

# CASE NOTES 2018



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OMBUDSMAN  
MALTA



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Address: 11/12, St Paul Street, Valletta, VLT1210

Email: [office@ombudsman.org.mt](mailto:office@ombudsman.org.mt)

Tel: +356 2248 3200, 2248 3216

Office opens to the public as follows:

October – May 08:30am – 12:00pm

01:30pm – 03:00pm

June – September 08:30am – 12:30pm

**Website:** [www.ombudsman.org.mt](http://www.ombudsman.org.mt)

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# Foreword

The main function of the Ombudsman institution is to investigate complaints by persons aggrieved by actions of the public administration and when necessary, to conduct own initiative investigations to address systemic failures. These investigations can only be credible and effective if they are conducted in a thorough, efficient and equitable manner inspired by the three basic virtues of integrity, impartiality and confidentiality. Virtues that translate into principles that underpin the objectives of the Ombudsman and his Commissioners to act as defender of the citizen and the conscience of the public administration.

Investigations by my Office are necessarily targeted to identify injustice and recommend redress as well as to identify and analyse administrative failures and recommend appropriate measures to rectify serious deficiencies in administrative processes and procedures. When conducting investigations it is the function of the Ombudsman and the Commissioners, to act as a mediator between the citizen and the public administration, while in the process, avoiding litigation and judicial proceedings.

In this context, the principle of confidentiality is of the utmost importance. Confidentiality is essential to generate trust. It is a constituent element that instills in the citizen the conviction that the Ombudsman institution functions with the utmost integrity and impartiality. The Ombudsman and the Commissioners are neither the advocate for the complainant nor for the public administration. They have therefore to strive to gain and nurture the trust, not only of the complainant but also of the public administration against whom the complaint is made.

Confidentiality is a vital element for an effective investigation. It is essential to generate and promote the conviction that the Ombudsman institution is a valid and trustworthy means to obtain redress against injustice.

It is well known that where practicable, the Ombudsman and the Commissioners in the first place attempt to mediate between the citizen and the administration. The mediation process can be conducted with a greater probability of success if the parties feel free to provide information and to negotiate in an open manner but in confidence and without, in any way, publicly committing themselves.

Experience has shown that investigations conducted in this spirit, that contrasts sharply with the adversarial procedure and publicity required in judicial proceedings often gives the desired result to the benefit of all. It is precisely for this reason that the Ombudsman Act requires that every investigation by the Ombudsman shall be conducted in private.

Moreover, the officers and employees of the Office of the Ombudsman are required before entering into the exercise of their office or employment, to take an oath administered by the Ombudsman, that they would faithfully and impartially perform their duties and that they will not divulge any information acquired by them in the process. Furthermore, information obtained by the Ombudsman, his Commissioners and every person holding any office or employment in his office, in the course or for the purpose of an investigation, shall not be disclosed except if required during the investigation and/or for any report that needs to be made.

Since the setting up of his Office, the Ombudsman has rigorously observed the duty to treat all information relative to investigations he and the Commissioners conduct, confidentially and with the utmost discretion. They consider themselves to be the custodians of the information, data and documents received and jealously conserve them, disclosing only what is strictly necessary for the proper conduct of the investigative process.

The principles of privacy and confidentiality are applied not only in respect of complainants but also in respect of the department, public agency or authority being investigated. They permeate all the activities of the Ombudsman institution and extend to the outreach activities that the Office needs to organize to make itself known to aggrieved citizens.

Foremost among these activities is the publication of periodical case notes meant to provide an inkling into the investigation of complaints carried out by the Ombudsman and the Commissioners, the considerations on which their final opinions are based and the type of remedy or redress recommended. As from the first publication more than twenty-two years ago, every effort has been made to conceal the identity of the complainant and particular circumstances of the complaint that could identify him/her to the general public. Exceptionally, this is not possible because the size and closeness of society as well as the particular nature of the complaint make it extremely difficult to conceal complainant's identity.

Regular readers of these case notes would have noticed that as from this publication, we have decided to omit any reference to the case number that corresponds to the office file of the complaint. This effectively removes the last positive link between the published case note and the investigation to which it refers. To further protect the identity of complainant material changes are done, when editing the text, to alter personal data and other information like the sex of the complainant, the locality and when possible the name of the authority or department involved.

The Office expects that public authorities and the public administration in general should appreciate the importance of respecting and adhering to the provisions of the Ombudsman Act that provide that investigations have to be conducted in private and confidentially. They are expected to be aware of the importance of these provisions. They should not do anything that would prejudice the investigation itself or the rights of complainants, who have recourse to the Office of the Ombudsman on the understanding that their identity and the nature of their grievance are to be protected from undue and unwanted publicity.

It is regretted that public authorities have not always been appreciative of the importance of the principles of confidentiality and privacy that govern the investigative process of the Ombudsman and his Commissioners. There have been instances recently where personal data and information on the nature of complaints and progress made in the investigation, together with the case number, have been recorded in official publications. Such developments are unwelcome and need to be avoided.

In this publication, as usual, we have tried to report cases that are of general interest and represent a good cross-section of the complaints investigated by me and the Commissioners. The Case Notes are concise and readable. The text has been limited to the gist of the main considerations that led to the final opinion. Care has been taken to indicate, where possible and appropriate, the outcome and sequel to the recommendations made.

One point needs to be emphasized. A number of these final opinions have been sent to the Speaker of the House of Representatives following negative response from the public authorities to requests to implement our recommendations. We have indicated that to date none of these referrals have been actively considered by the House. There has been no response whatsoever. One can safely conclude that this statutory procedure provided for in the Ombudsman Act, which was meant to be a final safeguard to provide redress against injustice to aggrieved citizens, is proving to be ineffective. This needs to be remedied.

**Anthony C. Mifsud**  
**Parliamentary Ombudsman**

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

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

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# **Case Notes from the Parliamentary Ombudsman**

**Armed Forces of Malta**

# **Army Officers selection process vitiated. Complainants suffered an injustice**

**The complaint**

Six officers in the Armed Forces of Malta felt aggrieved following a selection process in August 2013 when they were not promoted to the rank of Lieutenant Colonel. They alleged that the selection process had been discriminatory in their regard and had caused them an injustice because their attributes, professional and academic, had not been given due merit and consideration.

**The facts**

The officers had all been eligible to apply for promotion to the next higher rank. The allegations which were brought forth for investigation stated that the complainants merited promotion because the officers who were chosen were in fact their juniors or were not as qualified as they were. The selection process was allegedly biased towards subjective criteria which were easily manipulated to bring about the desired result.

The Ombudsman sought information from the Army and the Ministry for Home Affairs and National Security. The response was that the Ombudsman did not have jurisdiction to investigate these complaints because the complainants had not followed the redress procedure laid down by the Malta Armed Forces Act (MAFA).

The MAFA regulates the complaint redress procedure for both officers and other ranks, that is soldiers. Officers may petition the Commander of the Armed Forces of Malta (AFM) with their complaint. If this redress does not satisfy the officer concerned, he may request that his complaint be reviewed by the President of Malta through the Minister responsible for the Army.

The standpoint which the Army and the Ministry took was that once the complainant did not seek to petition the President of Malta, they had not exhausted the internal remedies open to them by the MAFA and, consequently the Ombudsman did not have the necessary jurisdiction to investigate. Therefore the requested information was not provided.

The Ombudsman Act at Section 13(3) makes it incumbent upon any complainant to use the available remedies. The Ombudsman is a remedy of last resort and any complaint which can be rectified through means, as for example a law or regulation, which are extant should be exhausted first. However, there is an exception to this, in that the Ombudsman in his discretion may investigate if there were reasonable grounds for the complainant not to have resorted to the available means of redress.

The Ombudsman in fact considered that the Administration's insistence that the complainants seek to petition the President before having recourse to him was unfair, principally on the following counts:

- The President was obliged to follow the Minister's advice constitutionally.
- Citizens should not be denied the protection of the Ombudsman or any restriction to the complaint process.
- Any decision by the President could not be investigated by the Ombudsman.
- The Army was not respecting a General Order issued in 2011 which permitted officers to complain to the Ombudsman or to petition the President, meaning that officers were not obliged to have recourse to the President for redress.

The impasse remained. The Ombudsman proceeded to institute a lawsuit in front of the Civil Courts requesting the Court's intervention to declare that the Ombudsman was entitled by law to receive all the information he needed from the Administration to conduct a thorough investigation on the allegations of the complaints.

The Civil Court stated that once the Ombudsman was satisfied that the complaining officers could not obtain recourse if they simply petitioned the President of Malta for redress, their grievance could be investigated by the Ombudsman. The Court held that this remedy was in fact not an effective and awaited remedy and justice could only be served if the Administration sent the requested information to the Ombudsman for investigation. The Administration was ordered to comply with the Ombudsman's requests because he had jurisdiction to investigate.

The Administration appealed. The question before the Court of Appeal was briefly described by the Court as one pertaining to the jurisdiction of the Ombudsman. The Court stated that the Administration was trying to prevent the Ombudsman from investigating the selection process. The Administration could not use the argument that officers have recourse to the President because that would negate their right to complain to the Ombudsman.

The Court of Appeal agreed with the First Court that the Ombudsman had jurisdiction to investigate the officer's complaints and, consequently, the Administration was obliged by law to provide all the information the Ombudsman required for investigating the complaints.

