes taken in the complainant's classroom. Since there is no doubt that the External Examiner's actions were *bone fide*, the Faculty can ask him to convert his notes into a formal report. It has to be said that the Faculty's policy of giving equal weighting to local Examiners' and External Examiners' reports, in the sense that in case of disagreement the latter's view should not outweigh the formers', is laudable and should be maintained.

There is another major omission in the TP assessment procedure that demands the Faculty's attention. TP remains one of the very few examinations at the University where students do not have the right of an appeal or a review or a 'revision of paper' opportunity. The Commissioner for Education had commented on this omission in previous Final Opinions, and it appears that the Faculty of Education has not adopted his recommendation to set up a permanent TP Appeals Board. If the Faculty of Education

12 University of Malta Assessment Regulations, 2009, Article 20 (2) (c).

has compelling reasons not to set up such a Board, this Office would like to be made aware of them. If the Faculty does not have justifiable reasons, then it is acting against the University's policy of allowing reviews or 'revision of paper' opportunities to students who fail written, oral or practical examinations.

Conclusion

It is not my role as the Commissioner for Education to decide on purely academic matters such as whether or not complainant should be awarded a Pass or a Fail grade for his Final TP performance. I leave such decisions to the appropriate University bodies established for this purpose. In this case the task belongs to the TP Examinations Board operating through the Assessment Regulations of the University. Furthermore, I do not normally disturb decisions taken by institutionally established bodies such as the TP Board and the Faculty Board of Education unless I find erroneous evaluations of objective criteria, manifest irregularities and discrepancies, or obvious improper discrimination. My responsibilities concentrate on ensuring that the decision-taking process by such Boards had considered all the elements that were relevant to the case, and that the process was transparent, fair and equitable. I ensure that the relevant Boards exercised their functions according to set and approved procedures, and pursued them in a manner that is not improperly discriminatory. I do not act as defence counsel for the complainant or as a prosecutor for the institution concerned. I endeavour to act as the 'honest and neutral broker' to seek solutions that are equitable to all parties.

The evidence emerging from this case both from the written documentation and the oral exchanges between myself, the complainant, the Dean of the Faculty at the time the TP took place, the current Deputy Dean, the TP Coordinator, and the tutors/examiners concerned, indicates that complainant was treated with due respect and was not discriminated against. In fact, it is clear that his tutors/examiners went out of their way to help and guide him towards a successful TP. It is also very clear that the examiners did not act out of malice, but out of genuine concern for the welfare and educational wellbeing of the pupils whom complainant might teach in future. It is the procedure leading to the final Fail grade that I consider flawed.

The two regular examiners were not certain on whether the complainant should pass or fail his TP and requested the opinion of a third examiner. The latter's marked evaluations and comments, which were similar to those of the two regular examiners, contained both positive and negative remarks, but more of the former than the latter. The complainant's

five assessment documents do not contain clear warnings that he was performing so poorly that he was in danger of obtaining a Fail grade. If, as Examiner B asserted, during his two visits the children had hardly learned anything new, this poor level of teaching should have been recorded in the assessment documents so that the complainant would have been fully aware of the gravity of the situation. Had clear warnings been given, he would have ignored them at his own risk. However, the three local Examiners' assessments did not contain such damning terms as to indicate that his teaching performance was of a Fail quality. If anything, there was a significantly higher incidence of positive markings and positive open-ended comments than negative ones. Moreover, it is a major flaw in this assessment procedure that the External Examiner's evaluation was not recorded and communicated to the complainant.

As stated earlier, I do not sustain the complainant's first claim namely that the Faculty of Education treated him unfairly when no examiners visited on the last week of TP. I also do not sustain his second claim that tutor/examiner B lacked the teaching and assessing experience to act as a Final TP examiner.

With regards to the complainant's third claim, while I wholeheartedly support the Faculty of Education staff's endeavours to allow into the schools only competent and committed new teachers, I regard the available evidence to uphold his claim that the examiners' standardised and open-ended assessments do not reflect a Fail performance. Consequently, I support his complaint that on the basis of the written assessments, the University treated him unfairly when he was given a Final TP Fail grade.

Recommendations

In view of the above, I recommend that the Faculty of Education should set up a TP Appeals Board to reconsider complainant's case. This should be done the soonest possible in order to avoid complainant unnecessary anxiety whether the ultimate result is a Pass or a Fail, and to allow him to apply for the appropriate post with the Educational authorities. Indeed, I recommend, as I have done in similar cases in the past, the setting up of a permanent TP Appeals Board to consider students' complaints when they are awarded a Fail grade. Such a Board will bring the TP assessment procedure in line with the Faculty's and the University's review or 'revision of paper' policies.

As I have done in previous complaints involving TP, I also recommend that Examiners should be more explicit when marking students' standardised instructional skills and unambiguous in their evaluative comments. If Examiners are of the opinion that students' teaching competences are "*Unsatisfactory*" and that their overall performances are below the expected standards, the assessment markings and comments should reflect clearly this fact. Decisive evaluations should prevail particularly in the Final Year TP, which of its very nature is more evaluative or summative than developmental. Examiners should inform in no uncertain terms those students whose instructional competences are weak and who consequently are in the danger of failing. Such a practice will be fair to the students concerned and will save the Faculty and the examiners themselves unnecessary litigation.

Finally, the Faculty of Education should reconsider the role of TP External Examiners in line with the University's policy. Once External Examiners observe and assess students, their evaluations should be presented to the Examination Board in writing to be discussed along with those of their resident counterparts. Their reports should be also available to the students on the same basis as those of local Examiners.

Outcome

The Faculty of Education agreed to the recommendation by the Commissioner for Education to appoint an *ad hoc* Appeals Board to review this case. The Board confirmed the earlier grade of Fail. The student repeated his Final Teaching Practice, completed it successfully and is now employed as a regular teacher.

Case Note on Case No UP 0006
Malta College for Arts, Science and Technology (MCAST)

Request for promotion refused

An academic member of staff at MCAST complained that the College unjustly refused his[13] request for promotion from the grade of Assistant Lecturer to that of Lecturer.

The Complaint
The Malta Union of Teachers (MUT) lodged a complaint with the Commissioner for Education on behalf of an academic member of staff against the Malta College of Arts, Science and Technology (MCAST). The complainant claimed that MCAST had rejected unjustly his request for promotion or progression from Assistant Lecturer to Lecturer even though he had the necessary requisites for the promotion to the higher post. The complainant also asserted that MCAST discriminated against him when it promoted to the Lecturer level, other members of the staff with lower qualifications than his own.

Facts and findings
The complainant joined MCAST in 2009 as an Assistant Lecturer in the Institute of Agribusiness. He applied for a promotion from Assistant Lecturer to Lecturer on 27 November 2014. However, the College refused his request on the grounds that his academic qualifications did not meet the requirements stipulated in the Collective Agreement reached by MCAST and the MUT on 20 September 2012.

Specifically, the College argued that the complainant was not in possession of a '*relevant degree*'. On 26 March 2015, in reply to claimant's assertions, the Principal wrote:

13 In order to avoid the cumbersome use of masculine/feminine pronouns (e.g. him/her) the masculine version is used throughout, even when the complainant is not a male.

"[Complainant] does not hold the minimum qualifications as stipulated by the MCAST – MUT collective agreement for entry into the grade of lecturer as per paragraph 18.6 of the said agreement.

[Complainant] in effect does not have a relevant first degree and neither a relevant Masters degree and therefore does not fall in the parameters of paragraph 18.6.

Having said that, MCAST acknowledges that [complainant]'s situation whereby he is falling outside the parameters of the collective agreement is an unfortunate one and MCAST has tried to explore ways how this could be resolved. However the collective agreement gives little leeway in this regard. MCAST has suggested to [complainant] that he could consider trying to develop his level 7 post graduate diploma in animal production which covers 60 credits in order to upgrade it to a Masters level." [14]

Paragraph 18.6.1 of the Collective Agreement entitled *Lecturer Grade* stipulated that:

"18.6.1 The minimum qualifications for appointment to the Lecturer grade shall be:

a) A relevant first degree together with a professional teacher training qualification and at least three years full-time and appropriate relevant lecturing and / or relevant industrial experience

OR

b) A relevant first degree and a relevant masters degree and at least three years full-time relevant industrial and / or relevant lecturing experience

OR

c) A relevant MQF full Level 5 qualification (120 ECTS) with a professional teacher training qualification and at least seventeen (17) years full-time satisfactory performance in the grade of Assistant Lecturer. Staff progressed in terms of this provision will not be entitled to further progression."

14 Letter dated 26 March 2015, from the MCAST Principal to the Commissioner for Education.

At the time of his application complainant held the following qualifications:

a. GTC (Graduate Teaching Certificate) in Vocational Education and Training (VET) awarded by MCAST referenced at Level 6 of the Malta Qualifications Framework (MQF);
b. Diploma in Management awarded by the University of Malta, referenced at Level 5 of the MQF;
c. Diploma in Animal Husbandry/Vocational Education and Training awarded by the College of Agriculture, referenced at Level 4 of the MQF;
d. Diploma in Agriculture awarded by the University of Malta referenced at Level 5 of the MQF; and
e. Post Graduate diploma in Animal Production awarded by the International Centre for Advanced Mediterranean Agronomic Studies (CIHEAM) referenced at Level 7 of the MQF.

He also had the following relevant work experiences:

a. five years lecturing at MCAST;
b. fifteen years as Senior Agricultural Officer at the National Research and Development Agricultural Centre at Luqa; and
c. several years in managerial positions in agricultural private enterprises.

Observations

Three main issues emerge from this complaint, namely:

i. whether the **spirit** of the Collective Agreement contemplates that the 'degree' requirement incorporates also the usual proviso *'or equivalent qualifications'*, and whether the two signatories of the Collective Agreement are prepared to accept and agree to the unwritten proviso?
ii. whether complainant's CIHEAM qualification is equivalent to a first or second degree in terms of alternative B of para. 18.6.1 of the agreement? and
iii. whether the complainant qualifies for progression to Lecturer according to Article 18.6.1(c) of the Collective Agreement on the basis of his two MQF Level 5 qualifications, his MQF Level 7 qualification, his teacher training qualification and his 20 years teaching and/or industrial experience?

I. The Spirit of the Collective Agreement

The General Secretary of the MUT argued that the answer to the first question should be a definite 'Yes'. He wrote:

> "*(5) In line with Article 18.6.1, [complainant] should be progressed to the grade of Lecturer since he is in possession of a recognised academic qualification higher to a first degree, holds a recognised teacher-training qualification and has over three years of relevant teaching and or industrial experience (as may be evidenced from his Curriculum Vitae).*"[15]

In contrast, the MCAST Principal, in his letter quoted above, as well as during our discussion on this case, answers the first question in the negative. He acknowledged that complainant is a hard-working and dedicated lecturer who is held in high regard by his students and peers. The Principal added however, that the College Progressions Board had adhered strictly to the wording of the Collective Agreement, which requires a Lecturer to be in possession of a "*degree*". The Principal noted that the Board felt bound by the Agreement, which makes no reference to equivalent qualifications.

