

CASE NOTES 2019

PARLIAMENTARY OMBUDSMAN MALTA




OMBUDSMAN

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OMBUDSMAN

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Foreword

The Ombudsman as a Mediator

On occasions the attention of the Office of the Ombudsman has been drawn to the fact that the number of final opinions by the Ombudsman and his Commissioners has decreased and that this could be a negative indicator on the performance of the institution. This is not necessarily so. Indeed the opposite might also be true. It is a fact that more emphasis is being made on trying to reach an amicable solution of complaints through mediation.

The core function of the Office of the Parliamentary Ombudsman is to investigate complaints from persons aggrieved by the action or inactions of the public administration. In the course of these investigations it often becomes apparent that the complaint can be resolved through an exercise of mediation bringing together the complainant and the public authority that has given rise to the grievance.

Having established the basic facts relative to the merits of the complaint the investigating officer offers his/her good services to attempt to reconcile divergent opinions or to convince the responsible official to take appropriate action to remedy perceived injustice or unjustified delay. Not surprisingly the percentage of complaints that can be resolved without the need to conduct a full enquiry and formalise a final opinion is relatively high. This of course does not mean that such cases can always be disposed of summarily or without considerable efforts. On the contrary they often require complex discussions and exchange of correspondence sometimes involving different interested departments and authorities. On occasions, witnesses have to be heard and meetings held with the complainant and often with public officials before a positive result can be registered.

Experience has shown that attempting to resolve the complaint through a process of mediation always achieves a result beneficial to complainants. In those cases where the mediation process provides proof that the complaint was not justified,

the complainant would as a rule, be satisfied with the information given and the access that the Office would have given him to documents and proof that show that the department or authority had acted correctly and justly. It is not unusual for complainants in such cases to express satisfaction that the Office of the Ombudsman has set their mind at rest that they have not been unjustly or unfairly treated.

On the other hand, in those cases where mediation would benefit both complainant and the public administration especially when it results in an outcome that substantially upholds the complaint and where action is taken to remedy the injustice. Complainant would have achieved the optimum result in so far as he would as a rule, have been given an appropriate remedy for the injustice he suffered; while the public administrator would have cleared itself of the allegation and satisfied an individual complaining about real or perceived maladministration.

Moreover, it is not uncommon that in the course of a mediation exercise during the investigation of an individual complaint, unjust or improperly discriminatory procedures that negatively affect a wider spectrum of society are identified. In such cases the Ombudsman would be acting as a proactive agent to visibly improve the public administration helping it to provide a service that is more efficient, equitable, transparent and accountable.

The success or failure of a mediation process depends on the attitude of the parties concerned and their willingness to negotiate and compromise. The public administrator and the complainant need to recognise that mediation requires a give and take approach. The public administrator must show a readiness to avoid a rigid position where he is allowed a measure of flexibility in the exercise of his administrative discretion. On the other hand, the complainant must be prepared to make concessions and accept a just and equitable solution that affords him realistic and substantial redress.

A mediation process does not prejudice the investigation of the complaint. It should in fact facilitate the compilation of the facts necessary for the Ombudsman and Commissioners to conclude the process and to formulate their final opinions. It will also help them to appreciate better the complexity of the complaint to determine whether it is justified and to identify an appropriate remedy.

Mediation requires patience and perseverance. The complainant and the public administrator need to understand their respective positions and the reasons for their initial reluctance to make concessions that allow compromise. Often the public administrator is afraid that by doing so he would be creating a precedent for similar past or future complaints. Decisions in such cases need to be referred to and taken by superiors who not only need convincing but must often find the funding necessary to provide redress. All this requires time and persistent efforts.

Regrettably, mediation is not always possible or successful. There have been cases where the Office was convinced that justice and equity required that an amicable solution should have been found in the interest of all. When mediation is not successful for reasons that were objectively unjustified and unacceptable the Office of the Parliamentary Ombudsman considers that it has failed in its mission to be of service to complainants. This is especially so when the merits of the complaint could have far reaching consequences well beyond the personal interest of the complainant.

This publication includes some examples of complaints that have been resolved through a process of mediation. They provide an inkling on how mediation is intertwined with the investigative procedures and how it can be instrumental in determining and resolving complaints.

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.

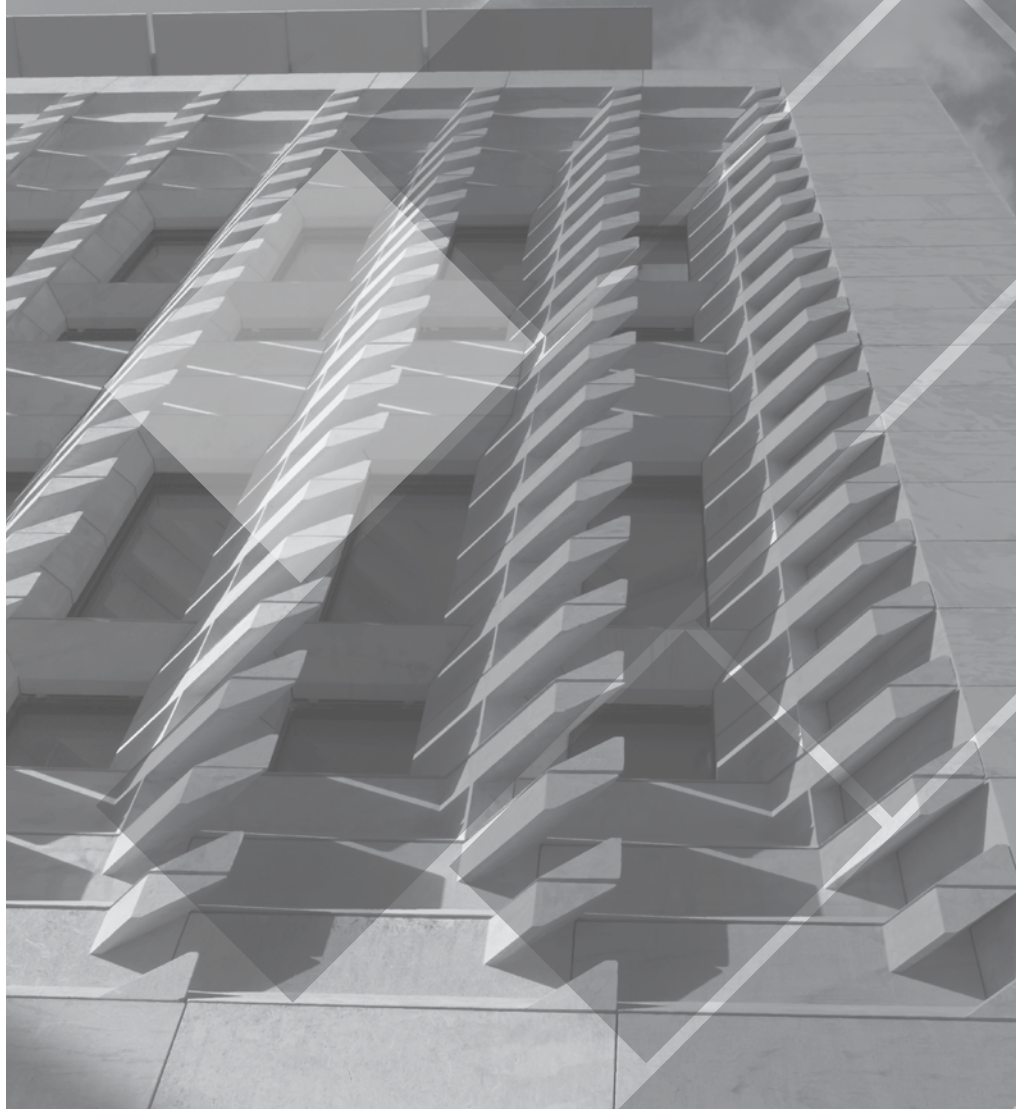
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CASE NOTES

Parliamentary Ombudsman



Social Security Department

Pension anomaly finally rectified

The complaint

Complainant asked the Social Security Department for an estimate of the pension rate he would be entitled to on retirement, including the percentage increase should he choose to keep on working when attaining retirement age up to the age of 63. He had been informed that his percentage increase would amount to 10.5% of the actual pension. On the basis of this information he had decided to continue working beyond 61 years even though he had enough paying contributions and could therefore have stopped working at age 61 and receive the full social security pension he would then be entitled to.

After some months, complainant had requested an updated estimate of his pension entitlement based on his latest payslips. He was however then informed that he would not be benefitting from the percentage increase schemes due to the fact that the University of Malta, with whom he was employed, fell under the public sector. This new negative information was communicated to him one year and seven months after he had continued working on the basis of the wrong information given to him.

Complainant insisted that the law should be amended since, as it stood, it was blatantly discriminatory against employees in the public sector. Moreover, he submitted that he should personally be compensated since he had clearly been misinformed. A fact that was acknowledged by the Social Security Department itself that apologised for the wrong information given to him months earlier. Complainant submitted that he expected to be given the relevant percentage increase with his pension since he should not be made to suffer as a result of someone else's mistake.

Complainant further stated that Government should shoulder the responsibility of amending the law and thus eradicate this discrimination between workers in the public sector and those in the private sector.

The investigation

The investigation showed that the facts as alleged by complainant were correct and fully supported by documents submitted. Moreover, as a result of enquiries made by this Office, the Social Security Department stated that the initial assessment was tentative and could not be considered to be an appealable decision. It was conceded however, that as claimant was maintaining, the law as it stood was discriminatory *vis-à-vis* employees in the public sector and discussions were being held with higher and competent authorities to have the anomaly rectified.

Conclusion

The Office noted that these discussions were also being held also in consequence of another opinion given by the Ombudsman on analogous facts, decided in May 2017. In that opinion the Ombudsman held 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 eventual higher rate of pension to private sector employees but did not provide the same benefit to employees in the public service who were in similar situations. The Ombudsman affirmed that it was correct to state that this concession was voluntary and that the employer 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 benefit to public service employees which was being given to other employees in the private sector. The Ombudsman had then recommended that proper measures be taken to remove this anomaly¹.

In the Budget Speech of October 2018, a new measure was announced whereby these incentives would also be applicable to employees within the public administration and discussions on its implementation were being held with the Social Security Department.

1 Published as Case Note in Edition 37, 2017 entitled 'Improper discrimination in pension benefit'.

Sequel

This measure was put into effect by means of Circular OPM 9/2018 of 3 December 2018. The 'top up' pegged to the postponement of pension beyond the age of 61 for public employees became applicable with effect from 1 January 2019. This Office was informed that the benefit would now be applicable to complainant who was due to retire in April of that year.

Housing Authority

Lift installed through successful mediation

The complaint

A complainant who in March 2015 purchased a second floor flat from the Housing Authority felt aggrieved that after more than two years and eight months the Authority had not yet installed the passenger lift in the block of flats. Complainant insisted that this was a contractual obligation and that the Authority had failed and was still failing to honour its commitment. This inordinate delay was causing him hardship that needed to be remedied.

Mediation

The Office of the Ombudsman verified the correctness of the basic facts and decided to mediate with the Authority in an attempt to remove obstacles that were preventing it from fulfilling its contractual obligations. The Housing Authority informed the Ombudsman that the tender for the lift in the block could not have been published before because the block of apartments did not satisfy the other contractual obligation that the lift should be operative once the majority of the buyers of the flats in the block were residing in their apartments. When filing his complaint, complainant had acknowledged that the installation of the lift was subject to this condition. However he had also pointed out that that condition had been satisfied almost a year and a half before filing his complaint but nothing had happened since.

The Housing Authority also informed the Office of the Ombudsman that new passenger lift standards regulations had come into effect on 1 September 2017. As a result changes had to be made in the shaft so that it could conform to the new requirements. The shaft was in fact reassessed and it was determined that civil

works would need to be carried out along the landing side. The Housing Authority informed the Ombudsman that the tender for the installation of the lift had been reviewed and was currently referred to the MFCS Ministerial Procurement Unit for publication, “*The lift to be procured will be an 8 passenger lift compliant with the latest version of the Accessibility for All Guidelines as required for all lifts in Social Housing Blocks.*”

The Investigating Officer continued to pursue the complaint with the Housing Authority insisting on a projected time frame for the installation of the lift. Eventually in April 2019, five months after the filing of the complaint the Ombudsman was informed that the tender had been approved and a call for tenders had been issued. The projected time frame could not be given before the process of tendering had been concluded.

Once the Ombudsman had established that the authority had taken concrete action to address complainant’s grievance and was assured that the lift in complainant’s block of apartments would be installed shortly, he proceeded to close the case at that stage. He informed complainant that should the installation be inordinately delayed he could again file a complaint with his Office for further investigation if necessary.

Public Service Commission

Recommendations to improve selection processes

The complaint

The Ombudsman received a number of complaints in connection with a selection process conducted by the Public Service Commission for the post of Assistant Principal in the Malta public service. Following the issue (PSC) of the call for applications a thousand civil servants applied for the post. Candidates had to undergo a general ability test (GAD) and an interview. When the mammoth exercise was completed, an order of merit was published. Hundreds were eventually appointed but candidates who placed in the upper range of 300 and beyond were not successful.

The Ombudsman investigated complaints from applicants who had sought his intervention after they had unsuccessfully petitioned the Public Service Commission. This case note is not concerned with the investigation of individual cases. Each complaint has its particular characteristics that emerge from the performance of individual candidates. During the selection process their academic qualifications, suitability and aptitude for the advertised post as well as a subjective assessment of the Selection Board of the qualities of each candidate determined their order of merit. These are matters that as a rule, should not concern the general public; nor does the outcome of individual complaints. What is, on the other hand, of public interest, is the correctness of the selection process itself, the transparency of the procedures adopted by the Selection Board and the Public Service Commission as well as the measures taken to ensure a fair and just promotion exercise.

Considerations that merit attention

In the investigation of these complaints these important matters were highlighted and considerations made by the Ombudsman on them merit attention. All complainants felt that they had been unjustly treated because:

- a. the marks assigned to them at the interview did not reflect the marks that they deserved considering their capabilities;
- b. complainants were aggrieved by the subjective opinions of the Board and the assessment methodology when awarding marks;
- c. the Board failed to justify or provide adequate reasons for its valuation; and
- d. the limited time allocated for the interview was inordinately brief and further compounded the unfairness of the exercise.

During the investigation the Ombudsman was provided with pre-set criteria and weighting that had to be applied by the three Selection Boards examining applicants as well as the set of questions used for the interview process and indications on how they had to be put to applicants during the interview. The Office of the Ombudsman was also provided with the notes taken by the Selection Board during interviews that recorded which questions complainant had actually been asked. It was established that the Selection Board followed the guidelines stipulated and the interview notes reflected the comments of the Board on the performance of the applicant.

General principles

Before considering the complaints in the light of the evidence produced during the investigation the Ombudsman made a number of important points.

His Office could only investigate cases involving the PSC if there was proof to his satisfaction that the complainant had sought redress from the Commission as they had in fact done.

His Office would not recommend a change in the PSC decision if complainant's petition had been treated fairly. That is: i) the PSC had given due attention to the points raised in the petition; ii) all relevant information had been considered; and iii) there was nothing in the process or deliberation on the petition that could lead the Ombudsman to conclude that any provision of Article 22 of the Ombudsman Act precluded him from investigating the case.

