OMBUDSMAN

Office of the Ombudsman

MALTA

Case Notes 2014

Edition 34

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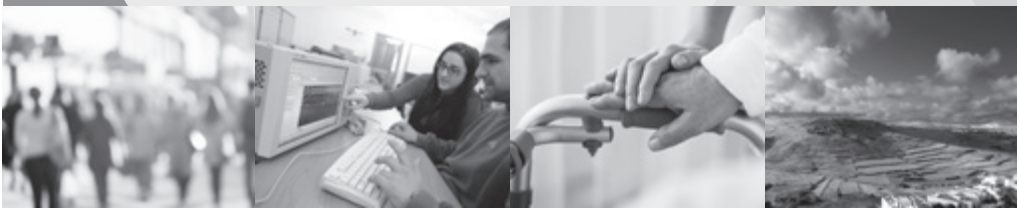

Case Notes 2014

Edition 34

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

Office open to the public as follows:

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Website: www.ombudsman.org.mt
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Foreword

The dual function of the Ombudsman is to defend the citizen against injustice, maladministration and improper discrimination and to be a proactive tool to ensure the citizens' right to a good public administration.

The Ombudsman exercises his functions primarily through the investigation of complaints by aggrieved persons seeking redress and also through own initiative investigations. The latter are conducted when he identifies systemic failures in the management of public affairs that negatively affect citizens and that require attention. Following the 2010 Constitutional amendments the Ombudsman institution has, through the appointment of highly qualified Commissioners who are experts in their field, acquired a high degree of specialisation in the investigation of complaints. These Commissioners work autonomously, in close collaboration with the Ombudsman within an integrated Office that provides them with administrative and investigative support. They can conduct own initiative investigations when authorised to do so by the Ombudsman.

This bilingual publication includes a sample of final opinions delivered by the Ombudsman and the Commissioners for Health, Education and Environment and Planning. The chosen case notes not only give an inkling on the nature and complexity of the complaints investigated but also shed a light, on the procedures followed to establish the true facts of the complaint and the veracity of the allegations made.

More importantly perhaps, the case notes illustrate the principles of good administration that the Executive and authorities are expected to follow to ensure a high level of transparency and accountability in the management of public affairs.

A cursory glance at the contents of this publication is sufficient to show the wide variety of complaints investigated by the Ombudsman and the Commissioners. Complaints extend over the whole gamut of social activity managed by public authorities, entities

and institutions falling under the jurisdiction of the Ombudsman. Investigating Officers are required to interpret and apply complex statutes and procedures governing new areas of economic and social development originating both locally and internationally. These include international conventions ratified by Malta, as well as EU Directives that have been transposed and now form an integral part of Maltese legislation.

In this respect, the expertise acquired by the Office of the Ombudsman through the appointment of the Commissioners is proving to be invaluable. It is clear that to exercise their functions in a comprehensive and competent manner, the Ombudsman and the Commissioners need to be ably supported by a strong and highly qualified team of investigating officers. That is the only means to ensure that the facts of every complaint are correctly and faithfully compiled and investigated. Investigating officers must not only have a sharp, inquisitive and tenacious approach in compiling and assessing the facts and circumstances that gave rise to the complaint, they must also be able to place them in their proper perspective within the framework of the principles that should govern a good public administration.

Moreover, complaints need not only be judged from a purely legal standpoint, though it is obvious that laws need to be respected and applied. More importantly perhaps, rather than emphasising a judgemental approach, investigating officers are required to assess and appreciate the facts of the complaint from a wider perspective of the principles of justice, fairness and equity applicable to the case. As former European Ombudsman Professor Nikiforos Diamandouros liked to emphasise "*There is life beyond legality*". Administrative correctness goes well beyond the observance of the strict letter of the law. It embodies other important values that need to be embraced and exercised by public administrators when taking decisions that directly or indirectly affect the rights of citizens.

It is in this context that the Ombudsman requires to constantly keep under focus the strength and efficiency of the investigative team that is undoubtedly the backbone of the Institution. He needs to ensure that that team is well-structured and has the capacity to materially cope with the inflow of complaints serenely, competently and within a reasonable time. I have nothing but praise for those entrusted with the investigation of complaints within my Office. They are highly qualified, competent officials who have performed well and are of invaluable support to me and the Commissioners.

Of course there is always room for improvement. Structures needed to be improved to ensure a constant and collective monitoring of the way investigations are proceeding. It is clearly impracticable and unrealistic to impose time limits on the investigation of complaints. I do not believe that the quality of the investigation should be hampered by undue emphasis on cost effectiveness, there is however need for internal review mechanisms to periodically ascertain what are the reasons, that are hindering a timely conclusion of the investigation and to identify what steps could be taken to hasten the process.

It is recognised that very often the delay is due to the failure of public authorities to promptly respond to requests for information put to them by investigating officers as well as to promptly react to queries addressed to them. A first step has been taken to provide a structure for our investigating team with the appointment of a Head of Investigations. To my mind, rather than performing the role of a traditional Manager ensuring performance of investigators, the Head of that section should be the link person between the investigating officers and the Ombudsman and the Commissioners. Through discussion and timely advice it could be ensured that procedures are correctly and expeditiously followed so that investigations can be concluded in the shortest time possible.

Though professional investigators need to be allowed space within which they are to carry out the enquiries entrusted to them, according to their better judgement and in their own style, every effort should be made to develop a common approach on how cases should be dealt with and final opinions drafted. Quality control and performance assessment of the service provided by investigators rests with the Ombudsman and the Commissioners, who are ultimately responsible for the final opinions that are released over their signature.

There is however, room for fine tuning of the structure of the section, to improve coordination and cooperation among its components, to streamline its operation and make it more efficient. A more precise definition of the functions of the Head of Investigations may also be necessary. An opportunity will arise in the not too distant future and certainly not beyond the first quarter of 2016 to introduce these improvements. By that time the most Senior Investigating Officer and the Administrative Consultant would be leaving the Office after years of sterling service to the Institution. This will require a new intake of new investigating officers and this would certainly be a good time to discuss and introduce the much needed reforms in this section.

This 34th Edition of the Case Notes is dedicated to the hardworking team of Investigating Officers who have for years given and are still giving invaluable support to the Ombudsman and the Commissioners. Their commitment, competence and hard work are reflected in the reported cases that are just a sample of the investigations carried out during the year. This is just the end product. The reports, by no means, do justice to the long, painstaking and patient work that investigating officers need to dedicate before investigations are finally concluded. It is recommended that one should keep this in mind when browsing through this publication. Providing an efficient and effective Ombudsman service crucially depends on a strong, qualified and dedicated team of investigating officers. We have had the good fortune of having such support throughout the years.

J Said Pullicino
Parliamentary Ombudsman
March 2016

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

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

Contents

Case Notes from the Parliamentary Ombudsman

Case Note on Case No N 0289
Medical Council of Malta

"Justice delayed, justice denied"

(unnecessary delay, inquiry, disciplinary proceedings)

The complaint
A medical specialist (complainant) alleged that the Medical Council of Malta had breached its obligations at law when it failed to conclude within the established legal timeframes, an inquiry into a complaint lodged against him with the Council.

Findings
In May 2005 the Medical Council received a report from another specialist in the same speciality as that of consultant, to the effect that (complainant) had endorsed a false testimonial for another doctor for the purpose of the latter attaining a specialist qualification from a UK institution. The person who filed the report was a member of the same Council and had also filed another report against this other doctor. Both complainant and this other doctor were subject to an inquiry instituted by the Medical Council in terms of the Health Care Professions Act 2004, for improper professional behaviour/ breach of professional ethics.

The Medical Council initiated its disciplinary proceedings against the doctors concerned in August 2006. The first sitting was held on 4 September 2007 and was adjourned to 16 October 2007. At that stage, complainant requested an adjournment and the hearing was eventually scheduled for 15 April 2009. A hearing was due to be held on 11 November 2009 but this had to be postponed because it clashed with a scheduled Court hearing. By the time the complaint was lodged with this Office (11 November 2013) – four years later, the Medical Council did not hold any further hearings on the case against complainant.

This Office understood that there was a link between complainant's case before the Council and the case of the other doctor referred to earlier. This may have been a valid reason for the deferment between September 2007 and April 2009. However, it was relevantly pointed out that the Medical Council had decided the other case in July 2011 – more than two years prior to complainant seeking redress from the Office of the Ombudsman. Complainant was arguing that this undue delay was affecting him negatively.

On receipt of the complaint, the Ombudsman sought explanations from the Registrar of the Medical Council. While informing the Council that it was not the function of this Office to enter into the merits of a case which fell within the jurisdiction of, and was *sub judice* before the Council, it was however concerned with the administrative aspect of the situation and specifically in respect of the delay on the part of the Council to reach its decision. The Ombudsman referred to the provisions of Article 31 of the Health Care Professions Act (Chapter 464 of the Laws of Malta) which article deals with disciplinary action and related inquiries by Councils (including the Medical Council) established under the Act.

Sub Article 4 of Article 31 states as follows:

"*(4) For the purposes of the foregoing provisions of this article, the relevant Council shall conclude the inquiry within a period of two years from the day on which any act of the inquiry proceedings is served on the party accused in respect of the fact or incident with which he is charged, except where the delay is occasioned through no fault of the relevant Council.*"

The Ombudsman therefore requested that the matter be brought to the attention of the Council and requested an early reply. In the meantime, complainant had filed a judicial protest against the Medical Council.

In its reply to the Ombudsman, the Council submitted a copy of the counter - protest which it had filed before the Courts which it said contained the Council's position on this case.

Specifically on the delay in concluding the inquiry, which was the specific issue investigated by the Ombudsman, the Council had replied to the Courts that in the near future it would inform complainant on the proceedings of the inquiry.

The Ombudsman considered that the reply given to this Office by the Medical Council ignored the issue which he was investigating *viz* the inordinate delay amounting to a *prima facie* failure on the part of the Council to conclude the inquiry within two years as stipulated in sub article 4 of Article 31 of the Health Care Professions Act. No justification had been presented to explain why the deadline set down by law was not respected in this case.

In the circumstances, the Ombudsman informed the Council that unless such justification is presented within 4 weeks, he would proceed to conclude his Final Opinion on the complaint. Soon after (6 February 2014) the Registrar of the Medical Council informed the Ombudsman that " *... the decision on the above-mentioned Inquiry has been taken by the Medical Council, during Council Meeting No. 20/2013 held on 4th December 2013, and that this is expected to be communicated by the first quarter of year 2014*."

The Ombudsman was surprised by the further inexplicable delay in communicating a decision already reached by the Council. Even complainant protested at this further delay.

On receipt of the Council's reply, the Ombudsman immediately wrote back to the Council, reminding it that proceedings against complainant had started seven years earlier (2006) and that the Council had not justified its failure to conclude the inquiry within the deadline of two years imposed by law. The Ombudsman could not understand why the decision, already unduly delayed, but reached in December 2013, was to be communicated to complainant four months later! He considered that these delays were unacceptable by any standard and that this manifested gross inefficiency on the part of the Medical Council, besides a failure to observe the legal time frames set under the Health Care Professions Act. This fact attracted serious criticism from this Office.

The Ombudsman further drew the attention of the Council to Article 41 of the Charter of Fundamental Rights of the European Union which formed part of the Treaty establishing a Constitution for Europe. This Article lays down the right of European citizens to good administration. The European Ombudsman had in 'The European Code of Good Administrative Behaviour' stated that this included a reasonable time limit for decision taking.

The Ombudsman further expressed his concern at the Council's lack of sensitivity in respect of the stress suffered by complainant and others in his position, who rightly expect to be given a decision, one way or the other, without delay - a decision which after all could be appealed at law. Stating that the decision has been reached (after an unlawful delay) and adding that it will be communicated months later, caused further unnecessary pain and suffering. This again attracted further criticism from this Office.

The Ombudsman therefore recommended that the decision be communicated to complainant within seven days from the date of his letter.

Notwithstanding this, it took another three weeks for complainant to be informed that he had been acquitted!

In view of the serious unjustifiable delays, in breach of good administration besides also breaching the legal provisions regulating the Medical Council, the Ombudsman drew the attention of the Minister responsible for Health to the Medical Council's failure.

Case Note on Case No O 0080
Public Service

Excessive workload unfairly assigned

(excessive workload, health consequences)

The complaint

A public officer pleaded that following his being promoted to the grade of Principal in the Public Service, the Director, to whom he was answerable, assigned him all the duties of another employee in that grade who was due to retire, while at the same time he had to continue to perform practically all his former duties in the lower grade and was only given minimal assistance. Complainant argued that he could not cope with this workload and as a results, a backlog had accumulated. Despite an offer of help from his Permanent Secretary, such help never materialised. Complainant further alleged that the situation was affecting his health.

Facts and findings

Complainant had been recently promoted to the grade of Principal and continued to serve within the Department where he worked. Prior to his promotion, he had been following a course of studies at the University of Malta, partly funded by Government following the necessary approval. At the time of his promotion, another employee in the grade of Principal in another Unit within the same Department was due to retire on reaching pensionable age and was already on pre-retirement leave. Complainant was therefore assigned the duties of this Officer since he was in his same grade following the promotion. However, complainant was additionally kept responsible for a major part of his former duties. Complainant objected to this and sought redress from his Permanent Secretary who promised to look into the matter, but the latter had also expressed his concern regarding the problem of getting a replacement. In effect complainant had the assistance of a clerk who performed her duties on the basis of the Teleworking system.

This Office sought the comments of the Permanent Secretary in the Ministry where complainant worked. In his reply the Permanent Secretary enclosed a statement from the Director who was responsible for the assignment of duties to complainant. This Director categorically denied that complainant was assigned excessive duties and referred to incidents involving complainant which reflected negatively on the latter's attitude in the performance of his duties. When this information was relayed to complainant, the latter rebutted the allegations and gave his version of facts which in parts were substantially in direct conflict to what had been alleged in his respect by his superior officer.

This Office noted that the tone of the Director's statement as well as complainant's reply clearly demonstrated that the working relationship of these two officers was not a happy one. Therefore this Office insisted on a personal evaluation of the situation by the Permanent Secretary who already had access to the conflicting comments of these two officers.

In his evaluation, the Permanent Secretary referred to complainant as a person difficult to deal with, not very cooperative and one who was not easily ready to accept a change of duties. In his honest opinion, complainant did not have a valid reason for his complaint since the assigned duties were reasonable and complainant could perform them without difficulty since he was a capable employee.

Considerations

The Ombudsman observed that, what was initially a disagreement in respect of allocation of additional duties in the grade of Principal following the impeding retirement of a public officer in that grade and complainant's promotion to that grade, had subsequently developed into reciprocal accusations between two officers in respect of their performance in the public service.

This Office considered that such development was a matter which, if necessary, should be investigated further by the competent authorities, including the Permanent Secretary within the Ministry.

The basic issue in this case was the assignment of additional duties to complainant following the vacancy created by the impeding retirement of an officer in the same grade of complainant but who worked in a separate Unit within the same Department. Complainant argued that these duties were excessive and unfair and that he could not

cope with them. At one time he had stated that he had to seek medical assistance because of the related stress.

This Office had always sustained that the assignment of duties was the prerogative of Management and that this Office does not intervene unless there is evidence that the new duties do not reflect the employee's grade, or that these are otherwise unjust or abusively imposed in a punitive or vindictive manner. None of these situations resulted in this case. However the Ombudsman observed that this complaint referred to a situation which could give rise to an injustice – the allocation of excessive duties, such that an employee cannot reasonably cope with, and possibly even being detrimental to the employee's health.

In this case this Office was presented with two dramatically opposite contentions – those of complainant and of the Director who was responsible for such assignment of duties. For this reason, this Office sought the personal evaluation of the situation from the Permanent Secretary in the Ministry. The Permanent Secretary maintained that in his honest opinion, the duties assigned to complainant were reasonable.

This Office also sought information from the Director Employee Relationship Management within the Public Administration HR Office (PAHRO) as to whether there existed any objective criteria to determine whether duties were excessive or otherwise. The reply[1] was in the negative. However PAHRO added that if a Director General or a Permanent Secretary considered it necessary, they may request the Management Efficiency Unit to carry out an Operations Review of the respective duties – an elaborate process which involves, amongst others, a time and motion study of officials within the Department – a process which understandably involves the use of human resources for a substantial period of time. In such case, the Ombudsman considered that if it resulted that the claim was frivolous, or that there was abuse of authority, the official responsible must be held accountable and the findings of this exercise be recorded in the personal file of the official concerned.

PAHRO further referred to the negative health effects suffered by an employee in such situations. An employee should be given the opportunity to participate in an Employee Support Programme – a service available to Public Service employees.

1 This was a verbal opinion expressed during a discussion with the official within PAHRO.

This Office further consulted the Occupational Health and Safety Authority which in turn referred to the possibility of seeking the advice of an Occupational Psychologist.

Conclusions

After reviewing the above findings the Ombudsman was not in a position to sustain the complaint. Apart from Management's prerogative in the assignment of duties, the fact is that there is no objective method/criterion which could help this Office conclude that the assigned duties were excessive. On the other hand, the opinion of the Director responsible in this case for the assignment of duties, was corroborated by the Permanent Secretary within the Ministry.

Without prejudice to the above, the Ombudsman opined that should complainant continue to find it difficult to perform the duties assigned to him, the Authorities had various alternatives, including transferring complainant to other areas in the public service to perform duties compatible with his grade. Furthermore, if the Authorities remain convinced that the duties assigned to complainant were fair even when compared with the duties of other officials in the same grade within the same Ministry, they should further consider other alternatives referred to in this report, namely that complainant be offered the services of the Employee Support Programme or the services of an Occupational Psychologist.

Case Note on Case No O 0081
Foundation for Medical Services

Qualification allowance to employees seconded to a State Agency

(qualification allowance, equality, good administration)

A clerk on an indefinite contract who was seconded by a State Agency – the Foundation for Medical Services (FMS) - to work in a government hospital, claimed that she was unfairly refused a qualification allowance when a colleague of hers in the same office (a Public Officer) where she worked and who was performing the same duties as her, benefitted from such allowance. Prior to obtaining her diploma in European Studies the hospital had granted her study leave for a number of days in connection with her studies.

When complainant applied for a qualification allowance she was informed by the hospital authorities that her request could not be acceded to in view of the fact that she was an FMS employee, and that when this Foundation was contacted, the latter informed that its pay structure did not include a qualification allowance. Considering that she had qualified for her diploma after she had been granted study leave for the purpose, complainant was not convinced of the reason for rejection of her claim for allowance.

This Office first requested comments from the hospital which had rejected her claim for the allowance. Specifically a request was made for a copy of complainant's contract of service as well as for the condition of her service at the hospital, including whether complainant was entitled to any benefits in addition to those listed in her FMS contract of service. Information was additionally requested as to whether there were other FMS employees deployed at the hospital who enjoyed additional benefits (beyond their contract) in virtue of the nature of their duties.

It resulted that in terms of her contract, complainant was entitled to her salary as Clerk in salary scale 16 and to the following allowances:

- a shift allowance; and
- allowance for working on Sundays and Public holidays in line with the Department of Health wage regulations.

She was further entitled to "*...receive any bonuses, allowances or increases which she is entitled to in terms of the law*". There was no specific mention of a qualification allowance.

This Office informed FMS that while complainant's salary was pegged to a Public Service salary scale, there was no reference to the qualification allowance payable to Public Officers as part of their service conditions when employees like complainant were seconded to the Public Service. This meant that potentially complainant could be paid less than her public service counterpart for the same duties. Even if the employment legislation in Malta did not bind FMS to go beyond the contractual obligations, there was an issue of equity. While seeking the reaction of FMS, this Office also requested the Foundation to indicate whether there were other FMS employees deployed at the hospital in question "*or otherwise in the Public Service*" who enjoyed a qualification allowance or some other form of benefit that was not listed in their contract.

