PARLIAMENTARY OMBUDSMAN | MALTA

CASE NOTES 2016

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OMBUDSMAN

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
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Website: www.ombudsman.org.mt
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Foreword

The investigation of complaints against the public administration by aggrieved citizens is the primary function of the Office of the Ombudsman. The Ombudsman Act gives the Ombudsman wide powers to conduct in-depth investigations on allegations of injustice, maladministration and improper discrimination that deprive persons of their rights.

The Office has access to all documents and can request the production of all evidence required for his investigation. He can also summon witnesses to give evidence before him in the conduct of his inquiry. He is bound to observe the basic rules of due process and in particular to ascertain that public authorities against whom allegations are made have the opportunity to defend themselves fully.

The Office of the Ombudsman is not however a Court of Law. While legality is to be observed, the Ombudsman when making his recommendations in his final opinion would be guided by the values of fairness, justice and equity that should always be the hallmark of good governance. Moreover, the Ombudsman's final opinions are not judgements and cannot be enforced. Their real strength has in the powers of persuasion of the Ombudsman's arguments and the sense of correctness and propriety that pervades them. His considerations based on what is right and just, seek to assess the conduct of public authorities not only to ensure that it is in line with applicable laws and regulations but also that it conforms with the code of good administrative behaviour. This to ensure that the enjoyment of the individual to his fundamental right to a good public administration is secured.

These defining characteristics distinguish the Office of the Ombudsman from a Court of Law and a government department. They are characteristics that are not readily understood by aggrieved persons who need to be made aware of the services the Office of the Ombudsman can put at their disposal to seek redress against

administrative injustice. Citizens therefore need to be informed of the role that the Office performs as a mediator between the citizen and public authorities and on the extent of the powers of the Ombudsman and Commissioners to investigate complaints, to determine whether there was a case of maladministration and recommend redress to remedy injustice. Many might not be aware of the opportunity that one could have to obtain, in the course of the investigation by the Ombudsman, direct information on how a complaint was processed by a public authority and what was the justification for its actions.

It is precisely because of this lack of awareness on the role of the Ombudsman that the Office has, since it was set up, felt the need to organise outreach activities to keep the public informed of the functions of the Ombudsman and his Commissioners, how they conduct their investigations and how aggrieved persons stand to gain from utilising their services.

The regular publication of these Case Notes has for the last twenty one years been a regular feature of these outreach activities. They are meant to provide an inkling on the nature of the complaints filed and how the Office conducts its investigation that is often concluded by an amicable settlement with the public authority or a final opinion with a recommendation on an appropriate remedy to rectify an identified injustice.

On receiving a written complaint, the Ombudsman assigns its investigation either to one of the Commissioners if the subject matter falls within his jurisdiction, or to one of the Investigating Officers. A reader who goes through these Case Notes will immediately realise that the first action taken by the Ombudsman, Commissioner or the Investigating Officer is to inform the public authority against whom the complaint is made, requesting that they be fully informed of the reasons of the action taken by the department and why the grievance could not be satisfactorily addressed.

During the investigation evidence is produced by both parties and the Office has full access to official documents relevant to the complaint. Readers will note that the central part of a Case Note is taken up by the considerations of the Ombudsman and

Commissioners that take into account the submissions of both parties, stating the conclusions that led them to uphold or reject the complaint. These considerations attempt to put the resulting facts of the case in their proper context in the light of applicable laws and regulations as well as the observance of the code of proper administrative behaviour.

Readers will appreciate that the work of the Ombudsman and Commissioners goes beyond the compilation of the relevant facts of the case since they are required to give a value judgement on whether there has been an act of maladministration that justifies the complaint.

This volume of Case Notes illustrates the great variety in the nature and complexity of complaints. These are factors that, together with the unfortunate delay sometimes experienced by Investigating Officers in receiving reactions from public authorities, directly negatively affect the time frame within which cases can be concluded.

Every effort is made to conclude investigations as speedily as possible, but the Office cannot forgo its duty to conduct comprehensive and qualitative investigations of complaints at the expense of celerity. It can be noted that persistence in pursuing the implementation of recommendations in final opinions often produce the desired result. That process is however time consuming because often one has to convince reluctant administrators who are required to depart from established administrative positions.

Every effort has been made to keep these Case Notes as short, concise and clear as possible. This has not however been possible in all cases. Important considerations from the Ombudsman and Commissioners on the interpretation of laws and regulations, the correctness and justness of administrative decisions should be well explained and should not be sacrificed for the sake of brevity. It is these Case Notes that ultimately serve as a useful guide to other citizens who feel aggrieved in identical circumstances.

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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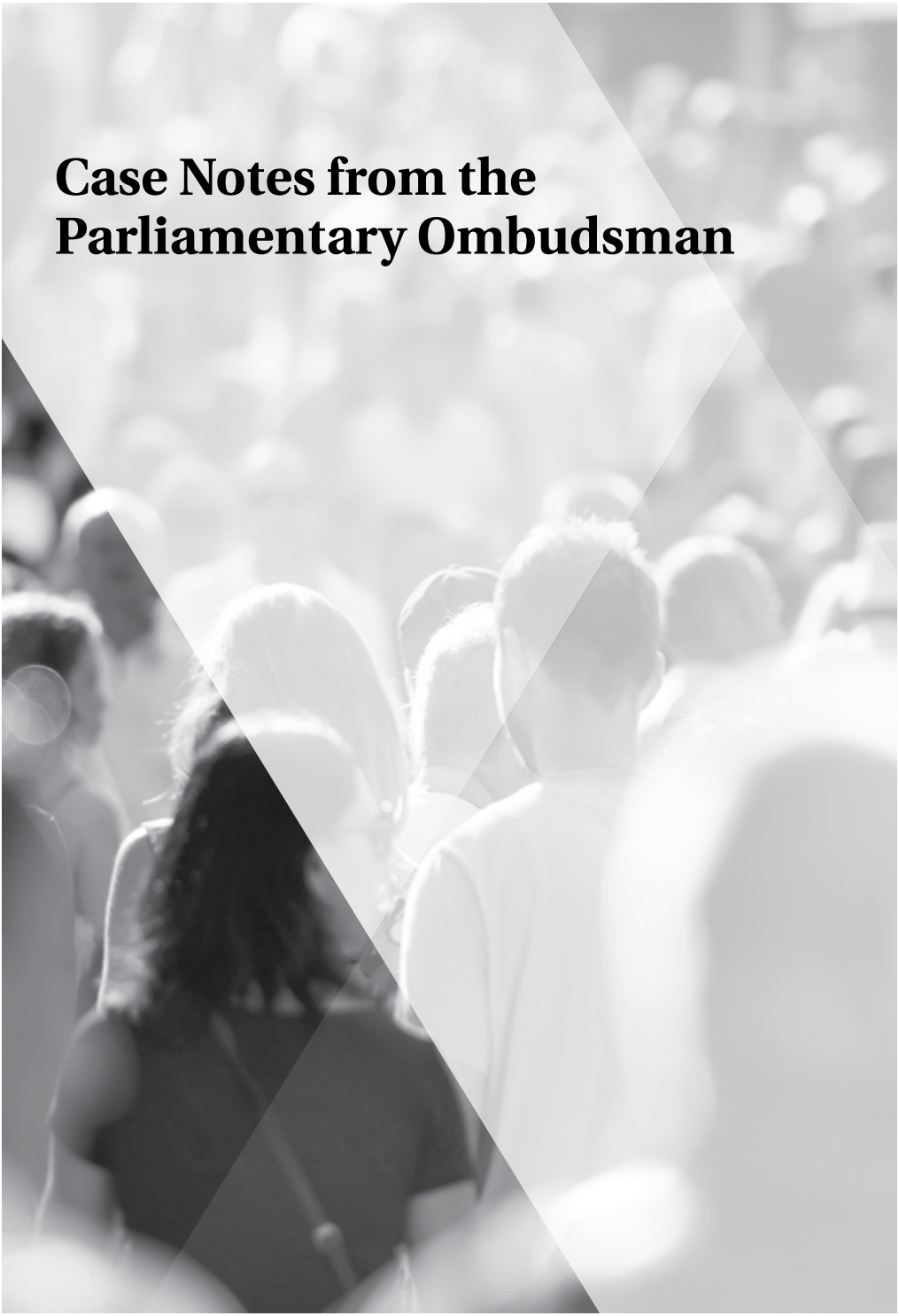


Case Note on Case No P 0079

Dangerous traffic situation

The complaint
The Ombudsman investigated alleged traffic irregularities in San Anton Street, Attard which were endangering the safety of pedestrians including small children.

The investigation
The complainant submitted that Transport Malta had been ignoring his suggestions for added safety on that road, including the fixing of a bollard in G. Portelli Street to prevent inflow onto San Anton Street near the President's Kitchen Garden. The Ombudsman established that the traffic flow in this part of Attard, as indeed in other parts of the three villages, was heavy and was causing inconvenience and problems to residents and users of roads alike.

The authority insisted that it was doing its utmost to alleviate the situation and mitigate inconvenience. The authority was of the opinion that if San Anton Street between Lord Strickland and G. Portelli Street became a one-way street, this would create a circulation problem for the residents at the upper part of Lija. That would inflate the problem rather than mitigate it. G. Portell Street was never a one-way street and the proposal to change Annibale Preca Street to a one-way system was opposed by the residents and Local Councils of Balzan and Lija. They argued that this would divert heavy traffic to residential streets and would actually prove no solution at all.

Ombudsman's opinion
In his opinion, the Ombudsman considered that the legal basis of the powers of the transport authority to regulate traffic emanates from Section 7 of the Authority for Transport in Malta Act. Sub-section (h) of that section stated that one of the functions of the authority was "*to do all such things that may be necessary for the regulation, management, safety and control of road traffic both at a national as*

well as at local level and for this purpose to adopt strategies and standards that are benchmarked at a European level". The authority considered the representations made by complainant but had concluded that its proposals, if adopted would create issues in other areas.

Conclusion

The Ombudsman noted that the authority had also to consult local authorities about traffic arrangements. The traffic issue was an onerous one for the local councils of the three villages given the narrow streets and the increase in the local population. Moreover, drivers daily attempt to avoid the main thoroughfares that were usually choked by traffic.

The Ombudsman informed complainant that the authority could not adopt his proposal. That in itself did not constitute an act of bad administration. It had tried to resolve the issue but it could not do so by laying down a more burdensome alternative to traffic flow onto other parts of the three villages which were more densely populated than San Anton Street in Attard.

He therefore informed complainant that his complaint could not be entertained.

Case Note on Case No P 0334

Unfair treatment of Executive

The complaint

An employee with a parastatal Company felt aggrieved at a treatment meted out to him despite his thirty-eight years of dedicated service to the Company, thirty years of which were in an executive position. He complained to the Ombudsman on the way he was treated when he was offered a new contract in 2012 and particularly the remuneration offered to him when compared to similar contracts. He also complained that the Company refused to grant him a terminal benefit when he had to retire prematurely on medical grounds as attested by medical certificates.

Limits of investigation

From the outset the Ombudsman informed complainant that his Office could not investigate the merits of the conditions of employment and remuneration attached to his 2012 indefinite contract. Nor could it investigate decisions taken by his employer when he had applied for the Company's early retirement scheme. An application that was not favourably considered because of his being the most senior officer in his section and management had requested him to stay on. These elements of the complaint were in any case prescribed in terms of the Ombudsman Act since more than three years had elapsed since he first became aware of the administrative act complained of. The Ombudsman however investigated the employee's claim to a terminal benefit because of his retirement on medical grounds.

The issue

Complainant's employer confirmed that he had retired after many years of dedicated service on the advice of his medical specialist. In a sense complainant's grievance was unlike that of other colleagues since he did not benefit from any terminal benefit as a result of his having had to retire on medical grounds. The Company pointed out that however, one had to distinguish between the conditions of service

of complainant's post prior to the signing of his indefinite contract in 2012 on the one hand, and on the other the significantly different conditions pertaining to his former post on a definite contract.

The employee's previous post entitled him to apply for the early retirement scheme with its benefits while the conditions of his indefinite contract did not. Since complainant occupied a key position, management was doubtful as to whether his request for early retirement would have been granted. His definite contract from which he retired, entitled complainant to a remuneration package that was much higher than that of his previous post.

The Company pointed out that complainant's contract was on an indefinite basis and not covered under the collective agreement. While the conditions of his former post in terms of the applicable agreement provided for a terminal benefit in case of retirement on medical grounds, complainant's position under his indefinite contract did not include such a benefit. That meant that irrespective of whether complainant resigned of his own free will as he actually did, or was boarded out on medical grounds he would still not have been entitled to a terminal benefit.

The Ombudsman enquired whether the employer could not have treated complainant's case on its own merits on compassionate grounds. This also in view of his significant contribution to the Company over several years and the fact that he was forced to retire on medical grounds. However, the management pointed out that any payment of a terminal benefit in such a case would create a serious precedent with significant financial implications especially as there were others who could make similar claims.

Complainant and his employer did not agree on the circumstances leading to his retirement on sick leave. However the employee insisted that according to his medical certificate the medical conditions on the basis of which he had to retire were a direct consequence of his work and responsibilities. He therefore argued that the Company should assume responsibility for that situation.

Complainant also submitted that he was informed that all employees who were boarded out on medical grounds had been offered medical benefits. He therefore

argued that this should also apply to him. He however failed to produce any evidence to this effect when asked to do so by the Ombudsman.

Considerations

The only issue that needed to be considered was whether complainant had been unjustly deprived of the terminal benefit following his premature retirement on medical grounds. There was no contestation about the fact that complainant accepted and signed an indefinite contract in a senior managerial position which did not fall within the grades covered by the collective agreement applicable to other employees. Therefore his entitlement to benefits was limited to those stipulated in his contract and the benefit claimed by complainant was not one of them.

The Ombudsman held that he could not challenge the conditions of the contract of employment or even still, investigate complainant's claim that it was unfair because it did not include a terminal medical benefit. The terms and conditions of a contract entered into between the parties concerned constitute a package. Certainly one could not validly argue that a contract was inferior to another on the basis of the argument that one single element was included or not.

The Ombudsman considered that there was no valid argument to contest the fact that the Company acted within the terms and conditions of the contract which complainant had signed, even if he claimed that his signature was conditional to the remuneration and conditions being no less than those of his peers.

Compassionate grounds

The Ombudsman then considered whether the Company should have treated complainant's case on compassionate grounds on an ex gratia basis and granted him a terminal benefit. There was no contestation regarding the fact that complainant had retired after many years of dedicated service in a position of very high responsibility. Nor was there any shadow of doubt regarding the genuineness of his severe medical condition which forced him to retire.

Under different circumstances and conditions of employment, complainant would have received a terminal benefit. His employer declined to grant such benefit on compassionate grounds arguing that his pay package was significantly superior to that which he enjoyed previously under conditions which would have entitled

him to such a terminal benefit. It also pleaded the well-known difficult financial condition the Company was in as well as the serious precedent that such a decision would entail since there were others who could eventually claim it.

Conclusion

The Ombudsman, while fully understanding the Company's position, considered that complainant's claim merited a further review of its decision. It had to be stressed that the Company was not obliged to do this but as a good employer who acted as a *bonus pater familias* it should reconsider whether a terminal benefit could be granted on a purely *ex gratia* basis on compassionate grounds. The Ombudsman recommended that the Company revisits its decision.

Sequel

Complainant did not follow up his case with the Ombudsman. However the Office was informed by a Grievances Unit of the Company that it had considered his complaint and decided to recommend that the Management should following negotiation with the Unions adopt transparent and established criteria. Therefore complainant should be given the opportunity to benefit from an adequate salary that reflects the duties and responsibilities inherent to his grade. The Office of the Ombudsman was not informed whether the Company accepted and implemented this recommendation.

Case Note on Case No O 0022

Down-grading causes injustice

The complaint
A Senior Legal Officer employed on a fixed term contract by a public authority alleged that he had suffered an injustice when he had been demoted and when the authority had unfairly and arbitrarily changed his job designation.

The investigation
Complainant had joined the authority as Senior Legal Counsel in 2001 on a 3-year contract that was successively renewed every three years. His job designation was that of Chief Legal Adviser and he was directly answerable to the Executive Chairman and the Director General. Whenever his contract was renewed his job description remained the same as did his direct line reporting. The line reporting in his "*position description*" served as an attachment to his last renewal contract in 2013 which stated that he had to report to the Chairman/Director General.

Complainant was informed that as a result of a restructuring exercise the heads of department or "*chiefs*" were given additional or due responsibilities or left with their current responsibilities. In fact his designation was "*arbitrarily*" changed to Head of Legal from Chief Legal Adviser, reporting to a peer of his, namely the Chief External Relations.

Complainant submitted that this was an effective demotion that was illegal and prejudicial to his career. He also alleged that the restructuring would adversely affect his eventual salary revisions and bonus because he would not be included in the top salary bracket of "*chiefs*". He therefore requested to be reinstated to his position of Chief Legal Adviser answering directly to the Chairman/Director General.

The Authority's response

The Authority maintained that it had in fact conducted a necessary restructuring exercise that included an organisational review. It had decided to streamline the existing organisational structure since the new board had discovered a number of characteristics which did not make for efficient operations. The authority stressed that it did not discriminate against anyone when conducting this exercise. The new designations did not affect the remuneration or conditions of employment and it was only complainant who did not accept the new designation of Head of Legal. Once complainant's responsibilities did not change and only his reporting line had changed this did not mean that he had suffered prejudice. His complaint that he could even suffer prejudice in his financial package would be addressed separately.

The Authority maintained that complainant had been consulted and had agreed to the proposed new structure though he voiced his concern with regards to whom he was going to report. On the other hand, complainant denied that the organisation or restructuring was discussed with him and he bluntly stated that there was no discussion on this, and that it was a *fait accompli*.

Conclusions and recommendations

The Ombudsman considered that the direction of the Authority was vested in its Director General. The executive duties of the Director General were being carried out by the Chairman himself who was in fact the Executive Chairman of the Authority. The investigation showed that objectively, complainant was slotted into a position that was below his designated position. Once complainant was not promoted, the only way he could go was downwards. He believed that his position had been downgraded from Chief to Senior Manager. Logically this meant that he had been demoted because his position had not remained static.

The Ombudsman concluded that while the Authority had the right to reorganise its own structure, it had caused an injustice to complainant when it removed him from the post of Chief Legal Officer and from membership of the management committee.

The organisational structure of an entity did not fall within the competence of the Ombudsman. Yet he could query any decision that might have been taken to the detriment of an employee who had been occupying that position for years on end. The Authority maintained that this was done to streamline the organisation but it seemed to have singled out the Chief Legal Officer and one other senior officer.

The Ombudsman concluded that the authority should have taken time and effort to explain in detail, if necessary, why complainant should have a change in designation and certainly not a downgrading or demotion as he believed.

Ombudsman's considerations

The Ombudsman reached his conclusions after making the following interesting considerations:

1. Undoubtedly the reorganisation or streamlining which the new board embarked upon negatively affected complainant. He was no longer an "*independent agent*" answering directly to the highest executive authority but a subordinate answering to a head of one of the departments of the Authority.

2. Complainant felt additional grief in that he had not been consulted when the board was considering this reorganisation. Undoubtedly, he had a direct interest to be informed since essentially, it only involved him and another senior executive.

3. Undoubtedly, complainant's position within the Authority did not remain the same. Though there was no reduction in complainant's conditions of employment, especially with regard to his salary and benefits, one could question whether there was equivalence between the former post of Chief Legal Adviser and the new Head of Legal.

4. In a complaint lodged with the European Ombudsman which had similar characteristics to the present one, the European Ombudsman quoted[1] with approval the judgement of the European Court of first instance that "*institutions have a wide discretion to organise their departments to suit the tasks entrusted*

1 Case 2393/2007/RT decided on 1 July 2008.

to them and to assign the staff available to them in the light of such tasks, on condition, however, that the staff are assigned in the interests of the service and in conformity with the principle of the equivalence of posts".[2]

In this case one had to question whether, though there was no reduction in complainant's conditions of employment, the reorganisation in any way diminished his position within the organisation itself. In other words, whether the new designation of Head of Legal signified a diminution of his standing and authority within the Authority.

Complainant interpreted the new designation as evidence of a demotion which in his opinion, was unjustified. He felt aggrieved that there was no discussion with him and that a good employer would have taken the time to meet and discuss such an important issue in a humane and reasonable manner.

Acknowledgement of Professional Merits

In the case quoted above the European Ombudsman stated *"… for a member of staff the job title normally constitutes an acknowledgement of his/her professional merits and it is not excluded, as argued by the complainant, that it may be of some relevance… when applying for other jobs in the future or even for his/her social standing. The Ombudsman recalls that the principles of good administration require that the …..* (institution) *provide accurate information to staff … The Ombudsman trusts that the ….* (institution) *complies with this principle when providing, internally, the information to its staff using the different means to information at its disposal."*

The Ombudsman noted that the right to good administration was a right which formed part of the general principles of European Law. Article 41 of the Charter of Fundamental Rights guaranteed the right of good administration to every citizen of the European Union. Admittedly, EU Member States had an obligation to comply with the Charter when implementing EU Law. However, before being proclaimed as a fundamental right, good administration had been recognised by the European Courts as a general principle of law. Rightly "*good administration*" characterised a model of administration which purported to pursue, properly and efficiently, the public interest by being respectful of the rights and interests of the persons with

2 See in particulat Clotuche v Commission; Case T-339/03 – judgement of 7 February 2007.

whom it related as well as to be at the service of the public in a way that fostered trust and acceptance to administrative actions.

It was submitted that this right was not applicable only to citizens in their relationship to public authorities but also in the dealings of public authorities within themselves and between management and employees. Management had the discretion to manage. Discretion was a pervasive and necessary feature of administration, both internally within the organisation and externally with the public at large. The core problem was how to ensure that discretion was used properly and wisely through appropriate mechanisms of accountability.

The Ombudsman concluded that the exercise of discretion was not unfettered. It had to take into account the effect that discretionary decisions would have on the recipients especially if this concerned a person's career prospects which was always a consideration of paramount and personal importance to the individual.

Case Note on Case No P 0173

The level and burden of proof

The facts
Complainant had recourse to the Ombudsman following unsuccessful attempts with the Local Council of Rabat, Malta to settle compensation for damages incurred by him when two tyres of his car burst while driving over a large pothole at Triq it-Tiġrija, Rabat. He was forced to stop on the side of the road. He could not report the incident to the Rabat Police Station since no police personnel were available to go on site at that moment and he was instructed to call at the nearest police station. Complainant did this and repaired his tyres. He then called at the Rabat Local Council that confirmed that Triq it-Tiġrija fell within its jurisdiction. Complainant was also informed that the potholes were to be repaired the following week.

He made a claim with the Local Council that however refused to accept responsibility stating that - "*the Council's decisions on such claims are based on the presentation of a police report compiled by the police officer that visits the alleged site of accident*".

The complaint
Complainant then lodged a complaint with the Office of the Ombudsman including a copy of the police report, photos of the potholes and of the vehicle all taken at the time of the incident as well as photographs of the potholes taken the following morning, the site plan showing where the potholes were situated, copy of a receipt of the new tyres and a copy of the letter that he had sent to the Rabat Local Council and their reply.

The burden of proof
In this case there was no issue on the evidence produced. It had been established that complainant had passed over a pothole during the night and burst two tyres which he then replaced by two new ones. He was accompanied by two friends who were police officers and were willing to testify on his behalf. He took photographs of the potholes and the tyres and called the Rabat Police Station to go on site to

verify the damages sustained by the tyres. It was the Rabat police officer himself who suggested that he had better report to another police station because there were no personnel in Rabat to visit the site. On the other hand, the Local Council insisted that a report following the incident in which compensation was requested had to be compiled by the police officer who "…*visits the alleged site of accident*".

Considerations

The Local Council's refusal to comply with complainant's requests led the Ombudsman to make some interesting considerations on the burden of proof in such cases. He said that the rigid position taken by the Local Council meant that anybody who had a right for compensation for damages sustained to his vehicle after an accident had no right to claim it if the police station happened not to be manned at the time. In many opinions delivered on such incidents, the Ombudsman never mentioned that it was necessary for a police officer to visit the site to make a report. It was enough that the person claiming compensation for damages following an incident presented himself at a police station and made a report.

If the Local Council had doubts regarding the veracity of the report made by complainant, evidence could be obtained from other sources. Thus in this case both police officers who were accompanying complainant could be interrogated to establish the veracity of his version. The Local Council should have given weight to the fact that at the time of the incident the Rabat Police Station was not manned and was unable to send personnel on site to investigate.