The Ombudsman stated that it was therefore not his function to investigate aspects of a complaint that were not in the first instance presented in the petition examined by the PSC. Nor could he conclude that the result of the interview was unfair, mistaken, discriminatory or otherwise unjust when it resulted that the selection process was a valid one and there was no clear, objective evidence that the process had not been conducted fairly or was not in line with the established criteria.

The Ombudsman did not himself decide or comment on how these criteria were set, even if for the sake of argument, he was not in agreement on the criteria/sub-criteria that were applied in a given process, unless it resulted that these were intended in advance to favour a particular candidate. Nor did the Ombudsman criticise the application of these criteria unless it resulted that this was not done uniformly. It had to be stressed that the Ombudsman did not substitute a subjective assessment/decision taken by a selection board by his own. For this reason unless there was clear and objective evidence of any irregularity in the process or that any action/decision of the Selection Board was manifestly wrong in respect of the interview of the candidates involved, there was no room for a differing opinion from the Ombudsman.

Unfairness of the process

The investigation of complaints on the fairness of selection processes requires an inquiry into the procedures adopted by the Public Service Commission when considering petitions by complainants and complaints on the selection process itself regarding the conduct of the Selection Board. The Ombudsman has therefore in the first place to determine whether the Commission had given due consideration to all the points raised by complainants in their petition and whether all relevant information had been taken into account.

The Ombudsman opined that in this case, while it could not be denied that the PSC did take cognisance of complainant's petition and had also made enquiries with the Selection Board, the outcome of these enquiries were rather generic and did not seem to address all the points raised by complainants. It might have been opportune at that stage for the Commission to provide a more detailed reply to complainants, thus allaying fears that the Commission did not give due consideration to all the points raised by him. This said however, the Ombudsman could not state that the Commission was mistaken in its conclusions.

The investigation did not find any unjustified discrepancy. The marks obtained in the written test and the interview were separate and distinct processes and a good performance in one did not guarantee an equally good performance in the other. The Ombudsman did not find any evidence that suggested that the assessment process was not conducted in accordance with the established pre-set criteria. One had to bear in mind that the pre-set questions act as a guide on the topics that had to be covered during the interview. They need not always be rigidly followed and all depended on how the candidates replied. The Ombudsman needed to be satisfied that the Selection Board had in fact assessed complainants in line with the established criteria and sub criteria.

Subjective assessment in Selection Processes

Complainants generally felt aggrieved by the subjective opinions of the Selection Board when awarding marks. This grievance was made with particular reference to those criteria which by their very nature, could not be objectively assessed. One cannot criticize the Board for subjectively assessing these particular criteria. Moreover there was no indication that subjective assessment/decision taken by the Board were manifestly irregular or wrong. The Ombudsman noted that the removal of subjective assessment would render the interview process redundant, consequently making selection processes less effective.

The Ombudsman stressed that he would not substitute a subjective assessment/decision taken by a selection board by his own unless there was clear and objective evidence that an irregularity had taken place in the process or that any action/decision of the Selection Board was manifestly wrong in respect of the interview of the candidate involved. The Ombudsman concluded that he was satisfied that in the complaints he investigated in this particular selection process the Public Service Commission had given due consideration to all points raised by complainants in their petitions and all factors were taken into account when reaching its decision. He would not therefore disturb the PSC's decision and complainants' requests that their marks be reassessed was not justified.

Recommendations made

In conclusion the Ombudsman felt the need to make recommendations arising out of the investigation of these complaints. He observed that hundreds of candidates had been assessed as a result of this call. The sheer number of candidates necessitated

the formation of three selection boards. The Office had serious reservations on the practice of conducting very large selection processes that required the appointment of multiple selection boards. It was a fact that the majority of the assessment criteria in an interview process were subjective in nature. Their assessment was dependant on the subjective opinions of the members of the Selection Board.

Despite any possible safeguards put in place (including pre-set questions and the different boards meeting regularly to discuss methodologies), subjective assessments would invariably differ from board to board. A completely uniform and cohesive assessment of all candidates cannot be guaranteed when such assessments are carried out by different selection boards composed of different members. Which in and of itself brings into question the fairness of this practice.

In line with what had been previously recommended by him, the Ombudsman recommended that in order to avoid such large and administratively complex selection processes, the Commission should demand that more frequent calls for application are made. This would result in fewer applicants per call, which in turn might remove the need of appointing multiple selection boards.

Parole Board

Parole justly denied

The complaint

A prisoner detained at the Corradino Correctional Facility, serving a sentence for a serious offence, felt aggrieved by the refusal of the Parole Board to allow him out on parole even though he was entitled to this benefit.

The facts

Complainant submitted that he had been given authorised leave of absence from the Facility strictly on parole. He was instructed to work at a church in Kalkara but had refused to continue to do so when he was told to whitewash areas he considered to be dangerous because of an injury to his back. Complainant had also refused to carry out other community work assigned to him and was therefore ordered back to the correctional facility. He had contested the decision of the Parole Board but to no avail.

Detainees have free and confidential access to Ombudsman

The complainant then requested the Ombudsman to investigate his case, in doing so he made use of a provision in the Ombudsman Act that secures free, private and confidential access to the Ombudsman by a procedure expressly laid down in sub section 2 of Section 16 of the Act. This provides that where any letter, appearing to be written by a person in custody or on a charge or after conviction of any offence that is addressed to the Ombudsman, shall be immediately forwarded unopened to the Ombudsman by the person in charge of the place where the writer of that letter was detained.

Conversely any letter written by the Ombudsman to the detained person should be immediately forwarded unopened to him by the person in charge. Procedures are in place to enable the Ombudsman and the Investigating Officers to access detainees

in the correctional facility and speak to them in confidence and in strict privacy. This can be done both by one to one personal interviews, by telephone and any other means of communication. Complainant in this case availed himself of these arrangements and was able to explain his case fully to the Investigating Officer.

Parole procedures

A Parole clerk of the correctional facility informed the Ombudsman that, when an inmate became entitled to apply for parole in terms of the Restorative Justice Act, he would be approached by the Parole clerk and if he was interested, a parole application was filled in. His case would be referred to the opportune units and a report prepared. The parole dossier was then forwarded to the Offender Assessment Board for its recommendations and the case would then be brought before the Parole Board.

In complainant's case his application was approved with effect from 3 November 2016. Among the conditions imposed for the grant of parole, he was to perform 20 hours of community work every week under the directions given to him by the Parole Officer. The Board was soon after informed that complainant had failed to do the work he was to carry out at the Capuchins' Convent in Kalkara.

The Board then, in agreement with the Parole Officer, assigned complainant to community work at a cat sanctuary. However, he again failed to carry out this work and had even tried to avoid specific instructions given to him by the Parole Officer. In view of this information the Board had revoked the Parole licence after hearing the Parole Officer giving further details of the case during its last meeting.

The investigation

The Investigating Officer confirmed that the Parole Board had revoked the parole licence given to complainant because it was proved that he had failed to comply with the conditions imposed on him. Sub Article 2 of Article 16 of the Restorative Justice Act provides that in such circumstances, the prisoner would forfeit his right to parole and would be sent back to the correctional facility to continue serving his term of imprisonment and would not be eligible again for parole.

Complainant continued to protest that he had been treated unfairly and that he had failed to satisfy the condition set out in his parole licence to do community

work because his serious back condition precluded him from doing heavy work. He claimed that the Parole Board had not taken full cognisance of this fact and asked for his case to be reviewed. The Investigating Officer sought to obtain the Parole Board's file on complainant's case that was eventually forthcoming, even if after some reluctance and prodding.

The Investigating Officer thoroughly investigated the allegations made by complainant. He met him several times at the Correctional Facility and discussed his case with officials of the facility and of the probation and parole departments. The investigation showed that complainant had been fully aware that his parole licence was conditioned to his acceptance to do a number of hours of voluntary work as directed by his Parole Officer. Evidence showed that complainant had failed to satisfy this condition even though the work that he had been directed to do on two different occasions was light and well within his possibilities, even considering the physical impairment he was alleging to suffer from.

Complainant had failed to produce medical certificates to justify his refusal even though he had visited doctors, the hospital and polyclinic for this purpose. He had even failed to satisfy a condition that he had to do community work when he was assigned to do so at a cat sanctuary even though this was in no way tiring.

Conclusion

The investigating Officer concluded that it was clear that complainant had no intention of doing any work assigned to him. Complainant did not cooperate in any way with his Parole Officer. The Parole Board therefore revoked his parole licence and ordered that he again be detained in the correctional facility to serve his sentence. The Ombudsman was of the opinion that there had been no maladministration or procedural error in the handling of complainant's case by the Parole Clerk of the correctional facility. The Parole Board was perfectly justified to revoke his parole licence.

Transport Malta

Disabled Reserved Parking Policy Changed

The complaint

The son of a severely disabled seventy year old woman complained that Transport Malta had unjustly refused to provide her with a reserved parking space in front of her residence, to which she would have been otherwise entitled, because his mother could not drive the car which was registered in his father's name.

The facts

Complainant's mother was certified to be suffering from a serious, progressive, degenerative condition that rendered her completely dependent on a constant supply of oxygen. She not only required this in her home twice weekly or more, but also needed to have oxygen available every time she ventured out of her house. She required to be constantly assisted by her husband who had to transport heavy oxygen cylinders from Benghajsa to their residence and had to carry smaller oxygen providing equipment and a wheelchair whenever his wife wished to go out. There was no doubt and it was never a question that complainant's mother was fully entitled to the blue badge that qualified her for a reserved parking space for disabled persons.

When the condition of complainant's mother aggravated, it was obvious that it was no longer possible for her to live a normal life unless she had free and unhindered access to her residence. The difficulties were further compounded by the facts that complainant's parents lived in a one way uphill road in a highly densely populated area where it was extremely difficult to find a free parking space.

Complainant's mother who, rightly assumed that she would be entitled to a reserved parking space because of her serious disability, applied to Transport Malta to confirm this and to make the necessary arrangements.

Reply by Transport Malta

Transport Malta informed her that reserved parking would not be given to relatives of persons who had mobility problems. It explained that there was a policy that established that the applicant would only qualify for this reserved parking if he/she was the driver of the vehicle for which the lot was reserved. It reiterated that this rule was meant to help persons who had severe mobility problems to enjoy a more independent living. Transport Malta stated that it understood that individuals who did not drive and were therefore passengers could be made to alight or descend by the driver at a spot which was as close as possible to their residence.

Complainant's parents felt aggrieved by this decision and appealed from it to the Review Panel for Reserved Parking. They submitted that Transport Malta's decision was completely unacceptable and in no way mitigated the extreme hardship being suffered by them. They also claimed that the decision was discriminatory and that it favoured disabled persons who possessed a driving licence. Their appeal was rejected for the same reasons and Transport Malta insisted on its position.

The investigation

During the investigation it was established that the reluctance of Transport Malta to change its position was due to a decision taken during a meeting of the Reserved Parking Transport Malta Board and Transport Appeals Board on 27 November 2017. During that meeting the Board was informed on the criteria for entitlement for a reserved parking. It was established however, that those criteria, listed in the application for a reserved parking, were to be considered only as guidelines. It was minuted that, although it was true that the policy to date allowed that relatives of disabled persons who resided in the same residence should be given a reserved parking, this should no longer be so. Reserved parking should be given only to the driver. Disabled persons who were wheelchair users and who drove should be given a reserved parking.

It was in line with this policy that Transport Malta informed complainant's mother that, while there was great sympathy with her condition, a decision of the authority

could not go against the policy that the applicant had to be the driver. The Authority therefore did not want to create discrimination and was deciding in line with its policy that the applicant could only qualify for a reserved parking if he/she was the driver.

Ombudsman's opinion

The Office of the Ombudsman considered the complaint to be fully justified. The facts showed that the policy was unjust and in certain cases, discriminatory. It was causing unnecessary hardship to vulnerable persons and should be reviewed. The Office therefore insisted that action should be taken by the authorities concerned.

The Commission for the Rights of Persons with Disability (CRPD) took the issue on board and spearheaded the need for a change in the regulations. The Commissioner of the CRPD is also a member of the Board of Transport Malta. These efforts proved successful and eventually the policy was changed and a new policy document dated November 2018 was issued stipulating that relatives of blue badge holders residing at the same address as the blue badge holder could apply for a communal reserved parking bay. This change of policy however came too late for complainant's mother since she had passed away in December 2018.

Sequel

The Ombudsman was made aware that there was reluctance to advertise this change in policy since this might open doors to abuse. He was not however convinced that this was the correct approach since this could prejudice the rights of individuals in similar situations who could benefit greatly from this change. Indeed the new regulation could make a significant difference to their quality of life. He therefore recommended to Transport Malta that action be taken so that citizens and in particular blue badge holders, are made aware of this positive change as soon as possible.

The complainant thanked the Office of the Ombudsman for its efforts. He said he was glad that now families in Malta would be spared similar inconveniences in the future.

Various entities

Successful mediation in another reserved parking saga

The Office of the Ombudsman achieved a more positive result in the investigation of another complaint regarding a request for reserved parking involving the same authorities.

The facts

An 82 year old resident had been involved in an accident in which he had been run over by a motorcycle in September 2016. He suffered from mobility issues complicated by other ailments that predated the accident. As a result he was unable to walk for more than a few metres as certified by his consultant. Parking his car for some distance away from his residence was proving detrimental to his health. Very often he ended up not leaving his home with the result that he was fast becoming a recluse.

He therefore applied for a reserved parking bay close to his house, he appeared before the CRPD board and was immediately granted the blue and yellow stickers. His request for a reserved parking bay was forwarded to Transport Malta. Initially his request was declined because the Appeals Board concluded that complainant did not qualify for a reserved parking bay. However, following clarifications regarding his medical condition, the Appeals Board carefully reviewed his application and certificates submitted. On 9 August 2017, it decided to uphold his request and directed Transport Malta to take the necessary steps, also with the Local Council, to ensure that complainant would start to benefit from this service.

Complainant repeatedly contacted Transport Malta to see what progress was being made. He had been informed that they would be contacting their road contractor

to paint the reserved parking slot. However, workmen never turned up for weeks on end until complainant was informed by Transport Malta that he would have to be re-examined by their doctor who in fact visited him at his house. On 18 December, almost four months after the decision taken by the Appeals Board, complainant received a notification from Transport Malta stating that the Commission for Rights of Persons with Disability (CRPD) had declined his request.

In January the following year, complainant was visited by two Transport Malta officials who informed him that he was to contact the Local Council since in August 2017, he had been granted the parking bay he had requested and his case had been closed. Complainant then contacted both Transport Malta and the Local Council but no progress was made. Complainant and his wife were finding themselves house bound and still suffering from serious inconvenience and hardship. He therefore lodged a formal complaint with the Ombudsman on 3 April 2018.

The investigation

The Investigating Officer was struck by the blatantly contradictory decisions taken by public authorities when handling this case. She attempted to establish what the procedure was for a person holding a blue badge to obtain a reserved parking bay. The CRPD clarified that the process fell within the remit of Transport Malta. The application was first processed by a Board (CRPD Board) and then at a pre stage by its Review Panel. The latter decision also included a medical assessment. It was confirmed that the only Appeals Board was the review panel and that the CRPD Board was the entity that took the decision on parking bays in the first instance. CRPD agreed with the Investigating Officer that the sequence of events made no sense. However it pointed out that there had been instances where Transport Malta unilaterally reversed decisions by the review panel. It was of the opinion that this was not legally possible but unfortunately it has been known to happen.

