PARLIAMENTARY OMBUDSMAN | MALTA

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Foreword

The investigation of complaints into allegations of maladministration that provoke injustice, improper discrimination and abuse of power often leads the Ombudsman and Commissioners in his Office to formulate final opinions that determine whether a complaint is justified or not.

These final opinions have to be well motivated. On the one hand, they have to convince the public authority allegedly responsible for the act or omission that aggravated the complainant, that the complaint was justified and that it had the duty to implement the appropriate recommended remedy. On the other hand, if the investigation showed that the complaint was not justified, the final opinion had to convince the complainant that it was not proper for him to seek redress.

The investigation of complaints and when opportune, the drawing up of final opinions by the Ombudsman and Commissioners remain the primary function of the Office of the Ombudsman. It is the *raison d'être* for its existence as the Defender of the individual's right to a good public administration.

The periodic publication of Case Notes, that has been undertaken since the setting up of the Office twenty two years ago, provides an insight into the investigative work carried out to establish the facts that gave rise to the complaint. The summaries of these final opinions also give an inkling into the exhaustive and thorough procedures that the Ombudsman, Commissioners and their Investigating Officers are bound by law to follow. Final opinions need to be well founded in law and investigating officers need to be well acquainted with the applicable legislative provisions and regulations that govern given situations and that both the public authorities and the complainant need to apply.

The Case Notes recorded in this publication show that the nature of complaints is becoming increasingly intricate and complex. Complaints are being generated in new areas of economic and social activity governed by regulations that are highly technical and novel. Legislation that often reflects international guidelines and conventions as well as EU Directives that have been transposed into our domestic law.

The Office needs to adapt itself to meet the challenges of a developing economy, absorbing the intricacies of business activity in areas like financial services, e-gaming, environmental regulation, the privatisation of public services and others. It has to be prepared and well-equipped to conduct investigations on complaints from professionals and individuals conducting activity in these areas. Areas that are often under the supervision of regulatory bodies set up by law that are themselves bound to follow the norms governing a good public administration and that are also subject to the jurisdiction of the Ombudsman. In this respect the Office has gained expertise through the appointment of the Commissioners who are focused on the specialised areas that fall within their jurisdiction, ably assisted by highly qualified investigating officers.

This publication, like the previous ones, gives an insight into the workings of the Office of the Ombudsman, the nature of the complaints received, the *iter* of the investigations carried out, the recommended redress where required and appropriate and the follow-up to secure the implementation of recommendations made. Where possible care has been taken to keep the Case Notes for the final opinions selected for this edition as concise and possible in an effort to make them more readable and accessible.

The Case Notes highlight the issues involved in the complaint and how they were tackled and resolved. In some instances where the complaint merited, case notes go into greater detail on the considerations that led the Ombudsman and Commissioners to form their final opinion. It should be emphasised that not all complaints received by the Ombudsman are the subject of a full investigation leading to final opinion. A number of them are resolved of in their preliminary investigation, while others are resolved through negotiations with the public authorities, utilising the services of liaison officers that the Office of the Ombudsman has in all government departments and public authorities.

More importantly, other complaints are resolved through a process of mediation during their investigation. A process that puts the complainant in touch with the public authority that allegedly caused him the aggravation he complained of. Through the services offered by the Office of the Ombudsman, the complainant would be fully informed of the reasons which motivated the contested decision, while the complainant will receive a full explanation of the factual and legal reasoning that, in the opinion of the public authority, justified its decision.

During the various stages of an investigation of a complaint it is this opportunity given to complainants to get to know the reasons why the public authority took the decision that aggravated them, that is crucial to the service offered by the Office of the Ombudsman. The opportunity that this Office gives the complainant to obtain vital information on the way they were treated by the public authority and that very often would have been withheld is greatly appreciated by complainants. This disclosure, to which a complainant is in truth entitled to, very often satisfies the aggrieved person and leads to the resolution of the complaint.

It is my conviction that the procedures, that have been in place since the setting up of the Office of the Ombudsman and that have with time, been developed and fine-tuned, are producing positive results. They enable the Office to sustain an efficient and effective process to seek redress against maladministration by public authorities. The reader should find that the Case Notes reported in this volume fully justify this conviction.

Anthony C. Mifsud
Parliamentary Ombudsman

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

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

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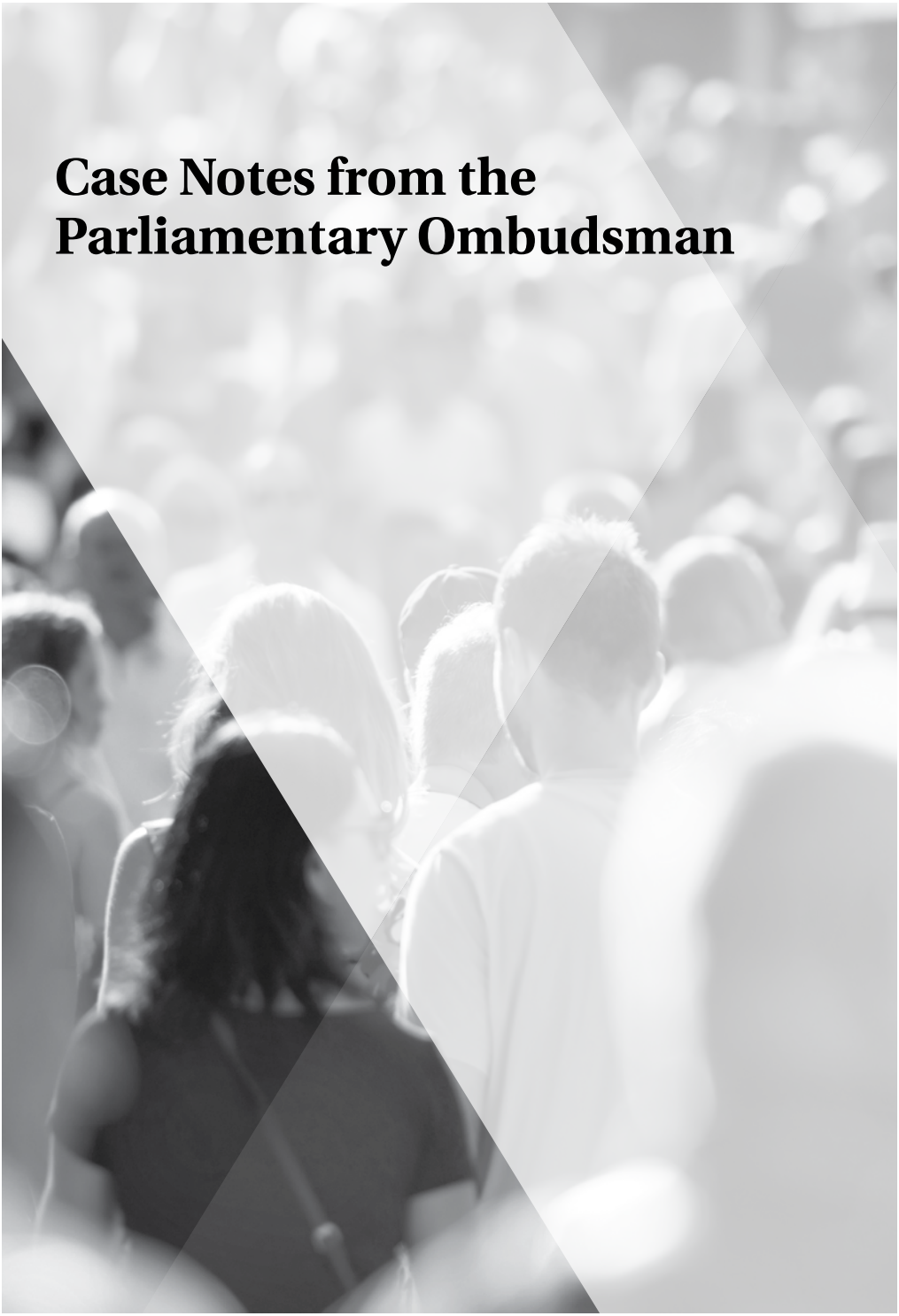


Case Note on Case No Q 0149
Public Service Commission

Review of Public Officer's Interdiction

The complaint
A government employee felt aggrieved that the competent authorities failed to accede to his request to lift his interdiction from his duties as a public officer even though a number of years had passed since it had been imposed on him pending criminal proceedings against him.

The facts
In 2009, complainant, as a result of pending criminal proceedings against him in the Courts of Malta, was interdicted from his duties as a public officer, with the approval of the Public Service Commission, following a submission to that effect from the Office of the Prime Minister.

In February 2016, following a request to the Public Service Commission in connection with various grievances raised by him, the complainant requested the Commission to review his interdiction on the basis of compassionate grounds "… *because of the severe financial hardship which an interdiction imposes*". Complainant added that the action taken by the authorities could in time potentially be considered "… *as an act of improper discrimination and unfairly causing an avoidable hardship*" to him.

It must be stated that complainant had disagreed with his interdiction in the first place and had in fact challenged that action in the Civil Courts. The case was still *sub judice*. During an interdiction, an officer is suspended from duties and receives only half his basic salary. In 2011, complainant was found guilty of the charges brought against him in the Criminal Courts but he appealed this judgement and the

decision from the Courts was still pending. Similarly complainant was still awaiting a judgement from the Civil Court on the case instituted by him.

Following his request to have his case reviewed by the Public Service Commission complainant was informed that "*The Commission has considered that, in view of the Court sentence against you, it would be more appropriate to maintain the temporary suspension until the appeal is concluded.*"

The investigation

The Ombudsman examined in detail the circumstances leading to the interdiction of complainant and his subsequent request to have it lifted. He engaged in discussions with the Public Service Commission and the Office of the Attorney General and analysed the documentation and correspondence that set out the reasons justifying the Government's reluctance to lift the interdiction. Essentially the Ombudsman established that the Commission considered that the administrative refusal of complainant's request was based on legal advice from the Office of the Attorney General. The Commission was advised by the Attorney General that since the judicial proceedings instituted by the complainant were still pending, the lifting of the temporary suspension could prejudice court proceedings.

The Ombudsman enquired whether he could be given information on analogous cases were a decision was made to lift the interdiction but the Commission did not address that query. The Ombudsman also established that on 5 June 2012, almost three years following complainant's interdiction, the Public Administration HR Office (PAHRO) had issued a circular listing new criterion that Heads of Department should take into consideration when recommending the interdiction of a public officer undergoing criminal proceedings.

These guidelines adopted a more reasonable approach to the use of interdiction as a disciplinary measure during the course of investigation until the determination of court cases. The Ombudsman established that these guidelines had had no bearing on the decision of the competent authorities not to lift complainant's interdiction at that stage.

Considerations

The Ombudsman considered in the first place that his investigation involved administrative issues. The investigation was not in any way to be interpreted as an investigation of the advice of the Attorney General's Office.

The merits of the case he considered were solely limited to whether the Public Service Commission and the Office of the Prime Minister were correct in the advice and decision to reject complainant's petition to the Public Service Commission requesting the lifting of the interdiction imposed on him 7 years earlier. During his suspension from duties as a public officer he was receiving only half his basic salary. The Ombudsman established that it resulted clearly that the rejection of complainant's petition was based exclusively on the fact that he had challenged in Court the original decision to interdict him. That court case was still pending. The legal advice given could have been different had complainant not challenged the original decision to interdict him. In fact, the Attorney General's advice to the Office of the Prime Minister could be reasonably interpreted as not objecting to the lifting of the interdiction, subject to complainant withdrawing the court case he had instituted and renouncing to any claim for damages. On the other hand the Commission's position was to give weight to the advice from the Attorney General's Office and abide by it.

The Ombudsman noted that no mention had unfortunately been made of the PSMC guidelines when imposing the interdiction in the first place, since these had been published years after complainant's challenge of the interdiction imposed on him in the Courts. It was fair to state that there were no published criteria regarding the lifting of an interdiction. However, it was relevant to consider whether, on the basis of the revised, listed criteria, complainant would have been interdicted in the first place. These criteria clearly implied that the decision to interdict a public officer should not be taken lightly and even if one or more of the listed criteria for interdiction applied, the Head of Department should always consider that instead of interdiction, the officer concerned should be assigned alternative duties that were commensurate to his/her grade/position and salary scale, if this would address the risks associated with the officer's retention.

New PSMC Guidelines

The Ombudsman considered that unfortunately the Office of the Prime Minister's message to the Attorney General's Office did not make any reference to the new PSMC guidelines - guidelines which could have possibly led to different advice from the Attorney General.