One can reasonably argue that, had the signatories of the Collective Agreement wanted to consider '*equivalent qualifications*' they would have said so. Instead, one can argue further that, they insisted on the inclusion of a "*degree*" and the omission of '*or equivalent qualifications*' because they preferred MCAST Lecturers to hold a traditional Bachelor or Masters degree to the exclusion of other qualifications. In reality, the MUT General Secretary emphasised that complainant should progress to the Lecturer grade on the grounds that his CIHEAM qualification, although not a "*degree*", was rated at Level 7 on the MQF, and therefore was equivalent to a second degree. He lodged the complaint on behalf of complainant knowing full well that the latter did not possess a degree and argued "*... he is being kept on the grade of Assistant Lecturer on the mere basis of qualification nomenclature.*"

The Progressions Board itself advised the complainant to seek the recognition and equivalence of the same qualification from the NCFHE. This fact emerges from an email by MCAST Acting HR Director who informed the complainant that the Board had turned down his request for promotion but goes on to urge him:

> "*..., your request was discussed at length and the Board is requesting that you obtain accreditation of your qualifications from the National Commission for Further and Higher Education (NCFHE) in order to satisfy the qualifications criteria set in the Collective Agreement.*"

15 Extract from MUT's letter addressed to this Office dated 6 March 2015.

and,

"The qualifications criteria are set in 18.6.1, hence you need to justify that your qualifications are equivalent to a degree."[16]

These quotations made it evident that although the Collective Agreement only stipulated the requirement of a "*degree*", its signatories implicitly accepted the spirit of the document to include '*or equivalent qualifications.*' The MUT Secretary General's appeal that complainant's CIHEAM Diploma should be recognised as equivalent to a degree confirmed the spirit of equivalency in the Collective Agreement. MCAST's Progressions Board demonstrates a similar spirit of recognition when it advised the complainant to seek a certificate of equivalence from the NCFHE.

II. Equivalence of the Post-Graduate Diploma

Once the signatories of the Agreement seem to accept the spirit of the '*equivalent qualifications*' notion, the next issue relates to the second question namely, whether complainant's CIHEAM qualification was equivalent to a degree.

The Malta Qualifications Council (MQC) evaluated the complainant's Post-Graduate Diploma at MQF Level 7. On 1 September 2009, the Acting Head of the Council wrote:

"*MQRIC confirms that the* ***"International Centre for Advanced Mediterranean Agronomic Studies (CIHEAM)"*** *is an intergovernmental organisation comprising thirteen (13) member countries from the Mediterranean Basin ...CIHEAM has come to be recognised as an authority in its fields of activity: Mediterranean agriculture, food and sustainable rural development. CIHEAM organises its activities in such a way to ensure that education, research and cooperation are fully integrated.*

In addition, CIHEAM was founded at the joint initiative of the OECD and the Council of Europe in 1962. Thus the qualification under review is recognised and is referenced to Level 7 of the Malta Qualifications Framework (MQF).

It is to be pointed out that since 2005, with the steady implementation of the Bologna process; Masters-level studies have been introduced in all Spanish universities. In 2006

16 Email dated 9 December 2014 from the then Acting Director of the Human Resources Office at MCAST to the complainant. The emphasis is this author's.

the Spanish authorities officially recognised the equivalence of the CIHEAM Master of Science degree awarded by the MAI Zaragoza".[17]

The above statement creates a certain amount of ambiguity. After providing the reader with the Spanish Centre's provenance, it goes on to evaluate the Centre's Post-Graduate Diploma, awarded to the complainant in 2009, at Level 7 of the Malta Qualifications Framework. However, in the last sentence, the statement declares that, three years earlier, the Spanish education authorities had "*... recognised the equivalence of the CIHEAM Master of Science degree* [not its Post-Graduate Diploma] *awarded by the MAI Zaragoza*". This sentence clearly distinguished between the Post-Graduate Diploma and the Master of Science degree. It therefore begs the question: If the Centre considered the Post-Graduate Diploma as equivalent to a Master degree, why did it not award a Master in the first place?

The answer to this question lies in the guidelines of the Bologna Process regarding first (Bachelor) and second (Masters) degrees. The Helsinki report entitled "*Conclusions and Recommendations of the Conference*" on The Bologna Process Conference on Master-level Degrees states that there is still some variety in the length of the study programmes leading to the Masters degree, but a definite trend had evolved towards Masters degrees containing a total 300 ECTS credits. In practice, this usually means five years of full-time studies comprising a combination of Bachelor and Masters programmes. The Fourth and Seventh Conclusions and Final Recommendations of the Report stated:

> "*4. Bachelor and master programmes should be described on the basis of content, quality and learning outcomes, not only according to the duration of programmes or other formal characteristics.*
>
> *...*
>
> *7. While master degree programmes normally carry 90 - 120 ECTS credits, the minimum requirements should amount to 60 ECTS credits at master level. ...*"[18]

Torsten Dunkel explained further these principles in his paper entitled "*The Bologna process between structural convergence and institutional diversity*" by:

17 Statement of Evaluation of Qualification issued by the Malta Qualifications Council (MQC) dated 1 September 2009.

18 **The Bologna Process:** Conference on Master-level Degrees, Helsinki, Finland, March 14-15, 2003.

"Master's degree – the second cycle:

In principle, there are two types of master's programme in Europe: short post-graduate programmes lasting 1-2 years (60-120 ECTS credits), which follow on from undergraduate programmes of 3-4 years (180-240 ECTS credits) and long, integrated master's programmes of five years (300 ECTS credits) or more in continental European countries.

Generally the MA should last two years (120 credits)."[19]

Eventually, the Association of European Universities (AEU) accepted the Helsinki proposals and confirmed that:

"Two basic degrees, Bachelor and Master, have been adopted now by every participating country; sometimes in parallel to existing degrees during a transition period, sometimes replacing them completely. European universities are currently in the implementation phase, and an increasing number of graduates have now been awarded these new degrees. Typically, a Bachelor degree requires 180-240 ECTS credits and a Master programme between 90-120 ECTS credits, with a minimum of 60 ECTS at Master level. This allows for a flexible approach in defining the length of both Bachelor and Master programmes."[20]

The above extracts explain that CIHEAM could issue the complainant with a Post-Graduate Diploma containing 60 credits at Level 7, but could not award him with a Master in Science degree, since he was 60 credits short. Indeed, the complainant's CV confirms that he does not possess any credits at the Bachelor or Level 6 credits. In this respect, therefore, MCAST's Progressions Board was correct to insist that to satisfy the degree requirement of 120 credits, complainant has to complete another 60 credits at least at the Level 6 of the MQF. In plain terms, complainant did not possess a degree or an equivalent qualification.

19 Torsten Dunkel, 2009: European journal of vocational training – No 46 – 2009/1 – ISSN 1977-0219 Page 181.

20 Association of European Universities: Work and Policy – *Bologna, An overview of the Main Elements*, 2014.

Complainant's Lecturing and Industrial Experience

The complainant contends that regardless of whether his CIHEAM qualification was to be regarded as equivalent to a degree or not, he held sufficient qualifications and teaching/ industrial experience to be promoted to Lecturer grade on the basis of Sub-Article 18.6.1 (c) of the Collective Agreement. He asserted that several of his colleagues with lesser qualifications (i.e. with MQF Level 5) were promoted to Lecturer grade on this basis. The MUT Secretary General supported the complainant's claim and wrote:

> "*... [MCAST's] argument is unjust and prejudicial in regard to [complainant] ... and is thus resulting in a situation whereby colleagues who – ceteris paribus – hold inferior qualifications to himself have been progressed and will be progressed to the grade of Lecturer whilst he is being kept on the grade of Assistant Lecturer on the mere basis of qualification nomenclature.*"

Complainant preferred not to provide the names of his colleagues to confirm his assertion. However, once again, a careful reading of the Collective Agreement shows that its specific wording is hampering complainant's progression. He possessed the required 120 credits at Level 5 or higher, has a teacher training qualification, and a total of 20 years relevant lecturing and/or industrial experience. Yet, contrary to Sub-Articles 18.6.1 (a) and (b), Sub-Article (c) requires: "*... at least seventeen (17) years full-time satisfactory performance in the grade of Assistant Lecturer.*" One notes, therefore, that this lecturing only requirement, apart from its overtly long duration, contrasts with what is expected from degree holders who need "*... three years full-time ... appropriate relevant lecturing and / or relevant industrial experience.*"[21] Complainant has a total of twenty years relevant lecturing and/or industrial experience but only five years lecturing. This renders him ineligible for promotion under Sub-Section 18.6.1(c) of the Agreement. The MCAST Principal states that "*... MCAST acknowledges that* [complainant]*'s situation whereby he is falling outside the parameters of the collective agreement is an unfortunate one and MCAST has tried to explore ways how this could be resolved.*"[22] The MUT Secretary General concurs and considers complainant's situation as unfair and prejudicial to his career progression.

If both sides of the Collective Agreement are of the opinion that some of the requirements in Article 18.6.1 are unjust and detrimental to complainant (and perhaps other members

21 Sub-Articles 18.6.1 (a) and (b) of the Collective Agreement quoted in paragraph 3 above.
22 Op.cit 1.

of staff at MCAST) it is up to the Union (which has its members' welfare at heart) and MCAST (which aims to be a model employer) to review the situation and if they agree, rectify the matter by means of amendments or side-letters to the Agreement.

Conclusion

It is not my role as the Commissioner for Education to decide on purely academic matters such as whether or not complainant's qualifications should be recognised as a degree. I leave such decisions to the appropriate bodies established for this purpose. In this case the task belongs to the Malta Qualifications Council currently operating within the realm of the National Commission for Further and Higher Education. Furthermore, I do not normally disturb decisions taken by institutionally established bodies such as MCAST's Progressions Board unless I find erroneous evaluations of objective criteria, manifest irregularities and discrepancies, or obvious negative discrimination. My responsibilities concentrate on ensuring that the decision-taking process by such Boards had considered all the elements that were relevant to the case, and that the process was transparent, fair and equitable. I ensure that the relevant Boards exercised their functions according to set and approved procedures, and pursued them in a manner that is not improperly discriminatory. I do not act as defence counsel for the complainant or as a prosecutor for the institution concerned. I endeavour to act as the 'honest and neutral broker' to seek solutions that are equitable to all parties.

In the course of this investigation, I found that the Progressions Board's decision-making processes were conducted according to the rules and regulations of MCAST and the terms of the MCAST-MUT Collective Agreement, and that these were pursued in an open and transparent manner. The Board acknowledged that the complainant was in possession of 60 credits at Level 7 of the MQC but, in accordance with the Collective Agreement, lacked another 60 ECTSs and consequently could not consider him as in possession of the requisite qualifications. In this respect, I regard the Progressions Board's decision as correct and the complainant's claim of unfair treatment as unjustified.

However, I consider the terms of Article 18.6.1 (c) requiring **seventeen years of lecturing experience** as incongruous with those of Articles 18.6.1 (a) and (b) which require **three years lecturing and/or industrial experience.** I regard this aspect of his complaint as justified.

The complainant did not present any evidence to support his allegation that the MCAST had discriminated against him by promoting to the post of Lecturer, colleagues who possessed lower academic qualifications. Consequently, I do not sustain this aspect of his claim.