The Traffic Ordinance and its relevant legal notices regulated the issue of reserved parking bays. The investigating officer sought clarification from Transport Malta that had decided to review the case following allegations that complainant had been seen walking without any aid and that the medical certificate on which his complaint was based was issued by a relative. Complainant refuted these allegations, insisting that he only knew the consultant signing his certificate in consequence of his medical condition. The doctor of Transport Malta again visited complainant at his residence.

Complainant reported that CRPD had given him assurances that his application had been approved without reservation. In August 2018, more than four months after complainant had filed his request for help with the Ombudsman, Transport Malta informed the Local Council of its decision and that the reserved parking bay would be implemented by it.

Saga to implement decision

The Investigating Officer with the full and active cooperation of its liaison officer with Transport Malta continued to pursue the matter to ensure that the decision would be finally implemented. After more weeks of inaction and a further exchange of numerous emails, the Investigating Officer messaged Transport Malta on 2 October 2018 deploring the unjustified and unexplainable delay.

The Office stated that its liaison officer with Transport Malta was extremely responsive to its enquiries and his handling of the case could only be commended. The same could not be said of the Traffic Management and Road Safety Directorate responsible for the matter. Principles of good public administration dictated that requests for information, be it from the Office complainant, should be answered in a timely fashion. Moreover, the apparent lack of ‘call backs’ from the directorate only served to heighten the perception that complainant was being deliberately targeted for some reason or another. Furthermore a decision granting approval to the zoning out of a reserved parking bay should be followed by the actual “installation” of it. Otherwise the whole process would have been futile.

Outcome finally positive

Within a week from the last correspondence the reserved parking bay was finally painted, six months, almost to the day, from when complainant requested the help of the Ombudsman and more than a year after the first decision by the Appeals Board declaring that complainant’s request was fully justified.

Żebbuġ Local Council

Bureaucratic saga leads to eviction from home

The complaint

A resident in an alley in Żebbuġ strongly complained against Żebbuġ Local Council for ignoring her repeated requests to take action against continuous parking illegalities and law breaking that were rendering her life miserable.

Vehicles were being constantly parked abusively in such a manner that access to her home and garage was often impossible. She was suffering grievous inconvenience as well as risking damage to her car whenever she attempted to enter or exit her garage. She requested the Local Council to install pillars stopping parking on the sides of the alley and yellow lines as well as no parking signs were necessary.

The facts

Complainant provided adequate documentary evidence to prove her complaint. It was clear that the abuse was flagrant. Complainant had immediately brought these illegalities to the attention of the Local Council but no action was taken to remedy the situation. Complainant had reported the matter to the Police but was informed that it was the Local Council that had to take action in the first place.

The investigation

The Office of the Ombudsman took the issue up with the Żebbuġ Local Council pointing out that the Council had failed to provide a concrete reply to any of complainant's enquiries. The Local Council replied that the enforcement of traffic regulations do not fall within its competence but was the responsibility of the Police Force and LESA. It pointed out that it was the cars that were illegally parked in the middle of the alley rather than those parked on the side that obstructed

complainant's access to her garage. The Local Council stated that for this reason it had informed complainant that her request had been forwarded to Transport Malta.

The Office of the Ombudsman then took the matter up with Transport Malta. After weeks of chasing officials from Transport Malta and Żebbuġ Local Council the Ombudsman was informed that the two authorities were discussing the matter with an end to resolving the issues. At one stage officials at Transport Malta requested the Local Council to confirm that the alley did not have proper signage and markings in place and that these could only be set up at the request of the Local Council.

After further delay the Ombudsman was informed that there was to be a check on site. Transport Malta maintained that it was usual procedure that the Local Council applied to carry out the works following approval by Transport Malta. However, if the Local Council did not implement, Transport Malta could check, and if the problem persisted it could issue its own work order.

Eventually a full five months after complainant had filed her complaint, the Ombudsman was informed by Transport Malta that it had instructed the Executive Secretary of the Żebbuġ Local Council to implement an order to provide for the requirements of this road in terms of traffic management and safety. The Council was instructed that, in view of the road width and according to Transport Malta's policy, no parking should be permitted along this narrow road and hence this road should be limited to access only. The Council was kindly instructed to implement double yellow lines to be painted along the whole length of the road on both sides and "*no parking*" signs to be placed at intervals to enforce no parking throughout the length of the alley. In addition "*keep clear*" bays already in place were to be refreshed. Transport Malta intimated that there should be proper enforcement once these measures were implemented.

The Office of the Ombudsman continued to follow the complaint to ensure that the instructions issued to the Local Council had been followed. The Local Council failed to implement Transport Malta's instructions. It objected to painting double yellow lines due to the lack of parking spaces in the area and asked Transport Malta to reconsider its instructions since there was already a parking problem in that area. The implementation of the signage as per instructions would be detrimental to the residents who did not own a garage.

This bureaucratic saga went on for months and remained unresolved. Eventually the frustrated complainant informed the Ombudsman that since nothing had been done after almost a year since she had first lodged her complaint, she had been forced to move out of her home to another residence. She had to take this extreme measure because of the appalling service she had been given by the authorities when seeking to ensure that her rights were respected.

The Ombudsman then wrote to the Chairperson Transport Malta and the Mayor of the Żebbuġ Local Council informing them of this development. He stated that, given the circumstance and in the light of the provisions of the Ombudsman Act, his Office would proceed to close the case. However, his Office expressed its disappointment and deep concern at the series of administrative delays incurred at the hands of both Transport Malta and the Żebbuġ Local Council that invariably resulted in the continuation of abusive parking which ultimately forced an individual to move out of her house. The delayed action by the authorities concerned severely prejudiced complainant's right to her residence.

Conclusion

The Ombudsman concluded that, while this particular complainant chose to move away from her chosen home, others who need to have access to the alley as they own or rent properties in it and were unable to similarly move out, were being severely prejudiced by the ongoing situation. Moreover, the Ombudsman observed that should access be needed by emergency services these would be severely hampered with dire consequences. He called on both Transport Malta and the Żebbuġ Local Council to rectify the situation quickly and decisively and requested to be informed of action taken.

Transport Malta duly replied maintaining that it had followed the complaint assiduously as soon as it was made aware of it. It reviewed step by step the initiatives taken to address the complaint with all the authorities involved including the Local Council and the Police. It declared its commitment to manage Ombudsman cases to the best of its ability. It did this also through the services of its liaison officer with the Office who was spot on in tracking the Transport Malta officials involved and ensuring that communication with other authorities was as efficient as possible.

In conclusion, Transport Malta informed the Ombudsman that, in an effort to rectify the situation, it would be organising a traffic control committee meeting in which the Local Council would be invited to voice its concerns in the interest of the public at large rather than from an individual perspective.

The Ombudsman pointed out that the issue did not centre on the extent of the cooperation shown by Transport Malta with the Office during the investigation. It focussed on the fact that there were delays in dealing with the grievance effectively. The Ombudsman again requested to be kept updated as regards the final solution adopted to remedy the situation.

Sequel

Two months later the Chairperson of the Traffic Control Committee informed the Ombudsman that it had been decided in a meeting in which the issue was further discussed with the Local Council that *“since the person that raised the complaint does not live any more at site in question, and also, there are no complaints between the remaining residents of site since there is a mutual agreement between such residents that works fine [sic] (due to the fact that parking space is very limited) there is no need to take any course of action for the time being. However, Transport Malta required the Local Council to come forward to discuss further towards a solution if there will be a potential complaint by residents”*.

The Ombudsman noted that decision and the case rested there.

Malta Police

Request for refund of towing fine accepted

The complaint

A complainant parked his/her car regularly in a parking bay in Gudja before leaving for a short four day holiday to the United Kingdom. While there complainant was taken suddenly ill and had to be hospitalised. On returning to Malta, a week later than scheduled complainant found that the vehicle had been towed by the Police since there was a public function in that locality.

The investigation

Complainant requested the Commissioner of Police to refund on humanitarian grounds the fine of 410 Euros that had to be paid for the release of the vehicle. Efforts to obtain a reply from the Police proved futile and complainant asked the Ombudsman to intervene. Initially the Commissioner of Police did not directly respond to the Office of the Ombudsman's request for comments on this grievance but complainant received a reply that the Commissioner had directed that "*no refund is to be reimbursed*". Complainant was informed that on the day of the towing of the vehicle there was a public activity. 'No parking' signs had been placed with the stipulated dates and time according to the law and the clearance was published in the Government Gazette.

In further correspondence addressed to the Commissioner this Office reiterated that complainant's grievance was fully supported by medical certificates and documentation provided. There was no doubt that complainant had in fact been urgently and unexpectedly hospitalised and that, had there not been a change in the originally planned return date, the vehicle would not have been parked there on the day when the public function was held in Gudja. Clearly complainant could

not have been expected to be aware of the clearance given in the Government Gazette while he/she was abroad on holiday. While it was correct to state that the Government Gazette was available online, it was not reasonable to expect a citizen to access and scrutinise the Gazette even when he/she was away from the island particularly when the individual is unwell and has been hospitalised.

The Police insisted that the Divisional Police acted according to law on the date that the vehicle was towed away and that at that moment in time they could not have been in a position to know that the owner of the vehicle was abroad. Police records show that the police made attempts and did their utmost in such circumstances to contact the owner. The Office reiterated that the Office did not at any time contend that the towing had not been made within the parameters of the law or that the Divisional Police had not attempted to contact the owner of the vehicle. He was only requesting a refund to be made on humanitarian grounds taking into consideration the particular circumstances of the case.

Outcome

Eventually and following further exchanges, the Office of the Ombudsman was informed that the Police had reviewed the case and had decided that complainant would be refunded the fees paid on humanitarian grounds.

The mediation process had finally borne fruit also with the active help of the liaison officer of the Police Force with the Office of the Ombudsman.

Collaboration between the Ombudsman Office of Malta and Spain and AWAS

Minor migrant reunited with mother in Spain

Close collaboration between the Parliamentary Ombudsman in Malta, his Spanish counterpart *El Defensor del Pueblo* and local authorities facilitated the process to reunite an eleven year old unaccompanied minor with his mother who was living in Spain.

In March 2019 the Office of the Spanish Ombudsman sought the assistance of the Office of the Ombudsman in Malta in connection with a very sad case that they were tackling which involved both Malta and Spain. Through an NGO working with migrants in Spain, the Spanish Ombudsman had been informed that an eleven year old boy from Cameroon who had been rescued and transferred to Malta, was claiming to be the son of a mother who, together with her other two daughters, had been rescued at sea following a gruelling journey through Nigeria, Niger and Libya and who were seeking asylum in Spain. The minor had expressed the wish to be reunited with his mother and two sisters who were currently residing within a Reception Centre in Spain. The Spanish Ombudsman had informed this Office that efforts were being made by NGOs and their Office so that the child could be reunited with his family. The Spanish Ombudsman sought the assistance of this Office in connection with the unaccompanied child's access to the asylum procedure in Malta, so as to seek to regroup the child by application of the Dublin Regulation and for the finalisation of a DNA Sample which was required so as to establish the family link.

A tale of pain, suffering and torture

From the information compiled by NGOs and their lawyers it transpires that upon their arrival in Libya the family was apprehended by an armed group that took them to a prison-like facility, where they were held against their will for months suffering torture and extortion. The child describes his family as having been ‘sold’ upon their arrival and kept in an over-crowded house without any windows. He witnessed torture on a daily basis and saw men and women being bought for work like cattle. The mother recounted that when they tried to escape the son jumped over a fence, but she and her daughters were left behind. They were eventually apprehended by the guards who took them back to prison and tortured them for attempting to escape. The minor eventually embarked to Europe and was rescued at sea and transferred to Malta. Eventually the minor expressed his will to be reunited with the mother.

From documentation provided and preliminary meetings held it appeared that the Spanish and Maltese branches of UNHCR had been following the case and that the child had contacted a Spanish NGO so that he could be reunited with his family in Spain. The UNHCR had met up with the mother, who had repeatedly expressed her will to be reunited with her son upon her arrival at the Centre, so as to assess the coherence of the story, compile information and explain the current situation and options available. It was also provided with a report on the psychosocial distress that this separation had caused her.

DNA essential to reunite family

During her meeting with the UNHCR representatives the minor’s mother maintained that she had lost her son’s birth certificate when they crossed Cameroon’s border. Given the difficulties to have the document reissued, she had expressed her willingness to run DNA tests in order to prove her biological maternity. During the said meeting the NGO shared images of the mother’s Facebook profile containing pictures of her three children together and several communications with the minor through a mobile application. The mother had only had her first contact with the child when he was already in Malta and kept constantly in touch. The Red Cross had directly communicated with the authorities of the centre hosting him in Malta.

From information provided by the Agency for the Welfare of Asylum Seekers (AWAS) it appears that when the boy was examined by the health services and interviewed in depth by AWAS he did not know his mother's whereabouts. However, after some months he had approached his social worker and informed him that his mother had made contact with him. At that point AWAS launched a reunification request through the Dublin Regulations while the Spanish authorities also initiated one on behalf of the mother. However, this reunification process is usually lengthy as it involves DNA testing to eliminate the possibility of human trafficking.

Institutional cooperation in action

Upon receipt of the request from the Spanish Ombudsman, the Office of the Parliamentary Ombudsman contacted officials of UNHCR Malta to obtain further information and try to facilitate the procedures to finalise the DNA tests on the minor to ensure the biological connection. It was established that the DNA sample had been taken but was still in Malta awaiting authorisation from the appropriate authorities to be sent to Spain.

The Ombudsman took the matter up with the Permanent Secretary for the Ministry for Home Affairs and National Security and the Chief Executive Office of AWAS. The Office also followed developments in this case with the Refugee Commissioner and the Ministry. The authorities confirmed that the process had been initiated and that they were cooperating to facilitate reunification pending the DNA result. The case would be speeded up because the minor fell within the category of vulnerable persons.

At that stage the Ombudsman reported developments to the *Defensor del Pueblo* and closed the complaint, though he continued to follow the case. The Spanish Ombudsman thanked his Maltese counterpart very much for his work and expressed the opinion that this was a very good example of cooperation between the two institutions devoted to the protection of human rights. The *Defensor Del Pueblo* hoped that the child would be able to join his mother as soon as possible.

Sequel

The transfer operation and unification of the family took place shortly after and was coordinated by the AWAS, the local agency set up by the Ministry for Home Affairs and National Security tasked with the implementation of national legislation and policy concerning the welfare of refugees, persons enjoying international protection and asylum seekers. The minor's DNA was found to be compatible and by mid-July he was accompanied by an AWAS social worker to Spain where he was finally reunited with the mother and his sisters. AWAS CEO stated that both boy and his mother had applied for asylum and were being offered psycho-social support in connection to offset the trauma they suffered while in Libya.

Air Malta

Lack of cooperation

Complainant, a then employee of Air Malta, plc claimed that she had been unfairly treated during the selection process held for the position of Ancillary Revenue Manager to which she had applied.

The complaint

Following the submission of her application, complainant was informed that Air Malta could not proceed to consider it further at that stage. She enquired the reason for this but no written reply was given. She was however verbally informed by the People and Performance Team (HR) that due to an upcoming split in the Company's operations by which ground handling operations would be hived off to a separate company, vacancies were not open to the ground handling staff of which applicant formed part. Complainant, therefore, asked the Ombudsman to investigate whether the refusal to process her application was unfair. She requested that she either be appointed to a managerial grade or be paid the difference in salary between her current role and a managerial role, for one calendar year. She insisted that ground handling crew should be allowed to apply for all internal vacancies issued by the Company.