The Ombudsman noted that the Board of Local Government had issued a number of Directives in connection with damages incurred to vehicles due to the bad state of the roads. The Directives were issued after the Board had studied the decisions given by the Courts and the recommendations of the Ombudsman. Directive No. 2 was a clear indication of what was necessary for a complainant to lodge his/her complaint with the Local Councils.

The Directive in question states that:

> *"Min iwassal ilment u jitlob danni, dan għandu jsir bil-kitba u b'dawn id-dokumenti: site plan fejn seħħ l-inċident, ritratti tal-ħsara fit-triq li wasslet għall-inċident, ritratt tal-ħsara li saret fuq il-vettura, rapport tal-pulizija u rċevuti fiskali ta' ħlas tad-danni sofferti."*

According to this Directive complainant had to produce a police report, not necessarily drawn up by the Police on site of the incident. Therefore the Rabat Local Council could not refuse as evidence, the police report which complainant presented together with his request for a refund.

Conclusion
The Ombudsman therefore concluded that the Council was obliged to consider complainant's claim, give due consideration to the matter and determine his claim on its merits and on the conclusive evidence he produced.

Sequel
Following this final opinion the Director of the Department for Local Government informed the Ombudsman that the Department had revised this case and, while respecting the autonomy enshrined in the Local Council Act, recommended to the Rabat Local Count that, in view of the conclusions drawn by the Office of the Ombudsman, it should consider the settlement of the amount claimed by complainant. The full amount was eventually reimbursed.

Case Note on Case No P 0004

ARMS Ltd unjust policy censured

The complaint

An owner of a residential property, leased to a third party who was then the registered consumer of water and electricity with the Water Services Corporation, claimed that he was constrained by ARMS Ltd to pay pending dues accumulated by his former tenant under threat that the supply of these services were not be restored unless they were settled.

The facts

During the investigation the Ombudsman established that complainant had leased his property to a tenant in September 2009 and had transferred the account for water and electricity services onto his name. The tenant paid a deposit as a guarantee for payment of dues. They both signed a form to transfer the account without any provision that held the owner of the property responsible for the payment of any unpaid bills by the new account holder. The tenant terminated the lease after three years and returned the keys to complainant. He had left the premises in a bad state of repair and failed to contact him to transfer the account back to complainant's name.

When complainant asked ARMS Ltd to effect the transfer of the account back to his name, he was informed that there was an unpaid bill of about 9,000 Euros since the tenant as account holder, had only paid estimates sent to him and no access has been given by him to the meter reader to take actual readings of consumption. Complainant had during the tenancy, requested ARMS to give him information on water and electricity consumption and payments made. This information was however refused because of data protection legislation. ARMS initially informed complainant that the account would not be transferred onto his name while the

dues were pending. It would take steps to recover the amount from the account holder but if those steps were unsuccessful, supply of the services to the premises could be suspended.

Complainant requested to have a new account in his own name and to have new metres installed. He was directed by a company official to apply for a new service and to pay the relative fees. The company however informed him later, in September 2014, that the registration of change of consumer form could not be accepted since there was a pending amount now exceeding 12,000 Euros and the transfer could only be carried out once pending dues were settled.

Meanwhile complainant had leased the premises to a family with small children and in December of that year the water and electricity supply of the premises was suspended without any notice. Complainant was therefore constrained in the circumstances, to accept liability for the payment of the amount still due to the Corporation and accepted to do so on an agreed pre-payments schedule. Complainant submitted that his consent on that agreement was vitiated, illegal and abusive since it was obtained under duress.

The position of ARMS Ltd

ARMS Ltd on the other hand strongly contested complainant's claims that he had signed the agreement under duress and insisted that it had acted in line with the agreement reached. It maintained that complainant had voluntarily assumed responsibility for past dues incurred by his tenant, signed the payment plan and effected the lump sum payments. That amount was then transferred to a new account in complainant's name.

Ombudsman's considerations

The considerations made by the Ombudsman from the facts resulting in this case could be summed up in the following manner-

1. It was not the function of the Ombudsman to give a definite ruling on legal issues since the interpretation of laws, contracts and agreements between private parties ultimatley pertains to the Courts of Justice. It was only the courts that could determine in a conclusive manner whether complainant's consent was vitiated when he assumed responsibility for the debt pending on the account

registered in the name of the tenant and consequently paid the amount due. This however did not preclude this Office from investigating the administrative actions taken and the decisions made by the Company prior to the signing of the said agreement. Neither did it debar the Office from commenting on the manner in which Company officials handled the situation.

2. The guiding principle should always be the juridical relationship which was created between an applicant and ARMS Ltd when the former requested the services of water and electricity and the latter accepted this request against the payment of the tariffs stipulated by applicable legislation and regulations. Since the account was transferred in the name of the tenant, a contractual relationship was created between ARMS Ltd and the tenant. Any other person including complainant who owns the premises –an extraneous third party to the contract, who had no interest in that contract and therefore could not be held liable for the payment of dues owed by the account holder.

3. The refusal of ARMS Ltd to accede to complainant's request to be provided with a new service, after it had suspended the supply of the services in December 2014 was subject to censure. This also because it had not taken effective steps to recover amounts due during the continuation of the lease. Complainant found himself with no alternative but to sign the payment plan and agreement prepared by the Company's officials, since his refusal would have resulted in his not being able to use his property without these basic and indispensable services. ARMS Ltd and the service providers should have exercised more diligence and verified what amounts were actually being consumed by the account holder. Had the Company acted conscientiously it would have been able to take timely and effective steps to recover what was due on the account by the tenant, if necessary by suspending the services supplied and even removing the meters.

4. The Ombudsman acknowledged that water and electricity were essential services to which citizens were entitled, obviously provided that they satisfied the obligation of paying for the services they consumed. It was because this was an essential and vital service for the livelihood of all and without which one could not enjoy one's property, that ARMS Ltd as a representative of the

Corporations that supplied these services and that enjoyed a monopoly in Malta, could not and should not have abused of the strength they enjoyed by not restoring these services unless and until pending dues were settled.

Enemalta plc and the WSC were expected, as providers of these essential services of water and electricity, to be fair and transparent in the manner they administered these public utilities. They were expected not to act arbitrarily and arrogantly. They were to justify the decisions and actions which affected the citizen on the basis of legislation and regulations applied correctly and equitably. Moreover, ARMS Ltd was bound to provide the citizen with clear and unequivocal explanations that justify and explain actions taken, particularly when the decision taken changed previously applied policies. This had happened in the case of complainant who had been told to apply for a new service but was later informed that this policy was no longer applicable because it had been only available for a restricted period of time.

5. The Ombudsman opined that it was unacceptable that the electricity supply was suspended or was not restored in such a manner that problems were caused to third parties who became innocent victims of the incorrect behaviour of the account holder who had consumed the services, but failed to pay for them. Complainant, who was the owner of the property, did not receive the bills himself since he was not the account holder. He therefore could not have known that the tenant was not paying for the services he was consuming. He was consequently not in the position even if he wanted to, to take the necessary steps to protect his interests in time and to limit the damage that ARMS Ltd was unfairly burdening him with when he regained possession of the property.

The attitude taken by ARMS Ltd could also be seen as amounting to an unjustified enrichment to the detriment of complainant with whom it had no direct or indirect contractual relationship.

Moreover, one could also argue that, once the services were suspended, the Company was also prejudicing complainant's right to the enjoyment of his property because without these essential services the value of the property certainly diminished. Complainant, who was currently renting the property, could not continue to do so unless the services were restored.

Overriding principles

1. The request by Arms Ltd for payment from a landlord of an amount which was definitely not due by him, since he was not the registered consumer and did not have any legal relationship with the supplier of the services, was essentially unlawful and illegal and was not supported by any law or regulation. Although complainant was not explicitly requested to pay the amount due by the account holder, ARMS Ltd refusal to restore the supply of the services so long as the amount owed by the account holder was pending, put undue pressure on complainant.

2. The fact that ARMS Ltd chose to rely and make use of its dominant position to virtually extort the consent of complainant to assume responsibility for the payment of a debt of a third party for which he was obviously in no way responsible, amounted to an abusive act of power that invalidated such consent. There could be no doubt that complainant did not freely and willingly assent to the request for payment once this was made conditional to the reconnection of these essential services.

3. The unacceptable policy adopted by ARMS Ltd in this and similar cases drew the censure of the Office of the Ombudsman. It was even more condemnable considering the acceptance by ARMS Ltd that it was very aware that complainant was not in any way liable to pay the amount it was requesting from him.

4. It is obvious that any act made by complainant, including his acceptance to pay the said amount, his agreement with ARMS Ltd to assume the debt of a third party and his signing of post-dated receipts, could be challenged in a court of law since his contractual consent was vitiated - *Quod nullum est, nullum producit effectum.*

This Final Opinion identified a number of serious shortcomings by ARMS Ltd over and above the issues raised. These included failing to take the necessary action not only to contain an escalating, exorbitant consumption through regular, actual reading of metres, relying only on estimates and also failing to take appropriate measures to exact payment from the registered consumer, if necessary, also through the suspension of services. Shortcomings that seem to be motivated by the misguided conviction of the Company that it could eventually and ultimately exact

payment from the owner of the property who required these essential services to be able to enjoy the full use the property. These shortcomings alone were sufficient to conclude that the complaint was justified and could be upheld.

Conclusion and recommendation

The Office of the Ombudsman was of the opinion that there was no need for ARMS Ltd to insist on or expect a judicial definition of the issues raised before redressing the injustice complained of. Such judicial definition would in all probability only further negatively aggravate the Company's position.

In the circumstances, the Ombudsman recommended that ARMS Ltd should reconsider its previous decision and redress the injustice complained of.

Sequel

Following this Final Opinion Arms Ltd and complainant reached amicable settlement. After protracted negotiation, Arms Ltd credited complainant with the full amount he was claiming. Complainant thanked the Ombudsman for the sterling work done to conclude his case positively.

Case Note on Case No O 0256

Ministry upholds Ombudsman's initiative

The complaint
The Birkirkara Local Council's refusal to assume responsibility for damages caused to complainant's motor whilst driving along Valley Road, Birkirkara. Similarly Transport Malta disclaimed responsibility maintaining that the road where the accident happened did not fall under its jurisdiction. Complainant requested the Ombudsman to determine which Authority was responsible for the damages he had suffered.

The facts
Complainant was driving along Mannarino Road[3], Birkirkara near the VAT Offices on 15 February 2014. His car went over a pothole with the consequence that he sustained damage to the right hand side tyres of his vehicle. Both of the right hand side tyres were damaged with the expense necessary for repairs amounting to €190.

Complainant duly made a Police Report on 15 February 2014. This report together with other documents and photographs were used by complainant's insurer in a claim for compensation sent to Transport Malta.

Transport Malta wrote to the insurer on 3 July 2014, after examining the claim, stating that:

> *"Transport Malta has diligently reviewed your claim but regrets to inform you that it does not see scope for any reimbursement from our end due to the fact that the road is not TM [Transport Malta] remit".*

3 Complainant stated that this was Valley Road. This is not strictly correct because the place where the incident occurred was Mannarino Road.

On 31 July 2014, complainant sought reimbursement from the Birkirkara Local Council. The Council replied through its legal counsel on 14 August 2014 and rebutted any liability for the damages and responsibility for the condition of the road where the incident occurred.

This refusal led the complainant to lodge his complaint with this Office.

The investigation

The Office of the Ombudsman investigated the facts of the case. This elicited from the Birkirkara Local Council a copy of the letter which the Council's legal counsel had written to complainant in which he declined to assume any responsibility for what had happened to complainant[4]. The Council maintained its stance throughout.

Enquiries were held with Transport Malta. This Authority stated that once the location where the accident took place was not within its remit, it could not be held responsible for any damages caused through lack of maintenance.

Transport Malta maintained that it was responsible to maintain arterial roads and these were listed in a publication issued by the Planning Authority in August 1999.

Considerations on applicable legislation

The Ombudsman considered that the main issue in this case was one of responsibility, namely, which entity was responsible for the maintenance and upkeep of the road where complainant had suffered damages. Was the road under the remit of the Birkirkara Local Council or that of Transport Malta?

The 'Authority for Transport in Malta Act'[5] listed the functions of the Authority. Section 7(b) stated that one of the Authority's functions was maintaining roads, but added the following proviso:

> *"Provided that where the maintenance of any road is the responsibility of a Local Council in terms of the Local Councils Act, the maintenance of such*

4 "*Il-Kunsill de quo filwaqt illi jirrespinġi l-pretensjonijiet imqajma minnek, jirrespinġi kwalsiasi responsabilità u jinterpellak sabiex tiddeżiżti milli tivvinta dawn it-tip ta' pretensjonijiet fil-konfront tiegħu.*" - letter to complainant by Dr Formosa dated 14 August 2014.

5 Chapter 499; Laws of Malta.

road shall not, to the extent of such responsibility, be the function of the Authority unless an agreement to that effect is reached between the Local Council and the Authority …"

The principle enunciated in this proviso was that the Local Council was legally responsible for the maintenance and upkeep of any road that should not be maintained by Transport Malta.

The 'Local Councils Act'[6] at Section 33(1)(a) stated that one of the functions of Local Councils was:

"to provide for the upkeep and maintenance of, or improvements in, any street or footpath, not being privately owned:

Provided that maintenance in relation to any street or footpath includes the patching or resurfacing thereof, but does not include its reconstruction".

It was clear from this provision that a street or footpath which fell under the responsibility of the Local Council must be maintained in a good condition. It was in fact the Local Council's legal responsibility to do so except where the road or footpath had to be rebuilt.

Road maintenance was also dealt with by the 'New Roads and Road Works Regulations'[7]. Regulation 3(i) thereof laid down that:

"The Authority[8] shall provide, either by itself or through an undertaking, and where appropriate in consultation with the Malta Environment and Planning Authority[9], for the construction, reconstruction, widening, renewal, upkeep, improvement, management, maintenance and classification of roads:

6 Chapter 363; Laws of Malta.
7 Legal Notice 29 of 2010; S.L. 499.57.
8 That is Transport Malta.
9 Now the Planning Authority following the enactment of Act VII of 2016 on 26 January 2016.

Provided that where the road is neither an arterial road nor a distributor road, the upkeep, improvement and maintenance thereof shall be provided for by the appropriate Local Council in accordance with article 33 of the Local Councils Act."

The Ombudsman held that it was clear from this regulation that roads which were not classified as arterial roads or distributor roads did not fall under the responsibility of Transport Malta. They had to be maintained by the Local Council.

The report which complainant submitted to the Police shows that the incident occurred in Valley Road, Birkirkara near the VAT Department building[10]. However, in truth this particular locality, though popularly described as Valley Road, was in truth Mannarino Road. This fact in itself could not be sufficient to dismiss the complaint because the report stated that the location was near the VAT Department offices and the repairs were carried out at Rizzo Service Station which was just a few metres away from this location.

Mannarino Road was clearly not one of the arterial or distributor roads which must be maintained by Transport Malta. The updated list could be found on the Authority's website[11]. There was a Valley Road, Birkirkara which is under the responsibility of the Authority but this did not extend to the place where the accident occurred because the latter was clearly Mannarino Road.

Responsibility of Local Councils

The Ombudsman considered that the responsibility of the Local Council involved mitigating the inconvenience of persons who lived and worked and passed through the locality. It was a reasonable expectation of every tax paying citizen that using the public thoroughfares was safe and did not involve the expense and bother caused by such an incident.

10 "*Il-kwerelant irraporta ġewwa l-Għassa ta' B'Kara kif hu kien ġarrab ħsarat fuq il-vettura tiegħu ... waqt li kien għaddej minn Triq il-Wied, B'Kara viċin tal-VAT*" – Report dated 15 February 2014 filed by PC 522.

11 http://www.transport.gov.mt/admin.uploads.media-library/files/092016.pdf

The Council might well claim that it was short of funds, though in this case the Council did not offer this platitude, but simply disclaimed liability. This in itself was not sufficient to disown responsibility for damages caused as a result of an incident which occurred in an area which was within the parameters of its jurisdiction.

Local councils were legally and not simply morally, bound to keep its streets, pavements, passageways and the locality in general in a good state of repair for the common good without exception. The Council should ensure that the citizen did not incur unnecessary expense due to negligence or bad workmanship of roads for which it was responsible.

This was an important function of local councils, so much so that the upkeep and maintenance of roads was placed first in the list of 'Functions of local councils'[12]. Therefore, the Birkirkara Local Council could not avoid its responsibilities simply by disclaiming its liability without justifying reasons.

Conclusion
The Ombudsman therefore sustained the complaint and held it was justified. He recommended that the complainant be paid €190 in settlement of the damages incurred by him whilst driving along Mannarino Street, Birkirkara. A road that fell within the confines of the Birkirkara Local Council, and within the responsibility of that Local Council.

Sequel
Following further negotiations, the Ministry for Justice, Culture and Local Government accepted the Ombudsman's recommendation and urged the Birkirkara Local Council to comply and settle the amount claimed by complainant.

12 Local Councils Act, Section 33(1)(a); Chapter 363, Laws of Malta.

Case Note on Case No P 0332

Limits of Rigid Application of Regulations

The complaint
An employee with the Education Department requested the intervention of the Ombudsman after she had unsuccessfully sought redress from the Public Service Commission to remedy what she claimed was objective evidence of an error on the part of the selection board for the post of Assistant Head of School in the Secondary Sector.

Complainant maintained that there was an error in respect of the marks awarded to her for qualifications. The Commission had refused to consider her petition on the grounds that it had been submitted days after the expiry of the deadline set for petitions relative to a call for applications.

Facts and findings
The complainant applied for the post of Assistant Head of School in the Secondary Sector. Following the publication of the result of the interviews complainant had requested the Public Service Commission for a breakdown of his/her marks. This was however done several days after the expiry of the deadline for the submission of a petition within ten working days from the publication of the result.

The complainant requested the Commission to enquire why the examining board decided not to consider a Masters degree in teaching as a relevant qualification for the post of Assistant Head of School.

Commission's decision
A few days later complainant received a reply from the Commission informing her that her petition had been turned down on the grounds that the ten working day window for submission of a petition had expired and as a result it could not be entertained.

Considerations
The Ombudsman considered that the issue in this case was whether there had been an administrative failure on the part of the Commission when it refused to consider complainant's petition on the grounds that it was submitted late. He asked whether the Commission could be faulted in rigidly applying that rule. Section 1.1.17 of the Public Service Management Code (PSMC) provided that in such situations, an applicant who wished to petition the Public Service Commission on his result must do so within ten working days from the date the notification of the result appeared on the Commission's website. All such applications included this alert to prospective applicants.

The Ombudsman stated that his Office fully recognised the importance of adherence to rules and policies as strictly as possible. Definitely, where legislation prohibited any act there was no other way but to respect the relative provision of the law. In the case under review the Commission was strictly speaking in order to apply the prescription rule since it was complainant's duty and in his/her interest to observe the deadline imposed by the PSMC and by the call for applications itself.

This notwithstanding ever since its establishment twenty years ago, the Office had always considered that *"rigid application of rules regulations and policies"* could in certain situations amount to maladministration and injustice in the same way as any action which is contrary to law. In fact this Office has been classifying complaints it received as falling under different categories which included '*Contrary to law or rigid application of rules, regulations and policies.*'

Such an approach should not be interpreted that one should not seek to apply rules and policies as rigidly as possible. However, the notion that rigid application of the rules or policies might amount to maladministration is based on the concept that one had to be cautious in order to avoid perpetrating a potential injustice in situations where if one were to apply such rules/policies rigidly, one could possibly be depriving

a person of a benefit he might mistakenly and unfairly have been deprived of. This was especially the case when the decision maker was in a position to avoid such a situation and there was no specific law prohibiting special consideration.

The Ombudsman however considered that one could not ignore the fact that a default on the part of a petitioner did not absolve the individual concerned from the consequences of his or her failure.

There was another consideration that was specifically relevant to selection processes. Procedural rules in promotion and selection processes were meant to ensure transparency, accountability and a level playing field amongst all competing candidates. Allowing flexibility or discrimination in the interpretation of rules, unless in very exceptional circumstances, would inevitably lead to uncertainty in the process and possibly abuse.

Applying these considerations to the facts of the case, the Ombudsman noted that complainant was aware of the result and in fact admitted that at first she was disposed to accept it. It was only as an afterthought, several days after the lapse of the deadline, that complainant requested information on how she fared in respect of the various selection criteria. The Ombudsman was of the opinion that the facts showed that there was absolutely no impediment that led to complainant's failure to submit the petition in time. Had there been such impediment there could have been a valid reason to consider it. In such cases, one would need to weigh the risk of perpetuating a potential injustice and the implications of relaxing on the rigid application of the 10 working day window for submission of a petition.

Conclusion

In the light of these considerations, the Ombudsman did not find any solid argument that could lead to the conclusion that the Commission's rigid application of the requirement regarding the timely submission of complainant's petition amounted to maladministration.

He therefore could not sustain the complaint.

Case Note on Case No P 0238

Selection on purely subjective criteria blurs transparency

The complaint
A complainant felt aggrieved by the marks he was awarded by a selection board when he applied for the position of Assistant Enforcement Office with a public authority. He felt that he had been awarded lower marks by the selection board than those that he merited considering that he possessed the necessary experience for the position.

The facts
It was established during the investigation that the candidates during the selection process were assessed on the basis of established criteria that were essentially all subjective. These were 'smartness', 'motivation and knowledge of the job', 'why should we choose you?', and job fit. The members of the board awarded marks to every candidate during individual interviews and the candidates chosen were selected according to that result. Complainant was interviewed with the first batch of candidates but failed to obtain a pass mark.

Complainant submitted that he had been employed for some time as a security officer while some of those selected for the position had no experience or qualifications. He also claimed that he had personally met some of the appointees who told him that they had no experience or qualifications.

The authority stated that it had interviewed all eligible of applicants as it believed that a candidate's CV did not give a complete picture of his/her abilities and skills. Thus no applicant was disadvantaged and once a candidate was eligible in terms of the call, he/she was given the possibility to be evaluated and to demonstrate that he/she could fulfil the duties expected for the position diligently.

The selection board was composed of three qualified interviewers, two of whom had years of experience in the field. The Senior Manager HR attended some of the interviews as an observer to ensure that the proper procedure was being followed. He had replaced a member of the board when the latter was unwell, so as to ensure continuity of interviews. The Authority finally submitted that the marks awarded by the board were dependent on its assessment drawn from the applicants' answers, behaviour and the statements made during the interview. Final marks awarded was the sum of the board members individual evaluations of the candidates.

Considerations

In his final opinion the Ombudsman made some interesting consideration on the evaluation of established criteria and the need to ensure transparency. It was evident that candidates in this selection process were assessed on the basis of subjective criteria which unlike objective ones, were not verifiable. Qualifications and years of experience in related positions which are generally objectively assessed, were not included amongst these criteria.

The marks awarded to candidates therefore depended exclusively on the subjective opinion of the members of the selection board on the candidate's performance, on the replies given during the interview and on how they managed to demonstrate that they possessed the traits and abilities necessary to perform proficiently the functions and duties of the position.

From a review of the documentation related to the selection process, it transpired that complainant had failed to make an impression on the three members of the board and in fact none of them had given him a pass mark. The Board stated that when assessing candidates, it had also observed their body language. It remarked that complainant was not the right person to judge his own qualities and performance during the interview and reaffirmed that the appointees were better suited for the position.

Ombudsman not an Appeal mechanism

The Ombudsman noted that it was imperative to clarify that his Office should not be looked upon as an appeals mechanism from the decision of selecting boards. He could not conclude that the outcome of the selection process was unjust or

mistaken when it resulted that the selection process was a valid one and had been managed fairly and in accordance with the criteria and weightings previously established by the selection board and applied uniformly to all candidates.

The Ombudsman did not determine or comment on how the criteria had been established. Even if for the sake of argument, he might not be in agreement with the criteria applied, he would only interfere if it was ascertained that the criteria utilised were intended in advance to provide undue advantage to one or more candidates. The Ombudsman could not substitute or replace a subjective assessment or decision taken by a selection board, that had the best opportunity to test the candidates' abilities and skills and determine its suitability for the position during the interview. He would only intervene if there was strong and convincing evidence that an irregularity was committed during the selection process or that any decision or action taken by the board was manifestly wrong in respect of the interviewees involved.

Unanimous assessment

In this case the board was unanimous and adamant on its assessment of complainant. It had not been particularly impressed by his performance during the interview and was of the opinion that there were a number of other candidates whose traits and qualities were more compatible with the position. Applicants had been assessed on the basis of criteria that had been set prior to the commencement of the selection process and the Ombudsman ascertained that established criteria and weightings had been uniformly applied in assessing candidates held prior to the final selection. The Board's assessment of candidates was completely subjective and dependent on its opinion on how candidates performed during the interview and how they demonstrated that they possessed the abilities, skills and traits required for a proficient performance of the duties required of the position.