The Ombudsman started receiving the information relative to this complaint following these two judgements. The members of the Selection Board, the complainants and persons of interest were questioned, files and papers examined in line with the decisions handed down by the Courts and the procedures of this Office.

### **Findings**

The promotion of officers in the Armed Forces of Malta is regulated by specific subsidiary legislation, namely the 'Appointments and Conditions of Service of the Regular Force Regulations' issued by means of a legal notice on 29 September 1970 as subsequently amended. Any vacancies in the officer ranks must be filled after a recommendation based on efficiency, seniority and selection to fill a vacancy.

A policy was implemented by the Office of the Prime Minister on 9 February 2011 for the express purpose of the proper conduct of promotions in the officer ranks, specifically in this case those from Majors to Lieutenant Colonels. This had various

components but was divided into an objective part, namely written tests, and a subjective part, namely interviews. There were also certain requisites which officers had to possess before participating in the selection process.

The selection was entrusted to a new board styled the 'Senior Ranks Appointments Advisory Committee' (henceforth SRAAC). An important part of this process was that vacancies had to exist for any appointment to be made after promotion.

This new procedure was used in 2011 whereby several majors submitted themselves for selection to fill four vacant posts in the military establishment in the rank of Lieutenant Colonel. The three criteria under which the candidates were tested were *Efficiency*, *Seniority*, and *Selection to Fill a Vacancy*.

The first criterion comprised the preparation of written briefs to attest military knowledge, military qualifications, command experience and staff experience, civilian educational qualifications and overseas operational deployments.

The second criterion was seniority.

The third criterion was selection to fill a vacancy which comprised personal attributes, a motivational statement and academic qualifications.

This meant that the 2011 selection process had a mix of objective criteria such as the testing by written means and academic qualifications and subjective criteria such as personal attributes.

The next promotion exercise for advancement to the rank of Lieutenant Colonel was held in August 2013. The assessment criteria detailed in the new policy was overhauled in favour of the subjective judgement of the SRAAC which was composed differently from that of 2011 and had an overly civilian component. Suffice to say that two of the Board Members were "*persons of trust*" employed by the then Minister for Home Affairs and National Security.

**Conclusions**

The investigation by the Ombudsman sought to throw light on whether the selection process was conducted fairly. The enquiry had to start from the beginning, that is, whether there were the vacancies for the promotions which were meted out. The investigation showed that originally there were two vacancies in the rank of Lieutenant Colonel, but, as the records show, the two-post vacancy in effect produced the promotion of eight majors to Lieutenant Colonel.

The composition of the Selection Board bore little resemblance to the 2011 because there was only one military officer present while two public officers and two persons of trust constituted the other members. This was strange because this selection concerned specialised positions and the task called for a military predisposition. There were four members of the board who were not versed in military matters and thus, could hardly have the capability of assessing and choosing the suitable officers for promotion. These individuals acknowledged that they did not have any experience on military matters.

The selection process itself, that is the interviews the candidates had to attend, was found wanting. The candidates were not advised what was required of them unlike the earlier process of 2011. There was no indication of what the selection process was looking for and what would be examined. No information of import was given with the notification of the process itself.

The criteria for selection were Seniority, Efficiency and Selection to Fill a Vacancy. The Ombudsman did not find any issue on the former because Seniority was marked as one point per year in the rank of Major.

The latter criterion was sub-divided: Communication Skills, Appearance, Experience and Motivation. This part of the criteria was purely subjective. The subjectivity of this exercise was also shown by the fact that the SRAAC did not agree what exactly constituted skills, appearance, experience and motivation. It appears that the board members did not have a coordinated and harmonised view of what exactly they were seeking in the criteria they themselves established. The members however, had been provided by a dossier on the qualities, merits and attributes of each officer candidate by the then Commander AFM which, it transpires, did little to guide the board as a whole when the marks were allocated.

There was also no coordinated effort to establish uniform marking. It transpired that there were indications that certain board members were influenced by instructions given by their political masters.

**Outcome**

The Ombudsman found that this selection process was vitiated and that the complainants had suffered an injustice as a result of an act of maladministration. He recommended that the necessary steps be taken to redress this injustice.

The Ombudsman also recommended that the Ministry must radically review and revise the existing selection/promotion procedures. The process should be transparent, auditable and factually based on qualifications, meritocracy and suitability.

The recommendation of the Ombudsman was not accepted by the Minister for Home Affairs and National Security in cases under review. The Report was sent to the Prime Minister who did not change the Minister's decision. The Ombudsman then sent the Report to Parliament in line with the Ombudsman Act.

## People and Standards Division – OPM

# Discrimination against civil servants

### The complaint

Two police inspectors who had terminated their employment with the Malta Police Force complained that the People and Standards Division unjustly discriminated against them when it refused to recognise their right to be paid for outstanding vacation leave.

### The facts

On giving notice of termination of their employment as police inspectors, two complainants submitted a request to receive the allowance due to them for outstanding vacation leave in terms of the Employment and Industrial Relations Act. However, the People and Standards Division informed them that they were not entitled to receive this allowance since it mentioned that that law did not apply to civil servants. Complainants submitted that the interpretation given to that law by the Division discriminated between employees in the private sector and those employed as civil servants. This was in breach of European Union regulations.

### Investigation and considerations

The People and Standards Division within the Office of the Prime Minister maintained that, in terms of the Employment and Industrial Relations Act (ERA), the provisions of that Act were not applicable to the members of a disciplined force within the public service, unless made applicable to them through a specific Legal Notice. That submission was essentially correct since sub section 48 (1) of the Employment and Industrial Relations Act provided that “*The Prime Minister shall*



*have power to prescribe by regulations the applicability of any Article or sub article of Title I and of Title II of this Act to service with the government and to members of a disciplined force”.*

The Ombudsman however argued that in this case this provision alone did not justify inaction on the part of the administration. EU legislation clearly required that a person who had not availed himself of his vacation leave and had his employment terminated in any situation had to be compensated. It further provided that when an employment was classified as part time, compensation must be pro rata. The Ombudsman was of the opinion that Article 7 of the Directive 2003/88/EC should apply in this case. This Directive, also known as the Working Time Directive concerned certain aspects of the organisation of “*working time*”.

Article 7 provided that:

1. *“Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.”*
2. *“The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.”*

The Directive thus established two very important principles regarding annual leave; (1) employees were entitled to at least four weeks paid annual leave, and (2) this leave could not be replaced by payment except when employment was terminated. This Directive was transposed into Maltese law by Legal Notice 247 of 2003 entitled ‘Organisation of working time regulations’.

Regulation 8 of S.L 452.87 stated that “*Every worker shall be entitled to paid annual leave of at least the equivalent in hours of four weeks and thirty-two hours .... and out of this paid annual leave entitlement, a minimum period equivalent to four weeks may not be replaced by an allowance in lieu, except where the employment relationship is terminated, and any agreement to the contrary shall be null and void*”. It was therefore evident that any termination of employment with pending leave, entailed the payment of compensation for that leave.

Furthermore, although Article 17 of Directive 2003/88/EC provided that Member States could derogate from certain provisions of that Directive, no derogation was allowed in respect of Article 7. The only opt out permissible under the Directive was that regarding the amount of working hours and not annual leave. In this respect the Member States had no right to derogate. EU Directives had direct effect on any EU citizen who might request to benefit from their provisions even if the Member State had not taken any steps to transpose them into its own laws.

The Ombudsman recognised that the members of disciplined forces in Malta, as elsewhere, constituted a special category of workers. Some EU legislation might not apply to them, as indeed was the regulation that no worker could work more than the 48 hours as stipulated by the Directive. The matter of annual leave was however different. Every one without exception was entitled to annual leave. The Directive goes further in that it provided that unavailed leave upon termination, had to be compensated. In his final opinion the Ombudsman quoted extensively from judgements of the European Courts of Justice that supported his considerations<sup>1</sup>.

## **Conclusions**

The Ombudsman concluded that the investigation showed that complainants never had the opportunity to exercise the right they were claiming and that was being denied to them. It was abundantly clear from the Directive that:

its provisions applied to all workers indiscriminately whatever their nature or status of employment. It included all workers whether in private or public employment. It did not exclude members of disciplined forces or others. On the strength of this Directive, today an integral part of Maltese law, everyone was entitled to this period of annual leave. National legislation or regulation could in no way deprive a worker from such entitlement. They could only lay down conditions for its entitlement;

- a. complainants have correctly drawn the attention of the People and Standards Division to their entitlement to annual leave. They were however informed that that law did not apply to civil servants;

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1 European Court of Justice - Case C341/15. Hans Maschek vs Magistratsdirektion der Stadt Wien - Personalstelle Wiender Stadtwrker. (Luxembourg, 20 July 2016).  
European Court of Justice - Case C214/10. KHS AG vs Winfried Schulte - Judgement of the Court (Grand Chamber, 22 November 2011).

- b. when requested by the Ombudsman to give a reaction to the complaint the Division never advanced any justification for their stand. It could not defend its position on the basis of any derogation from the Directive because there was none. Nor could it argue that civil servants were not workers and were therefore not entitled to this benefit under the Directive;
- c. it was totally unacceptable to attempt to bypass or neutralize an EU Directive that has been transposed into Maltese law and that was therefore applicable to all workers in the country. Nor was it acceptable that the administration ignored completely the repeated references by the Office of the Ombudsman to the need to conform to an express provision of the law without any attempt to justify its actions; and finally
- d. the attempt by the Division to find a solution by advising complainants to agree with management to postpone the termination date due by an equivalent number of days/hours to coincide with the amount of their outstanding vacation, was deplorable. It amounted to an attempt to condone their breach of an EU Directive. An attempt that drew the censure of the Ombudsman.