The first reaction from FMS was to insist on the conditions of complainant's contract which did not include a qualification allowance. However FMS subsequently identified four FMS employees deployed in another Government hospital who were in receipt of a qualification allowance which was not included in their contracts. It argued that in all these cases the qualifications were relevant to the respective employee's duties. The Foundation still objected to complainant's claim on the grounds that her qualification was not relevant to the specific duties that were assigned to her at the hospital. FMS finally added however that it intended to draw up a clear policy regarding requests for a qualification allowance "*to ensure equity across the board*".

In a situation where FMS was in effect granting such allowance to its employees deployed in the Health Section, this Office queried FMS's yardstick for the purposes of determining whether a qualification was relevant to an employee's duties. This Office drew the attention of the agency to the provisions of the Public Service Management Code (PSMC) which regulates the conditions of public officers and which provides valuable and specific information/guidelines on the relevance of qualifications to one's duties. In fact, Appendix

2.VI of PSMC provides a list of areas of studies for which the relevant qualification is always to be considered relevant to duties in all general service grades. This list includes the area of European Studies. Complainant's grade was that of a Clerk which was a general service grade.

In the light of this deployment, FMS replied as follows:

> "*Kindly note that the Foundation for Medical Services (FMS) has reviewed it's position and taking into consideration the fact that, as you correctly state, a qualification in European Studies is listed as being eligible for a qualification allowance in PSMC, the board has agreed to approve ...(complainant's) request.*
>
> *In addition, FMS is in the process of drafting an official policy regarding Qualification Allowance which will serve as a guideline for future applicants*".

This was a victory for equity and the case was thus satisfactorily concluded.

Case Note on Case No N 0263
Principal Permanent Secretary

Permanent Secretary alleges that his definite contract was unfairly terminated

(definite contract, termination)

The complaint[2]

A former Permanent Secretary complained that his definite (3 year) contract was unfairly terminated without a valid reason and without respecting the provisions of Clause 3 of the same contract and Sub-article 3 of Article 92 of the Constitution of Malta – and despite his valid performance over the years including those as Permanent Secretary since 2004.

The investigation

In his comments on the complaint, the Principal Permanent Secretary (PPS) argued that the whole process was carried out in line with the Constitution of Malta as well as with the performance agreement (contract) which had been entered into by complainant. Unlike the other Permanent Secretaries who had accepted to offer to resign and their resignation was accepted after the March 2013 General Election which brought about a change in Government, complainant had not submitted such offer.

On 26 March 2013, the Public Service Commission, in terms of Sub-article (3) of Article 92 of the Constitution, concurred with the termination of the complainant's contract. He was so informed on the same day and in terms of Clause 3 of his contract, he was given 90 days' notice of termination which was considered as a handing-over period.

During this period complainant had two meetings with the Principal Permanent Secretary where he was invited to indicate his preference in respect of his new posting. Complainant did not indicate his preference and he was therefore assigned duties commensurate with his category of employment in the same Ministry where he had been serving. The contract

2 Complainant pleaded further grievances which were investigated but could not be sustained. These do not fall within the scope and purpose of this Case Note.

was definitely terminated with effect from 26 June 2013 following Presidential approval.

Complainant commented that he had not offered to resign his position of Permanent Secretary because the instructions to offer to resign were contrary to established norms and should never have been given. The position was not a political one as proven by established practice and the fact that there is no clause in the contract to this effect in the case of a change in Government, the complainant contended that had he accepted to resign, he would have gone against his contract. He iterated that a change in Government does not constitute a valid reason to terminate the contract. In respect of the offer made to him to indicate where he preferred to continue to serve, he argued that it was Government that had created the problem and it was Government's onus to solve it.

This Office after consulting PAHRO received clarifications to the effect that there is no job description for Officers in Scale 2 and what one may consider is the level of responsibilities being as near as possible to those of a headship position, even if the Grade is not in itself a headship position.

Considerations

The Ombudsman considered the provisions of Sub-article 3 of the Constitution of Malta which regulated the appointment of Permanent Secretaries as well as Clause 3 of the contract itself.

Sub-article 3 of Article 92 of the Constitution essentially provides for the appointment and removal from office of a Permanent Secretary. This means in effect (as also affirmed in Clause 3 of complainant's contract) that Government is not bound to retain a Permanent Secretary for the whole duration of his definite contract. The Prime Minister may, after consulting the Public Service Commission, advise the President of Malta to terminate the contract/agreement at any time in the course of its duration.

It resulted that for its own reasons, the new administration decided to request the incumbent Permanent Secretaries to offer their resignation. While others complied, complainant, as was his right, refused on the basis that his contract did refer to a situation following a change in Government. Government subsequently proceeded in terms of Sub-article 3 of Article 92 of the Constitution and after consulting the Public Service Commission which signified its concurrence, proceeded to seek the consent of the President of Malta. Following this consent, complainant was duly informed of the

termination of contract, effective 90 days after the original intimation to complainant. Considering the sequence of events and the fact that the President could only act on the advice of Government, the Ombudsman concluded that the termination of the contract did not breach Sub-article 3 of Article 92 of the Constitution of Malta.

In respect of complainant's contention of a breach of Clause 3 of his performance contract, the Ombudsman considered that this clause referred to termination of contract. It empowered Government to end such contract prematurely subject to:

- compliance with Sub-article 3 of Article 92 of the Constitution;
- giving 90 days notice in writing; and
- giving reasons for the termination.

It has clearly resulted from the investigation that the first two conditions had been satisfied. As regards reasons for termination, complainant argued that there was no sufficient reason for such termination all the more so considering his number of years of valid service in that capacity. He further argued that employment norms dictate that employees who perform at a superior level should be rewarded for their efforts, and not the opposite as happened in his case. He further iterated that the change in Government was not a valid reason for the termination.

The Ombudsman considered that in the first place, the contract clause did not specify "*valid reasons*" but "*reasons*". In this respect, the new administration had immediately made it clear that it wanted to decide on the choice of Permanent Secretaries who were to assist the new Ministers in their assigned role. It requested the incumbents to offer their resignation so that it could decide whom to retain or on whom to enforce the termination clause of the respective contract. Therefore strictly speaking, there again, was no breach of the contractual clause.

Without prejudice to the above, the Ombudsman considered that complainant's contention that Permanent Secretaries are not political appointees and should not have been forced to resign following a change in Government, merited further consideration. In this context the Ombudsman cited Sub-articles (1) and (2) of Article 92 which precede the sub-article cited by complainant. These state as follows:

> "*(1) Where any Minister has been charged with responsibility for any department of government, he shall exercise general direction and control over that department;*

and subject to such direction and control, the department may be under the supervision of a Permanent Secretary: [and]

...

2) *The Prime Minister shall be responsible for assigning departments of government to Permanent Secretaries.*"

The above means that in terms of the Constitution, the role of a Permanent Secretary is a supervisory one to assist the Minister who is charged with the responsibility of departments within his or her portfolio.

While recognised over the years that:

- the appointment of Permanent Secretaries is not a political appointment, and the position is not one of trust as interpreted for some other positions;
- it has, even if not formally, been muted that the Permanent Secretary is the non-political link for continuity of the public service administration following a change of Minister or Government, one cannot but also acknowledge and consider the element of mutual trust and comfortable feeling between the Minister who in reality, even if not ideally, remains a politician despite his Constitutional appointment as Minister, and his Permanent Secretary as a public officer, is indispensable. This connotation does not exclude decisions, based on personal trust/comfort, for a Permanent Secretary to be removed from that position following a change in Government. Indeed there are countries like the United States where all top officials are changed following a change in the head of state admittedly because these are political appointments, but the concept is there. Civil servants are appointed in the United Kingdom under the *Royal Prerogative*. The traditional rule, which has rarely been challenged by the UK Courts is that civil servants are employed at the pleasure of the Crown.

This situation is not the norm or the situation in Malta, but on the other hand, the Constitution does not exclude it, and the (contractual) performance agreement signed by complainant in fact provides for the termination of the contract for a given reason which may possibly, even if not ideally, be based on these considerations. It is not necessarily a case of retaining incumbents as a reward for superior performance.

Furthermore, the appointments to the positions of Permanent Secretary and Head of Government departments are in effect made by the Prime Minister who advises the President (and the President acts in terms of such advice); the Prime Minister only needs

to consult the Public Service Commission. This is a different situation from that of other public officers where the Prime Minister must act on the advice of the Public Service Commission.

Conclusion and recommendation

In concluding that the complaint could not be upheld, the Ombudsman made one further consideration. This concerned another grievance raised by complainant regarding the loss of allowances he previously enjoyed as Permanent Secretary. Although not finding fault on the part of Government in this respect, the Ombudsman was of the opinion that despite that complainant's actions in this case was the result of significant frustration and his resisting the instruction to resign (something he was entitled to do) in effect eventually worked to his detriment because the other colleagues who adopted a different attitude and accepted to resign got a better deal. Even if through no fault of Government, complainant was the one who despite his long and valid service as Permanent Secretary (something which was never challenged) lost the benefits which he had been receiving prior to the termination, while his colleagues did not.

The Principal Permanent Secretary had already shown his readiness to reduce the blow suffered by the other former Permanent Secretaries (as he tried to do with complainant) by arranging for them to be given positions to their satisfaction. The Ombudsman therefore deemed appropriate and in order, to recommend that the PPS considers offering a further final discussion to complainant as to a possible solution, through identifying a role for which a new performance agreement may be signed with complainant – as was successfully done with his colleagues. Should agreement be reached it was likely to result in the best interest of the public service.

Case Note on Case No N 0084
Air Malta

Selection Process for a permanent employment as Air Cabin Crew Member with Air Malta

(selection process, permanent employment)

An applicant for the position of permanent cabin crew member felt aggrieved that she was not selected despite having more experience than other applicants who had been selected, besides being more academically qualified than others.

In the course of the investigation, it resulted that eligibility to apply for this position under this internal call, was limited to a minimum age (18 years), a height to weight ratio as defined by the Company, possession of a minimum 5 'O' Levels (with specified grades) and proficiency in verbal and written communication in English and Maltese. Consequently all employees irrespective of their length of service with the Company were eligible to apply provided they satisfied the above requirements.

Because of a very high number of applicants the selection process included, also as stated in the call for applications, a shortlisting stage and a second final stage which included two group exercises and an interview.

The shortlisting stage consisted of a Written Assessment, a Personal Statement and an Interview, carrying 35%, 25% and 40% respectively. At this stage, the panel of assessors were advised not to limit their assessment to the quality of the answers but also to rate the candidate's self-confidence, depth of knowledge, communication skills and perceived honesty – this through pre-set criteria which included grooming and overall presentation, awareness of the Company's customer orientation/relations, understanding of the ambassadorial role and related safety aspects, communication and compliance with the Company's new cultural elements.

Complainant obtained a total of 67.55% in the shortlisting stage (pass mark having been set at 65%) in respect of the three elements of the shortlisting stage, including a very high mark for her Personal Statement. The marks in the first stage were however not considered for the second stage.

61 out of the 92 applicants made it for the second and final stage of the selection process for the 27 vacancies that needed to be filled. The Group Exercises part of this stage carried 60% of the marks, the remaining 40% of the marks being allocated to performance at the Interview. The pass mark was again set at 65%.

In view of the large number of candidates that remained following the shortlisting exercise, this phase was carried out by three separate panels who were provided with pre-set criteria and sub-criteria identified by the Company.

The Group Exercise involved assessment on four main areas each sub-divided into sub-criteria namely communication and influencing, working with others, problem solving and creativity and interpersonal skills. The same approach was applied in respect of the other element/stage of the final phase of the selection process, once again the selection panel being provided with a list of questions to be used as guidelines during the interview. Complainant scored 41 marks out of 60 for the group exercises and 26 marks out of 40 for the interview – a total of 67 marks which placed her 32nd in order of merit, thus missing being appointed in view of the fact that there were only 27 vacancies.

By way of preliminary considerations, it was clarified that:

- it is not the function of the Ombudsman to conclude that the result of an interview was unfair, mistaken or unjust when it results that the selection process was a valid one and the process was conducted and concluded fairly and in line with the established criteria and relative weightings. The Ombudsman does not himself decide or comment on how the criteria utilised in a selection process were established, even if, for the sake of the argument, he were not in agreement with the criteria that were applied in a particular selection process. He will only comment if it results that the criteria were intended in advance, to favour or prejudice a particular candidate – evidence which does not result in this case. Nor does the Ombudsman criticise the application of the said criteria once these were applied uniformly;
- Furthermore, the Ombudsman should not be considered as an appeals mechanism from the decision of a selection board. He does not substitute or replace a subjective

assessment or decision taken by a panel composed of members with years of experience in their respective field. For this reason, as long as no convincing evidence emerges that an irregularity was committed in the process, or that any action/decision taken by the selection board was manifestly wrong in respect of the assessment of the candidates involved, the Ombudsman should not intervene; and

- The board's subjective assessment cannot as a rule, be reviewed or be substituted by the Ombudsman – or any other office of review – who was not involved even remotely in the process, and consequently cannot comment on how the candidate demonstrated his/her claimed merits for the post during the process.

This Office has however ascertained that a series of safety measures had been created to ensure that this judgement is as fair as possible. A detailed list of sub-criteria was drawn for each criterion in the group exercise and the panel was instructed to allot a maximum mark for each of the sub-criteria and to enter the specific mark allotted to each candidate for every sub-criterion. These requirements ensure that the assessor's subjective judgement links the specificity of expertise with the fairness of objectivity. The candidates who obtained a pass mark (65%) in the first stage proceeded to the second stage of the process. The marks obtained by the candidates in the first stage of the procedure were only relevant for the purpose of shortlisting. The criteria utilised throughout the second stage of the selection process were all subjective – hence the marks awarded were dependant on the subjective interpretation of the assessors on the candidate's performance during the group exercises and interview. The assessors had also been briefed on the qualities which they were to seek when evaluating the candidates, and according to the Company even the candidates had been informed beforehand on the qualities which the panel would be looking for during the group exercises. The Company was mainly looking for personality rather than experience, as full training would be provided for the successful candidates.

The Ombudsman considered that the selection panel had recognised complainant's merits and she was successful in the process, but since she did not qualify with the first 27 in order of merit, she was put on a standby list. The Ombudsman stressed that an interview and, in this case, also the group exercises were a selective process where normally the skills and abilities of each applicant are evaluated in accordance with set criteria and sub-criteria. In this case no evidence was found that the selection panel's decision was unjust, mistaken or unfair. In addition, during a meeting with complainant and with the Investigating Officer, complainant had admitted that she was hesitant when answering some of the questions at the interview.

The Ombudsman also gave his opinion on another allegation made by complainant that the Company chose some full-time students when it required full-time commitment and availability – something she had committed herself to. In this respect however these students were eligible to apply in terms of the call for applications and if successful, it was up to the selected candidates to decide whether to accept the job or otherwise.

Conclusion and recommendation

While not being in a position to sustain the complaint, but in the interests of transparency and accountability of any selection process, the Ombudsman reiterated his previous recommendations that the Company should consider making public the results of the selection processes, so that candidates are made aware of their rankings. Moreover in such cases, candidates should, if they so request, not only be provided with feedback on the selection process, but they should also be provided with a breakdown of the marks awarded to them by the selection board.

Case Note on Case No J 0293
Housing Authority

Exorbitant utility consumption resulting from faulty connections

(utility bills, housing, bad workmanship)

The occupier of a tenement owned by the Housing Authority argued that he should not be made to pay an exorbitant bill for water consumption that had accumulated as a result of underground water seepage due to faulty water pipe connections laid underground.

Some years prior to lodging his complaint, complainant had discovered a leak under the floor tiles of the back yard of his home and had reported the matter to the Architect of the Housing Authority. The Water Services Corporation (WSC) was called in and its technician identified a leak under the tiles caused by poor workmanship on the plumbing system. Subsequently complainant received a utility bill which included a charge of around €3650 for water consumption.

Complainant had been living at these premises for around eight years before the leakage was discovered. Following his objections, WSC reduced the charge by half. When complainant insisted that he should not be charged even this amount, he was threatened with suspension of the service – a threat that was subsequently withdrawn.

Complainant had argued that he was not responsible for the fault and that the matter should be resolved between the Housing Authority and the WSC – in fact other tenants in the same block of flats where complainant lived had had similar problems with the plumbing works.

This Office tried to mediate and see whether the Housing Authority or its successor in the ownership would accept responsibility for the fault and its consequences. This effort was not successful.

The Housing Authority submitted that it was not the owner of the property which was vested in the Housing Construction and Maintenance Department of the then Ministry for the Family and Social Solidarity. The premises had been built in the early 1990s and the Architect of the Housing Construction and Maintenance Department accepted that it was not usual for water pipes to require replacement after such a relatively short time. On the other hand, the Contractor could in all probability disclaim responsibility since he was never informed of the damage. On its part, WSC, while very understanding and cooperative, maintained that it could not be held responsible for the water loss/damage. WSC quoted the Water Supply Regulations (S.L. 423.03) which stated that it was only responsible for that part of the connection/service from the mains pipe up to the tenement, up to and including the relative meter. The internal plumbing system had been entrusted by the Housing Authority to a contractor. In this case the leakage was found in the internal plumbing system beyond the meter, for which the respective consumer was responsible.

WSC further argued that once the meter registered the relative consumption, the relative charges automatically become due to the Corporation and complainant should direct his claim to those responsible for the faulty works. The Corporation further reminded that notwithstanding the above, and without any obligation on its part, it had already, way back in 2007, reduced the original bill by the equivalent of €1665 and in the circumstances insisted on the payment of an outstanding sum of €1706, subject to its right to suspend the supply in case of non-payment, besides additional charges for interest on the unpaid amount.

On its part, the Housing Authority that administered the block of flats maintained that in view of the time lapse it could not be held responsible for any consequential damages, even if one were not to take into account the issue of prescription of claims. It argued that the block of apartments in question was constructed by a private contractor under the supervision of the Housing Construction and Maintenance way back in 1997 and the apartment in question was leased to complainant the following year. It was only in 2005 that the tenant (complainant) had informed the Authority of the exorbitant bill for consumption for the period March to December 2004. It submitted that no evidence was brought forward of bad workmanship or of damage of water leaks from the original pipes or that the water leakage was not the result of the works carried out by complainant two years earlier when he constructed a new bathroom. The Authority argued that if originally there was bad workmanship the leakage would have appeared at an earlier stage, not seven years later.

In the course of the investigation, it resulted from the Architect's certificates that were made available to this Office, that there were two problems in the original plumbing installation – namely installation of pipes of an inferior quality which were inadequate to sustain the pressure in the pipes, and the sleeves through which these pipes were passed were "*... inappropriate because the sleeve pipes themselves were buried under the tiles and therefore did not help in the detection of the problem.*"

The above technical report was supported by the fact that all tenants had to change their plumbing installation and one other tenant in the same block had suffered from a similar extensive water leakage at the same time in question. Moreover another apartment block in the vicinity had experienced similar problems.

After establishing the above facts this Office considered a further argument brought forward by the Housing Authority that in terms of the Leasing Agreement it signed with complainant, the property was being rented "*tale quale*" and that the tenant was responsible for any plumbing or drainage works that may be necessary[3]. It therefore argued that the maintenance of the property was the tenant's responsibility, something that was taken into consideration when the (low) rent had been established for social housing allocation. The Authority argued that this was a contract of lease, not of sale, and the clauses of the contract had to be respected. Moreover it could not create a precedent.