In his Final Opinion, the Ombudsman reproduced the PSMC criteria which Heads of Department should take into account in such cases. These referred to:

1. the gravity of the criminal charges brought against the officer;
2. the correlation between the officer's duties and the criminal charges;
3. possible conflict of interest if the officer continues to perform his/her duties;
4. whether other members of staff or general public would be at risk if the officer continues to perform his/her duties or whether he/she would be in a position to tamper with any evidence or intimidate/influence any witness; and
5. whether interdiction was necessary to uphold public confidence in the Department, especially if the Department is particularly sensitive to such public confidence, for example in Departments connected with law and order, revenue raising departments or departments concerned with cases of minors or other vulnerable persons.

The Ombudsman's opinion

The Ombudsman opined that even if any of the above criteria was applicable in complainant's case, alternative action such as transfer to perform other duties should have been considered. It was clear that an interdiction imposed a serious financial hardship on the officer concerned but it also entailed expenditure of public funds - the payment of half the officer's salary for nothing in return - and this for the duration of the interdiction. This had seriously to be considered in terms of good administration. Moreover, if eventually the Court were to decide in favour of complainant, Government might have to compensate him for the withheld emoluments for the duration of the interdiction. The Ombudsman believed that both the financial hardship to complainant and the financial burden to Government were behind Government's policy to lift an unchallenged interdiction after months of its imposition.

In this respect one could not but also give weight to the fact that the interdiction had been in force for over seven years and the longer the Court took to decide the issue the longer the hardship to complainant and the greater the financial implications to Government.

The Ombudsman and the Attorney General's Advice

Finally the Ombudsman noted that his Office was barred in terms of the Ombudsman Act from investigating the advice of the Attorney General's Office even if it did not agree with it. However, this did not in any way mean that the Office could not investigate the administrative issues/circumstances relating to such advice or to state its opinion as to whether it agreed or disagreed with it. As repeatedly made clear to the Office of the Prime Minister and to the Public Service Commission, prior to the decision to reject complainant's petition, it had been and still was the opinion of the Ombudsman that while the administration is obliged to fully consider such advice, it was finally responsible for the decision. The administration was bound to act in line with existing policies and practices within the principles of justice and fairness and above all without discrimination.

Finally, strictly from the standpoint of the application of the principles of good administrative behaviour, it was to be pointed out that:

1. A person should not be prejudiced or disadvantaged simply because he/she chooses to persist in seeking to vindicate his right to redress before a Court of Law. It was administratively improper to condition the lifting of complainant's interdiction to an unconditional renunciation of his claim that the original interdiction was illegal and on his withdrawal of court proceedings instituted by him.
2. The review of complainant's interdiction on humanitarian grounds, also through the application of the guidelines published some years after complainant's interdiction, gave complainant the right to have his case reconsidered from this perspective. A decision in his favour on this ground would have had no bearing on the validity or otherwise of the original interdiction that was being and would remain upheld by the administration and contested by complainant.
3. The Ombudsman noted that the outcome of the Civil Court case, unfortunately still pending, should have no effect on the decision to lift the interdiction on humanitarian grounds. Indeed if Government won the case, complainant's position would remain unchanged. The Government would still have to decide

whether the interdiction should be lifted on humanitarian or administrative grounds. If on the other hand, complainant won the case, the judgement would have no material bearing on the issue of the lifting of the interdiction, since it would have been already lifted, while all his other rights would have remained unprejudiced.

Conclusion

In conclusion the Ombudsman stated that in the first place the Public Service Commission had tendered its advice in line with its mandate in terms of its Constitutional mandate. However, he considered that the Commission had not given sufficient weight to the administrative concept that, while the legal advice from the Attorney General's Office had to be given due consideration and respect, the administration was obliged to act fairly and without discrimination in line with its policy in respect of lifting of an interdiction and in full respect of its administrative responsibilities. Moreover, in seeking legal advice, the administration was in duty bound to present to the Attorney General's Office all the relevant information and details. The same applied to the administration's responsibilities when it sought the advice of the Commission.

The Ombudsman stated that, while he was not in full agreement with the advice of the Attorney General's Office, this was not in any way to be interpreted as an investigation of such advice or as a ruling thereon. The Office was inclined to believe that if fuller information had been provided to the Attorney General's Office, the advice could have been different.

Recommendation

The Ombudsman therefore recommended that without delay the Office of the Prime Minister should have further discussions with the Attorney General's Office giving full details of the administrative issues involved, also those considered in his Final Opinion. It should request fresh advice in the light of the new information provided. Subsequently, the Public Service Commission should reconsider its decision after the fresh advice from the Attorney General's Office and the findings of the Ombudsman.

Case Note on Case Nos Q 0008 & Q 0103
Office of the Prime Minister

Improper discrimination in Pension Benefit

The complaint
Complainant, a female government employee, alleged improper discrimination on the grounds of age because the Government was refusing to give its employees the benefit to opt to continue in employment, on a voluntary basis, after reaching retirement age. An incentive that the Government had accepted to acknowledge to employees in the private sector.

Complainant submitted that this was an injustice to all government employees. She requested the Ombudsman to investigate and to recommend that this unfair situation be rectified.

The facts
Complainant based her submission on a statement made during the 2016 Budget Speech in which Government reiterated that it believed that more employees should be encouraged to carry on working after reaching retirement age. This on a voluntary basis and in agreement with their employer.

The Government was proposing that this measure would be available only to employees in the private sector. Those employees who opted to continue working after reaching retirement age and did not apply for a pension, even though they would have a right to do so, would be given an incentive of an annual percentage rise in their rate of pension. They would continue to enjoy this increase, throughout their life, when they actually retire.

Complainant and a number of other government employees who were about to retire in a few months, enquired whether it was possible for this benefit to be extended to government employees. However they were always given the stock reply that the Budget Speech clearly stated that the policy applied only to employees in the private sector.

The investigation

Following an exchange of correspondence and discussions with the appropriate Government authorities, the Ombudsman was of the opinion that the declared policy to grant this incentive to employees who continued to work beyond retirement age and did not claim retirement pension under the Social Security Act, was possibly improperly discriminatory since it provided an added benefit of an eventually higher rate of pension to private sector employees but did not provide the same benefit to analogous employees in the public service.

This when both classes of employees continued to pay the relative contributions in terms of the Social Security Act, including paying such contributions beyond the age of retirement when they could otherwise get a pension under the same Act.

The Ombudsman affirmed that it was correct to state that this concession was voluntary and moreover that the employer, including Government, had the right to declare that it was not in a position to retain the employee in employment. However he reiterated that if the employer including Government retained such employee in employment beyond retirement age it would be unfair and improperly discriminatory to withhold any benefits to public service employees which were being given to other employees in the private sector and who were equally continuing to pay the relative contributions due under the Social Security Act.

The Ombudsman therefore requested to be given valid reasons why denying the benefit of a higher pension to employees in the public sector in these circumstances should not be considered to be improperly discriminatory. There had been however no reaction to this request.

Conclusion and recommendation

The Ombudsman was of the opinion that the fact that the benefit of an increased pension was limited to private sector employees to the exclusion of public service employees, when they were respecting all the provisions of the Act, under the Social Security Act including the payment of Social Security contributions, amounted to an act that was improperly discriminatory. The Ombudsman therefore recommended that Government should take action to remove such discrimination.

Case Note on Case No Q 0180
Housing Authority

Right of First Refusal Denied

The complaint
A complainant who owned a flat purchased from the Housing Authority tendered to buy a garage beneath his property. When submitting his tender he declared that he was opting for the right of first refusal. The Authority refused to recognise complainant's claim to purchase the garage by matching a higher bid by a third party. Complainant also requested the Ombudsman to investigate the Authority's failure to observe a specific condition of the contract binding it to provide the flat he purchased with proper rainwater drainage facilities.

The facts
When tendering for the purchase of a garage in the block of apartments where complainant had bought a flat from the Housing Authority, he specifically requested to be given the right of first refusal on the ground that he required more space for storage since the flat he owned was rather small and did not have a box room. Complainant and his wife both had cars and they felt that they required extra space to supplement the limited area of his flat that would also be inadequate if there was an increase in their family.

There were two bidders for this tender, complainant and a third party who did not own a flat in the same block who offered a higher price. The Housing Authority did not however recognise complainant's request to exercise his right of first refusal and instead awarded the tender to the highest bidder. In the same complaint, complainant requested the Ombudsman to investigate the failure of the Housing Authority to honour its obligations under the contract of sale of the flat that he had bought in shell form, to provide it with properly functioning rainwater/drainage system. Complainant had to complete the works at his own expense and was claiming the refund of this amount from the Housing Authority.

The investigation

Clause 6 of the contract of sale of the garage stated that "*the Authority reserves the right in terms of current policy or for any other reason which it considers valid and appropriate, to allocate to the tenderer the right of first refusal in which case the chosen bidder would be asked to pay the highest offer tendered*". The Housing Authority was requested by the Ombudsman to state what the reasons it considered valid and appropriate to refuse complainant's request to be given the right of first refusal were. It was asked whether complainant had been informed that his request had not been acceded to before the expiration of the date for the submission of tenders.

The Housing Authority informed the Ombudsman that complainant had been informed that it had decided not to accept his request to avail himself of the right of first refusal after the closing date for the submission of tenders had lapsed. This was inevitable since complainant's letter requesting to be granted the right of first refusal was annexed to his tender. According to established policy, the tender was kept sealed during the whole period during which tenderers could submit their offers. All tenders were opened in front of the public after the closing date for the submission of tenders.

Following further enquiries, the Housing Authority informed the Ombudsman that the right retained by the Authority to offer the right of first refusal was only used in extreme and special circumstances that did not result in the case under review. The reasons submitted by complainant did not justify a departure from this policy since the inconveniences he mentioned were commonly experienced by a large sector of the population and did not constitute sufficient reason to trigger the need to offer a right of first refusal. This would have placed complainant at an undue advantage over other bidders who might be in similar circumstances.

The Ombudsman was satisfied with the explanation given by the Authority. He continued to enquire on the failure of the Housing Authority to carry out the necessary works to install a complete, fully operational, drainage system as it had bound itself to do in the contract of sale. The Ombudsman noted that the tender document specified that "*semi-finished*" meant that the property was being sold in shell-form including the facades, the roof, external apertures, the rainwater system and the drainage system together with the common parts finished or installed.

The conditions laid down in the tender document formed an integral part of the contract of sale. The Ombudsman maintained that irrespective of what the normal practice of the Housing Authority dictated, it was the final contract signed by the Housing Authority and complainant that was binding. It was evident that the rainwater system and the drainage system, together with the common parts, had to be finished or installed at the expense of the Housing Authority and not to be borne by complainant.

Recommendation

The Ombudsman therefore recommended that complainant should be reimbursed for the expense he had incurred to purchase the drainpipes and to complete the connection of the rainwater and drainage systems.

Outcome

The Housing Authority accepted this recommendation and agreed to refund the amount spent by complainant to finalise the works on the production of the relevant receipts supporting his claim.

Case Note on Case No R 0118
Commissioner for Revenue

Administrative Fault Rectified

The complaint
Complainant contested a claim by the Inland Revenue Department that he owed almost €4,000 in tax for the year 2000. Most of the amount was debited to him in additional tax and interests accrued on liquidated tax for basic year 1999.

The facts
The Department maintained that complainant had not submitted a return for that year. Complainant declared that this was not the case. The Department had insisted that it was in his interest to file a late return for that year. He duly did so since he did not have, at that time, evidence to show that he had sent his return.

Eventually complainant traced an acknowledgement for the return he had actually sent but the Department still requested him to file a request for remission of additional tax that would have meant an admission of fault on his part. The highest amount of remission that would have been permissible by law in such circumstances would be 80% of the amount claimed. Complainant refused to fill in that form and requested that his case be heard by the Board of Special Commissioners. He asked the Ombudsman to intervene on his behalf to rectify this administrative error.

The investigation
The Office of the Ombudsman discussed the case with the Inland Revenue Department submitting evidence provided by complainant that the return for that year had been duly submitted in time. Eventually the Inland Revenue Department informed the Ombudsman that, based on the acknowledgement by the Department that it had received the return in April 2000, and since it was not

clear why such return had not been processed, all resulting additional tax had been cancelled. Complainant would only be required to pay actual tax due for that year of assessment.

Conclusion
This complaint was satisfactorily resolved and the Ombudsman closed the case.