### **Recommendation**

The Ombudsman therefore concluded that the law at present required the payment in compensation of any annual leave unavailed of when complainant's employment ended. The Ombudsman recommended that in this case necessary action should be taken to bring Maltese law in line with EU regulations so that civil servants were treated in the same manner as employees in the private sector. In default the Ombudsman would be recommending that steps be taken to bring this breach to the attention of the appropriate EU institutions, including the European Ombudsman.

### **Outcome**

The Ombudsman actively followed the process for the implementation of his recommendation. Initially the People and Standards Division submitted that in order to be able to take an informed decision on the case, internal consultations with the various stakeholders concerned were inevitably required. This was necessary to ensure that the case was viewed from a comprehensive perspective allowing a sound and informed decision to be taken. The Division stated that in the meantime they had evaluated the current state of affairs and the implications of any change in current practice and it had decided that the current position still stood.

No progress was registered and the Ombudsman as bound by the Ombudsman Act, referred the case to the Prime Minister who through the Principal Permanent Secretary, informed him that “*This Office has once again carefully reviewed the case in question and has concluded that the decision taken as communicated in the letter dated 10 May 2017 from Director General (People and Standards), OPM is to stand.*”

The Ombudsman felt that the matter at issue deserved to be brought to the attention of the House of Representatives since it regarded a case of improper discrimination between civil servants and those employed in the private sector in clear violation of applicable legislation. He therefore referred his final opinion, together with relevant correspondence, to the Speaker of the House of Representatives in terms of Article 22(4) of the Ombudsman Act requesting that his recommendation be implemented and that action be taken to bring Maltese law in line with EU legislation.

On 7 February 2018 this Final Opinion was laid on the Table of the House by the Speaker but to date no progress has been registered.

**Malta Police Force**

# Redress against Police inaction

**The complaint**

Complainant is claiming that the police were responsible for payment of damages he suffered in his car while this was parked in a road in Żejtun. He claimed that the police had failed to take the necessary action in time to ensure that vital evidence necessary to establish third party responsibility was preserved.

**The facts**

It was established that complainant used to regularly park his car in front of a lotto office. While he was in the shop, a van driven by a third party hit his vehicle. He immediately reported the incident to the police who advised him to go back to the lotto office and verify whether they had security cameras. The owner of the shop informed him that their cameras had in fact recorded the whole accident and the film clearly showed the van hitting his car. However the shop owner informed him that she could only hand over the recording to the police.

Complainant went back to the police station and requested the duty police constable to recover the recording. The constable told him that he should leave the matter in his hands. Notwithstanding complainant's insistence and numerous phone calls entreating the police to recover the recording, it was only after three weeks that the police went to the lotto office. The owner informed them that it was too late because the recording had been automatically erased.

Complainant submitted that as a result, there was no evidence of the accident. He could not prove the responsibility of the third party who got away scot free and he had to bear the cost of repairing the damage himself. Complainant had been insisting for some time with the Commissioner of Police to intervene to mediate and ensure payment of the damages he suffered either by the defaulting, negligent policeman or else by the police corps.

**The investigation**

It was established that the duty officer had failed to collect the video footage from the shop that was situated very close to the Žejtun Police Station. As a result the identity of the person who crashed into complainant's car could not be established and no criminal proceedings could be taken against the person responsible for an accident that was essentially a hit and run case. These facts were confirmed during an interview that the Investigating Officer had with the owner of the lotto office.

***Police reaction***

The Ombudsman was informed by the police authorities that they had conducted an internal investigation in which it was established that the duty police officer had not collected the CCTV video in time and that therefore the case was referred to the Commissioner of Police for disciplinary action to be taken against him. These proceedings had as yet not been initiated by the Board of Discipline since the Police Commissioner had not yet assigned the case to the Board. The accident happened on 26 July 2016. It was only referred to the Disciplinary Board almost two years later, in February 2018.

The Ombudsman was informed that the Police Board could not function because formal procedures that had to be taken by the Ministry following a change in the law had not as yet been finalised. The Ombudsman therefore decided to carry on with his investigation.

The Police Commissioner was duly informed by the Ombudsman that he was of the opinion that this case could have been investigated in a more professional manner and that, through the negligent conduct of the duty officer, complainant had to bear the expense to repair his car. The Ombudsman therefore recommended that the police authorities again investigate the incident and if it was established that the police had been negligent because of the delay in recovering the CCTV footage, the complainant should be compensated for the expense he incurred.

***Outcome of the investigation***

Complainant informed the Ombudsman that he was not interested in any disciplinary action that could be taken against the duty officer following the investigation of his grievance by the Internal Affairs Office. He was only interested in recovering the expense he incurred.

On their part the police authorities informed the Ombudsman that “*the advice of the Attorney General was sought where it was established that strictly speaking, the Commissioner of Police is not bound to pay for these damages. The Attorney General further recommended that further investigations by the divisional police are to be made to identify the person who caused the damages on [complainant's] vehicle*”. The Police also informed the Ombudsman that these investigations were being carried out but did not however have a positive outcome.

### **Considerations**

In these circumstances, the Ombudsman felt that, independently of whether his Office was in agreement with the advice given by the Attorney General, he should entreat the Commissioner to reconsider his decision and to compensate complainant for the damages sustained. The principles of good public administration, particularly the principles of fairness and equity, dictated that where it transpired that a public department or entity or an official of that department or entity had failed to carry out his duties with the diligence and care required of a public officer, the citizen who had suffered as a result of this negligence, should not have to bear the consequences of the action or inaction of the public officer. He should therefore be compensated by the Department or entity for any harm or loss incurred.

This was more so in the case under review, where the complainant, who was a law abiding citizen, put his faith and confidence in the Force, duly referred his grievance to the respective police station, and made several formal requests to the police over a period of time, to take action on his case. The Ombudsman considered that all public officers, including members of the Police Force, entrusted with safeguarding and protecting the civilian population, should carry out their duties with responsibility and integrity and should therefore act promptly upon a report made by civilians.

One would expect that a police officer informed by a civilian about the existence of evidence of an offence, should in the public interest take immediate steps to preserve this evidence.

**Outcome**

Notwithstanding this Final Opinion and the recommendation made by the Ombudsman to the police authorities to consider the payment of damages suffered by complainant, the Police Commissioner informed the Ombudsman that he still stood by the advice given to him by the Attorney General's Office and that therefore complainant should seek redress through civil proceedings.

Since the police authorities continued to refuse to implement his recommendation, the Ombudsman forwarded his opinion together with copies of all relevant correspondence that in his opinion justified the complaint to the Minister for Home Affairs and National Security as he was in duty bound in terms of the Ombudsman Act.

The case was sent to the Ministry for review in August 2018 and to date there has been no reaction from the Ministry.



## Housing Authority

# Housing Authority respects Ombudsman institution

### The complaint

An employee of the Housing Authority (complainant) felt aggrieved that during an interview for the post of Administration Officer - Investigations and Evictions, a selection board had disqualified him since he was found to be ineligible to apply. This because the call for applications laid down that applicants had to have at least ten years of experience as a police sergeant. The complainant alleged that the Housing Authority was not giving prospective applicants including himself equal treatment because the criteria established for the vacancy were such as to fit and favour a particular person.

### The facts

Complainant is basically basing his allegation on these facts:

1. A call for applications of 23 December 2014 for a post of Administration Officer within the Housing Authority required that to be eligible, applicants had to have three years' experience in investigations and three years in the post of Officer II. At that time experience in investigation was considered by the Authority to be an asset.
2. On 17 March 2016 a call for applications for Officer II Investigations and Evictions provided that one of the criteria had to be 10 years' experience as Police Sergeant. On that occasion a person from outside the civil service was appointed since following an internal call no employee had applied.
3. On 3 October 2017 another call was issued for Administration Officer - Investigations and Evictions in which contrary to previous practice, there was no mention that applicants had to be in the grade of Officer II. Instead 10 years' experience as Police Sergeant together with at least one year experience "*in investigations and evictions*" was required.

4. This call for applications was processed in a very short time and the person who a year before had been appointed Officer II Investigations and Evictions was appointed on the ground that he had the requisite experience as a Police Sergeant.

### **Reaction from the Housing Authority**

When the Housing Authority was asked by the Ombudsman to explain the reason for this change in the eligibility requirements in calls for applications for the same grade, the Authority maintained that the government was endeavoring to reduce the list of applicants for social accommodation and to protect its assets from abuse by its tenants or others. It had therefore decided to strengthen the investigation section to ensure proper monitoring against the possibility of abuse.

For this reason a new post of Administration Officer - Investigations and Evictions was created. Due to the complexity of certain investigations it was decided to set up a new unit that would include officers having qualifications and experience that one could only find in persons having a long period of service with the police corps. For this reason it was decided that applicants should have experience as a Police Sergeant versed in the investigation of cases and the fight against criminality.

The Authority submitted that it had undertaken an intensive programme of inspections and investigations of every rental premises. It was being proactive and in five months 2400 inspections had taken place compared with 1500 done previously. Some of these investigations had led successfully to evictions with the Authority recovering possession of the vacant property.