In his considerations, the Ombudsman noted that the facts of the case had not been contested and there was no doubt that the water leakage, resulting in an exorbitant water consumption bill was the result of bad workmanship by the contractor commissioned by Government and that complainant did not in any way contribute to the 'damage'. The issue was therefore basically a legal issue – The Housing Authority invoked Clauses 14 and 15 of the lease agreement regarding the lease '*tale quale*' and the tenant's responsibility for maintenance without any right on the part of the latter to claim compensation for any maintenance works, including any works required under sanitary legislation.

The Ombudsman considered that Clauses 14 and 15 (the "*tale quale*" and maintenance obligations) were not applicable to the present case. It was the duty of the tenant on taking possession of the premises to carry out all necessary maintenance work on the property. It resulted that for a number of years, complainant could not have been in a position to be aware of the bad workmanship of the water installation in the tenement

3 Clauses 14 and 15 of the Leasing Agreement.

– it was underground and only manifested itself years later. Clause 15 was however very relevant to the issue. This clause imposed the duty on the tenant to keep the tenament in a good state of repair in respect of ordinary maintenance during the whole term of the lease at his own expense and without any right to compensation.

Apart from ordinary maintenance this clause expressly charged the tenant with the duty to make all that is necessary for the maintenance and repairing of all works connected with pipes, drain pipes and any other work connected with drainage, and this including all types of damage to tiling or stone slabs. This clause is not only all embracing but it clearly makes an exception to the general rule in the Civil Code that extraordinary expenses are to be borne by the lessor and not by the lessee. In the case of this particular type of maintenance, complainant expressly assumed the obligation to make all the necessary repairs. The clause does not make any distinction between manifest defects in workmanship, that could have been noticed by the lessee when signing the lease agreement, and latent defects that were hidden, could not have been seen by the leasee before signing the agreement and that manifested themselves during the course of the lease.

This exception, which is legally legitimate and binding on the contracting parties if they agree to it as they clearly did in this case, is justified by the Authority on two reasonable grounds:

i) water and drainage connections can be very easily damaged by the actions of the tenant or third parties during the lease and it is not easy to ascertain responsibility for the consequences of such damages; and
ii) the Authority wanted to ensure that it would not be involved in complicated litigation once its tenements were rented at subsidised rates. It submitted that renting out the property at rents which were well below their market value, should allow tenants to make good for any damage they incurred in the water and drainage systems during the continuation of the lease.

It is relevant to point out that complainant is not asking to be compensated for expenses he incurred in repairing the system. He was asking to be relieved from paying the exorbitant bill for water consumption he was asked to pay to WSC as a result of the underlying leakage.

From a strictly legal point of view it would, at first sight, seem that complaint cannot be sustained. Complainant has in effect shifted his request from the Housing Authority to WSC.

It is clear that the Corporation has no legal obligation to entertain complainant's request since complainant is the registered consumer, the bill represents the value of the amount consumed even if involuntarily by complainant and the water leakage occurred at a point beyond the water meter installed by the Corporation. Notwithstanding this, the Corporation sympathised with complainant's predicament and made an *ex gratia* gesture to reduce the bill by half. Certainly the Corporation cannot be deemed to have failed its duty or otherwise been guilty of an act of maladministration.

The case therefore rested on whether the Housing Authority was (administratively) correct in refusing to accept responsibility for the consequence of the faulty water installation of the premises it leased to complainant on the strength of Clauses 14 and 15 of the lease agreement. Strictly speaking, the Authority appeared to have been correct since a contractual obligation is binding on both parties and the *maxim pacta sund servanda*[4] should apply even in unfortunate and unforeseen circumstances. There was however one timely consideration that could up to a certain extent soften the rigorous application of this principle. In this case:

- bad workmanship in the installation of the water pipes was the sole cause of the damage suffered;
- the works were carried out by a contractor commissioned by the Housing Authority instead of the Government department that constructed it; and
- the defects pre-existed the date of the lease agreement and were undoubtedly latent to the extent that it could not be noted at the time of the lease agreement or years after complainant took up residence in the premises.

It is true that the relationship between complainant and the Housing Authority is one of lessee and lessor and not of buyer and vendor. The statutory guarantees against latent defects do not therefore apply in this case. On the other hand, there is no doubt that the lessor is bound to ensure the enjoyment of the item let to the lessee by delivering the item let, in this case the house in question, in a good state of repair and free from any defects. It is true that complainant was responsible for all maintenance and repair that was required following the signing of the agreement but this had to be on the assumption that when the

4 Agreements must be kept.

property was delivered to the complainant the systems were in good working order and installed according to good standards of trade and workmanship.

It has been proved that this was not the case when the keys were handed over to complainant. It has also been established that for a number of years, complainant could not have been aware of the structural defects that were completely hidden. The only just interpretation of Clause 15 requires a premise that the lessee is bound to assume responsibility for all maintenance and repairs, both ordinary and extraordinary, in the water installation but this only on the assumption that these had been initially properly installed according to the recognised good practices of the trade.

The relationship of the contractor, who would have been ultimately responsible, had action been taken at the time when the damage first manifested itself, was with the Government Authority that commissioned him and not with the complainant. At no time did the Housing Authority, claim or put in doubt that complainant had failed to notify it within a reasonable time when he was first made aware of the hidden defect – a defect that was also shown to have resulted in most of the other apartments in the same block. It is not fair and just for the Authority to shift responsibility onto the lessee when its technical officers were in duty bound to ensure that works carried out by the contractors at the installation stage was of the required standard. Its contractors had to be held accountable for their actions and complainant, as lessee, cannot be held responsible for consequential damages caused through acts that were antecedent to the signing of the lease agreement.

The above considerations remain overriding, even if one considers that the provisions of Clause 15 which is a standard clause in all such agreements are in no way incompatible with the Housing Authority's submission that housing rents are subsidised precisely because the tenant is expected to assume more onerous responsibilities of maintenance and repair than those required under the Civil Code.

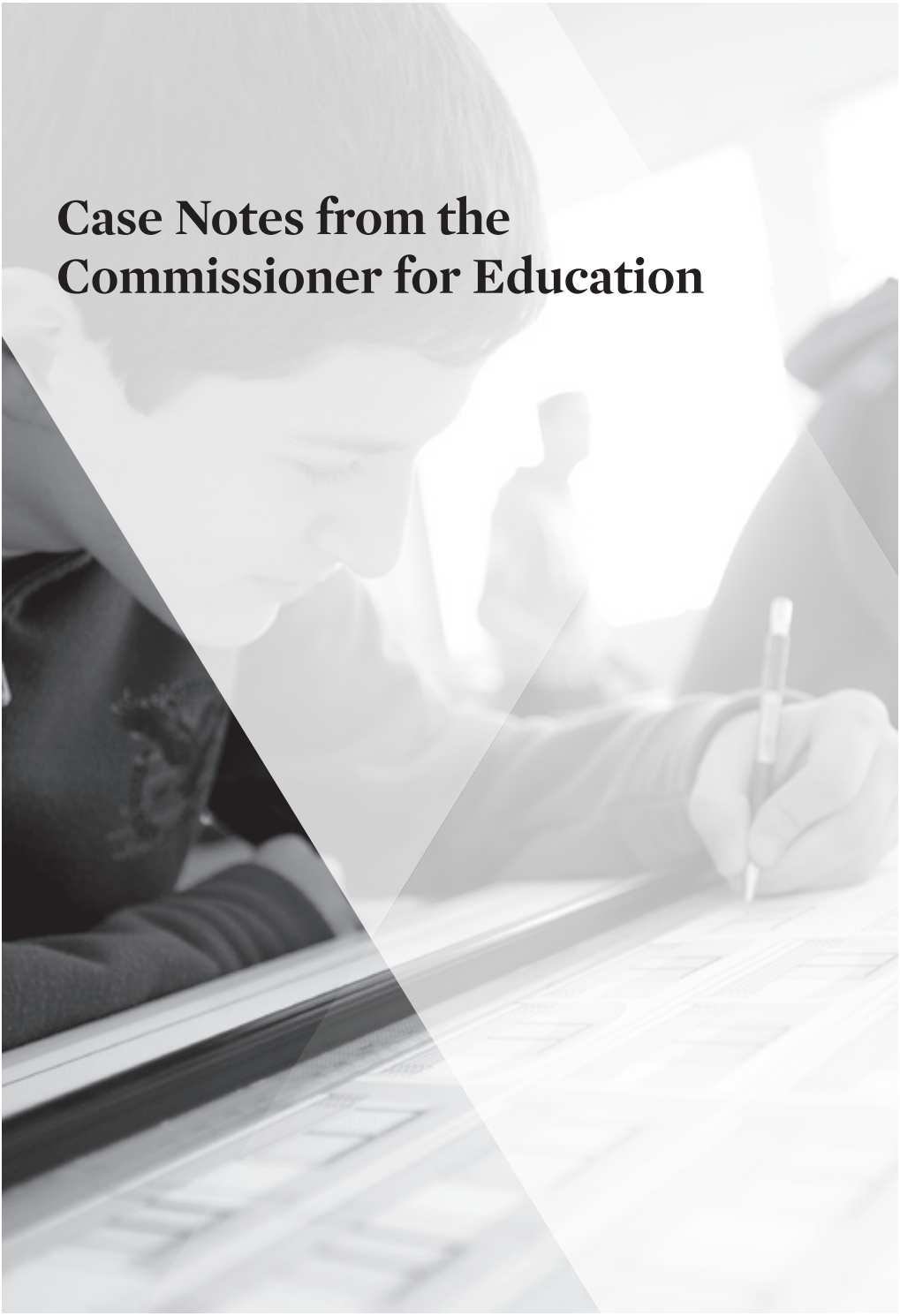
It was finally noted that complainant did in fact assume responsibility for the required repairs. This was a reasonable approach from the complainant and in the opinion of the Ombudsman it was only fair that consequential damages due to the faulty installation should not be borne by him but by the Government Authorities concerned. The WSC has already cooperated by reducing the excessive water bill by half.

On the basis of the above considerations, the Ombudsman found that the complaint was justified and that the Housing Authority was bound to compensate complainant in respect of the exorbitant bills resulting from the leaking, badly installed plumbing system. He recommended that the bill be written off save for the amount due for normal water consumption for the period in question. It was up to the Housing Authority to make arrangements for this with WSC since both are entities of the same public administration.

Outcome

ARMS Ltd held discussions with the Housing Authority and gave complainant a further credit of €1683, in effect waiving off all the charges for the increased consumption due to the leak. Furthermore it waived off the amount of interest due on the pending unpaid charges.

Case Notes from the Commissioner for Education



Case Note on Case No UN 0018
MCAST – Institute of Agribusiness

Incorrect evaluation of student's work

(incorrect evaluation, assignment, diploma)

The complaint

The student lodged a complaint with the University Ombudsman[5] claiming that a lecturer (hereafter referred to as the Lecturer) in the Institute of Agribusiness at MCAST evaluated his[6] work incorrectly. The Lecturer gave him a Fail grade for an assignment he submitted and as a result he failed to attain the related Extended Diploma. The student further complained that throughout his studies, the then Director of the Institute victimised him because the latter criticised the general maladministration of the Institute. The complainant alleged that the repeated failure in this particular Unit resulted in the form of retaliation for his criticism.

The complainant further claimed that the first 're-sit' procedure was not conducted properly since the Lecturer concerned did not provide a scheduled revision tutorial.

Moreover, the complainant maintained that the appeal sessions held to consider his case were flawed because the Board's members did not consider all the evidence. He alleged that the Board chairpersons allowed him and his parents to attend the hearings but prohibited them from contesting witnesses' statements.

The complainant requested that the Fail grade be upgraded to a Pass without further testing so that he could satisfy all the course requirements and be awarded the Extended Diploma.

5 Professor Charles Farrugia opened this investigation in his role as University Ombudsman, and concluded it following his appointment as Commissioner for Education on 1 February 2014.

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

He also sought financial compensation for the private psychological treatment he had to undergo and for the mental stress he suffered during the time spent contesting the MCAST decisions.

Facts and findings

The complainant joined MCAST in October 2010, to pursue the two-year full-time course leading to an Extended Diploma in Agriculture. He completed all his studies successfully except for one Unit in the course, which he failed. As a result he could not attain the Extended Diploma unless he undertook an extra year of study to complete the module successfully. The following is the ensuing sequence of events.

In the first week of January 2012 the complainant submitted an assignment for the Unit in question. On 16 January 2012, the Lecturer handed him the result as a Fail stating that the assignment lacked sufficient details. An internal verifier confirmed the Fail result and the complainant opted for a referral as a first 're-sit'.

In such cases, lecturers could voluntarily conduct a revision session prior to resubmission. The complainant asserted that on the assigned date for revision, the lecturer took the attendance of the students present but noting the poor turnout, left the lecture room without conducting the revision session. The Lecturer refuted this claim and produced an attendance sheet for 19 January 2012 to show that eight students, including the complainant, had attended the revision session.

On the eve of the submission, the complainant e-mailed a revised version of his assignment seeking the Lecturer's advice. The latter did not reply to the complainant's email. The Lecturer subsequently explained that due to illness he had not checked his emails on the day in question.

The complainant resubmitted the 're-sit' assignment on 26 January 2012. The Lecturer and an internal verifier evaluated the revised assignment on 31 January 2012 and once again marked it as a Fail. The complainant immediately protested to the Institute's Appeal Board challenging the result. The latter, composed of the Director, a lecturer in the Institute and a student councillor met the complainant and his parents on the 16 and 24 February 2012 to investigate the student's complaints especially his claim that his work was superior to those of his colleagues who had obtained a pass. The Board appointed two independent examiners to conduct a revision-of-paper exercise; and once again the

reviewers confirmed the Fail grade. The Appeals Board concluded that the reassessment procedure was correct and consequently the Fail grade should stand.

Unconvinced, the complainant brought his case to the College Corporate Appeals Board claiming that during the earlier appeal hearings the Director had been openly hostile towards him and had not allowed him and his parents to present their arguments fully.

The College Corporate Appeals Board met on two occasions in March 2012. Its members were the MCAST Deputy Principal, the Registrar and a College lecturer. The complainant and his parents were present throughout the hearings except during the Board members' final deliberations. The Board interviewed the Director of the Agribusiness Institute, the lecturer who was a member of the Institute Appeals Board and the Lecturer as well as the students in the Unit in question. The Corporate Appeals Board decided against the complainant's claims of flawed assessment procedures and of unfair discrimination against him during the Institute Appeal Board hearings. It concluded that the Fail result should stand. The complainant and his parents once again claimed that during the hearings they were not allowed to cross-examine witnesses or to express their interpretation of events. The Chairman of the College Corporate Appeals Board categorically refuted this assertion, stating that he allowed the complainants to have their say, but disallowed interruptions, comments and gratuitous allegations by the complainant.

The complainant and his parents sought the outgoing College Principal's intervention to remedy what they considered as unfair treatment by the Lecturer and the two Appeals Board Chairpersons. Eventually, they renewed their efforts with the new Principal who investigated their claims. In a letter to the University Ombudsman, the latter explained:

> *"On taking over as Principal at MCAST, on being informed of the situation, in an attempt to resolve the situation and to give the complete benefit of the doubt to the student, the Corporate Appeals Board was reconvened and decided to give [complainant] another opportunity to redo [his] failed assignment. It was also decided that the new assignment would be corrected by a different lecturer. This lecturer deemed that the student had not achieved the relevant criteria in this assignment and thus failed the unit."* [7]

7 Letter dated 7 October 2013 from the MCAST Principal to the University Ombudsman; the two discussed the case again in February 2014 when the Principal clarified the point that an internal, as well as an external, examiner corrected the second 're-sit' and both agreed on a Fail grade.

At the meeting with complainant and his parents, the Principal conveyed the result of the third re-sit and explained that according to the regulations the complainant could not be awarded the Extended Diploma. He advised the student that to obtain the desired qualification his best course of action was to repeat the failed module.

Unsatisfied with the Principal's conclusions and advice, the complainant lodged a complaint with the University Ombudsman. In his reactions to complainant's allegations in the complaint document, the Principal confirmed that he had thoroughly investigated the complainant's claims and found them wanting. He stated that the complainant was given every opportunity allowed by the regulations to re-submit the failed assignment, including an extra 're-sit' in order for him to avoid repeating the year. The Principal was convinced that the four assessment procedures and the two appeal sessions were conducted with all due diligence.

Observations

The complainant was convinced that the then Director of the Agribusiness Institute regarded him as *"a torn* [sic] *in her side"* [8] because he often drew her attention to the alleged shortcomings in the organisation she ran. The complainant claimed, for example, that the animals were kept in unacceptably poor conditions, that fruits were left rotting on trees, and that staff frequently missed lectures. He was also one of the organisers of a petition signed by 64 Agribusiness students insisting that the Institute should provide them with the academic and practical experiences that were promised in its promotional brochure.

The complainant maintained that the Director harassed him for his troubles. The complainant also highlighted two occasions when the then Director accused him of theft, once of stealing €20 from the library, and on another occasion of stealing reptiles from the Institute's farm. The first accusation was eventually dropped. The laboratory curator apologised for the second charge when the real perpetrator was caught live on the CCTV cameras. The Director also accused the complainant of frequent absenteeism but his actual attendance records showed otherwise to the extent that his stipends were always paid in full. The complainant and his parents are convinced that the Fail grade for the Unit in question was the Director's and the Lecturer's form of retribution. The latter vigorously dismissed this assertion pointing out that he rarely saw eye to eye with the Director, and would certainly have refused to collude with her to harm students.

8 Quoted from complainant's complaint document.

During our meeting, the complainant repeatedly stressed that he cared deeply about animals, and had spent much of his free time improving containers for the Institute's reptiles. His writing and expressions reveal his urge to seek perfection even where it is not always possible to attain it. It is evident that his attitude and demeanour did not endear him to some members of staff at the Institute. The Lecturer described complainant as a difficult student who thought too highly of himself and his products; he rubbed people the wrong way and often made derogatory sweeping statements about staff and fellow-students with little or no justification. MCAST's Deputy Principal observed that the complainant presented his allegations as factual truths when it was obvious that these were coloured according to his own mistaken perceptions. The Principal observed that the complainant misinterpreted the discussion he had with the student and his parents. The student mistook advice that the Principal had given in good faith for censure and arrogance. The Principal argued that if the complainant's retelling of his encounters with College staff were as inaccurate and as distorted as his own meeting with him, then the veracity of his allegations was very much in doubt.