Case Note on Case No Q 0343
Police Force

Long and Efficient Service Medal (LESM) denied

The complaint
A retired police officer felt aggrieved that he was denied the Long and Efficient Service Medal given to members of the police force under the provisions of the *Ġieħ ir-Repubblika* Act to which he felt he was entitled. He requested the Ombudsman to investigate this complaint and to ensure that he was awarded this medal according to law.

The facts
Complainant joined the force as a Police Constable in 1970 and served in the Corps uninterruptedly for a period of 25 years till 1996. During those years he had only faced four disciplinary proceedings, three of which were offences he had committed during the 1970's and were petty in nature. Complainant retired from the force in the rank of Police Sergeant.

The investigation
The regulations issued under the *Ġieħ ir-Repubblika* Act setting up the conditions that entitled a member of a disciplined force to the long and efficient service medal, provide that all members and former members who had served on an aggregate basis for the period stipulated under the Act and had rendered efficient service throughout, were eligible to be awarded the medal and the clasp.

A serving member of a disciplined force, including the Malta Police Force, was eligible to be awarded the medal after completing an aggregate of 18 years efficient service with irreproachable character and conduct throughout. The Commissioner of Police informed the Ombudsman that in 2004 a set of criteria for the award of

the medal was drawn up during a Senior Executives Meeting. These criteria were still being applied today when determining which members of the force qualified for the medal/clasp. These selection criteria consider different options to assess the eligibility of candidates who have been found guilty of offences in summary proceedings. In the case of a member of the force who was found guilty of up to 4 disciplinary offences, a period of two years prescription from the last offence committed (provided that the first two offences were committed more than two years before) must elapse in order for him to be eligible for the LESM.

The Commissioner of Police informed the Ombudsman that Human Resources Records showed that complainant had been found guilty of 4 disciplinary offences during his tenure of office. He gave details of these four instances and of the punishment meted out. The Commissioner concluded that since complainant had retired on pension before two years had lapsed from his last disciplinary conviction, he did not qualify for the award. Complainant's request could not therefore be entertained.

The Ombudsman informed complainant that it had been established that his name was found listed as being not eligible for the awards held on the 12th of July 1995 since he had committed 4 disciplinary offences and in 1995 he was still a serving member of the Force. Complainant would have been eligible to appeal from that decision if he had remained a serving member of the force till March 2005.

Conclusion

The Ombudsman informed complainant that he could not sustain his complaint. To be eligible for the Long and Efficient Service Medal one had to be a serving member of the Police Force at the time of the award and his police conduct had to be without any disciplinary offences throughout his complete police service. Evidence showed that he was not eligible to qualify for the award under existing regulation also because he had retired before two years had lapsed from his last disciplinary conviction.

Case Note on Case No Q 0195
Ministry for Education and Employment

Use and Abuse of the National Library of Malta

The complaint
An elderly person, who regularly availed himself of the research facilities provided by the National Library, felt aggrieved following the instructions issued by the Director responsible for Maltese Libraries barring him from access to that section of the Library and use of the relative facilities. He requested the Ombudsman to investigate the circumstances of the case and recommend that the instructions be withdrawn.

The Facts
The complainant, who is an elderly person, regularly avails himself of the facilities offered by the National Library of Malta and every week peruses the news section of the London Sunday Times. On one occasion security cameras had caught him leaving the premises with two pages from the journal without permission. As a result, the Director barred complainant from his right to make use of the facilities available at the Library's main hall. On his part, complainant explained that he had so acted because he did not have enough time to read the journal, from which, amongst other things, he used to copy the crossword and other weekly games in that section of the journal. He added that this journal was only available for perusal for one week. He had therefore realised that because of this mistaken policy it would not have been possible for him to copy the pages he wished during his next visit to the Library the following week.

Complainant requested the Ombudsman to consider whether there were grounds for revision and revocation of the interdiction imposed on him by the administration. He further requested that the London Sunday Times remains available for perusal for at least three months from date of publication.

The Investigation

It resulted from the investigation that the Library Staff had seen complainant taking away pages from the London Times News Review. He was informed that there was confirmatory evidence to this effect from the closed circuit television cameras. The Director explained that a section of the Malta Libraries Act provides that:

> *"(1) Any person who -*
> *(a) … wilfully or through negligence, unskillfulness or non-observance of the regulations causes damage to or destroys, mutilates, alters any record; or*
>
> *(b) contravenes or fails to comply with the provisions of this Act …*
> *shall be guilty of an offence under this act and shall be liable, on conviction, to a fine (multa) not exceeding two thousand and five hundred euro (€2,500) or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment …"*

Since complainant's action was considered to be of a less serious nature, instead of applying their provision of the law, management applied the internal administrative rules for access to the National Libraries of Malta. These specify amongst others, that "*The National Librarian may expel any visitor or user who fails to respect the regulations imposed by the Library, or who does not behave in a satisfactory manner in the Library.*"

Considerations

In his Final Opinion, the Ombudsman considered that the National Library regulations had to be respected, and if not observed, at least some other form of disciplinary action should be taken. Such action must however be applied according to the seriousness of the case. There was nothing irregular in the sanctions imposed on complainant in this case. So long as the suspension imposed on complainant is for a reasonable time, this would be justified and indeed necessary. However since 10 months had passed from the time complainant was debarred from access to an essential section of the National Library, the Ombudsman opined that the scope behind the suspension had been achieved and that there was no reason for its further application.

The letter of suspension communicated to complainant did not indicate how long the suspension was to remain in force. This could suggest that the revocation of such suspension was at the discretion of the Library authorities and this should be applied in a reasonable manner. In his Final Opinion, the Ombudsman reviewed the subsidiary legislation prescribed under the principal Act regulating the use of the National Libraries. He concluded that in terms of these regulations, the suspension from misuse/abuse of the Library facilities should not be indefinite. The legislation intended dismissal from the National Library of Malta as being a temporary suspension and/or payment of compensation.

Conclusion

The Ombudsman therefore concluded that the disciplinary action taken by the Library authorities in respect of complainant was justified. He agreed that places like the National Library, where books and documents which form part of our National Heritage are kept, should be treated with the fullest respect both by the administrators as well as by researchers. However the principle of proportionality between the seriousness of a particular case and the relative penalty should be respected.

This case concerns a foreign weekly journal, which as the Permanent Secretary himself agreed, did not form part of our national collection. The Ombudsman moreover acknowledged that the Library authorities were considering how complainant would be allowed to resume access to the reading room facilities subject to certain conditions - an argument which was not pursued further because it was not considered to be a practical one. The Ombudsman was of the opinion that such reconsideration was in itself a positive one and should be reviewed/perused further since months had by then passed from the sanction imposed on complainant and it was fair that complainant, who was a person of advanced age, be given another opportunity to spend his free time making use of the facilities of the National Library.

The fact that CCTV facilities as a security system are in place at the Library, entails that there was no need for a member of staff to continuously supervise a visitor. The Ombudsman considered that if the suspension of complainant was to remain in force without a valid reason, the disciplinary action taken by the authorities in

respect of complainant could no longer remain justified and could be abusive. He was sure that with good will on both sides, such eventuality could be avoided.

In respect of complainant's request that the London Sunday Times be kept available for readers for a period of three months following publication, the Ombudsman considered that the availability of a foreign journal is an additional service that the Library offers to visitors and researchers and such journals cannot be considered as forming part of the Melitensia collection. The Ministry also confirmed that Wi-Fi and computer facilities were available free of charge at the National Library and this provided reasonable access to foreign journals. This was a satisfactory alternative for researchers to have access to past issues of foreign journals and magazines. It was therefore only fair that the period during which foreign journals are to be kept available for readers is left at the discretion of the Library authorities.

Finally, the Ombudsman was confident that both the Library authorities as well as the Permanent Secretary in the Ministry for Education and Employment agreed that the principal aim of our National Library was to encourage general knowledge which is educational in nature, besides also promoting the attendance of the public who will have access to all the material at the Library. This was in line with the function and mission statement of the National Library of Malta which encourages "*… reading for study, research, self-development and lifelong learning information and leisure purposes*".

Recommendations
The Ombudsman recommended that the decision of the authorities barring access of complainant to the National Library facilities be immediately reviewed and a reasonable date be established for complainant to be able to access the available facilities reserved for reading and research. This recommendation was accepted by the Ministry for Education and Employment, and the Permanent Secretary within the Ministry informed the Ombudsman that complainant's access and use of the facilities in the reading room was to be restored as from 1 April 2017.

The complainant was to be warned that in the eventuality of another breach of the Library regulations, more severe disciplinary measures would be applied in his respect.

Case Note on Case No Q 0341
Identity Malta

Acquired Maltese Citizenship

The complaint
A foreigner complained that despite his application for Maltese Citizenship submitted years ago, he remained without a reply.

The facts
A foreigner, married to a Maltese woman, had submitted an application for Maltese Citizenship around July 2013. His claim was based on his marriage to a Maltese citizen. Up to two and a half years later, he had not received a reply. Despite going to the Department responsible for citizenship on a number of occasions, he was kept in the dark - given hope but always told to wait. He requested the Ombudsman to investigate.

The investigation
The Ombudsman insisted on a person's right to a reply, as well as information, as to what stage his application for citizenship was at. Following this, the responsible department investigated complainant's case and informed him of the status of his application. After one year from submission of his complaint to the Ombudsman, the Department informed the Ombudsman that earlier that year it had sent the certificate of Maltese Citizenship to complainant.

Conclusion
The Ombudsman informed the complainant accordingly and closed the case.

Case Note on Case No R 0029
ARMS Ltd

More transparency regarding small fines imposed by ARMS Ltd

The complaint
A water and electricity consumer requested the Ombudsman to investigate a disagreement he had with ARMS Ltd regarding his utility bill which included a charge in respect of the reading of both his water and electricity meters - a charge of 4.60 euros, that is 2.30 euros for each meter.

The facts
When complainant requested ARMS Ltd to give it's reason for the additional charge, he was informed that such additional charges are imposed on the consumer if the meter reader finds a premises closed when he goes to carry out such readings and nobody opens to enable him to carry out such readings.

Complainant contended that in such situations, the consumer should be notified of the fact. According to Arms Ltd, the meter reader had tried to access the meters on two occasions. On his part, the complainant affirmed that on no occasion did he find a notice to this effect in his letter box. He therefore objected to the additional charge. After lengthy correspondence, Arms Ltd informed him that the additional charge had already been paid by Direct Debit and could not therefore be deducted. Complainant therefore requested the Ombudsman to investigate.

The investigation

The additional charge in this case is so minimal that the Ombudsman could in terms of the law, have decided not to investigate. The Ombudsman however decided to investigate the case because it was possible that such additional charges were regularly being imposed by ARMS Ltd and therefore affect a wide selection of society. Moreover the Ombudsman considered that this was a matter which concerns the principle of natural justice which needed clarification.

In the course of the investigation, ARMS Ltd maintained that the meter reader had left a note in place on two separate occasions and that moreover, complainant had all the opportunity to submit the readings of the meters himself in the time allowed for such purposes, once he could not be present when the meter reader called. He could have done this within 5 days from the date of the notice left at his house. In this case, complainant had contacted ARMS Ltd after the lapse of this deadline and requested that he be sent the bill for actual consumption. ARMS Ltd informed the Office of the Ombudsman that a revision and submission of a bill outside its schedule for such billings entails a fee, and not a fine, of 4.66 euro. ARMS Ltd therefore reiterated that the requested fee was in line with established procedures.

After lengthy discussions with ARMS Ltd the latter informed the Ombudsman that complainant's case had been reconsidered in more detail and it was decided that the fee of 4.66 euro be deducted on *ex gratia* basis for that occasion only. ARMS Ltd also added that in the eventuality that the client was not present to provide access when the meter reader calls in the future, such reading could be submitted by the client by phone or by email.

Complainant expressed his satisfaction at the outcome, even if he could not accept the *ex gratia* basis for the decision. He reiterated that he had never received notice of such intended readings, and that his objection was not based on the sum of 4.66 euros, but on his contention that this was an injustice - which unfortunately many submit to because of the small amount involved.