The investigation

From an examination of the internal call issued by Air Malta for the selection process to the position of Ancillary Revenue Manager it resulted that no sectoral limitations had been imposed. Therefore all employees who satisfied the eligibility criteria could submit an application. It appeared that *prima facie* complainant was indeed eligible to participate in the selection process and the Ombudsman requested the Company to justify its refusal to entertain complainant's application. Air Malta replied through its legal adviser, insisting that industrial law gave the employer the discretion to determine the criteria for eligibility, including which

strata of employees would be eligible to apply for the post provided these criteria did not discriminate or were not tailor made to favour particular applicants.

Air Malta insisted that the selection criteria had been drawn up specifically and exclusively to attend to the operational needs of the Company and were not geared to favour one particular candidate over another.

The Ombudsman was not satisfied with this feedback since it did not address the issue as to why complainant's application had been refused. He therefore requested the Company to inform him why complainant's application could not be processed and to list the eligibility criteria that she was deemed not to have satisfied. Air Malta did not provide any further information insisting that its original explanation was exhaustive and that its decision was according to law. In a meeting convened with the Company's Chief Executive Officer and its legal adviser to discuss the case, Air Malta insisted that the complainant was verbally provided with reasons but would not elaborate further. No justifications for the action taken in handling complainant's application were given.

Considerations

The Ombudsman considered that there was no doubt that it was the employer's prerogative to determine what skills and competences an individual had to possess in order to occupy a particular post. Those skills and competences would in turn determine the eligibility criteria for the selection of future employees. However, the Company's prerogative was limited by the principles of good administration which had to be observed. Selection processes must be transparent, just and equitable and should not give rise to the suspicion that the criteria are set to favour one particular candidate over another. The focal issue of the complaint did not refer to specific eligibility criteria or whether one candidate was afforded preferential treatment over others but centred on the refusal of the Company to process an application by an employee.

At the time of the call, the Ground Handling Operations still formed an integral part of the Company and had yet to be hived off to a separate company. Moreover, decisions of publicly funded entities such as Air Malta which affect citizens' rights have to be substantiated with adequate reasons. The Company was only willing to provide its reasons verbally to complainant which in and of itself brings into

question the transparency of the process and the legitimacy of the reasons provided. When provided with the opportunity to give the Ombudsman written reasons for the actions taken, the Company failed to do so.

Conclusions and recommendation

The Ombudsman concluded that the evidence led him to the opinion that Air Malta was not just or fair to the complainant and that the Company's actions amounted to an act of bad administration. Considering that the Company's handling of complainant's application went against the principles of good administration, the Ombudsman recommended that the Company take immediate action to provide an adequate remedy for the injustice suffered by complainant as a result of the decision not to accept her application. A decision that could have negatively affected the complainant's career progression.

The Ombudsman further recommended that in the interest of good administration, the Company take any necessary action to avoid the occurrence of any similar situation in the future.

The Ombudsman observed that it could not be assumed that, had the complainant been allowed to compete, she would have ranked first in the selection process and would thus have been appointed to the post. He could therefore not recommend that she be appointed to a post when she had been in effect left outside of the competitive process. The same held true with regards to her request to be given the difference in salary between her current post and the managerial position to which she was aspiring. Her request for these specific remedies therefore could not be upheld.

Sequel

The Ombudsman continued to follow the recommendations made in his final opinion. Air Malta did not respond to a number of requests by the Ombudsman wherein he demanded to be informed of any action taken to implement his recommendations. It took the Company three months to inform him that the position to which applicant had applied was no longer vacant. As a result it was not possible to implement his recommendation for the issue of a new call for applications for the same post as such a call could potentially prejudice third parties. It must be pointed out that the Ombudsman never made such a recommendation.

Air Malta informed the Ombudsman that in line with his recommendation, it had during the previous months assured the workers of Air Malta Aviation Services (with which complainant was now employed) that they would be eligible to apply for 'internal' vacancies within Air Malta. Therefore, through this measure, complainant was being given the opportunity for career progression within Air Malta if and when the occasion arose. This would be in addition to any opportunities that might arise to progress further within Air Malta Aviation Services. This concession was being given for an interim period (which was not specified) only.

Whilst measures were put in place by the Company to avoid the re-occurrence of the same situation in the future, complainant was not given a direct remedy for the injustice suffered, leaving the Ombudsman's recommendations only partially implemented.

Housing Authority

Financial loss incurred of regularised building not built in line with the approved building permits and applicable regulations

The complaint

A couple who bought a house from the Housing Authority in 1995 complained that they would be incurring financial loss as they had discovered that they had to regularise the building as it transpired that it had not been built in line with the approved building permits and applicable regulations.

The facts

It resulted that the Housing Authority had allocated the building to complainants on plan when the construction was not yet complete. The Authority had bound itself to transfer the property that was built in accordance with a regular Planning Area Permits Board Permit. The building was completed in 1993 and a promise of sale was signed between the parties the following year, where complainants paid the remaining part of the price and were given the right to reside in the property. Once the Authority acquired title to the land on which the residence had been built a contract of sale was published stipulating, amongst other conditions, that the property was being transferred *tale quale* in the condition it was in, including any latent defects. In 2016 complainants became aware that the property they acquired was not constructed in accordance with the plans approved by the Planning Area Permits Board. They therefore requested the Housing Authority to take the necessary steps to regularise/sanction the building at its expense.

Complainants were informed by the Authority that it was not its policy to apply for the sanctioning of buildings not constructed according to planning permits after so much time had lapsed. Complainants maintained that the Authority's refusal to take steps to regularise the building it sold to them amounted to bad administration. They submitted that the Authority, as a public entity, was in duty bound to ensure that buildings were constructed in accordance with building permits and that it was bound to take steps to correct serious mistakes for which it was solely responsible.

The investigation

The Ombudsman took the matter up with the Housing Authority and requested further clarification of its position. The Authority maintained that the sale had been made *tale quale* and the warranty against latent defects excluded. Complainants had had the opportunity to view the property and also had the option of not buying. Moreover, any claim of payment of damages was barred by prescription. The Authority claims that irregularities encountered would have been reflected in the price which complainants had been asked to pay for the property. It therefore argued that it "*should not therefore be expected to be burdened with new obligations that it was never intended to carry*".

It was established that one of the conditions of the sale was that the property in question was being transferred *tale quale* and in the state and condition in which it was when the contract was published, and this including any latent defect.

Complainants had requested the Authority to sanction or regularise the property, part of a block of eight maisonettes, as this was not in line with approved PABP permits in 2016. It resulted that similar requests had been submitted to the Housing Authority but these had been rejected following a decision taken in 2015. From a report prepared by the Authority's architect it had been established that requests by Housing Authority's beneficiaries for reimbursement of expenses incurred as a result of the submission of applications for regularisation of minor differences in layout from the original PABP/MEPA approved permits, mainly arose when these opted to transfer the premises to third parties.

In complainants' case a report of the Authority's Executive Head of Technical Services and Operations established that "*It transpires that the layout of eight maisonettes as built, differ completely from the approved layout to the extent that*

even the position of door entrances do not tally. Hence the whole block layout needs to be sanctioned. Moreover, there were complications in view that since 1994 alterations may have been affected in some of these maisonettes with or possibly even without a permit". Complainants' case therefore did not refer simply to the regularisation of minor differences in layout from original approved plans, but would require further expense.

Throughout the investigation the Housing Authority reiterated that it was not its policy to reimburse such costs after a long time had lapsed and it would only regularise or sanction if the transfer had been recently made. The Authority also clarified that it had not built the property in question, that had been developed by the Works Department and the Housing Construction and Maintenance Department when this was established in 1992. The Authority had merely acted as the agent, which had allocated and transferred the property in line with the Scheme published in 1991. It was of the opinion that one could not expect the Authority, that had transferred properties at subsidised prices within the framework of social housing, to remain responsible with the new owners to remedy any defect or problem after a long time had lapsed and when the architect could no longer be held legally responsible.

Complainants strongly contested the Authority's refusal to reimburse them the amount of money they would have to incur for sanctioning/regularising the property. They maintained that they had not engaged an architect before acquiring the property because they had assumed that a building acquired from a public authority would have been constructed according to the permits issued by the competent authority and would be free from any defects. They insisted that the Authority should not refuse to regularise grave mistakes solely due to its negligence simply because time had lapsed.

Considerations

The Ombudsman opined that the Housing Authority, as the public authority that administered the Scheme through which complainants benefitted and the entity that transferred the property to complainants, could not disclaim responsibility arguing that it had not built the property or that it would not take the steps necessary to sanction any irregularities as too much time had elapsed. Once the Department responsible for the development of the Housing Estate had applied and obtained

the necessary building permits from the relevant authorities, any structural changes in the development had to be reflected in the approved building permits and the Authority, as owner of the property was responsible, even if it had not developed or supervised the works, as it had transferred the property to complainants.

The Ombudsman also considered that it was not correct to argue that the Authority was released from its responsibility because the sale had been done with the express condition that it was being sold *tale quale*, in the condition it was in, including any latent defects. The fact that the building was not constructed in conformity with approved plans issued by a competent Authority could not be considered to be a latent defect.

The Ombudsman referred to established case law that the rescission of contracts of sale of buildings on the ground of latent defects could only refer to serious, material defects in construction that affect the use of the property or its integrity. Buildings not covered by proper permits or not in conformity with existing permits could not be said to be suffering from a latent defect. The Courts have consistently been critical of, and condemned the actions, of those who sold property that was in violation of the country's laws and regulations governing development and planning.

The Ombudsman also considered that complainants had paid the full price for the property when they signed the promise of sale. They had the right to assume that the property sold was built in accordance with approved plans, issued by the competent authority and they had at law, no legal obligation to verify this fact. It was the duty of the seller not to transfer property that was not built according to the laws of the land and approved permits.

The Ombudsman maintained that the Housing Authority as a public authority, that had the duty to administer with the diligence of a *bonus pater familias*, had to ensure that the property it was transferring was fit for the aim it was being transferred for and free from any complications. The Housing Authority was in duty bound to administer correctly public funds and to utilise them in the best way to provide adequate accommodation with reasonable prices, accessible to those who needed it. Moreover, it had to be just and transparent with citizens who make use of its service.

The Ombudsman emphasised the basic principles of good governance. No one was above the law. Laws and regulations approved by Parliament bound government and public authorities in the same way that they bound the citizen. The public administration had to set an example by constantly and correctly applying laws, policies and regulations applicable from time to time. They should continue to remain accountable for their actions notwithstanding the lapse of time. They should provide an adequate remedy for their actions when they cause hardship to the citizen for which they are responsible.

Applying the aforementioned to the particular case, the Ombudsman considered the fact that more than twenty years had lapsed since complainants bought the property. He maintained that it was possible, and even probable, that had complainants asked for the property to be regularised before, the cost for regularisation would have been considerably less. Moreover, even though complainants had become aware of the need to regularise in 2016, they had not themselves taken immediate steps to start procedures to regularise/sanction the property.

Conclusion and recommendation

In these circumstances, and considering the lapse of time and the fact that at the time when the final opinion was being published complainants had not yet applied for the necessary sanctioning to limit the cost involved, he was of the opinion that it would be just and equitable that the Authority refunds complainants half the costs incurred after that the complainants would produce the relative receipts of the costs involved. Complainants had to take steps to file the necessary application within six months from the date of his final opinion.

Sequel

The Housing Authority accepted the Ombudsman's recommendations and eventually complied by paying the amount due to complainants.

MFSA

The Malta Financial Services Authority cooperates fully with Ombudsman

The complaint

A complainant who is an account holder of a bank that had its banking licence withdrawn in March 2017 by the European Central Bank, claimed that he was not being provided with a continuous update about the actions being taken by the Malta Financial Services Authority (MFSA) as regulator of the sector and the firm of accountants appointed as Competent Person following the payment issued by the Malta Depositor Compensation Scheme in 2017.

The complainant submitted that he had received a last update by the Competent Person in October 2018 by which he had been informed amongst other things that at that point in time the financial position of the entity remained precarious and liabilities exceeded assets as at 31 August 2018. The Competent Person elaborated that at that stage its role was not perceived as one whereby it effect partial payments or any other distributions to depositors unless there were sufficient funds to repay all depositors in full. It was therefore likely that any further disbursements to depositors, if any, would be made by the liquidator of the entity. It was moreover explained that it was the prerogative of the banking regulatory supervisor and not of the Competent Person to appoint the liquidator for the entity.

In view of that update complainant sought an explanation from the MFSA as to why a liquidator had not yet been appointed. He asked for an update about the bank's situation and an indication when the depositors would be repaid the monies still deposited. Complainant felt aggrieved by the fact that his request was

ignored notwithstanding a reminder sent some time later. The situation remained unchanged up to the 2 July 2019 when he filed his complaint requesting the Ombudsman to investigate and take action so that the Authority and the Competent Person would provide a constant update to depositors on the funds available and actions being taken in their regard.

Facts and findings

The remit of the Office of the Ombudsman does not extend beyond the investigation of grievances concerning the public administration and the public sector. Therefore the Ombudsman could not investigate the action or alleged inactivity of the Competent Person/Appointed Administrator since it is a private entity. The Office did however refer complainant's grievance to the MFSA requesting clarification on the lack of reply to enquiries made by complainant to its Head of Banking Supervision.

The Authority fully cooperated with the Ombudsman's request and gave a brief description of the circumstances of the case. It noted that complaints or enquiries were to be directed to its communication officers and not to its supervisory functions, pointing out that whenever complainant had made use of these channels replies had been provided. The Authority maintained however that *"subsequent to the withdrawal of the banking licence the Authority could not provide specific indications on specific actions which were being considered by the Authority including the appointment of a liquidator"*. MFSA also informed the Ombudsman that *"the Competent Person was still managing the bank's assets and that all efforts were being made to realise maximum proceeds from the disposal of such assets"*. MFSA also confirmed that the bank had not yet been dissolved.

In conclusion, MFSA submitted that *"while deciding to keep the creditors of the bank informed through press releases and accompanying FAQs as well as through the Authority's communications function, the Authority noted that ongoing cases involving supervisory measures (pending in front of the Financial Services Tribunal and before the Court of Justice of the European Union CJEU) are sensitive in nature even more so by virtue of the fact that many decisions in relation to the (bank) are still sub judice"*.

Considerations

The Ombudsman considered that it was clear that the Malta Financial Services Authority, was the Authority by law vested with the functions of regulating the financial sector in Malta. It has been designated by the legislator as the “*Competent Authority*” in terms of the Banking Act and the Investment Services Act. The legislator has granted the Authority *qua* regulator extensive regulatory and investigative powers, amongst which power to take control of credit institutions and to issue directives and take action to protect customers and depositors and the public interest in general.

The Ombudsman therefore should not unduly interfere in the manner that the Authority exercises its powers and discretion in the performance of its functions. The Authority possessed the necessary expertise to be able to assess the circumstances of such delicate cases and it has assured his Office that, when assessing what measures ought to be taken in relation to a credit institution and the timing thereof, the Authority takes into account all relevant circumstances.