Consequently, my Final Opinion is that overall complainant's case is partly justified.

Recommendation

The Commissioner for Education does not interfere with Collective Agreements. However since in this case, MCAST and the MUT provide evidence that they both consider certain aspects of Article 18.6.1 in their Collective Agreement to have had unfair consequences on complainant's lecturing career, I am prompted to make the following recommendations. I recommend that:

(a) MCAST and the MUT should reconsider this Article and amend it to remove any unfairness or discrimination that it may cause to complainant and other members of staff;
(b) once the Article is amended, the Progressions Board should reconsider complainant's request for progression to Lecturer; and
(c) Complainant should heed the Principal's advice and undertake further studies to upgrade his CIHEAM to a degree level in order to become eligible for further promotions.

Outcome

Both MCAST and the MUT accepted the recommendation by the Commissioner for Education that the complainant's case should be reviewed in the positive light expressed throughout the investigation. Following protracted negotiations between the Institution and the Union to establish how a review of the case would impact on the Collective Agreement, both sides agreed that the complainant's request for a promotion should be acceded to. He is now serving as a Lecturer.

Case Note on Case No UP 0025
Faculty of Education – University of Malta

Teaching Practice unfairly graded

Complaint
A student lodged a complaint against the University of Malta claiming that the Faculty of Education treated him[23] unfairly when the Teaching Practice (TP) Board decided that his teaching performance was not up to the expected standards, resulting to a Fail grade. He asserted that the tutors concerned had highlighted his weak points but ignored his positive aspects including his hard work and willingness to perform at his best.

Facts and Findings
Complainant joined the Faculty of Education Post-Graduate Course in Education (PGCE) in October 2014. He had chosen teaching English as his subject of speciality. He obtained good results in the theoretical aspects of the course but did not perform so well in the practical component.

He commenced the second TP on 18 February 2015 and completed it on 27 March 2015, teaching English to Form One students at St Aloysius' College. Two regular local tutors/assessors observed his teaching on four different occasions, a third local examiner visited him for an additional 'third opinion' assessment, while an External Examiner observed him once. Of the five observations by the local examiners, three assessed his teaching as a 'marginal pass', and two as 'unsatisfactory'. Unfortunately, the External Examiner's assessment was not available.

The TP Board considered the comments and evaluations made by the local examiners and concluded that he deserved a Fail grade since he had not reached the expected teaching standards. The Dean of the Faculty of Education explained to complainant as follows:

23 In order to avoid the cumbersome use of masculine/feminine pronouns (e.g. him/her) the masculine version is used throughout, even when the complainant is not a male.

> "*I hereby confirm that the examination process was conducted correctly and that throughout Teaching Practice you were offered and given all the necessary support. There is also sufficient evidence, also documented in your Teaching Practice reports, that the examiners indicated a number of weaknesses in your teaching and that these were not addressed in a manner which could have led to a satisfactory outcome of the practicum.*" [24]

He added:

> "*May I also assure you that, contrarily to what you state in your letter, all procedures were carried out fairly, by teacher trainers whose reputation, both locally and internationally, is highly respected. There was never an attempt from any one of these examiners to influence the judgment of another one and I ask you to retract this statement and other accusations made in your letter.*"[25]

The Dean also informed complainant that after having investigated the matter, he was of the opinion that the Fail grade should stand.

Observations

I have already presented extensive observations on the complexities of observing and assessing student-teachers on TP[26], and I will not repeat them here. I can confirm that the examiners' pre-set markings tallied accurately with their open-ended comments. Indeed, it is reasonable to observe that in two specific markings the 'marginal pass' assessments were somewhat generous when compared with the negative remarks in the open-ended comments. In this case, the student was given ample warning, in both the pre-set markings and the open-ended comments, that if he did not improve his performance he was in grave danger of failing TP. The complainant argued that he is fully committed to undertaking teaching as a profession, and had tried hard to perform at his best. This might be the case, but in the opinion of the examiners, his best was not good enough, and there is no basis for me to question their judgement.

During our meeting, complainant expressed his opinion that the negative assessment could have originated from the fact that he hails from Gozo and/or the fact that he is

24 Letter dated 11 June 2015 from the Dean, Faculty of Education to the complainant.
25 *Ibid.*
26 These observations were made available to the complainant as an attachment to this report.

related to a prominent Gozitan politician. Nothing in my investigation remotely pointed to the possibility that these two factors may have influenced the examiners' opinions and their assessments, and I do not sustain this aspect of his complaint. Moreover, I found no evidence that when complainant sought guidance from his tutors, they failed to provide it, as he claimed in his email dated 21 August 2015.

Complainant has argued that the three 'Marginal Passes' should outweigh the two 'Unsatisfactory' one. Since TP was not an exercise in averages, this line of argument is not tenable. Taken as a whole the five assessments (supported by the examiners' comments) pointed clearly to a poor and unacceptable overall teaching performance.

Complainant also claimed that although he was visited and observed by the External Examiner, he had not been provided with his observations and assessment. I sustain this element of his complaint. It is the right of every individual to have access to the comments, observations and assessments that have an impact on their normal and professional lives. In my view, it is a grave shortcoming by the Faculty of Education to deny students this information. Once again I strongly recommend that the External Examiners' observations and evaluations should be made available to students. Faculty of Education officials have argued that External Examiners' evaluations should not be taken into account because they do not visit and observe all students. I have counter-argued that none of the Local Examiners visit and assess all students, and yet their assessments are taken into account. I fully agree that the External Examiners' evaluations should not outweigh those of the locals, a practice that may have occurred in the past, but surely, examination boards can take precautions to ensure that a balance is maintained throughout the assessment process. I urge the Faculty of Education to review the current practice, which raises questions about transparency and accountability as well as the purpose of engaging External Examiners.

Conclusion

My role as Commissioner for Education is not to decide whether complainant should be awarded a Pass or Fail TP grade. I leave that task to the appropriate University body established for this purpose. In this case, the undertaking belongs to the Teaching Practice Board nominated by the Faculty Board of Education and appointed by the University Senate. Furthermore, I do not normally interfere with decisions taken by institutionally established bodies such as examination boards unless I find erroneous evaluations of objective criteria, or manifest irregularities and discrepancies, or obvious improper discrimination. My responsibilities concentrate on ensuring that the decision-taking processes by such boards had considered all the elements that were relevant to the

case, and that the process was transparent, fair and equitable. I ensure that the relevant boards exercised their functions according to set and approved procedures, and pursued them in a manner that is not improperly discriminatory. I do not act as defence counsel for the complainant or as a prosecutor for the institution concerned. I endeavour to act as the 'honest and neutral broker' to seek solutions that are equitable to all parties.

I have investigated carefully the various aspects of this case. I have read through the examiners' evaluations in the pre-set markings and the open-ended comments, and found that they underpin each other. Moreover, the student was given ample warning, with appropriate advice, that he was in grave danger of failing TP if he did not improve his teaching. Overall, I consider the assessments as consistent with a TP performance that has not reached the required standards. Consequently, while I acknowledge that the complainant may have worked hard, I do not support the complainant's claim that the Faculty of Education has treated him unfairly or discriminated against him when his TP performance was graded a Fail.

I must stress that the Office of the Commissioner for Education is not an appeals office and therefore complainant may decide to apply for the 'revision of paper' or an appeal option against the Fail grade. Alternatively, he can follow the counsel given to him by the Dean of the Faculty of Education who advised him:

> "*... if, as you state in your letter, you have teaching to heart you are advised to take heed on the advice you were given throughout your Teaching Practice and work hard in order to perform better during the next session.*"[27]

Apart from the criticism levelled at the University authorities in respect of the External Examiner's comments, I do not sustain the complaint. I urge the University authorities to comply with my earlier recommendations to give access to the comments of the External Examiner to student teachers he observes.

Outcome

The Factually of Education debated and accepted the recommendation by the Commissioner for Education that External Examiners should write reports on their visits to students during Teaching Practice, and that the reports should be made available to the latter. This practice has now been adopted throughout TP.

27 Ibid.

Extract from Earlier Reports on the

Complexities of Assessing Teaching Practice

"*Before proceeding with my observations, a brief explanation will help to understand better the TP assessment procedure. TP is a multifarious and complex exercise component of the B.Ed. (Hons) course. The variables that come into play are many and interrelated. This renders it a difficult assessment process. Examiners have to take into account the quality of the school, its location and its leadership style, as well as the quality of the class pupils where the student-teacher operates. The subject being taught and the time when the lesson is being conducted are other variables. For example, pupils tend to prefer hands-on experiences; lessons just before the lunch-break when the pupils become hungry and anticipate play-ground games tend to be more demanding to conduct; as are after-break sessions when pupils need time to settle down. Other important variables relate to student-teachers' lessons preparation, their commitment and ability to communicate with and motivate the pupils. Students' classroom management and correction techniques constitute important instructional techniques, as is their ability to deal with the myriad unexpected occurrences that crop up during lesson time that may tax the abilities of inexperienced teachers.*

In order to bring a modality of uniformity and reduce the subjective nature of assessing the many teaching and learning activities involved, the Faculty of Education has converted the abilities inverted into a number of verifiable instructional tasks. Examiners assess each of the tasks and grade them on a four-point scale model, namely Satisfactory, Marginally Satisfactory and Unsatisfactory [for PGCE students], as explained earlier. Examiners amplify their markings with open-ended remarks to explain where students performed well or poorly, often with suggestions on how to improve their techniques.

This assessment scheme has been proved successful and has helped to reduce much of the ambiguity previously contained in TP examiners' evaluations. However, problems persist. One such problem arises from the fact that students tend to give equal one-to-one values to each of the competencies marked, regardless of their actual importance in the teaching-learning process. Thus, if their marking register ten 'Satisfactory' and three 'Unsatisfactory' assessments, they conclude that they are doing well, when in fact they may be performing poorly. For example, the ten 'Satisfactory' markings may be important but not crucial to the teaching process (such as Organization of Lesson Notes File or Dress Code etc), while the 'Unsatisfactory' markings deal with such essential elements as Classroom Management, Mastery of Teaching Content and Questioning Techniques. It would be a mistake to give equal values to each of the competences when the last three far outweigh those of the Satisfactory ten. This factor is a major source of misunderstanding and contention for students."[28]

28 This extract is being attached to the Final Opinion on this complaint, Case Number UP 0025.

Case Note on Case No UP 0034
Education Division – Ministry for Education and Employment

Year 6 benchmarking examination remarks contested by parents

The Complaint

The complainant on behalf of himself[29] and eight other parents and their children lodged a complaint against the Education Division within the Ministry for Education and Employment. The complainants expressed doubts about the validity of their children's Year Six Primary School Benchmarking (BM) examination results in English Writing, which were considerably lower than their Mid-Term results in the same subject. The parents were convinced that a 'revision-of-paper' exercise, which they or their representatives would monitor, would improve the marks gained by each pupil.

Apart from heightening their children's moral, the parents believed that improved marks would provide the pupils with an overall better 'classification' and a place in the higher achieving classes at the Secondary School they will be attending. The complainants attributed the discrepancy in the results either to excessively strict marking or to negligent collation of marks by the examiners. They did not contest the results of the other BM subjects, but anticipated that a monitored 'revision-of-paper' would produce BM results that approximate the Half-Yearly ones.