Consequently the Ombudsman, or for that matter any other body of review, could not review complainant's assessment as he was not involved even remotely in the process and therefore cannot comment on how complainant demonstrated his claimed merits for the post during the interview.

The Ombudsman noted that it had to be kept in mind that an interview is a selective process where the skills, characteristics and abilities of every candidate are evaluated by the board so as to find the most suitable applicants to fill the available vacancies.

While a candidate may have his opinion on his performance during the interview it is the board's assessment that matters and unless there is uncontested and clear evidence of a mistake or bad intentions, no office of review could change the subjective opinion of the board composed of members with years of experience in the sector and appointed for their knowledge in the area covered by the application. The board's integrity and the validity of the decision should not be doubted on the basis of allegations or unfounded claims. The Ombudsman could only intervene if it found conclusive evidence that the board had not adhered scrupulously to its duties in the selection process. No such evidence emerged in this investigation.

Ombudsman's concern

Finally the Ombudsman noted that his Office was concerned about the decision taken by the Board to assess applicants **exclusively** on the basis of subjective criteria. In this case the documentation showed that there had been candidates amongst the twenty-five appointees who had related experience and who had performed duties of security guard or served as members of the Armed Forces or of the Police Force. On the other hand, some of the appointees had very little related experience.

The Ombudsman concluded that his Office had already had the opportunity to criticise the approach adopted by selection boards that tend to be increasingly in favour of reducing the weight set for objective criteria - which could be reviewed by an extended body of review - thus allowing a freer hand in their deliberations and choice of successful candidates. Such decisions reduce considerably the possibility that a fair and impartial review of the selection process could be fruitfully conducted if questions arose about its outcome.

Conclusion

The Ombudsman in his final opinion therefore did not find clear and conclusive evidence that the evaluation criteria were improperly applied in this exercise. Complainant's grievance could not be sustained. However, the decision to assess candidates on the basis of purely subjective criteria was a matter of concern and attracted criticism since it tended to blur the element of transparency that should be considered a crucial feature in any process for due selection or the promotion of staff.

In the light of these considerations, the Ombudsman therefore directed the Authority to review the manner in which selection processes were conducted.

Case Note on Case Nos P 0065, P 0070 and P 0077

Serious Deficiencies in Selection Processes

The complaint

Three complainants felt aggrieved at the result of the selection process for the posts of Assistance and Rescue Officer with the Civil Protection Department (CPD). They pleaded that the process was unjust and that their total marks and order of merit following the interview were unfair. Amongst other arguments they contended that while they were fully qualified and had long years of experience as Volunteers at the CPD, others with no experience or qualifications were appointed while they were not. They argued that the Selection Board had not given due weight to their experience and qualifications. They also queried the legality of the appointment of untrained applicants. They had in vain petitioned the Public Service Commission.

The investigation

In the course of the investigation, the Office of the Ombudsman was faced with unacceptable delays on the part of the Commission to address serious queries regarding the Selection Board's decisions and statements. Faced with this unacceptable attitude, the Ombudsman submitted a report on two of the complaints since the third complainant's case which practically contained the same arguments as those of the other two complaints, took longer to be decided by the Commission.

Ombudsman's conclusions

In his report on the two complainants' cases, the Ombudsman concluded that there was a serious shortcoming in the handling of complainants' petitions by the Public Service Commission. In particular:

1. it did not give any consideration to one of the arguments raised by the petitioners regarding the implementation of L.N. 95 of 2003 through which they queried the appointment of applicants with no training;

2. in respect of the petitioners' claim that persons with little or no experience and qualifications were given preference, the Commission was prompt to accept the statements of the Selection Board and did not invite complainants to indicate the persons they were referring to so that the Commission would be able to go deeper into the matter. As a result, this element of the investigation had to be carried out by the Ombudsman and what emerged was, to put it mildly, an incomprehensible method of award of marks for experience, which *prima facie* revealed that the Selection Board was overgenerous with some candidates and not so generous with complainants. Moreover the Selection Board's interpretation of paragraph 5.2 of the call for applications was, in the opinion of this Office, the opposite of what was intended in the call as worded;

3. the investigation of this Office also raised several queries as to the Board's award of marks for the different criteria including subjective criteria. The Ombudsman remarked that when the marks awarded for objective criteria create serious doubt, this gives rise to grave concern also in respect of marks awarded for subjective criteria and therefore on the fairness of the whole selection process; and

4. the Commission's decision not to uphold the petition was based on its superficial handling of the case especially in so far as marks awarded for qualifications are concerned - this when there was objective evidence which did not support the Board's statements.

The Ombudsman therefore upheld the two complainants' claim that the Commission had not given them a fair deal. He could not but also express his criticism at the way with which the Commission left the issues, raised by this Office, on the back burner and had ignored repeated deadlines set by this Office. The Commission's plea, made several months later, of backlog of cases, did not convince the Ombudsman.

Request for further investigation
The Commission was additionally requested to investigate the following issues:

1. why the selection process was handled within the Ministry and not by the Department;
2. whether any member of the Selection Board occupied a position of trust;
3. the Selection Board's interpretation of paragraph 5.2[13] of the call for applications;
4. the interpretation of L.N 95 of 2003 in the selection process; and a review of the third complainant's marks for qualifications in view of the evidence that complainant's certificates in Advanced Firefighting Emergency Response were not attendance certificates as stated by the Board, since these Certificates themselves indicated successful completion of a course. Moreover, the Courses in Firefighting lasted a total of 10 days while that in Emergency Response lasted 9 days which for courses of this type may not be considered to be very short courses as stated by the Board.

This Office strongly urged that such investigation should be more thorough and the Commission should not decide by simply depending on the Board's statements.

Selection Board's reaction
Following a meeting with the Commission and the Ombudsman, the Board's Chairman submitted the Board's comments to the Commission. Amongst others the Board argued that:

> *"The Board did consider participation in voluntary work as relevant and valid experience, both where Non-Governmental Organisations and Governmental Organisations (specifically, with CPD) were concerned.*
>
> *Experience was however gauged principally on the documentation provided with the application, and through the interview process."*

13 Paragraph 5.2 of the call for applications stated as follows:

"*Due consideration will be given to applicants who, besides the requisites indicated in paragraph 5.1, have proven relevant related experience in the assistance and rescue field with both Government and non-Governmental organisations*".

The Board's statement was aimed at dispelling the notion that complainants were to be given preferential treatment because of the mere fact that they were CPD volunteers. The Board argued that its original statement was not to be construed to mean that experience as volunteers was not given its due attention. The Board took into consideration the documentation provided by the applicants[14], and the information relayed during the interview process. It added that it gave points for voluntary work, including that performed with CPD and that experience was assessed not just on the CV, but also through supporting documentation and the interview proceedings.

The Board added that it did not consider resorting to the logbooks of the Volunteers because the methodology adopted did not entail giving marks in proportion to the years of voluntary work. The Board preferred to gauge the activity and involvement of the interviewees from their performance during the interview process. It considered that attendance (at CPD) as volunteers did not necessarily relate to activity and involvement (both on station and on site) directly related to civil protection activity (such as rescue operations). The mere presence on station or being present during an event is an anticipation of any eventual involvement in case of an emergency, which more often than not does not occur. The Board gauged the level of involvement as elaborated during the interview time.

Interview and allotting of points

In respect of marks awarded to six successful applicants[15] who were named by the complainants as having no experience, the marks allotted by the Board were decided and agreed upon following the interview during which the interviewees were asked to elaborate on any experience they deemed relevant for this post, and also took into account the applicants' feedback provided during the interview, including experience gathered from their work responsibilities and involvement in organisations.

On the other hand, points for qualifications were based on the documented evidence available at the time of the interview. A breakdown of the scores was given to these applicants.

14 Yet the Board specifically refused to look at logbooks of the complainants' work as volunteers!
15 All these applicants were given higher marks for experience than the three complainants.

The Board quoted Regulations 3 and 8 of the Civil Protection (Volunteers Corps) Regulations 2003 (LN 95 of 2003) and argued that this regulation does not set any standards as to the eligibility of applicants for the full-time vacancy under review.[16]

In respect of the interviews, the Board declared that the duration of each interview depended on the interaction of the interviewee. They all had the opportunity to elaborate and expand on the questions they were asked. The interviewees were given the opportunity to elaborate on their involvement in organisations working on assistance and rescue, and also on other related activities such as first aid, fireworks etc.

In respect of certificates, the Board stated that it treated certificates of attendance, participation and completion in an equal manner. It opined that all these certificates demonstrate that the participant was present and probably actively participated in the program or event, but argued that possession of such certificates does not necessarily indicate that the participant had accomplished the intended learning outcomes in an accredited manner and certificates only served as proof of attendance/completion, and did not credit or qualify their beholders to any speciality.

The Board did not use any particular standard or timescale when determining whether a course was to be considered as 'short' or not. However courses that were days long were broadly considered as short.

The Commission subsequently informed the Ombudsman that in its opinion the Selection Board had submitted an exhaustive report, addressing all points raised by the Ombudsman.

Complainants' reply

The complainants on their part countered that the reply of the Selection Board, besides containing incorrect statements, did not address important queries as to why they were given less marks for experience than applicants who had no experience at all with CPD and no qualifications. They also referred to an item appearing on the TVM news portal written by the present Deputy Director at CPD and dated 5 September 2016, wherein it was stated that those who had joined the CPD in 2013 (shortly before the call was issued) had started the course only recently which meant that a number of the selected

16 Following review of the relative provisions of LN 95 of 2003, the Ombudsman was not in a position to support the complainants' argument on this issue.

candidates were not trained. They also mentioned (for the first time) a candidate who did not even know how to read, but who had been appointed.

Complainants challenged the Board's statement that the CPD engaged two types of volunteers. To this effect they produced evidence of 2 recent calls and quoted the CPD website which referred to the volunteer force within the Department as having an important role and who undergo firefighting and rescue courses like the professional staff of the Department. Upon successful completion of the course they were awarded a certificate which entitled them to be operative with the Assistance and Rescue Force members on emergencies. Volunteers were stationed at different sections once they took the volunteers' oath.

Complainants' further argued that they had followed the required training courses and were as competent as the regular members of CPD. Yet they had not been chosen while others who had not followed these courses lasting 13 – 15 weeks, were. Finally complainants stated that when a volunteer was on duty in a station, it was the practice at CPD for the unit to consist of two officers – Assistant Rescue Officer and an Assistant Rescue Volunteer. From the Board's statements it did not appear that it had given serious consideration to this point.

Ombudsman considerations

In his deliberations, the Ombudsman noted that the Commission had not given a satisfactory reply as to why it permitted the selection process to be carried out within the Ministry when this function had been delegated to the Department of Civil Protection. The Commission had moreover been satisfied with the way the Selection Board interpreted paragraph 5.2 of the call for applications. The Selection Board had pleaded that this was not to be interpreted as giving any particular discriminatory edge or preference over other applicants other than giving markings as applicable where related experience was concerned. However, the Ombudsman considered that when a particular asset or achievement was specifically mentioned in a call for applications for due attention to be given during the selection process, this was not done for that asset to be treated like any other asset.

The Board was then also stating that it did consider participation in voluntary work as relevant and valid experience both where Non-Government Organisations and Governmental Organisations (specifically with CPD) were concerned. The

Ombudsman queried which Board statement was to be believed – the latest one or its original statement when it had stated:

"Experience (or lack of it) within CPD had not been tantamount to experience (or lack of it)"…….

Voluntary work by definition did not mean any particular yardstick of comparison (one could be registered as a volunteer for 10 years but being actively involved only once every fortnight".

Apart from the fact that the Board's first reaction was to belittle the merit of such experience, the Ombudsman did not consider that this was the best and fairest interpretation of paragraph 5.2 of the call. If the Board was correct, why was this paragraph specifically included in the call? "*Due consideration …*", within the context of the call, meant something more than the interpretation given by the Board as endorsed by the Commission. On the other hand the Selection Board's statements clearly indicated that it did not consider that experience of volunteers at CPD of any special relevance which this paragraph clearly implied.

The Ombudsman however, considered that experience as volunteers had to be considered as valid experience for the purposes of paragraph 2 of the Call, and irrespective of whether this is done on payment or not. He re-iterated that the fairest and best interpretation of paragraph 5.2 was that it intended to give an edge, to applicants who had served as volunteers with CPD even if he agreed that this would not be the one determining factor for selection.

This Office had repeatedly requested the PSC to have detailed explanations on the marks awarded for experience, to a number of listed candidates who had all been given much higher marks for experience than the three complainants (despite the latters' experience as volunteers with CPD), did not make any mention of such experience in their CV submitted with their application. While giving some details in respect of marks awarded for qualifications, the Selection Board was very generic in its reply in respect of experience. No details were given on the basis for the award of the individual marks, or on the supporting documentation on which the Board opted to give much higher marks to six of the selected candidates mentioned by complainants.

The Board's reasons for not giving any importance to logbooks and incident reports which were strong evidence of voluntary work having actually been performed, were far from being a convincing argument.

The Board's argued that it relied on the interview time to gauge whether the applicants' claimed experience was relevant and truthful and added that applicants would often falter when pressed for more information. In the opinion of the Ombudsman, such statement would be relevant in respect of knowledge of the work and responsibilities involved and is certainly of much lesser value (if not of no value at all) in respect of assessing experience, than documented evidence of actual experience – such as log books.

The Selection Board had in the opinion of the Ombudsman, failed to explain the much higher marks awarded to the specifically indicated selected candidates for experience. Apparently in originally minimising the importance of volunteer work, the members of the Selection Board were not aware of what the CPD website stated in respect of volunteers. The Office further concluded that the Board's interpretation of paragraph 5.2 of the call was certainly not the fairest and best interpretation. If the PSC was still of that opinion, it should take steps to delete or re-word this paragraph in future applications. Paragraph 5.2 as worded in the relative call for this post had, in these cases, to be seriously respected. Unfortunately it was not, and this to the detriment of complainants.

The Board's statement that courses lasting days were considered short (no marks were given to attendance certificates of short duration), are certainly not worthy of a Selection Board which claimed to have done a good job. In this respect, one of the complainants declared that a First Aid course's duration is of a maximum of 9 half day sessions or 4 full days and that longer courses do not exist, unless taking courses as a paramedic. He also stated that a Rescue Diver's course is over three months. Similarly the Life Support Course he followed was of a maximum of 4 full days' training – all followed by a written exam, and in the case of firefighting also a practical test before issuing the relative certificate.

Conclusions and recommendation

The Ombudsman concluded that all the three complainants were negatively discriminated against by the Selection Board and in turn by the Commission, in respect of marks awarded for experience. The Ombudsman queried how the statements of the Selection Board, in respect of subjective criteria could be accepted without any reservations, as has been done by the Commission, when the Board

had failed in such an objective evaluation. Such blatant failure, which to a certain degree amounted to improper discrimination, led to the complainants being given a lower order of merit and thus fail to be appointed.

Moreover one complainant had for no valid reason whatsoever, been deprived of marks for a number of qualifications which he had submitted with his application. The Board had miserably failed to justify its action in this respect, exhibiting a lack of proper appreciation of the value of the certificates in questions. Even apart from his experience, the marks for these certificates which are objective evidence in themselves would have probably been enough for him to be appointed.

The Commission had been very prone to support statements by a Selection Board without any in-depth evaluation and verification.

Recommendation
The Ombudsman recommended that the Commission rectifies the discriminatory treatment given to the three complainants and reviews the marks of the complainants and of the cited selected candidates in line with his findings and conclusion.

Sequel
Ombudsman's Opinion referred to Prime Minister.

The Commission adamantly refused to accept any failure on its part and the Ombudsman referred the matter to the Prime Minister in terms of the Ombudsman Act. Subsequently during a meeting with the Chairman of the Public Service Commission, the Ombudsman was informed that there was a possibility of a solution which however did not materialise.

Following deeper analysis of the evidence resulting from the investigation and further consideration of the conclusions made by the Commission and its defence of the conduct of its Selection Board, the Ombudsman delivered a follow up opinion essentially confirming his findings as set out in his first report.

Case Note on Case No P 0266

Refund on tax registration on an imported vehicle refused

The complaint
A senior official of a foreign bank seconded to its branch in Malta felt aggrieved because he was constrained to pay a considerable amount, almost 5000 Euros in registration tax for a vehicle that he imported during his two-year secondment in Malta.

Facts and findings
As part of his package complainant was eligible for a host location car allowance of €6000 per annum for the duration of his secondment. His car, registered in United Kingdom was brought to Malta and he submitted an application at Transport Malta to use this foreign registered vehicle in Malta without paying the registration tax in view of the fact that he was a non-resident worker in Malta. His application was approved by the local authorities and complainant issued with a temporary permit according to the provisions of Article 18(b) of the Motor Vehicle Registration and Licensing Act. Once the twelve month period stipulated under the law expired, the temporary admission permit could not be renewed. At this stage, complainant was informed that he was either to pay the registration tax due or export the vehicle back to the UK. Complainant paid the registration tax and kept his vehicle in Malta. When his secondment in Malta was about to expire he expected a refund of the registration tax paid or a part thereof, as he contended that this amount was unfairly charged.

Complainant's submissions
Complainant maintained that the law discriminated against temporary resident EU citizens and was contrary to the right to free movement, particularly for those who were on a recognised contract of employment, as it pressured them into paying something which they should not have paid in the first place. He contested the application of the law by the Authority arguing that no other country in the EU

applied such an injustice. He therefore requested the Ombudsman to exercise his powers to defend individuals against maladministration and to ensure that laws were applied fairly and equitably and that the public administration was improved through the amendment of laws and procedures which were a source of injustice and hardship.

Transport Malta's position
Transport Malta justified its decision to change the registration tax and to refuse complainant's request for a refund of the tax paid on the basis of its application of Article 18(1) (b) of the Motor Vehicles Registration and Licensing Act.

Complainant had a two year secondment here in Malta with his employer. He was therefore entitled to the one year exemption in terms of applicable legislation but could not keep his vehicle in Malta for the remaining time of his employment unless he paid registration tax. In terms of Maltese legislation the Authority's decision to charge the registration tax could not be censured and was in line not only with applicable local legislation but also with Council Directive 83/182/EEC on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, which also provided a time limit for the exemption from registration tax.

Ombudsman's considerations
This case note is being limited to the Ombudsman's considerations on whether Maltese legislation and its application in this case were in conformity with EU Directives.

Transport Malta in its function as a regulatory authority, was in duty bound to apply the law as enacted by Parliament and cannot decide to depart from the law at its discretion, as complainant seemed to imply. That legislation restricted the possibility of a refund to specific instances and complainant's case did not fall under one of these cases. Moreover, the Administrative Review Tribunal, that could modify the amount charged, was competent to decide whether the Authority's decision was in line with applicable legislation and ensured that the provisions and policies applicable in terms of law had been so applied. The Tribunal's

competence was limited to the administrative act or decision and not to the law under which the administrative decision was made. Therefore, if the administrative act was in conformity with the law as enacted by Parliament and the law did not allow a discretion how the administrative act (in this case the computation of the registration tax due) was to be exercised, it could not conclude that the law in terms of which the tax was charged was without effect.

Transport Malta correctly applied the applicable legislation and could not be censored for not having provided complainant with a *pro rata* refund as he expected. This was clearly provided in Article 18(1)(b) of the Motor Vehicles Registration and Licensing Act which stated that the vehicle was exempt from registration only where it was imported "*… by a person who has been residing outside Malta for at least 185 days and who comes to Malta under a works contract, in which case the exemption shall be for a period of twelve months from the date of the vehicle's arrival in Malta*". Consequently, after the twelve month period expired, registration tax was due, if the vehicle is to remain in Malta.

Complainant argued that the charge was unfair, excessive and in breach of his right of freedom of movement since he was an EU citizen who had temporarily imported his vehicle to Malta from the United Kingdom, his home country and country of residence, for a limited period of time – the duration of his secondment with his employer. He insisted that he was only residing here temporarily and since it was always his intention to return to his country of normal residence and export his car back to the UK once his secondment terminated, he should not have been pressured into paying the registration tax, as this had already been paid in his country of normal residence.

The Ombudsman reflected that the free movement of goods, services, persons and capital were fundamental freedoms which underlie the European Union. It was a fact that a considerable number of vehicles were transferred between Member States as a result of people migrating or moving temporarily or otherwise from one Member State to another. Over the years the Commission had in fact been collaborating with Member States to dismantle the barriers impeding the completion of the internal market, which led to serious inconveniences when moving across the borders – movements, which frequently have significant financial implications.

In this regard it was worth nothing that while a great deal of harmonisation was achieved in the case of VAT, motor vehicle registration tax had not been harmonised at EU level and different rules were applied by Member States in relation to the levying of car registration, circulation and other taxes related to the use of motor vehicles within their territory. This issue had been discussed with the Member States and the Commission had over the years sought to harmonise these charges so as to minimise the possibility of double or multiple taxation and of the potential tax discrimination. The Commission had put forward proposals for the enactment of legislation to provide a solution to specific cross–border situations which led to the adoption of Directive 83/182/EEC on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another and Directive 2009/55/EE, which codified the changes made on the originally applicable Directive 83/183/EEC on the permanent introduction of personal property of individuals.

This latter Directive provided an exemption for personal property (including private motor vehicles) introduced permanently from another Member State by private individuals from consumption taxes which normally apply to such property, but did not apply to motor vehicle registration fees. In 2005 the Commission put forward a proposal aimed at abolishing registration taxes and replacing them by annual circulation taxes and to 'green' circulation taxes after a transitional period, but this had not so far received the required unanimous approval of the Member States.

In 2012, the Commission had also prepared a working paper clarifying the EU rules to be respected by Member States when applying car registration and circulation taxes, which also included recommendations to improve the Single Market and avoid double taxation of cars when EU citizens move from one Member State to another. Consequently, this matter was currently only regulated by this very limited secondary legislation and by the general principles of the Treaties, as interpreted by the Court. Otherwise, the Member States enjoyed considerable freedom in determining whether to apply registration tax on vehicles that were intended to be used on their territory and the level of this taxation.

The Ombudsman noted in this regard, the Court clearly stated that the Treaty did not offer any guarantee that a transfer of a citizen or a worker would be tax neutral. The transfer would be to that person's advantage or disadvantage in terms of

taxation, depending on the circumstances. Therefore, any disadvantage suffered as compared to the pre-transfer situation would not be contrary to EU law, provided the individual was not treated less favourably than residents of the respective Member State subject to the same tax.

This Office of the Ombudsman was of the opinion that the provisions of the Motor Vehicles Registration and Licensing Act are in conformity with EU law and regulations, particularly Article 30 and Article 110 of the TFEU which prohibits any taxation, on products coming from other EU countries which result in providing an indirect competitive advantage to local similar products, as interpreted by the Court. Article 18 was also in sync with Directive 83/182/EEC which granted an exemption from a number of taxes, amongst which registration tax, to those individuals who moved temporarily to other Member States on condition that the importation of that vehicle is temporary – that was, for a period, continuous or otherwise of not more than six months in any 12 months – and the individual had his normal residence in a Member State other than the State of temporary introduction, used the vehicle for private use and did not hire out or lended it to residents of the Member State of temporary introduction. This Directive only mentioned two instances where the exemption granted was not restricted to this time-limit – that of students who moved to another Member State from the State of their normal residence to pursue their studies and cross-border workers whose vehicle was registered in the country of normal residence of the user and was used regularly for the journey from their residence to the place of work in an undertaking of another Member State and vice-versa. In the former case, the exemption ceased once the student started working in the Member State where he was also studying. Local legislation also satisfied the recommendation made by the Commission in its 2012 communication, of allowing citizens to use a vehicle registered in another Member State for a certain period without levying registration tax, provided the conditions established to avoid tax evasion were fulfilled.