### **The Ombudsman's considerations**

The Ombudsman considered that the investigation showed that during these last years, it was regular practice in calls for applications for administrative officers in the different sectors of the Housing Authority to require an academic qualification MQF Level 5 or higher or else experience for a number of years as Administration Officer II that could vary from six, three or even two years. This apart from experience for a number of years in the duties that the post in the call for applications carried. It was in 2017 that the level of academic qualification was reduced to MQF Level 4. Moreover, it was only in this same call for applications that the academic qualification and/or experience of years as an Officer II with the Authority, as an alternative, was not required.

It was surprising and in sharp contrast with what happened previously that in the call for applications for Administration Officer - Investigation and Evictions that provoked this complaint, there was no mention of any qualification either mandatory or as an alternative for eligibility. Moreover, the requirement for specific experience in investigations and evictions had been reduced to a minimum of one year.

On the other hand, a new, mandatory requirement that was introduced namely that of ten years' experience as a police sergeant. These changes were made in the context that the chosen applicant had been employed with the Authority to do these duties just over a year before he was appointed Officer II, when the requirement for years of experience as a member of the police corps had also been introduced.

The Ombudsman considered that it was the prerogative of management to decide what qualities a person should have to occupy a post and therefore to decide what eligibility requirements applicants should possess. However this prerogative automatically required that such a decision had to be made in a just, transparent and equitable manner and that every effort should be made to ensure that the call for applications did not give rise to justified suspicions that the application had not been specifically tailor made for one person to the total, intentioned exclusion of others.

In this case such exclusion interested other employees in the Housing Authority who according to established custom, had every right to expect that they would be given the chance to apply because of their experience. This even though it did not necessarily mean that they would be chosen. It was the duty of management to ensure just competition and to protect the legitimate aspiration of its employees.

The Ombudsman concluded that management had in this case chosen to deviate completely from established practice followed by the Authority in calls for applications regarding Administration Officers. After considering how the policy adopted by the Authority favoured the candidate that was eventually selected and prejudiced complainant and other applicants, the Ombudsman opined that he could only arrive at one conclusion namely that the call for applications for the post of Administration Officer - Investigations and Evictions had been tailor made to suit one particular applicant to the complete exclusion of all other officials of the Authority who had long years of experience in inspections and evictions. In fact the chosen applicant was the only candidate who was eligible.

The Ombudsman emphasised that his opinion did not in any way negatively reflect on the officer who was actually chosen. This officer was not personally involved in the investigation conducted by this Office. The investigation concerned only the actions of management.

Finally, the Ombudsman also considered whether the call for applications, that was clearly tailor-made, could however be justified because of genuine exigencies of the Authority and because there was no other alternative. The Authority argued in favour of introducing the condition of 10 years' experience as a police sergeant in the call for applications because of the need to decrease the number of applicants for social accommodation. It wanted to strengthen the unit for investigation to ensure that abuse is checked by having qualified, competent personnel with experience in fighting criminality.

The Ombudsman was of the opinion that these reasons were not enough to justify manifestly limiting the call for applications to only one person and to exclude from the right to apply all those officers of the Authority who had long experience in this type of work and who according to the former practice, had the legitimate expectancy to aspire to fill the vacancy.

### **Conclusion**

The Ombudsman concluded that in his opinion the call for applications for the post of Office Administrator - Investigations and Evictions had been manifestly tailor-made and was therefore a clear case of bad administration. The call treated the employees of the Authority, including complainant unjustly. It therefore found that the complaint was justified and recommended that complainant, who suffered an injustice, should receive in compensation a token amount of €2000.

### **Outcome**

The Housing Authority reiterated its original position that the complaint was not justified. It was not in a position to agree with the complaint or with the Final Opinion of the Ombudsman. However, purely out of respect for the Office of the Ombudsman and to adhere to best practice, the Housing Authority was prepared to implement the Ombudsman's final recommendation on condition that payment would be in full and final settlement. Complainant was informed of the Housing Authority's decision.

# State's duty to care - Accepting liability for damages caused to a third party

## Abbreviations

*MFIN* - Ministry for Finance; *AFM* - Armed Forces of Malta; *PCF* - Protection and Compensation Fund; *MIB* - Motor Insurance Bureau

## The complaint

The complainant, the owner of a Suzuki Alto, was involved in a traffic accident at Qormi with a Land Rover Defender owned by the Armed Forces. His vehicle sustained damages and the cost of repairs amounted to €1477. Since the claimant did not have a comprehensive motor insurance cover and he had collided with an army insurance exempt vehicle, he made a claim with the Protection and Compensation Fund. The Motor Insurance Bureau Fund accepted and paid for the damage sustained to third party except for an amount of €466 that it was entitled to retain as excess under the existing arrangements. Complainant was informed that he could claim this amount from the Government of Malta. However, despite various attempts to recover this excess, complainant had not received any payment.

## The investigation

The investigation of this complaint revealed a number of interesting aspects that are of general interest.

- a. AFM's refusal to pay - The insurance agency covering complainant's vehicle sought to communicate directly with AFM requesting it to settle the issue of liability. The insurance itself did not have any doubt that responsibility for

damages lied exclusively with the person driving the Army vehicle. The army authorities failed to reply to repeated requests and a claim was therefore lodged with the PCF. Eventually, AFM replied and informed the insurance agency that it did not accept liability for the collision alleging that it had been caused by a 'dangerous manoeuvre' performed by complainant. Even though the complaint did not directly involve the AFM but sought redress from the Ministry for Finance, the Office of the Ombudsman felt it was fair to provide AFM with the opportunity to give its comments once the collision involved one of its vehicles. The AFM replied to the Ombudsman submitting that the Ombudsman Act explicitly "*applies to the Armed Forces of Malta in respect only of appointments, promotion, pay and pension rights of officers and men of the Force*". It submitted that complainant was not a member of the Armed Forces of Malta and "*the Ombudsman Act does not apply to complaints concerning traffic collisions to which specific ordinary legal remedies apply*." AFM declined to give its views and comments. Once AFM was not a party to the complaint the Investigating Officer rightly ignored its reaction, even though it became abundantly clear that the AFM's failure to deal with the complaint in a correct and timely fashion seriously prejudiced its right to contest it.

- b. MFIN's Reaction - the Office of the Ombudsman was informed by MFIN that claims to the PCF, like the one referred to it by complainant, are handled in accordance with the terms of a 2009 Agreement entered into by the PCF on the one hand and the Government of Malta as represented by MFIN, on the other. This agreement had materialised following a recommendation in EU Directive 2009/103/EC (Fifth Motor Directive) which calls for an independent body to oversee claims made against insurance exempt vehicles<sup>2</sup>. MIB in turn entered into an agreement with the PCF to handle the claims made. The aim was to facilitate the processing of such claims made by private citizens.

The Agreement was entered into for a period of three years but following its expiry in 2012, it was agreed by all parties concerned that the agreement would remain valid pending a new agreement being entered into on termination by any party.

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2 Recital 14 and 44 and Article 5 and 10 of Directive 2009/103/EC relating to insurance against civil liability in respect of the use of motor vehicles and the enforcement of the obligation to insure against such liability.

A formal notice together with the claim, road accident report and survey report was sent by MIB to MFIN, as requested by this Agreement, stating that the Bureau was determining the claim on the basis of the police report that attributed responsibility to the driver of the AFM vehicle whilst changing its lane. The Fund therefore proposed to pay third party damages amounting to around €1,011 whilst the third party namely complainant, would retain his rights for compensation for the excess shortfall of €466.

- c. AFM liable by default - The investigating officer examined Clause 2(f) and (g) of the Agreement. She concluded that it was clear that if the owner of the insurance exempt vehicle, namely the AFM, did not submit a written objection within 30 days of receipt of the notice, then one had to presume that it was in agreement with the disbursement of damages in satisfaction of the claim. This clause was presumably introduced to ensure that private citizens enjoy a measure of legal certainty and benefit of a timely remedy. Clause 2(d) also provided that in all claims the excess was being determined at €466. This was not based on any calculation and was withheld irrespective of the value of the claim.
- d. AFM's failure to respond - MFIN informed the Ombudsman that each time a claim was lodged with MIB in connection with a Government uninsured vehicle, the Ministry is notified by an official notice. This is done because MFIN was the signatory to the Agreement on behalf of Government and more often than not, MIB would not know which department owns the vehicle involved. The notice would then be forwarded to the department or entity concerned. Any replies and contestations had then to be forwarded to MFIN so that it could forward them to MIB.

In line with this procedure, the formal notice was forwarded to AFM underscoring the importance of a timely reply given the 30 day deadline. A reminder was sent again but this too remained unanswered. The claim was therefore solved by a *Discharge Release Form* which was drawn up by MIB on behalf of the PCF and signed by complainant, wherein it was stated that complainant after deducting the excess was due the amount of €1,011 in damages. The *Discharge Release Form* confirmed that it had the right to claim the excess from the Government of Malta and/or the driver of the AFM vehicle. MFIN took up the issue of payment

of excess with AFM. Various reminders were sent, and it was only months later that the army refused to accept any liability maintaining that its driver was not responsible for the accident.