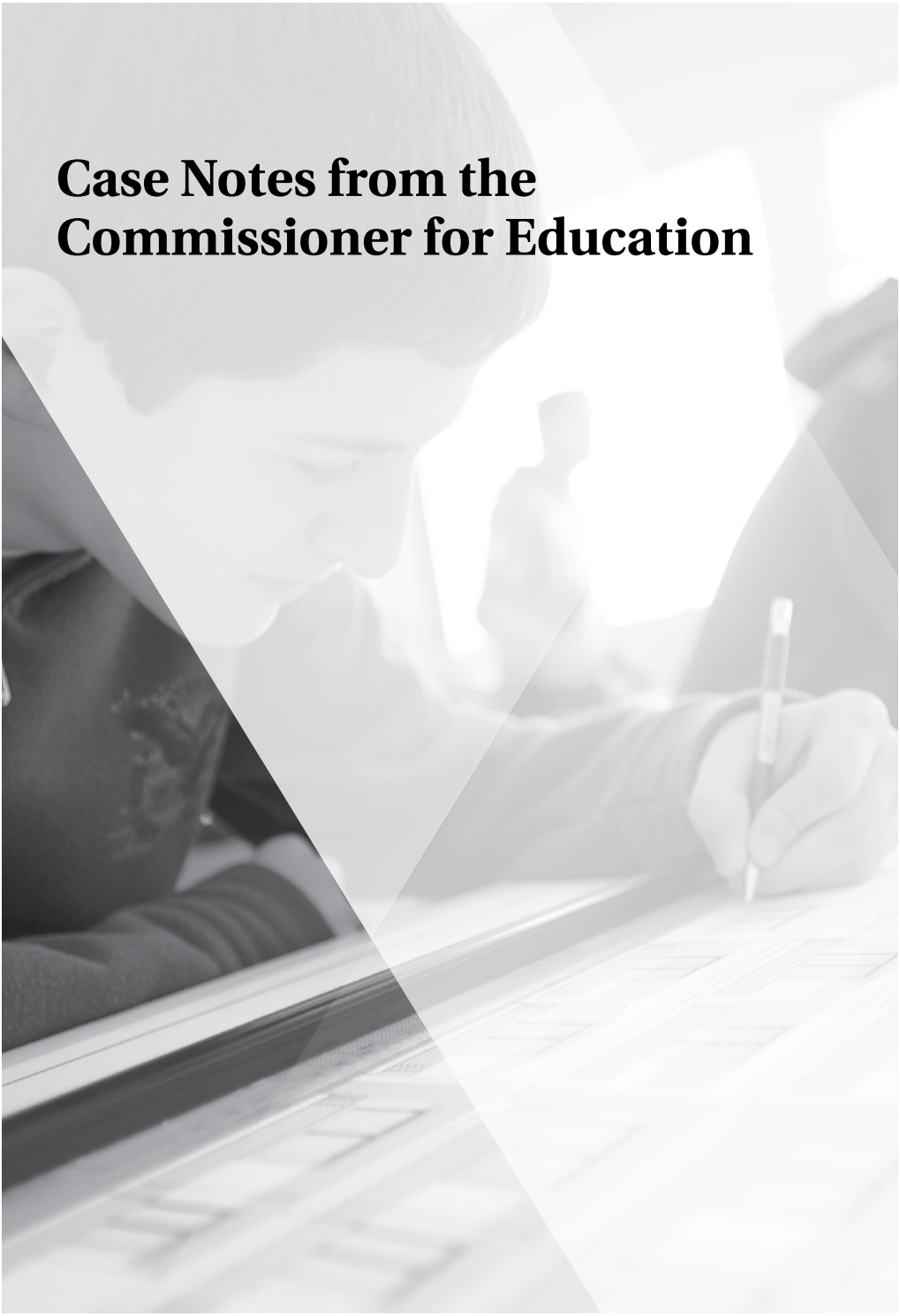
Recommendations
The Ombudsman thanked ARMS Ltd for its cooperation which led to the resolution of this case. He agreed that in similar cases there should be a penalty if and when a person ignores the notice left by the meter reader of the date when the reading is to be carried out and does not provide access to such meter reader. However, in the interests of justice and equity, he recommended that there should be a reasonable advanced notice of such intended meter readings. In such cases the meter reader should retain a signed and dated copy of the original notice given to the consumer.

In the absence of such copy, the additional charge should not be imposed on the consumer.

It was further recommended that the advanced notice which is given for meter readings should include information explaining in detail what the consumer should do if he would not be able to give access to the meter reader when the latter is due to call. Such notice should further inform that the consumer could himself phone or email the readings of the water and electricity meters. The consumer should further be informed that in case access is not given to the meter reader on the date and time listed on the notice, ARMS Ltd could impose the additional charge.

These recommendations were intended to avoid unnecessary complaints on lack of information, as well as to provide a guideline to consumers on the procedures involved and improve transparency on the application of additional charges. It was not fair that such cases be treated on an *ex-gratia* basis.

Case Notes from the Commissioner for Education



Case Note on Case No UR 0005
University of Malta

Flawless Selection Process

The complaint
A visiting academic in the Faculty of Science at the University of Malta felt aggrieved at the conduct of the selection process following a call for applications to fill the Resident Academic full time post at the Department in which she had lectured for many years. Complainant felt aggrieved that the post was given to someone else with far less teaching experience than her. She submitted that this was unjust and asked the Parliamentary Ombudsman to investigate the complaint.

The facts
Complainant submitted that she was fully qualified for the advertised post. She had been a senior visiting lecturer for a number of years and during that time she had gained experience and competence in the teaching of the scientific subjects in which she specialised. She had dedicated a lot of time to the Department and shouldered all responsibility that came with the job. She felt that she had been discriminated against. While it could be true that the successful candidate had more scientific publications than her, the fact remained that the great work she did within the Department had been greatly underestimated.

The investigation
The University cooperated fully with the Commissioner for Education in the investigation of the complaint. It provided full information on the workings of the Selection Board and pointed out that the call for applications for a Resident Academic post was an external call that required a competitive selection process. In her case complainant contested that she should have been awarded the post based on her years of experience as a visiting academic. However, the Selection Board did acknowledge complainant's relevant experience. It had also however, to review each candidate in terms of other pre-determined selection criteria including

academic qualifications, academic work experience, aptitude and suitability for the post and their performance during the interview.

The successful candidate had convinced the Selection Board that she possessed a greater degree of aptitude and suitability for the academic post, particularly in relation to her academic publications, her ongoing research as well as her teaching experience at tertiary level. It was not therefore correct for complainant to claim that she had been unsuccessful in her application for the post due to her other private work commitments. That consideration would have arisen at a later stage had she been successful in the selection process. She would then have been informed that a Resident Academic post required a full time commitment to teaching, research and administration. It would then have been her decision whether to accept this responsibility or not.

Considerations

The Commissioner for Education had a number of meetings with complainant and University authorities to discuss her complaint. Several matters that arose from the claim were clarified. The Commissioner concluded from his investigation that it was clear that the selection process had been conducted without flaws, in accordance with the University's regulations and established practices. It was significant that the Selection Board had confirmed its conclusions when it had met to review the complaint following the Commissioner's intervention taking into account complainant's years of experience lecturing in the Department.

However, the Selection Board emphasised the point that the selected candidate had a much stronger research and publications profile than complainant's. The Commissioner declared that he had found no evidence to support complainant's claim that she was denied the post because of her substantial private work commitments outside the University. He could not therefore sustain the complaint based on the allegation that the University had treated complainant unfairly or discriminated against her when it placed her second in the order of precedence for the post in question.

On the other hand, the Commissioner, after having considered the case, was of the opinion that complainant's current employment status of visiting part time academic at T1 level did not accurately reflect her workload in the Department.

He therefore recommended that the University should re-evaluate complainant's lecturing, tutoring and students' supervision load, including the use of her private laboratory facilities, to grant her the academic status that would be compatible with her University duties.

Conclusion

The University accepted the Commissioner's Final Opinion. It concurred with him that complainant's appointment would reflect her workload within the Department where she lectured.

Case Note on Case No. UR 0021
Directorate for Educational Services

Teachers cannot opt to change the subject they teach

Having a qualification in two subjects does not entitle a teacher to drop a subject in which he/she was appointed in favour of another one.

The complaint
A regular Teacher appointed to teach English in State Primary Schools responded to a call for applications for Supply Teachers for a post described as 'Peripatetic Teacher of Art'. Her application was first refused on grounds on ineligibility but later accepted after she protested. She attended an interview, but was later informed that she could not be deployed as an Art Teacher because she taught English and that was considered as being more important, Teachers of English being in short supply.

The Teacher placed a complaint with the Office of the Ombudsman, claiming that she was being discriminated against in the sense that her preferences, as well as her qualifications, were being unjustly and unfairly ignored by the Ministry for Education and Employment (MEDE).

Investigations and findings
The complainant had graduated in 2004 from the University of Malta, obtaining the Degree of B.Ed. (Hons) in English and Art, being classified within the Second Class (Lower Division). She responded to a call for applications issued in 2004 which permitted final year students of the B.Ed. course to apply, and she submitted two separate applications, one for the post of Teacher of English, the other for the post of Teacher of Art. On being successfully selected as Teacher of English, she was deployed to teach the language at a State Secondary School on 1st January 2005, and received her appointment as Teacher on probation (1 Year) in August, 2005, receiving her Warrant in November of the same year.

In 2017, she applied for the post of Peripatetic Teacher of Art in State Primary Schools; her application was at first refused on grounds of ineligibility, but she contested this and MEDE conceded that she was eligible. She attended the interview for the post, but was informed by the Director, Education Resources at MEDE, that, in spite of her good performance during the interview, MEDE would not allow her to switch from being a Teacher of English to becoming an Art Teacher, because Teachers of English were in short supply, and that it would be practically impossible to fill the vacancy such a switch would create. The Teacher in question wrote letters to the Commissioner which clearly expressed her anger, disappointment and bitterness at this refusal.

The Commissioner decided to investigate her case and asked the Permanent Secretary at MEDE to present his response to her claims. The Permanent Secretary, in his reply, refused to entertain the complainant's request, mainly on the grounds of 'exigencies of the Department', but also rebutted several claims she made in her original letter, and requested clarification with regard to her accusation of discrimination. At this point, the Commissioner realised that this case would involve a detailed examination of several important documents, in order to ascertain what the complainant was entitled to and what she was not. The following documents were requested, some from the complainant, some from MEDE:

- A copy of the official University transcript of the complainant's Degree;
- A copy of the original call for applications for the posts of Teachers in various subjects issued by the Ministry of Education in 2004;
- A copy of the complainant's letter of first appointment issued by the Minister in 2005;
- A copy of the award of the Teaching Warrant to the complainant, issued in 2005;
- A copy of the letter of her first deployment, signed by the Headmistress of the School to which she was assigned, specifying the subject she was to teach.

Other documents were also volunteered by the complainant, in order to support her claims.

The Commissioner also spoke to the Director, Education Resources at MEDE, who confirmed the salient points made by the Permanent Secretary in his letter.

The documents showed that the complainant had been appointed to teach English at Secondary level, and that, indeed, after a period of maternity leave, she was again deployed to teach the same subject at the same level. It transpired that the complainant had volunteered to teach Art for 12 years, probably to make up for some missing Art lessons at her school. This, however, was probably an internal arrangement between the complainant and the Head of her school, and indeed there was no document officially sanctioning this.

The facts

It soon became increasingly clear that the complainant's request for redress was founded more on a misguided sense of entitlement than on any actual or tangible act of discrimination committed by the administration. Her letters were extensive, and marked by emotional statements, of which the following is an example: '*I feel that the sole intention of MEDE is to take the subject of Art away from me and have me teach English on a full time basis against my wishes*'. This, of course, is technically absurd, because no worker can complain that he is being forced to do the work he was contracted to do. The sentence also contains the implication that MEDE (that is the administrators of MEDE) carried some sort of personal grudge against her and were acting vindictively. The Commissioner detected no shred of evidence to support this. It was also noted that the complainant claimed that a union comforted her with statements which seem to have very dubious accuracy. The Commissioner received no document from the complainant, originating from the Union, which supported these statements in writing. One such declaration used by complainant was '*and according to the Union*[1] *I am automatically an Art Teacher within the Department if I have taught it for a number of years*'. There is no evidence that such automatisms exist within the praxis of the Department, and therefore, if such comments were in fact made by a union, they are to be deplored because of their misleading and irresponsible nature, especially if such advice was given orally and not in writing. The complainant may have been teaching Art *de facto*, but was a Teacher of English *de jure*. The Commissioner was tempted to feel that the complainant had originally applied to teach English as a kind of stratagem by which to insert herself into the State teaching cohort only to take any advantage that came her way to switch to teaching Art, some way or another. Such a scenario would induce serious concern on whether complainant was, in fact, teaching English with a grudge, which naturally would severely impact the quality of her lessons.