Ombudsman's conclusions

The primary function of this Office was to investigate whether the facts raised by a complainant in his complaint constituted an act of maladministration. In his investigation the Ombudsman had first and foremost to be guided by the principle that the public administration is at all times obliged to apply properly and correctly applicable laws and regulations and to implement policies that were in place, in

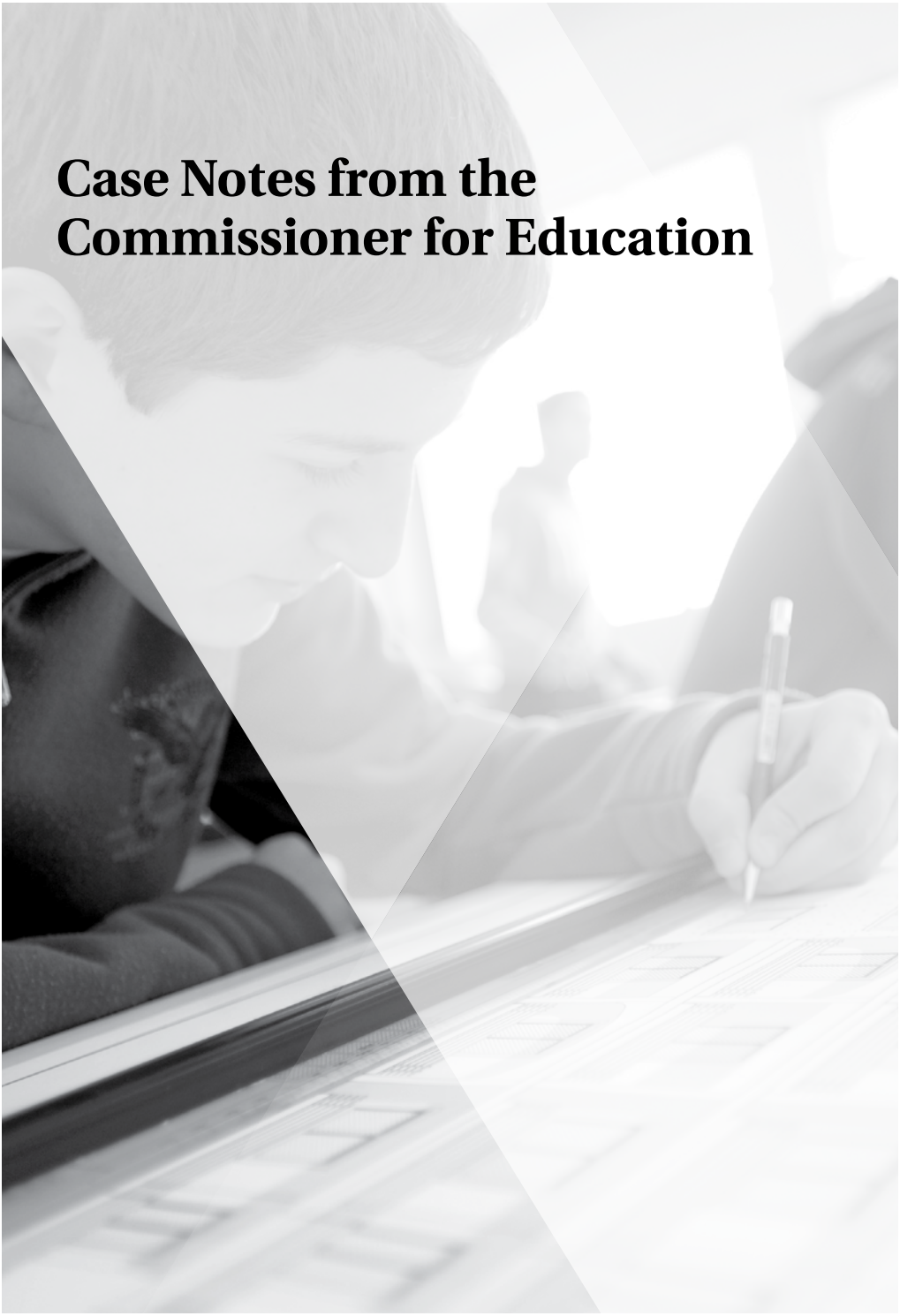
furtherance of that law. In the event that it resulted that the public administration had acted in accordance with the law with reasonableness and equity, the Ombudsman cannot conclude that the Authority was guilty of maladministration. It is further noted that the Ombudsman's remit did not include that of amendment of existing legislation, a role which was reserved to Parliament, the legislative arm of Government.

As explained above, the Ombudsman could not censure or consider unreasonable or unjust the administrative decision taken by Transport Malta – a decision which was perfectly in line with local legislation and compliant with EU law and regulations, in an area where Member States still held considerable freedom in the establishment of the legal regime relating to car registration and circulation taxes. The Authority applied the provisions fairly and without discrimination against complainant.

By way of conclusion the Ombudsman further noted that complainant had been provided by his employer with a host country car allowance for the duration of his two year secondment so as to ensure that his transport costs would be covered throughout his stay in Malta. This notwithstanding complainant decided to import his private vehicle for him to use throughout his secondment. Transport Malta could not be expected to give him a refund of the registration tax or to exempt him from payment, since this was not contemplated anywhere in the applicable legislation.

His complaint could therefore not be entertained.

Case Notes from the Commissioner for Education



Commissioner for Education
Case Note on Case No UQ0051

Deprived of the deserved grade

The Complaint
A student's parent, on behalf of his son, lodged a complaint with the Office of the Ombudsman against Giovanni Curmi Higher Secondary School (GCHS School) and the University's MATSEC Support Unit. The complainant claimed that the two entities through administrative oversights deprived his son from obtaining the rightful Intermediate Matriculation Examination grade in Information Technology (IT) that was due to him and he wants the MATSEC Support Unit to correct the grade to include the marks his son had obtained in the IT project, which had been omitted.

Facts and findings
The student joined the two-year MATSEC stream course at the GCHS School in September 2015. He planned to obtain the full Matriculation Certificate for entry into University in October 2017.

A full Matriculation Certificate requires MATSEC passes in two subjects at Advanced Level, two at Intermediate Level and Systems of Knowledge (SoK) with a minimum of 44 grade points. The student decided to sit for Intermediate Level in English and IT at the September 2016 session in order to lessen the study load. This had enabled him to concentrate on the two A Levels, another Intermediate subject and SoK in June 2017. The complainant commenced private lessons in the theoretical aspects of IT with a tutor who also lectured at GCHS School, but was not his IT teacher. The complainant claims to have informed by school's IT teacher, that he intended to sit for the subject in September 2016 and asked for his assistance with the IT project, which carried 30 percent of the examination marks. The student's IT teacher complied. He accepted the student's project and arranged for him to make the required student's presentation in February

2016 together with the Second Year students who were to sit the MATSEC IT examination in June 2016. Eventually the student's teacher assessed the project at 24 out of 30 marks. MATSEC examiners monitored the students' projects – including the complainant's – and the School's IT co-ordinator forwarded the marks to the MATSEC Support Unit.

In May 2016, MATSEC officials noted one error and one omission that did not tally with the complainant's records. The first was that the ID card number provided was not the student's: the officials contacted the school and the correct ID number was inserted. MATSEC officials also noted that the student had not registered for the IT June session of the examination and consequently they could not assign him the 24/30 project mark that had been forwarded by the school. The complainant and his father claim (and were prepared to assert under oath) that they were completely in the dark about this development. They were under the illusion that once the student's project had been accepted, it would satisfy the project requirement when he sat for the IT September 2016 session.

In mid-summer 2016, the student registered for the MATSEC September session in English and IT. He did not re-submit the IT project believing that once he had submitted it in May 2016, he did not need to do so again. Whilst he took note of the September 2016 examinations time-table sent by MATSEC, he failed to note the accompanying instructions sent to all students. These stated that candidates for the September session had to submit projects directly to the MATSEC Office not through their schools. The complainant discovered his error on receiving the IT examination result as a PASS when he expected a much higher grade to reflect his 80 and 90 percent schoolwork. On inquiry, MATSEC officials informed him that they did not include the project mark because he had not submitted a project for the September session. The student protested against the decision arguing that when he presented the IT project in May 2016, it was with the clear understanding that it would count towards the September session. He explained that it was for this reason that he had not applied for the June 2016 session of the examination. The MATSEC Board considered but rejected his appeal arguing that it had to abide by the regulations and that if it were to accept his project at this late stage it would be discriminating against other candidates who had submitted their projects after the extended closing date.

Following this outcome, the student's father lodged a complaint with the Office of the Ombudsman claiming that the MATSEC Board was treating his son unfairly by not taking cognisance of all the facts of the case. He also blamed his son's predicament on the GCHS School teachers and administrators, who, he alleged, should have provided better guidance to his son during the examinations application process. He further argued that the low IT grade could prejudice his son's entry to University.

Observations

Cases such as this raise the question about the role of bureaucracy, its impact on people's lives and how rigidly it should be enforced.

In this case, GCHS School has its procedures about preparing students for the Matriculation Certificate. It offers them a two-year programme at the end of which they sit for the examinations and, where applicable, present the requisite projects. The school follows this protocol for all MATSEC stream students, but does not prohibit them from sitting for examinations at the end of the first year of the course if they so wish. At the same time, the school makes it clear at meetings with students and parents that while the school will help students to achieve their aims, it cannot take reasonability for students' actions if they opted to sit for examination prior to the completion of the two-year programme. The complainant's school IT teacher, followed this procedure. He accepted the student's project, made it possible for him to make the required presentation with the Second-Year students, had the project assessed and monitored, and submitted the result to the School's IT co-ordinator for forward transmission to the MATSEC Support Unit.

At this point complications arose. It appears that the IT co-ordinator was not aware that the student intended to sit for the September not the June 2016 session, otherwise he would not have submitted the student's project result to MATSEC so early. The complainant claims that his private tutor, had agreed to discuss his application procedures with the student's class teacher, in order to guide him accordingly. Both denied having ever taken such an undertaking and insisted that they had never discussed the student's plans. The private tutor stated that his responsibilities were to prepare the student in the theoretical aspects of IT, which he did. The class teacher argued that he had guided the

student up to the point of presenting the project and forwarded the assessment marks to MATSEC, but he could not be aware of the student's intentions and actions during the summer holidays.

The MATSEC Support Unit also has its own regulations and protocols. It accepts and processes thousands of students' applications covering the tens of thousands of subject options that candidates sit for. In these circumstances strict bureaucratic procedures become essential to ensure smooth administration devoid of serious errors as well as unfair or discriminatory treatment. The MATSEC Board has to safeguard the credibility of its examinations and the validity of its certificates both in Malta and overseas. The Board's resolve that its officials, examiners and candidates should abide by the regulations is most commendable since to deviate indiscriminately from its steadfastness would open a Pandora's Box with disastrous results.

At the same time, the MATSEC Board can, and does, demonstrate the robustness of its regulations and administrative procedures when it deals equitably with justified exceptions. I believe that this was one such case.

Complainant's case has flaws: for example, he assumed wrongly that when he presented his IT project in May, it would satisfy the requirements for the September session. For the same reason he failed to present the project in September 2016 in spite of the fact that the time-table and additional information circulated by MATSEC to all candidates stated in capital and bold letters that students had to submit their projects at the MATSEC office. The student acted in the belief that if he did something wrong, his teachers would guide him to rectify it. The latter did not do so assuming that when the IT co-ordinator submitted the monitored projects and grades to MATSEC, the school's responsibilities had been fulfilled.

MATSEC officials contributed to the misunderstandings. When in May 2016 officials took steps to check and correct the student's mistaken ID card number, they should have gone a step further and enquired why the candidate had a result for an examination he had not registered for. Similarly, during the September session, they should have enquired why a student who performed so well in the theory part of the examination, had omitted to submit his project. One can argue that the officials concerned were not obliged to take such initiatives; the Commissioner argued that

good customer care demands that they should have followed up the discrepancies. Had they done so, the school and/or the candidate would have been alerted and the omissions would have been rectified. It is fair to say that it was unlikely that the same official dealt with both instances to make a connection between the two, yet both occurrences were sufficiently unusual to prompt further probing. An explanation that these officials have thousands of applications to process does not hold in this case as their enquiry about the complainant's ID card number amply demonstrates; there could not have been many other candidates in this student's predicament.

The MATSEC Board rejected the complainant's appeal on the grounds that if it accepted his IT project after the submission date, it would discriminate against all the other candidates whose projects had been rejected due to late submissions. The Board's concern not to discriminate against candidates is most valid. However, by accepting the complainant's appeal the Board would not have discriminated against the said candidates. His case was unique in that it did not fall within 'the late submission' category: **in reality, he had submitted his IT project too early**. He had done so not to contravene MATSEC regulations but through a combination of misunderstandings. In the circumstances MATSEC officials should have drawn the complainant's attention to an anomalous or irregular situation.

Conclusions and recommendation

Taking into account all the factors mentioned above, the Commissioner did not find that GCHS School lecturers or officials acted incorrectly in this case. They helped the complainant (as they did with many other students) to sit for an Intermediate examination a year ahead of the two-year programme. His teachers assisted him with developing and presenting the project, examined it, monitored it and forwarded the results to the MATSEC Support Unit. The confusion ensuing from the fact that the school presented the IT project for the June examination session instead of the September one, resulted from a combination of misunderstandings. All actors concerned, albeit unintentionally, contributed to the unfortunate outcome. Consequently, the Commissioner did not sustain complainant's contention that GCHS School lecturers or officials acted negligently to the detriment of his examination result.

The MATSEC Board believed that to accept the complainant's project as a late submission would discriminate against other candidates whose late submissions had been rejected. However, the Board took this decision under the wrong premise.

As pointed out earlier, this student's case was one of a too early submission not a very late one. The complainant had acted in good faith: he did not try to cheat or take unfair advantage over other candidates or knowingly broke the rules. His IT project was assessed, marked, monitored and presented to MATSEC which accepted it although initially it could not record it against his name. That it was presented at the wrong session was not his fault. The fact that the project mark was not linked with and added on to his theory mark resulted from misunderstandings that could have been avoided with deeper probing from the officials concerned.

Moreover, and without prejudice to the above, it is relevant to point out that while rigid applications of a rule or policy are very often mandatory, one cannot reject the notion that in some situations there may be valid exceptions. Indeed the Office of the Ombudsman in Malta has, since its inception, considered that a rigid application of a rule or policy might result in unfair treatment. This occurs in situations where there are no risks of discriminatory treatment or where there are enough mitigating circumstances to warrant an exception to the rule. In this case I consider that there are no valid grounds to sustain the MATSEC Board's decision that aimed to avoid discrimination, since for discrimination to subsist one must compare like with like.

Furthermore, even if the Board rejects the 'too early submission' argument, the Commissioner suggested that there are sufficient mitigating circumstances to warrant an exception and accept this student's project as a justified late submission.

The role of the Commissioner for Education is not to decide whether examination candidates should fail or pass or attain better grades. That task belongs to the examiners appointed for this purpose by the appropriate University authorities. Furthermore, the Commissioners do not normally disturb decisions taken by institutionally established bodies such as examination boards or the MATSEC Board. They do not suggest the review of results unless they find erroneous evaluations of objective criteria, or manifest irregularities and discrepancies, or obvious improper discrimination. Their 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. They 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. The Commissioner for Education does not act as defence counsel for the complainants or for the University: he endeavours to act as the 'honest and neutral broker' to seek solutions that are equitable to all parties. In this case, the Commissioner concluded, that without any malice or negligence, the MATSEC Board took a decision without being fully aware of all the factors involved.

Following a thorough consideration of all the facts and findings, the Commissioner concluded that a student should not suffer because of a bureaucratic misunderstanding. He proposed that the MATSEC Board should review its decision not to accept the 24/30 mark awarded for the students' IT project and proceed with any follow-up actions to ensure that he is awarded an equitable grade that truly reflects his studies and efforts in the subject.

Outcome
The MATSEC Board accepted the Commissioner for Education's conclusion and recommendation and awarded the student the marks due to him for his IT Project.

Commissioner for Education
Case Note on Case Nos UQ 0008 and UQ 0009

Declared ineligible for a post despite having the required qualifiactions

The Complaint
The lecturers separately lodged identical complaints with the Office of the Ombudsman against their employer, the Malta College of Arts, Science and Technology (MCAST). They regarded as unfair the decision of the Selection Board that declared them ineligible to apply for the post of Programme Coordinator ICA at the College. They felt aggrieved that they were declared ineligible for the post despite their having an academic qualification, which was higher than that requested in the call for applications.

Facts and findings
In September 2015, MCAST issued a call for applications for the post of Institute Vocational Coordinators (IVC) on a definite two-year contract. The eligibility requirements for the post were:

> *"To be eligible for the role applicants should currently be employed as Full Time Lecturers with MCAST.*
> - *Possess a relevant First Degree.*
> - *Possess a Professional Teacher Training qualification.*
> - *Five years lecturing experience is required."*

These criteria were based on Paragraph 20.1 of the MCAST/MUT Collective Agreement, which stated that the minimum qualifications shall be at least a relevant first degree, a professional teacher training qualification, and five years' lecturing experience.

Both complainants were full time lecturers at MCAST, with five years or more lecturing experience and possessed a Professional Teachers Training Qualification. They also held a relevant Master's degree, which had been obtained from a British University without the attainment of a First Degree.

It had been MCAST's standard practice for a number of years to accept as satisfying a call's academic requirement, a Master's degree in lieu of a First Degree. However, in this instance, the Union representing the lecturing staff objected to this procedure. The MUT strongly objected to the interpretation of the eligibility clause as had been MCAST's practice. It insisted that Paragraph 20.1 of the MCAST/MUT Collective Agreement should be interpreted in a strictly literal manner namely, that a Master's Degree should not be considered in lieu of a First Degree for those lecturers who did not have an undergraduate degree.

Eventually, MCAST decided not to insist further on its stand and to avoid further disputes with the Union accepted the latter's demands. The College informed the complainants that they were ineligible for the post since they held a postgraduate but not a first degree. The complainants considered this decision as most unjust especially as both had filled the same post they applied for during the previous two-year term. They sought the intervention of the Office of the Ombudsman.

Observations

The issue in this case centres on the interpretation of the eligibility requirements laid down in the call for applications for the post in question. The requirements of a call for applications imply binding conditions, which have to be respected by the Selection Board appointed by management on the one hand, and the applicants on the other hand. For this reason the wording of a call for application and especially the eligibility criteria should be clear and specific as to leave no doubt at all regarding the relative interpretation. They should moreover be reasonable and fair as to eliminate any doubt or suspicion of being tailor made for any particular candidate.

The contested interpretation in this case concerns the academic requirement. The call is very clear and specific namely, the requirement of "*... a relevant First Degree*". Regrettably this wording, strictly interpreted, excludes a higher academic qualification such as a Master's degree, which complainants possessed as an alternative. In this respect one cannot but comment that it is often the practice in

analogues calls to provide for a minimum academic qualification and/or higher ones. One also notes that it is the current practice of several British universities to enrol candidates for a post-graduate degree without the requirement of a first degree. As a result this issue will need to be resolved as it will occur more frequently in the future since many local students are obtaining such qualifications through correspondence or on-line courses.

Normally the Office of the Ombudsman, and therefore the Commissioner for Education, do not investigate complaints that pertain to the interpretation of clauses in collective agreements. The area generally falls within the field of the industrial relations. This Office maintains that once the signatories concur on an agreement regarding the interpretation of any particular provision, there should not be a reason for third party intervention. Where there is disagreement, the respective parties should find a way to resolve the issue. However, the issue in this case appeared so incongruous and incompatible with logic that the Commissioner for Education felt duty bound to offer his services to assist the two sides in reaching a speedy solution that would serve justice to the complainants.

The Investigation

The Commissioner held a joint meeting with the complainants to clarify several points. He discussed the case with MCAST's Principal and the MUT President and sent both officials copies of the complaints for their reactions.

Reacting to the complaints, MCAST stated that they sincerely regret the situation these two valid lecturers, and others in the same situation, have found themselves in. MCAST continued that in this situation, the College has gone out of its way to find a solution which would be fair on them by trying to convince MUT to accept a wider interpretation of paragraph 20.1 which would effectively favour more lecturers to apply for these posts. In this case, unfortunately no agreement was reached. MCAST is however committed to amend and clarify paragraph 20.1 during the forthcoming negotiations for a new collective agreement so that this situation does not repeat itself and is resolved once and for all.[17]

17 Letter dated 22 February 2016 from MCAST Principal to the Commissioner for Education.

In turn, the Union's President argued that MCAST's reply is correct and it is true that we insisted that the agreement is adhered to.

In other words, both sides agreed or implied that denying the two complainants the opportunity to apply for the advertised post was unreasonable, but since their case was confounded by other wider, complex issues related to it and which also needed to be resolved, the impasse prevailed.

This Office can understand both the Union's stand and MCAST's eventual decision. The former felt it was not enough to resolve this issue on its own, but the others related to it had to be dealt with as well. The latter chose, in the interest of smooth running of its services, to ensure a peaceful settlement of the issue by accepting the Union's interpretation. One cannot consider such action as a case of maladministration. At the same time, one cannot declare the outcome as a just and equitable solution for the two complainants concerned. They were caught in an unfortunate management-union tangle with negative outcomes for all. Apart from the two complainants, other highly qualified Union members were rendered ineligible for these and other posts, while MCAST lost the opportunity to consider and appoint the more qualified academics.

Without prejudice to the above, this Office cannot but make what it considers a crucial and relevant observation regarding the wording of the eligibility requirement of the call in question and the extent to which it respects Paragraph 20.1 of the Collective Agreement. A close scrutiny of the wording of the clause in question states that the relevant first degree, and the professional teacher training qualification were the minimum qualifications. The call in question did not make any reference to the word 'minimum'. Had it been included, there could have been a stronger case for considering complainants' claim that their Master's qualification satisfied the eligibility requirements as being a qualification which was higher than the minimum requirement of a first degree.

Consequently, if any failure can be impaired to MCAST, it is that the wording of the call for application did not fully respect the wording of the Agreement. There is no reason to believe that this was intentional and the evidence suggests the contrary. In any case, all concerned accepted the wording of the call, and the fact that the complainants applied and did not officially object to it, closes any issue.

Conclusion

After due regard of the merits of the complaints under consideration the Commissioner concluded:

The rigid interpretation of an eligibility clause, as was done in this case cannot in itself be deemed to be an act of maladministration. The clause as worded had been indirectly accepted by all parties involved without any reservation and was therefore binding. Consequently the Commissioner was not in a position to sustain the complaint that MCAST acted wrongly or discriminated against them.

Having said that, the Commissioner found it regrettable that the two complainants were put in this predicament because MCAST, albeit unintentionally, worded the call in the way it did when the relative Collective Agreement specified that a first degree was a minimum requirement. Had MCAST included the words 'as a minimum qualification' in the eligibility clause, complainants could have validly claimed that they satisfied the requirements of the call since a Master's degree is officially recognised as a higher academic qualification than a first degree.

Commissioner for Education
Case Note on Case No UP 0056

Technical hitches in submission of PhD Scholarship application

The complaint
A foreign PhD student lodged a complaint with the Office of the Ombudsman against the Ministry for Education and Employment claiming that its Scholarship Unit unjustifiably denied her an award under the REACH HIGH Scholars Programme. The complainant maintained that the administrators of the Programme disqualified her application because it failed to reach their office by the closing time. She asserted that her failure to apply in time originated from a technical fault at the Ministry's end and not due to any negligence on her part.

Facts and findings
In April 2015, the Ministry for Education and Employment (MEDE) launched the REACH HIGH Scholars Programme (hereafter referred to as RH) inviting doctoral degree holders to apply for financial assistance to undertake post-doctoral research. On the same day, the Scholarship Unit at MEDE opened an online platform through which prospective candidates had to apply until the closing date of 19 June 2015 at 12.00 noon. In line with Government policy, applicants could only apply online through the provided platform.

The complainant, a non-EU national, was eligible to apply for the EU co-funded scholarship since she holds an EU passport through her marriage to an EU national who has been living and working in Malta for the past seven years.

At approximately 9.00 am on 19 June 2015, the complainant initiated the electronic interactive application form using the Safari for Mac OS Internet browser. However, she could not proceed beyond the seventh stage of the application because the platform

blocked. The complainant phoned the MEDE Scholarship Unit at 11.45 am about her problem and was advised to switch to the Google Chrome browser, which she downloaded, but the link problem persisted. Faced with this problem, she again phoned the Scholarship Unit at 12.01 pm and was informed that because other applicants were experiencing technical difficulties, the line was going to remain open for a few minutes beyond the closing dateline at noon. In fact the online platform remained open for an extra 45 minutes before it was closed while the complainant persisted in her efforts without success. Later that evening, through the computer facilities at the office of the Head of Department of the Faculty in which she was conducting her research at the University of Malta,[18] she sent an application form with the relevant supporting documents through email, which reached MEDE at 6.41 pm[19]

In September 2015, the RH Project Leader informed the complainant that her application was been found in breach of Clause 9.4 which read *'Late and incomplete applications shall not be considered by MEDE'."* The RH Project Leader continued that *"...her application was not submitted and therefore it is not recorded on our audit for the REACH HIGH Scholars Programme applications."*

The Project Leader informd the complainant that if she disagreed with the Board's ruling, she could appeal the decision. The complainant appealed, claiming that her application did not reach the Scholarship Unit due to technical problems at MEDE's end. Her main point of contention centred on the argument that if the scholarship scheme portal did not accept the Safari browser, then the Scholarship Unit should have advertised this fact when the scheme was launched. She quoted MEDE officials admitting that other applicants had faced the same technical problem. The Board turned down her appeal stating that while it was true that other applicants using the Safari browser had had technical problems, all had managed to submit their forms.