It is not the role of the Commissioner for Education to analyse the complainant's character, or anyone else's, although the above background information serves to understand better the nuances of this case. Moreover, it must be stressed that this investigation limits itself to those of the complainant's claims that impacted directly on his failure in the Unit under review. It does not deal with the other alleged administrative shortcomings at the Institute, which were not related to complainant's complaint. For instance, the investigation did not delve into the question of whether the animals at the Institute were ill-treated or whether fruits were left to rot on trees. Once these issues were brought to the attention of MCAST's authorities, it was for them to investigate and take the appropriate action. Similarly, I will not comment on the quality of complainant's academic work and whether it deserved a Pass or a Fail grade since this task belonged to the lecturers concerned. This investigation will also ignore the complainant's comments, comparisons and references to his fellow-students' alleged poor work. Here, my task is to establish whether due process was diligently followed in order to ensure that the grade given to complainant was a fair one, and that the ensuing appeals procedures did not discriminate negatively against him.

i) The Assessment of the Unit in question

The complainant submitted the assignment for the Unit under review: his Lecturer and an internal verifier marked it as Fail grade. Complainant resubmitted his assignment as a re-sit. The original lecturer and internal verifier corrected the resubmitted work and

again marked it as Fail. The student's work was subjected to a revision-of-paper exercise and the reviewers (different examiners from the above) confirmed the Fail grade. The College allowed the student a second 're-sit' with a new set of questions on the module and appointed two entirely new assessors as internal and external examiners. Once again they gave a Fail grade; the external examiner wrote:

> "*Student did not achieve the requested criteria in questions 1 and 3. In question 1 mistakes could have been easily avoided as basic straight forward answers were required. In question 3 student used direct online information in one case, and did not discuss in detail as expected. Grade not achieved.*"[9]

The above shows that on four occasions six examiners assessed the complainant's work for this Unit. All found it wanting and marked it as a Fail. These facts make it difficult to understand how the complainant persists in maintaining that his work was of acceptable or Pass quality when six academics in the subject declare that it was not. When, at our second meeting, the complainant was asked to reconcile his claim to a Pass grade with four recurring Fail assessments by six examiners, the complainant, and his mother, became extremely agitated alleging widespread corruption at MCAST and lecturers' collusion to fail him.

ii) Pre-submission tutorial

During the Institute Appeals Board hearing, the student protested that the grade for the first 're-sit' should have been invalidated since the Institute had not provided him the tutorial assistance due to him before a referral. The relevant Assessment Regulation 3.15 states:

> "*Students who receive a referral grade may need to arrange a referral tutorial in order to clearly establish what work still has to be completed.*" [10]

However, the Lecturer has produced documentary evidence to show that he did conduct the pre-resubmission tutorial and that the complainant had attended it. Students giving evidence before the College Corporate Appeals Board corroborated the Lecturer's statement and led the Board to inform the complainant as follows:

9 External Examiner's report on the complainant's second 're-sit' examination.

10 Section 3.15 of the MCAST Assessment Regulations.

> "*You have failed to prove that the tutorial of the 23rd* [should read 19th] *did not take place. On the contrary, a number of students stated the contrary and stated also that they were happy with the feedback they received on that day.*"

The Board's conclusions go on to say:

> "*Your statement that the email sent to the lecturer* [name of lecturer] *on 25th January was left unanswered is not reasonable, considering that you chose to submit the assignment the very next day on the 26th. Your action hardly gave the assessor time to look at* [his] *email and respond.*" [11]

The Corporate Appeals Board upheld the decision of the Institute's Appeals Board that the Fail grade, for the work resubmitted by complainant as a 're-sit', should stand.

iii) The Appeals Procedures

The complainant and his parents complained that the appeal procedures carried out first by the Institute Board of Appeals and later by the College Corporate Board of Appeals were flawed. They claim that both Boards prevented them from presenting their case properly and disallowed them from cross-examining witnesses. The Deputy Principal, who investigated the Institute's appeals procedure and who chaired the Corporate Appeals Board, refuted the complainant's allegations. He explained that on both occasions the student and his parents were allowed to have their say and to present any evidence they thought fit. He added that the complainant was not allowed to disrupt witnesses' accounts or to make gratuitous remarks on the latters' statements that the complainant disliked. Furthermore, the Principal stressed that his own investigation into complainant's allegations, established that due process was followed scrupulously.

It is evident to the neutral observer that complainant's acrimonious experiences at the Institute, not least the Director's unfounded accusations against him, coloured his perceptions and fed his conspiracy theories. Eventually he extrapolated the negative experiences at the Institute to include the entire College hierarchy. His suspicions about mismanagement at the Agribusiness Institute spread to the belief that all MCAST officials were corrupt and conspired to discriminate against him. By the time he lodged his complaint with the University Ombudsman, he mistrusted and disparaged even the College officials who sought to help him and gave him sound advice.

11 Letter dated 21 May 2012, from the MCAST Registrar to the complainant.

Conclusion

It is not in my remit, nor is it in my ability to evaluate the work presented by complainant for the Unit in question. However, I note that six examiners, including an external one, corrected complainant's assignments. All found the work of below acceptable quality and marked them as Fail. During this investigation, I found no evidence to suggest that complainant's work was corrected in an unfair or discriminatory manner. Consequently, I am unable to uphold his first claim that the failing grade given to him was an invalid one. Nor do I support the complainant's claim that his lecturer failed to carry out his duties before the first re-sit examination.

The complainant also claimed that throughout his studies at the Agribusiness Institute, he was harassed and treated unfairly. The complainant inferred that this treatment was reflected in the manner his two appeals against the Fail grade were conducted. My investigation did reveal that complainant's interactions with some members of the Institute were turbulent but his own aggressive attitude exacerbated the mutual distrust. Indeed, his relations with the Director verged on the acrimonious, as evidenced by the three occasions she wrongly accused him of serious misconduct. It is not surprising, therefore, that complainant was highly suspicious of the whole appeals process. However, complainant was wrong to misinterpret the normal practice in such hearings of restraining those present from interrupting and from hurling accusations at each other, as measures to curtail his right to defend himself.

In view of the above, my final opinion is that I do not exclude that the outgoing Director may have exerted unwarranted pressure on the complainant. However, I found no evidence that the College authorities conducted the two formal appeals procedures in an unfair manner or with improper prejudice towards the complainant.

Under the circumstances, I likewise find no justification to sustain the complainant's claim for monetary compensation.

Recommendation

It behoves educational administrators to promote, not discourage students' awareness in the management of the organisations where they train. Such interest enhances students' sense of belonging and commitment. This investigation reveals that the administrator of the Agribusiness Institute did not cherish the complainant's enthusiasm to improve the organisational and physical setup. Indeed, the indicators are that she viewed it as a threat.

On his part, the student interpreted his encounters with other MCAST officials in the same light as his unpleasant experiences at the Institute. As a result he even mistrusted and accused of bias those who genuinely sought to help him. Both sides now have an opportunity to show good-will by seeking an equitable solution to the complainant's desire to complete his studies.

Despite the fact that I do not uphold complainant's allegation of an unfair result, I propose that, if the College regulations allow it, the complainant should request the MCAST authorities to give him the opportunity of re-joining the course even at this late stage in the scholastic year. With the appropriate tuition and guidance, together with his best efforts, the student will have the chance to graduate and attain the Extended Diploma later this year. Thus one hopes that, to use a pastoral metaphor, his toils and aspirations to flourish in the Agribusiness field will bear fruits.

Report on Case No UN 0026
University of Malta

Student contests plagiarism accusations and claims unfair treatment

(thesis, plagiarism, unfair treatment)

The complaint

A PhD student lodged a complaint with the University Ombudsman[12] alleging unfair treatment by the University of Malta. He[13] claimed that:

a) the University's Assessment Disciplinary Board (ADB) falsely accused him of plagiarising his thesis when the Board of Examiners and ADB members based their judgement on a flawed Turnitin Similarity report
b) the ADB did not give him a fair hearing because members were prejudiced against him;
c) prior to submitting his thesis, the Faculty concerned failed to provide him with sufficient information on the established procedure, including on the use of the Turnitin Similarity Test;
d) the ADB refused his request to withdraw his thesis in order to alter the unintentionally plagiarised sections and resubmit it; and
e) the penalties imposed on him were too harsh.

Facts and findings

On 22 January 2009, the complainant registered for the Degree of Doctor of Philosophy (Ph.D.) with one of the Faculties at the University of Malta. He planned to conclude his thesis in 2012.

12 Professor Charles Farrugia opened this investigation in his role as University Ombudsman, and concluded it following his appointment as Commissioner for Education on 1 February 2014. The nomenclature Commissioner for Education is used in the rest of this document.

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

On 11 June 2010, the University Registrar informed students, including complainant, that the University Senate had approved strict rules on plagiarism. She advised students to visit two University web sites, which dealt specifically with (a) "*Plagiarism Guidelines*", and (b) "*How to Avoid Plagiarism*". Her email urged students:

> "*It is highly recommended that you access the above mentioned links and familiarize yourself with the documents*".[14]

The links explained in great detail the dangers of plagiarism in a tertiary education context and the very serious view the University took when the plagiarism rule was broken. The links also guided students on how to deal with quoted references and 'borrowed text'. Chapter 3.7 entitled "*Using Turnitin*" in the first document[15] instructed readers on the use of the similarity test electronic programme and advised them how to test their work before submitting it for assessment.

On the morning of 27 September 2012, the Faculty Officer concerned learnt that complainant was about to present his thesis. She also noted that he had not activated his IT account and consequently could not have tested his dissertation for plagiarism on the Turnitin programme. She sent him an email urging him to activate the IT account and to upload his thesis on Turnitin for testing "*... as soon as possible ...*". The complainant submitted his thesis later in the day without doing either.[16] The Faculty Officer forwarded complainant's thesis to the members of the Board of Examiners on 3 October 2012. A week later and in conformity with usual practice, she reminded the Board of Examiners members on the use of Turnitin stressing the point that the computer programme was to be regarded only as a guide rather than the final arbiter on whether a piece of work was plagiarised or not.[17]

At the end of the same month the Board of Examiners, consisting of a Head of Department in the Faculty (as Chairperson), an External Examiner eminent in the subject in question, and three distinguished academics in the area, met to evaluate complainant's thesis.

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14 Email entitled *Plagiarism Notice* sent by the Registrar to all students on 11 June 2010.

15 Retitled *Plagiarism and Collusion* in 2013.

16 Email dated 27 September 2012 by the Faculty Officer to the complainant, and confirmed by the former during her interview with the Commissioner for Education held on 26 March 2014.

17 Email, dated 10 October 2012, by the Faculty Officer to the examiners of complainant's thesis.

The examiners concluded:

> *"It is the considered opinion of the Board of Examiners that candidate has committed major plagiarism, consisting of unattributed quotations being "passed off" as candidate's own work. This plagiarism was detected by the Turnitin software utilised to scrutinise the dissertation, which returned a similarity report of no less than 54%. Upon receipt of this report, each of the examiners conducted an independent search to ascertain whether this similarity report had detected actual cases of plagiarism and we all concurred that it had ... ".*[18]

They also endorsed the judgement of their External Examiner's harsh adjudication of the complainant's work, when he wrote:

> *"There is no need to go into details of whether this paper is the product of plagiarism – it undoubtedly is. In fact, I have rarely seen such a blatant disregard of academic ethics as in this case. While many of the findings of TurnItIn indeed were citations properly referenced, other (and substantial) segments obviously are not. I personally do not see how this can be amended without rejecting the paper in its entirety."* [19]

The Board of Examiners Chairman, listing sixteen instances of major plagiarism, advised the Dean to report the case to the ADB for disciplinary action to be brought against complainant.

On 6 December 2012, the Registrar summoned complainant to appear before the ADB on the 11 December to answer the charge of plagiarism. The Registrar further advised him to read carefully the relevant regulations, and that he could attend the meeting accompanied by a friend to help him in his defence. The Registrar also informed him that her Office would be sending him through email an electronic version of the Turnitin report on his thesis. As things turned out, the file was too massive to send through email. Therefore the Assistant Registrar phoned complainant asking him to collect a CD copy of his Turnitin Report. He replied that he would not be collecting the electronic version since he did not need it. He also chose to attend the Disciplinary Board meeting unaccompanied.

The ADB met on 11 December 2012, and was composed of the following members:

- The Pro-Rector for Academic Affairs

18 Examiner's report sent by the Chairman to the Dean, dated 1 November 2012.
19 Ibid.

- An academic appointed by Senate
- The University Registrar
- The Dean of the Faculty concerned
- The Dean of another Faculty

The Students Representative, who was a member of the Board, was unable to attend. Before commencing the meeting, the Chairman asked the complainant whether he wished the hearing to be postponed in view of the facts that he was unaccompanied by a friend, and that the Student Representative was unavoidably absent. The complainant stated that he preferred to continue with the meeting. The Chairman asked members to note that complainant had declined to collect the CD copy of the Turnitin report when asked to do so by the Registrar's Office. The latter made no comment in answer to this statement.

Complainant replied to the charge of plagiarism by explaining that the nature of his thesis required extensive quotations from specified texts. He stated that to the best of his knowledge he had cited and referenced all the works by other authors according to the requirements by the Faculty involved. The Chairman handed the complainant a copy of the Turnitin report, pointing out that its findings did not tally with the latter's assertions. At this point, complainant asked to retrieve the thesis in order to correct its shortcomings. The Board members rejected his request on the grounds that the examiners had already corrected and marked his work.

The Board found the complainant guilty of plagiarism and decided:

- to reprimand severely the student for plagiarising his work and to mark the thesis at zero percent;
- the thesis was not to be considered for examination any further;
- the student was not to be allowed to resubmit a revised thesis;
- the student was not to be allowed to register for a University of Malta course before the lapse of ten years, and then only with the permission of Senate; and
- the student was to be fined €50.[20]

The Registrar communicated the Board's decisions to the complainant on 12 December 2012.

20 Assessment Disciplinary Board Minutes, 11 December 2012.

Complainant wrote two letters, one to the Dean of the Faculty and one to the Registrar, objecting to the Board's decision and requesting them to withdraw the accusation of plagiarism and the accompanying penalties. He again requested to retrieve the thesis in order to correct and resubmit it.

At a subsequent meeting on 8 February 2013, ADB members considered complainant's protest letters. The Dean of the Faculty presented documentary evidence to refute the student's claims that the Faculty had failed to guide him on the procedures associated with the presentation of a PhD thesis. The Dean pointed out that Faculty officials had kept the student informed, but he had largely ignored their advice. The Board confirmed its earlier decisions. [21]

Following receipt of complainant's complaint, the Commissioner for Education requested the University to run a fresh Turnitin Similarity Test. This proved technically impossible because such a test would show a 100 percent similarity with complainant's text submitted earlier.[22] As an alternative and in consideration of the seriousness of the case, the Commissioner asked the ADB to commission an independent assessor to carry out a fresh physical visual plagiarism appraisal of the complainant's work. Following a meticulous analysis, the new assessor concluded:

- "*It is clear that the submitted dissertation is in breach of the University of Malta Assessment Regulations (2009)*."
- He proceeded to give five detailed reasons substantiating his conclusion.[23]

Observations

i) The Charge of Plagiarism

The University of Malta has always had strict rules on plagiarism. Its Assessment Regulations Section 39 states:

> *"39 (1) Students shall not:*
>
> *...*
>
> *(b) in any form of Assessment:*
>
> *(i) engage in plagiarism – defined as the unacknowledged use, as one's own, of work of*

21 Assessment Disciplinary Board Minutes, 8 February, 2013.

22 Letter by the Pro-Rector for Students' and Institutional Affairs to the Commissioner for Education, on 31 January 2014.

23 Document handed to the Commissioner for Education by the Chairman of the ADB at a meeting held on 24 February 2014. The meeting was attended also by the Pro-Rector for Students' and Institutional Affairs and the Registrar.

> *another person, whether or not such work has been published, and as may be further elaborated in Faculty or University guidelines...*"

One such publication is entitled "*Plagiarism and Collusion: Guidelines for students, academics, and Faculties/Institutes/Centres/School*" published in 2010. In Section 1, entitled 'Purpose of this document' the Registrar informs students:

> "*The University of Malta is committed to ensuring that awards made to students are based on work that they have done themselves. Therefore, it takes cases of plagiarism, collusion, and other acts of academic fraud and dishonesty very seriously, and a disciplinary procedure is in place whereby such acts are punishable by reduction or cancellation of marks and may lead to expulsion from the University or the revocation of a degree already awarded.*"[24]

Complainant had no conflict with the University's stand on plagiarism. He contested the method used by the University ADB to conclude that his work was plagiarised. He and his lawyer asserted that the Board of Examiners and the ADB erroneously based their decisions on an automated computer programme "*... without having any physical person assessing whether the conclusions derived from such software is correct....*"[25] The lawyer referred to an "*important*" notice in the University guidelines on the use of Turnitin, which advises users to "*analyse and interpret*" the similarity index and not simply rely on it as a numerical indicator on whether plagiarism had been resorted to or not.[26]

Complainant further pointed out that he had presented successfully four other undergraduate and postgraduate dissertations before he embarked on doctorial work. As such, he argued, he was fully cognisant of the need to avoid plagiarism and the dire consequences if he did not. In a three-page defence, he asserted:

> "*It is to be pointed out that the composition of this thesis is the result of years of research in several papers, internet and above all, [a selected text]. ... There was never the intention that research conducted from internet sources as well as journals and several papers is directly copied from source and presented as original text. ... In occasions where*

24 University of Malta (2010) "*Plagiarism and Collusion: Guidelines for students, academics, and Faculties/Institutes/Centres/School*", p.1.

25 Complaint presented by complainant's lawyer to the Commissioner for Education, 21 August 2013.

26 University of Malta: "*Using Turnitin for Plagiarism Detection*", IT Services, p.16.

> *it was deemed necessary to cite on a word by word basis, all quotations were captioned in double-quotes and referenced in footnotes.*" [27]

The complainant goes on to claim how the Turnitin report identified sections of his work as plagiarised when they were not. He argues this point in six lengthy paragraphs entitled: *The Declaration, Table of Contents, Direct Referenced to* [selected text], *Several instances where sources are already referenced, Footnotes,* and the *Appendices.*

In a similar vein, complainant's lawyer argued that the ADB should have ignored the outcome of the Turnitin report because its findings were "*solely based on the erroneous conclusions which were automated by the said software.*" The lawyer stressed the point further by referring to a part of the following University guidelines on the use of Turnitin:

> *"A high similarity index does not automatically imply that a piece of work has been plagiarised. Neither does a low similarity index imply that plagiarism has not occurred.*
>
> *A judgment about whether or not plagiarism has occurred cannot be based simply on the percentage of matching text that is found. You are therefore required to analyse and interpret the originality reports carefully to determine if your work is plagiarised or not.*" [28]

The lawyer proceeds to assert:

> *It is amply clear that no tutors have analysed the thesis submitted by my client since had an independent and impartial tutor assessed my client's work as indicated above, such tutor would have easily ascertained that the contents deemed to be plagiarised by the Turnitin report are correctly referenced quotations and texts in accordance with the OSCOLA guidelines, footnotes and other references.*" [29]

The lawyer's and his client's assertions are not borne out by the evidence. The Chairperson of the Board of Examiners states that the five members had physically and independently analysed the text for plagiarism. The five examiners agreed that:

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27 Paper written on 25 April 2013 by the complainant regarding the shortcoming of the Turnitin Similarity report on his thesis, and presented to the ADB as well as to the Commissioner for Education.

28 Op. cit. These are the same guidelines that the Faculty Officer forwarded to the examiners, as pointed out in paragraph 4 above.

29 Letter of complaint presented by complainant's lawyer to the University Ombudsman on 21 August 2013.

> *"Whole chunks of this work are lifted from other publications without their source being acknowledged."*[30]

Furthermore, the ADB Chairperson and the Registrar assured the Commissioner for Education that Board members invariably physically checked the Turnitin report with the text whenever students are brought before the Board accused of major plagiarism. In addition, the independent assessor appointed by the ADB at the request of the Commissioner for Education, had also manually vetted the complainant's thesis and noted numerous instances of gross plagiarism. He cited one example where the complainant copied entire sections from a well-known author in the field, without giving him credit, presenting the author's footnotes as his own, and without including the author in the bibliography. Citing another excerpt, the independent assessor writes:

> *This has been copied verbatim from [author's name] paper (page 1). [The author's] voice has become candidate's voice without any acknowledgment whatsoever, ... Copying from [this author's] paper ... continues throughout the chapter."*[31]

Complainant has been so insistent in his claim that he did not plagiarise, that one starts to suspect that he is not fully aware when the academic ethic is raptured. However, faced with such overwhelming evidence, the neutral observer has no other option but to endorse the University's claim that complainant did engage in major plagiarism. Furthermore, there is no doubt that this conclusion was not based solely on an automated computer programme, but was confirmed by physical academic analysis.

II. Personal prejudice

Complainant alleged personal prejudice by members of the Board, without specifying whether it was the Board of Examiners or the ADB. He alleged that the Chairperson and members had conflicts of interest, bore him personal grudges and were influenced by pique in reaching their judgements. However, since he did not substantiate these allegations, this aspect of his complaint was discarded.