1 The name of the Trade Union concerned has been redacted.

Another observation concerned the change of status her request might cause if it were to be upheld by MEDE, since it was quite probable that she would have to switch from being a Teacher operating in the State Secondary Sector to one operating in the State Primary Sector, and that carries substantial ramifications and administrative problems. This, in itself, provided another hurdle to having the complainant's requests being accepted.

It is possible that the complainant felt entitled to switch subjects because of the name of her Degree. The transcript[2] shows she was in possession of a B.Ed. Hons in English and Art; this might lead a person into forgetting that the specialisation of such an Honours Degree[3] lies in Pedagogy, and not in either English or Art.

Conclusion

The Commissioner could find no legal basis to support complainant's request, and closed the case by means of a letter sent to both the complainant and to MEDE in which the reason for his decision was made clear.

It was pointed out that the most essential and inalienable right of a teacher appointed to teach a subject is, in fact, that of teaching that subject. As such, her letter of first deployment became a crucial document, since it showed that she had been deployed to teach the very subject (English) for which she had applied, and for which she had been selected. There is all evidence and no doubt that to MEDE she was solely identifiable as a warranted Teacher employed to teach English at Secondary level.

The Commissioner also emphasised that an appointment to teach a subject is *per durata* by nature and, indeed, by historical experience; Teachers are proud, justifiably, of being Teachers of the subject they were appointed in, and indeed identify themselves with that subject[4]. The only way to affect a subject change is through resignation and re-application for a vacant post in the 'preferred' subject, which, of course, entails a loss of seniority, and which would be considered unthinkable by most Teachers.

The Commissioner also pointed out that the complainant's wish to teach Art rather than the subject she was appointed in was capricious, though that adjective was not

2 A transcript is the official document released by the Office of the Registrar of the University of Malta which gives all the details about a person's Degree.

3 An Honours Degree implies a level of specialisation, usually in one field.

4 A representative example would be 'Is-Sur Borg tal-Malti'.

used in formal correspondence. MEDE is fully entitled to employ her as a Teacher of English, even given the prevailing shortage of such Teachers, and MEDE was not in breach of any Law or bye-law in its refusal to change her status from that of Teacher of English to that of Teacher of Art. The particular wishes of an individual may, in ideal circumstances, be taken into consideration, but those wishes cannot override national exigencies.

It was also stressed that when Teachers accept to teach a subject other than the one in which they were appointed they were doing so without any claim to a changed classification; indeed, the Commissioner pointed out that such 'arrangements' were not to be encouraged, for several technical reasons.

The complex and problematic nature of the exercise known as 'deployment' was explained to the complainant, in order to dismiss her impression that this was some sort of game played by Civil Servants, or that the operations involved allow individual persecution to take place. It is, in fact, the quite impersonal application of standard procedures which irritated the complainant, but she erroneously transformed this impersonality into an act of personal spite against her.

The Commissioner did not uphold complainant's request, and the case was formally closed.

Outcome
The complainant replied to the Commissioner's letter which had concluded the case by means of a letter which clearly showed that she was very disappointed by the Commissioner's decision, and felt that his Office had allied itself with MEDE, which is patently ridiculous, since the Ombudsman is completely independent and is not beholden in any way to any State or Parastatal entity or Institution. The complainant again based her argument on the unfairness she felt was involved in not having her wishes satisfied. Once again, therefore, the unfounded perception of persecution and the unjustified sense of entitlement which refused to be regulated by laws and procedures was clearly evident.

The Commissioner sent a final reply explaining that he could find no legal or reasonable basis on which to accommodate the complainant, and intimated that no further correspondence on the matter would take place.

Case Note on Case No UR 0026
University of Malta

University student refuses to follow English Communication aptitude course

A first-year student following a B.Sc. course at the University of Malta objects to being compelled to follow an English Communications Aptitude (ECA) course under constraint because she feels proficient enough in the language not to need it.

The complaint

This complaint was presented by the parents of the individual, since she was under aged at the time. Their letter to the Commissioner displayed a sense of outrage at the fact that their daughter had been submitted to a test in the English language, the result of which constrained her to follow what the University calls an English Communications Aptitude (ECA) course. They claimed that (a) their daughter's performance at SEC level showed that she was an expert user of English and (b) the test result, as well as the revision of paper report they had requested, which confirmed the girl's poor performance in the test, simply had to be wrong. They argued that the ECA course was just a waste of her time, and a distraction to her studies. They also claimed that the student had been poorly treated by the Director of the ECA course when the former had complained orally about the matter.

Findings

The Commissioner decided to open the case. The Pro-Rector was contacted both orally and by means of a letter, with the parents' letter of complaint attached. The Commissioner requested a meeting with the Director of the ECA course, together with the Examiner involved in the testing and revision of paper stages. The University replied with an exhaustive answer which outlined the purpose of the

ECA course, and maintained the accuracy of the marks ascribed to the student, as well as the accuracy of the report on the revision of paper exercise.

The meeting with the Director ECA and one of its most experienced examiners proved to be of paramount importance in reaching a balanced judgement. What follows is an explanation of the *raison d'etre* of the course, together with the technical details concerning course-content and examination methodology and procedures.

It transpired that quite a few students following Degree Courses did not require passes at Matsec ('A') level or at Intermediate level in order to be eligible to be accepted for their courses. Eligibility criteria vary from Faculty to Faculty, and some Faculties consider proficiency in, for example, science subjects as being more important when it comes to student selection. The student was following a B.Sc. (Hons) Degree Course in Statistics and Operations Research, and the prospectus for the course does not stipulate English 'A' or 'I' level passes as entry requirements. In view of the fact that a number of students, then, had lost contact with English on leaving Secondary School, the University created the ECA course in order to revive any skills they had lost through disuse and to furnish them with the new skills which would have been acquired had they taken up English at 'A' or 'I' level at Sixth Form.

The University did not impose the course on all those students who had not followed English courses at Sixth Form but rather subjected them to a test, the result of which would indicate those among them who would most benefit from it, and this was dictated by a scarcity of human resources (in the form of Lecturers who are capable of delivering such a course).

As its name implies, the course is tailored to impart or hone those linguistic skills which are deemed necessary whilst following a University course and, subsequently, whilst practicing professional career activities. Without listing in detail its course-content, it suffices to say that synoptic techniques were given their importance. This detail proved to be important in the course of the investigation.

Process

During the meeting with the Director of ECA and with the Examiner, it was explained to the Commissioner that the student did very poorly in the Synoptic exercise. A copy of her paper was provided, and it was clear to the Commissioner that the assessment

of the quality of work had been accurate, and based on scientific procedures. Subjectivity was not involved in any way. Her performance in the test led to her being selected for an ECA Course. The Commissioner subsequently met the parents and the student and explained to them that her selection was completely justified on the merits of her performance, and how the grade obtained was simply the result of a technical process. The Commissioner also explained that it was difficult to accept a claim which refused extra tuition and academic grooming. The parents and the claimant were basing their argument on at least two misconceptions, one being that her performance in English at SEC ('O' Level) indicated her actual ability to cope with the new academic demands imposed linguistically on her by the Degree Course she was following. Another misconception was the idea that being selected for the ECA Course carried any sort of stigma, since it was the result of her options in Sixth Form, rather than anything else.

The Commissioner also went into detail about the benefits which such a Course would confer. The family accepted the Commissioner's advice, and the case was deemed closed by all parties.

Conclusion and Recommendations

In his letter of closure to the University authorities the Commissioner, among other things, drew attention to the fact that the classification of such subjects as Economics and Accounts as Arts subjects in the Matsec options list was creating problems of perception among students who opted for them and did not opt for English at either 'A' or 'I' level, and suggested that in view of this and the subject-content, it would make more sense to classify them as 'Science' subjects. He also pointed out that such a re-classification would make opting for English or for an Arts subject more feasible; this would, in turn, relieve the ECA team of excessive pressure since fewer students would require a Course.

Case Notes from the Commissioner for Environment and Planning

Case Note on Case No EQ 0019
Transport Malta

Local Council accused of failing to remove traffic markings in front of a garage

The complaint
Complaint against Transport Malta and a Local Council on alleged lack of action to remove traffic markings in front of a garage.

Case history
Complainant stated that he rented a private car garage which abutted another such garage on one side and the doorway to a third party residence on the other. The two garages formed part of a row of similar garages.

Opposite his garage was a third party garage used by a truck owner. Relations between the truck owner and complainant were not on good terms and there was a history of confrontations between them.

In order to facilitate the truck's access to the garage, double yellow lines had been laid down along the road in front of the property facing the garage, terminating at the party wall between complainant's garage and the adjoining third party doorway. In fact, a further section of double yellow lines in front of complainant's garage, which had originally been laid down, were obliterated. This was all done in conformity with Transport Malta requirements.

Complainant had requested Transport Malta to obliterate a further section in front of the third party doorway in order to allow space for him to park his car opposite his garage without obstructing access to the adjoining one.

In its reply to this request Transport Malta stated that it could not accede to complainant's demands. It justified its decision on the grounds that 'Autoturn' modelling indicated that double yellow lines were required to allow the truck to access and exit the garage. It acknowledged that although access and exit could not be obtained in one clean sweep as some manoeuvring was necessary, reducing the length of double yellow lines further would have meant that the truck owner would not be able to use the garage.

Complainant was also notified that what he was proposing went against internal policy.

Observations
It was observed that the road was a one-way street with vehicles entering at the end nearest to the properties in question and exiting at the opposite end.

This meant that the truck would enter and pass in front of complainant's garage to enter its own garage.

However, on exiting, it would have to move towards the opposite end of the street, and therefore further away from complainant's garage.

It was also observed that parking was allowed in front of complainant's garage and the other garages adjoining it. Therefore to access the garage, the truck could not perform the swept path used by Transport Malta as a basis for its justification to refuse the request.

Documentary evidence submitted showed that in actual fact the truck entered the garage in reverse by moving past complainant's garage and the adjoining property, and then crossing the road in a reverse curve to enter the garage.

This manoeuvre enabled the truck to exit forward and proceed up the road.

In the light of the facts as established, the complaint against the Local Council was not upheld since the Local Council laid down the road markings under instructions from Transport Malta.

Likewise, the complaint against Transport Malta's insistence on the retention of the existing road markings was not found to be justified in principle since it was acting within its remit.

However, the particular circumstances of the case presented a situation where the permission for vehicle parking in front of the row of garages which included complainant's, in actual fact meant that the 'Autoturn' trace established by Transport Malta to allow the truck to access its garage could not be utilised.

Given these particular circumstances the complaint was found to be justified and it was recommended that Transport Malta should remove the contended length of double yellow lines.

Outcome
This complaint was found to be partly justified, and it was recommended that Transport Malta was to remove the contended length of double yellow lines.

Subsequent correspondence included a request by Transport Malta for a disclaimer by this Office in order to implement the recommendation, citing internal policy.

While the request was declined, Transport Malta was requested to explain what the internal policy consisted of. As a reply, a copy of the Motor Vehicles Regulations (S.L.65.11) was submitted.

Case Note on Case No EQ 0053
Planning Authority

Alleged lack of information on scheduling procedures

The complaint
Complainant (a Perit) stated that members of his family had found a scheduling notice pinned to their door.

However, he stated, neither the scheduling notice nor the relevant entry in the Government Gazette gave information on what rights the owners had to contest the scheduling, and had it not been for him, through his professional experience, the owners would have been unaware that they had the right to appeal to the Executive Council of the Planning Authority, and subsequently to the Environment and Planning Review Tribunal.

Complainant drew a comparison with notification of PA decisions where applicants' rights of contestation are clearly spelt out.

The Planning Authority was notified with the complaint, and with a preliminary opinion that the complaint appeared justified.

In its reply the Authority stated that rights of third parties served with a notification under Article 57 of the Development Planning Act 2016 were all contained and explained in the said Article, and were available on the Authority's website.

The Authority however took note of the recommendation and agreed to act accordingly.

Outcome

This complaint was therefore justified and as a result, scheduling notifications will henceforth contain guidance on the rights of the owners to contest the scheduling.

Case Note on Case No EQ 0051
Planning Authority

Incorrect application of policies in approving permits with no provision for on-site parking

The complaint
The Sliema Local Council lodged a complaint against the Planning Authority on alleged incorrect application of policy with respect to development applications in Sliema as regards parking requirements.