The complainant disputed the Appeal Board's decision and lodged a complaint with the Office of the Ombudsman.

18 The Head of Department confirmed the complainant's efforts to submit the application forms, endorsed her Appeal and accompanied her during the meeting with the Commissioner for Education.

19 Scholarship Programme Project Leader's reactions to the complainant's claims recorded in a letter to the Commissioner for Education dated 14 January 2016 and reiterated at a meeting with the Commissioner on 21 April 2016.

During the course of the investigation, the Commissioner for Education sought the assistance of MITA to clarify some technical points raised by both sides. MITA's Associate Software Developer for the e-Government section stated that eventhough they have conducted several searches to locate any information that can be linked to complainant's application the outcome was negative. Later, in the investigation the Agency's Solutions Architect of the same section confirmed that the Agency was able to receive e-Forms submitted through the Safari browser.[20]

Observations

The Commissioner asked the complainant why she had waited to submit her electronic application form to the last three hours of the closing day when she had had two full months to do so. The complainant justified her delay by stating that she had waited to receive documents that needed to be included in the application. She explained that these documents had to be sent by the Canadian researcher who held the patent for the studies she intended to carry out through the scholarship. She added that, in any case, when she commenced with the filling in of the e-Form and uploading of data, she felt confident that she would complete the task within the allowed closing time. Eventhough there was no reason to doubt the complainant's justification for leaving the application to the last moments, the Commissioner for Education was of the opinion that these reasons do not outweigh the very valid arguments presented by the Appeals Board when it decided that it could not uphold complainant's appeal.

During the investigation the Project Leader explained that neither the Scholarship Unit nor the Appeals Board could make any concessions to the complainant on the basis that her late application could have been caused by human error or technical faults in her computer over which she had no control. The Project Leader explained that if the REACH HIGH Selection Board had to accept her claim, definitely the REACH HIGH project will be subject to an Irregularity report issued by the Managing Authority, which report does not reflect well on the scheme itself, but it will mean that the funds reimbursed to her or on her behalf for such project which is hefty sum of up to €200,000 will have to be reimbursed back to the Managing Authority by the Ministry. Also, the Post-Doctoral Scholars Programme – Post Doc Scheme is an ESF Project subject to continuous rigorous audit by the Managing Authority and definitely they will not accept any awardee's file without the proper application.

20 Emails dated 17 March 2016 and 8 April 2016 respectively.

Conclusion

Taking into account all the facts and findings in this case, the Commissioner for Education concluded that the REACH HIGH Scholars Programme managers have provided convincing evidence that technical faults, which may have prevented the complainant from submitting the electronic application for a post-doctoral scholarship, did not originate at the Ministry for Education and Employment's end. Furthermore, his investigation did not reveal any evidence that REACH HIGH Scholars Programme personnel treated the complainant unfairly or in any way discriminated against her. Therefore, the Commissioner did not sustain her complaint.

Outcome

The IT Section of the Ministry for Education and Employment undertook to review its procedures to ensure full communication between the section and applicants for scholarships.

Commissioner for Education
Case Note on Case No UP 0060

Student claims that dissertation result was a consequence of conflicting guidance of her supervisors

The complaint
A university student lodged a complaint with the Office of the Ombudsman against the University of Malta. She claimed that conflicting guidance by her supervisors led the Examination Board to conclude that her dissertation had not reached the required standard for a Pass grade for a Master's degree. She also complained that the Board had been even more unjust when it reached a similar conclusion following extensive revisions to her resubmitted work.

Facts and findings
Following the attainment of a degree in Pharmacy, the complainant enrolled for the course leading to the degree of Master of Science (M.Sc.) in Public Health Medicine with the Faculty of Medicine and Surgery in 2013. The course programme consisted of 90 study units, of which 30 credits were assigned to the dissertation. She completed successfully the taught-course requirements and in mid-September 2015, with the approval of her Principal Supervisor and Co-Supervisor, submitted a dissertation title focusing on dementia.

The Examination Board, consisting of three local examiners and an external examiner, held a *viva voce* examination which was also attended by the complainant's Principal Supervisor but in compliance with the Master's Programmes Regulation did not participate in the discussion. The participation of the External Examiner

was through Skype video conferencing. In reply to the complainant's complaint, the examiners stated that during the question time, she was given various opportunities to further elaborate on some of the lacunae identified by the examiners during the viva. Unfortunately, she failed to shed any more light or, indeed, to show that she had any insight of these lacunae, neither during the presentation nor in the discussion that followed. This reflected a poor knowledge and understanding of the subject area.

On the basis of this assessment the Board decided on a Fail grade with a 43-percentage mark. The complainant requested a 'revision of paper', which was conducted by a fifth examiner who raised the mark to 46 percent. Since the pass mark of a Master's degree programme is 50 percent, the grade remained a Fail.

The complainant, with the assistance of the Co-Supervisor, worked through the list of suggestions recommended by the Examination Board and re-submitted her thesis. She felt it crucial to submit so early and not utilise the six-month extension period because she was pressured to complete and obtain successful results by the end of October 2015 in order to satisfy the conditions of the 'MASTER it' scholarship scheme that had funded her studies. Failure to complete the course in time meant that she had to refund most of the scholarship funds to the Maltese Ministry for Education and Employment as the scholarship sponsor.

The Examination Board, composed of the earlier members reconvened to assess the referred dissertation on 30 October 2015 with the aim of issuing a result before the 31 October 2015 deadline. In accordance with University regulations, it was not necessary for the Board to call the student for a second *viva voce*: it sufficed to examine the resubmitted text. The Primary Supervisor could not be present on this occasion as he was away from the island, and the Co-Supervisor was not summoned to the meeting.

The examiners deliberated at length on the final outcome and declared that "*The Board members were in consensus that, although the student had made amendments, these were mainly linguistic. The Board members felt that the fundamental weaknesses of the dissertation had not been addressed. The Board agreed that the dissertation was only marginally improved and had not achieved the required standard and it did not merit a pass mark.*"

During the investigation it was revealed that in spite of the *in consensus* statement, three members of the Board were of the opinion that the student's work should be awarded a Pass grade, but one member was unwaveringly against, and eventually the rest succumbed to his insistence. The Board recommended that the complainant had completed successfully 60 study-units, and be awarded a Postgraduate Diploma.

As one could imagine, the complainant was highly disappointed with the outcome and was convinced that throughout the dissertation writing exercise and the examination process, she had been treated unfairly. She sought the intervention of the Office of the Ombudsman to rectify what she termed a grave injustice.

Observations

In the course of the investigation, the Commissioner for Education held an extensive interview with the complainant, as well as discussions with the complainant's Co-Supervisor, the Chairman of the Examination Board, and her Principal Supervisor. He also clarified points related to University regulations with the Registrar.

The complainant

The complainant was very critical to her Prinicipal Supervisors' attitude and she claimed that most of his corrections and suggestions concentrated on the English text rather than on the substance of her research. She pointed out that this demeanour contrasted greatly with that of the Co-Supervisor who was far more supportive. The complainant alleged that she was constantly caught between the contradictory advice and instructions she received from the two supervisors and often had to juggle her written work in efforts to satisfy both and offend neither.

The complainant reiterated that, with the assistance of the Co-Supervisor, she had meticulously revised her dissertation to comply with each and every one of the revisions recommended by the Examination Board following the *viva voce*. The Co-Supervisor assured her that the revised version of the dissertation complied fully with the recommended corrections suggested by the Examination Board. She was unable to establish contact with the Principal Supervisor before resubmitting. Therefore, she expected that once the Principal Supervisor was unable to be present at the second examination session, the reconvened Board should have invited the Co-Supervisor to attend and clarify any queries that arose.

The Co-Supervisor

During the investigation, the Co-Supervisor, stated that he thought highly of complainant's work to the extent that once her ordeal was over he planned to publish her work with him as a co-author. He also stated that he was convinced that his colleague's conflicting approaches and instructions had impacted negatively on their students' work and on the Examination Board's results.

Furthermore, the Co-Supervisor severely criticised the fact that none of the Examination Board members specialised in *dementia* or mental health. He argued, however, that since *dementia* featured so prominently in the study as indicated by the dissertation title, an academic well versed in the area should have been a member of the Examination Board.

He also confirmed the complainant's statement that they had meticulously revised and improved all the areas that the Examination Board had indicated as needing reviewing. He was incredulous that all the revisions and corrections he and the complainant had carried out resulted to an increase of just three percentage points on the original mark and was equal to the 'revision of paper' mark awarded before the revisions had been made. He asked whether all the revision work according to the instructions of the Examination Board were useless. He reaffirmed his conviction that the Examination Board had treated the complainant most unfairly.

The Chair of the Examination Board

The Chairman of the Examination Board, stated that he was aware of the friction that existed between the Principal and Co-Supervisor, and had tried his best not to let it colour the examiners' perceptions. He agreed with the Co-Supervisor that, although *dementia* was not the crucial subject of the dissertation, a specialist in the area would have enriched the expertise of the Board. The Chairman acknowledged that the complainant's revised dissertation was a considerable improvement on her first attempt, and it was regrettable that she had not taken the full extension period to improve the work further. He added that once the Principal Supervisor was unable to attend the second examination session, he had not felt the need to ask the Co-Supervisor to attend. The Chairman confirmed that the Examination Board members were not unanimous in their decision to fail the student, even though ultimately they all signed the final result.

The Principal Supervisor

The student's Principal Supervisor, agreed that the student had worked hard on her dissertation. However, he detected that she was following the pattern of research and writing of another dissertation she had presented for an earlier degree. He urged her to modify her research methodology to Public Health Policy issues, which contrasted greatly to Pharmacy subjects. He explained that in his opinion the complainant was most reluctant to abandon the pattern, which she found more familiar. The Principal Supervisor also felt that the English text and written presentation often lacked the standard of a Master's thesis, and he felt duty bound to correct it. He had to adhere to what he considered the requirements of post-graduate level standards. He agreed that the complainant did not concur to his corrections and he often felt that she resented his attempts at improving her work.

The Principal Supervisor denied that he had any personal or professional issues with the Co-Supervisor however he confirmed that they simply disagreed about the nature and quality of complainant's work. He confirmed that he and the Co-Supervisor had never actually discussed her work. He also stated that he was particularly annoyed by the complainant's reaction when he informed her that her first thesis was graded a Fail. He added that he followed the advice from the University's legal office and avoided having any further communications with the complainant; he did not contribute towards the resubmitted version of her dissertation.

The three academics namely, the Principal and Co-Supervisor, as well as the Chairman of the Examination Board, concurred that taking all the circumstances into account, the complainant should be allowed another opportunity to present and defend her thesis if the regulations allowed it.

Conclusion and recommendations

The Commissioner for Education does not normally disturb the conclusions of Examination Boards unless he detects clear evidence of unfair treatment or maladministration. A careful analysis of the facts emerging from this investigation does not indicate that any of the academics involved acted improperly or consciously behaved in a manner to harm the complainant. On the contrary all, in their own respective ways, acted in what they believed to be the best interest of the student and of the *academia*. Still, a study of the events in this case, points

to the conclusion that the cumulative proceedings involving the supervision and examination of the complainant's dissertation collaborated to give her a raw deal.

For example, one cannot conclude that the complainant's dissertation supervision was a smooth and flawless one. The University's General Regulations for Postgraduate Awards (2008) devote a whole section to describe how the Principal and Co-Supervisor should collaborate to guide their students in their work. *Inter alia* Paragraph 51 (2) states:

> *"If the nature/topic of research requires the input of another specialist, the Board may appoint a Co-Supervisor, in which case the two supervisors shall meet the student together to decide how they will divide their responsibility for advice and how future meetings are to be arranged.*
>
> *They should collaborate by:*
>
> *(a) assisting students to select and elaborate a research problem and to formulate a written proposal for their dissertation;*
>
> *(b) offering ideas and providing guidance and encouragement on the planning and progress of research, submission of the dissertation, and publication of results;*
>
> *(c) providing or arranging instruction in research methodology, including use of information technology;*
>
> *(d) guiding students in acquiring and improving appropriate generic skills, including written and oral communication, numeracy, decision-taking and organisational and management skills;"*

Apart from the fact that the two supervisors never met to discuss the student's work, it is evident that the two fulfilled these duties, even if with the best of intentions, not in collaboration but in opposition to each other, and with disastrous results to their student. Students should not be placed in a position where they have to maneuver their research and writings between the conflicting instructions of their tutors, as was obviously the case here.

Shortcomings also occurred in the composition of the Examination Board. It is not the Commissioner for Education's role to establish who the members of such boards should be since such decisions should be left to the appropriate University authorities. Yet in this case, the Board's Chairman agreed with the complainant's Co-Supervisor's observation that an expert in *dementia* should have been included. Again, although not mandatory by the Postgraduate Degrees Regulations, it would have been appropriate to invite the Co-Supervisor to attend the examination of the resubmitted dissertation once the Principal Supervisor was unavailable. It would also have been prudent to have the Co-Supervisor representing the student's point of view considering the disagreement that emerged among the Examination Board members about the eventual assessment mark. His presence could have clarified the point raised by the complainant and himself that in spite of the extensive corrections and revisions they carried out based on the Board's own recommendations, the final mark remained the same as that given by the 'revision of paper' examiner.

Finally, it is a source of surprise to the Commissioner that the opinions of three academics, who considered the resubmitted dissertation sufficiently improved to deserve a Pass, were subjugated by the determined objections of the fourth who insisted on a Fail. This constitutes a distorted form of consensus.

One must also state that certain actions and decisions by the complainant contributed to complicate her problems. For example, her disrespectful behaviour towards the Principal Supervisor was totally unacceptable. Her haste to complete the revised version of the dissertation in one month when she had six to do so may have been detrimental to the final quality of her work. In this regard one understands the compelling pressure of the 'MASTER it' scholarship deadline and the considerable sum of money she may have had to refund, but the attainment of the degree should have taken priority.

It is not for the Commissioner for Education to decide whether the complainant's dissertation should be awarded a Pass or a Fail grade. The appropriate University authorities should resolve the academic assessment. The duties of the Commissioner for Education pertain to establishing whether the administrative processes involved, including the academic related ones, were conducted according to best practice principles in full conformity of University Regulations.

The Commissioner concluded that, in spite of the complainant's shortcomings, they were not, especially when one takes into account the following factors:

1. the conflicting and contradictory guidance by her supervisors during the research and dissertation writing process;

2. the absence of a *dementia* expert on the Examination Board when the mental ailment was a major feature of the research;

3. the absence of a supervisor at the second examination session when one considers the contentious circumstances, even if his presence was not strictly required by the regulations; and

4. the award of a Fail grade a few points from the pass-mark when there are clear indicators that the majority of the examiners favoured a Pass, but succumbed to the insistence of one member.

The fact that the three main academics concerned concur that the student should be given another opportunity to present and defend her thesis constitutes an added factor in her favour.

Therefore, when considering all the factors occurred during this investigation, the Commissioner concluded that a permutation of uncoordinated and inconsistent tuition coupled with a flawed examination process constituted unfair and discriminatory treatment against the complainant. Consequently, he sustained her complaint, and urged the University to take the appropriate actions to rectify the injustice.

Outcome
The University of Malta accepted the Commissioner for Education's conclusions and recommendations in their totality.

Commissioner for Education
Case Note on Case No UQ 0019

Stipend not given. Student claims unfair treatment

The Complaint
A father lodged a complaint on behalf of his eighteen year old son claiming that the Stipends Office at the Ministry for Education and Employment (MEDE) treated his son unfairly and discriminated against him when it refused his request for a student's stipend. The Stipend Office based its decision on the argument that the student had not resided in Malta for the five years prior to his request.

Facts and findings
The complainant's son is a Maltese national who in 2011 enrolled as a boarding student at a College in the UK where he studied until the completion of his Sixth Form Studies in June 2015. Each year, he returned to his family home in Malta during the Christmas, Easter, summer and mid-term holidays, and often during long weekends.

In October 2015, he registered for the course leading to a Bachelor of Commerce Degree at the University of Malta and applied for the student's stipend. In March 2016, the Stipends Office informed complainant's son that it could not accede to his request since he had not resided in Malta for the previous five years. The Chairperson of the Stipends Office cited the relevant regulations, which stated:

> *"According to Subsidiary Legislation 327.178 (part 1) maintenance grants shall be paid to full time students who... (ii) 'have resided in Malta for a period of not less than five years from the commencement of the relative course of studies'."*

Complainant appealed this ruling arguing that his son was a Maltese citizen who resided abroad during term-time for study purposes and therefore, for all intents and purposes, he was to be considered as domiciled in Malta. Both parents, who are Maltese citizens, have lived in Malta all their lives and their son was temporarily away for study purposes. The Stipend Office rejected this argument and confirmed its earlier decision.

Following the rejection by the Stipend's Office, the student's father lodged a complaint with the Office of the Ombudsman. The Commissioner for Education forwarded the complaint to the Stipend Office for its reaction, and the Chairperson replied in the same terms as they had answered the complainant. The Commissioner then invited the Stipends Office to provide more details concerning the Board's decision. He sought to establish, for example, whether the Stipends Office had previously dealt with applications similar to the complainant's. He also asked what procedure the Office followed when it dealt with requests for stipends from Maltese students who had not been residing in Malta for the last five years because they had accompanied their parents working abroad, in particular parents who were in Malta Government service or who were employed by the European Union. Regrettably, in spite of several written and telephone reminders by the Commissioner the Stipends Office failed to reply.

This Office established that the Maltese Constitutional Court had dealt in 2003[21] with the notion of residence and had concluded that:

> *"Il-kelma "residenza" ma tfissirx preżenza fiżika fil-pajjiż, iżda tinkludi fiha u tippermetti allontananzi perjodiċi mill-istess pajjiż. Persuna li tkun temporanjament assenti minn Malta minħabba xogħol, studju, mard jew missjoni, m'għandiex u ma tistax ma titqiesx li m'għadhiex residenti f'Malta."*

The Courts quoted Graveson[22] who defines residence as "*habitual physical presence in a place during a period of either limited or unlimited duration*". Hence the Courts held that:

21 Dr Harry Vassallo bħala mandatarju speċjali tal-assenti Professur Armold Cassola vs Kummissarju Elettorali Prinċipali in rappreżentanza tal-Kummissjoni Elettorali u John Mary sive Jimmy Magro f'isem proprju u in rappreżentanza tal-Partit Laburista. Kompetenza Kostituzzjonali datata 21 ta' Marzu 2003.

22 Conflict of Laws (7th Edit.p.194).

"Residenza, kwindi, ma tirrikjedix preżenza kontinwa fil-lok ta' dak il-pajjiż, imma waħda abitwali skont iċ-ċirkustanzi tal-każ ta' dik il-persuna".

Conclusion and recommendation
In view of the facts and findings during the investigation, the Commissioner for Education stated that the several absences of the complainant from Malta in the period 2011– 2015, for all intents and purposes, he should have been considered as a resident of these Islands.

The following reasons support this view:

1. his substantive and legal home address was that of his parents in Malta;

2. his stay abroad was exclusively for study purposes;

3. he returned home to Malta three or four times a year during the vacation periods;

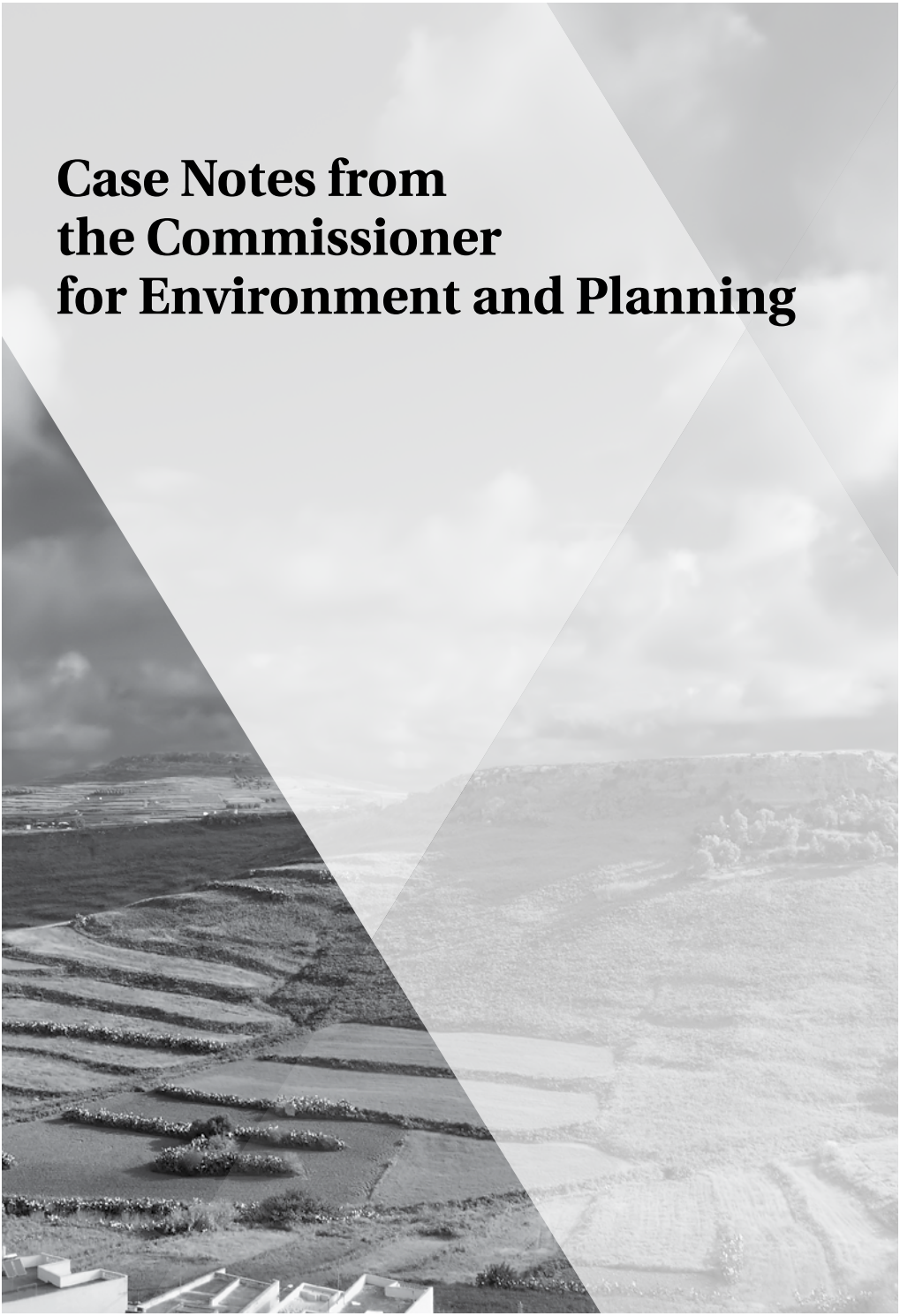
4. for most of the period in question, he was under 18 years of age under the legal responsibility of his parents; and

5. his intention had always been that of returning to Malta, and he had never sought or acquired residence abroad.

For the above reasons, and supported by the decision of the Court case cited earlier, the Commissioner recommended that the complainant was eligible for a stipend as a Maltese student at the University. The Commissioner recommended that the Stipend Office should reconsider its earlier decision and award him the stipends due to him from the day he became eligible on enrolment as a student in October 2015.

Outcome
The Stipends Office accepted fully the Commissioner for Education's conclusion and recommendations. It reimbursed the complainant all stipends due to him, including those for his first year of studies.

Case Notes from the Commissioner for Environment and Planning



Commissioner for Environment and Planning
Case Note re Case No EP 0052

Refusal of refund of expenses incurred to commission and Energy Performance Certificate

The complaint
Complaint lodged against the Building Regulations Office (BRO) for refusal to refund expenses incurred in connection with the issuing of an Energy Performance Certificate.

Case history
On 16 September 2015 the Office of the Ombudsman received the following complaint:

> *"In April 2015 I received a registered letter from the Building Regulations Unit (please see scan of envelope attached). …*
>
> *It transpired that the Building Regulations Unit (BRU) obliged me, under threat of additional fines, to commission an Energy Performance Certificate (EPC). We complied with the BRU's request, and obtained a certificate … for which I had to pay 175 Euros ….*
>
> *The BRO had requested said Certificate, ostensibly in terms of Legal Notice 376 of 2012. However, a close reading of said Legal Notice indicates that the BRO had acted ultra vires when they demanded of me that I must produce said EPC. ….*

To put the matter into more context, the EPC was requested for my property … an old property (in an Urban Conservation Zone, scheduled Grade 3) on which I am simply carrying out renovating works. Therefore the BRO had no legal basis for their insistence that I obtain an EPC for my property.

I am therefore petitioning the Ombudsman to, at least, advice the BRO to pay me back the cost of the EPC, i.e. €175."