III. Maladministration

Complainant argued that the University administration failed to guide him about Turnitin use, hence he could not test his thesis for similarity before submitting it. The

30 Examiners Report, ibid.

31 Independent Assessor's report, ibid.

University refuted this claim pointing out to the Registrar's memo of 11 June 2010 dealing specifically with the issue of plagiarism and how to avoid it. The documents quoted earlier devoted entire sections on the use of Turnitin as one method to test one's work. One notes also that at the second ADB hearing dealing with the complainant's case, the Dean of the Faculty concerned presented the Board with a copy of an email sent by the Faculty Secretary urgently reminding the complainant to activate his IT account and use the Turnitin programme to test his thesis for plagiarism. Complainant's lawyer claims that his client received this email after submitting the thesis. This point carries little weight, since the Faculty Officer forwarded the thesis to the examiners on 3 October 2012 and in the interval nothing prevented his client from retrieving his work, test it for similarities, amend it and resubmit it. Instead, all the indicators point to the conclusion that at this stage, the complainant felt satisfied with the quality of his work and would not be bothered with electronic testing programmes with which he may not have felt at ease.

IV. Fair hearing

The complainant laments that the proceedings of the ADB failed to give him a fair hearing. He argued that (a) the Board did not give him prior notice about what he was accused of or the purpose of the hearing, and (b) he was provided with a soft copy of the Turnitin report during the hearing itself and consequently could not prepare his defence against the charge of major plagiarism.

The Registrar refuted the first claim pointing out that on 6 December 2012 she wrote to the complainant:

> "*It has been reported that you have committed a breach of the University Assessment Regulations (Regulation 39(1(a)) by plagiarizing parts of the thesis you submitted for the course leading to the degree of Doctor of Philosophy. In terms of Regulation 43(a) of the said Regulations, you are hereby requested to appear before the Assessment Disciplinary Board on Tuesday, 11 December, 2012 at 12 noon at the Registrar's Office, Administration Building, University of Malta.*"

In this letter, the Registrar goes on to advise the complainant to read carefully the relevant regulations and that he could attend the meeting accompanied by a friend. The Registrar's statement renders the first claim meaningless. Furthermore, one cannot imagine how a mature professional with the claimant's background would attend a disciplinary board summons without first enquiring about its purpose. Once again, here it

is reasonable to conclude that complainant knew precisely the purpose of the ADB hearing but felt sufficiently self-assured in his ability to defend himself that he chose to attend unaccompanied.

With regards to the second assertion, it has been established that the Registrar initially informed complainant that her Office would be forwarding him through email an electronic version of the Turnitin report. However, the file was too massive to send through email so the Assistant Registrar phoned complainant to collect a CD with a soft copy of the report from her office. The Assistant Registrar's *aide memoire* on the telephone conversation stated that the complainant replied that he would not be collecting the electronic version since he did not need it. The complainant gave the same reply when the ADB Chairperson asked him why he had not collected the CD.

It is significant that at the ADB hearing, the accused neither complained that he had not been informed about the purpose of the meeting, nor protested that he was not allowed sufficient time to prepare his defence. On the contrary, when the Chairman offered to postpone the sitting to another day because the Student Representative on the Board was absent, complainant stated that he preferred to continue with the meeting.[32]

V. Unreasonable penalties

The complainant felt that the ADB was unreasonable to refuse his request to withdraw the thesis in order to correct the plagiarised parts and re-submit it. He also protested that the penalties imposed on him, were too draconian.

The complainant's desire to temporarily withdraw the thesis in order to remove the plagiarised parts is understandable. However, the ADB had no other administrative option but to reject his request once the examiners had assessed the work and delivered their verdict. The Board's refusal to a resubmission was also guided by the examiners' verdict and the external examiner's statement, quoted earlier, to the effect that the thesis had to be rejected outright because the extent of plagiarism was too gross to be remedied. As a result, the Board's rejection was justified for administrative as well as academic reasons.

When dealing with the merits of this complaint one has to consider three factors. One concerns the seriousness that all universities attach to the breach of academic ethics

32 ADB Report dated 11 December 2012. In spite of the Student Representative's absence, the Board still had a quorum.

through plagiarism: hence the Malta University's unyielding regulations and severe warnings on the subject. The second aspect relates to the fact that the complainant breached plagiarism regulations in PhD and research work related to the University's highest and most prestigious award. The standing and academic credibility of the Institution would be seriously compromised if suspicions or rumours spread that it awarded doctoral degrees gained through plagiarised work. The third consideration relates to the individual found to have committed major plagiarism. Complainant is justifiably proud to be the holder of several degrees and stated that he is well familiar with academic ethics and the demands of scholarly work. No doubt, the ADB took into account his extensive academic experience when meting out its penalties.

In my view, the exclusion of the complainant from participating in University courses for the duration of ten years is too harsh, and the University may wish to reconsider a shorter period. Under the appropriate academic conditions and supervision, complainant could be allowed to redeem himself. I also suggest that the University may wish to reconsider the fining of students found guilty of plagiarism. Such a serious breach of academic ethics should not be trivialised by a monitory penalty especially if the culprit can ignore it with impunity.

Conclusions

It bears repeating that plagiarism is a very grave breach of academic ethics and takes weightier dimensions when it occurs at the doctorial research level. It is no surprise that the University took a most serious view of the complainant's unscholarly actions. It is not the Commissioner's task to evaluate and decide whether a scholarly piece of work has been plagiarised or not. This task belongs to the academics assigned by the University to do so. The role of the Commissioner for Education in such situations is to examine whether the decision of the University authorities is supported by conclusive evidence as to their findings. The evidence elicited during this investigation undoubtedly supports the conclusion that complainant did breach academic ethics through plagiarism. The evidence is not reflected solely in the automated Turnitin report, which tested a similarity index of 54 percent. The five members of the Board of Examiners, members of the ADB, and an independent assessor specifically appointed at the request of the Commissioner for Education, visually examined the complainant's dissertation. All agreed that the work was heavily plagiarised. The most damning judgement of complainant's work came from the External Examiner who regarded it as the worst case of blatant disregard of academic ethic he had come across.

Faced with such evidence, I cannot sustain the students' complaint that the University falsely and unjustifiably accused him of major plagiarism in his PhD thesis. Furthermore, the Assessment Disciplinary Board's decision to grade his work as a Fail and Zero marks corresponds with the grading and marking assigned by reputed universities to plagiarised work. Hence, I cannot support complainant's claim that the University treated him unfairly or discriminated improperly against him in this regard.

Similarly, I cannot support complainant's allegation that he was not given a fair hearing. Faculty officials had alerted him that he had to activate his IT account to run a pre-submission Turnitin test, but he ignored the advice. Furthermore, the evidence clearly shows that the Registrar had informed the complainant about the nature of his summons before the ADB meeting. He was also informed that the Turnitin report was too long to send through email, and he could collect a CD version from the office of the Deputy Registrar. He declined to do so. Furthermore, had he genuinely felt ill prepared to present his defence, he could have accepted the Board's offer to postpone the sitting. He declined that option as well. Taking into account these factors, it is reasonable to conclude that at the time of the hearing complainant felt confident and capable to defend himself against the charge of plagiarism. It could also be the case that he felt genuinely and utterly innocent of the charges brought against him and only became fully conscious of the thesis similarity level when presented with the Turnitin report. Still, I cannot sustain his claim of an unfair hearing: the evidence shows that he was fully aware of the charges brought against him and he had every opportunity to prepare his defence.

The penalties imposed by the ADB on the complainant are consistent with the grave breach of academic ethics through plagiarism. Therefore, I cannot support his claim that the retributions imposed upon him were too severe, except that in my view the prohibition from joining another University course in the next ten years is too long.

Taking into account all the factors emerging from this investigation, my final opinion is that:

a) The conclusions of the University authorities that complainant did breach University regulations and academic ethics through major plagiarism at the highest level of research activity, namely doctoral studies are based on substantial valid evidence; and
b) in the events prior to, during and following the submission of his thesis as well as at the disciplinary hearings, the University authorities treated the complainant fairly,

according to the University regulations, and did not discriminate improperly against him.

Consequently, I cannot sustain the complaints.

Outcome

Following the Commissioner's Final Opinion, the complainant requested the University to reconsider his case especially the imposition of the ten years' ban on studies at the University. The ADB sustained the original penalties it had imposed.

Case Note on Case No UN 0038
MCAST

Changes in lecturing duties undermined lecturer's professional status and reduced his income

(lecturer, lecturing duties, remuneration)

The complaint

An academic member of staff lodged a complaint with the Office of the University Ombudsman[33] against the Malta College of Arts, Science and Technology (MCAST). He[34] claimed that, through unwarranted changes in his lecturing duties, the College undermined his professional status and reduced his income. He sought the termination of the services of the part-time lecturer who took over some of his previous lectures so that the situation would return to the one prior to her employment.

Facts and findings

The complainant took up employment with MCAST in 2001 to lecture at the Institute of Mechanical Engineering. At the time of his engagement, he satisfied the second requirement of the call for applications, which demanded either a first degree or fifteen years of industrial experience in the area for which he was appointed to teach.

For more than a decade, the bulk of his lecturing concentrated on two levels, namely:

a) the Extended Diploma at Level 4; and
b) the Higher National Diploma at Level 5 of the Maltese National Qualifications Framework.

During the academic year 2011-2012, his combined lecturing load averaged 28 hours per week, compared to the maximum of 19 hours per week agreed to in the current MCAST/

33 Professor Farrugia opened this investigation in his role as University Ombudsman, and completed it as Commissioner for Education following his appointment on 1 February 2014. The latter nomenclature is used in this Final Opinion.

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

MUT Collective Agreement. The complainant received additional remuneration for the extra lecturing hours.

In September 2012, the new Director of the Institute of Mechanical Engineering revised complainant's timetable, limiting it to 18 hours per week. Furthermore, his new lecturing duties concentrated on the Level 4 rather than on Level 5 of the syllabus since the Director assigned the higher level lectures to a newly appointed part-time lecturer, holder of a Ph.D. in the area. Soon after, the complainant sought and was given six extra lecturing hours against extra remuneration in MCAST's Institute of Electrical Engineering.

Observations

The complainant's first complaint centred on the issue of teachers' prestige and esteem. It is a fact of life in the teaching profession that the higher level of learning content and the more advanced the students, the higher prestige and esteem a teacher holds among his peers and in the community at large. This when the situation should be reversed, as an analogy in the medical field will explain. A healthy person with a mild aliment will normally visit a General Practitioner. On the other hand a seriously ill individual will seek the services of a Consultant with specialised knowledge in the specific disease. However, the converse practice occurs in teaching: the better teachers are assigned to high achievers while poor teachers are relegated to instruct unmotivated and/or weak students. As a result, public opinion concludes that teachers operating at the higher educational levels must be the better educators than those teaching lower levels. Consequently society holds the former in higher esteem.

It is not surprising, therefore, that when the Institute Director divested complainant of the Level 5 classes in September 2012, the complainant perceived it as a professional demotion resulting in loss of prestige among his peers and students. The allocation to what he considered 'peripheral' teaching duties, such as supervising students' laboratory work, exacerbated the hurt to his professional pride. He argued that the Institute Director was intentionally side-lining him to accommodate and sponsor the services of the newcomer.[35] He claimed, and there is no reason to doubt his statement, that the experience caused him demotivation and frustration on the job, especially as initially the timetable changes led also to a loss of income.

35 Letter dated 28 February 2014 from the General Secretary of the MUT to the Commissioner for Education and an earlier discussion between the two.

One can, however, present a contrasting side to the issue. The College authorities represented by the Director, Institute of Engineering had the responsibility, and the duty, to provide students with the best tuition possible. In this case, the Director felt that the pedagogical objectives would be reached more effectually by assigning the teaching of Level 5 students to a Ph.D. holder, who held far higher academic qualifications but less industrial and teaching experience than the complainant. In this respect, one cannot censure the Director's actions since, as long as he followed the College's recruitment policies, the Institution bestowed on him the right to employ additional staff to cover the necessary tuition. It was also his prerogative to engage academics with the highest possible credentials when the Institute was in the process of improving its academic programmes leading to degree level courses.

Under such circumstances, education administrators face the perennial dilemma of having to choose between continuity and innovation. They have to determine whether students benefit most from the higher qualifications and freshness of new, younger, doctoral degree holders or from the experience of capable practitioners whose students have had academic success in the past. It is to complainant's credit that as soon as he offered to lecture in the Institute of Electrical Engineering, his proposal was promptly accepted. Yet, in this instance, the Institute Director opted for change with the blessing of the College's highest authorities, and as the Commissioner for Education, I find no justification to condemn this academic decision.

The MUT General Secretary has suggested that a less radical change, which took into account the complainant's past service, would have solved the problem. However, one has to remember that compromise solutions work in a spirit of dialogue and cooperation. This case certainly lacked both. The Institute Director failed to consult the complainant on the planned changes. The latter only discovered his revised lecturing programme when the timetables became public knowledge on the Institute's noticeboard. It is therefore a fair comment to state that the Director's lack of consultation in such a delicate matter showed insensitivity and a shortage of courtesy towards a long serving member of his staff.

Similarly, the industrial militancy inherent in the complainant's demeanour and demands heightened the aggravation between the two. His derogatory comments on his superiors, and his belligerent reactions to observations that did not tally with his point of view (including those during his meetings with the Commissioner for Education), left much to be desired. Indeed, during our discussion on this case, the Principal referred to the

complainant's frequent clashes with students, a charge complainant strongly denied.[36] Furthermore, the complainant's insistence that the College should terminate the part-timer's engagement so that he would have his former extra sessions and additional remuneration raised the stakes in the confrontation. MCAST dismissed the complainant's demands as unacceptable for educational as well as administrative reasons. The Director decided to prioritise the students' academic needs over past practices and individuals' egos.

The complainant's second complaint concerned the fact that his new teaching load unjustly deprived him of extra income. The reduction from the stipulated 19 hours to 18 hours per week did not disturb his monthly salary. He did lament the loss of the additional remuneration derived from extra lessons, which, with an average of nine hours per week at €23.28 per hour, led to a considerable sum throughout the academic year. As noted earlier, the complainant's remedy for his financial setback was that MCAST should have terminated the newly employed part-timer and reassigned her contact hours to him. He based his argument on the assumed industrial practice that extra work against extra remuneration should be offered first to incumbent employees before it is offered to outsiders. Initially, he claimed that this practice was catered for in the MCAST/MUT Collective Agreement, however, when it transpired that the document contained no such proviso, he vigorously maintained that such principles were embedded in general employment legislation.

It would have been an odd condition had the MCAST-MUT Collective Agreement contained the proviso initially intimated by the complainant. It would also have been highly censurable to impose such a condition in an educational context even if the practice may be legitimate in an industrial environment. MCAST and the MUT opted for a maximum students-contact load of 19 hours per week with the proviso that lecturers would spend the remaining hours of the national 40-hour working week on research, lecture preparations, corrections and a contribution to the institution's administration.

Therefore, the MCAST/MUT Collective Agreement underlines the belief that MCAST lecturers deliver at their best at the 19 hours teaching threshold per week. The College and the Union decided that a higher teaching load would diminish lecturers' capabilities

36 Discussion between the Commissioner for Education and the Principal, as well as the latter's letter, dated 20 November 2013, pointing out that a group of students had collectively accused the complainant of abusive language, an accusation they later retracted.

to the detriment of their students; fewer hours would result in the underutilisation of human recourses. In this spirit, most institutions of Further and Higher Education consent to three or four hours of extra contact hours per week. They frown upon a higher extra lecturing load, whether it is against extra remuneration or not, since such practice would detract from lecturers' professional output. In this particular case, one can understand complainant's disappointment at the loss of extra income before he took up extra teaching duties in the Institute of Electrical Engineering. Yet, he is wrong to blame the Director of the Institute of Mechanical Engineering when the latter acted in accordance with conventional tertiary education practice and engaged an additional lecturer to provide the extra tuition hours.

Conclusion

The complainant was assigned a lecturing load compatible with his status and in accordance with the terms of the MCAST/MUT Collective Agreement. The Institute management had the right to appoint part-time lecturers to service the appropriate academic areas as long as it followed faithfully MCAST's staff recruitment procedures, and did so in the best interests of its students. Complainant had no vested right in terms of the MCAST/MUT Collective Agreement to arbitrarily insist that he should retain his lecturing levels or extra hours/remuneration he held in the past on the basis of antecedence. Furthermore, his claim that the Institute should dismiss the more qualified lecturer in order for him to retain his earlier benefits is unacceptable in educational, managerial and industrial relations terms as explained earlier. In view of the above, I do not sustain his complaints that the MCAST authorities improperly discriminated against him when they reduced his lecturing hours with Level 5 students to give them to a much better qualified academic, or that they treated him unfairly when they assigned his overtime lectures to a part-time lecturer.

I do however support complainant's claim about the lack of consultation before the decision to change his lecturing duties was taken. The Director of the Institute should have discussed the impending changes in the timetable with the complainant rather than let him discover the information from the Institute's noticeboard.

Case Note on Case No UO 0020
Institute of Tourism Studies

Lecturer alleges that he was deprived of his vacation leave

(lecturer, vacation leave)

The complaint

A lecturer at the Institute of Tourism Studies (ITS) lodged a complaint with the Commissioner for Education against his[37] employer on April 2014. He claimed that the institution deprived him of five days vacation leave during the Christmas period and another five days during the Easter period of the current academic year.

Facts and findings

The complainant disagreed with the interpretation given by ITS and the Malta Union of Teachers (MUT) to paragraph 14.2 of the Collective Agreement, signed by the two parties in 2012. The paragraph concerned related to the vacation leave entitlement during the Christmas and Easter periods. The complainant supported his claim by highlighting the difference between the relative wording of this provision in the 2007 and 2012 Agreements. He stressed the point that the wording of the most recent agreement should have precedence over the previous one.

Paragraph 14.2 of the 2012 Agreement states:

> *"Academics are not required to report for work at the Institution or to provide their services to the Institution within the following periods:*
> *• the month of July;*
> *• the month of August; and*
> *• 10 working days during Christmas and Easter periods, which days shall be determined annually by the Management and notified to the academics by the end of November of each year.*

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

Such periods incorporate academics' statutory vacation leave entitlement as part thereof."

The relative provision in the 2007 Agreement (Section 10 (d)) related to vacation days during the Christmas and Easter periods stated:

"*Lecturing personnel may, during the Christmas and Easter period, work from home for a maximum of ten (10) working days. The Management shall have the right to assign the area and the task, including tasks related to professional development, to be the subject of such work from home and to verify the performance thereof.*

The Management shall, in November of each year, identify the dates during which the lecturing personnel may avail themselves of this facility in the following year."

On 16 December 2013, the ITS Management issued an Internal Memo defining the Christmas and Easter vacation days. It stated:

"*Following consultation with the shop stewards of the Malta Union of Teachers; it has been agreed that the five days allotted for the Christmas period; as per collective agreement in force; will be left for the individual staff members to decide, as long as these five days are taken at a stretch*".

The complainant argued that the memo was obviously based on the 5 + 5 days vacation leave interpretation rather than the 10 + 10 reading. The complainant contested the contents of the internal memo with the ITS Management as well as with MUT Officials arguing that their interpretation of the 2012 Collective Agreement was incorrect. Unsatisfied with their replies, he presented his grievance to the Commissioner for Education on the last day of term before the Easter holidays of the 2013-2014 academic year.

The Commissioner for Education sought the reactions of ITS and MUT to the complainant's claims. The ITS Management simply replied by quoting Paragraph 14.2 of the 2012 Agreement without any comments or observations; the MUT Officials failed to reply by the date this Final Opinion was concluded, in spite of reminders.