Investigation
The Sliema Local Council is preoccupied with the situation where the Planning Authority is approving a significant number of apartments, offices and hotels in the locality without provision for on-site parking with repercussions on town-centre traffic from cars desperately searching for a car space leading to health concerns due to pollution.

A total number of 104 applications for developments in Sliema submitted to the Planning Authority during the year 2016 were analysed. The Sliema Local Council alleged that the relative development permissions represented a shortfall of 184 car parking spaces and are in full violation of Planning Authority policies, namely the Development and Control Design Policy, Guidance and Standards 2015 and the Strategic Plan for Environment and Development as these permits*:*

- ignore the protection of the public realm and the more social objective;
- jeopardise the success and viability of overall development;
- deteriorate air quality through pollution leading to health hazards; and
- impose a contribution to the Commuted Parking Payment Scheme rather than imposing provision for on-site parking.

The Planning Authority submitted its views against this complaint and referred to the transport thematic objectives in the Strategic Plan for Environment and Development that facilitate the modal shift from the private car to greener mode and the provision of an efficient public transport and other green modes whilst stating that less parking provision will lead to car users shifting to other modes of transport, namely public/collective transport. The Planning Authority submitted that further concentration of development within the Principal Urban Area (that includes the locality of Sliema) creates the critical mass of population required for feasible public transport provision and encourages the reduction of traffic through pedestrianisation, shared street spaces and traffic calming to continue restraining car-use and free up streets for pedestrians. The Planning Authority also referred to the Development and Control Design Policy, Guidance and Standards 2015 goal in collecting funds which are then used to enhance the environment, improve historic areas and manage parking by supporting the provision of strategically located public car parks and also that in exempting on-site parking this policy states that this exemption can be applied not only where on-site parking is not physically and technically feasible but also where it is undesirable.

The reply to a Parliamentary Question dated 16th April 2017 gave the following breakdown on permits in Sliema upon which the Commuted Parking Payment Scheme was calculated:

Year	Number of Parking Spaces	Number of Permits
2014	53	25
2015	161	37
2016	257	93
2017	54	17
Total	**525**	**172**

This data shows the increase in the demand for parking in the locality of Sliema alone.

The Sliema Local Council quoted also a Parliamentary Question dated 3rd April 2017 stating that a total of 47 parking spaces have been sacrificed for the placing of tables and chairs on our roads.

Observations and findings

A detailed analysis of the 104 development applications submitted to the Planning Authority for the locality of Sliema during the year 2016 portrayed the following results:

a) 13 of these applications were refused/dismissed or are still pending;
b) 12 approved applications involve the change of use from commercial to commercial/residential;
c) 26 approved applications involve alterations, extensions, or amendments;
d) 5 permits were for minor developments such as an advertisement, tent, generator and cleaning;
e) 16 approved applications included provision for on-site parking or were on a site that is so restricted that parking cannot be provided;
f) 25 permits were for additional dwellings on existing buildings on which the Planning Authority imposed the Commuted Parking Payment Scheme;
g) 1 approved application involved the removal of the proposed garage on the request of the Planning Authority;
h) 3 approved applications for which the Planning Authority imposed the Commuted Parking Payment Scheme; and
i) 3 approved applications were for tables and chairs occupying parking spaces.

With regards to point (a) above, these applications were not investigated, refused or dismissed by the Planning Authority and are still pending in front of the Planning Authority.

Points (b), (c), (d) and (e) involve developments that do not require on-site parking and hence the Planning Authority was justified in issuing these permits.

As regards point (f), these developments involve the addition of dwellings over existing buildings (mainly following the introduction of the height relaxation policy emanating from the Development Control Design Policy, Guidance and Standards 2015). Although in this respect, this policy is a burden on the demand for on-street parking (as are also other issues such as the retention of existing facades as can be evidenced in many of the applications mentioned above), the imposition (rather lightly) of a €2,096 contribution to the Commuted Parking Payment Scheme for each parking space required is not enough to counter for the increasing demand for on-street parking, especially in similar dense localities such as Sliema. Even the

Planning Authority's argument that "*Only when car users realise that it is not possible to park in Sliema will they start to consider shifting to other modes of transport. As long as parking spaces are ample (and cheap, if not free!) car use will continue to rise and bus patronage and use of green modes will continue to decline, …*" does not do much to solve the parking problem that various localities are facing. Statistics show that registered cars are increasing by the thousands and the use of public transport does not relieve the need for garages/parking spaces as the cars (whether on the move or not) still need to be accommodated somewhere.

Point (g) relates to an application wherein the Planning Authority requested the garage to be eliminated in order to preserve the streetscape of the area. The Planning Authority's decision to preserve the streetscape for the sake of one on-site parking was justified as the introduction of the garage is considered detrimental to the environment of the area.

As regards point (h), the Planning Authority could have showed more sensitivity towards the parking problem and obliged the applicants to provide more parking spaces as established in the Development Control Design Policy, Guidance and Standards 2015, policy P18 that states: "*For both residential and non-residential development there will be a concerted effort to provide on-site parking in line with the Vehicle Parking Standards provided in Annex 1 (to original report) to this document. This will be particularly enforced in residential areas. If this is physically and technically unfeasible/impossible, or undesirable, there will subsequently be a contribution to a Commuted Parking Payment Scheme (CPPS)/Urban Improvement Fund (UIF).*" In approving these permits, the Planning Authority did not justify why the provision of more parking spaces for these developments were "*technically unfeasible/impossible, or undesirable.*"

As regards point (i), policy P8 of the Public Consultation Document entitled 'Policy, Guidance and Standards for Outdoor Catering Areas on Public Open Spaces 2016' states that "*In the case where the Outdoor Catering Area is directly adjacent to parking spaces, the permitting Authorities may consider requests for extending the Outdoor Catering Area over parking spaces. However, each case shall be assessed on its own merits and the extension over the parking space shall consist of an easily removable, reversible/demountable timber platform.*" In approving these permits, the Planning Authority did not consider the parking problems resulting from such

developments, namely the parking spaces being lost by the same development and the additional demand for on-site parking emanating from the same development.

On a general note, the Commuted Parking Payment Scheme for Sliema imposing a €2,096.44 (Lm900) "*fine*" for each parking space has been in force for two decades and it is time that this scheme is revised, more so when the number of registered cars has almost doubled.

Conclusions and recommendations

In view of the above, it was therefore recommended that the Planning Authority should:

1. be more considerate and strict when processing applications that can result in a higher demand for parking spaces and the Planning Authority should adopt a more positive approach by rewarding developments that provide for off-street parking rather than impose schemes that fine those who do not, especially in processing applications for outdoor catering areas;
2. embark on a study whereby the Commuted Parking Payment Scheme that has been active for more than two decades is revised and updated; and
3. promote collective developments through various incentives, as collective developments can improve the provision of on-site parking through the efficient use of common accesses and circulation areas. Collective developments can prove fruitful also to the developers, the neighbours and not least to the environment (in reducing haphazard development and the number of accesses and in involving bigger developers that are more structured and organised). Such collective developments can be promoted by introducing specific time intervals (say three or five years) wherein works, say in a specific street, can be carried out. Other than the advantage of providing an incentive for collective development, the period of construction inactivity grants the neighbours and the environment breathing space. Of course, such a drastic change in the way development is carried out will involve studies and public consultation, however, this procedure is to immediately be embarked upon as there seems to be no prospect that the number of cars will decrease (independent of the increase in the number of public transport patrons).

Planning Authority's Reaction Outcome

In reply to this report, the Planning Authority submitted that:

"1. The CPPS calculation is regulated by a Planning Circular and both the Directorate and the Board follow the same circular. Moreover, I can assure you that the application of the so called 'fine' is always left as a last resort.

2. A new study has just been completed and a document is currently being prepared for discussion internally and eventual approval.

3. As stated in the Government's electoral manifesto government will be providing a scheme for site parking. The Planning Authority has already identified a number of sites with the relative plans for consideration by the Ministry."

Case Note on Case No ER 0005
Building Regulation Office

Alleged unfair treatment in requesting EPC certification

The complaint
Complainant stated that the Building Regulation Office (BRO) was requesting him to submit an Energy Performance Certificate (EPC) on a building which had been sold for 8 years.

He contended that demanding such a certificate now, when the building could have undergone alterations and refurbishment, was unjust and unreasonable, especially since the certificate would not necessarily reflect the state of the property as at the time of the sale.

Requested to submit its reaction to the complaint, the BRO stated that:

> *"The EPC requirement is as per LN 376 of 2012. Clause 14(1) and 14(4)(a) which stipulates that an owner selling a dwelling after the 02/01/2009 would need to have an EPC registered.*
>
> *The 60-day period is determined by Clause 21(1) which states that: The Building Regulations Office may demand, from the owner of a building in terms of these regulations, or the agent of such owner, the production of an EPC in respect of the building or the installations within a building as required by these regulations, and if the building owner or the agent of such owner, as the case may be, refuses or fails to produce without reasonable cause the EPC, such person shall be guilty of an offence, unless such person provides the requested ECP* **within sixty days after the request was made.***"*

It also added that it was prepared to accept present-day certificates even though the property transfer had taken place years back.

One of the European Union Directives which forms part of the local legislation is Directive 2010/31/EU regarding Energy Performance of buildings.

This Directive, substituting all other Directives which were published earlier, established the objective that energy consumption is reduced by 20% by the year 2020.

To achieve this objective, several measures have been designed including those aimed at buildings using energy more efficiently by providing certain facilities to protect against extreme weather conditions, and deliver an acceptable level of comfort inside the building, with minimum energy consumption.

Locally, the first legislation that was published was Legal Notice 238/2006 (Minimum Requirements on the Energy Performance of Buildings Regulations, 2006).

It was replaced by another Legal Notice 261/2008 (Energy Performance of Buildings Regulations, 2008), which was then replaced with the present Legal Notice, L.N 376/2012, (Energy Performance of Buildings Regulations, 2012).

In 2011 the Building Regulation Office (BRO) was given more executive powers under the Act XII of 2011 (the Building Regulations Act of 2011), with one of the functions of this office being the implementation of the said regulations, although the office was already operating before this Act was published.

However, the introduction and implementation of these regulations was problematic from the start.

The investigation revealed that during the period between 2007 and 2010 problems with the software had caused the suspension of the implementation of the certification system, and that these problems had persisted up till mid-2011.

In addition, when the Ministry for Resources and Rural Affairs issued a notice that enforcement of the regulations was to commence, the responsibility for providing the EPC was placed on the shoulders of developers who had applied for a development permit after the 2nd of January 2009.

There was no indication on the impact that the same regulations might have had on property owners who had sold their property.

It also resulted that no information campaign to alert the general public as to the wide-ranging implications of the regulations had been carried out.

As a result, owners who sold their property were unaware of the obligations imposed by the regulations. Even if they had been aware, it would have been impossible to observe the regulations until the end of 2010, as the system was not functioning.

In view of these facts, the complaint was considered to be justified as property vendors were being treated unjustly once the failure of the system prevented them from submitting an EPC at the time of the sale.

At present previous owners were in no position to guarantee that they would be in a position to provide an EPC as they had no access rights over the property.

The BRO was criticised for issuing such demands under the penalty of fines for non-compliance.

However, it was noted that the delay in implementing the regulations could also have been due to a lack of resources, and it was recommended that the BRO be provided with adequate resources to undertake its obligations efficiently, in view of the important role that it played in the implementation of energy performance Directives and Regulations.

Outcome
The BRO informed that they would be seeking to obtain the EPC from the purchaser and not the vendor.

Case Note on Case Nos ER 0008 and ER 0010
Transport Malta

Transport Malta failed to take action to complete road formation

The complaint
Complainants stated that their road had been formed as required by law. All contributions had been paid, permits were obtained and the plots developed, yet Transport Malta was refusing to enter and conclude the road formation and surfacing. As a result, the road surface was in a bad state causing inconvenience through dust and inaccessibility for service vehicles.

The complainants stated that initially Transport Malta had refused to complete the road on the grounds that the development of the frontages had not attained the minimum ratio to qualify for the finishing works to be carried out, and that when the development had reached the threshold the Authority refused to carry out the works on the pretext that the road formation was incomplete.

In addition, they claimed that Transport Malta had carried out finishing works on other roads in the vicinity although they had been developed much later than the road in question.