An investigation was opened in terms of Section 13(1) of the Ombudsman Act.

The BRO was requested to state its position on the matter.[23]

The BRO responded[24] as follows:

"The EPC has examined its EPC database. The attached asset-rating certificate … was issued in connection with [a] notification letter … for alterations and extension to an existing terraced house.

According to L.N. 376 of 2012, the EPC requirement is applicable to buildings that are being constructed, sold or rented out. Since no new dwelling unit was created … no EPC was required in this case and notification letter … was issued erroneously to the applicant. As stated in the notification letter, the BRO offers an EPC Helpline to offer support to the general public in its queries regarding the EPC requirement. The registered assessors also undergo training, including the contents of LN 376 of 2012, and usually screen any notification letters that are sent out erroneously.

In view of the above, the BRO is willing to refund the €75 registration fee to the applicant. As a sign of good will, the EPC will still remain valid for 10 years and may be presented in case of future sale or rental of the property."

23 E-mail dated 23 September 2015.
24 E-mail dated 3 November 2015.

This reply was communicated to the complainant[25] who claimed that the fees of €100 that he paid to his consultant had to be refunded as well[26]. He was advised to contact the BRO and attempt to negotiate a settlement of this part of the claim.

Complainant next communicated with this Office[27] by stating that he had received the refund of €75 but that the BRO was refusing to refund the EPC Assessor's fee, claiming that as a trained professional he/she should have noticed that the request letter by the BRO had been issued by mistake.

Complainant stated that he had abided by the BRO's request under duress as he had been threatened with penalties and fines for non-compliance unless he produced the EPC certificate.

An attempt was made once more to arrive at an equitable solution and the BRO was requested to consider an '*ex gratia*' payment to settle the case. However it replied quoting difficulties in accounting procedures were such a payment to be made, due to the controlled payment system relating to EPC certification, since a payment relating to professional fees had not entered into its system. It recommended to complainant to seek a settlement with his consultant.

Remarks

In this case, the intervention by this Office brought about a partial refund of the total expenses that complainant had incurred in relation to this case, and this after he had spent considerable time in trying to get a refund.

Although it is true that complainant was not completely satisfied with the outcome, the assistance rendered by this Office did lead to a partial refund which complainant had been attempting to obtain for a considerable amount of time.

In addition the BRO's explanation did carry a justification as they would not have been able to justify the outlay, even of a relatively small amount, when this outlay had not been previously received.

25 E-mail dated 22 February 2016.
26 E-mail dated 24 February 2016.
27 E-mail dated 23 March 2016.

Commissioner for Environment and Planning
Case Note on Case No EP 0034

Illegal extension and use of a club premises

Complaint lodged by a group of residents regarding illegal extension and use of part of a club premises.

Sequence of events
In 2015 a group of residents (complainants) wrote to the Office of the Ombudsman as follows:[28]

> *"We the undersigned, as a group of residents/owners of property in Alley … wish to draw your attention regarding what may be considered as an alarming and potential cause of concern to us as residents in the area.*
>
> *… The club acquired possession of a residence … the development permits were issued by MEPA … and immediately works started on the demolition of antique structures thus converting same into a sizeable yard. This property which lies within a residential zone was subsequently communicated with the existing club premises.*
>
> *This structural extension translates itself into an extension/increase in the services provided by the club into a totally new zone with a more ambitious function than that of a traditional club bar. In effect this new yard became more like an open-air commercial club. Obviously this means the service of a new open air bar on this site. This site lies in the heart of a residential zone and clearly in the middle of the village core and is being used as a venue for open air discos, open air get together parties, open air tombola and even*

28 The letter was written in Maltese and this is a free translation of said letter.

as a site for a big screen (enormous) for use by the society and club clients. I would also like to add that access to and exit from this open air club is through the alley which is a narrow lane intended for use by a few residents and not for access by the masses.

The yard has been so converted with the aim of having new space for entertainment in time of commercial use on the days of the village feast.

We have been so informed by the Club Committee members during a formal meeting which took place on … inside the club premises. This meeting took place at the request of all the residents of the alley after some of us had already been the victims of damages to third party property when bulky machinery were used in the conversion of this site including the demolition works on antique structures, the uprooting of trees and the covering of the site with concrete. It was after that we became aware of the intended ambiguous use of the site which would change our lives through unnatural changes in a residential zone in the heart of a historic village.

As you can appreciate, when we heard that the club considered that it had the sacrosanct right to have ongoing music in the open air up to 11:00 p.m. all the year round and even up to 1:30 a.m. during the week of the village feast as happens in a bar situation inside the premises, we feel the need to have peace of mind through legal advice. We do not consider that we should negotiate on our quality of life especially when the club was insisting that the law was on its side.

Our concern stems from the fact that it is now clear that our quality of life is threatened by loud noise at night through the music and noise from the clients. We are worried that the access to the site through the alley will result in damage to our property and it is difficult to conceive how a small alley can serve as a passageway to a large number of clients, some of whom may not be sober and accessing the site as if it was their own home. We are being exposed to noise all night since the club has not been observing the time limit and our alley has been converted into a 'brothel'. Each and every resident of the alley whether elderly, parents with children or adults have to work the day after having endured a sleepless night because of the activities organised in this yard.

The most recent feast has clearly shown that it is impossible for the authorities responsible for law and order to be able to control abuses since the noise levels can easily be controlled as to increase or decrease as needed. You will appreciate that there is a limit as to how much or how repeatedly we can resort to telephone calls to report such abuses to the Police at the local Police Station. Following more than a week trying to cope with this situation we felt that the Police were getting fed up receiving the same complaints and they remain ignored by the club. In order to fully understand our frustration, it is to be stated that DJ parties were held under the veil of a get-together party starting at 14:00 hours right through the night – a continuous bombardment day and night.

We have witnessed dirt, the use of the alley as a latrine, fear of drug abuse and possibility of fighting between drunken persons – these became the order of the day apart from insults to residents who were considered as being against this ground project. These are among the realities we have had to face during the week of the feast day. Now the problems will extend over a longer calendar period.

We are aware that the depreciation of our properties, apart from the fact that in respect of two properties, MEPA's … permit which basically ignored the proper use of the premises, has resulted in the [infernal] situation of having their bedroom adjacent to a party wall common to this open air club. In all honesty we cannot understand the rationality of all this as applied by MEPA in this particular case. The situation is surreal.

For this purpose, we also anonymously request your guidance and protection in this matter. We urge you and the authority you represent so that the Trading Licence Unit does not issue a licence for the new bar.

It is also wished that you investigate:

- *why only one address was shown in the notice for the extension of the club instead of the 3 addresses where the notices were not affixed;*

- *why the alley was never indicated in the plans submitted by the club to MEPA; and*

- *the letter sent to the Commissioner of Police.*

It is the wish that after you read this letter we are given the opportunity to discuss all the above points in more detail."

The Commissioner for Environment and Planning started this investigation on the complaint in terms of Article 13 (1) of the Ombudsman Act.

MEPA was requested[29] to comment on the complaint while a meeting was held with some of the complainants on 15 July 2015.

By means of e-mail dated 25 September 2015, MEPA replied as follows:

"I wish to inform you that two site notices were affixed on site, one on the facade of the Band Club, the other at the entrance to ... [the lane]. Attached please find photos of the two site notices as affixed on site. These photos are available on the MEPA website.
...
I wish to inform you also that an Enforcement Notice (ECM) has been served on the Band Club in view of the deviations from the approved permit."

This Office pursued discussions with the MEPA Chairman till 18 November when MEPA was informed that an application had been received for a Minor Amendment to the permit and that this application was approved. Therefore the development which did not conform to the original permit was now sanctioned. In effect MEPA, by means of letter dated 17 December 2015, confirmed that as a result of the permit for the 'minor amendment' the enforcement procedures were stopped.

Observations
The application was for a "*proposed extension of existing... club, proposed new alterations and sanctioning of minor demolition works...*".

It results that MEPA had received an anonymous letter objecting to the development. This letter read as follows:

29 E-mail to Chairman dated 16 July 2015.

"To whom it may concern:

I would like to complaint on the proposed extension to the existing band club, proposed new alterations and sanctioning of minor demolition works ...
I would like to point out the proposed extension, alterations and demolitions have been already carried out before permits, demolition of rooms which had kileb and xorok.

Please note that the purpose of the demolition and alterations is to convert the existing rooms (which have been already demolished) into a back yard with a back entrance to the band club. Please note that the area is a residential area and will not tolerate any excessive noise or inappropriate behaviour in the alley. Also I would like to mention that the back yard was not mentioned in the application for the permit.

I would like you to consider this matter seriously."

It therefore resulted that somebody had objected to the development, mainly because the proposed development, according to the letter, was intended for a yard inside a residential area.

These arguments closely resemble those brought forward by complainants and indicate in a convincing manner that contrary to what was stated by complainants, someone was aware of the application and had in fact sent an objection letter. This fact therefore confirms what MEPA sustained namely that the notices had been affixed even in the alley and the residents knew of the application. Even if the notice had been removed, as insisted upon by the residents, the fact remains that they or some of them were aware of the proposal so much so that they submitted a written objection.

As regard the processing of the application, this Office examined the report prepared by the Directorate. The report recommended a refusal of the application because certain internal architectural elements inside the building needed to be preserved and the applicant had failed to amend the plans to address the issue. Another reason for this refusal was that the proposal did not address the issue of universal access as requested by KNPD.

When the Board discussed the application, it directed the applicant to amend the designs to address the failures referred to in the report. Meanwhile KNPD had given its approval. When these instructions were complied with, the Board approved the application.

It has to be stated that in Section 4.7.2, Height Limitations, the report referred to a map where the maximum permissible height was four floors. Evidently this was a mistake firstly because the map indicated the maximum height was not the one indicating in the report but another one, and moreover according to the map, the maximum height on the site was two floors and not four. This mistake is also evidenced in the Site Description (Section 4.3) wherein it is correctly stated that the site lies in a zone where the maximum permitted height was two floors.

The same report stated that "*The site lies within the Local Centre and Urban Conservation Area …*".

However even this was a mistake. While it was correct to state that the club premises itself lies in the Local Centre, however the building where the extension was to be carried out as stated in the proposed development application, lay in another zone and not in the Local Centre. According to the map's classification the site lay in a residential area.

This was an important element since in such case the applicable MEPA policies are different from those applicable to a Local Centre and in processing the application and preparation of the report which had to be submitted to the Commission for its decision, the Directorate was in duty bound to ensure that the proposal respects these policies and not those applicable to a Local Centre.

The applicable policies were not mentioned in the report. Neither was there any explanations or evaluation on which development was … in the context of the site and its proximity to a residential zone.

The policy states as follows:

> *"**Residential Areas and Residential Priority Areas***
>
> *The Local Plan designates Residential Areas (RAs) and/or Residential Priority Areas (RPAs) as shown on the relevant Policy Maps.*

The following is a list of acceptable land-uses (new uses, extensions to existing uses, and change of uses) within all frontages located within the RAs.

i. A mix of Class 1 (Use Classes Order, 1994) terraced residential development as detailed in the DC 2005, Part 3, and in accordance with the specific zoning conditions indicated in the same guidance, unless otherwise stated by a policy in this Local Plan;

ii. Class 2 (Use Classes Order, 1994) residential institutions, provided that:

- *they are of a small scale and do not create adverse impacts on the residential amenity of the area;*
- *Class 2 (a) institutions are located in close proximity to a town or local centre; and,*
- *Class 2 (b) nursing homes and clinics are easily accessible from the arterial and distributor road network.*

iii. Class 3 (Use Classes Order, 1994) hostels provided that these uses are in accordance with all other relevant Local Plan policies.

iv. Class 4 (Use Classes Order, 1994) small shops provided that:

- *the small shops (of any nature) are not to exceed a total floor area of 50 m^2 each, and convenience shops are not to exceed a total floor area of 75 m^2 each;*
- *they comply with all the provisions of paras. 1.4.16 to 1.4.18 of the Interim Retail Planning Guidelines (2003); and*
- *they comply with any relevant section of the DC2005 (design, access, amenity, etc.).*

v. Supermarkets provided that they comply with all the provisions of [the] Policy

vi. Class 5 (Use Classes Order, 1994) offices provided that:

- *the floor space does not exceed 75 m^2;*

- *they do not unacceptably exacerbate parking problems in a residential street that already has an acute under provision of parking spaces for residents; and,*
- *they comply with any relevant section of the DC 2005(design, access, amenity, etc.).*

vii. Classes 7 and 9 (Use Classes Order, 1994) non-residential institutions, swimming bath or pool, skating rink, health club, sauna, sports hall, other indoor or outdoor land based sports or recreation uses not involving motorised vehicles or firearms, and interpretation centres, provided the facility:

- *is of a small scale and does not create adverse impacts on the residential amenity of the area;*
- *is located on land already occupied by buildings and will replace these buildings provided they are not worthy of retention due to their historic/architectural merit and/or their contribution to the character of the area, unless land is specifically allocated for the facility by this Local Plan; and,*
- *the immediate surroundings of the site are already of a mixed use character.*

viii. Class 8 (Use Classes Order, 1994) educational facilities, provided that access and the character of the area are taken into account and are deemed adequate by MEPA to allow the safe and neighbour compatible use of such facilities.

ix. Class 11 (Use Classes Order, 1994) business and light industry provided that:

- *The gross floor area of the premises does not exceed 50 m^2 (including storage of materials and/or finished products);*
- *The activity conducted within the premises does not use heavy duty and/or noisy electrical/mechanical (including pneumatic) equipment, and equipment which requires a 3 phase electricity supply;*
- *The activity conducted within the premises does not entail extensive and/or prolonged use of percussion hand tools (eg. Hammers, mallets etc);*
- *The activity employs less than 5 people; and*
- *The activity conducted within the premises does not inherently entail the generation of combustion, chemical or particulate by products.*

Examples of acceptable uses considered by MEPA include tailor, cobbler, lace making and computer and electronic repair. Moreover, examples of unacceptable uses include carpentry, panel beating, mechanic, mechanical plant servicing, spray painting and bakery.

Proposals to convert from existing Class 12 (Use Classes Order, 1994) general industry to Class 11 (Use Classes Order, 1994) business and light industry within designated Residential Areas shall only be considered acceptable by MEPA if all the conditions listed above are adhered to, and provided that it can be proven that the Class 12 Use (general industry) operation is a permitted one and the Class 11 Use (business and light industry) operation is actually more neighbourhood compatible than the Class 12 Use operation it intends to replace.

x. Taxi Business or for the hire of motor vehicles as per para. 6.15 of DC 2005.

Land-uses falling outside those mentioned above will not be considered favourably within the designated RAs, unless there are overriding reasons to locate such uses within these areas.

The acceptable land-uses (new uses, extensions to existing uses and change of uses) within all frontages located within the RPAs are:

- *A mix of Class 1 (Use Classes Order, 1994) terrace houses, maisonettes and flats on sites zoned in the relative Area Policy Maps for these specific forms of residential development. This development is to be in accordance with the relevant conditions as detailed in the DC2005, Part 3, unless otherwise stated by a policy in this Local Plan.*
- *A mix of Class 1 (Use Classes Order, 1994) detached and semi-detached dwellings on sites zoned in the relative Area Policy Maps for these specific forms of residential development. This development is to be in accordance with the relevant conditions as detailed in the DC 2005, Part 3, unless otherwise stated by a policy in this Local Plan.*
- *Class 5 (Use Classes Order, 1994) offices provided that all the provisions in point vi above with regard to Residential Areas are adhered to."*

In the list of land uses permitted under this policy, nowhere does it mention that the use of a band club or an extension of the same are acceptable. In fact, from the provisions of the Legal Notice applicable at the time that the application had been processed and decided, one finds that using a band club for the permitted use under this legal notice in not permissable.

The policy for Local Centres also frovides a list of land use that is acceptable under this policy and using it as a band club is included. Thus the change in zoning was crucial because it means that under the policy for Local Centres this was acceptable but under that for residential areas it was not.

The fact that no mention was made of all this led to the Commission not having the full picture of the development that could be made under the policies applicable to the site.

The importance of this failure is incereased when one sees that there is a clause in this policy which states:

> *"Land-uses falling outside those mentioned above will not be considered favourably within the designated RAs, unless there are overriding reasons to locate such uses within these areas."*

Had the Report correctly identified the zone, it could have possibly let the Commission in its deliberations, to approve the application just the same, citing "overriding reason" and at the same time impose conditions to protect its rights of the residents. This is a classical case where a conflict on use of premises could have been avoided to the satisfaction of all concerned. This opportunity was lost because of the error in the Report regarding the zoning classification.

Conclusions

The complaint regarding the alleged failure to affix the Site Notice is not sustained since MEPA produced evidence that the Site Notice had also been affixed in the alley in question. Moreover, the fact that an anonymous letter objecting to the application had been sent amounts to a clear indication that the person/s that would be affected by the proposed development had the opportunity to object in terms of the Planning Act and these objections were included in the Directorate's Report which was presented to the Commission.

The complaint in respect of the commercial use of the yard is sustained. The Commission was not presented with a clear and correct picture of the policies which regulated this development on this site since the policies applied, in this case those relating to a residential zone, were not applied and instead the wrong policies, that is those relating to a Local Centre, were applied.

This was an evident error and the case qualified for the application of the provisions of Article 77 of the Planning Act.

The permit, including that for Minor Amendment should be withdrawn and the building application should be reassessed and decided on the basis of the correct policies.

Remarks
It resulted that although MEPA reconsidered whether the permit should be withdrawn, the Board decided that there was no justification for such withdrawal and therefore it confirmed the permit. Complainants have appealed this decision and the appeal is still pending.

Commissioner for Environment and Planning
Case Note on Case No EP 0026

Unfair assessment of qualifications and experience during a selection process

Complaint against the MEPA on alleged unfair assessment of her qualifications and experience during a selection process for the position of Human Resources Office Administrator.

Case history
Complainant stated the following:

> *"I am writing this letter in order to bring to your kind attention an injustice which I feel that I am suffering at my place of work.*
>
> *A call for applications for the post of Human Resources Office Administrator at the Malta Environment & Planning Authority (MEPA) … was issued …. The requisites for the post were as per the attached.*
>
> *I submitted my application for the said post …. My qualifications at the time were as follows: a "**Sociology – Gender Equality**" **Diploma** …; a **Human Resources Management certificate** …, 6 O Levels, 1 A Level and a total of 30 years' experience working in different Government departments (more than 5 years experience in an administrative support function, 9 years at MEPA, the rest at different Government departments, including at the OPM in the Employee Relations Department).*

*I was called for an interview … and by that time I had successfully completed another course entitled "**HR Practices & Employment Law: Recruitment to Termination**" (MQF/EQF Level 5.4) awarded by Business Leaders Academy. I presented the original certificate in relation to this qualification to the panel of interviewers. Further to this interview, I was presented with the below criteria and marks achieved and was placed last amongst all candidates.*

I strongly feel that these marks and criteria are not a fair reflection of my qualifications and experience and that an injustice been carried out in my regard. In so far as qualifications are concerned, I can safely state that I was one of the few candidates who had any certificates relating to HR whilst in so far as experience is concerned, as alluded to above, I do have years of experience in various Government Departments and have always shown an aptitude to work in the HR department. Indeed, many a time I expressed an interest and applied to be transferred to an HR department in the Authority but with no success, since other employees were always given preference to me. This, despite the fact that my qualifications have been recognised by the Authority, and in fact I have been receiving a qualification allowance for my diploma since I joined the Authority. In this way, I was never given the opportunity to demonstrate my abilities in an HR Department despite the fact that I have all the qualifications for doing so. I would also like to point out that the call did not make reference to the absolute requisite of having experience in an HR Department but merely to "2 to 5 years' experience in an administrative support function". Lastly, I would like to bring to your attention the fact that out of the 10 years that I have been employed by MEPA, I have always, in the last 7 years, received outstanding performance in my yearly appraisals for my duties as personal assistant/Administrator.

I would be grateful if you could look into the matter so that the injustice that has been carried out in my regard will be rectified at the earliest."

An investigation was opened in terms of Section 13(1) of the Ombudsman Act (Chapter 385).

The MEPA was requested to submit its position on the matter[30] and in its reply[31] stated that:

> *"… contrary to the complaint raised by … the Call for Applications for the post of Human Resources Office Administrator stipulated the following:*
>
> *Experience: 2 to 5 years experience in an administrative support function, preferably in a Human Resources function is essential."*

Subsequently complainant informed[32] that she had applied for a transfer. The MEPA was requested to submit further clarifications. Following a request[33] for further clarifications the MEPA elaborated that:

> *"In response to your queries I wish to inform you that:*
>
> 1. *Your assumption that all criteria, except for qualifications were assessed subjectively is correct. This is always the case in interviews for employment or promotions and applicants are mainly assessed on their responses during such interviews.*
>
>   *In their report to me of the Selection Process, the Selection Panel … had remarked that "the candidate provided very vague responses to the questions posed at times conflicting within the same reply. Although she stated more than once that she has always studied and wants to work in HR, she lacks the skills which make her eligible".*
>
> 2. *Although the maximum mark for a Diploma was ten (10) points … [complainant] was awarded seven (7) points based on her diploma in Sociology and Gender Equality. In my opinion the mark allotted … is fair and reasonable considering that the Call of Applications had indicated that a "Diploma in Human Resources Management" was desirable.*

30 E-mail dated 25 May 2015.
31 Letter dated 8 July 2015.
32 E-mail dated 3 September 2015.
33 E-mail dated 20 January 2016.

I wish to inform you that only one candidate, out of the seven (7) candidates who were interviewed, were awarded full marks for the "qualifications" criteria.

3. *As already informed …, in the Call of Applications the term "experience" was qualified as being "2 to 5 years' experience in an administrative support function, preferably in a Human Resources function is essential".*

4. *I am informed that … [complainant] was never assigned to the Human Resources function within MEPA and thus this explains the reason why she was awarded zero points for "related Administrative experience". On the other hand she was awarded the maximum number of points (ten (10)) for "other relevant experience"."*[34]

Another request was made[35] to MEPA to provide the breakdown of marks awarded in relation to the qualifications of each candidate.

The PA replied[36] providing the requested information.

Observations

Complainant is alleging that the marks awarded to her during this selection process, were not a fair reflection of her qualifications and experience, and that as a result she has suffered an injustice.

On its part the Planning Authority contends that the selection process was carried out in a fair and just manner and that the marks awarded to complainant in the selection criteria fully respect this process.

The complaint rests on two main issues, namely the qualifications possessed by complainant and the experience she had gained in the Human Resources sector.

34 Letter dated 9 February 2016.
35 E-mail dated 24 February 2016.
36 Letter dated 15 June 2016.

Qualifications held

Complainant's qualifications by the closing date of the call for applications were the following:

1. Diploma – 'Sociology – Gender Equality'
2. Human Resources Management Certificate
3. 6 O Levels and 1 A Level.

In addition she had obtained another qualification after the closing date of the call for applications. This was a certificate in 'HR Practice and Employment Law – Recruitment to Termination' from Business Leaders Academy. By the time of the interview she had terminated the course and presented the certificate to the panel.

Before the commencement of the selection process the Selection Board had established that marks for the criterion of 'Qualifications' which is generally objective in nature and therefore reviewable by this Office, would be limited to those qualifications which were over and above the entry requirements. The marks to be awarded were the following:

- Degree – 15%
- Diploma – 10%
- Advanced certificate – 2% for each A level certificate (maximum of 10%)
- Intermediates – 1.5% for each certificate (maximum of 6%)
- O level – 1% each (maximum of 5%)

Complainant was awarded 7 marks out of a maximum of 20 marks.

In terms of the call for applications the qualifications essential for eligibility were the following:

1. Advanced level passes in three (3) subjects, preferably including computer sciences and a social science.

2. Demonstration of completed courses in administration, HR Management and/or training and development.

A Diploma in HR Management was considered desirable but was not indicated as an essential requirement. The call however provided that "*Certain qualifications requirements will be waived where candidates have equivalent total experience and a proven track record in the area*".

In her complaint letter complainant informed this Office that at the time when she submitted the application she possessed a Diploma from the University of Malta (Sociology – Gender Equality) an HR Management certificate, six (6) O levels and one (1) A level. Complainant therefore did not possess the three (3) A levels mentioned in the call but was still found to be eligible by the Board presumably in line with the call for applications where it was stated that certain qualification requirements will be waived "*… where candidates have equivalent total experience and a proven track record in the area.*"

Complainant's certificate in HR Management was a pre-requisite and therefore no marks could be awarded by the Board. Neither could the Board award any marks to complainant for her certificate obtained from the Business Leaders Academy entitled 'HR Practices and Employment law – Recruitment to Termination' as this course was completed by complainant after the closing date of the application.