Observations

The issue here is one of interpretation. ITS Management explained to the complainant

that the 2012 Agreement grants academic staff an aggregate of 10 working days as vacation leave for Christmas and Easter periods. They maintained that academic staff could avail themselves of five days leave at Christmas and another five days at Easter time. In contrast, complainant contended that academic staff was entitled to a total of twenty holidays: ten days at Christmas time and another ten at Easter.

The statement contained in the ITS's internal memo of December 2013, namely "*... the five days allotted for the Christmas period...*" left no doubt which of the two interpretations the Institute's Management and the MUT's shop stewards had agreed upon. The internal memo built on the practice that had existed since the 2007 Collective Agreement.

Before lodging his complaint, complainant sought a clarification from the MUT President. His reply did not clarify the controversy. He stated:

> *Although I see your line of reasoning and it makes a lot of sense I beg to differ with this interpretation. The agreement is not perfect but the interpretation of this clause by the signatories, even those that preceded me, has always been the same and if we were to go to court and we had to testify we will have to say that the understanding was not the one you are putting forward.*" [38]

In reply to the complainant's objections, he wrote further:

> "*While I still see your point the wording in question does not say 10 x 10. You are interpreting it that way and yes it can be interpreted that way indeed. However, it can also be interpreted the exact opposite.*" [39]

The above statement simultaneously gives different and conflicting interpretations to the already ambiguous wording of the contested paragraph. At one point, the MUT President agreed with the complainant's understanding of the proviso, at the next he stated that it could mean "*the exact opposite*."

While one can consider the complainant's interpretation as a plausible one, one cannot discard the practice that had taken place during the Christmas and Easter periods between 2007 and 2013. Even more important is the fact that both signatories of the Collective

38 Email dated 3 April 2014 from the MUT President to the complainant.
39 Email dated 4 April 2014 from the MUT President to the complainant.

Agreements have concurred in their interpretation of the paragraph in question (namely five days in Christmas and another five days in Easter) and had applied this interpretation over and over again. On the other hand, a repeated interpretation of a provision of an Agreement does not necessarily render it valid. Similarly, the mistaken application of the proviso over a number of years does not justify its perpetuation. A Collective Agreement is a document that binds its signatories and ultimately, it is the actual text on which the parties had signed that determines its application.

In my opinion, in a situation where the wording of a provision in the agreement is not clear, it is for the signatories to sit together and agree in writing on its interpretation. The wording of any agreement should always be clear and should never leave any doubt as to the interpretation of any of its provisions. Any ambiguous wording in documents of a contractual nature is unacceptable.

Conclusion and Recommendation

In this case, the Commissioner for Education has adopted the standpoint of the Office of the Parliamentary Ombudsman with regards to the interpretation of an unclear clause in a Collective Agreement. The Commissioner cannot give a final decision on the interpretation of a Collective Agreement, which, as stated earlier, in itself has the characteristics of a contract. Such a decision rests with the Courts of Law. The Commissioner, like the Parliamentary Ombudsman, intervenes when the wording is clear but one of the parties gives a manifestly unreasonable or not plausible, if not out rightly mistaken interpretation of a provision in the agreement. In situations where the wording is ambiguous the Office of the Ombudsman considers the matter to fall within the realm of industrial relations where the parties involved would be the best suited to resolve the issue. This is certainly the case regarding this complaint since Paragraph 14.2 of the 2012 ITS and MUT Collective Agreement lacks clarity and is open to conflicting interpretations.

On the basis of the above considerations, particularly the fact that the drafting of the paragraph in question is not so clear, I am not in a position to state whether the complainant's claim, namely that the number of holidays should be ten days at Christmas and another ten days at Easter, is indisputably the more accurate. This is all the more reasonable approach since both parties signatory to the agreement concur in its interpretation, and therefore, I am not in a position to conclude that the reading given by ITS is patently mistaken or that its decision to grant five holidays at Christmas and another five in Easter is manifestly unjust. As a result I am not in a position to sustain or reject complainant's claim.

Notwithstanding the above, I recommend that ITS and the MUT should revisit the issue. The two parties should re-examine the provisions of Paragraph 14.2 in the 2012 Agreement with the aim of rephrasing it in a more precise and explicit wording that leaves no doubt about its interpretation and implementation. In doing so they may wish to consider the relevant paragraphs of the Collective Agreements covering the conditions of work of academic staff working in Malta's two other institutions of higher learning, namely the University of Malta and MCAST, especially since the MUT represents the academic staff working in these institutions.

I strongly suggest that the two parties should resolve the issue by November 2014. Such timing will allow ITS to apply a clearer interpretation of Paragraph 14.2 in time for the Christmas holidays of the same year.

Outcome

Following the Commissioner's Final Opinion, the ITS Management and the MUT met to consider his recommendation. Both sides agreed that the intended interpretation of the Collective Agreement was that the vacation leave should stand at five working days at Christmas and another five working days at Easter. The MUT notified the Commissioner for Education and its members of the outcome of its discussions with ITS.

Report on Case No UO 0022
University of Malta

Student with learning disabilities asks for the removal of Maltese language as a requirement for Secondary Education Certificate

(Maltese, Secondary Education Certificate, learning disability)

The complaint

The complainant lodged a complaint on behalf of his[40] fifteen-year-old son against the University of Malta. He claimed that the Institution refused the request to exempt his son from the Maltese Language requirement at Secondary Education Certificate (SEC). The absence of the Maltese Language certificate could eventually render him ineligible for entry into his chosen University course. The complainant based his request for an exemption on the fact that his son suffers from dyspraxia with mild dyslexia and attentional difficulties. He also suffers from Lyme Disease, which he claims, is the cause of his learning disabilities. Initially, the complainant argued that his son's learning disabilities rendered it impossible for him to learn English and Maltese simultaneously. However, subsequent to his passing the English SEC examination, complainant shifted his claim and argued that Maltese was a foreign language to his son.[41]

Facts and findings [42]

Complainant's son is a Maltese national who comes from a family where English is the predominant language spoken at home. The complainant explained that his son's efforts to improve his competency in the Maltese language have proved futile. These efforts included four hours per week in one-to-one private tuition for the last seven years in

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

41 Complainant's complaint dated 26 April 2014 and his email of 19 August 2014.

42 Prior to publishing this Final Opinion, the Commissioner for Education forwarded a copy of the *Complaint* and *Facts & findings* sections to the complainant and to the ADSC Chairperson. Their counter comments were considered in drawing up this report.

addition to the normal Maltese lessons at school. [43]

Convinced of his son's inability to learn Maltese, the complainant requested the University's Access Disability Support Committee (ADSC) to exempt his son from the Maltese language requirement when he eventually applies for entry to a University undergraduate course where the knowledge of Maltese is not crucial. To support his request the complainant attached a detailed diagnostic psycho-educational report (dated 1 December 2012), an occupational therapy report (dated January 2013) and another health report related to his son's Lyme Disease ailment.

Following the normal battery of tests, the psychologist writing the psycho-educational report concluded that: "[complainant's son]'s *difficulties are related to* ***Dyspraxia with mild Dyslexia and Attentional difficulties***." He went on to suggest:

> "*For the Matsec examinations the following is recommended:*
> • ***25% extra time***
> • ***Distraction free room***
> • ***Movement breaks***." [44]

The occupational therapist also subjected complainant's son to a number of tests. He diagnosed poor vestibulo-proprioceptive processing, and recommended that during his examinations he should be allowed extra time, movement breaks, a distraction free environment, the assistance of a prompter and word processing facilities.[45]

The psycho-educational and the occupational therapy report writers did not conclude that complainant's son was unable to learn Maltese or that he should be exempted from the Maltese language requirement.

43 Complainant's son's private tutor in Maltese (document dated 8 October 2013) and the Headmaster of the College where the complainant's son attended Secondary School confirmed this statement. The latter added that the student also "*... attended informal Maltese sessions for 2 years as part of the extra curriculum programme.*" (letter addressed 'To Whom It May Concern' dated 7 October 2013).

44 '*Psycho-educational Report* - by a Psychologist and Psychotherapist dated 17 December 2012.

45 Occupational Therapy Report by an Occupational Therapist, dated January 2013.

The Pro-Rector for Students' and Institutional Affairs, who is also the chairperson of the ADSC,[46] replied to the complainant's son's request as follows:

"

- *A Prompter will be provided to draw the candidate's attention back to the examination task when necessary.*
- *Extra time (25% of the allotted time) which may also be utilised as supervised rest breaks as necessary, will be given only during the* ***written*** *examinations.*
  Note that extra time is not given in Mathematics Paper 1-Section A (non-calculator section), Art and Graphical Communication.
- *Candidate's spelling mistakes will not be penalised in* ***non-language subjects.***
- *Arrangements will be made to accommodate the candidate in a quiet room.*" [47]

The complainant accepted the ADSC provisions but insisted that his son should also be exempted from the Maltese language requirement for University entry. In reply, the Pro-Rector informed complainant, that the ADSC had reviewed his son's case in the light of the documentation and arguments provided by his parents, but the Committee was of the opinion that its earlier decision should stand. The Pro-Rector wrote:

> *"The psychologist's report has provided enough evidence for [complainant's son] to qualify for SEC 2014 examination access arrangements. However, there is no evidence to accede to the request for [complainant's son] to be exempted from sitting for his Maltese O' level which constitutes part of the entry requirements for pursuing his studies at Junior College and subsequently also constitutes part of the entry requirements to pursue his studies at the University of Malta."* [48]

In a letter to the Commissioner for Education (hereafter referred to also as the Commissioner) reacting to complainant's complaint, the Pro-Rector concluded:

46 The ADSC is a University Senate appointed committee composed of academics who specialise in learning and other disabilities. The Committee considers and decides on requests for special arrangements from students and staff during their stay at University. It is made up of the Chairperson, a psychologist who is also the Pro-Rector for Students' and Institutional Affairs, a medical expert, two educational psychologists, an organisational psychologist who worked for many years within the disability field, the Rector's delegate for Disability who is a linguist with expertise in language and disability, and an assistant Registrar.

47 Letter dated 14 January 2014 by Pro-Rector for Students' & Institutional Affairs to complainant's son.

48 Letter dated 14 April 2014 from the Pro-Rector to complainant.

> *"It is clear that [complainant's son], as certified, has mild dyslexia and dyspraxia as well as attentional difficulties. He was given examination arrangements for these for the SEC examinations for this academic year.*
>
> *Mild dyslexia, dyspraxia and ADHD can in no way be considered to exempt [complainant's son] from the SEC Maltese entry requirement."* [49]

Following the ADSC's refusal to his request, the complainant had a lengthy discussion on the phone with the Rector's Delegate for Disability stressing the validity of his son's case. Unsatisfied with the ADSC's arguments and conclusions, the complainant presented his son's case to the Commissioner for Education. The latter organised a meeting with University officials to highlight the general learning limitations faced by students suffering from dyslexia and dyspraxia, and more specifically to discuss complainant's son's case. The following University officials attended the meeting with the Commissioner for Education:

- the Pro-Rector and ADSC Chairperson;
- the Registrar;
- the Rector's Delegate for Disability, who is a language learning disability specialist;
- the Coordinator of the Faculty of Education Access Unit (later referred to as the first advisor of the three Commissioner's advisors); and
- the Coordinator of the Faculty of Social Wellbeing's Disability Studies Unit (later referred to as the second of the three Commissioner's advisors).

As stated earlier, the Pro-Rector and the Rector's Delegate for Disability are members of the ADSC; however the two Coordinators who are **not** members of the ADSC, run units that promote and safeguard the interests of students with special needs. The Units are totally autonomous and independent of the ADSC.

The group reached the following conclusions relevant to this case:

> *"Children with dyslexia experience different degrees of difficulty with language, in particular with reading and writing. However, those with average (or above average) cognitive ability normally manage to overcome these difficulties sufficiently to learn language when they receive the appropriate support. In fact there are several students at university with dyslexia who cope well with their university course. Some of these are granted extra time for written examinations.*

49 Letter dated 28 May 2014 from Pro-Rector and Chairperson ADSC to the Commissioner for Education.

> *Dyspraxia refers to difficulties with sensori-motor tasks and so does not prevent children from language learning though they experience various difficulties.*
>
> ...
>
> *More specifically, ... it should be stated that [complainant]'s certification refers to mild dyslexia. Children with dyslexia are seen on a continuum from very severe to mild. Children with mild dyslexia would never qualify as having the degree of difficulty on the basis of which one would be considered for exemption from a second language were that to ever be considered. Nor can the case be made were it to include dyspraxia."* [50]

All the members of the *ad hoc* discussion group agreed that the above conclusions applied also to complainant's son, meaning that he should be provided with special examination arrangements for his SEC and MATSEC examinations. They also agreed that his request for the exemption of the Maltese Language requirement for entry to University was unjustified.

The group considered that the literature provided by complainant to support his case was not directly related to his son's case as he had claimed.

The Commissioner for Education sought also the opinion of a third advisor, an acknowledged experienced dyslexia and dyspraxia expert within the Ministry for Education's *Specific Learning Difficulties Service.* The professional concerned studied the reports of the psychologists who had examined complainant's son and who had written the psycho-educational and occupational therapy reports referred to earlier. Her comments concurred with those of the specialist *ad hoc* group referred to above. The Commissioner's third advisor observed:

> "*We do have students who give up [learning two languages] even before starting but we are trying in as much as possible to work with parents and educators to make them aware that dyslexia does not imply that a child cannot progress and develop two languages adequately. In fact, schools for students with dyslexia in the UK normally demand that Secondary school students study two languages.*[51]

50 Extract from the Minutes of the *ad hoc* group meeting held on 22 May 2014.
51 E-mail from advisor to the Commissioner for Education dated 28 July 2014.

Later on in her report she added:

> *"The first issue to consider is whether a child with a learning difficulty can learn two languages concurrently. An overview of research suggests that learning two languages was considered inappropriate for children encountering language difficulties and consequently such children were often restricted to learning only one language. However, recent research suggests that bilingual children with for example specific language impairment should be exposed to two languages like peers without SLI [Specific Learning Impairment] (see Paradis, Crago, Genesee, Rice, 2003; Paradis, 2007)".*

In the 2014 Summer Session of SEC, complainant's son sat for the following eight of the ten subjects he studied at school and obtained the following results:

Subject	**Grade**
Maths	3
Physics	3
English Language	3
English Literature	3
Computer Studies	3
Religion	5
Environmental Studies	5
Accounts	Ungraded
Maltese	Absent

He opted not to sit for French. He was also allowed the special examination arrangements promised by the ADSC.

Observations

The following observations will clarify some key issues related to this case:

i. The role of the Commissioner for Education is not to decide over purely academic or medical issues; such matters should be left primarily to the University's officials nominated for the purpose by Senate. He normally does not disturb decisions taken by such bodies as the ADSC or the Admissions Board unless he finds erroneous evaluations of objective criteria, manifest irregularities and discrepancies, or obvious discrimination. His responsibilities concentrate on ensuring that the decision-taking process was fair, equitable, conducted according to set and approved procedures,

and pursued in a manner that is not improperly discriminatory. He does not act as defence counsel for the complainant or the institution concerned. He acts as the 'honest broker' to seek a solution that is equitable to all sides. In this respect, the Commissioner is satisfied that the actions of the ADSC followed established procedures and were conducted in the correct manner. The Commissioner has avoided going into the medico-educational aspects of this case, first because he is not sufficiently knowledgeable in the area, and more importantly because his remit prohibits him from doing so.

ii. The fact that the majority of members of University boards and committees are employees of the Institution, does not necessarily mean that they habitually and inevitably decide in favour of the Institution regardless whether the complainant or appellant is right or wrong. Neither does it mean that they are expected to support decisions taken by their colleagues. Therefore, it will be wrong to conclude, or even assume, that the learning disability experts/advisors consulted by the Commissioner for Education would automatically and inevitably support the views and conclusions of ADSC members. On the contrary, one should accept the principle that as responsible professionals they would act with integrity in the interest of the students, the reputation of the institution they work for, and their own credibility as specialists in specific areas of expertise. Furthermore, members of the University are entrusted with the responsibility of safeguarding the interests of the community by ensuring that the qualifications and certificates issued by the University of Malta are valid and trustworthy. This principle should not be interpreted to mean that one should regard all the conclusions reached by University boards and committees as infallible. Neither does it mean that they should go unchallenged or be accepted blindly without the need for accountability. Whenever doubts arise, these should be checked within an ambit of mutual respect and trust. In this context, therefore, one cannot consider as tenable complainant's suspicions that since two of the Commissioner's advisors in this case are University employees, their conclusions are not to be relied upon.

iii. The University of Malta has designed the SEC and MATSEC qualifications based on the notion of the 'all-rounded matriculated student'. Such students are expected to be competent in Maltese and English, the first as their Mother Tongue, the second as an international language, which is also the second official language of these Islands. Students are also required to be proficient in Mathematics and Systems of Knowledge as well as a combination of Arts and Science subjects. The University considers it

essential that its future students should possess these competencies as preparation for the undertaking of its undergraduate programmes, regardless of whether the candidates involved regard one or more of the required subjects as inconsequential for their future area of studies. One notes that Maltese society as a whole has approved these requirements, which the House of Representatives has enacted and embedded in the Education Act (Cap. 327). Statute 1.2 entitled Compulsory subjects for Admission states:

"*Maltese and English shall be compulsory subjects for admission to the degree and diploma courses of the University:*
Provided that the Senate may by regulations allow candidates in special circumstances to offer other subjects instead."

Therefore, conscious of the restricted use and teaching of Maltese to these two small islands communities, clause 7 of Section B – Regulations and Byelaws of the Education Act provides for alternatives to the Maltese Language requirement. It states:

"Alternative Compulsory Subjects in Special Circumstances

7.1 The Admissions Board may, in the special circumstances and subject to the conditions set out hereunder, allow a candidate to offer another subject instead of Maltese as follows:

(a) It may allow a non-Maltese candidate to offer instead of Maltese his own language.

(b) It may allow a Maltese candidate who, for reasons of residence or education abroad over a significant period during the previous four years, has not received adequate teaching in Maltese, to offer instead of that subject another language or another subject."

The complainant has emphasised in his petitions and verbally to the Commissioner for Education, that his family appreciates and supports the University's safeguards for the National language. He points out that his son's elder brother obtained the SEC Maltese Language certificate in spite of the fact that he has undergone brain surgery some months earlier. He argues that as the University waivers the Maltese language requirement in the cases identified above, it should do the same in cases of medical conditions similar to his son's. It is noteworthy, however, that neither the Education Act nor the University Byelaws allow similar exceptions for candidates with learning disabilities. In fact, the University's Access Arrangement guidelines Section 5.5 states:

> *"Currently, students who are Maltese citizens are expected to have advance literacy skills in English and Maltese. These requirements are stated in the entry requirements which include SEC passes in both languages."*[52]

It is reasonable to conclude that the authorities concerned have not taken these decisions lightly, and they disallow exemptions on the basis of valid medical and academic justifications. They certainly do not impose the Maltese language requirement to discriminate against disabled persons or to render their entry into University more difficult. Therefore, the issue raised by complainant that his son was deprived of his Fundamental Human Right to Education as well as his rights according to the Malta's Disability Act, does not arise. Complainant's son has the right to tertiary education in Malta provided that he satisfies certain conditions, including a SEC pass in Maltese. The respective learning disability experts claim he is capable of achieving this. The complainant's point that foreign universities do not include the Maltese Language requirement in their entry requirements is irrelevant.