- e. Agreement needs fine tuning - The 2009 Agreement between PCF and the Government of Malta is structured in such a way as to require the injured party to first apply with the PCF to determine the claim and subsequently lodge a separate claim with the Government department owner of the vehicle in order to recoup the excess. The whole procedure is certainly not straightforward and leaves the injured party with having to follow multiple procedures, incurring unnecessary delays and possibly further expenses, to receive the full compensation for damages suffered. The Office was of the opinion that the procedure laid down in the Agreement, that allows the excess of €466 to be withheld by PCF irrespective of the value of the claim, is unfair on the injured party involved in traffic collisions with insurance exempt vehicles. MFIN informed the Ombudsman that while a new agreement which excluded the withdrawal of the Excess by PCF was being drawn up, it has yet to be finalised.

The Ombudsman acknowledged and appreciated the efforts of the parties concerned to rectify this situation, he was however of the opinion that further decisive action should be taken to resolve the issue quickly and conclusively.

## **Conclusion**

The investigation showed that the payment of damages in settlement of the claim was done on two grounds. In the first place it followed an analysis of the police report by the PCF that seemed to attribute fault to the AFM driver. Secondly failure by AFM to object to the settlement of damages on the basis of Clause 2(g) of the Agreement, created the presumption that the owner of the exempt vehicle had agreed to the payment of the claim. It appeared that the AFM had failed to provide any feedback following notification forwarded to it by MFIN. As a result MFIN was unable to object to the claim and liability was accepted.

The Ombudsman concluded that principles of good administration dictate that emails between different departments and ministries should be answered in a timely fashion especially when these communications dealt with citizens' rights. If the complainant was at fault then AFM should have, in its own interest, challenged



the proposed settlement during the time window provided - a time window that was agreed to by the Government in the Agreement. The acceptance of liability was thus the consequence of the alleged action of the AFM driver coupled by the inaction of MFIN/AFM.

Once responsibility was accepted by Government, disbursement of the whole amount of the claim must be made. A private citizen must not be made to suffer due to a lack of communication between one ministry/department and another. Since responsibility had been accepted by MFIN on behalf of Government and the complainant had lodged a claim directly with MFIN for the excess, the Ombudsman was of the opinion that the claim was to be settled wholly by MFIN. It would then be up to the Ministry to make use of any internal mechanism to recoup this disbursement from AFM.

**Outcome**

Following the Ombudsman's report, complainant informed the Office that he had received payment of the amount due for the excess. He thanked the Office for investigating his complaint and for its positive outcome.

**Department of Social Security**

# **Right of civil servants to be informed and their duty to keep themselves informed**

**The complaint**

Complainant, who is employed as a General Hand with the Department of Social Security, claimed that her career progression within the Public Service had been negatively affected as she had not been able to apply for the position of Messenger since her Superior had failed to inform her, verbally or otherwise, about the publication of the relative call for applications. She claimed that the Circular had not been displayed on the Department's Notice Board and that she had only become aware of the vacancies after the closing date of the said call. This, through other cleaning staff deployed with other Departments.

**The facts**

1. Complainant alleged that no one had informed her about the call for applications. Her Superior did not inform any of the workers that the call had been issued. Nor did he publish a copy of the call for applications on the notice board as required by law.
2. Complainant confronted him head and protested that it was his duty to inform staff of Circulars that concerned their employment but was not given satisfactory answers. She maintained that because of the negative attitude of her Superior and his bad administration, she had lost the opportunity to obtain a promotion to which she had been aspiring for years.
3. Since complainant did not succeed to obtain redress from the Department she had recourse to the PSC and made a request so that her case will be investigated and to take all the necessary steps for her to be able to sit for the interview that would allow her to be considered for promotion.

4. The PSC, after having examined the records of the case, was of the view that the selection process could not be reopened once appointments to the position had been finalised. The PSC noted that in terms of the present Circular published in July 2016, applications had to be submitted by August of that year. However complainant's request to have her case re-examined had been sent much later. In fact, the selection process had already been concluded and the persons chosen appointed.
5. Complainant therefore filed a complaint with the Ombudsman arguing that the Commission had stated the obvious since she would never have considered submitting a claim had the selection process not been concluded.

### **Official reaction**

The Assistant Director responsible for managing the back office, while highlighting that he was not complainant's direct superior, did not contest her statement that the Circular was not displayed on the Department's notice board. He in fact confirmed that at that time, the back office did not have a notice board. He however maintained that all staff had full access to departmental circulars as these were kept on the attendance sheets' desk for a month. He elaborated that although the information dissemination system adopted at the time could be considered as unorthodox, it was highly improbable that minor staff was not at least informed once about this option.

The Assistant Director insisted that complainant could have avoided this situation by keeping in touch with her colleagues at the human resources section. She was seeking to blame others for her failure to take serious interests in matters which concerned her and for not utilising the information tools available. He informed the Ombudsman that he had since taken necessary steps to install a notice board and to have minor staff sign all department circulars.

The Director (People Resourcing and Compliance) submitted that complainant should have contacted the PSC the instant she became aware of the call for applications for the grade of Messenger. The selection process had been concluded and vacancies filled because the Commission ensured the selection processes were to be concluded at the earliest possible.

### Considerations

In his considerations the Ombudsman concluded that he could not criticize the PSC's decision not to entertain complainant's request to be allowed to sit for an interview at such a late stage. The Commission could not be expected to reopen a selection process after it had been finalised by a Selection Board. The investigation of any petitions submitted has been concluded and clearance had been given to the administration for appointments to be made. The Commission had the remit to make recommendations to the Prime Minister regarding the appointment of public officers, and must ensure that selection processes are concluded at the earliest possible and do not remain pending indefinitely.

Complainant however was seeking compensation for alleged injustice as she claims that her career advancement was hindered because of the negligence of her Head of Department. In his opinion the Ombudsman reproduced Paragraph 5.1.1 of the Public Service Management Code (PSMC) which together with the manuals listed in it has been assigned the status of a Directive, in terms of the Public Administration Act, and thus bound the Public Service and defined and regulated the rights and obligations of employees.

This paragraph provided *inter alia* that all public employees should have equal access to information. It was the employees' duty to keep themselves informed and updated and also the duty of the Permanent Secretaries, DCs, Directors and Heads of public sector organisations, to ensure that all circulars are brought to the immediate attention of all employees falling under their responsibility. This paragraph lists the way such information is to be brought to the attention of employees. These procedures are additional to specific procedures relating to the notification of calls for applications contained in the 'Manual on Resourcing Policies and Procedures'.

In paragraphs 2.11.1 and 2.11.3 the manual lists in detail not only how such calls could be accessed from the Malta Public Service Online Recruitment Portal and how applications could be submitted by hand, by post or online but also provides that it was imperative that calls for applications, whether advertised through a circular or a public call for applications, had to be given maximum coverage. It was the responsibility of the Directors for Corporate Services to ensure that appropriate mechanisms are in place so that all calls for applications are displayed in a timely manner and in a prominent place.

The Ombudsman noted that procedures are aimed at ensuring that all staff was fully appraised about the contents of circulars and memoranda, official guidelines and orders issued by the administration, and that vacancies are brought to the immediate attention of all prospective applicants. He concluded that the unconventional method utilised by the Head of Department in this case, including that of placing all circulars on the attendance sheet desk for about a month, did not adequately satisfy the requirement of displaying circulars/notices prominently.

The method used did neither ensure that the notice containing the call for applications remained available for all staff to consult at all times, nor did it satisfy the requirement stipulated in the PSMC that a hard copy of internal circulars was to be circulated and be duly signed by those who do not have an email account. This to confirm that they had actually read it.

Although the Assistant Director might not have been complainant's direct superior, there was no doubt that he was responsible to ensure that circulars in calls for applications were given adequate coverage and brought to the attention of all staff at the office in a timely manner in line with regulations. The Ombudsman considered that management was expected to perform at a high standard of professional responsibility and should be conversant with applicable policies and procedures.

In this case the Department had failed to correctly recommend the procedures envisaged by the PSMC and its manuals. The Ombudsman was also critical of the inaction of the officer at the People and Standards Division (P&SD) who had the duty to deal with complainant's request. Complainant's letter of complaint asking for guidance was not addressed with efficiency, fairness, impartiality and integrity. It appears that it has been ignored and disregarded by the official who was tasked with overseeing correspondence received by the Division.

Complainant was also at fault. The Ombudsman considered that he could not overlook the fact that complainant did not follow up her correspondence addressed to the Director (People Resourcing and Compliance) with the required diligence. She had only contacted the P&SD when she had not received a verbal or written reply after a few days from her superiors. Moreover, she had sought the intervention of the Ombudsman more than two months later. She had tried to shift all responsibility on her superior when she had herself failed to take reasonable steps to ensure that

she kept up to date with any vacancies which might have been of interest to her. The PSMC required public officers to be proactive - to keep themselves informed and updated and regularly check the official government websites, the public service websites and the government intranet.

Complainant did not seem to have access to internet at the office or an office email address where she could receive circulars. She should have taken the initiative to enquire on a regular basis with the department's human resources office about the calls for applications that were being issued. She would have been able to submit a timely application in respect of any position she might have been interested in. The Ombudsman also noted that complainant did not seem to be conversant with the PSMC and its manuals even though these encompass the basic policies, rules and practices regulating the conduct, rights and obligations of public officers. Public officers were expected to be familiar with the rules contained in these documents since they govern the relationship between the administration - their employer - and themselves.