However, complainant possessed a Diploma in Sociology and Gender Equality from the University of Malta and therefore should have been awarded 10 marks in line with the schedule prepared by the Selection Board for the assessment of candidates. As this Office had noted that complainant had been awarded 7 marks in the criterion 'Qualifications' enquiries were made with the MEPA that informed this Office that:

> *"Although the maximum mark for a Diploma was ten (10) points … [complainant] was awarded seven (7) points based on her diploma in Sociology and Gender Equality. In my opinion the mark allotted … is fair and reasonable considering that the Call of Applications had indicated that a "Diploma in Human Resources Management" was desirable."*[37]

However, further investigation revealed that, contrary to what had been submitted by the Authority, complainant had not been awarded any points for her Diploma in Sociology and Gender Equality, but that the total of 7 points

37 Letter dated 9 February 2016.

awarded for her qualifications consisted of 5 points for her O levels and 1.5 points for an Intermediate qualification and that the final mark of 6.5 was rounded up to 7.

In the same letter the MEPA Chairman informed this Office that "*… all criteria, except for qualifications were assessed subjectively …*" Consequently the points awarded by the Board for 'Qualifications' were to be allotted in line with the schedule prepared before the commencement of the selection process.

Therefore complainant should have been awarded a further 10 points for her Diploma, in addition to the points already awarded as the schedule prepared by the Board for the award of marks indicated that a "*Diploma*" would be allocated 10 marks – consequently any Diploma, independent of whether this was a Diploma in HR Management was to be awarded 10 marks.

After having reviewed the breakdown of the marks awarded to each candidate for the criterion 'Qualifications' this Office also notes that the Board awarded points to some candidates in excess of the threshold stipulated in the schedule. One candidate was awarded 1 point for the ECDL certificate and 5 points for O levels. In the opinion of this Office, the ECDL certificate should not have been considered for the purpose of the allocation of marks in the case of this particular applicant as this is generally equivalent to an O level and this candidate had already been granted the maximum points for O levels (that is 5 points). Moreover, all candidates who had Typing as a qualification were awarded 1.5 points making the typing exam equivalent to an Intermediate qualification. Furthermore, one candidate was awarded 1 point for a 'certificate' when qualifications, other than those mentioned in the schedule, were not originally allocated any marks by the Board when it established the schedule of points with which marks for qualifications were to be awarded during the selection process.

Experience
The Selection Board had allocated 25% of the marks to this criterion subdivided in the following manner:

- Related Administrative Experience – 15 marks, where complainant was awarded no marks; and

- Other relevant Experience – 10 marks, where complainant was awarded maximum points.

Complainant contends that she possesses the necessary experience for this position and claims that the marks awarded by the Board do not reflect her experience and skills.

She explained that she has a total of 30 years' experience working in different Government Departments, including the OPM where she performed duties within the Employee Relations Department. She emphasised that she possesses 20 years office administration experience, the last 8 years of which were at MEPA, more than 5 years' experience in administrative support function and years of HR experience in other Government Departments. She pointed out that she had always shown an interest in Human Resources, but could not prove her abilities in an HR environment at MEPA as her request to be transferred to the HR Department in 2012 was not successful, notwithstanding her continuous professional development in the area. However, other employees had been given the opportunity to demonstrate their abilities.

Complainant further stated that her abilities had been recognised by the Authority itself as is reflected in her annual performance appraisals, which went up from 'very effective' to 'outstanding' for her duties as PA/Administrator.

In terms of the call for applications the experience required was "*… 2 to 5 years' experience in an administrative support function, preferably in a Human Resources function is essential.*"

MEPA contends that the term 'experience' in the call was qualified by this wording used in the call.

In this regard, this Office opines that the wording and punctuation used in the call does not make sense, unless a comma is inserted between the term 'function' and the verb 'is'. This Office believes that the sentence should have read:

'2 to 5 years' experience in an administrative support function, preferably in a Human Resources function**,** is essential.'

Consequently, the essential experience was between 2 to 5 years' experience in an administrative support function, but candidates with HR experience would then have been given preference – possibly by the award of extra marks in the applicable sub-criterion.

The Board seems to have considered experience in a human resource function as being far more important than experience in an administrative support function. In fact, the Board seems to have awarded marks under the sub-criterion 'Related Administrative Experience' by reference to the experience the candidate demonstrated he/she possessed in HR issues and functions. This is confirmed by the Board's statement that complainant was awarded no marks in this sub-criterion, as she had no experience related to HR. The Board however recognised the other experience she had acquired by awarding her the maximum mark under the sub-criterion 'Other relevant experience'.

Independently of whether this Office shares the Board's decision not to award complainant any marks in the sub-criterion 'Related Administrative Experience', it cannot vary the mark awarded to complainant in the criterion 'Experience', as the criterion was assessed subjectively and was dependant on the replies which complainant gave to questions posed by the Board during the interview.

The Board was very clear about complainant's performance and stated that she "*… provided very vague responses to the questions posed at times conflicting within the same reply. Although she stated more than once that she has always studied and wants to work in HR, she lacks the skills which make her eligible.*"

Neither can this Office review the marks awarded to complainant in the criteria 'Ability required by the post' and 'Suitability' as these were subjectively assessed. Subjective assessments cannot be reviewed or substituted by the Ombudsman, or any other body of review, since he is not involved, even remotely, in the process and consequently cannot comment on how the candidate demonstrated his/her claimed merits for the position during the interview.

This Office however notes that a particular candidate, the one who ranked first, had been given an undue advantage on the other applicants since she had been posted at HR for a year and this naturally gave her an edge in the selection process

over some of the other applicants, amongst whom complainant, who had not been given the possibility to work in HR notwithstanding her request to be transferred to HR in view of her studies and interest in the area. There is no doubt that the selected candidate had an undue advantage and in fact the Selection Board itself commented that this candidate had been employed within HR for a year, was familiar with HR procedure and had a sound knowledge of HR practices. Moreover, in its letter dated 9 February 2016 the Authority stated that "… [complainant] *was never assigned to the Human Resources function within MEPA and thus this explains the reason why she was awarded zero points for "related Administrative experience*".

Conclusions and recommendations
In conclusion therefore:

1. the complaint that the marks awarded by the Selection Panel were not a fair reflection of complainant's qualifications is sustained;

2. contrary to what was reported by the Planning Authority, complainant was not awarded marks for her qualifications, even if she was entitled to them. Complainant should be awarded a further ten points for her Diploma in Social and Gender Equality; and

3. complainant, who was in possession of qualifications related to HR management, had repeatedly requested to be given a post where her qualifications could be put to good use by the Authority. This request was not acceded to, and another person was allowed to work in that section for a year. As shown by the selection process results, this work experience proved to be a determining factor in the selection process as this particular candidate was placed first.

This situation is therefore prejudicial to complainant since she was not given an equal opportunity to obtain exposure to HR function.

This Office is not however in a position to review the marks awarded in the criteria that were dependant on a subjective assessment of a Board and consequently cannot recommend an amendment of the marks awarded in these criteria.

It is to be emphasised that care should be taken to ensure that no candidate is given an undue advantage over other applicants in a selection process because of the experience he/she may have acquired as he/she was moved to a particular section, particularly if the Authority is aware that a call for that position will be issued in the near future. Such situations might give rise to understandable doubts and suspicions that the selection process was not being conducted on a level playing field for all candidates and was therefore unfair.

Remarks

The Authority did not accept the recommendations carried in this report.

Commissioner for Environment and Planning
Case Note on Case No EP 0049

Local Council accused of lack on information on new road levels

The complaint
Complaint regarding alleged failure on the part of a Local Council to provide information on new road levels.

Sequence of events
In August 2015, complainant wrote to the Office of the Ombudsman as follows:[38]

> *"I am presenting this complaint in connection with a request I made to the Local Council … to be informed if the new (building) levels which were to be allowed …* ***were compatible with those that were originally allowed by PAPB,*** *since the road was to be dug up and asphalted anew.*
>
> *It took me more than three (3) years to obtain the information, entailing correspondence with various entities who not only failed to provide the requested information but instead tried to take me for a ride with the infantile responses they provided.*
>
> *… I had presented the same complaint to the Local Governance Board. In its decision the Board insisted that "whenever a person requests information from a Local Council, the Council should ensure that a timely reply is sent which is correct, concise and with shortest possible time".*
>
> *… I emailed the Parliamentary Secretary responsible for Local Government … requesting to be informed on action he intended to take so that the*

38 This is a free translation of complainant's letter.

information I requested … as well as my request for the report of the Local Council Architect on the works … be given to me in line with the Local Governance Board's ruling.

While the email … remained unanswered … I spoke to the Local Government Advisor … who informed that he would be speaking to the Executive Secretary of the Local Council and to be given the Architect's report which had been requested by the Department's Monitoring Officer.

[Subsequently] I emailed the Minister's Secretary … requesting to be informed of action which the Minister would be taking so that what had been insisted on by the Local Governance Board be implemented. The reply thereon made reference to an email which the Local Council had sent to the Department's Monitoring Unit … This email did not address my query … this apart from the fact that when the Local Governance Board took its decision, it was aware of this email and the same Board did not state that this email addressed the information I had requested.

*… [The Local Government Advisor] in his email informed me that "**Despite various efforts, the Local Council did not provide the information I requested, and therefore I could, if I so deemed appropriate, take legal action against the Local Council**."*

I again sent two emails to the Minister's Secretary … none of which were replied to. In these emails I had again asked as follows:

What action did the Minister intend to take to ensure that the Local Governance Board's decision be implemented?

Regarding the fact that money could have been saved if the culvert was not constructed since there was no need for it.

Whether it was acceptable for the Minister … that for a resident to get information requested from the Local Council he had to resort to legal action against the said Council?

> *I am therefore requesting you to investigate this case since despite various correspondences with the Local Council … the Department for Local Government, the Department's Monitoring Unit, and Local Government Advisor, the Ministry for Justice, Culture and Local Government as well as the Local Governance Board, my simple query was not addressed. The reply as to whether the levels would remain the same, had simply to be "yes" or "no" – and this before the works on the construction anew of the road, which works should have been approved by MEPA, were to start".*

Together with his letter complainant attached copies of all the correspondence referred to above. The Local Council was asked [39] to explain its position on the complaint.

An onsite inspection was carried out on 27 August 2015 during which the local Mayor and other officials of the Local Council, including the Local Council's Architect at the time responsible for this project, were present.

The Local Council also submitted the Architect's report on the street levels.[40] Following a meeting with complainant, the latter submitted a series of photographs[41] which depicted the situation of the ramps from the street to various places.

Since in complainant's letter to the Local Council (a copy of which had been submitted with the complaint) it was mentioned that road level measurements were taken and that a report had been prepared by a '*technical person*' the Local Council was requested to submit a copy of the report and of the levels[42].

The Local Council in its reply stated that all it found was an email from the Architect to the representative of the contractor who had been assigned the relative works.

In the light of the information obtained, complainant was asked whether[43] he wished to proceed with the investigation should proceed. He replied[44] in the affirmative.

39 Email dated 24 August 2015.
40 Email dated 23 September 2015.
41 Email dated 4 October 2015.
42 Email dated 30 September 2015.
43 Email dated 5 October 2015.
44 Email dated 7 October 2015.

The Local Council subsequently stated that following contact with the previous Mayor it was clarified that the only technical report available was the Architect's and that what had been done earlier was the measurement of the street levels by a technical person, which measurements were subsequently translated into sketches on the gradients of the road by the Architect – this before, and after, the road works were carried out.

The facts

The complaint under investigation is not in respect of the actual works carried out, but concerns the failure of the Local council to provide information requested by complainant on the related project, and specifically if the proposed street levels were compatible with those originally approved by PAPB.

This is clearly evidenced by the request made by the complainant when lodging the complaint with this Office as well as complainant's reply to this Office when he was requested to clarify whether he wished that this Office continues to investigate after this Office had provided him with the information he required.

From correspondence attached to the complaint, it results that the then Local Council Mayor had written to the Department for Local Government, wherein, amongst others, he declared that:

> *"Although never at any time did we ignore (complainant's) request regarding the levels which he had, we could not ignore the facts relating to the existing buildings all along the street …. As would appear from the technical aspect, we could not stick to the level of complainant's property, not because whether or not it was our wish, but because the circumstances of the street so dictated."*

There is moreover an email from the Local Council to the same Department where it explained that:

> *"… road was resurfaced as part of the roads pilot project that was launched by Local Government Department. … At that time the road resembled a large swimming pool. All storm run off water, used to accumulate in the midst of the road in a one large pothole. In fact, somebody with good intentions*

drilled holes all over a drainage manhole for this water to seep from the very large pothole into the drainage system - which was illegal. For the storm water to get drained in a manner not to mix with the drainage water, there was no other option except for the construction of a culvert to redirect it …. As such, the road levels had to be altered in a manner to accommodate the earlier constructed houses. As you know, one cannot ignore house storm water run offs from yards for otherwise the water would have been trapped under the surface of the road itself."

There is also another email from the Local Council to the same Department where it was stated that in respect of whether the street levels, were compatible with those approved by PAPB, the Council was not in a position to confirm this, since it did not possess that information and since it had been a long time since PAPB was no longer operative and the Council had no assurance that the MEPA levels were the same.

It results from the above information that presently, the street levels in question have certainly changed from those existing prior to the start of the project. It was not the scope of this investigation to determine whether this was justified or not, since the complaint is specifically directed at the lack of reply to a query made by complainant to the Authorities.

However, in order to be in a position to provide the information requested by complainant, one has to verify if the original levels, or indeed the new levels were those laid down by PAPB. This entails tracing the Alignment File opened at the time of application for building developments in the area, wherein applicants for the relative permits were given the level of the damp proof course - which level is linked to the level of the pavement and the street. It results that no such exercise had been carried out to date.

One could not however exclude the possibility referred to by the Local Council that such file would not be traced, taking into consideration the long period of time that has passed and the fact that presently the responsibilities of PAPB now pertain to MEPA.

Conclusion
The complaint is sustained since to date, complainant has not been given a reply to his specific query.

Such reply depends on a comparison between the street levels as directed in the Alignment File in the past and those existing before and after the completion of the project in the area. Research should be done by the Local Council with the aim of tracing such file.

It is recommended that in order to facilitate such research, complainant should provide details of his permit, if this had been issued by PAPB.

Remark
Following this report, the Local Council accepted the recommendations made by this Office and declared that it will commit itself to try and obtain the relative file.

Commissioner for Environment and Planning
Case Note on Case No EO 0037

Shared space concept – a collaborative initiative between the Bicycle Advocacy Group and Local Councils

The Complaint
This case does not form one of the normal cases dealt with by this Office, in that it does not deal with the investigation and reporting on a complaint filed by an aggrieved citizen, but is the result of a collaborative exercise between this Office and Local Councils, as part of a wider initiative to interact with Civil Society on issues dealing with improvement to the quality of life through better public administration.

Case Chronology
During discussions with the Bicycle Advocacy Group (BAG), an NGO which promotes cycling as a healthy environmental-friendly method of transport, the issue of the implementation of the 'shared-space' concept within the historic urban centres was raised.

This concept allows for the 'sharing' of these spaces between pedestrians and traffic not by segregating the latter from the former but by the removal of such road features such as kerbs, barriers and road markings and allowing this space to be shared between the two.

This concept was introduced in the Netherlands more than thirty years ago, by Hans Monderman, a traffic engineer, following a successful experiment in a local urban

centre where, in an attempt to find a solution to curb traffic speed, he removed all existing traffic calming measures such as chicanes, markings and kerbs instead of increasing them. The result was a 50% reduction in traffic speed against the 10-20% rate achieved by the traffic calming measures.

The concept was evolved through research into behavioural aspects of drivers when passing through shared spaces. This research showed that in such situations drivers tend to become an integral part of the social and cultural context.

The idea was mooted that Local Councils could potentially explore means of carrying out the necessary research in order to establish whether such a scheme could be implemented within their historic urban cores.

Preliminary discussions with MEUSAC helped to identify those EU-funded programmes for which Local Councils could qualify. One such programme was URBACT, which teams up Local Governments within EU member states in carrying out studies related to specific urban problems.

Discussions were also held with Transport Malta on projects which had already used this concept in regulating traffic flows in some historic urban areas. One such scheme was implemented in Valletta for instance, and feedback indicated a positive and successful implementation.

Contact was made with the Association of Local Councils which produced a good response. Meetings were held with representatives from individual Local Councils, however it was felt that a more fruitful outcome would be achieved by the Association being involved rather than individual localities.

Finally, the proposal was taken up by the *Reġjun Xlokk,* which was already involved in other EU-funded projects of a similar nature. Further discussions were held with MEUSAC, where the issue arose regarding a potential hurdle for qualification due to the regional status of the participants. However the matter was successfully solved.

Another issue arose because of the fact that this region was already actively involved in another project named SUMP, relating to urban mobility. This particular project was evolving around the redevelopment in Paola Square.

It was therefore decided that once a programme was already at project stage, the concept could be 'plugged in' to the SUMP programme. During a subsequent visit by the programme's coordinator the details were elaborated and a way forward was set out.

At this stage, the involvement of this Office had to be stopped, since the project was now about to be executed which meant that no further active involvement was possible.

This case highlighted the potential of this Office in empowering civil society by assisting in obtaining the tools for improving the quality of our urban environment. It is hoped that other Local Councils and e-NGOs will be encouraged to do likewise.

Commissioner for Environment and Planning
Case Note on Case No EP 0053

Enemalta fails to remove electricity pole from in front of the façade of premises

The complaint
Complaint against Enemalta on alleged undue failure to take action to remove a temporary electricity pole from in front of the façade of premises.

Case history
Complainant stated the following:

> *"There has always been (sic) 2 in no. brackets fixed against the façade of the owners of … [the adjoining premises].*
>
> *It seems that a request by these owners has been made to Enemalta to remove such brackets and the overhead electrical wires and instead relocate these on a temporary pole which was fixed opposite this façade. This was done so that the owners could give the façade a facelift.*
>
> *Since works on this façade has been finished some time ago, Enemalta has not reinstated this service back in place, but instead left the pole fixed.*
>
> *I lodged a formal complaint to Enemalta plc … whereby we are holding Enemalta plc fully responsible for any structural damages that could be sustained to our property. This is because on our façade there is another bracket and all the electrical wires are now suspended with this pole in question which is causing too much strain on the façade. No problems were foreseen when these electrical wires were supported on the mentioned 2 in no. brackets.*

An investigation was opened in terms of Section 13(1) of the Ombudsman Act.

Enemalta was requested to submit its position on the matter.[45]

In its reply[46] Enemalta stated that:

> *"Reference is made to the abovementioned complaint and the allegations made therein. Enemalta's feedback is as follows.*
>
> *The pole in question was erected to support Enemalta lines that had to be shifted following application for deviation of lines …. This deviation was required as Client needed to cover facade with franka slabs and build a new room. Following these works, Client refused to allow the reinstatement and fixing of the two removed brackets and lines …, which would consequently allow the removal of the pole in question as requested by neighbour (complainant).*
>
> *Furthermore, please note that if these two brackets are in fact fixed again with these premises, they would damage the franka slabs. Moreover, MEPA Permit … covering these works included condition that "There shall be no service pipes, cables or wires visible on the front elevation or any other elevation of the building." Consequently, Enemalta has no option and the pole has to be retained accordingly.*
>
> *Finally, kindly note that Enemalta does not enter into civil disputes between neighbours and such decisions are only taken on technical grounds as determined by the competent Enemalta employees and in line with the law and any other directions given by the relevant authorities, like MEPA in this case.*
>
> *For these reasons, Enemalta believes that no injustice has taken place and the complaint is wholly unfounded."*

The reply was forwarded to complainant for his comments.[47]

45 Letter dated 7 October 2015.
46 Letter dated 21 October 2015.
47 E-mail dated 28 October 2015.

Complainant replied[48] that:

> *"To start with I totally disagree with … [the] reply letter … for the following reasons.*
>
> *(1) My dispute is **only with Enemalta** and **NOT** with our neighbour.*
>
> *(2) [Enemalta] … has referred to MEPA permit … and quoted paragraph (k) **which precisely prohibits the applicant in question from fixing service pipes, cables, etc.etc.** This I am afraid was interpreted wrongly by … in her reply to the Ombudsman and gives the wrong impression.*
>
> *However MEPA's interpretation to this paragraph is as clear as crystal.*
> *…*
> *I refer to your e-mail.*
>
> *The permit condition you quote means exactly what it says – that no service pipes, cables or wires may be installed…*
>
> *This condition, however, is a limitation imposed on the specific permission. It clarifies that the specific permission does not authorize the holder to install any service pipes, cables or wires. It is to be construed as limiting the powers of the specific permission. If, therefore, another entity is authorized to install such items through some other permission, development order or legislation, the condition in the specific permission would NOT be limiting the powers of such other permission, development order or legislation.*
>
> *The above is without prejudice to the property owner's civil rights.*
>
> *Please be guided accordingly.*
> *…*
>
> *(3) …*

48 E-mail dated 30 October 2015.

(4) I have already stated to Enemalta that the pole with all the services connected to it may cause structural damages to our property and for this reason we are holding Enemalta fully responsible for future damages that may result.

*(5) When … [Enemalta] states in … [its] letter that client needed to cover facade with franka slabs, and following these works, **client refused** to allow the reinstatement and fixing of the two removed brackets and lines with her property, which consequently allow the removal of the pole in question. She should now realize my point in question and understand that applicant has no right whatsoever **not** to accept the services as installed before.*

(6) The applicant in question has up to now not applied with MEPA to do the limestone cladding to her facade. In fact a case has been opened with MEPA. …

Enemalta personnel know exactly that I am completely right in my arguments but for a reason or another want to disappoint me or show special treatment to the applicant in question and therefore I feel my rights have been breached.

This is the only reason why I called for the Ombudsman assistance for I would have never ever got my rights defended; I await for a fair judgement."

Complainant further informed[49] that the owner of the neighbouring premises had submitted a fresh application to sanction the changes to the materials and finishes used on the façade, among other things.

Observations

The complaint centres around the refusal by Enemalta to remove an electricity pole which had been erected following a property owner's request for a temporary deviation of the power lines hanging on her facade, in order to carry out some works to the same façade.

49 E-mail dated 11 January 2016.

Enemalta had installed the electricity pole to provide a temporary means of deviation. This is borne out by Enemalta's own response when it explained that following completion of the works, the owner refused to allow them to reinstate the brackets which had existed on her façade, in order to restore the original path of the power lines.

Enemalta justified its position by referring to a condition in the MEPA permit issued to the owner wherein it is stated that "*There shall be no service pipes, cables or wires visible on the front elevation or any other elevation of the building.*"

In addition it submitted that re-fitting the brackets to the façade would damage the *franka* stone cladding which had been fitted.

This latter justification is not tenable, since the risk of damage to finishes and materials applied to the façades of buildings through the fixing of such brackets always existed. Yet this has not stopped Enemalta from fitting thousands of such brackets.

As for the condition imposed in the MEPA permit, this is a condition imposed on the applicant requesting the permit for the works and not the utility companies such as power or communications suppliers.

This fact is confirmed by the reply that the MEPA gave to complainant when it stated that "***The permit condition you quote means exactly what it says – that no service pipes, cables or wires may be installed …***

> ***This condition, however, is a limitation imposed on the specific permission. It clarifies that the specific permission does not authorize the holder to install any service pipes, cables or wires. It is to be construed as limiting the powers of the specific permission. If, therefore, another entity is authorized to install such items through some other permission, development order or legislation, the condition in the specific permission would NOT be limiting the powers of such other permission, development order or legislation.***"

It is clear that Enemalta, as a service provider, is authorised at law to carry out such installations irrespective of the age and/or condition of the façade finishes. It is also taken that all works are carried out in conformity with normal standards of practice in order not to cause any damage to the façade.

Therefore there is no valid reason why Enemalta cannot proceed with the works.

Conclusions and recommendations
In conclusion therefore:

1. the complaint that Enemalta was unjustified in failing to re-instate the existing brackets in order to revert the power lines to their original routing is sustained; and

2. Enemalta should immediately take the necessary steps to carry out these works.

Remarks
Subsequently, following discussions with Enemalta, it was agreed that a compromise solution could be adopted by installing a pole on the corner of the residence instead of the brackets on its façade.

Commissioner for Environment and Planning
Case Note re Case No EN 0054

Inconvenience caused by an illegal extension and obstruction of pavement

The complaint
Alleged failure to take action in respect of an illegal extension and obstruction (encumberment) of pavement at Sliema.