Transport Malta was requested to state its position on the matter. It replied that:

> *"My client makes reference to the New Roads and Road Works Regulations enacted as Legal Notice 29 of 2010 and issued under Chapter 499 of the laws of Malta as Subsidiary Legislation 499.57 (a copy of which is attached for ease of reference) and, in the context of the complaint registered with your office, notes the following:*

1. *Part IV of SL499.57 applies to the issue that is the subject-matter of the complaint;*

2. *…[the road] is a private schemed road and it is therefore incumbent upon the person or persons who opened such road to ensure that it is properly levelled*[5]*, metalled, placed in a proper state with regard to drainage and provided with footways with kerb and gutter and kept in a proper state of repair (vide Articles 16 and 17);*

3. *For the purposes of Article 16, the person or persons who own property that abuts a road shall be deemed to be the person/s who opened such road and the owners thereof;*

4. *Where the owners of the road have failed to fulfil their statutory obligations as laid down in Article 16 and Article 17 of SL499.57, Transport Malta may carry out such works itself, at the expense of the owner, subject to prior notification in the manner required by law. The Authority may also asphalt the road itself at the owner's expense, again subject to due statutory notification.*

The plan and explanatory note attached hereto as Annex A show the extent of the schemed road and its proper alignment, the parts of the road that may be deemed to have been formed but not asphalted and the parts of the road that have been asphalted but are not properly maintained. Annex A also defined the total area of the schemed road as against the area of formed road (asphalted or otherwise) together with the percentage of development of the schemed road as also formed but not asphalted.

It is clear from Annex A, that the owners of … [the road] have failed to abide by their statutory obligations and now expect my client to step in to undertake works that are clearly their obligation and responsibility, to the extent that even were Transport Malta to act under the authority vested in it in terms of Article 19 of SL499.57, works would be carried out at the expense of the owners.

5 "*Article 12 of SL499.57 established that levelling must be to the line defined by the Planning Authority in consultation with Transport Malta and also defines the length of road to which such levelling applies.*"

My client further notes that there exist a number of private roads in Malta in respect of which the owners have fulfilled their statutory obligations in a manner by far superior to that in which the owners of …[the road] have fulfilled theirs and which are therefore more deserving of Transport Malta's intervention in terms of Article 19. It is clear that Transport Malta's resources, both human and financial, are limited and it would therefore be remiss of Transport Malta to prioritise this case merely because the owners have had recourse to the Office of the Ombudsman.

…

My client therefore contends that the inhabitants of …[the road] being also the owners thereof, have no legitimate right to expect Transport Malta to expedite its right to intervene in the face of their default and feels that the complaint should therefore be deemed unjustified."

From the investigation it resulted that whereas the streets mentioned by complainants had development carried out on both sides of the road, in complainants' case the opposite side to their property was not to be developed.

Therefore, it was their responsibility to form the full width of the road, while in the other cases, the developers on each side had each formed half of the road width, completing the full road formation, and enabling Transport Malta to enter and complete the surfacing.

A major stumbling block in complainants' case was that in order to form the full width of the roadway, land on the opposite side would have had to be purchased by them, to enable the full width formation.

Although legislation provided for compulsory purchase by Transport Malta where no agreement was reached between the developers and the land owners, the ultimate responsibility to bear the costs of such purchase would still have remained that of the developers.

It became apparent that complainants were reluctant to bear such huge costs, and indicated that they would be content to form and use one half of the projected roadway only.

For this to be possible however, the reduction in width of the roadway would have had to be authorised by the Planning Authority through a Planning Control (PC) permit.

In the absence of such a permit, the full width of the roadway had to be formed, and since this process had not been completed Transport Malta was correct in refusing to enter and surface the roadway.

Outcome
This complaint was found not to be justified. It was up to complainants to obtain a PC permit if they wished to form only one half of the roadway, failing which the full width of the roadway would have to be formed.

Case Note on Case No ER 0039
Building Regulation Office

Removal of debris at night during summer in a tourist area

The complaint
A resident lodged a complaint against the Building Regulation Office on alleged lack of proper procedures in permitting removal of construction debris at night.

Investigation
During August 2017, Birkirkara Road, St Julians was closed to traffic for a number of nights to allow the removal of construction debris from a construction site, thus leading to noise and sleepless nights for the residents.

These works were permitted by Transport Malta in order to mitigate traffic congestions as this road is considered as an arterial road and due to the ongoing Kappara road project.

On the 4th of August 2017, the Building Regulation Office approved the works in question to be carried out at night "*… as stipulated in Legal Notice 72/2013.*" The Building Regulation Office submitted that "*… no demolition or excavation works were to take place.*"

As later on, the complainant informed this Office that the works were once again being carried out during the night, this Office brought to the attention of the Building Regulation Office that:

1. the works carried out were construction works that require regulation through the 'Environmental Management Construction Site Regulations' (S.L. 552.09) Legal Notice 295/2007 whereas the Legal Notice 72/2013 quoted in same approval relates only to 'Avoidance of Damage to Third Party Property Regulations';

2. the competent authority in terms of Legal Notice 295/2007 is the Planning Authority;
3. Legal Notice 72/2013 is not the only and exclusive legal instrument to regulate these works; and
4. the decision of the 4th of August 2017 allowing the works on the strength of the latter regulations alone was wrong.

The Building Regulation Office was strongly urged to rigorously follow these procedures as the residents are right in complaining about the consequences of the approval which was issued by the Building Regulation Office.

With the road in question falling within a Tourist Area, the Malta Tourism Authority submitted that it was not aware or consulted before the permit in question was issued.

Observations and findings

The approval of the 4th of August 2017 for the works in question to be carried out was issued by the Building Regulation Office "*… as stipulated in Legal Notice 72/2013*". Legal Notice 72/2013 is entitled 'Avoidance of Damage to Third Party Property Regulations' and specifically lays down that the objective and scope of these regulations is "*… to ensure that before any demolition, excavation and, or construction works are taken in hand, methodologies that are technically sound are prepared by a* perit*, in collaboration with the site manager and the contractor, to minimise the risk of damages to third party property or injury to persons that may result through the proposed works.*" Article 2(2) of the same Legal Notice stipulates that "*The provisions of these regulations shall in no way be construed as having any bearing on the responsibilities related to the design of buildings and construction activity emanating from other legislative instruments.*"

The regulations proper to this case are the Environment Management Construction Site Regulations in Legal Notice 295/2007 which specifically lays down that "*These regulations have the scope of limiting environmental degradation through appropriate construction management practices that cause the least nuisance to neighbours, minimising the risk of injury to the public, protecting the property belonging to the Government and Local Councils, and as much as possible reducing the harm to the environment. The provisions of these Regulations shall in no way be*

construed as having any bearing on the responsibilities related to construction sites emanating from other legislative instruments."

The works in question consist in removal of debris from a site in Birkirkara Road, St Julians. The photos submitted show that these works were carried out by means of an excavator and truck loader. When it comes to "*Nuisance Abatement*" as established in the Third Schedule in Legal Notice 295/2007, excavation should not be construed to mean only the physical excavation in rock or loose material below the building floor level, but also the removal of any demolition material and loose material that accumulates on site following demolition works, especially considering that in both instances the same equipment is used and the same nuisance is created. Hence, the activity in question of removal of debris from site should be considered as excavation works in terms of the Third Schedule in Legal Notice 295/2007.

As the works in question were carried out during the night and as excavation works in Tourism Zones during the Summer months, according to the same Legal Notice, require the approval of the Malta Tourism Authority, the Building Regulation Office was wrong not to consult the Malta Tourism Authority and even more so in not being sensitive to protect the tranquillity of the residents at night.

Conclusions and recommendations

The approval issued by the Building Regulation Office for the removal of debris in a Tourist Area at night was wrong and the Nuisance Abatement measures established in the Legal Notice 295 of 2007 should have been considered.

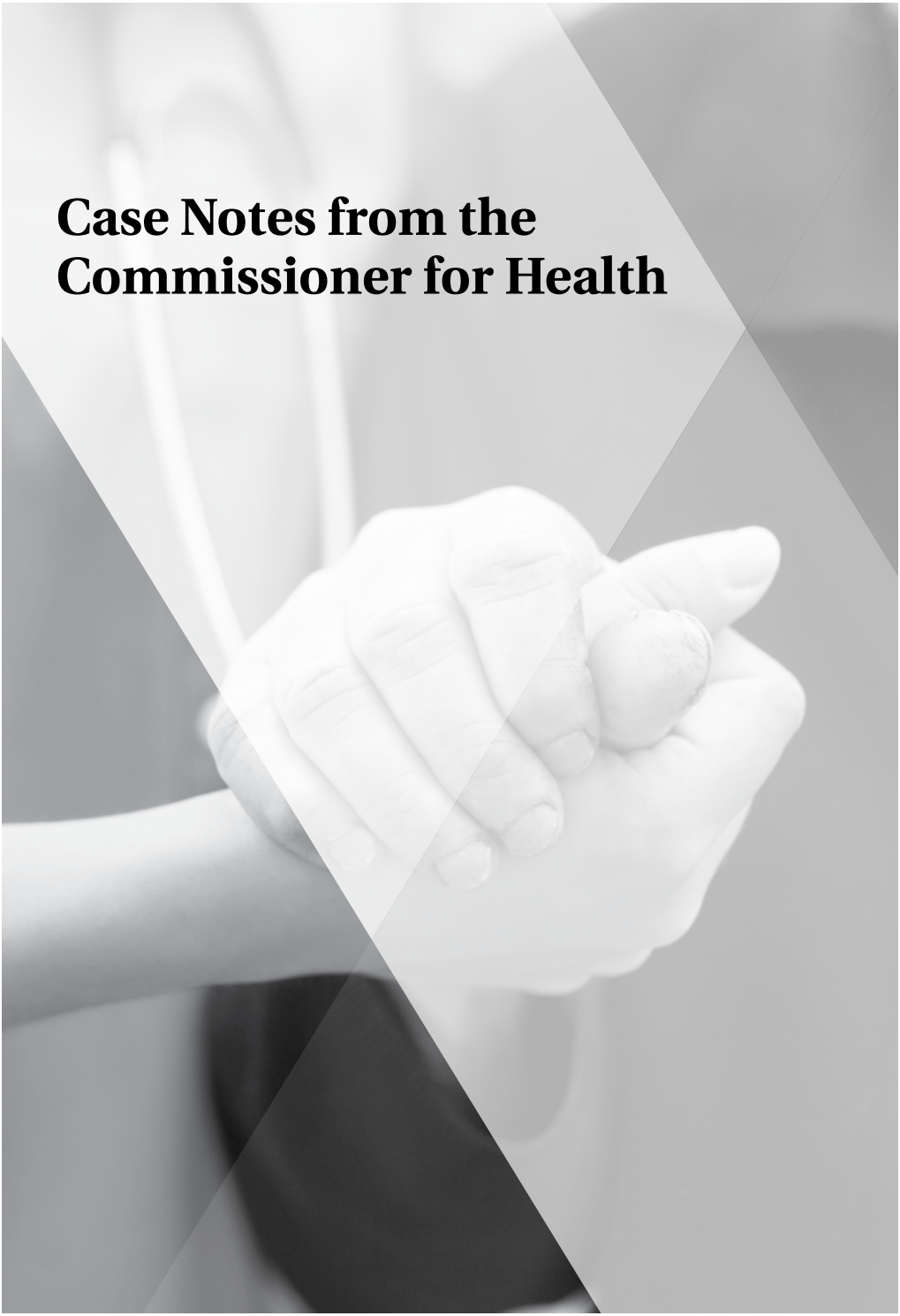
In view of the above it was therefore recommended that the Building Regulation Office should:

1. apply rigorously Legal Notice 295 of 2007 when issuing similar approvals;
2. consider removal of demolition debris from site as excavation works when applying the same Legal Notice;
3. ensure that developers carry out demolition works under strict mitigation measures and that these works are not embarked upon just before the start of Summer; and
4. approve similar works to be carried out in Tourist Areas and/or at night in exceptional circumstances and under stricter control.

Outcome

As no reaction was forthcoming from the Building Regulation Office within an established reasonable time limit, the Building Regulation Office has been informed that it is being understood that the Building Regulation Office is fully abiding by these recommendations in line with the same report.

Case Notes from the Commissioner for Health



Case Note on Case No HR 0021
Ministry for Health

Request for refund of qualification allowance paid

The complaint
In 2010, a Ministry for Health employee had applied for a qualification allowance for a Diploma Level 3 which she had obtained. The Qualification Allowance was approved and was being paid regularly. Following revision of the Public Service Management Code, new regulations governing the Qualification Allowance were issued and complainant was no longer eligible.

The employee, who was not aware of the new regulations, was requested by the Department to refund €1,900 in Qualification Allowance given and was informed that she was no longer entitled to the allowance in terms of the new regulations.