Facts and Findings

The pupils concerned attended the top class of Year 6 at a local Primary School and in September this year will proceed to the Secondary School within the same College. During the Half-Yearly examinations, the nine pupils concerned attained high marks in all the subjects they sat for, including English Writing. Their performance did not repeat itself in the BM examinations held in June. They achieved high results in all the subjects,

29 In order to avoid the cumbersome use of masculine/feminine pronouns (e.g. him/her) the masculine version is used throughout, even when the complainant is not a male.

but lower marks than expected in the English Writing section. The average results for this subject in the Mid-Yearly and BM examinations were 29 marks and 19 respectively of the 30 marks allotted to this section of the paper. The whole English paper carried 100 marks.

The parents, with the support of their children's Class Teacher and Head of School, complained about the discrepancy in the results to the Director, Department of Curriculum Management (DCM) within the Directorate for Quality and Standards in Education (DQSE) at the Ministry for Education and Employment. They also sought the intervention of the Minister concerned. At a meeting with parents, the DCM Director explained that, in line with standard practice, two different examiners had assessed the students' work and had decided the awarded marks. He also informed the parents that in view of their request for a 'revision-of-paper' an additional examiner would be appointed to review the scripts of all the pupils in their class. Eventually, the additional examiner raised the marks of three pupils in the class, but confirmed the BM marks originally attained by practically all the complainants' children.

This development greatly disappointed the parents. It also heightened their concern that the original BM and the 'revision-of-paper' marks were flawed since the latter raised the marks of three pupils who were considered lower achievers. Following the 'revision-of-paper' exercise, the latters' median become at par with those who were regarded as high performers

On the publication of the 'revision-of-paper' results, the parents sought another review of their children's scripts, which the Director DCM granted. To the great consternation of the parents, the extra examiner confirmed the BM results, which they once again rejected. They were particularly galled by what they deemed harsh criticism by the fourth reviewer whose adverse comments contrasted markedly with his predecessor's affirmative ones. Their renewed demands led one senior Ministry for Education and Employment official to observe:

> "*It is not acceptable that parents continue to claim that 'there is some mistake in the marks assigned.' It is clear that the parents/some of the parents are not willing to accept the professionalism of the teachers involved in the marking and the whole benchmark process.*"[30]

30 Memo, dated 19 August 2015 by Assistant Private Secretary, Ministry for Education and Employment.

However, in reply to the parents' latest objections, the DCM Director, with the approval of the DQSE Director General, proposed yet another assessment of English Writing section of the whole class. The fourth review was to be conducted by two 'education persons who held the full confidence of the parents', or what the Education Division officials termed 'nominated professionals'. The DCM Director insisted that the monitoring exercise would be conducted under established procedures.

The DQSE Director General and the Minister for Education and Employment endorsed the procedures laid down by DCM Director who asked the parents to propose the two nominated professionals. The parents objected to some of the provisions in the review procedures. Eventually, the parents agreed to the review procedures and nominated the pupils' Class Teacher and the Primary Head of School to monitor the review.

Subsequently, a meeting between the parents and the Education Division officials in the presence of the the Commissioner for Education was scheduled.

This meeting had the objective of finding an equitable solution was attended by the complainant and another parent as the parents' representatives, the Director General DQSE and the DCM Director. After a lengthy discussion the parties agreed that following the review, the nominated professionals would report their findings to the Commissioner for Education, who would then present his Final Opinion and recommendations.

Observations

The Office of the Ombudsman does not ordinarily call together complainants and the officials against whom grievances are lodged. In this case, however, time was of the essence, since the Secondary School where the pupils concerned will attend, was under pressure to publish the students' classification lists for the school's opening in September. Under these circumstances, the Commissioner for Education decided that a meeting of all concerned would lead to an early and just solution.

At the start of the meeting, the Commissioner laid down the following parameters that would underpin the discussion:

a. It goes without saying that parents had the right to question procedures and decisions they believed militated against their children's interests.
b. The Education Division's high officials, as well as the examiners engaged in this exercise, were specialists in their own right. Consequently, unless unequivocally

proven otherwise, their actions were to be considered as professional and their decisions reached in good faith.

c. All participants were meeting in a spirit of good-will with the aim of reaching a fair and speedy solution.

d. The role of the Commissioner for Education is not to decide whether the pupils concerned should obtain higher marks in their English Written BM examination. That task belongs to the examiners appointed for this purpose by the appropriate education authorities. Furthermore, the Commissioner does not normally disturb decisions taken by institutionally established bodies such as examination or review of results boards unless he finds erroneous evaluations of objective criteria, or manifest irregularities and discrepancies, or obvious improper discrimination. The Commissioner's responsibilities concentrate on ensuring that the decision-taking processes by such boards had considered all the elements that were relevant to the case, and that the processes were transparent, fair and equitable. He ensures that the relevant boards exercised their functions according to set and approved procedures, and pursued them in a manner that is not improperly discriminatory. The Commissioner does not act as defence counsel for the complainants or for the Education Division. He endeavours to act as the 'honest and neutral broker' to seek solutions that are equitable to all parties.

Both sides agreed to the above provisos and the meeting progressed in the most harmonious manner.

The parents stressed the point that the written comments on their children's work varied greatly particularly between the evaluations of the third and fourth examiners, and yet their marks were practically identical. They acknowledged the well-known phenomenon in the educational world that the correcting of essay-type examination scripts can be highly subjective. Numerous experiments have been conducted where a number of examiners assessed the same answer with varying, sometimes extremely contrasting, results. Still, the parents expressed their view that in spite of the dissimilar comments by the examiners, it could not be accidental that the marks remained unchanged. The DQSE Director General agreed that the comments by the third and fourth examiners varied considerably, and expressed his view that this normally would have been reflected in the marks they would award, but he could find no trace of wrong doing.

The various claims and counter claims of the case deserve another important observation, namely that in the process of drawing comparisons, one needs to compare like with like. Most of the statistical evidence presented by the parents did not adhere to this principle since they compared the results of their children's Mid-Yearly English Written with those attained in end-of-year BM exams. Notwithstanding it was the same subject, the Mid-Yearly examination was based on their particular school, conducted by school personnel and graded according to the restricted Year Six school population of some fifty-five pupils. On the other hand, the BM exam entailed a nationally based exercise involving the Maltese and Gozitan Year Six Primary school cohort of approximately three thousand seven hundred pupils. If the marks attained in the two examinations sat for by the pupils concerned did not match, one cannot conclude that either of the two assessment procedures must have been flawed. The conflicting results do not inevitably imply that any deception or incompetence existed in either case. It means that the pupils attained the marks under different conditions. An analogy with the case of the American students sitting for the PISA Mathematics competition reinforces this point. In 2012, the highest achieving USA students in Mathematics performed poorly when compared with their counterparts from Asian countries. The Americans were greatly dismayed but recognised that theirs was a national test-score while the PISA one was international. They acknowledged the results and proceeded to improve their national mathematics education.[31]

Throughout the meeting, the parents retained the strong conviction that unfair or incompetent marking by the Education Division Assessment Unit deprived their children of higher marks. These were serious allegations and no arguments would persuade them otherwise.

The senior Education Division officials emphasised the fact that four examiners had produced coinciding results, that the pupils' papers had two revision-of-paper reviews when normally only one was allowed, and that all procedures were conducted in a transparent and open manner.

Eventually, both sides agreed to the Commissioner's proposal that another attempt would be made to conduct the monitoring exercise. Both sides also agreed that the parents

31 **The Hechinger Report**: Education by the Numbers "*Top US students fare poorly in PISA text scores*", 25 October 2013. The PISA (Program for International Student Assessment) exercise was conducted by the Organisation for Economic Development (OECD) for 15 year olds world-wide.

would once again ask the Primary Head of School and the pupils' Class Teacher to be the nominated professionals. If they declined, the parents would nominate two other educators acceptable to the DCM. The Commissioner had misgivings about nominating professionals who were so closely involved in the schooling of the pupils concerned, but to avoid any possible bad light to fall on the individuals concerned, and to speed up the process, the Commissioner agreed. In this respect, the Commissioner strongly suggested that in future the DQSC and DCM should avoid a repeat of the situation, and only accept as nominated professionals educators who are entirely independent and totally unrelated to the case.

Both sides also agreed that the report by the nominated professionals would be addressed to the Commissioner for Education and copied to the parents and the Education Division officials. They committed themselves to leave it in the hands of the Commissioner to decide whether the process was conducted in the correct manner, and to offer recommendations following the presentation of the report by the nominated professionals. The Commissioner once again emphasised that he would concentrate on the administrative, not the academic aspects of the report. The nominated professionals conducted their review and presented their report which stated:

> *"We were given a batch of thirty exam papers of which eighteen belonged to students from Primary School [in question]. We were also handed 5 batches of exam papers for comparison purposes, each batch grouped according to a particular band of marks.*
>
> *All thirty scripts handed to us (which included the ones of our students) were all read, discussed, given a mark and compared to the 5 batches of exam papers.*
>
> *Five students out of the thirty were given a final mark higher than 20. One has to keep in mind that the highest mark obtained by one of these students in the Benchmark Exam was 19 out of 30."* [32]

The nominated professionals raised the marks of fifteen and confirmed those of three.The increased marks varied from 1 at the lowest end and 8 at the highest, with an over-all average increase of 3.2 out of 30 marks for the English Writing. The English paper as a whole carried 100 marks. They drastically reduced the marks of pupils coming from other schools, in five cases by 14 marks (two pupils), 12 marks (two pupils) and 11 marks (one pupil).

32 Nominated Professionals' Report dated 17 September 2015.

One final observation: the complainants can argue that their claims were vindicated by the results produced by the nominated professionals who increased the marks of the majority of the pupils in the class in question. Such an argument is weak for two reasons. First, the average increase in marks (3 out of 30 marks for the English Writing section, and out of 100 marks for the whole English paper) did not reach the 10 points expected by the parents and did not change the Secondary School 'classification' in any meaningful way. Second, an objective evaluation of the fact that the nominated professionals were the Head of School and the Class Teacher of the pupils concerned, leads to the conclusion that the increase in marks was insignificant. The fact that the pupils' scripts were index numbered not named, could not have rendered them anonymous since no teacher worth her salt would miss the handwriting and writing style of pupils she had been teaching for a whole scholastic year.

Conclusion

After a careful consideration of all the issues involved, the Commissioner for Education has not found any evidence to sustain the complainants' initial claims. He also has not found any evidence that the original two BM English Written examiners and the additional two 'revision-of-paper' examiners discriminated against the pupils in question by correcting their work too severely or differently from the national cohort.

Furthermore, the Commissioner has not found any evidence which indicated that Education Division officials were in any way unprofessional or negligent in the way they dealt with the correction of the scripts concerned or in dealing with the parents' complaints. Indeed, the Commissioner noted that the highest officials in Education Division took it upon themselves and went out of their way to ensure that the assessment and moderating processes were executed in the most transparent manner.

Following these conclusions, based on the facts and findings during his investigation, the Commissioner for Education did not uphold the complainants' claims that the examination results were unfair or that the examination process was flawed. The fact that the nominated professionals awarded higher marks than the BM and revision-of-paper examiners can be explained by the subjectivity of correcting essay-type scripts, and their direct involvement in the pupils' education.