The Ombudsman noted however that, this notwithstanding, principles of good administration dictate that public entities and authorities should provide a prompt and timely reply to enquiries made. Complainant as a depositor of the bank was understandably concerned about the funds he was still owed by the entity and sought further clarifications from the regulator following the update he received from the Competent Person. Once enquiries were made, it was up to the Authority to channel them to the proper unit charged with communicating with customers. Enquiries made by those having an interest are to be dealt with promptly and reasonable updates on any changes or decisions affecting them should be provided in a timely manner.

Conclusion and recommendation

The Ombudsman therefore concluded that it appeared that the last update provided by the Administrator was provided to complainant in October 2018. He therefore recommended that the Authority directs the Competent Person to regularly update depositors and those having an interest about the bank’s current situation.

Sequel

The MFSA informed the Ombudsman that, in a bid to fully comply with the recommendations made, it would be requesting the Competent Person to regularly update depositors and other possible creditors about the bank's situation.

In fact, the Competent Person, issued an update within days of being instructed to do so by the MFSA providing what information it could disclose at that stage. It concluded its update by saying that as Competent Person "*we are regularly in touch with the Malta Financial Services Authority and further updates will be provided in due course*".

Ministry for Education and Employment

Unfairly treated during selection process

The complaint

A complainant who applied for the position of head of department in the Ministry for Education and Employment claimed to have been unfairly treated in a selection process during which allegedly, a change to the assessment criteria was made after the conclusion of the process and publication of the relative results.

The facts

In terms of the call for applications, applicants had to be public officers by the closing date of the call who were confirmed in their current grade of teacher and in possession of a permanent teacher's warrant and a) to have not less than ten scholastic years teaching experience, three years of which would preferably be in a State's School and b) have served at least four years, out of these ten scholastic years of teaching experience, teaching the subject/area/s of level applied for. Complainant submitted that the decision of the Public Service Commission (PSC) to direct the Selection Board to deduct the number of years of teachers' experience stipulated in the call for applications as an eligibility requirement from the sub-criteria "*teaching experience in State School*" and "*teaching experience in the area/subject applied for*", was unfair.

The investigation

The Ombudsman examined the call for applications and the documentation relative to the selection process as well as the conclusions and report of the Selection Board. Following consultations with the PSC, he concluded that its decision that marks should be deducted to all candidates for the years of experience required as an eligibility requirement, could not be faulted. It was ascertained that during the

selection process, there had not been a change in the assessment criteria. In fact the PSC had noted that during its deliberations, the Board had not deducted the number of years' experience required for eligibility purposes when awarding marks in the contested sub criteria as was generally done in other selection processes.

It also resulted that the Commission had directed the Board to deduct the number of years' experience referred to in the call from the marks awarded to all candidates. This because it was clear that the years of experience stipulated in the call were a pre-requisite which every applicant needed to satisfy so as to be able to be considered and called for an interview by the Selection Board.

Having established that the directive given to the Selection Board by the PSC and obtained further information from the Ministry for Education and Employment in respect of this selection process, the Ombudsman required the Commission to ensure that its directions had been correctly implemented by the Board when the revised results had been published. The PSC carried out the necessary verifications and informed the Ombudsman that this Office had been correct to notice that the Selection Board had incorrectly implemented the Commission's instructions. These verifications led to an amendment of the marks of complainant in the sub criteria and a consequent change in the ranking of complainant.

Outcome

A revised result was approved by the Commission and published by the Ministry.

CASE NOTES

Commissioner for Education



Ministry for Education and Employment

Procedures for awarding scholarships claimed to have been vitiated

The complaint

The complainant's mother lodged a complaint in her daughter's name¹ on 25 February 2018 with the Office of the Ombudsman. She claimed that her application for an Endeavour Scholarship was not considered properly, her work experience being ascribed only 2 marks out of 75. She claimed that her work experience with Deloitte Malta and with the Malta Stock Exchange was disregarded. Later, when her parents held a meeting in her name with the Commissioner, they claimed some of the successful applicants did not even have any work experience and were still awarded a scholarship.

Investigation and findings

The Commissioner consulted the informal copy of the sentence delivered by Mr Justice Joseph R. Micallef on 2 January 2015 in the case *Antoinette Greta Grima vs The Minister for Education and Employment (MEDE)*, wherein the Court refused the plaintiff's plea for the Court to order the Minister to force the Selection Board to alter her marks on the alleged grounds that the same Board had not acted properly in her regard during her interview.

The Commissioner then requested the entire file concerning the Endeavour 4th Call for applications (May-June 2018), but was informed that because of the hundreds of applications, this was not feasible. The Commissioner therefore opted for a sample of the applications and interview results ranging from Nos 130 to 136, inclusive,

1 The complainant was abroad at the time and sent her written consent for her mother to act on her behalf.

which were those of the lowest-scoring awardees, together with complainant's application and result, which was ranked as No. 178.

It was noticed that the Selection Board, consisting of a Chairman and nine members, was split into groups of 3 by the Chair, each group interviewing a number of candidates. The result sheets indicated the persons assigned to interviewing each candidate. In complainant's case, the team consisted of members identified by the initials JA, JD and PSS. It was noted that the complainant only received 2 marks for 'previous experience' out of a maximum of 10 allotted to part-time applicants.

She only referred to her work *sojourn* with a particular entity after the publication of results, in her appeal lodged with MEDE in October 2018, so this had no bearing on the marks allotted to her for this component during her interview.

The Commissioner noted that students (who can only work on a part-time basis) would find it very difficult to compete with full-timers, because whilst the latter were able to obtain a maximum of 75 marks for work experience, the former could only obtain a maximum of 10. Even so, the Commissioner wanted to see what work experience was quoted by students who applied successfully, particularly the marks they obtained on the strength of their part-time activities. He noticed no major discrepancies in this area, since the parameters for part-timers were what they were, and if the successful applicants earned more marks than the complainant it was because they had more years of pertinent experience than she had. None of the successful applicants vetted by the Commissioner declared that they had no work experience whatsoever, as was originally intimated by the parents of the complainant who acted on her behalf since she was studying in Glasgow.

It is common knowledge that it is in the ascription of marks for aspects which rely heavily on subjective evaluations that most problems arise. It has already been pointed out that the Board was divided into groups of three and these groups were well able, being experienced people, to ascribe fairly and correctly the appropriate number of marks for such areas as qualifications and work experience, but when it came to evaluating the relevance, impact and quality of a student's proposed project, they could clearly encounter difficulties.

The document coded as ESF03.15, which is the formal guide to the terms and conditions of the Endeavour Scholarship Funds for the years 2014-2020, lists 58 subjects in 9 areas of study within which application-projects could be submitted, with the added wording for each area reading “*but not limited to*”. The nine areas are the following:

- Science, Technology, Engineering and Mathematics
- Tourism and Hospitality Studies
- Transport and Logistics
- Service and Retail
- Veterinary related studies
- Humanities and Arts
- Information and Communication Technology
- International Affairs
- Maritime related studies

It is clear that for a sound and accurate appraisal of each project as described by the applicants, as well as to distinguish between the merits of two or more projects in the same area or subject, each area necessitated the presence of at least one member of each interviewing group who would have some expertise in it. This did not result to have been so in quite a few cases. The Commissioner was informed that it was very difficult to recruit the desired experts, the low remuneration being one of the major reasons for this.

The result sheets displayed the maximum marks given by each member for each of the following descriptors (maximum in brackets) as follows:

1. Academic merit (a) (100)
2. Quality of proposal (b) (125)
3. Relevance (c) (100)
4. Impact (d) (100)
5. Previous experience (e) (75)

Each applicant’s final score was therefore based on a maximum of 500 marks. It is to be noticed that 325 marks were ascribed to areas 2, 3 and 4 which are heavily subjective and require expert evaluation. It bears repeating that such expert

evaluation was not readily available to all the selection sub-group boards. This notwithstanding the fact that page 13 of the document referred to above states “*The Endeavour Scholarships Scheme Board shall give considerable weight to the content of these sections in the application form*” (referring to quality of proposal, relevance and impact). This problematic area shall be dealt within the Recommendations section of this Final Opinion Report.

The Commissioner sent for the Chairman of the Board and the three members (initials JA/JD/PSS) who had interviewed the complainant. It transpired that the complainant’s mark of 2 out of the 10 available in her case was fair. Had she included the work experience with an important entity which she mentioned in her correspondence with the Commissioner, it would have been quite higher, but this work experience was unknown by the Board.

The Commissioner noted that one member of the Board (PSS) was in a position to give a fair evaluation of the applicant’s worth in relation to quality of proposal, relevance and impact, since he was an Accountant specialising in Financial Management and was a senior official in one of Malta’s biggest banks. Of course, the other two members (JA, JD) were not in a position to pass personal judgement and relied on his evaluation. The Commissioner scrutinised the applications of two of the successful applicants in the batch of six whose projects concerned finance, banking and economics, and, even though basing himself solely² on the lucidity and expansiveness of their written responses, concluded that their write-ups rightfully deserved and were ascribed more marks than the complainant’s. These applicants were ranked 131 and 134 out of the total 136 successful applicants, whilst complainant was ranked 178.

Conclusion

The mother’s claim in her letter to the Commissioner dated 22 February 2019 that “... *some of the students who got the scholarship did not graduate as First Class*” is invalid because at the time of the submission of the application and the attendance at the interview, no student had as yet graduated.

2 It must be borne in mind that the Commissioner cannot assess the academic merits of submitted projects as per S.L.305.01/18 (1), (2).

Her claim that her daughter should have been given more marks for work experience with an important entity is invalid because this work experience was not recorded by the complainant on her application form, and the Selection Committee can only ascribe points on what is officially submitted.

Her claim that “... *other students who got the scholarship had in actual fact never worked in a part-time capacity let alone in a full-time capacity that is, they had never worked at all.*” is not supported by any evidence which was available to the Commissioner.

Her claim that “*The only reason why my daughter did not rank in the first 136 list of student (sic) who got the scholarship was due to the marking on the work experience which is 2/75 which is totally less than deserved and unjustified*” is incorrect since she actually scored 2/10, ten being the maximum marks available to her as a first-cycle student working part time.

Even if the complainant had included her work experience with the important entity, and had this resulted in her being awarded a maximum of ten points available in her case, she would still have been 5 marks short of the 343 obtained by the last person to qualify, ranked No. 136. It was in the areas of quality, relevance and impact that she could have done better, and although the marks ascribed are derived from a largely subjective evaluation, the evaluation was made by a highly-competent person. So stiff was the competition that she scored an average of 80 (240/325) in the areas of quality, relevance and impact, which is quite high. A little more care and attention in the writing of the proposal would surely have gleaned the five or six marks she required to qualify. Another inscrutable element is her personal performance during the interview. The Commissioner cannot say whether she could have been a better promoter of her own worth. In any case, the interviewing panel was made up of highly-experienced people, one of them being an expert in the complainant’s field of study.

The Commissioner, therefore, detected no breaches of procedure on the part of the interviewing Board, and as a result, after a thorough scrutiny which involved the meticulous consideration of pages of results and two rather long meetings with the Chairman of the Selection Board as well as the persons involved in her interview, cannot uphold the complainant’s request.

Recommendations

(1) The Court case referred to at the beginning of the section entitled 'Investigation and Findings' was given prominence in the local press, and the Commissioner found the following quotation from plaintiff's interview with the Times of 20 December 2014 very pertinent:

"In her affidavit, Ms X said she was assessed by a group whose professions had nothing to do with her studies.

'The people who examined my application and who interviewed me have no experience in geoscience, geography or even geophysics and therefore cannot understand or appreciate the importance of this doctorate.' The MGSS regulations state that the board shall, where and as necessary, appoint an expert with expertise in the subject area concerned to evaluate the application. This rule was not implemented."

Even as early as the first call for applications for the Endeavour Scholarship Scheme, then, in 2014, at least one candidate was disappointed by the fact that there was no-one on the interviewing panel who could assess her technically. Given the fact that MEDE officials as well as the Chairman of the Selection Board acknowledged the difficulty of recruiting suitable experts given the intricacy of the work and the unattractive remuneration offered, it is clear that the present situation cannot and must not be sustained. A scheme which involves the just distribution of a fund amounting to more than 6 million Euros (co-funded by the European Union through Operational Programme II – Cohesion Policy 2014-2020) cannot be allowed to operate with any amount of vagueness as a result of lack of appropriate human resources.

The present constitution of the interviewing panels may potentially give rise to more complaints, some of which could be justified, and would possibly entail financial damage to MEDE. The aspect of accountability to extra-national scrutineering bodies should also be kept in mind.

The Commissioner feels that each of the designated areas for submission of proposals should have an expert, and that such persons may be recruited as temporary consultants through the co-operation of the University of Malta and/or other Institutions, and has, indeed, sounded the Rector about such a process,

and furthermore written a letter to the Minister for Education and Employment in which the matter was mooted.

The Commissioner, therefore, recommends that MEDE obtains permission for the recruitment of temporary consultants and holds talks with the University and with MCAST and perhaps ITS in order to select the appropriate experts preferably before the interviewing process for this year's call for applications take place. The Commissioner will monitor progress in this area during this year and the next.

(2) Applicants who have been in full-time employment for 6 to 7 years enjoy an automatic maximum advantage of 65 marks over students, while those employed for 3 years have 30 marks. These marks make it very hard for undergraduate students to qualify.

It is suggested that a number of scholarships be reserved for undergraduates in their final year, and that the number be established annually by the Ministry. It is also suggested that work experience of a general nature be awarded 1 mark per year, whilst work directly related to the study area be awarded 4 marks per year, in both cases for not more than 5 years.

These first-cycle students are also disadvantaged by the fact that their score in the descriptor entitled 'Academic Merit' is limited because their final results would not be published or known at the time of submission of application or on the date of the interview.

The Commissioner does not expect this change to affect the present 2019 call for applications.

Malta College for Arts, Science and Technology

Unfair revocation of announced promotion

The complaint

Five lecturers at MCAST wrote to the Ombudsman complaining that their application for promotion to the grade of Senior Lecturer (I or II) via a 'fast-track policy' had been turned down after it had been approved in the first instance, because they did not have a first degree. MCAST was insisting that they had to obtain a PG Dip qualification, as per the MCAST-MUT Collective Agreement dated 27 July 2018.

Investigation and findings

Complainants claimed that, between August 2018 and the end of February 2019 they were told by the Deputy Principal Administration that they were in line for promotion to Senior Lecturer (I or II). The Commissioner saw all the relevant documentary evidence, wherein they were also told that their progression arrears would be appearing in the March payslip. In March 2019, however, they were informed, again by the Deputy Principal Administration that their progression had been revoked because they had a missing qualification, namely PG Dip. The Sectoral Agreement between MCAST and the MUT was signed and came into force on 27 July 2018. This Agreement stipulates, on page 12, that progression to Senior Lecturer grade (I or II) necessitates a PG Dip if the applicant does not have a first degree, and indeed the possession of a PG Dip is a *sine qua non* in 7 of the 9 possible routes for progression.