Sequence of facts
Complainant wrote to the Ombudsman as follows[50]:

> *"I would like to draw your attention regarding the extension of the pavement at the Strand. I phoned the Local Council[51] about the matter since this resulted in the effective loss of 2 parking spaces and that no application notice had been fixed in the area so that we as residents as well as others could object to the development. The Council was not aware of this development – in fact it only heard of the matter through my phone call. I phoned MEPA etc and nobody knew anything about the matter. Even Transport Malta were not aware even if subsequently it resulted that the former Chairperson had given such permit. Obviously this created a precedent and about another 5 establishments did the same – resulting in the loss of 15 parking places. I request that we are given further parking spaces to compensate for this loss since parking for me has become much more difficult than previously. These extensions had been there since May. It has to be pointed out that some years back*

50 This is a translation of his letter which was written in the Maltese language.
51 Sliema Local Council.

I had enquired regarding the extension of the pavement. … The Local Council at that time had informed me that these were illegal … Nothing happened since then.

The situation is now desperate. It results that all the extensions are illegal – this after verifying with MEPA and the Local Council. However there was an appeal. Can you please inform me how it is possible to appeal against a breach of the law? Does it mean that I can paint a yellow line in front of my house so that I can have (reserved) parking and then appeal if the authorities remove it? Why is the law different in my respect?

I ask you to investigate as parking has become impossible and when I had to double park so that my mother can alight from my car, or when I had to unload purchases, I got a parking ticket, this since I could not know where to park my car for this purpose. Other establishments are already applying to extend the pavement… Does this mean that all the coast will become like this? Moreover, very often, pedestrians cannot use the pavement. I invite you to try to use the pavement one afternoon or evening and it would be like passing through a bar – this besides the chairs obstructing such passage. I do not consider that this is fair – I have to use the pavement together with my mother who is elderly and needs me to support her – often there is no space for us to walk alongside each other, let alone the problem of smoke and loud music. I have sought in vain the assistance of the Local Council and of the Department responsible for pavements but nothing happened."

The Commissioner held a meeting with complainant and there was also an exchange of correspondence on developments which had taken place in the meantime.

This issue involves a number of entities namely MEPA (now Planning Authority (PA)), Transport Malta, Malta Tourism Authority, the Government Property Department and the Sliema Local Council. All these entities were asked to comment.

MEPA replied as follows:

"Whilst this is not the direct responsibility of MEPA but such enforcement should be undertaken by the Transport Malta and the Lands Department,

this matter is being tackled in the new structures of the Planning Act and action will be taken accordingly.

However in the circumstances it will be appreciated if you could exert pressure on Transport Malta and Lands Department to take the necessary action immediately."

Transport Malta on its part stated as follows:

"Transport Malta does not have any pending action to take in respect of the build-outs in question for the reasons outlined in the table below.
…

Attached to this reply is a set of official documentation supporting the above table.

It is to be kindly noted that the involvement of Transport Malta lies in providing consultation and corresponding no/objection from the safety aspect of a Project. The permit is issued from MEPA."

This Office requested the following clarifications from Transport Malta by e-mail:

"I refer to your e-mail dated 20 February 2014 and attached documentation giving Transport Malta's position on the various developments involving build-outs and placing of tables and chairs along the Strand in the Gzira/Sliema area.

In the copy of the covering letter you sent with the e-mail, you have stated that "… the involvement of Transport Malta lies in providing consultation and corresponding no/objection from the safety aspect of a project. The permit is issued from MEPA."

However in the table provided in the same letter, the first case listed shows that the build-out was constructed as approved by TM on 27 February 2013. There is no mention of a MEPA permit.

Kindly provide this Office with further explanations concerning this case."

Transport Malta replied on the same day by stating that:

> *"Reference is made to your e-mail below, querying that in the table provided in the letter dated 23 January 2014 as per attachment, the first case listed shows that the build-out was constructed as approved by TM on 27 February 2013 and that there is no mention of a MEPA permit.*
>
> *Your query has been forwarded to the appropriate TM Official in question and the following was referred to be communicated to your Office:*

It is the responsibility of the developer to procure all necessary permits as required by law.

> *The Traffic Management and Road Safety Unit, within Transport Malta gives feedback, in the form of an approval or otherwise, irrespective of a MEPA permit. The developer then applies to MEPA and the developer's submission to MEPA would include Transport Malta's 'no objection' letter."*

Since Transport Malta's reply did not clarify all the queries, this Office requested further clarifications in respect of two establishments referred to in its e-mail to Transport Malta:

> *"I requested clarification whether, … , Transport Malta knew whether a MEPA permit had been applied for or not, as in the other cases bar one, your records indicate that the MEPA was involved, either by Enforcement action or through the issuing of a permit.*
>
> *…, your list shows that the build-out was designed by Transport Malta in 2001 as part of an embellishment project, in which case a MEPA permit is presumed to have been issued. Kindly provide the relative permit number."*

Transport Malta further clarified as follows:

Re Para 1:
In this case, as per other cases, TM is consulted by the developer regarding proposed placing of tables and chairs. Subsequent to feedback from TM, the developer applies for a MEPA permit as required by law. This is becuase the developer would need to

attach the 'no objection' letter by TM to one's MEPA application. Permits for the placing of tables and chairs are not issued by TM but by MEPA, and hence, it would be MEPA and the developer who would have the permit number.

TM is only a consultant in this process and hence would not always be informed back of respective permit numbers, or any further action taken by the developer.

In the circumstance that the developer implements the works as per 'no objection' letter issued by TM, however, does not acquire a MEPA permit for such works, the developer would be in breach of MEPA regulations only.

Re Para 2:

> *Whilst TM does not have a record if a permit was applied for as part of this embellishment project, however, it is to be noted that since such a project did not increse the asphalt area, it would not have required a MEPA permit."*

The Malta Tourism Authority submitted the following comments:

> *"The said email makes reference to a complaint regarding the public pavement and carriageway at the Strand, Sliema directed at the alleged illegal obstructions and extension of pavements in the said area. Indeed, the Authority cannot answer for the latter, since such extension does not fall within its responsibilities and it has no powers or mandate to monitor and take action in relation to such action.*
>
> *In relation to the illegal obstructions mentioned in the said email, the Authority is assuming that reference is being made to the temporary structures as well as tables and chairs that can be found in the area. As far as the latter structures as concerned, the Authority is not in a position to comment since such like the extension of pavement, such duties fall beyond its legal remit and powers. The Authority can however respond in relation to the tables and chairs issue."*

On its part, the Government Property Department replied by submitting a file containing various documents relating to three of the mentioned establishments, including action taken by the Department thereon.

Sliema Local Council on its part, submitted as follows:

> *"The Sliema Local Council has flagged these illegalities with Transport Malta, MEPA and the Lands Department.*
>
> *Indeed, and upon our request, a coordination meeting between these entities occurred some months ago, wherein we mentioned this problem.*
>
> *Some of the establishments listed below have since applied with MEPA for sanctioning. We objected to such sanctioning.*

The Sliema Local Council position is of course against such illegalities. Moreover, and for the below mentioned reasons, we are against these type of developments.

Such encroachment on public land is resulting in the loss of pavement space as a consequence of bottle-necking by almost half the width making it very uncomfortable for pedestrians especially at night when there will be increased movement between inside and outside the establishment.

It is anticipated that patrons of this establishments (as is the case with other catering outlets having similar arrangements nearby), particularly at night will 'spill over' onto the inner land of the Sliema-bound carriageway posing a very dangerous threat to themselves and motorists.

More precious parking space is being lost in a locality where no public parking amenities are being provided to counter such losses, when such establishments themselves attract car-users to the area.

> *To conclude, therefore, kindly note that the Sliema Local Council is presently categorically opposed to any extension of pavements as they are primarily of detriment to the urban quality of the locality's few yet popular public open spaces, in this case the wide pavement that pedestrians enjoy on this side of the Strand."*

The information received at this Office was submitted to the respective entities in tabular form which included the permits that had been issued (or refused) and

whether there was any enforcement action against any illegal development in the named establishments such as extensions of pavements, chairs and tables as well as temporary structures such as tents etc.

This tabulated information was sent to all the authorities concerned to see if the situation in respect of action taken and the current case status were correct.

Following this there were further developments including decisions on Appeals which were all rejected and the respective Enforcement Notices confirmed, however action thereon was suspended because of a new application on sanitary matters which application had not yet been decided. Subsequently this application was approved subject to a number of conditions regarding the placing of chairs and tables on the pavement, and the matter was closed.

Observations

Perusal of the tabulated information referred to above, shows clearly that the situation regarding permits and licences in respect of the named establishments is far from being considered as a uniform policy.

There is no common system applicable to all, and in respect of enforcement notices, no follow up action was ever taken so that direct action be taken to remove the illegal developments in those cases were there were no pending procedures in respect of contestations.

It is indeed a pity that an application that had been submitted and which could have resulted in a holistic solution for this stretch of road was left pending for such a long time and no action whatsoever was taken by MEPA to decide thereon or withdraw it – all this when in respect of the same sites there were all these applications which had been submitted later.

It appears that there is a serious failure on the part of MEPA as well as the other responsible authorities in respect of effective control on the developments which took place. There was no effort to maintain order and ensure that conditions tied to these permits were observed, especially in respect of extensions of concessions for the placement of chairs and tables outside the establishments.

Such situation cannot but give rise to abuse of public spaces which are meant for the use of pedestrians.

As a result of the later developments the situation will certainly improve since there will be more control on such development. One therefore hopes and expects that there will be continuous surveillance and effective action where the permit conditions are not observed.

However in those cases where similar developments in the same area have not yet been sanctioned, MEPA should ensure that such developments are removed. MEPA should not solely rely on the daily fine imposed on such illegalities as a means of enforcement.

Conclusions and recommendations
The complaint regarding the existence of illegal extensions of the pavement in the area referred to by complainant is justified. However legally acceptable administrative and executive procedures were implemented which led to the sanctioning of the illegalities.

MEPA should keep the situation under control and should not tolerate breach of permit conditions – this if necessary through Direct Action to remove such illegal developments.

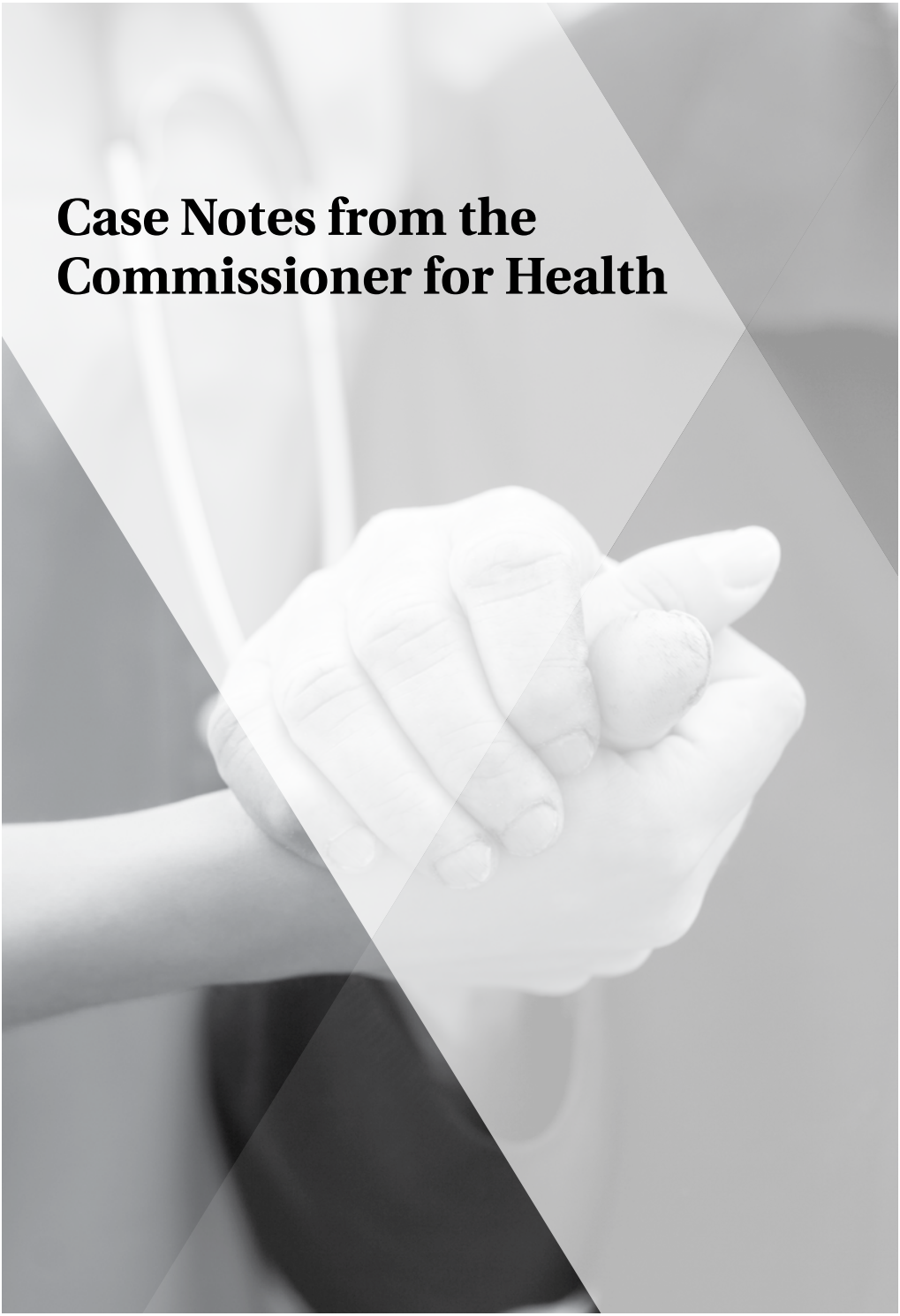
MEPA should take immediate similar action on all developments of this type which have not been sanctioned.

Remarks
Following this Report, MEPA declared that it would consider the (above) recommendations in similar cases in the future.

It has however to be further stated that this Office had already, in 2012, published a report on a complaint in respect of a number of reported cases of obstruction to public passage ways through chairs and tables which were illegally placed in front of commercial establishments and in respect of which the Authority had not taken any action.

It would appear that despite the above recommendations, there is still lack of commitment on the part of the Authority to effectively control such illegalities.

Case Notes from the Commissioner for Health



Commissioner for Health
Case Note on Case No HP 0038

Allowances deducted following an appointment to a higher position

The Complaint
A Ministry for Health employee filed a complaint because following her appointment (after a Call for Application) to the position of Assistant Director she discovered that the allowance she had been receiving prior to her appointment was deducted. Later, the salaries section informed complainant that she had to refund the amounts paid to her in error.

The complainant also felt aggrieved that her annual performance bonus was less than what she was assessed for.

The Ombudsman reviewed the complaint and referred it to the Commissioner for Health.

Facts and findings
The Commissioner sought the reaction of the Department of Health on the three issues raised by the complainant. In their initial reaction the Department stated the following:

1. Substantive Grade Allowance
The terms and conditions of employment are dictated in line to the call for applications and following the necessary enquiry of the content of the call, the Department said that at no point it is mentioned that the incumbent is to retain the substantive grade allowance.

2. Refund due to mistake
On the second issue, related to the mistake taken by the salaries department, the Health Department said they will contact the Treasury to make the necessary arrangements so that the repayments will be done over a period of time and not paid as a lump sum.

3. Deduction of performance bonus
The Department said that the reduction of the complainant's performance bonus resulted from an agreement reached between the Permanent Secretary and her immediate superior whereby it was agreed that the rate of bonus was to be what was eventually paid.

The Commissioner asked for a copy of the Call for Application, Letter of Appointment and a copy of the agreement signed between the Union representing the workers in the particular sector. Following a review of the documents the Commissioner reacted as follows:

1. the Letter of Appointment stated categorically that the person continues to hold her substantive grade and will continue to receive the benefits and conditions as stipulated in the sectoral agreement:

2. since she was in receipt of a performance allowance she was not to continue to receive the qualification/specialisation allowance;

3. she was entitled to an "*extra working period allowance*".

Conclusions and recommendations
The Commissioner's investigations revealed that even though the complainant had been given the qualification allowance for which she was not entitled, she was deprived of the benefits and conditions as stipulated in the sectoral agreement and in the letter of Appointment. The Commissioner also concluded that complainant was not given the extra working period allowance.

The Commissioner for Health therefore recommended that the matter should be rectified and complainant is to be paid her dues after deducting the qualification allowance that was not due to her.

Outcome

The Ministry accepted the Commissioner's recommendations and agreed to issue payments to the complainant to ensure that the relative outstanding substantive grade allowance will cover the period from her date of appointment. The payments erroneously made to the complainant would be deducted from the payments due.

Commissioner for Health
Case Note for Case No HP0014

Reimbursement of branded medicine not available on the Government formulary

The complaint
The husband of a patient who was in a critical condition at the Intensive Care Unit (ITU), Mater Dei Hospital, claimed that his wife made dramatic improvement after her consultant advised the husband to buy a "*branded*" medicine to replace the generic one which she was having.

The complainant lodged a complaint against the Department of Health for refusing to procure the "*branded*" medicine as prescibed by her consultant. The Department of Health has a policy not to purchase *"branded"* medicines and therefore the patient had to purchase this medicine which costs €100 monthly.

Facts and Findings
The complainant had no doubt that his wife improved considerably when she was given this "*branded*" medicine so much so that she was released from ITU after a couple of days. The Commissioner for Health sought the reaction of the Department of Health and asked to request this particular case under the Exceptional Treatment Request. The Commissioner also cited similar cases that were considered in the past.

The Department of Health confirmed that the type of medicine the patient needs is available on the Government Formulary List, however not of the same brand as prescirbed by her consultant. The Department continued that they are working towards a policy where requests for branded products are not met.

During the 2017 Budget Debate, the Minister for Health was reported saying that "*the Government would be irresponsible to shun generics and only buy top brand products*" but "*this does not mean that we will not listen to those who for some specific reason cannot take generics and that we will not make special allowances for them.*"

Recommendation
Taking this statment in consideration, the Commissioner for Health asked the Department for Health to consider this particular case within the merits of '*specific reason*' mentioned by the Minister.

By the end of 2016 the Commissioner was still waiting for a reply from the Department of Health.

Commissioner for Health
Case Note on Case No HO0069

Salary scale discrimination

The complaint
A Health Department employee filed a complaint with the Office of the Ombudsman, because following the signing of a Memorandum of Understanding (MOU) between the Government, the Union Ħaddiema Magħqudin (UHM) and the General Workers Union (GWU), he found himself discriminated because colleagues who were junior to him received the maximum salary permitted in the salary scale whilst he was placed two steps lower, thus receiving a lesser salary.

The complainant, following a competitive call, was promoted to a position in Salary Scale 11, however he found himself two salary steps lower than all the rest of employees in the same position including those who did not qualify for the promotion.

Facts and findings
Before complaining with the Ombudsman, the complainant sought redress with the Department of Health to which they replied that the department adopted the 'point to point' approach in assigning the salary scales. The principal of 'point to point' was applied throughout the agreement when applying and assimilating employees in their new scales as a result of the MOU. For example, an employee who was in salary scale 12 point 7 prior to the signing of the MOU and who as a result of the MOU became entitled to move to Salary Scale 10, the employee would be placed on salary scale 10 point 7.

Not satisfied with the Department's reply, the employee filed a complaint with the Ombudsman, which was then assigned to the Commissioner for Health for investigation.

The Commissioner for Health initiated the investigation by organising a meeting between the Human Resources Health and Public Administration Collective Bargaining Unit (PACBU) which is the unit responsible in negotiating the collective agreements on behalf of Government.

In their reaction, PACBU, confirmed that the 'point to point' principle had to be adopted in line with the agreement, even though this case was the only one to be be effected in this way.

Following a number of reminders on this case, the Commissioner organised another meeting to try and resolve the issue. The Department of Health, following the discussion, concluded that the Department was of the opinion that the provisions stipulated in the MOU have been observed, implemented and administered in favour of the complainant. It was also noted that the aforementioned assimilation process, as outlined in the agreement was implemented in accordance with pre-established methodology which was universally applied.

In order, to try to resolve this anomaly, the Commissioner organised a further meeting between all stakeholders.

Conclusions and recommendations
During the investigation, it resulted that complainant had satisfied all the three requirements as in Clause 4 of the MOU that are:

- one has to be a *serving officers within the position grades*
- one has to be "*registered with the Council regulating such position*"; and
- one had to have "*fifteen (15) years full time satisfactory service, or equivalent, within the same class…*".

Therefore, had the complainant still be in Scale 12 step 7 he would have been promoted to Scale 10 step 7. Since he had previously been promoted to Scale 11 following a Call for Applications, he was penalised because he was in Scale 11 step 5 and placed in Scale 10 step 5 i.e. two steps lower than the colleagues who were his juniors.

The same requirements of the MOU were also satisfied by his junior colleagues who were placed in Scale 10 step 7. Because of this reasoning complainant became "*junior*" (salary wise) to his colleagues who were previously his juniors.

The Commissioner pointed out that it is a principle of this Office not to, in anyway, interfere regarding collective agreements reached after discussions with the Departments concerned, PACBU and the Unions. In this case this Office was in no way interfering but only commenting on an injustice which seemed to have been inadvertently overlooked.

It resulted that all the employees in the same senior position of the complainant and those in a junior position were all in their Scale (11 and 12) step 7 and were therefore promoted to Scale 10 step 7 in view of this agreement reached with the UHM on a point to point basis. Complainant, who is a senior was in Scale 11 step 5 and was promoted to Scale 10 step 5.

The Commissioner therefore considered this to be an anomaly and an injustice and recommended that complainant should be compensated, on a personal basis, with the difference in pay between Scale 10 step 5 to Scale 10 step 7 with effect from 30 November 2012 since the Agreement states that "*the effective date of these provisions shall be the date of signing of the MOU*".

Outcome
After further discussions and correspondence the Ministry for Health replied that "*kindly note that sectoral agreements provisions prevail*".

The Commissioner for Health was not in agreement and in terms of the Ombudsman Act the Ombudsman referred the matter to the Office of the Prime Minister and by the end of 2016 the matter was still not resolved.

Commissioner for Health
Case Note on Cases Nos HQ0031, HQ0041, HQ0058

Multiple Sclerosis patients deprived of treatment they are entitle to

The complaint
Three patients who are suffering from Multiple Sclerosis filed a complaint with the Ombudsman because they were not given the medicine Dimethyl Fumarate (Tecfidera) which they are entitled to. Instead they were told by the Mater Dei Hospital Pharmacy to wait for their turn in about three months' time.

Recommendation
The Commissioner for Health was asked by the Ombudsman to investigate the case. The Commissioner informed the Department of Health that this was in breach of the law and the matter should be treated with urgency so that the patients be given the treatment they require. The reason given by the Department of Health for the delay was because of lack of funds. The cases were also reported in the local media.

Outcome
Following the intervention of the Commissioner for Health the Department of Health informed the Commissioner that the medicine was going to be supplied to all the patients who were on the waiting list.

Commissioner for Health
Case Note on Case No HQ0024

Hepatitis patient claims that prescribed treatment was not approved

The complaint
A person who was diagnosed with Hepatitis C filed a complaint with the Office of the Ombudsman because the Ministry for Health did not approve the medicines prescribed for her by her Consultant. The complainant claimed that she was entitled to receive such treatment which was in continuation to the treatment she had already been given free of charge. The patient had to purchase the costly treatment herself causing financial hardship. Apart from requesting that the treatment is given free of charge, the complainant also demanded a refund of the treatment she purchased.

Facts and findings
The Ombudsman referred the case to the Commissioner for Health, who initiated the investigation by speaking to complainant. She stated that she had been given the treatment for her illness but her Consultant advised her to continue the treatment for a further four weeks because she still had traces of the infection from which she was suffering. Complainant added that she was told that treatment was approved for twelve weeks and that she had to buy any additional treatment that was prescribed for her.

The complainant argued that since the required treatment was very expensive, her Consultant also gave her contacts from overseas suppliers from where she could buy treatment at a cheaper price. Since she was not sure whether the recommended treatment from overseas had the same efficacy as the treatment she had been given

from Mater Dei Hospital, she decided not to opt for this advice. However she had to buy treatment from the local agent because the hospital did not allow her to buy from its stock which was needed for other patients.

Conclusions and recommendations

The Commissioner sought the reaction of the Department of Health. Following an internal review of the case the Department of Health offered the complainant a refund which amounted to less than half of the expenses she had incurred.

The Commissioner for Health asked the Department how they arrived to the amount offered to the complainant and insisted that he is of the opinion that the complainant is given a full refund of the expenses incurred. The Commissioner argued that it was her Consultant who advised his patient to continue to take the medicine for a further four weeks.

The Commissioner continued his argument by stating that the fact that the Department for Health had issued a payment of less than half of what the complainant spent; it was in itself an admission that the Department was not correct when it asked the complainant to purchase the medicine out of her own pockets.

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