The Commissioner noted that he would not disregard the results presented by the nominated professionals and will adhere to the agreement reached in my Office between the two parties, namely that the results of the nominated professionals should be given their due importance. One solution would be simply to accept the latest results by the nominated professionals and ignore all the previous ones. Such a decision would undoubtedly please the parents, but it will be unjustified and unfair because it would disregard the evaluations of four other examiners on whom he found no evidence to show that their procedures and conclusions were erroneous. Such an action would also discredit without justification the work of four experienced examiners who were involved in a nation-wide assessment exercise.

Recommendation

In view of his conclusions, the Commissioner recommended that the four results awarded by the different examiners needed to be taken into account. Thus the final marks assigned to all the Primary class pupils in question would be based on an average mark obtained from four assessments, namely:

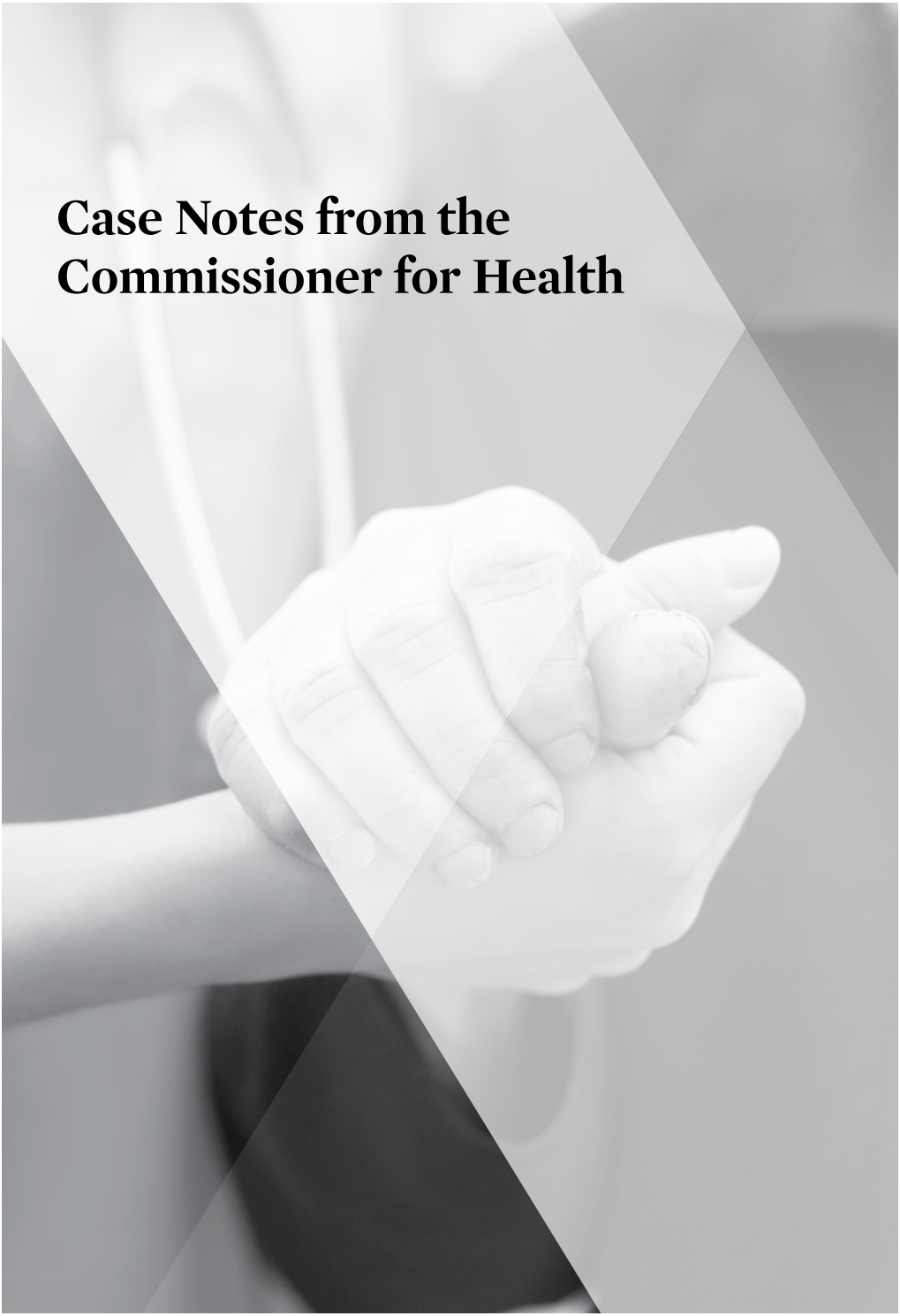
a. the original BM marks;
b. the marks given by the two revision-of-paper examiners; and
c. the marks assigned by the nominated professionals.

The proposed formula provides a comprehensive and just result. The Commissioner added that he was also reassured by the Director DCM that the results will not affect adversely the classification of the other Secondary School students who are not involved in this complaint.

Outcome

All parties agreed to the Commissioner's recommendations, and all the students concerned are now pursueing their secondary school studies harmoniously and with success.

Case Notes from the Commissioner for Health



Case Note on Case No HP0052
Department of Health

Recognition of Nursing Aide certificate disputed

The complaint
An employee working in a Government Home for the Elderly felt aggrieved because a training certificate issued by the Foundation for Medical Services (FMS) was not considered by the Deparment of Health when she applied for the recognition as a Nursing Aide. Complainant added that some of her collegues who had the same training had their qualification recognised.

When the complainant asked for an explanation, the Department of Health stated that the certificate was not recognised since it was issued by the FMS. The complainant claimed that she was the only employee in possession of this certificate that was not granted the grade of a Nursing Aide.

Facts and findings
The Commissioner for Health asked the Department of Health to explain why a course advertised by the Employment and Training Corporation (ETC) for which a certificate from the FMS was issued, was not being recognised by the Department and by the Ministry for the Family and Social Solidarity (MFSS).

The Department of Health explained that the complainant cannot be given the grade of a Nursing Aide because such appointment had to be done through a Public Service Commission (PSC) call. The department continued that since the Nursing Aide grade is being phased out, no such calls have been issued for the last fifteen years. On the certificate recognition, the Department of Health confirmed that the course attended by the complainant was purposely introduced by FMS for Nursing Aides and suggested that the complainant gets the recognition of the course from the Malta Qualifiaction Council (MQC).

The Commissioner asked for the outline of the course undertaken by the complainant. Following an assessment of the course objectives and its content, the Commissioner has asked the Department of Health for further explanation. The Department of Health stated that although the course which the complainant attended to was not equivalent to the course offered by the Department of Health years before, at the time both courses were recognised for one to attain the nursing aide grade. The Department explained that since then the situation had changed for two reasons. Firstly, the Nursing Aide grade was being phased out and secondly, courses for support workers, paramedics, nursing aides or care workers were being accredited by the MQF.

Following this exchange of correspondence, the Commissioner sought for the reaction of the complainant. The complainant explained that contrary to what the department had stated, the grade of Nursing Aide was still being accepted. She mentioned examples of other employees who, in 2012, migrated from one department to another and who were given the grade she is requesting. The complainant also informed the Commissioner that in agreement with the unions, all Nursing Aides employed with the goverment have been given a Scale 13 grade.

The Commissioner asked the department to verify and comment on what the complainant has stated but no reply was forthcoming. The case is still pending.

Case Note on Case No HP0007
Department of Dental Surgery – Mater Dei Hospital

Girl residing in a care institute denied dental treatment

The complaint
A fourteen year old girl residing in a care institute was refused Orthodontic treatment at Mater Dei Hospital (MDH) because the Department of Dental Surgery claimed that her condition did not fall within the protocol established for such cases.

The Head of the care institute looking after the minor sought the help of this Office. The Ombudsman decided to investigate the case and referred it to the Commissioner for Health.

Facts and findings
The Department for Dental Surgery argued that the treatment needed by the girl was only given to people with functional dental and orthodontic problems. Since in their opinion, the girl was not severely affected, they could not approve that the treatment is done at MDH.

The Commissioner asked the Department of Health for their feedback arguing that since the girl was still a minor being taken care of by an institute, she could not afford such treatment privately. He also stated that, as he had remarked on various different occasions, protocols were not intended to deny the patient's right to receive treatment but should be done on medical provision to prevent abuses.

In their reply the Department of Dental Surgery repeated that the treatment needed by the girl was normally given to patients who have functional problems from an orthodontic point of view, and insisted that the complainant did not fall within that category. The Department of Health added that there were established criteria on the entitlement of certain treatments to which the department strictly adhered to.

In his reaction, the Commissioner for Health reiterated that given the circumstances of the case, the Department should not refuse complainant's request that such treatment is given at MDH. This even so, when considering that the girl had no financial means to undergo the treatment in a private clinic. He continued that the protocols governing such policies should not apply to all patients in the same circumstances as the girl. Such an approach would imply that we were living in a society which did not give the desired attention to the most vulnerable.

The Department replied that policies treatment required within the Health Service followed patterns used in other countries, such as the United Kingdom which were not related to means testing but rather to the severity of the illness. The Department added that making exceptions would create a precedent for other cases.

Conclusions
In his Final Opinion, the Commissioner for Health insisted that the Department should deal with each case on its own merits especially when vulnerable people are concerned. A one size fits all policy was not necessarily good.

The Commissioner stated that good administration dictated that the management should not be afraid of creating precedents if special circumstances warrant an exception to the policy. In order to prevent abuses, the management should have the prerogative to establish the conditions to justify the need to make exceptions to established policies.

Recommendation
Considering the special circumstances of the complainant who was living in a care institute, the Commissioner recommended that the patient is given the necessary treatment at MDH.

Outcome
Following the conclusions and recommendations of the Commissioner for Health, the Department informed this Office that following several internal discussions and feasibility studies, the Department of Health decided to approve the Commissioner's recommendations.

The Department of Health confirmed that the complainant started receiving treatment in early 2016.

Case Note on Case No HP0028
Public Service Commission

Commissioner disagrees with PSC on the selection criteria

The complaint
A healthcare professional who works at Mater Dei Hospital (MDH) claimed that he was not given the post of practice nurse he had applied for, even though, he was eligible and suitably qualified. The complainant alleged that instead the post had been awarded to a '*newcomer*' despite his having less experience and expertise than him.

Complainant also alleged that the other two applicants, including the candidate who placed first, were not even eligible to apply. He also added that one of the applicants did not even work in the specialised areas while another applicant did not have the required experience. He submitted that he had more experience in the requested fields than what was required in the Call for Application.

The investigation
From the information provided to the complainant by the Public Service Commission (PSC) it resulted that the complainant placed second in order of merit. After he was given the breakdown of the marks by the Selection Board, the complainant confirmed his "*suspicion of unfair marking*" and insisted that in his opinion, he was the most eligible candidate. Not satisfied, with the detailed information provided by the PSC on his queries, he sought the intervention of the Office of the Ombudsman.