The complainants do not have a First Degree but possess a Masters, and the actual possibility of obtaining a Master's Degree without having previously obtained a First Degree was bound to be problematic. This situation mainly applies in the field of Business Studies wherein an MBA course can be followed as an independent

course which does not require prequalification at degree level and leads to what is considered by NCFHE as a second-cycle degree (MQF 7), as a result of the final stipulation described by the NCFHE Accreditation Manual, (2016) p.38:

“iii. Master’s Degree: ·

- A relevant MQF/EQF Level 6 degree at second class, or
- An MQF/EQF Level 6 degree plus a portfolio evidencing relevant work experience for at least 3 years, or
- An MQF/EQF Level 5 full qualification, AND a portfolio evidencing
 - » *appropriate writing and analytical skills to ensure that the prospective candidate can fully and meaningfully participate in the course, and*
 - » *work experience at professional and/or executive level for at least 5 years.”*

This anomaly seems to have been addressed by the Sectoral Agreement because advancement was bound strictly with the possession of a first Degree or a Post-Graduate Diploma in Pedagogy in the case of a ‘first cycle’ Masters Degree such as the MBA. A normal first-cycle degree (B.A. or B.Sc) was pegged at 180 ECTS and the second-cycle one (Masters) at 90 ECTS.

The complainants also objected to the fact that there were members of the staff who had progressed in spite of having an in-house second-cycle Degree which carried 60 ECTS rather than the stipulated 90, and claimed that this is discriminatory in their case.

It should be noted that the PG Dip carries 30 ECTS, so that complainants would have to have a total (180+30) of 210 ECTS to qualify for progression, whilst in the case of those holding a first Degree and an in-house Masters the total would be (180+60) 240. The Commissioner will not enter into the merits of whether the Institution is in breach of the Agreement by accepting a 2nd cycle in-house Degree rated at 60 rather than the stipulated 90 ECTS because this matter does not impinge in any way on the complainant’s claim and also because it is the Malta Union of Teachers who should react to any breach of the Agreement.

Final Opinion

An official MCAST document issued on 20 June 2018 (that is 28 days prior to the signing of what is known as MCAST-MUT collective agreement 2017-2021) explained to staff members that there were various paths to promotion, and, in the application form attached to the statement, they were told that one of the paths available to Lecturers who wished to progress to Senior Lecturer 1 level was the possession of a Masters Degree together with ten years 'relevant' experience; in the case of Senior Lecturer 2 the number of years of experience required rose to 18. There was no mention of other requirements, such as the possession of a PG Diploma. The application was headed 'Fast-Tracked Lecturer Progression Application'.

The Principal at MCAST, in his letter to the Commissioner of 16 June 2019, made a distinction between a 'fast-tracked application form' and a fast-tracked 'policy'. But this is rather recondite, and complainants cannot be blamed for thinking that the application was, in fact, based on policy. The Commissioner, in fact, considers the heading of the application form as being very misleading, though he has no reason to believe that this was intentional.

What is remarkable, however, is that the application form was published a mere 28 days before the signing of the Agreement. One is quite certain that the Principal was aware of the salient and crucial details (such as the requirement of a PG Dip) which would appear in the Agreement, but it seems equally certain that the Assistant Principals were not. The publication of what is essentially a call for applications for promotions is a serious matter, and the Commissioner fails to see how an official document describes a promotion track which would become null and void within less than a month. Was the Principal aware of the publication of the application form? Did he scrutinise the details? Did the Assistant Principal ask for the Principal's permission prior to its publication? Logic seems to indicate that in the latter case he did not, and that the Principal stopped proceedings when he became aware of them, in March. One cannot fail to notice how it was published at quite the wrongest of times, with inaccurate information, and the Commissioner is equally convinced that the Principal would not have sanctioned the publication had he known about it. In any case, this displays quite clearly the Institution has a weak communication structure internally, and that it requires strengthening, with immediate effect.

An important premise is that a Sectoral Agreement lays down conditions, agreed to by both sides, which binds the institution with an inflexible *modus operandi*, and which may not be altered by antecedent considerations, but regulates rigidly the implementation of the *modus operandi* from the date of the agreement onwards.

It is clear that notwithstanding any conditions published previous to the Agreement, the new circumstances do impinge on and modify such conditions. Since the dates of the applications submitted by the complainants are subsequent to the date of the Agreement and since the complainants must have been aware of the new conditions because the Agreement was made public before they submitted their applications, their claim to unfairness or discrimination is null and void. They knew that such an agreement cannot contemplate exceptions, because that would produce uncertainty and instability in their Institution.

Had their application been approved by the Principal before the publication of the Agreement (that is, before the terms and conditions came into effect on 27 July 2018) their promoted status would not have been alterable, but the process was not endorsed by the Principal. Did the Principal's action constitute maladministration? The Principal would have been guilty of maladministration if he had revoked their progression after having confirmed it with his signature prior to 27 July 2018. Their progression necessitated a document bearing the signature of the Principal for it to become official. The Commissioner would have upheld the complainants' claim had the Principal furnished them with such a document and then proceeded to revoke it. The Principal was, however, acting within his jurisdiction when he stopped a process which was going to run counter to the imposition of higher standards.

The Commissioner therefore cannot recommend that because an untenable promise based on ignorance of facts was broken, the complainants are entitled to be treated according to parameters existing prior to the Agreement, because he cannot suggest remedies which effectively break the law. A further consideration is the fact that the Institution is offering a remedy (a PG Dip qualification) which would guarantee their progression, and the enhancement of an academic's professional qualifications can never be considered an injustice.

The Commissioner, whilst strongly deploring the confusion caused by the publication of an application form which described a promotion procedure which was false, does not uphold the complainants' request.

University of Malta

Italian State qualification not accepted for entry into University of Malta courses with special requirements

The complaint

An Italian national approached the Commissioner for Education on 5 July 2019 complaining that her application to join a course at the University of Malta (UOM) had been refused because her Italian qualifications did not make her eligible to do so. She learned that while Italian qualifications are not recognised, English ones are, and she felt this amounted to discrimination on the basis of nationality.

Investigation and findings

The complainant already held the Diploma di Stato, and could see no reason why her qualifications had been accepted for a Diploma Course but not for one leading to a Degree (Bachelor of Science).

Her qualification consisted of the official certificate issued by the *Ministero dell'Istruzione, dell'Università e della Ricerca* of the Republic of Italy, which is what is required by Italian universities for entry into their courses. Her certificate declared she had received a global mark of 60/100 for the examinations related to the subjects she had studied, and was issued in 2017. Mathematics and Physics formed part of her study portfolio. Her mark made her eligible to join an Italian university.

The Commissioner discovered that Italian system differs from the Maltese or the English one in that whilst Maltese students study 6 subjects, two at what is called 'Advanced Level' and the remainder at what is regarded as one third of an Advanced

Level, and called 'Intermediate level', Italian students study 11 subjects all at the same level; it also transpired that the level at which these studies are conducted classifies them as Intermediate.

The Maltese system requires a student to obtain a 'Matriculation Certificate', and the system is rather a complex one. Students have to sit for six subjects from various areas in one session of the examination. The choice of subjects available to a student includes a language, a humanities or a business subject, mathematics or a science subject, and any other two subjects. The sixth subject is Systems of Knowledge, which is compulsory. Two of the subjects must be at Advanced level whilst three are studied at Intermediate level; apart from these five subjects, the student must also pass in 'Systems of Knowledge', which is also rated as an Intermediate level subject. This is further complicated by the fact that the subjects on offer are split into 4 groups, and the student has to choose his corpus of studies in a strictly prescribed fashion, namely, he or she must choose one subject from each of the first three groups and then any other two subjects from any of the four groups. For the sake of clarity, the groups are being reproduced hereunder:

- Group 1: Maltese, Arabic, English, French, German, Greek, Italian, Latin, Russian, Spanish;
- Group 2: Accounting, Classical Studies*, Economics, Geography, History, Marketing, Philosophy, Psychology*, Religious Knowledge, Sociology;
- Group 3: Applied Mathematics (Mechanics), Biology, Chemistry, Environmental Science*, Physics, Pure Mathematics;
- Group 4: Art, Computing, Engineering Drawing, Graphical Communication, Home Economics and Human Ecology, Information Technology, Music, Physical Education*, Theatre and Performance*

(* offered at Intermediate level only)

For the sake of convenience, it shall be understood that an Intermediate subject consists of one third of the material of an Advanced level. Advanced level subjects have six hours of tuition per week, whilst Intermediate subjects have two.

In contrast with this, the Italian system requires the student to study 11 subjects at the same level, and it is clear that the number of hours devoted to each subject is, consequently, considerably less than 6, with the result that the Diploma issued by the Italian Ministry displays considerable spectrum of subjects but does not indicate great depth in any subject.

UK NARIC, which is the designated United Kingdom national agency for the recognition and comparison of international qualifications and skills, and which performs this official function on behalf of the UK Government, declares that the *Diploma di Esame di Stato*, which the complainant possessed, has no 'direct comparison' with GCSEs, whilst GCSEs are almost directly equivalent to Matsec examinations.

Moreover, the University of Malta does not accept the presentation of an increased number of intermediate subjects as a substitute for 'A' levels.

The Italian *Diploma di Stato* is rated at EQF level 4, which is equal to our MQF level 4; what this means is that while the *Diploma di Stato* is considered as an 'A' level certificate, none of the subjects individually are of 'A' level standard. This is the University of Malta's official position about the matter.

In spite of this, the University of Malta does make allowances for foreign students, and indeed, the complainant could have been accepted for many courses it offers. Since, however, the complainant opted for a course which had 'special course requirements', and since she did not possess these special requirements, she could not join the course she selected. To take one example, the course she wished to follow required her to possess a Diploma in a specific field.

In his Final Opinion, the Commissioner explained to the complainant that the University's refusal stemmed from technical considerations, and was not based on anti-Italian sentiment of any kind, as she alleged. He therefore did not uphold complainant's request.

CASE NOTES

Commissioner for Environment and Planning



Planning Authority

Impartiality in decision-making

The complaint

This investigation concerns the transportation of a Board member of the Authority to a public hearing by means of a private jet.

The investigation

This investigation did not deal with the Board decision concerned that was under appeal but dealt with the applied procedures that led to this decision in order to ensure that decisions are taken correctly according to law.

The Commissioner heard the Board member involved and took note of the minutes both of the Authority and of the Executive Council of the same Authority where this matter was discussed. It was apparent from these minutes that there is unanimous agreement that neither the Authority nor the Executive should intervene in any way so that members of the Board are present for the public hearings. This in conformity with the basic principles that each Board member must be free to attend the hearing, hear the representations and finally decide when the vote is taken. Any intervention in any part of this process can be interpreted, naturally, that there was undue interference on the same Board.

Recommendations

The Commissioner made the follow four recommendations:

1. The Executive Chairman shall assume only the role of recommending and answering for any questions put forward by the Board and shall assume no other role that could be interpreted that the Executive had an influence, even if on only one vote, on the final decision of the Board.

2. All the Board members shall make it a point to attend for the hearings and they shall inform the secretary of the Board sufficiently in advance when they are not attending or when they have any problems (such as with transport) to attend. However, the Board members shall be left free and under no circumstance must they accept insistence to attend or not to attend for the hearing.
3. The Authority shall make recommendations to the Minister on regulations within the provisions of Article 85(2)(i) of the Act, specifically with regards to the *quorum* and the decisive majority for specific cases. That is, whether it should be considered that in projects of certain importance the *quorum* and the decisive majority would be more than the simple majority established.
4. The Board members have to be and should still be seen to be impartial till the precise moment of the vote and any doubts that could have been raised before or during the hearing shall be cleared during the same hearing. Reference was made to certain articles in the media that appeared before the hearing that indicate how certain Board members were voting and also in relation to an alleged conflict of interest.

The reply of the Authority

The Authority accepted the first two recommendations and replied that these have already been activated.

With regards to the third recommendation, the Authority submitted that this would be very difficult to apply as the majority of applications, except for those that are undelegated by the members, are applications under Schedule 1 of the regulations that are decided by the Board.

On the fourth recommendation, the Board members were guided to refer requests by the media to the Authority's public relations office and that it is only the Parliamentary and Local Council Board representatives who have immunity to speak in public on matters that are discussed in front of the Board.

Transport Malta

Irregular road markings obstructing access to garage

The complaint

This case concerns an official un/loading bay marked on a street which the complainant claims is obstructing access to and from his garage.

Investigations and findings

A site inspection was carried out where it was found that the bay in question was outlined by a yellow line and was situated close to the corner. Further investigation showed that Transport Malta had already recommended that the Local Council converts this bay into double yellow lines as this bay ran counter to the regulations that establish the distance of a parking bay from the corner for safety reasons.

However, later on Transport Malta argued that within the resulting double yellow line, that was nine meters long from the corner, a parking bay could be accommodated counteracting parking problems in the area.

This Office reiterated that no parking bay could be accommodated along a nine meter stretch when the regulations state that any parking bay shall be at least five meters from the corner as no parking space can be accommodated within the remaining length.

Conclusion

This Office recommended the removal of this irregular parking bay. Transport Malta accepted this recommendation and after issuing the relative order, the regularisation of the relative road markings were implemented by the Local Council.

Planning Authority

Minor amendment referred to Planning Board

The complaint

Complainant drew the attention at the approval of a minor amendment request by the Planning Authority Executive Chairperson. The complainant submitted that this approval was inconsistent with the Planning Development Regulations which state that amendments to approved drawings and documents shall be considered as minor when they do not affect the objections raised during the public consultation period where they have been material to the decision. Furthermore, complainant submitted that the registered interested third parties were not informed with the drawings approved in this minor amendment when they were submitted to the Planning Authority with the effect that having not objected against this minor amendment in the first place, rather than being processed by the Planning Board as required by regulations, this minor amendment application was processed by the Executive Chairperson.

Investigations and findings

On investigating the relative Planning Authority file it was found that whilst the Planning Authority did inform the registered interested parties that a new minor amendment application had been submitted, the interested parties were not informed that subsequently the applicant also submitted fresh drawings in relation to the same minor amendment. It also resulted that this minor amendment approval ignored the development planning procedure regulation excluding amendments material to the decision that were raised by the interested parties during the public consultation period from being considered as minor amendments to a development permission.

Authority's reaction

The Executive Chairperson admitted that the planning directorate failed to note that the minor amendment in question included amendments that were not acceptable to the Planning Board in the first place and consequently instructed the directorate to initiate revocation procedures against the same minor amendment approval. Furthermore, with regards to the submission of fresh plans following a minor amendment application, directions have been given by the Executive that once a minor amendment is submitted and there are registered objectors, no changes to the plans are to be allowed and a decision has to be taken on the plans submitted. Notwithstanding this, this recommendation for revocation was not accepted by the Planning Board and hence the minor amendment approval in question was not revoked.

Further developments

Another minor amendment was subsequently submitted on the same site and this Office was bound to intervene in order to avoid a repeat, ascertain that the regulations are strictly adhered to and avoid having a minor amendment approval vulnerable to revocation procedures. This latter minor amendment request was subsequently withdrawn by the applicant and a new development application submitted.

Planning Authority

Conversion of a use covered through a construction management plan

The complaint

Complaint concerning the temporary conversion of a sports ground into a car parking area allegedly without the required development permission.

Investigations and findings

From the Planning Authority map-server no planning application or notification for the temporary use of land could be traced. To this effect, on being duly approached by this Office, the operator replied that the necessary paperwork was duly filed with the competent authority in respect of this temporary change in the use of the ground.

Subsequently it transpired that the operator tried to regularise this development by including this conversion in the construction management plan on an active development permission. However, as this management plan was awaiting the approval from the relative transport authority, the Planning Authority was asked by this Office for any enforcement action deemed in line in the circumstances.

Authority's reaction

Following this, the Planning Authority submitted that this matter has been resolved following the approval of the construction management plan as endorsed by the transport authority.