The investigation
The Commissioner for Health was asked to look into the matter. The Commissioner asked the Department of Health for their comments about the case and specifically asked why the complainant was not informed when the new directive was issued and was erroneously paid for a full five years.

In their reply the Department insisted that the complainant received an allowance which was not due to her and therefore she had to pay it back.

Conclusions and recommendations
In respect to the administration's claim to refund the overpayment resulting from the Department's mistake, the Commissioner concluded that the administration should consider the analogous but specific provision in Maltese Legislation regarding overpayment of benefits under the Social Security Act. This law clearly

specifies that when benefits have been overpaid by the Social Security Department, the latter can claim refunds subject to the following conditions:

a) If overpayment was due to any failure on the part of the beneficiary, for example the failure to declare changes in his or her status, the Department can claim the full amount of overpayment; and
b) If the overpayment was not due to any failure on the part of the beneficiary but was due to an administrative failure, the Department can claim back refunds only in respect of over payment made over the previous two years.

The Commissioner concluded that the mistake was totally on the part of the administration and complainant cannot in any way be blamed for it. He also considered that there was a difference between a situation where money is owed to Government on the basis of any law, and a situation, like the complainant's case, where through an administrative error, Government made an overpayment.

In his conclusion, the Commissioner quoted Section 1027 of the Civil Code which states: *"The action for the recovery of that which may have been unduly given, unless prescribed under any of the provisions contained in the title relating to prescription, shall be prescribed by the lapse of two years from the day on which the person to whom the action is competent shall have discovered the mistake"*.

The Commissioner added that this concept was also based on the added consideration that if the administration, through its own error, let a person to lead a lifestyle or enter into commitments on the basis of the pay package given to him/her, the employee should not be subjected to unnecessary or unfair hardship through long term reduction from an already reduced pay package.

Therefore, the Commissioner recommended that the administration should at least bear in part the responsibility of its failure and limit a maximum of two years in respect of its claim for refund.

Outcome

The Department of Health accepted the conclusions and recommendations of the Commissioner for Health and that complainant had to pay back around €600 instead of the €1,900 claimed by the Department.

Case Note on Case No HR 0024
Ministry for Health

Refusal to renew contract for post-retirement employment

The complaint
A nurse employed at Mater Dei Hospital who was approaching the retirement age applied to continue to serve as a nurse after reaching her retirement. The Hospital Administration refused her application without providing an explanation. The nurse felt mistreated and that the department was unjust in its decision because other nurses, who were much older than her, had their application approved without any difficulty. She decided to lodge a complaint with the Ombudsman and seek redress.

The investigation
The Ombudsman accepted her complaint and referred the case to the Commissioner for Health for investigation. Aware of the great shortage of nurses in the health sector, the Commissioner sought the reaction of the Department for Health. The Commissioner also requested the personal file of the complainant to examine the matter. The Commissioner discovered that the Director Nursing and the Senior Nursing Manager, both direct superiors of the complainant, had recommended that complainant's application should be approved. However, the Hospital Administration instructed that the contract should be terminated quoting *'prevailing circumstances'* as the only reason for the decision. The Commissioner did not accept this justification and asked the Permanent Secretary in the Ministry for Health for further clarification.

The Department of Health reacted by stating that the renewal of complainant's re-employment was not included in the HR Plan and therefore the decision that was taken was based on the plan submitted by the Ministry. The Department also informed the Commissioner that, a number of new nurses were joining the health

workforce. The Commissioner commented that according to the Malta Union of Midwives and Nurses (MUMN), the nursing service is short by 500 nurses, of which 240 were at Mater Dei. Therefore he requested the Department to reconsider.

During the investigation, the Commissioner discovered that the Government and the MUMN had reached an agreement that in view of the great shortage of nurses, all Maltese nationals who seek to be re-employed post-retirement age, were to be accepted provided that they were found fit to perform nursing duties and they pass an interviewing test. Furthermore, the Commissioner found out that the Ministry for Health had issued a Call for Applications inviting retired nurses to apply for re-employment. Following this development, the Commissioner saw no reason why complainant's request should be refused and recommended that the complainant should be re-employed.

Outcome
Following the said finding and the recommendation by the Commissioner for Health, the Department of Health agreed to re-employ complainant.

Case Note on Case No HR 0030
Ministry for Health

Request to grant foreign patient access to cancer treatment

The complaint
A foreign third country national who was not awarded a refugee status was admitted to Mater Dei Hospital. During the admission, he was diagnosed with a medical condition which needed surgery. Due to the urgency of the case he was operated at Mater Dei Hospital. Following the operation, the patient needed chemotherapy treatment and was referred to Sir Anthony Mamo Oncology Centre.

However, since the patient is a third country national and therefore he was not entitled to free healthcare, the Consultant who was treating the patient, was not allowed by the hospital authorities, to see him until he paid the hospital fees amounting to thousands of euros. The patient was not in a position to pay the fees due as he was practically penniless.

The Consultant concerned wrote to the Commissioner for Health explaining the case and asked whether he could help in this pitiful case.

Recommendation
The Commissioner for Health agreed to investigate the case and asked the Health authorities to consider this case as exceptional. In his letter to the Ministry, the Commissioner recommended that the Minister for Health invokes paragraph 26(5) of the Health Act which states: *"Without prejudice to sub-article (4) or to any other law and regulation, the Minister may approve for the partial, or full, waiver of fees and, or costs due by any person, not being an insured person, in exceptional circumstances, and, or on humanitarian grounds."*

The mentioned clause would enable the health authorities to waive the pending fees and would also approve any needed oncology treatment.

The Commissioner also mentioned the fundamental rights every individual is granted by the Constitution of Malta, the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union.

The Commissioner also recommended that when there are cases that the hospital authorities decide to withhold treatment for whatever reason, the Ministry for Health is to be informed so that the Ministry would be able to go into the details of the case and issue rulings to the hospital authorities accordingly. This would avoid any delay in treatment which in certain circumstances is crucial.

Outcome
The Ministry for Health accepted the Commissioner's reccomendation to consider this case as exceptional. The hospital fees were waived and the required treatment was given. The Ministry added that funds from EU sources directed to member states that are most exposed to the immigration phenomenon will be solicited.

Case Note on Case No HM 0029
Ministry for Health

Drug for prostate cancer

The complaint
In March 2017, the local media reported the Minister for Health saying that the Enzalutamide drug for the treatment of cancer of the Prostate was to be approved by the Government Formulary List Advisory Committee (GFLAC) and therefore would be available for free for patients in need of such treatment.

In the previous months, the Commissioner for Health had already communicated with the Department of Health in regards to a complaint from a patient suffering from prostate cancer, who was prescribed another type of treatment, Abiraterone.

Correspondence with the Ministry
The Commissioner for Health reminded the Ministry for Health that Abiraterone which is prescribed for the same condition was also indicated. He also explained that the two drugs were not interchangeable, but were given according to the needs of patients, that is, certain patients would need one drug and other patients would need the other drug. The Commissioner asked whether the Ministry had the intention to include both drugs since, even in the UK, both drugs were considered as the first line for the treatment of prostate cancer.

The Chief Medical Officer informed the Commissioner that the Advisory Committee on Healthcare Benefits (ACHCB) received a recommendation from the GFLAC to introduce Enzalutamide. The Commissioner asked for an explanation as to why the Committee had decided to go for one treatment and not for both. The Commissioner insisted that this would amount to discrimination with patients who need the other treatment and recommended that Abiraterone be also included in the Government Formulary List for free medicines.

Outcome

After months of correspondence, the Ministry for Health has not yet approved the Commissioner's recommendation.

Case Note on Case Number HR 0050
Ministry for Health

Request for unpaid leave not approved

The complaint
A Mater Dei Hospital employee had asked for three months unpaid leave to try a new job in the private sector. Complainant was told by the hospital administration that the period of three months was too short and advised him to apply for one year unpaid leave.

Following this request from his superiors, the complainant applied for a year of unpaid leave. Before accepting his application, he was asked to avail himself of his vacation leave before he starts the one year unpaid leave period. When complainant used all his vacation leave, his unpaid leave request was put on hold until a replacement was found. Complainant decided to refer the case to the Office of the Ombudsman because he felt that he was misguided.

The investigation
Since the complaint was against Mater Dei Hospital, the Ombudsman referred the case to the Commissioner for Health for investigation. The Commissioner for Health started the investigation by requesting the comments of the Department of Health. The Department of Health insisted that even though every effort was being made to accommodate the personal reasons of the complainant, they had to find the right balance in order to ensure a timely service to those who might be affected by the complainant's absence. The Permanent Secretary continued that, as soon as a replacement was found, the complainant will be released on unpaid leave.

The Commissioner reacted by citing paragraph 2.7(ii) of the Public Service Manual on Special Leave which stated that *"temporary substitutes may be engaged to replace employees who avail themselves of unpaid leave to try alternative employment, provided that prior approval is obtained from the respective Permanent Secretary, subject to existing parameters."*

The date when complainant had to start his new endeavour was fast approaching, with the department still on the lookout for a suitable replacement; the Commissioner for Health requested that the matter be treated with urgency. He added that if the complainant had to resign, they would still face the problem of a replacement and therefore the responsibility of finding a replacement falls solely on the department.

Outcome
Following the intervention of the Commissioner for Health the department granted the one year unpaid leave and complainant successfully commenced his new employment in the private sector.

Case Note on Case No HQ 0080
Ministry for Health

Definite contract terminated without justification

The complaint
A healthcare professional, employed on contract for service with the Department for Health, felt aggrieved because his contract was not renewed. Since complainant had given up his private practice in order to be in a better position to honour his contractual obligations, he became unemployed. The complainant stated that he was not given a reason behind the decision of not renewing his contract.

The investigation
The complainant lodged a complaint with the Ombudsman, who on his part referred the case to the Commissioner for Health for investigation.

The Commissioner for Health started the investigation by seeking the comments of the Ministry for Health. In its reply, the Ministry stated that the relationship between the complainant and the Ministry was on a definite contractual basis and therefore the Ministry was in its right to terminate it. The Ministry referred to clause 6.1 of the contract of service which stated "*Either party shall (without prejudice to and in addition to any remedies available to him) be entitled to terminate this agreement forthwith by written notice to the other party, for whatever reason.*"

The Ministry however added that the decision not to renew the contract, was because of his behaviour towards his superiors and the patients.

In his reaction, the Commissioner for Health argued that in spite of the fact that complainant was not a Government employee he, nonetheless, was giving a service to the Government and was being paid out of public funds. The reason given

verged on disciplinary action and he should therefore have been given a written notice to this effect and the opportunity to defend himself. As proclaimed by the European Ombudsman, good administrative practice includes the right of a citizen to be given reasons for decisions which affect him.

Following the representation by the Commissioner for Health, complainant was given an appointment by the Primary Health Care (PHC) authorities to discuss the issue. The Commissioner was present during this meeting.

Following this meeting, the Commissioner was informed by PHC authorities that they were willing to give complainant another chance and enter into a "*gentleman's agreement*" and re-employ him. However, the contract will be for only three months since discussions were being held with the Medical Association of Malta (MAM), and depending on the outcome, will then receive instructions how to proceed with all new contracts from October onwards.

The authorities explained that complainant had to abide by the rules of the Institution. They were not questioning his clinical competence but insisting that he should abide by the job description.

Complainant agreed to enter into the mentioned "*gentleman's agreement*" but made counter conditions to which the Ministry could not agree. Complainant informed the Commissioner that he was reluctant to sign a new contract for just three months, notwithstanding the discussions being held with MAM. The Commissioner explained that unless he is already on contract he will not be eligible for renewal of his contract beyond the three months, for the simple reason that there was no contract to renew.

Conclusions and recommendations

The complaint emanated because complainant's Contract for Service was not renewed without any written explanation. This was in accordance with the terms of the contract.

The reason for the decision to terminate the contract was given and complainant was given the opportunity to give his version of events. He was even offered renewal of the contract, albeit for a short period of time, because of the discussions

that were ongoing with MAM. Complainant had to decide whether to agree on the terms given by the department or whether to proceed with legal action against his employer.

Therefore, the Commissioner concluded that since complainant's request to be given a hearing was met, and was even offered immediate re-employment, therefore he saw no reason why this case should pursue. The decision as to whether complainant accepts the "*gentleman's agreement*" or whether he proceeds with legal action rested solely with him. The Commissioner remarked that he respected complainant's right how to best safeguard his interests.