The Ombudsman assigned the complaint to the Commissioner for Health for investigation. The Commissioner asked the PSC to withhold any action on the selection process until the claim was investigated by his Office. However, the PSC did not agree. It stated that since the request for the appointment of the first placed candidate had been withheld for more than three months, it considered that the Department should not be deprived of his services any longer. The Department was therefore authorized to proceed with the appointment.

Facts and findings

In order to verify the eligibility of the candidates, this Office asked for the Curriculum Vitae of all the applicants for the said post and compared them with the requirements listed in the Call for Application.

Such specialised post required a minimum of twelve years of proven aggregate experience in the fields as specified in the Call for Application. Therefore, for the purpose of eligibility, the Selection Board was duty bound to consider each candidate's minimum twelve years' aggregate experience.

Moreover, the Commissioner argued that since the Call for Application requested experience in two specialised fields, the Selection Board had to consider the minimum twelve years' aggregate experience in both fields and not in one or the other. On this point, the Commissioner concluded that had the Selection Board considered the complainant's long experience in both fields together, the marks allotted to complainant would most probably have been significantly different.

The main issue in this case was the interpretation of the qualifications required in the Call for Application.

The Commissioner brought these considerations to the attention of the PSC. In its reply, the PSC confirmed that it was satisfied with the explanations given by the Selection Board and they found no valid reason to justify a change in the result of the selection process and it considered the case as closed.

Conclusions

Following a thorough examination of the information provided by complainant and feedback and reactions sent by the PSC, the Commissioner concluded that:

a. the Selection Board should have considered experience in respect of both fields because the result would most probably have been different;
b. the Selection Board and subsequently the Commission did not make a correct evaluation of the marks which had to be awarded to candidates for their experience in the two fields required in the Call for Application;

Recommendations

Based on his conclusions, the Commissioner for Health recommended that the Public Service Commission requests the Selection Board to review its selection report taking into consideration the eligibility requirements and also the actual aggregate experience of the first and second placed candidates in both areas of specialization as specifically required in the Call for Applications.

Outcome

The PSC reacted to the Commissioner's report by stating that its interpretation of the qualification required was the correct one and that it *"stands by its decision that the marks allocated to the candidates were fair and that no valid reasons exist which justifies a change to the result of the selection process."*

Since the Commissioner did not agree with the position taken by PSC statement he sent a copy of the report to the complainant in terms of the Ombudsman Act so that he could take any action he deemed fit to safeguard his interests.

Case Note on Case No HP0030
Public Service Commission

Selection process for a managerial post contested

A Mater Dei Hospital (MDH) healthcare professional filed a complaint with the Ombudsman because she felt aggrieved as she was not chosen for a managerial post. The complainant also alleged that the post was given to a colleague who was not even eligible to apply in terms of the Call for Application.

The complaint
The complainant alleged that the selection process for a managerial post at MDH was irregular since the selected candidate was ineligible to apply. The complainant further requested to know what marks were awarded to the selected candidate for knowledge in the specialised field related to the post, since the selected candidate had only worked in an acting position in the field for only eight months

Concurrently, the same allegation of ineligibility on the part of the selected candidate was also made, in a separate case, by another complainant who had placed third in order of merit.

Facts and findings
The Ministry for Energy and Health had issued a Call for Application inviting applications for the position in question on a definite contract of three years.

The complainant was one of the three applicants who were interviewed for the post, for which she placed second scoring 8 marks less (out of 200) than the selected candidate.

As a first means of redress, the complainant petitioned the Public Service Commission (PSC). In her petition, the complainant alleged that before the results were published, the first placed candidate informed her and her colleagues that he had been placed first.

Moreover, the complainant stated that the selected candidate did not satisfy the requirements for eligibility as he never performed duties in a management position as requested in the Call for Application. Also, the complainant argued that the selected candidate's knowledge was only limited to one specific area.

The PSC took the leak allegation very seriously and requested sworn declarations from the Selection Board members to the effect that they did not leak the result. The PSC added that it took a dim view of such behaviour and would consider taking all necessary steps including the cancellation of the whole process if it transpired that any member of the Selection Board divulged information s/he was duty bound not to disclose.

In respect of complainant's request for breakdown of the marks of the other candidates, the PSC informed complainant that it does not divulge information concerning any candidate to persons other than the candidate himself or herself.

In their final reaction to the complainant's queries, the PSC stated that the Selection Board has confirmed the eligibility of the first-placed candidate. Moreover, the Selection Board provided proof of work experience which had been relevant to the position in question and could be considered of a managerial stature.

Not satisfied with the replies given by the PSC, the complainant queried again on how the first placed candidate was considered as eligible for the post when he was not employed in a management position for one year as required by the Call. The PSC reteirated its position and informed the complainant that it considered the case as closed.

At this stage complainant sought the intervention of the Ombudsman who requested the Commissioner for Health to investigate the complaint.

The Commissioner for Health sought the reaction of the PSC. The PSC kept to the version communicated to the complainant and added that after thoroughly addressing and considered the points raised by the complainant in her petition it has decided that no further investigations were required.

Considerations

The main, and the determining, issue in this case concerns the eligibility interpretation as applied by the Selection Board, an interpretation sanctioned by the PSC in addressing complainant's petition. The complainant argued all along that the first placed candidate

did not satisfy this requirement since he never occupied a management position for one (1) year. Faced with this argument, the PSC consulted the Selection Board which confirmed the eligibility of the first placed candidate and which in the opinion of the Commission provided proof of "*... work experience which had been relevant to the position in question and could be considered of a managerial stature.*"

This Office has also scrutinised the Job Description of the post the selected candidate held, and the Commissioner for Health was of the opinion that the selected candidate did not previously occupy a managerial position.

On this issue, the PSC commented that it had scrutinised the duties carried out by the first placed candidate and insisted that he had carried out managerial duties. It noted that amongst other duties, as a deputy, the selected candidate had to assist his superior in the co-ordination of the personnel and services involved in the delivery of care to patients, participate in the development, implementation and evaluation of quality initiatives, and play a leading role in the education of junior staff and students. Such duties definitely entailed good managerial skills.

The Commissioner also remarked that the position held by the selected candidate was a Scale 8 job, therefore, rendering him ineligible to apply since the Call for Applications stated "*... in a Scale not below Scale 7...*".

The eligibility and other conditions and requirements of a Call for Applications are binding to the employer, the applicant and to the Selection Board appointed for the purpose. The Selection Board had no right to ignore or deviate from the conditions laid down in respect of the Call.

On the allegation that a member of the Board leaked the results of the selection process, the Commissioner commented that the PSC did well to take a serious view of the leak and was ready to consider annulling the whole process if this was proved. The Commission had sought clarification and received sworn affidavits from the Chairman and members of the Selection Board which it accepted, and as a result closed the issue. However, the Commissioner commented that the wording of the individual affidavits revealed that while two members clearly denied speaking to anyone about the result of the interviews, the other two members were not so specific. The Commissioner stated that in his opinion the Commission should have scrutinised these statements in more depth more so since the complainant had stated that she was informed of the results in the presence of witnesses.

On the request by the complainant to provide the breakdown of the marks given by the Selection Board, the Commissioner said that the PSC gave due consideration and reasonable replies. This Office acknowledges that marks given depended on the subjective evaluation of the members of the Selection Board on the replies given by the candidates during the interview.

Conclusions

Based on the facts and findings of his investigation, the Commissioner for Health concluded that:

a. *The interpretation of the eligibility requirement* - The Selection Board misinterpreted the eligibility requirement of a minimum of one year relevant experience in a management position when it considered only the experience/nature thereof of the first placed candidate. While the Board reached a debatable conclusion in respect of the experience of the selected candidate, it ignored the qualifying element of such experience as laid down in the Call for Applications – which had to be in a management position. The first placed candidate never occupied a recognised management position for a minimum of one year. On its part the PSC continued to support the Selection Board's decision. The Commissioner for Health did not agree with the PSC's decision.

b. *The alleged leak of the result* - While this Office considers that, if proven, the alleged leak of the result could not necessarily affect the result, it noted the importance which the Commission, rightly attaches to such breaches of secrecy. The Commission accepted the sworn declarations of the four members of the Selection Board even though closer scrutiny of the wording should have been taken to ensure that the statements enure that they satisfied the statement of the complaint.

Recommendation

The Commissioner for Health recommended that the Commission reviews its decision regarding the eligibility of the first placed candidate in line with the findings of this Office and, if it agrees with these findings, publish an amended result and take further consequential action.

Outcome

The Public Service Commission did not accept the recommendation of the Commissioner for Health, and therefore he informed the complainant so that she could take any action she deemed necessary to safeguard her interests.

Case Note on Case No HP0073
Mater Dei Hospital

Claim setteled following Commissioner's intervention

The complaint
A foreign Healthcare Professional who was employed at Mater Dei Hospital (MDH) filed a complaint with the Office of the Ombudsman against the Department of Health regarding a lack of reply to his request for refund of legal expenses incurred.

Facts and findings
The complainants, together with another Healthcare Professional, were accused of imprudence and carelessness whilst carrying out their duties.

After eight years of legal and court proceedings, the complainant was cleared of all charges and was declared not guilty by the Court. In its judgement the court stated that he had exercised diligence according to his profession. There could be no other way how he and his colleague could have performed a better job.

Following the Court judgement, complainant requested reimbursement of all the legal costs he had incurred to defend himself. The sum incurred amounted to more than €26,000.

Complainant submitted that he and his legal representatives had been requesting MDH to refund the expenses, for two years. The Hospital Authorities never replied to his plea. Complainant also revealed that the other Healthcare Professional, who was a Maltese national, had been fully refunded. On various occasions, complainant unsuccessfully tried to speak to the Hospital Authorities.