Conclusion

To this effect this case was closed as resolved prompting no further action from this Office against the questioned change of use.

Planning Authority

Republishing a planning application

The complaint

Complainant requested an investigation on whether the Planning Authority is acting abusively when it fails to republish a planning application with a fresh proposal description reflecting the significant increase in the scope of the proposed development.

Investigations and findings

A preliminary investigation revealed that after this application was published and heard in front of the Planning Board, the applicant submitted new plans adding two underground floors to the proposal incorporating more than a thousand parking spaces. Following this submission, the Planning Authority failed to republish this application thus hindering any potential representations.

The Authority's reaction

Asked for its reaction, the Planning Authority replied that following the first hearing this application was suspended to allow the applicant to consider the comments raised with respect to the inclusion of a car park. It also submitted that at this stage republishing of this application can only be requested directly by the Planning Board and thus such action will be decided upon during the public hearing when the application will be discussed again.

A question was also raised whether the Authority was right to continue processing this application during the period that this application was suspended. However, no irregularity was found in this regard as it later transpired that this processing was followed by the applicant's request for an unsuspension of the application.

Conclusion

During the second Planning Board hearing the application in question was deferred pending the submission of another application covering the extensive underground car park. To this effect, this case was closed as resolved prompting no further action from this Office against the questioned failure for republishing as this would now be followed with the publishing of the new application.

Planning Authority

Wall protruding onto a projected road merits no enforcement action

The complaint

This investigation concerned an allegation that the Planning Authority failed to take action against the construction of an illegal wall protruding onto a residential street potentially also acting as a blind corner.

Investigations and findings

It resulted that two years ago the Planning Authority had issued an enforcement notice on site against a “*boundary wall out of official alignment*”. As the status of this enforcement notice was marked for direct action, other than asking the Planning Authority for its views on the matter, Infrastructure Malta was also approached as any direct action by the Planning Authority would have to include road works interventions.

Following the Planning Authority’s submissions it transpired that this enforcement notice was not on the wall protrusion being lamented but rather on another wall on the same site but on a different street as the enforcement site in question was located in a corner. According to law, the Planning Authority could not act against the wall protrusion being lamented as this existed prior to the year 1968. Thus, any direct action on the enforcement notice in question would not address the issue being lamented.

Conclusion

Although the complaint against the Planning Authority was found not to be sustained according to law, this case was followed up with Infrastructure Malta in order to tackle the public safety issue raised by the complainant. In this regard Infrastructure Malta introduced speed limit signs and a mirror at the corner to enhance road safety.

Building Regulation Office

Contractor registration duties delegated to a non-government organisation

The complaint

The Office of the Ombudsman investigated the involvement of the Building Regulation Office (BRO) in the registration of building contractors by the Malta Developers Association (MDA). As the Office of the Ombudsman has no jurisdiction whatsoever on the activities of the MDA and does not interfere on any initiative that the MDA wishes to embark upon, this investigation dealt with the involvement of the BRO in this issue.

The investigation

After asking the BRO for information regarding the contents of the agreement reached between the BRO and the MDA as published on the BRO website and on what basis at law did the BRO authorise the MDA (as published on the BRO Facebook page) to compile such a register, the BRO asked this Office how the BRO falls under the scrutiny of the Office of the Commissioner for Environment and Planning as the latter only has jurisdiction on the working of the Planning Authority and the Environment and Resources Authority according to the Ombudsman Act.

To this effect the Commissioner informed the BRO that as a Government entity that falls within the remit of the Ombudsman, this case involving the BRO was delegated to the Commissioner for Environment and Planning in terms of the Ombudsman Act as has been done during the past seven years. The BRO was thus reminded to provide the requested information.

To this Office's queries the BRO replied that it reached an understanding with the MDA to draw up a list of industry operators who are willing to voluntarily submit their details for onward publication in order to take stock of the current situation and added that there is nothing at law which prohibits such an initiative and that a register as established by law would be compiled at a later stage.

The Building Regulation Act enacted in the year 2011 states that the BRO shall be the entity responsible to register building contractors and that the Minister may delegate this function to any other Government department or body corporate at law. The MDA did not require the blessing of the BRO in order to compile such a register and the contents published by the BRO that the MDA register was authorised by and in agreement with the BRO is against the law that states that the same register must be compiled by the BRO. Furthermore, the law does prohibit the involvement of the BRO in such a register being compiled by a third-party so much so that the law does not only list who may delegate such functions (that is, the Minister) but also onto whom these functions may be delegated (that is any other Government department or body corporate established by law which the MDA does not form part of).

Recommendations and conclusion

The Commissioner recommended that the BRO should immediately remove its adverts on the media wherein the BRO advertises its involvement in the MDA register and that the BRO should compile its own register as established by law without taking note of any other registers compiled by any other body except for those registers that are authorised according to law.

After the BRO did not reply on what action it intends to take in line with these recommendations, as established by the Ombudsman Act this Office referred the recommendations to the Prime Minister and subsequently also to the House of Representatives.

Infrastructure Malta

Publication of information related to a public project

The complaint

The Office of the Ombudsman was requested to intervene on an issue regarding information on a large infrastructural project involving widening of roads and excavation of underground tunnels affecting the quality of life of a large number of residents.

The investigation

As an office of last resort, the Office of the Ombudsman asked the complainant whether this information was requested to the Agency in the first place and to provide the details of the Agency's reply, if any. Although the complainant's reply was that this information was not requested to the Agency, the Commissioner felt that this case merited the launch of an investigation.

After the Agency was asked whether there were any finalised documents that can be immediately published for the sake of transparency and the best information to the public, the Agency replied that it is meeting with the interested parties who are making their suggestions and also that as the project is still in its infancy, there are no finalised documents that can be published.

The Office of the Ombudsman has full access to the documents and minutes in the Planning Authority's electronic files. From the relative electronic file it resulted that Infrastructure Malta had already submitted finalised documents, so much so that these documents were shared by the Planning Authority with the relative public entities for consultation. However, although these documents lead to a full application that according to law is made public following validation of the same

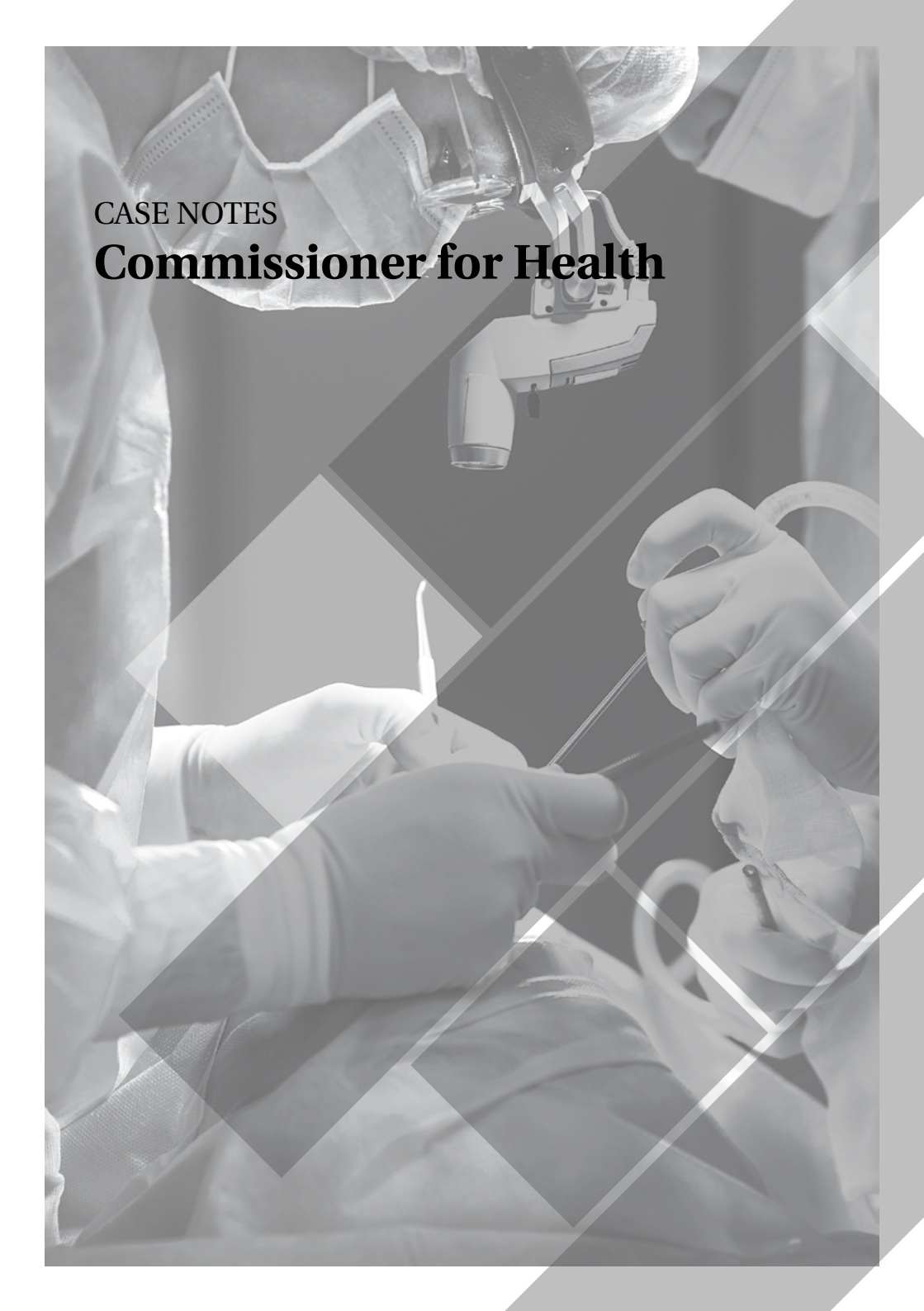
application, these documents are only made available at a late stage when the public is just given a few days to submit representations.

As a small parenthesis at this stage, this investigation reveals the importance that the Office of the Ombudsman is provided with immediate access to all the documents and minutes pertaining to all Government entities. The Planning Authority is the only Government entity that gives immediate and complete access to the Office of the Ombudsman through electronic means. This leads both to promptness and to the convenience that from the Office one can scrutinise each application at the Authority without the need of having to ask for this information from the relative entity. This also with the benefit of eliminating logistical requirements that are not environment friendly such as printing the file and delivering the same file from one office to another.

Recommendation and conclusion

In light of the fact that the public has the right to be informed progressively about such an important national project, it was recommended that the documents presented to the Planning Authority, or those more updated, be published with immediate effect for the sake of transparency and the protection of environmental rights.

Subsequently, Infrastructure Malta took immediate steps so that this information was published within a few days through the Planning Authority after the same application was validated at the request of the same Agency.



CASE NOTES

Commissioner for Health

Case Notes update from previous years

The following is an update from previous cases published in different editions of the Case Notes editions over the years. The aim of this section is to highlight what happens when Commissioner's recommendations are not implemented by the Public Administration.

Case Notes 2012

Discriminatory and unlawful protocols

In the 2012 edition, the Commissioner for Health published a case where patients were suffering the consequences of protocols (regulations) which the Department of Health wrongly imposed. The Commissioner had concluded that such protocols are discriminatory and unlawful.

After seven years no progress has been made in spite of the fact that, in terms of the Ombudsman Act, the matter was referred to the Prime Minister on 3 August, 2015 and to Parliament on 12 August, 2015.

Case Notes 2016

Reimbursement of branded medicine not available on the Government formulary

In the 2016 edition a complaint related to a patient who was entitled for the free supply of medicines was published. The patient needed a particular brand of medicine as prescribed by her Consultant, however this was not supplied to her by the public healthcare system.

This patient is still waiting approval in spite of constant reminders to the Department of Health from this Office. In the meantime, the patient is still buying the medicine.

Hepatitis patient claims that prescribed treatment was not approved

A patient who was diagnosed with Hepatitis C filed a complaint with the Office of the Ombudsman because the Ministry for Health did not approve the supply of

medicines prescribed to her by her Consultant for another four weeks over and above the normal twelve week course. The patient had to purchase the costly treatment herself causing financial hardship. Complainant demanded refund of the cost of the medicines which she had to buy.

The Commissioner for Health had recommended that the patient should be refunded, however she was refunded only less than 30% of the amount she spent without explanation from the Department of Health.

The Department of Health is still refusing to refund the difference and in terms of the Ombudsman Act the case was sent to the Prime Minister on 28 August, 2018. Correspondence is still on-going.

Salary scale discrimination

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

The complainant, was promoted following a competitive call, however he found himself two salary steps lower than all the other employees.

The Commissioner for Health concluded that the complainant suffered an injustice and recommended that he should be compensated. Four years have passed and complainant is still suffering the injustice. In terms of the Ombudsman Act, the case was referred to the Prime Minister on 17 October, 2016 and to Parliament on 28 August, 2018. A reply is still awaited.

Case Notes 2018

MCAST accused of misleading students on the MQF Level of a particular course of studies

Candidates who applied for the Post of Contamination and Sterilisation Technicians were found to be ineligible to apply because the Certificates issued by the Malta

College of Arts, Science and Technology (MCAST) were not worth the paper they were written upon.

Discussions were held with MCAST and the Department of Health with a view that the course of studies will be properly organised.

Whilst still in the planning stages, the Department of Health unilaterally decided to issue another Call for Applications and the former applicants who had raised the issue are still ineligible to apply.

The Commissioner for Health protested with the Department which is now holding discussions with the Union concerned.

Written warning to a civil servant unjustly issued

A civil servant received a written warning from the Principal Permanent Secretary (PPS), Office of the Prime Minister by which he was accused of lack of professionalism and negligence during his administrative duties. The employee rebutted the charge within the stipulated timeframe, providing documents to back his defence, and explained why he should not be disciplined, mostly because, the incident in question did not fall within his responsibility.

The civil servant lodged a complaint with the Office of the Ombudsman expressing his grief that he received a written admonishment charge from the Head of the Civil Service and asked the Ombudsman to investigate the case.

The Commissioner for Health investigated the case and found in favour of the civil servant and had recommended that the PPS should inform the complainant in writing that the original decision to issue a written admonishment was being rescinded. He also recommended that the complainant should be compensated financially to cover the legal fees he incurred and for the harassment which caused him unnecessary distress during the period of uncertainty while being investigated. Since the Principal Permanent Secretary did not agree, the case was referred to the Prime Minister on 14 September, 2018 and to Parliament on 14 February, 2019. The Office of the Ombudsman is still awaiting a reply.

Department of Health

Suspension from work

The complaint

An employee of the public health was suspended from work and also arraigned in Court following a report filed at the Police station by the Health Authorities on an issue related to his duties. During the court case, he was on half-pay. The Court did not find the complainant guilty, and after ten months he returned to work.

The complainant requested that the Department of Health also pays him the allowances to which he was entitled and, for missing work on Sunday, Public Holidays and overtime.

Facts and findings

Following the court judgement, the Chief Executive Officer of the Primary Health Care *“informed the Public Service Commission that in view of the Court’s decision disciplinary action (against the complainant) would no longer be pursued”*.

Moreover, the People and Standards Division (P&SD) of the Office of the Prime Minister informed the Ministry for Health that half the salary withheld during the period of precautionary suspension be refunded.

The Commissioner for Health who was investigating the case sought the reaction of the P&SD – OPM on the issue of allowances. In their reply, the P&SD – OPM referred to the PSC Disciplinary Regulations 2017 and the Manual of Allowances and reaffirmed their position that allowances are only paid for actual work performed.