The University appoints academics as members on boards and committees on the basis of their expertise, which they acquire from advanced studies, research and applied experience. They retain their expertise by keeping up with the readings and latest findings in their areas of interest. One mentions this point because the complainant insisted with the Commissioner that he and the academics he consulted should read specific scientific papers or chapters in books, which he felt supported his claims. The Commissioner did refer one paper submitted by complainant to his advisors, the ADSC Chairperson and the Rector's Delegate for Disability. However, he did so with great hesitation. In the first place, he felt certain that the academics concerned were up-to-date in their research and did not need him or anyone else to direct them to the relevant literature. Furthermore, apart from the seminal literature in the area, most papers are subject-specific, meaning that the findings and conclusions reached with one set of learners or individuals do not necessarily apply with a different set of learners or individuals.[53] The five academics agreed to evaluate it in order to demonstrate their willingness to consider every aspect presented by the complainant. The Pro-Rector and the Rector's Delegate for Disability

52 University of Malta Access Arrangements (2013) Section 5.5 *'Access arrangements cannot bypass the requirement for literacy competence'*.

53 The same argument applies to complainant's advice to the University of Malta to follow the example of the National University of Ireland, which exempts the Irish Language requirement for students who cannot cope with the subject. His point is not tenable because the use of Irish in Ireland is not comparable with the use of Maltese in these Islands.

stated that the paper in question dealt with a range of learning disabilities apart from dyslexia and dyspraxia, which were not necessarily related to complainant's son's specific conditions. They pointed out that:

> "*... the article by ... is on children with Specific Learning Impairment which is a group far wider than children with dyslexia and does not usually include children with dyspraxia. Moreover, one cannot make a case on the basis of one article alone, particularly one referring to SLI.*" [54]

The Commissioner's second advisor observed that he had read and agreed with the review written by the ADSC Chairperson and Rector's Delegate and had nothing else to add.

The Commissioner's first advisor wrote:

> "*This study does not suggest at any time that these results should lead to an advice to drop a second language. In another study, Genesee (2009) show that "Evidence on children with specific language impairment, admittedly rather limited at this time, suggests that ... these children can acquire functional competence in two languages at the same time, within the limits of their impairment. Therefore, children with specific language impairment living in families where knowing two, or more, languages are useful and important, should be given every opportunity to acquire two languages". Paradis (2010) shows that children with SLI learning two languages at the same time do not demonstrate any greater difficulties in their two languages, as compared to monolingual children with SLI. So Genesee (2009) insists that children with SLI can still be bilingual if they are given continuous and regular exposure to both languages to ensure their complete acquisition.*" [55]

He goes on to explain that this study was conducted primarily among migrant children in Holland, a situation that does not compare to complainant's son in Malta. He concludes that the article in question provides no justification to comply with complainant's request to exempt his son from the Maltese Language University entry requirement.

54 Letter by the Pro-Rector for Students' & Institutional Affairs and the Rector's Delegate for Disability to the Commissioner for Education, dated 17 June 2014.

55 Email by the Commissioner's first advisor to the Commissioner for Education, dated 17 July 2014.

The Commissioner's third advisor and a pioneer in the field of dyspraxia, dyslexia and education in Malta, wrote in very much the same vein. His comments and conclusions were:

> *"As has long been established children with a profile of dyslexia generally do encounter difficulties with the development of reading and writing skills. Experience has also shown that while some pupils encounter excessive difficulties with English others might encounter more outstanding difficulties with Maltese. Nonetheless, evidence indicates that both languages can develop adequately especially in response to structured, cumulative and sequential teaching.*
>
> *...*
>
> *Moreover, unpublished data (SpLD [Special Learning Difficulties] Service) indicates that students encountering mild to moderate dyslexia have been able to develop appropriate competence in each of the two languages provided that they are given appropriate opportunities and adequate support and have moved on to obtain the necessary qualifications."*[56]

Obviously, the paper referred to by complainant did not alter the disability experts' earlier opinions and conclusions.

The complainant has spent the last twenty months or more in attempts to persuade University officials to exempt his son from the Maltese Language University entry requirement. In these endeavours, his family has had the support of the Headmaster and school psychologist at the College, which their son attends. At the same time, he has consistently refuted the opinion of local experts in the field of special needs and education. More significantly, he has ignored the singular omission in the recommendations made by the psycho-educational psychologist and occupational therapist to waiver the Maltese language requirement. On the basis of these reports the Commissioner's third advisor, who studied both documents carefully, reported:

> *"Given that [complainant's son] is a child of 'above average intelligence' who has scored well on the English locally standardised tests and on the Bartolo Test of single word reading, and keeping in mind that he is only encountering 'mild dyslexia' it is my opinion that [complainant's son] could cope with the development of the two languages to acceptable levels. It is evident that the basics are already in place for [complainant's son] to continue to extend literacy in each of the two languages even though this might*

56 Comments by the Commissioner's third advisor, dated 28 July 2014.

present more challenges than it would to other students of his age."[57]

In his latest communication (19 August 2014), complainant stressed more than he had done previously that his son's disabilities originated from Lyme Disease for which he is currently under treatment. He supports his claim by a letter from a Professor in this field, who wrote:

"This patient is positive for Borrelia Burgdorferi (Lyme Disease) by PCR, confirmed by DNA Sequencing. ... He is currently being treated by IV antibiotics and other medications.

It is highly likely that he has had this infection for a very long time. It is a well-known fact that long-term, chronic Lyme Disease causes neurological damage which often leads to learning disabilities in young patients."[58]

One notes that local education and disability experts have accepted the fact that complainant's son has learning disabilities, but they have persistently stressed that these learning disabilities do not prevent him from learning Maltese. One also notes that the above cited Professor did not state that complainant's son's learning disabilities prevent him from learning Maltese.

Conclusion

One must admire complainant's fortitude and perseverance in seeking the form of education his son desires by removing all the obstacles that could hinder him from achieving his aims. This esteem is heightened when one realises that his efforts coincided with a time when he and his family faced serious health crises. At the same time, one cannot ignore the University of Malta's stand to uphold and operate within its established rules and regulations when these are legitimate and reasonable. The inclusion of the national language as a required subject for Maltese nationals seeking entry into undergraduate courses forms part of the Institution's objective of having all-rounded university entrants. Malta's House of Representatives endorsed this objective when it embedded the requirement in the Education Act quoted earlier. The University's Admissions Board and the Access Disability Support Committee regulate the application of these exceptions and have stressed the fact that none of these exceptions include the waiver of the Maltese language requirement for

57 Ibid.

58 Medical Certificate, dated 13 August 2014, by a Professor Emeritus in Physiology and Medicine, Medical Director Himmunitas Foundation, Brussels, Belgium.

candidates suffering from dyslexia and/or dyspraxia and/or attentional difficulties. They do so on valid evidence that such exemptions are not needed.

The ADSC has considered complainant's son's case and reconsidered it a second time when complainant appealed the first decision. The Rector's Delegate for Disability explained in detail to complainant the reasoning behind the Committee's decisions. These rests on the fact that there is no convincing evidence to show that sufferers from dyspraxia, dyslexia and attentional disorders are unable to study and successfully sit for examinations for two languages simultaneously or in one subject designated as a foreign language. In fact, international research supports experience at the University of Malta showing that students who were given special support arrangements similar to those given to complainant's son have obtained successful results in English and Maltese. These points were further confirmed by the three advisors appointed by the Commissioner for Education, two of them University lecturers independent of the ADSC, and the third is a senior disability expert at the Ministry for Education and Employment. Most significant of all, the two psychologists engaged by the complainant's family to evaluate their son's learning abilities and disabilities, recommended special examination arrangements but did not advocate the waiver of the Maltese language entry requirement.

In view of the above, my Final Opinion is that the University of Malta dealt fairly with complainant's case. The appropriate authorities studied his case fully and considered carefully the arguments and counter arguments presented by his parents. The decision-making process did not contain manifest irregularities, discrimination or maladministration. It was transparent, fair, equitable and compatible with the Institution's laws and regulations. As far as this investigation could ascertain, the ADSC's decision was based on the most current and informed research in the area. Consequentially, I am unable to sustain complainant's case.

Recommendation

Complainant's son is two years away from University entry. It is extremely unlikely that the University will alter the Maltese language entry requirement during this period, if ever.

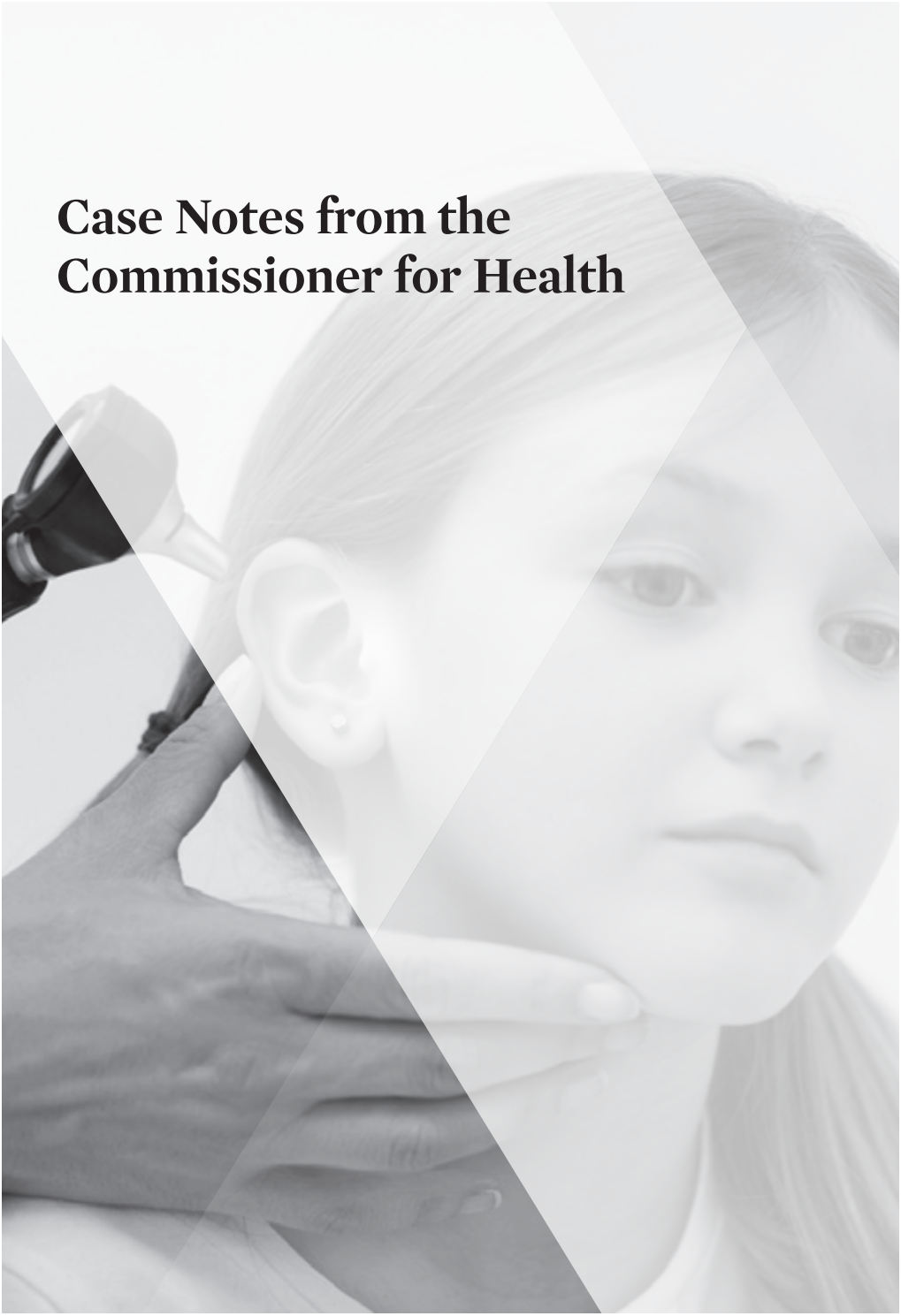
Therefore, I recommend that complainant's son should reconsider his current stand on the matter. He should make a fresh effort to surmount the obstacle that may hinder him from reaching his objective to study at the University of Malta. With the assistance of an

experienced tutor and his family's support, he should strive to attain a good grade in the Maltese Language exam as he has achieved in the other SEC subjects he has undertaken this summer.

Outcome

The complainant did not agree with the Commissioner's conclusions and recommendations. He referred his case to the Parliamentary Ombudsman, who is currently reviewing this case.

Case Notes from the Commissioner for Health



Case Note on Case No HO 0014
Department of Health

Refund of expenses incurred for treatment abroad

(treatment abroad, terminal illness, compensation)

The complaint

A patient who was diagnosed with a rare type of brain tumour, sought the help of the Ombudsman to be refunded for expenses he incurred to seek treatment abroad. The patient's family were informed that there was no effective cure locally and that his case was inoperable. The Health authorities also sought the advice of Surgeons in a renowned London hospital who were of the same opinion.

The patient and his family could not accept this 'death sentence' and they researched alternative options abroad. Through their search, they identified a hospital in Germany who dealt with similar cases successfully. Eventually, the patient and his family went to Germany and the patient was operated at his own expense.

The complainant insisted that although he understands that certain specialised treatment cannot be given in Malta, however systems should be in place to assist patients in these circumstances. He insisted that the right of life is a basic Human Right. He subsequently asked the Department of Health for a refund of the expenses incurred. His request was turned down by the Department and therefore he submitted a complaint to the Ombudsman. The Ombudsman accepted to investigate the matter and referred it to the Commissioner for Health.

Facts and findings

The Commissioner immediately took up the case with the Health authorities and requested their comments. Following a series of correspondence on the case the Department of Health informed the Commissioner that it had been decided that since the procedure was carried out in a private institution, the department will reimburse the costs of similar treatment carried out in the public sector.

To the patient's dismay, the amount offered by the Health Department fell far short of the expenses incurred. In fact the sum reimbursed amounted to only 14% of the total cost the family had to pay. The complainant's family complained with the Commissioner that in their circumstances they had no alternative than to seek for the cure abroad as that was their only hope.

The Commissioner asked the Permanent Secretary in the Ministry for Energy and Health to comment on the case asking a series of clarifications. The Commissioner reiterated that since the health authorities decided on no intervention and the patient was given just a few weeks to live, the patient could not be faulted to search for an alternative which he found abroad. The Commissioner explained that since the department based its decision on the advice given from the UK, and Government sponsorship was not approved neither through the Treatment Abroad Advisory Committee nor through the EU Cross Boarder Directive, the only alternative the patient was to seek treatment in the private sector.

Adding to that, the Commissioner reported that, according to the complainant's family, the patient's condition improved considerably. He suggested that the department could verify the patient's progress by asking local consultants to submit a report on the complainant's condition comparing his state pre and post operation.

The Permanent Secretary replied by explaining that the amount reimbursed was the equivalent cost of the same surgical procedure carried out in the UK National Health System within the framework of the Bilateral Agreement between the two countries. Therefore the Health Authorities stood by the amount they had offered.

Further investigation

The Commissioner took the matter to the European Commission Representation (ECR) in Malta asking them for their advice. On their part the ECR referred the case to the Health Care System Unit and the Directorate General for the Health and Food Safety in Brussels. In their reply the EU Commission DG Health informed the Commissioner that the person concerned had to seek authorisation from the Health Authorities in order to pay directly for the treatment received. Otherwise, if the patient had paid the costs directly, as in this case, the costs should correspond to those benefits within the limits and under the conditions of reimbursement rates laid down in its legislation.

Conclusions and recommendations

The Commissioner informed the complainant that the Department of Health confirmed that it cannot give any reimbursement other than that already given.

He also informed the complainant that he looked into the European Union regulations and Regulation 987/2009 laying down the procedure for implementing Regulation (EC) No. 883/2004 which states:

i) Article 19(1) – treatment shall be provided "*in accordance with the provisions of the legislation it applies*" i.e. as if the treatment was being carried out in Malta.

ii) Article 20 – the person concerned "*...shall seek authorisation from the competent institution*" so that the local institution – in this case the Department of Health – shall bear the cost of the scheduled treatment.

iii) Article 25(B)(4) states that if the person concerned "*has actually borne the costs*" "*the costs correspond to those benefits within the limits of and under the conditions of the reimbursement rates laid down in its legislation*"

iv) Article 27(4) – the cost of the treatment shall be that which the institution (Department of Health) would have incurred had the treatment been given "*state of residence*" i.e the expenses that would have been incurred had the treatment been given in Malta.

Considering that, even though the complainant did not seek prior approval, the Department of Health has refunded the cost it would have incurred had the treatment been carried out in England which is more than the cost in Malta.

Therefore, in the circumstances, the Commissioner was not in a position to state that the Department of Health had acted incorrectly and the request for full refund could not be upheld.

Case Note on Case No HO 0038
Department of Health

European Health Insurance Card - Discrimination against non-Maltese EU Citizens

(EU Health Card, discrimination, validity)

The complaint

A foreign European Union citizen who was living in Malta complained with the Ombudsman that on the term of validity of the European Health Insurance Card (EHIC), the Department of Health was giving preferential treatment to Maltese citizens. The complainant alleged that the EHIC for Maltese citizens was valid for five years, and the same card was being issued for one year to other European citizens. The Ombudsman assigned the case to the Commissioner for Health for investigation. The complainant also complained that the Department concerned did not reply to him.

Facts and findings

The Commissioner took up the case with the Department of Health pointing out this alleged discrimination. The Department replied that it transpired that there was a misunderstanding regarding the nationality of the person in question. Moreover, the Department initiated the necessary steps to make sure that similar incidents do not occur.

The Commissioner informed the complainant that the issue had been resolved and asked him to contact the department concerned to have his EHIC replaced. The complainant confirmed that the card had been replaced, however, expressed his wish that the procedure used in his case would be reviewed to ensure that this was a mere misunderstanding and not an act of discrimination with foreign EU citizens.

Further investigation

The Commissioner accepted complainant's plea to investigate further and asked the Permanent Secretary in the Ministry for Energy and Health for his comments. On his part, the Permanent Secretary informed the Commissioner that the Directorate for

Health Care Funding reviewed its process of issuance of EHIC and provided refresher training to all members of staff concerned. He also stated the card in question was issued for the period of one year as per established policy for holders of Identity Cards ending with an 'A'.

Following the communication from the Permanent Secretary, the Commissioner requested further review of the process of issuance of the EHIC by amending the adoptive policy granting EU nationals the same rights applicable to Maltese nationals.

The Ministry for Energy and Health, through its Permanent Secretary, replied that the period of validity for the issue of EHIC applied by the Member States varies and it is left for the discretion of the individual Member States. To back their argument, the Ministry referred to 'Article 3.1 – Period of validity' of the guidelines of the EHIC issued by the Employment, Social Affairs and Inclusion Directorate of the European Commission. The Permanent Secretary continued that the rationale behind issuing the EHIC with a one-year validity for persons coming from the EU is mainly due to high work mobility that is experienced throughout the EU. Therefore, this is done to mitigate the risk that an individual may start working in another Member State while still covered through the EHIC issued in Malta.

Considerations and conclusions

Given the clarification from the Health Ministry, the Commissioner informed the complainant with the explanation given by the Permanent Secretary and concluded that this case does not amount to discrimination or maladministration.

Following the Commissioner's conclusions, the complainant continued to pursue with his argument and insisted with his allegation stating that as a non-Maltese EU citizen, he is being discriminated.

The Commissioner sought advice from the European Commission Representative in Malta and asked them for their comments on the complaint, stating that although, as stated by the Health Department, they had the right to decide on the validity period, the said decision does not give the Department of Health the right to distinguish between Maltese and other EU citizens.

The Commission Representation in Malta referred the case to the SOLVIT Centre for clarification. The SOLVIT Centre forms part of an EU-wide network coordinated by the European Commission committed to resolving problems with EU citizens and businesses. The SOLVIT Centre took the case with their counterpart in the country from which the complainant comes. Their feedback was that the differentiation in the validity of the EHIC might go against Article 18 of the Treaty of Functioning of the EU (TFEU). This was also communicated to the Health Department.