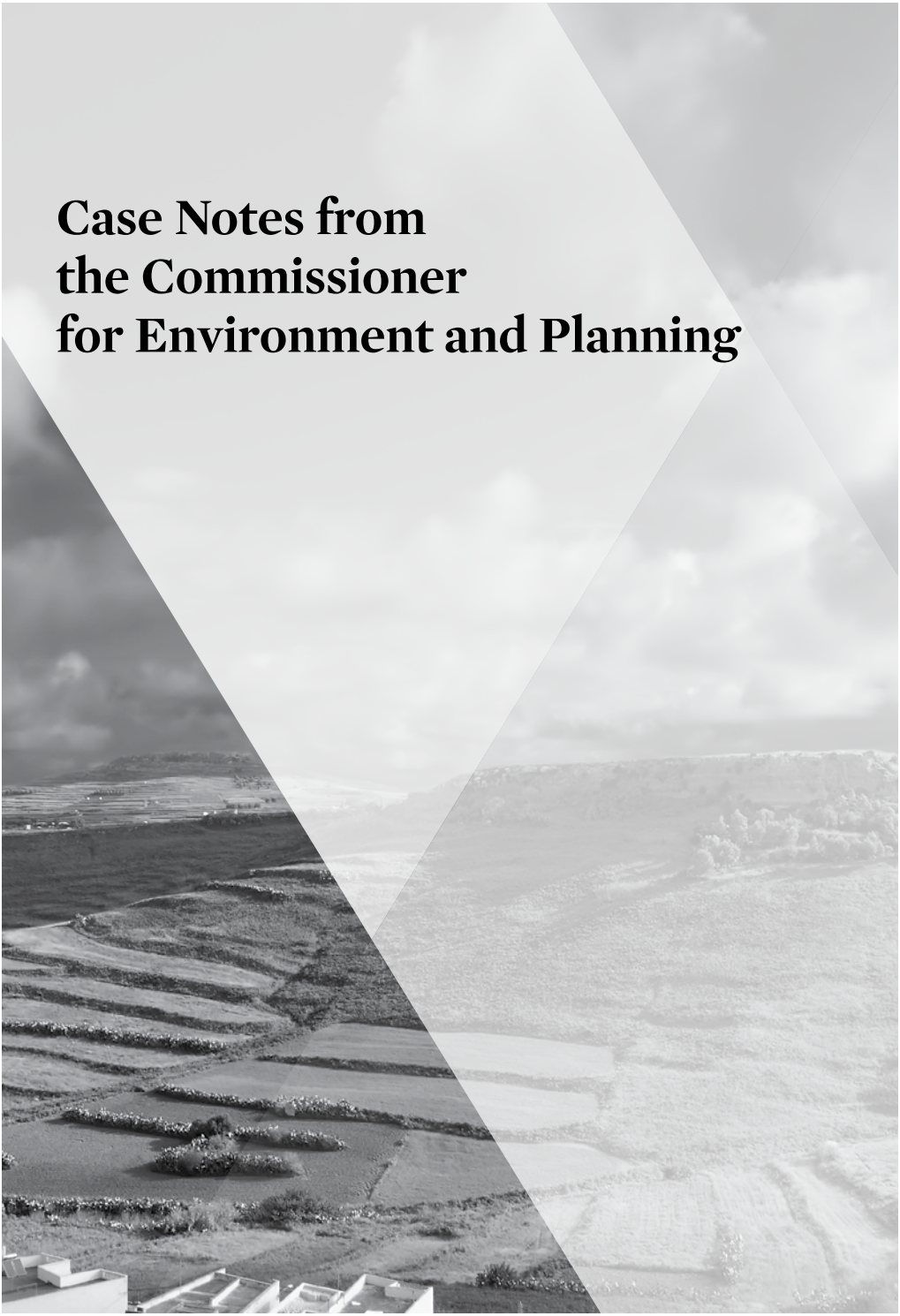
Conclusion

The Commissioner sought the reaction of the Department of Health. Through the the intervention of the Commissioner, the Department of Health formally informed complainant that he would be fully refunded and the funds were eventually approved.

Outcome

The Commissioner continued to follow up the case both with the complainant and the Department of Health until complainant received the full refund he was due to him.

Case Notes from the Commissioner for Environment and Planning



Case Note on Case No EN 0058
Malta Environment and Planning Authority (MEPA)

Unfair treatment in employment duties

Complaint
Complainant submitted that she had been employed by the MEPA since 2010 and had always carried out her duties diligently and efficiently, and was assigned work above her grade.

In 2013 she was transferred to lower job duties which incurred a loss in her income, following a negative *Annual Performance Appraisal Report*. In addition she had suffered harassment in her former post as her immediate superior, who had written the report, ignored her and never allocated her work in line with her Grade.

Investigation
The MEPA was requested to submit its position. In reply the MEPA stated that:

> *"On 26th July 2013, [...] was assigned to [...] a new Unit following an internal reorganization. In a meeting that was held with [...]complainant, Assistant Director [...] and Unit Manager [...] on the same day, she was informed that her duties will also incorporate those of a Personal Assistant, given that these were required and she was already receiving above-grade allowance of Grade 5. She was also informed that she will be continuing with her work related to the [...] tasks of her previous employment, since this had once again become the responsibility of the [...] Unit as it was prior to 2010. She informed management that the work related to [...] her former duties was taking hundred percent of her time and therefore she could not do other duties apart from that. Management insisted that being paid with an above grade allowance of Grade 5, the same level of productivity as any Grade 5 was expected.*

As time progressed, it was evident that [...] complainant was dealing only with [...] her previous duties and was not doing any PA duties as she kept insisting that she cannot cope with further duties. In view of this, management could not retain [...] complainant in this post since the role required that duties of a Personal Assistant were also handled besides those related directly to [...] her previous work. The above grade allowance that had been assigned and which was particularly linked to the duties she was carrying out at Grade 5, were halted. [...] She was offered various options at informal meetings with management, to which management had no affirmation and on 5th November 2013 she was located [...] elsewhere to carry out related duties.

The above sequence of events as outlined above does not justify the claims as presented in your correspondence and affirms that the transfer of [...] complainant was based on sound facts.

It is also worth noting, that management holds high esteem to the capabilities of [...] complainant and has recently relocated her to another Unit within the organization with an attempt to assign work which is more fulfilling to her aspirations. Management is informed that she is satisfied in her current duties."

A meeting was held with the Assistant Director responsible for complainant's sector, where further background information on the case was obtained. It was explained that the *Annual Performance Appraisal Report* had been amended by him in order to give a better reflection of the performance bracket attained by complainant in her work.

According to the Assistant Director, the issue boiled down to incompatibility between complainant and her immediate superior.

Meanwhile efforts were made to provide a suitable alternative posting for complainant, and after further discussion, this matter was resolved.

Observations and Findings

Complainant submitted that since 2011 she was being given an above-grade allowance due to the nature of work she was handling. In addition she had worked without supervision between September 2012 and August 2013.

On being transferred in 2013, she was informed that she was to continue with her previous duties while assisting her new direct superior.

Complainant stated that her superior failed to communicate with her as one would expect between a manager and his direct subordinate and she could not carry out her work as his assistant, such as in keeping his diary of appointments.

Then in September 2013, she got to know that she was to be transferred, and on enquiring with management was informed that this was being considered. On hearing this she wrote to the [...] Government about her case. Then a month later she found her *Annual Performance Appraisal Report* on her desk.

Following her complaint on the performance rating, a meeting was held with the Assistant Director together with her Manager, where the latter stated that he did not want to work with her. Complainant stated that in the meeting the Manager indicated that he had been offended by the contents of the letter she had sent, although she claimed that she had not mentioned him by name in it.

The MEPA contended that although complainant informed Management that her time was fully taken up by the work she had been carrying out to date, she had been told that since she was being paid an above-grade allowance it was expected that she attains the level of productivity commensurate with that grade.

It was further submitted that when it became evident that complainant was not carrying out above-grade duties, as she was insisting that her time was fully taken up, she was transferred to a post where she could carry out work according to her grade, and the allowance was stopped.

In reviewing the case, it emerged that complainant had been building up a sound track record, as borne out by her performance reports. Matters took a turn for the worse when she was transferred to assist a particular manager where problems between them arose.

It was considered that, given the facts of the case, complainant could not be found at fault since, notwithstanding the difficulties of communication and of being ignored by her direct superior, she had not shirked her new duties and had also continued to carry out the work previously assigned to her.

Conclusions and recommendations

In view of the above it was found that:

- the complaint that the MEPA had acted in a discriminatory manner when it had withheld emoluments due to complainant for performing duties in an above-grade category was justified. Complainant's performance [...] within her new posting had not been negatively affected, notwithstanding the difficulties with her Team Manager. This was borne out by her performance report;
- the allegation that complainant had been subject to harassment by her Team Manager during this period was however not justified. Though there had been a communication breakdown between them, complainant had been fully taken up by the administration of the UIF funds and therefore had more than enough on her plate, as she herself had expressed. In addition the situation that had evolved between complainant and her Team Manager, though certainly not harmonious, had not led to her being incapable of continuing to execute her duties efficiently; and
- the MEPA should have immediately reinstated complainant in an above-grade position, with salary and allowances commensurate with a Grade 5 post, and reimbursed her all amounts due to her, from the date when she had been downgraded to date.

Subsequently it was reported that complainant had been given her former position back with an above grade allowance with a partial reimbursement of the emoluments due.

Case Note on Case No EO007
Transport Malta / Ministry for Gozo

Unjustified delay in opening up a new roadway

Complaint
A relative of a property owner lodged a complaint against Transport Malta and the Gozo Ministry because of alleged unjustified delay in opening up a public roadway in the limits of Xewkija, Gozo.

Complainant reported that her relative had built his house according to the permit issued, but Transport Malta did not open up the roadway and as a result he and his family were suffering hardship which was also impinging on their health.

Investigation
It resulted that the house had been built on a plot located in a schemed road which had not yet been formed and which was located on private land. The road was linked to other roads at each end, but the only entrance at the time consisted of an alley besides an existing building which stood at the corner with an existing road at one end of the planned street.

Access to the plot was therefore restricted, since to form the whole width of the street it was necessary to demolish the corner building.

Complainant was stating that the delay by Transport Malta in opening up the roadway was unjust.

Transport Malta and the Gozo Ministry were requested to respond to the complaint. From the resulting information it transpired that in order to open up and form the roadway, Government, through the Gozo Ministry, would have had to expropriate private property on behalf of the complainant's relative.

In addition, no other plots had been developed yet, and it would be economically and technically inadvisable to complete the road construction at this stage.

Observations and Findings

The formation of new roads is covered by Regulation 12 of the *New Roads and Road Works Regulations*, Legal Notice 29 of 2010 (S.L. 499.57) which states that:

> "*No building abutting on a new road in an inhabited area shall be erected before the road has been levelled to the proper line fixed by the Malta Environmental and Planning Authority, in consultation with the Authority. The length of the road to be so levelled shall extend from any existing inhabited road already opened to the public to the extreme end of the frontage of the building to be erected.*"

The conditions imposed by this Regulation are:

a) No building can be constructed unless the road has been levelled.
b) The road must be levelled to the proper line.
c) The proper line must be fixed by MEPA in consultation with Transport Malta.
d) The length of the road must extend from any existing inhabited road already opened to the extreme end of the frontage of the building to be erected.

At present the road is formed and levelled from the plot in question up to the corner where the building and alley are located. Only one plot has been developed, and the remainder of the frontages are still undeveloped.

The Gozo Ministry argued that it would not be advisable to complete the construction of the road at this stage, first of all because it would involve having to expropriate land on behalf of third parties, and secondly because by the time the remaining frontages were developed, the road would have had to be rebuilt to repair the damage caused by the construction of the various units and the road excavation required to connect the utilities to each plot.

It was acknowledged that access to the developed plot was somewhat restricted but not impossible. However in the present situation, opening and final formation of the roadway was not technically and economically advisable.

Conclusions and recommendations

In view of the above it was found that although access to the plot was indeed restricted and was causing some discomfort to the inhabitants and visitors, the reasons brought by the Gozo Ministry were not unjustified.

There had to be a balance between the legitimate rights of the inhabitants to access their property freely and without undue hindrance, after having paid all fees and obtained the necessary permits, and technical and economic considerations which made the opening up and final formation of the road unfeasible at the moment.

In the circumstances it could not be stated that the Gozo Ministry and Transport Malta had acted unfairly or in a discriminatory manner in refusing to carry out the necessary works. The complaint was therefore found not to be justified.

Case Note on Case Number O0008
Malta Environment and Planning Authority

Incorrect application of policies in approving request for development

Complaint
A property owner lodged a complaint against the MEPA about the manner by which the MEPA had granted a permit for his neighbour to erect a washroom on the roof of his villa, when the same washroom had been already refused by the (then) Planning Appeals Board.