### **Conclusion**

While the Ombudsman was critical of the shortcomings of the administration and its failure to keep complainant fully informed of the call for applications which could offer her an avenue of promotion as it was bound to do by applicable regulations, he could not sustain complainant's request as he considered that through her own lack of timely follow up and initiative, she had contributed to the situation she was complaining of. She expected her superiors to inform her about the publication of calls for applications but failed to be proactive and enquire on a regular basis with the department's HR Office about existing vacancies.

Complainant had failed to act diligently and not follow up the correspondence she had sent to the People and Standards Division. She was fully aware that time was of the essence as she had been informed by other public officers that interviews were already being held. The Ombudsman concluded that in the circumstances he could not therefore uphold the complaint.

**Birkirkara Local Council**

# Local Councils responsible for road upkeep

**The complaint**

Complainant who suffered damages in his car while driving along Notabile Road, Birkirkara from Fleur de Lys in the direction of Attard claimed reimbursement of damages he suffered from the Birkirkara Local Council. Notwithstanding various reminders he did not receive any reply to his correspondence and he therefore sought the intervention of the Ombudsman to secure adequate redress from the Council.

**The investigation**

Though the amount involved in the claim was small some of the issues raised during the investigation are important and of general interest. It was established that the road where the accident occurred fell within the remit of the Birkirkara Local Council. The Council informed claimant that his claim was unfounded both at law and in fact “... *as the Local Council had taken such care as in all the circumstances was reasonably required to secure that the part of the road to which the action relates was not dangerous for traffic in terms of Regulation 8 of Subsidiary Legislation 499.57 of the Laws of Malta*”.

During an onsite visit held by the Investigating Officer at the Office of the Ombudsman, it was established that photos attached to complainant’s request were in fact photos of the site where the incident took place. It was further noted that although the pothole had since been resurfaced, the photo showed the state of disrepair that the road was in at the time of the accident.

Confronted with this evidence the Council reiterated that it could not accept liability because it had satisfied its obligations under Regulation 8 and that, should Local Councils accept liability for such cases “*most Local Councils would end bankrupt*”.

The Council also contended that it contested the fact that while Mdina Road, Fleur de Lys Road, Valley Road and Mannarino Road all had the characteristics of arterial roads, they were all considered to fall under the responsibility of the Birkirkara Council. The maintenance of these roads was placing disproportionate burden on the Local Council that was not in a position to sustain the financial burden of their repair.

***Defence issues raised***

1. The Local Council through its legal adviser raised a number of issues in its defence. These included whether the Ombudsman could validly investigate such cases. The Council's legal adviser questioned whether the Ombudsman's remit included that of recommending the payment of damages and expressed the opinion that claims for damages should be referred to the Courts and Tribunals where evidence could be produced and witnesses examined. During a meeting he also remarked that sometimes he had the impression that the Office favoured complainants.
2. In his Final Opinion the Ombudsman stated that he was an independent Officer of Parliament tasked by the legislator to investigate complaints about alleged injustice and maladministration by the public administration that included local councils, their officials and their employees. He had the right to recommend a remedy to redress injustice where the complaint was found to be justified.
3. Over the years the Ombudsman was increasingly being seen as a promoter of the fundamental right of individuals to good administration and a defender of citizens against maladministration, abuse of power and improper discrimination. This however did not imply that the Office favoured or was biased in favour of those who felt aggrieved by actions of the public administration.
4. When investigating complaints the Office of the Ombudsman was neutral and impartial. The Ombudsman does not take sides and does not act as a defender of the complainant or of the department, or local council against whom the complaint is lodged. Investigations are carried out in an impartial and objective manner and both parties are given the opportunity to submit their views and comments about the claim. The Ombudsman considers all arguments and examines the information and documentation submitted by the parties so that a just and equitable solution could be reached.
5. The Ombudsman also rebutted the submission that the Courts or Small Claims Tribunal were the only proper forum for the determination of complaints on the payment of damages incurred as a result of maladministration. The



Ombudsman had given the Council every opportunity to present evidence to contradict the statements made by the complainant in this case, both regarding his letter of complaint and those made in the police report if it doubted its veracity. It was given every opportunity to provide evidence to exonerate itself from responsibility.

6. The Office also underlined the nature of the Office of the Ombudsman as an interlocutor between an aggrieved person and the public administration. One could not expect a person aggrieved by an action or inaction of a public authority to seek recourse before the Courts or a Tribunal incurring additional fees and expenses, when the legislator provided an alternative avenue through which he could obtain redress. Recourse to the Courts or Tribunal should be seen as an extraordinary remedy. The Office of the Ombudsman always held the view that it would not be administratively correct for the public administration of which the local councils formed part to require a citizen to refer a grievance to the Courts when the legislator himself had provided for an alternative ordinary remedy for the redress of his grievance. The Ombudsman has been endowed by the legislator with the power to investigate grievances and recommend a remedy when this was appropriate. A remedy that could obviously be quantified through the liquidation of damages suffered. The complaint under review fell squarely within the remit of the Office of the Ombudsman. Its functions and jurisdiction were regulated and limited only by the provisions of the Ombudsman Act. The submissions of the Local Council in this respect were therefore inadmissible.

### ***Responsibility of Local Councils***

It was established that the Authority for Transport in Malta Act provided that local councils were legally responsible for the maintenance and upkeep of any road which was not required to be maintained by Transport Malta. Moreover Regulation 3(1) of the New Roads and Road Works Regulations which dealt with road maintenance, provided that roads which were not classified as arterial or distributary roads would not fall under the responsibility of Transport Malta and needed to be maintained by the Local Councils. This Act provided that Local Councils were legally bound to keep the locality, its streets, pavements and passageways in good condition for the common good of all. They therefore could not escape from their responsibilities by simply disclaiming liability without justifying reasons. According to the Act a street or footpath that fell under the responsibility of the Council had to be maintained in good condition. It was the Council's legal responsibility to do so except where

the road or footpath had to be reconstituted. The investigation established that the site where complainant's vehicle was damaged fell within the remit of the Birkirkara Local Council.

***Local Council took reasonable care***

The Council finally pleaded in its defence that it had observed Regulation 8(1) of the New Roads and Road Works Regulations that envisaged that a Council could defend itself against a claim for damages incurred by road users alleging failure to maintain a road, provided that it proves that “*the authority or local councils had taken such care as in ordinary circumstances was reasonably required to secure that the part of the road to which the action related was not dangerous to traffic*”. Sub regulation (2) of that Regulation lists a number of elements that a court should have regard to when considering whether the Council's defence was justified. The Ombudsman considered the replies sent by the Council and the documentation available to his office, particularly the photos taken at the time when the incident occurred. He was of the opinion that the Council failed to prove as it was required to do so in terms of Regulation 8(1), that it had exercised due diligence and taken those measures which were reasonably required of a public authority entrusted with the maintenance of roads within the locality so as to ensure that the road in question was not dangerous to traffic.

From a review of the photos taken by complainant after his vehicle went over the pothole, it transpired that the part of the road where the incident occurred, which is one of the main roads used in the central region and from which hundreds of cars pass incessantly on a daily basis, lacked proper maintenance and was in a state of disrepair at the time when the incident occurred. It was highly improbable that such a pothole could have been formed in the short time frame envisaged by the Council. Considering the character of the road and the traffic which uses it on a daily basis, it appeared that the road was not being maintained up to the standard which was reasonably required of a road of that character.

**Conclusion**

The Ombudsman concluded that the Council could well claim that it was short of funds and that the maintenance of major roads falling within its locality was adversely affecting the budget allocated to it. However, this was not sufficient for it to disown responsibility for an incident which occurred in a road which fell

within the parameters of its jurisdiction. The responsibility of the Local Council included mitigating the inconvenience of persons who lived and worked in the locality and who used it. The Council had to ensure that citizens did not incur unnecessary expense due to the negligence of bad workmanship of roads which the council itself was responsible for. It was the reasonable expectation of every tax paying citizen that using the public roads was safe and did not involve the expense and bother which was occasioned by such incidents. The Ombudsman therefore sustained the complaint.

### **Outcome**

The Birkirkara Local Council refused to implement the Ombudsman's recommendation. The Ombudsman therefore referred the matter to the Director Local Government, Monitoring and Support within the Department for Local Government requesting him to intervene with the Local Council to resolve the issue so that immediate action could be taken to provide redress to the aggrieved complainant.

The Ombudsman was informed in November 2017 that the Director in that department had recommended to the Birkirkara Local Council that it should implement the Ombudsman's recommendation, even though he recognised the autonomy of the Local Council. The Local Council continued to refuse to do so and the Ombudsman as empowered by the Ombudsman Act, by letter of 5 March 2018, referred the case to the Minister for Justice, Culture and Local Government for his attention. Following repeated reminders by the Ombudsman, the Ministry finally replied that it had followed up the case and the Local Council had been reminded of the Ombudsman's recommendation "*However kindly note that independence of the local council is such that the course of action that they decide upon is ultimately their decision.*"

*In this case local council is intent on not issuing the compensation required and if need be the complainant takes legal proceedings he deems fit".*

On receipt of that communication, the Ombudsman sent his Final Opinion, together with relevant documentation, to the Speaker of the House of Representatives to be laid on the Table of the House. This was done on 4 October 2018. To date no further progress had been registered in providing justified redress to complainant.