Outcome

Following this recommendation, the Department for Health informed the Commissioner that a decision had been taken by the Ministry that the validity period of the EHIC issued for EU citizens will be at par with the validity of the EHIC issued to Maltese citizens. The Commissioner informed the complainant that as of 1 January 2015, EHIC issued to non-Maltese EU citizens will be valid for five years.

Case Note on Case No HO 0064
Department of Health

Consultant salary witheld for six months

(salary, contract, renewal)

The complaint

A surgical consultant lodged a complaint with the Ombudsman alleging that in spite of repeated enquiries with the Department of Health, he was not informed why his salary was withheld for over six months.

The Ombudsman referred the case to the Commissioner for Health to investigate the matter.

Facts and findings

On enquiring with the Primary Health Care Directorate, the Commissioner was informed that even though the said consultant was giving a service in a Health Centre, his employment was considered to be an outreach of Mater Dei Hospital (MDH), therefore, his salary had to be issued by MDH.

The Commissioner then spoke to the Financial Controller of Mater Dei Hospital, who informed him that, since the Department of Health did not give him a copy of the contract signed between the Department and the consultant, he could not regularise the position.

Investigating further, the Commissioner spoke to the Director Human Resources of the Department of Health and, it transpired the latter was not aware of the problem. To complicate matters, the Commissioner discovered that the necessary paperwork that needed to be done with the Public Service Commission (PSC) and the Public Administration Human Resources Office (PAHRO) was not affected, and, therefore, everything was stalled.

During the investigation, the Commissioner also discovered that eight other consultants were in the same situation as the complainant.

The Commissioner took the matter to the Public Service Commission (PSC) to confirm that they had received the request from the Department of Health. The Executive Secretary of the PSC confirmed that the request from the Department of Health had been made. Following a PSC meeting, the Commissioner was informed that the Commission approved the renewal of the contracts of the consultants. Immediately, the Commissioner followed up the issue with the HR Director of the Department of Health who confirmed that they were issuing the necessary instructions for the payment to be done and for the contract to be signed.

However, some weeks later, the complainant contacted the Commissioner informing him that although he received part of the arrears, the contract was not handed to him to sign. He also questioned the way the arrears were calculated as no breakdown was given to the complainant explaining how they arrived at the total amount given.

The Commissioner took up the matter again with the health authorities requesting immediate action. Some weeks later, the complainant wrote again to the Commissioner informing him that he received the contract. However, the complainant stated that he did not sign the contract as it did not reflect the agreement between the Government and the Medical Association of Malta (MAM) that stipulated a higher remuneration than the amount mentioned in the contract.

To verify what the Government-MAM agreement stipulated, the Commissioner requested a copy of the agreement. The Commissioner then wrote to the Department of Health requesting urgent feedback.

Outcome

Following months of follow up and correspondence between the Commissioner and the Department of Health, the issue was resolved with the health authorities informing the Commissioner that following discussions between the Government and the MAM it was decided that in line with the Government-MAM agreement, retired consultants will be remunerated as stipulated in the agreement.

The Commissioner will continue to follow up the case to ensure that proper remuneration had been received and that the contract of work had been signed.

Case Note on cases related to Hepatitis medicine
Department of Health

Entitlement to the free supply of medicines to Hepatitis patients

(free medicines, Social Security Act, government formulary)

The complaint

A number of patients suffering from Hepatitis C complained with the Ombudsman that they are being denied the treatment indicated for their serious condition because the health authorities are refusing to provide it due to financial constraints notwithstanding the fact that the condition is listed in Part II of the Fifth Schedule to the Social Security Act. A fact that entitles these patients to a free supply of the indicated treatment.

The Parliamentary Ombudsman referred the case to the Commissioner for Health for investigation.

Facts and findings

The Commissioner for Health took up the case with health authorities asking for an explanation. The first correspondence between the Commissioner and the Chief Medical Officer (CMO) dated back to 2012. The CMO, at the time stated that the Health Technology Assessments for the medication used for the treatment of Hepatitis B and C had been performed. The CMO also informed the Commissioner that the procurement of these medicines can only be done if and when the Government Formulary and Advisory Committee recommends the introduction of such treatment.

In the subsequent months the discussion and correspondence between the Commissioner and the health authorities on the case continued. Even though the treatment was included in the revised list of the Schedule V of the Social Security Act in February 2012, two years later the entitled patients to receive this treatment free of charge were still without the needed medicine.

Despite that two years have passed from the relative Parliamentary decision, the Department of Health had not yet taken steps for the procurement of the required medicines to treat this condition, the reason being financial costs.

In 2012 the only treatment indicated for this medical condition was valued at approximately €18,000 per patient and the more recently recommended treatment (Harvoni regime), which has the potential to offer 95% cure, costs approximately €75,000 per patient.

Further considerations

As specified by the Consultants of two of the patients, the longer the patients have to wait for the treatment, the worse are the consequences. One of the patients was a haemophiliac and had contracted Hepatitis C because he had been given, around thirty years ago, contaminated blood products imported by the Department of Health. His Consultant has certified that "*... it is hereby being recommended from the clinical point of view that the patient receives this treatment as soon as possible as this will impact the long term prognosis in his case. Failure to do this will result in deterioration of his liver function and more medical care needs with further life-damaging consequences*".

In the other case, the Consultant has certified that "*... given that the patient has thalassemia he should be regarded intolerant of Ribavirin. In my opinion he should be treated with all oral anti-viral agents (the Harvoni regime without Ribavirin). It is highly likely that eradicating the virus will stabilise his liver condition and reduce the chance of him developing complications that may require transplantation or expensive interventions*".

The Commissioner sought an expert opinion to the effect that in about 20% of the patients who suffer from Hepatitis C there are strong indications that such patients, if untreated, will develop liver failure or cancer. Some of these complications would require liver transplant followed by very costly anti-rejection drugs – apart from putting their lives very much at risk.

From further enquiries done by the Commissioner, it resulted that at the end of 2014, there were about 35 patients who needed the new treatment urgently. This would cost an approximate expense of €2,600,000.

It is pertinent to note that although it was extremely likely that the availability of the newly introduced treatment regime will, in the long run, result in savings due to prevention of

more serious complications which in turn require available treatment but which may be even more costly regarding the quantum of such savings, this Office was not in a position to know the savings that would accrue if the patients would not need liver transplantation and the resulting, post-transplant anti-rejection drugs.

This Office considered that once Parliament has decided, in 2012, to give new hope to Hepatitis C patients, the Health Authorities were not acting correctly when they were not making the treatment available because of financial considerations.

Conclusions and recommendations

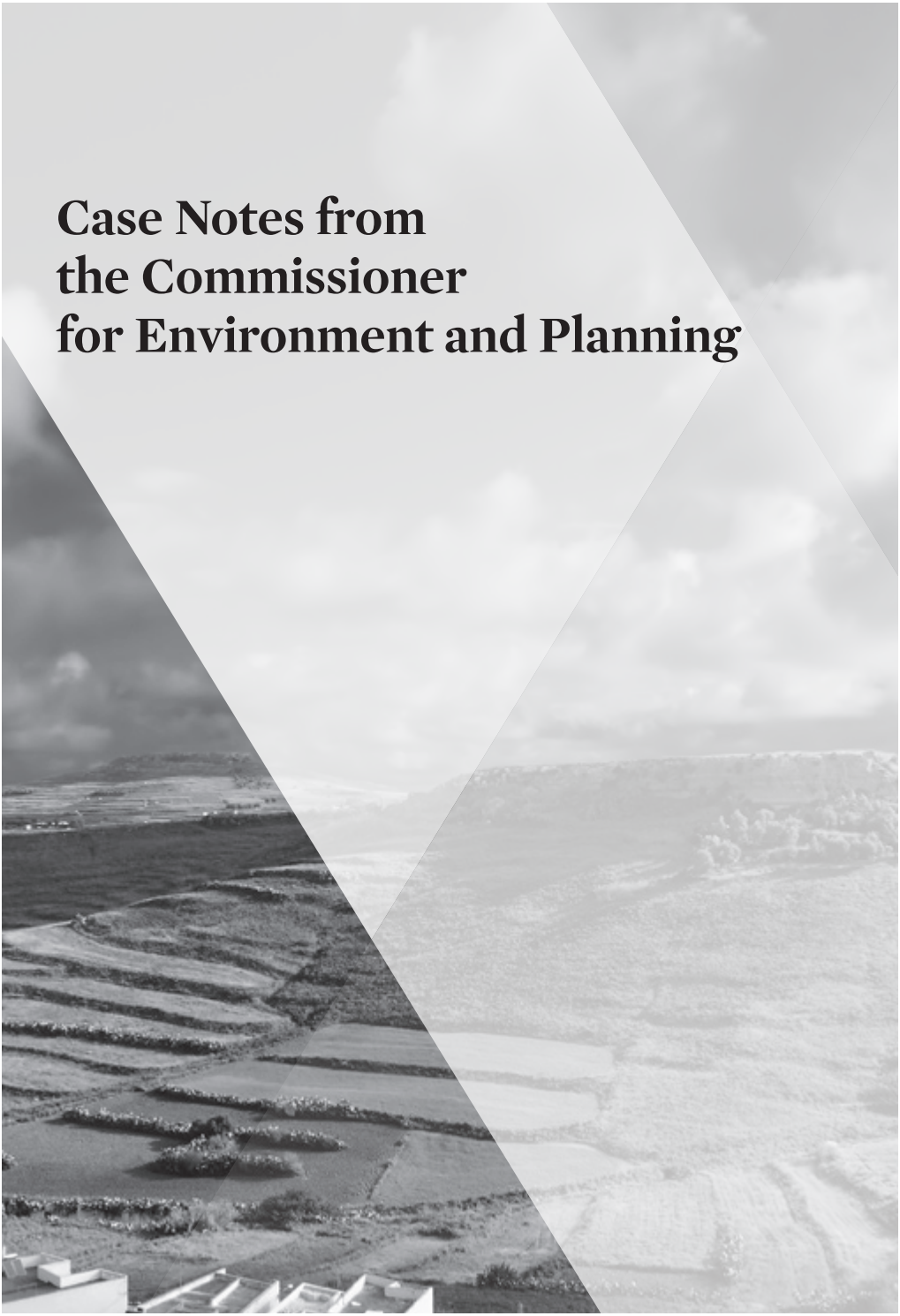
The Commissioner for Health concluded that, contrary to what the health authorities are maintaining, the complainants were eligible for free medical aid in terms of the Social Security Act. Denying them their entitlement will result in an injustice that needs to be adequately remedied.

The Commissioner recommends that a review of applicable legislation is carried out to ensure clarity and legal certainty about the rights of persons entitled to receive free medical aid. A review that should ensure that regulations/policies/protocols made by the competent authorities that determine, limit or condition the right of households or persons to receive free aid to which they are entitled, have the necessary vires in terms of the law under which they are issued.

Moreover, and more importantly, these regulations must reflect not only the word but also the spirit of the Social Security Act as expressed by the people's representatives in Parliament. The Social Security Act justly imposes on society a compulsory, contributive insurance for the benefit of the common good. It creates a social contract that entitles eligible persons to legislated benefits but also imposes on the State a corresponding obligation to deliver them. Fiscal and economic considerations in the management of available funds are primarily aimed at securing essential treatment to indigent households and/or persons suffering from serious and life-threatening diseases or conditions - the most vulnerable sections of society.

If this impasse is not resolved in the coming months, the Commissioner will be sending his recommendations to the Prime Minister and refer these cases for evaluation to the House of Representative Standing Committee on Health in terms of its powers under Standing Order 1203.

Case Notes from the Commissioner for Environment and Planning



Case Note on Case No EM 0043
MEPA

Lack of proper application of policies

The complaint
On 3 September 2010 the Ombudsman's Office received a letter from complainant on alleged improper application of planning policies in determining planning applications on adjacent sites in Rabat, Malta.

The complaint was referred to the MEPA Audit Officer who took up the investigation. Since the investigation was not concluded by the time the Audit Officer's term was abolished on 1 August 2012, the case was taken over by the Commissioner for Environment and Planning in terms of Article 6(2) of Act XVII of 2010.

In 2009, the complainant as the owner, submitted an application to MEPA for a proposed development. The application was for alterations and extensions to a premises in Rabat, in order to convert the premises into two separate dwellings. This was approved by MEPA the same year.

Facts and findings
The original development had been erected by virtue of permit issued in 1969. The development covered by this permit included two other dwellings besides the one owned by complainant. In fact the approved plans indicated a common yard at the rear, which also served the adjoining premises for light and ventilation purposes. There was no dividing wall shown on these plans.

The approved drawings in the 2009 permit indicated an 8 courses high dividing wall at ground floor level. Part of the adjoining property on the other side of the wall was also shown on these drawings, where apertures giving onto the yard were indicated.

However the initial drawings submitted with this application did not include this information. A perusal of the file revealed that after the file had been processed and the draft Development Permit Application Report (DPAR) prepared, the file had been forwarded to the Sanitary Engineering Officer (SEO) who sent a request for additional information to the applicant.

Following this request, fresh plans were submitted. The SEO approved the latest submitted designs and the application was subsequently approved.

In 2011 the Directorate requested the Enforcement Section to check on the yard dimensions at a premises on which a Development Notification (DN) application had been submitted, and to check the adjacent yard dimensions as well. The latter was the yard in complainant's premises.

Following the inspection and subsequent Enforcement Officer's report, the SEO was requested by the Directorate to advise whether there was a case for revocation of the permit under Article 77 of the Planning Act.

The SEO requested further information from applicant, and this was followed by a Minor Amendment application which was submitted and approved in June 2011.

This DN application specifically requested approval for the raising of the same party wall.

Following an inspection by the Enforcement Officer it resulted that the information with regards to the internal yard dimensions were incorrect and action was initiated to revoke the DNO in terms of Article 77 of the Planning Act.

Following lengthy deliberations by the MEPA Board, it was finally decided that the DN permit was to stand.

In 2012, complainant requested the General Services Board (GSB) to review his case. In its reply the GSB endorsed the decision to permit the raising of the wall.

Observations

This case raises many interesting issues. The first one concerns the imposition of a condition limiting the height on part of a common wall separating two properties.

On this point the MEPA was requested to state its position on the matter. The MEPA replied by stating that:

> "*... neither the Planning Directorate nor the Development Control Commission imposed any 'condition or limitation'. Rather, it was the architect himself who stated a fact, that is, a party wall of 8 courses.*"

The Commissioner remarked that this was incorrect since a 'condition' or 'limitation' of a maximum height of 8 courses had been imposed by the SEO.

In addition, the sequence of events clearly indicated that after the application had been processed and the DPAR recommended an approval, the file was passed to the SEO who requested further information. Following the SEO's intervention the plans were revised to include the caption "*8 FILATI HIGH*" in relation to the party wall in question. The plans originally submitted did not include this caption. It was only logical to conclude that this limitation was imposed as a condition by the SEO.

This was also followed from the fact that whereas with the original layout of 1.5 metres width of the yard was sufficient as it extended into the backyard, with the lengthening of the building backwards, this space was now completely enclosed to form an internal yard, where sanitary regulations require a minimum width of 1.8 metres.

Consequently, it would not have been possible for the proposed development to be approved by the SEO unless there was a limitation on the side wall in order to safeguard light and air into the newly-formed internal yard.

This condition, however, was not included in the text of the permit as a specific limitation. As a result there was no means of flagging this limitation which of course was affecting the adjacent third party property's development rights.

The second issue was consequential of the first one. Once it is clear that the height limitation was requested by the SEO to enable the existing width of the yard to be approved, could this condition be required by MEPA without a deed as set out at law?

Originally the two side yards formed part of one development. In fact the approved drawing in the 1969 permit did not indicate a dividing wall in the middle of the yard.

Therefore there was no need for any deed at the time. However, it was clear that by the time that the application approved in 2009 was submitted and processed, the premises had been split into two separate dwellings, which meant that consent from the next-door owner would have been required before imposing the 8-course high party wall.

The Commissioner stated that the permit should not have been approved and the permit issued, without the deed required at law. The MEPA was responsible for this flawed processing since the imposed height limitation on the wall was:

a) not endorsed as a specific condition in the permit;
b) not provided with the comfort of a deed confirming the neighbour's consent to retain this height limitation; and
c) not flagged in order to draw the attention to the case officer during any future processing of applications affecting this wall.

As it happened, when the DN was submitted, it was processed independently of the permit issued next door, with the case officer oblivious to the imposition of the condition limiting the height of the wall separating the two yards. As a result of this complainant protested to the granting of a permit allowing the wall to be raised.

Further comments

Following an investigation it was discovered that the information regarding the width of the yard in the DN was erroneous leading the SEO to comment that had the actual dimensions been indicated correctly in the application then it would have been refused.

The SEO further explained that the internal yard had been approved with 1.5 metres on each side with the party wall to remain 8 courses high, therefore the plan infringed sanitary law. He re-confirmed his opinion that with a width of 1.88 metres the site was sanitary compliant, but with 1.55 metres it was not.

The Board finally decided to approve the DN application on its own merits, disregarding the commitment established by the SEO's request in the 2009 permit to retain a maximum height of 8 courses, on the justification that the fresh plans submitted showing the correct width of 1.5 metres, independently of the situation in the adjacent internal yard and permits issued on it, could be approved.

It was held by the Board, that it was unjust of the neighbour (complainant) to impose a limitation on the party wall without notifying the owner of the adjacent premises and obtaining his consent.

The General Services Board also chose to decide on the DN application independently of the permit issued on complainant's property, and endorsed the DN approval as it maintained that there was no limitation to the height of a dividing wall.

From a legal point of view, Subsidiary Legislation 504.80 Section 3(4)(i)(a) specifically prohibits the permitting of any development which would prejudice "*any condition or limitation imposed by any development permission...*"

The approval of the DN, a specific notification to raise a party wall, ran counter to the specific condition on the same wall imposed in the 2009 PA permit. It thus ran counter to the requirements of the Development Notification regulations and is therefore null.

To compound the issue, the approved drawings in the Minor Amendment Permit issued reveal that balconies had been constructed projecting into the yard, further restricting the airspace, while, notwithstanding the existence of the forty-course high party wall, the party wall is still shown as being 8 courses high and to complete the picture, the premises were issued with a Compliance Certificate.

Conclusions and recommendations

In his Final Opinion the Commissioner remarked that:

- the complaint that the MEPA incorrectly applied policies, procedures and regulations to the detriment of complainant when a party wall height limitation condition in her permit was ignored in the neighbour's DN application is sustained;
- this came about due to defective processing by the Directorate when the SEO and the Directorate failed to insist on the submission of a deed as proof of the neighbour's consent to the limitation before including it as a condition. In addition, the Commissioner continues, it failed to include the height limitation imposed by the SEO on the wall as an express condition in the permit and flagging this condition as a reference for future applications affecting the wall;
- this lack of crucial information misled the Board into approving the application, as a result of which a limiting condition was imposed on the wall to the detriment of the neighbour's vested interests;

- the MEPA Board was wrong in avoiding the issue when it discussed the DN application in isolation, ignoring the fact that it was the MEPA itself which had granted the permit to the neighbour with a limiting condition on the party wall. This fact was not even brought up during the discussion;
- the MEPA was wrong once again in approving the Minor Amendment application to the 2009 PA permit, with drawings showing the party wall limited to an 8 courses height, when it knew full well that the wall had been raised higher than 8 courses;
- the MEPA was also wrong in issuing a Compliance Certificate for the same reasons as expressed above; and
- the DN approval is null as it removed a condition laid down in a full development permission, which runs counter to Subsidiary Legislation 504.80 Section 3(4)(i).

In view of the facts and findings during the investigation, the Commissioner recommended that MEPA should revoke the DN approval and order the lowering of the wall.