Complainant also alleged that the permit was abusively issued through a 'Minor Amendment' application in breach of Legal Notice L.N. 514/2010.

Investigation
The MEPA was requested to respond to the complaint. In its response the MEPA justified the procedures and decision leading to the permit by stating that in the original permit the Planning Directorate had recommended an approval. The application sought approval of other development on the site as well.

However the Environment and Planning Commission (EPC) requested changes to the washroom design as it was concerned about the lack of adequate site curtilage.

The MEPA argued that the main concern about the washroom was related to the design since it was situated at the highest part and at the very back of the detached dwelling.

The MEPA contended that the issue dealt with by the Appeals Board was about the side curtilage only and that the washroom issue was never discussed.

The Minor Amendment application subsequently submitted was for the washroom only.

In this application the washroom was reduced in size and positioned at a lower and centrally located intermediate level.

The MEPA justified approval of the application since it argued that the new height is normally accepted for the installation of services without the need of a permit, and the request was accepted in good faith and within the spirit of the decisions and recommendations carried out during the processing of the permit, without jeopardising both the Boards' decisions.

Observations and findings

The MEPA stated that the request was accepted in good faith, without clarifying what the 'good faith' consisted of.

The facts of the case showed that a specific request for the construction of a washroom on site had been turned down by the EPC and that the appeal on this decision had been thrown out.

It had clearly emerged that the refusal to construct the washroom was conditioned by the shortfall in side curtilage. It was therefore pointless to argue that the washroom design conformed to DC 2007 guidelines.

The decision on the washroom had to be tied to the issue of the lack of side curtilage. In this context, the decision by the Appeals Tribunal to confirm the refusal strengthened the EPC's decision to refuse a permit for the washroom, which refusal had been based on the fact that the shortfall in side curtilage width could not justify the additional washroom, regardless of whether or not it conformed to design guidelines.

The situation is analogous to those where washrooms are not permitted on roofs, due to insufficient depth of the backyard. The side curtilage is just as important in respecting amenities and character of the zone by retaining sufficient clear space within the side curtilage, and where this was found lacking, to refuse further increase in building height which would exacerbate this shortfall.

In the light of the foregoing it was clear that the 'Minor Amendment' procedures had been used to circumvent planning decisions taken by the Boards.

Examining the provisions of LN 514/2010 covering procedure for applications and their determination, Section 12(2) states that conditions of permissions cannot be amended through the minor amendment procedure.

It follows that once a single condition in a permit cannot be amended in this manner, than it should be even more unacceptable to reverse a blanket refusal by using this procedure.

Section 3(b) sets out the criteria which have to be met for such amendments to be acceptable. These criteria have to be respected *in toto* and cannot be applied in a piecemeal fashion.

Sub-sections (i) to (iii) in particular establish that minor amendment applications are unacceptable where the proposed development (i) materially alters the character and external appearance of the site, (ii) results in development which no longer accords with the character of the surrounding area, and (iii) significantly alters the overall form or nature of the development.

In addition Section 12(8)(b) establishes that the proposed amendments must not affect the way in which the material consideration raised by the development had originally been assessed or addressed, and in addition they must not conflict with a decision taken by the Authority or Commission, even if this was not a condition of the permit.

In accepting to process the Minor Amendment application, the MEPA denied the complainant the right to contest the application for two reasons, namely:

i. Minor Amendment applications are not publicised in the same manner as full applications, and so complainant could not register his interest as a third party interested person because of the lack of publicity; and
ii. In such cases there is no appeal allowable on decisions regarding Minor Amendment applications, not even by third parties.

Conclusions and recommendations

In view of the above it was found that:

(i) the complaint that the application should not have been processed as a Minor Amendment application was sustained;

(ii) the development could not qualify as a minor amendment as it breached the provisions of Legal Notice 514/2010;

(iii) the MEPA should have declined to process the request and should have directed the applicant to submit an Amended Development application instead;

(iv) since the MEPA's processing and approval of the request were in manifest breach of the law, the approval constituted an error on the face of the record which offends against the law. Consequently the provisions of Section 77(1) of the Planning Act (Act X of 2010) should apply; and

(v) as a result, the Minor Amendment approval for the washroom should be revoked.

MEPA Reaction

The MEPA responded stating that following the recommendations, it had initiated the procedure to revoke the permission in accordance with Section 77(1) of the Planning Act. This response was communicated to complainant.

Later Developments

It resulted however that at its subsequent meeting, the MEPA Board decided that there was no basis to invoke Article 77. This decision was communicated to complainant (it was not communicated to this Office).

As a result complainant lodged a judicial protest. However a counter-protest was never filed and it appears that no further legal action was taken.

Case Note on Case No O0027
Transport Malta

Development in breach of safety and not properly covered by permits

Complaint
Residents along Triq ix-Xatt, Pietà lodged a complaint against Transport Malta, alleging that the proposed implementation of a Priority Bus Lane in front of their property breached safety requirements, and in addition was going to be carried out without the necessary clearances from the MEPA.

Investigation
Transport Malta was carrying out infrastructural changes to the public transport system in the Msida/Pietà area, as part of a larger project under the MODUS ERDF 256 funding programme.

The Msida/Pietà component of the project included the upgrading of the traffic light junction at Msida Pjazza and the provision of bus priority lanes at the Msida Pjazza junction and Triq ix-Xatt, Pietà.

In the latter sector, on the landward side it was being proposed to remove the trees separating the former bus lane from the carriageway, leaving the bus lane as a buffer space between the new bus priority lane and the buildings.

A notification (DN 0405/12) had been submitted to the MEPA however it had been refused since the proposal included the removal of the trees. The design was then amended to retain the trees. As a result, the bus priority lane was designed along the old bus lane, leaving no buffer space. Parking was being provided between the trees.

Transport Malta stated that the design was based on a 'Shared Space' concept, which seeks to reduce the dominance of vehicles, vehicle speeds and road casualty rates, while demarcation between vehicle traffic and pedestrians is minimized by the removal of kerbs and footways. Vehicle traffic was to be restricted to public transport route buses, service vehicles and residents' vehicles.

Since the revised design did not include the removal of any trees, nor did it extend the existing road alignments, there was no need to submit a new notification to the MEPA.

It was claimed that the revised design also addressed concerns raised by the Pietà Local Council.

Observations and Findings

The residents were irate because they suddenly found themselves faced with works about to start on a project which re-established the bus lane just outside their properties, without being given an opportunity to contest this decision.

Their concerns stemmed mainly from the fact that the past use of the bus lane had been the cause of many accidents, even fatalities, and they did not wish to have a recurrence of those hazardous conditions.

In addition, access to and from their vehicles parked across the bus lane was going to be a constant potential source of further danger.

Transport Malta contended that the project was going to be carried out in full respect of procedures required in terms of permit procurement. In addition the concept allowed for the shared use of the space with controlled and restricted vehicular access, and that traffic hazards would be minimised.

Conclusions and recommendations

In view of the above it was found that:

- the complaint that the project that was carried out by Transport Malta was in breach of public health and safety and was not covered by permits was partly sustained in that while Transport Malta did not appear to have acted outside the law with regards to permits for implementing the revised project following the MEPA's refusal of the original designs, it did however act inconsiderately and insensitively to the detriment

of the residents' health and well-being by not using all alternative MEPA application procedures at its disposal to obtain approval for the initial concept to be implemented, but instead went ahead with an alternative design which not only brought about a reduction in the residents' quality of life but was also less effective in achieving the objectives of efficiency and improvement in the public transport system as set out in the MODUS programme which was funding the project.

- the revised design also introduced hazards to pedestrians' safety which were not present in the initial concept. Therefore the complaint was justified with regards to this issue.
- the sudden implementation of the project with revised designs moving the carriageway right up to the buildings had deprived the owners/users of these buildings of their fundamental right to be informed beforehand on the details of the project with enough time to make their case and if necessary, contest the implementation. Therefore the complaint was justified on this point also.
- the change in design was not notified to the PPCD as per procedure and the matter should have been investigated in order to establish whether the aims and objectives of the funding agreement were still being observed.
- although the project was already being implemented and there was no breach in procedure with regards to permits, the project should have been halted and a suitable alternative design sought.

A full Development Application should have been submitted to the MEPA to seek approval for the original design which achieved the aim of establishing a fully autonomous bus lane while restoring a measure of respect of the residents' rights to intervene in the process in defence of their right to preserve their quality of life.

Transport Malta Reaction

Transport Malta responded by stating that:

> *"1. Your first Conclusion and Recommendation is in the sense that "the complaint that the project being carried out by TM is in breach of public health and safety and is not covered by permits is partly sustained in that while TM does not appear to have acted outside the law with regards to permits for implementing the revised project following MEPA's refusal of the original designs, it did however act inconsiderately and insensitively to the detriment of the residents' well-being and health by not using all alternative MEPA application procedures at its disposal*

to obtain approval for the initial concept to be implemented, but instead went ahead with an alternative design which will not only bring about a reduction in the residents' quality of life but will also be less effective in achieving the objectives of efficiency and improvement in the public transport system as set out in the MODUS programme which is funding the project".

In this regard TM would like to outline the following considerations:

(a) The design of the Revised Project is a 'shared space' standard design based on internationally recognized principles which has and continues to be implemented world-wide in innumerable projects of this kind. Said design has been planned and prepared on the strength of the combined expertise of competent and fully-qualified architects and street design engineers from TM in collaboration with the MEPA Transport Planning Unit. The Project has in fact been designed in order to achieve the intended purposes outlined in the MODUS programme (which is funding the project) of increasing traffic efficiency and improving the public transport system.

Whilst opinion is sacred and TM acknowledges and appreciates the opinion pronounced in your Report in the sense that the Revised Project does not achieve in the best way possible the intended purpose, TM feels that the best endeavours have been exerted by its technical team, acting in collaboration with the MEPA Transport Planning Unit, to achieve these goals without jeopardizing the quality of life of the residents. It is being reiterated that the 'shared space' design has been internationally acknowledged and adopted as a primary tool in the efforts to increase traffic efficiency and the implementation of such a design has reaped the desired rewards in numerous other projects, both locally as well as in other countries, in which it has been adopted.

(b) With regards to the issue of MEPA Permits, TM would like to underline the fact that it has acted strictly within the parameters of the law, and hence it fails to understand how the part of the complaint in which it is alleged that the project is not covered by permits can be sustained, neither totally nor partially, since this is wholly untrue. Indeed, as declared in your Report, MEPA itself has confirmed that no notification or any further permit was required for the Revised Project. Consequently TM, being a public authority, cannot but express its strong

reservations to the statement that the complaint that the Project is not covered by permits is, albeit partially, correct.

TM would further like to highlight the fact that, in the carrying out the necessary works for the execution of the Project, all necessary permits from the Pietà Local council have been sought and obtained. In this regards, kindly find attached Permit No: RWP1-0838/14 (Permit to Carry Out Road Works) issued by the Pietà Local council on the 26th August, 2014. This further goes to show that all permits are in place and that the allegation made by the complainant to the effect that the Project is not covered by permits is completely unfounded."