**Public Service Commission**

# **Principles guiding relations between Ombudsman and the PSC**

**The complaint**

Complainant felt aggrieved with the response she had received to her petition on the outcome of an interview she had for the post of Executive Officer in the Malta Public Service. She had objected to the result of her interview but notwithstanding that she furnished proof attesting to her abilities, the Commission had found no grounds for marks originally awarded to her to be changed.

**The investigation**

The Office of the Ombudsman reviewed her case in the light of submissions made by the selection board to the Commission and those made by complainant detailing her aggravation on the marks given to her on the various criteria on which the assessment of all candidates was made.

**Conclusion**

In his final opinion the Ombudsman opined that his Office had no reason to doubt complainant's dedication to her present duties and her respect for her obligations at her place of work, the efficient way she discharged her duties and her justified aspirations to a higher grade. He further stated that his Office might not necessarily agree with the way criteria were interpreted during the selection process and indeed considered that at least the interpretation of one criterion was incorrect. However, in the absence of evidence of the Board applying a different interpretation according to candidates concerned, this Office was not in a position to conclude that there was any discrimination against complainant or that her marks should be revised.

The marks had been awarded according to the answers given during the interview and finally depended on subjective interpretation of the members of the selection board on what happened during the interview. An interpretation that could not be challenged by the Ombudsman. The Ombudsman therefore concluded that he regretted that he was not in a position to be of help to complainant in her quest to a revision of her marks.

### **Notable considerations**

Commenting on the conduct of his investigation and its limits the Ombudsman made some interesting considerations on the relations between his Office and the PSC. He pointed out in the first place that -

- a. his Office could only investigate cases involving the PSC if there was proof to his satisfaction that the complainant had sought redress from the Commission; and
- b. the Ombudsman could not recommend a change in the PSC's decision if complainant's petition had been treated fairly, that is:
  - i. the PSC has given due attention to the points raised in the petition;
  - ii. all relevant information had been considered; and
  - iii. that there was nothing in the process of deliberation on the petition that could lead the Ombudsman to conclude that any provision of Article 22 of the Ombudsman Act applied in complainant's case.

These provisions relate to any decision, recommendation, act or omission which:

- i. appeared to have been contrary to law; or
- ii. was unreasonable, unjust, oppressive, improperly discriminatory; or
- iii. was based wholly or partly on a mistake of law or fact, or indeed was wrong.

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

The Ombudsman did not himself decide or comment on how these criteria were set even if for the sake of argument he was not in agreement with the criteria/sub-criteria that were applied in a selection process. This unless it resulted that these

were intended in advance to favour a particular candidate and was not therefore improperly discriminatory. Nor does the Ombudsman criticise the application of these criteria unless it resulted that this was not done uniformly.

Finally it had to be stressed that the Ombudsman did not substitute a subjective assessment/decision, taken by a selection board, with his own. For this reason unless there was clear and objective evidence of any irregularity in the process, or that any action/decision of the Selection Board was manifestly wrong in respect of the interview of the candidates involved, there is no room for a differing opinion from the Ombudsman.

The Ombudsman concluded that in this complaint there was no evidence that the selection board did not assess the candidates for the post in line with the pre-set criteria and the related sub-criteria applying them uniformly to all of them.

**Commissioner for Standards in Public Life**

# Conflict of laws on corruption

**The complaint**

The Ombudsman was asked to investigate an apparent anomaly between Article 14 of the Standards in Public Life Act that precludes the Commissioner for Standards in Public Life from investigating an allegation of an act which occurred prior to 30 October 2018, the date on which the Act came into force, and sub-article 2 of Article 115 of the Criminal Code. This latter Article was intended to remove the applicability of prescription to an offence of corruption when committed by persons elected to public office and to further implement the provisions of the Criminal Law Convention on corruption of the Council of Europe.

**The issue**

The issue arose after the Commissioner for Standards in Public Life stated that he could not take any action and could not initiate any investigation on offences allegedly committed before 30 October 2018 by a Member of Parliament or of the Government. The complainant submitted that if that statement was correct the Standards in Public Life Act was diametrically contrary to the recent amendment of the Criminal Code and would therefore be depriving Maltese citizens from seeking judicial remedies against politicians who allegedly abused of their position.

**Opinion**

In his opinion the Ombudsman stated that it was not his function to investigate the acts of the legislator or to enquire whether a law was correct, adequate or consistent with other legislations. He only had the right to recommend that a law be reconsidered if, in his opinion, the administrative decision, recommendation, act or omission that was the subject matter of his investigation had been based on a law that allowed discretionary powers that were abusive or improperly discriminatory.

The Ombudsman was of the opinion that complainant was asking him to investigate inconsistencies between legislative acts that negatively affect citizens independently from any investigation of administrative actions. This did not fall within his functions. Considering the complaint in the light of the citizen's right that the State should guarantee a good public administration to all, it was useful to note that:

- i. the limitation in the Standards in Public Life Act, which stipulates that the Commissioner should not investigate allegations or acts that occurred before the coming into force of the Act, in no way diminished or reduced the effect of the recent amendment to the Criminal Code that removed the applicability of prescription in case of corruption when committed by persons elected to political office. The word 'elected' has a precise meaning that restricts the applicability of that provision to persons appointed to political office through an electoral process. The Commissioner for Standards and Public Life in the exercise of his functions, has a power of review of a much wider category of public officers to whom the amendment of the Criminal Code does not apply;
- ii. it is the legislator's prerogative to establish on what date a law should come into force. It was also considered correct that a law, that was intended to impose stricter measures of scrutiny or financial or other burdens, would not, as a rule, be given retroactive effect.
- iii. a similar clause in fact had been introduced when the Ombudsman Act, on which the Standards in Public Life Act was modelled, was enacted.
- iv. The fact that the Commissioner cannot investigate an allegation of an act which occurred prior to the coming into force of the Act did not exclude that he could investigate an alleged offence that was continuous or if the person who allegedly committed it was still enjoying the benefits of his actions after the coming into force of the Act.

## **Conclusion**

The Ombudsman therefore concluded that, while the complainant was fully entitled to the opinion that the Standards in Public Life Act, as drafted, was in this regard denying citizens the right to justice, it was not correct to say that the law was blatantly against the provision of the Criminal Code that abolished prescription in respect of corruptive acts committed by persons elected to public Office.



**Air Malta**

# Improper discrimination by Air Malta

**The complaint**

A number of Air Malta employees filed a complaint with the Ombudsman claiming that they were being subjected to improper discrimination by their employer that was refusing to pay them arrears in pay due to them according to their Collective Agreement. Other employees in their same situation who had made a similar complaint before a Grievances Unit set up by the company had been paid.

**The facts**

It was established during the investigation of the complaint by the Ombudsman that Air Malta employees had in 2003, voted in favour of a moratorium regarding their Collective Agreement. However, it was agreed that once a new collective agreement was signed, it would be backdated to the 1<sup>st</sup> of April 2004. Eventually, complainants got to know that ex-employees who had terminated their employment with the company under the same agreement and conditions like theirs had received arrears due to them following a complaint they had done before a Grievances Unit set up by Airmalta to consider complaints.

The complainants requested Air Malta to be given the same treatment and payment of arrears. The company refused to do so on the grounds that it only settled claims decided by its Grievances Board. Complainants therefore in various ways, requested their case to be reconsidered by the Board but their claims were not accepted.

## **The investigation**

### ***Preliminary issues***

The Office of the Ombudsman had in the first place to dispose of a number of preliminary pleas raised by the legal adviser of Air Malta that did not correctly interpret the applicable provisions of the Ombudsman Act, nor did they reflect a proper awareness of the nature of the Office of the Ombudsman and its functions. They were also couched in terms that showed lack of respect due to the Ombudsman as a constitutional authority. These included:

- a. that the Ombudsman should not investigate further the complaints that were essentially money claims since the complainants had other effective remedies at their disposal at law. This submission is fallacious in so far as the function of the Ombudsman was precisely to investigate administrative injustice whatever its nature and avoid the need for aggrieved persons to have recourse to judicial or other remedies;
- b. the complaints were time barred because they were filed with the Ombudsman well after the lapse of the six month statutory period from the date in which the injustice took place. Article 14(2) of the Ombudsman Act however gives the Ombudsman the right to dispense with this prescriptive period “*if he considers that there are special circumstances which make it proper to do so*”. Instead of respectfully submitting that the Ombudsman could consider whether he should decline to investigate the complaints he unilaterally decided that such circumstances did not exist when this was an issue reserved by law to the Ombudsman’s sole discretion; and
- c. complainants filed their complaint before the Grievances Unit months after they were entitled to do so and the Unit could not therefore consider their complaint.

Finally, the Ombudsman strongly objected to submissions made by Air Malta that the investigation into these complaints should stop because they were irregular and vitiated in the way they were being conducted or that he was in any way prejudiced in favour of complainants.

### ***On the merits***

The Ombudsman considered that the Grievances Unit set up by Air Malta to investigate complaints of alleged injustices had received a number of complaints from employees who were in identical situations with complainants and decided

in their favour. The Unit concluded that their complaints were justified since the 2011 Scheme had created an anomaly that prejudiced these employees who should therefore be compensated.