The Commissioner countered by stating that *“the PSC Disciplinary Regulations do not mention any allowances which an employee might have been receiving. Only the salary is mentioned.”* He said that he believed that the complainant should

also be refunded the allowance which was due to him by virtue of his duties as he should not suffer injustice because of something which the Court had not found him guilty of. The Commissioner continued that even though he had not been working, the employee, nonetheless, was given the full salary.

Moreover, the Manual of Allowances stated that “*all automatic and fixed allowances which are specifically incorporated in the pay package will not be deducted...*”.

Following the representations made by the Commissioner, the P&SD – OPM agreed that complainant “should not forfeit the Class Allowances withheld from him during the period of precautionary suspension”. However, the complainant was informed that he was going to be given a different class of allowance. He also argued that besides he should also be paid the money he would have earned for working on Sundays, Public Holidays, according to his roster, and overtime had he not been suspended.

He added that during the period of his suspension, he would have worked on twenty-two Sundays and five Public Holidays.

Conclusions and recommendations

After reviewing all the facts and findings that emerged during the investigation and after consulting the various manuals regulating the public service, the Commissioner for Health concluded that:

1. although the Ministry for Health felt justified to proceed with Precautionary Suspension, yet, once the employee was not found guilty by the Criminal Court, he should not suffer any consequences and be deprived of his regular income in terms of allowances, shift work and overtime;
2. the Court exonerated the employee from any wrongdoing. Therefore to deprive him of his full remuneration would mean that the Government would be going against the Court’s decision by imposing another punishment;
3. there is no doubt that in such cases, the employee should be placed in the same situation he had been in before his suspension, that is he should not suffer the consequences of actions taken by his superiors. Such action, that is suspension from work, was found by the Criminal Court to be unwarranted because he was exonerated from all the accusations;

4. the employee should not only not forfeit half his salary, but he should also not forfeit any other remuneration which he had been receiving regularly before his suspension;
5. the employee and his family passed through a hard time for ten whole months to make both ends meet with half of the salary. The complainant stated that his son had to interrupt his studies to find employment and help the family; and
6. suspension from work is a severe disciplinary action and should only be taken after a thorough examination of the circumstances of the alleged offence.

Given his conclusions, the Commissioner for Health recommended that:

1. the complainant is to be paid for all the Sundays and Public Holidays and overtime he would have worked had he not been suspended for 293 days;
2. when an employee is suspended and given half his/her salary it should be ascertained that the half wage would at least be equivalent to the National Minimum Wage;
3. the Manual of Disciplinary Procedure is amended to read - the refund of "*the full amount of remuneration that would have normally been earned*"; and
4. before a Precautionary Suspension is decided to be taken, an employee should first be summarily suspended for a maximum of eight working days during which time the Department will obtain as much proof as possible to justify the Precautionary Suspension. It is also recommended that the Investigating Board be composed of three senior Officials.

The recommendation of the Commissioner for Health is still being considered by the public administration.

Department of Health

Indiscriminately not given allowance

The complaint

Complainant, who is a qualified nurse, stated that the nurse escort allowance, which is given to nurses who accompany patients for treatment abroad, is not being given to her. The complainant stated that she goes with her daughter, who needs a nurse escort during the flight and also during the out-patient period. Had she not been a nurse, the Department of Health would have had to send a nurse and give the said nurse an allowance.

The Treatment Abroad Committee refused to give the allowance because it argued that nurses should not escort immediate relatives as this goes against medical ethics.

The investigation

The Ombudsman referred the case to the Commissioner for Health who requested the reaction of the Department of Health. The Permanent Secretary of the Ministry for Health replied that as per “*DH Circular 88/2017 (DH3459/2015) all nursing staff carrying out escort duties were to apply for registration to be considered for the said role*”. He continued that the complainant has never registered for this role and “*Therefore, since she never applied for this formal role, to carry out escort duties as per the said DH circular, while the Primary Health Care Department granted her the two days duty leave, she was not eligible for the associated remuneration.*”

Reacting to the Permanent Secretary’s feedback, the Commissioner for Health stated that complainant was not interested in registering to work as an escort nurse for the simple reason that her daughter requires constant, 24/7 attention, and therefore she cannot perform nursing escort duties with other patients. The complainant was only interested in accompanying her daughter. If she was not a qualified nurse, the

Department would have to send a nurse and incur additional expenses towards air journey, transport and accommodation. Moreover, the patient had other serious problems, one of which is that she is non-verbal and would make it very difficult if a nurse replaced her mother, a nurse herself.

In his reply, the Permanent Secretary said that the Treatment Abroad Committee had discussed the issue and that particular reference was made to paediatric cases where the parents manage children patients at home, and when a nurse is requested to accompany the patients abroad. Instances arise when the parents, who are themselves health care professionals, ask to be their escorts. He continued that *“The Committee agreed that this was not considered ethically correct; it is highly suggested that caregivers do not treat members of their immediate families as professional objectivity may be compromised when an immediate family member is involved.”* Reference was also made to the Committee’s discussion and the decision taken in 2009 when the complainant requested that she acts as the official nurse escort to her child. At the time the Committee Members had agreed that on ethical grounds the request should not be conceded. The Committee, therefore, decided that the decision taken in 2009 is reinforced and that no relatives are to be allowed to act as Official Medical Escorts.

Facts and findings

The Commissioner sought the reaction of complainant who explained that during the past sixteen years she always acted as *“official medical escort”* whenever her daughter was sent abroad for treatment. The Ministry for Health gave the go-ahead so much so that she was always given duty leave. She continued that *The purpose of my complaint was so that I would be rewarded as are all the other “official medical escorts”*. The complainant also said that she would be ready to explain her case to the Treatment Abroad Committee. An offer which was also endorsed by the Commissioner for Health.

The Department of Health reiterated his position by stating that *“Even if in the past, the complainant was allowed to act as a clinical escort for her daughter, in breach of this long-standing policy, this situation needs to be rectified to ensure that all appropriately follow existing policies and procedures. Should the complainant’s daughter require a clinical escort, then her consultant can apply with the Treatment Abroad Committee for this service, and her mother can accompany her as a parent.”*

Since both, the Department of Health and the Treatment Abroad Committee mentioned ethical issues, the Commissioner for Health sought advice from the Medical Council. The Medical Council confirmed that “*there are no official MC guidelines regarding treatment by Medical Practitioners to close relatives*”.

Following another meeting of the Treatment Abroad Committee to which the complainant was invited to explain her case in detail, the Treatment Abroad Committee informed the complainant that it was unanimously decided that the complainant cannot be her daughter’s “*official medical escort*”. The Committee said that the decision was based on medical ethics.

Conclusions and recommendations

The Commissioner for Health made further enquiries with the Medical Council and the Council for Nurses and Midwives. Both confirmed that no guidelines/directives were issued as regards such cases. He also perused the Ethics and Regulations of the Medical and Dental Professions and the Maltese Code of Ethics for Nurses and Midwives and both publications do not refer to the subject.

The Commissioner also referred to the General Medical Council (GMC) UK ‘Good practice in prescribing and managing medicines and devices’ and the Nursing and Midwifery Council (NMC) UK who make no prohibitions, whether specific or implied, that preclude doctors and nurses from prescribing and administering treatment to close relatives in an emergency.

The Commissioner noted that the complainant was not prescribing treatment, but only administering the treatment prescribed by the doctors treating her daughter, which medication, she regularly follows.

He also noted that the Health Care Professions Act gives the functions of professional and ethical standards to the Medical and Nursing Councils.

The Commissioner commented that the issue arose because the mother/nurse asked to be remunerated in terms of Circulars issued by the Department of Health. Given the facts and findings that resulted during his investigation, the Commissioner for Health considered that:

1. The complainant was accepted to act as escort to her daughter but not allowed to work as a nurse to her daughter.
2. The reason behind it seems to be the question of remuneration because this was when the problem arose.
3. No doubt has ever been raised as to the need of a nurse escort in this case.
4. Nor has it ever been suggested or implied that the mother, who is also a qualified nurse, was not the best person to do this job because of the various severe conditions from which the daughter suffers, one of which is that she is non-verbal.
5. The mother proved her competence on the 25 times that she escorted her daughter.
6. The mother's request to act as nurse escort was turned down "*on ethical grounds*" which do not exist. The Treatment Abroad Committee is not the forum where decisions on ethical issues are decided. Such decision with decisions must be taken by the Medical Council or by the Nursing and Midwifery Council.
7. Both the Medical and Nursing Councils have not pronounced themselves so much so that midwives are allowed to deliver babies of their immediate relatives and Surgeons are allowed to operate on their immediate relatives.

Therefore the Commissioner for Health concluded that:

1. The Treatment Abroad Committee was not competent to plead ethical grounds when the relevant Councils have never ruled that such a request would be in breach of Medical or Nursing ethics.
2. In such a case good administrative practice dictates that the Treatment Abroad Committee should have sought the advice of the Medical and Nursing Councils.
3. The Treatment Abroad Committee's objection was baseless and was not competent to decide on ethical issues and acted imprudently when it failed to consult the Medical and Nursing Councils.

The Commissioner for Health upheld the complaint and recommended that the complainant is accepted to be the nursing escort to her daughter and that such recognition be accepted with retrospective effect.

The Commissioner also recommended that the complainant is given the remuneration due to her for past and future services.

Outcome

The complainant was informed that the Department refused to agree to these recommendations and she, therefore, decided to take the matter to Court.

Department of Health

Unfair transfer

The complaint

The complainant who works in the Public Health sector performing ward duties was transferred to the Hospital Maintenance Section following a report made against him by a patient. Following a preliminary investigation, the hospital transferred the employee and was subjected first to a Board of Investigation and later to a Disciplinary Board.

The Disciplinary Board did not find the employee guilty, and he was transferred back to his former duties.

The complainant asked the Ombudsman to intervene to be compensated for the allowances and overtime he lost while being investigated and transferred to the maintenance section.

The investigation on allegations made by a patient

As part of the investigation, the Commissioner for Health went through the investigation process that investigated the allegations made by a patient on the complainant. Upon receiving the report, the department in which the complainant worked, decided to transfer the employee from Ward duties to General Service duties so that he would not be in a place working with patients until the disciplinary process was concluded.

On his part, the complainant refuted the allegations and pleaded not guilty. The Disciplinary Board interrogated several witnesses brought forward by the prosecution and defence. Following a thorough investigation, the Disciplinary Board concluded that complainant was not found guilty and was sent back to perform his duties.

The investigation on the allegations lasted for more than a year during which the complainant lost the Shift Allowance, did not work on Sundays and Public Holidays and did not perform any overtime.

Conclusions

Since complainant was proved to be a victim of allegations made by a person who was found by the Disciplinary Board to be “*unreliable*” and therefore exonerated him from any wrongdoing. The Commissioner for Health concluded that the complainant should not suffer the consequences.

The Commissioner also concluded that if the complainant was to be deprived of his regular income, this would mean that another punishment was being imposed on him.

Therefore, the Commissioner concluded that the complainant was to be refunded the money he lost in allowances, the shift allowance, for not working on Sundays and Public Holidays and for overtime he would have undoubtedly been asked to perform.

Recommendations

Given his conclusions, the Commissioner for Health recommended complainant should be paid all the remuneration he was deprived of earning during the year that he was not allowed to perform ward duties, that is, shift allowance, work on Sundays and Public Holidays according to his roster, and overtime he would have undoubtedly completed.

The case is still pending, and this Office is yet following it up with the Department.

Department of Health

Kept in hospital until given specifically needed medicine

The complaint

The husband of a patient who suffered from a life-threatening condition complained with the Ombudsman because the health authorities did not give a particular medicine which his wife needed. Had the health authorities authorised the required medication, the patient could have been released from hospitalisation.

Facts and findings

The Ombudsman referred the case to the Commissioner had Health for investigation. Upon receiving the complaint, the Commissioner spoke to the Consultant who informed him that the patient was a unique case of a resistant and potentially life-threatening chronic condition. The Consultant added that he had given the patient other medicines, but, unfortunately, the disease was not adequately controlled. The only available treatment, short of keeping the patient hospitalised was a particular medicinal which he prescribed.

Moreover, the Consultant had already requested this medicine four months before, but the Committee turned down his request.

The Commissioner sought the reaction of the Department of Health who informed the Commissioner that they had requested the Consultant to try an alternative medicine instead of the particular treatment he prescribed. The Consultant believed that the only treatment that would allow the patient to be discharged from recurrent hospitalisation was the specific treatment he prescribed.

The Commissioner asked the Committee to reconsider the case with urgency

since the patient was being kept in hospital. He also wrote to the Department of Health lamenting that when the Committee asked the Consultant to try alternative medicine, even though he was in disagreement, they were overstepping their remit.

Outcome

It took the Department of Health six months to approve the purchase of this medicine and another two months for the medicine to be procured. Meanwhile, the patient had to remain hospitalised.

Subsequently, the Consultant monitored the patient with this new medicine until he was satisfied that the patient responded well to this treatment and discharged her from the hospital where she had been during the previous eight months.

Mater Dei Hospital

Request for refund of expenses incurred for treatment abroad

The complaint

The parents of a twenty-year-old filed a complaint with the Ombudsman because they had to take their son for an urgent eye operation abroad due to delay to be operated at Mater Dei Hospital.

Facts and findings

The Ombudsman referred the complaint to the Commissioner for Health for investigation. In their complaint, the parents explained that their son was diagnosed with an eye condition and needed surgery. The patient was unsuccessfully operated at Mater Dei Hospital with the result that he lost vision in one eye.

The parents were preoccupied because the other eye was also giving cause for concern. The patient was being seen and followed up by ophthalmic surgeons both privately and at MDH who decided that the patient should be operated and therefore, he was put on the waiting list.

A year had passed, and there was no response from MDH, and no date was given for the operation. The parents decided to take their son to the UK, and to finance the procedure, they had to borrow money.

The patient was operated in the UK and vision was adequately maintained. The parents asked the Ombudsman to intervene to be refunded the costs related to the operation. The parents argued that delay from MDH part was increasing the risk for their son to lose his eyesight.

The investigation

The Commissioner for Health asked the Department of Health for their reaction. The Department of Health stated that since the patient had chosen to travel to the UK for treatment privately, without obtaining authorisation to do so, they could not accept the request for reimbursement.

The Commissioner for Health explained that the decision taken by the parents was made because their son was risking losing his eyesight. He also asked if the Department of Health investigated the reason behind the delay when considering that the patient had already lost the vision in one eye. Also, he inquired if the department had considered sending the patient to the UK as a Government-sponsored patient following the unsuccessful operation in the lost eye. The Department of Health stated that since the patient was due to be operated in Malta, there were no plans to refer the patient to the Treatment Abroad Committee for consideration. The Department of Health reiterated their position and stated that since the patient went for the operation to the UK, no follow up with MDH was reported from the patient's side.

In his reaction, the Commissioner for Health stated that the statement that there was no follow up from the patient's part following the operation in the UK is not correct since the patient was later sent for follow up treatment through the Government Scheme. The Commissioner insisted that even though MDH promised the parents that the operation would be conducted in '*a few weeks*', a year had passed, and no date was forthcoming from MDH.

Conclusion

The Commissioner for Health insisted that the parents' request for the reimbursement is legitimate and made representations in this respect with the Ministry for Health from which he is still awaiting a reply.