Very relevant to the complaint investigated by the Ombudsman is the Unit's consideration that the principle of proportionality had not been observed in dealing with these employees, who had also to carry part of the burden of the freezing of salaries and the failure to renew the collective agreement from 2004 to 2011. If the company as well as the representatives of the workers had ignored this principle it should not be the employees who suffer. On this basis the Unit found complaints submitted to it to be justified and recommended payment of arrears and adjustment in pensions where necessary.

The complaints investigated by the Ombudsman were identical to those presided by the Grievances Unit and the very valid reasons on which the Unit based its decision that an injustice had been made against those employees wholly applied to complainants. The only difference was that the complainants before the Ombudsman did not file their request before the Grievances Board of Air Malta within the statutory time limit. This was confirmed.

However complainants submit that they were not informed that the Board had been set up, what they should do to file a request before it and also whether it was required that they make such a request to Air Malta to recover what was justly due to them. It was noted that complainants had actually retired from Air Malta by the time the new collective agreement was negotiated. They submitted that it was also for this reason that they had not been aware of their rights and of the need to file a claim before the Grievances Unit. No contrary proof was produced to contradict this evidence.

### **Conclusion**

The Ombudsman therefore concluded that in his opinion, if complainants were not given the same compensation as that given to their colleagues in identical circumstances, they would be subjected to improper discrimination. He therefore recommended that complainants should be awarded the same treatment as that given to other employees of Air Malta who had left the company on the basis of the same agreement and who had eventually received, or were about to receive this compensation from the Permanent Secretary of the Ministry.

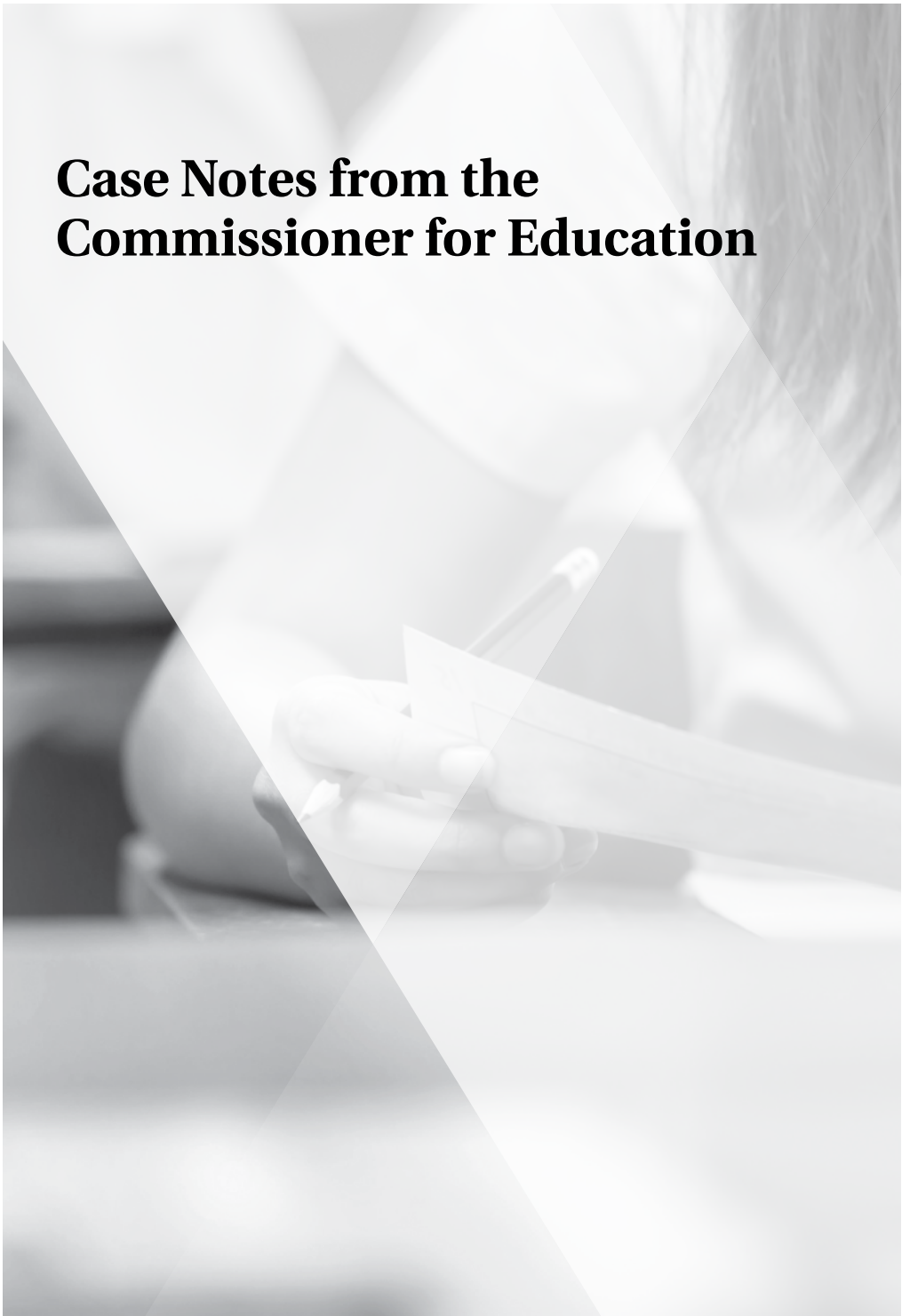
**Outcome**

Air Malta refused to accept the recommendation of the Ombudsman who therefore took up the matter with the Permanent Secretary, Ministry for Tourism. Following eight months of constant reminders the Permanent Secretary confirmed Air Malta's decisions and stood by the advice of its legal adviser that “... *highlighted the fact that both complainants did not submit their grievance case on time and these are now considered as time barred*”.

Following this reply the Ombudsman referred his final opinion to the Minister for Tourism but the Permanent Secretary of the Ministry informed him that “*the Ministry understands, therefore, that the complainants had adequate opportunity to submit a claim before the Grievances Board and, having failed to do so, could not claim to have a Grievance Board decisions revised*”.

The Ministry therefore determined “... *that it should not interfere in a grievance process which was implemented fairly and transparently*”. The Ombudsman then referred his Final Opinion for the consideration of the Prime Minister on 31 October 2018.

# **Case Notes from the Commissioner for Education**



**University of Malta**

# **An applicant who was eligible to apply for a post but not eligible for selection**

A University lecturer was eligible to apply for a post but became ineligible to occupy the post because he had become superannuated before the interview.

## **The complaint**

A Resident Academic Lecturer who was a staff member of an Institute at the University of Malta submitted an application for the post of Director of the Institute when this became vacant. He attended an interview, after which he was given to understand that he had secured the post after being placed first among those short-listed. In the period between the official submission of his application and the date on which the interview was held, the complainant had lost his Resident Academic status since it had been terminated on his reaching retirement age. The post of Director required the successful applicant to possess Resident Academic status.

Two months after the interview, the post was officially given to the applicant who had been classified in second place during the interview.

The complainant argued that this was a case of maladministration since, having been classified first in the interview, the post of Director was rightfully his.

## **Investigations and findings**

A chronology of the salient events in the case is necessary in understanding the case:

Chronological Order of Events:

- 1 October 2007 - Appointed Resident Academic (Assistant Lecturer) at the University of Malta.
- 15 September 2017 - Internal Call for Applications - Director of Institute issued.
- 29 September 2017 - Application submitted by email (as required).
- 30 September 2017 - End of tenure as Resident Academic due age.
- 1 October 2017 - Appointment as Senior Visiting Lecturer.
- 16 October 2017 - Application acknowledged by Office of the Rector.
- 25 October 2017 - Email from Office of the Rector confirming presentation to Council on submitted Mission Statement on 3 November 2017.
- 3 November 2017 - Interview.
- 16 January 2018 - Email to all staff from staff member informing that the sender had been appointed as Director of Institute.

The precise wording of the call for applications is of major import, because it stipulates the requirements very precisely:

The Director moreover:

- a. is to report directly to the Chairman of the Board governing the Institute and shall collaborate with all senior administrative officers of the University;
- b. shall be a Resident Academic engaged with the University on a full-time basis for the duration of his tenure as Director given that the Institute is engaged in teaching programmes of study;
- c. should not be engaged in any Other activity outside the University which may be in conflict with, or distract him from, his duties at the University;
- d. is expected to be present on campus or any designated University of Malta site at least during normal office hours from Monday to Friday throughout the year subject to the exigencies of an academic in accordance with the University's practices and needs, and subject to normal leave entitlement and public holidays as provided for at law; should his absence be necessary and justified he must ensure that he is immediately contactable through the secretarial staff of the Institute;
- e. should be residing in the country at all times;

- f. shall not give access to any information to any third party that is not associated with the University of Malta, about any work or data that relates to tasks conducted at the University of Malta without the prior approval of the University of Malta;
- g. ensure that all work carried out within the Institute must be treated according to Maltese data Protection legislation; and
- h. is to abide with the statutes, regulations and policies of the University of Malta, which are in force now or will become effective in the duration of his tenure.

It is condition (b) that constituted the main cause of the complainant's claim and also, indeed, the basis of its refusal by the University. The chronology above shows that at the date of the complainant's submission of his application for the post, on 29 September 2017, he was still eligible to apply, but that less than 24 hours later he could not have done so because he had lost that ability, strictly stipulated by requirement (b), because of superannuation. The chronology also shows that on the day of the interview, 3 November 2017, he could not have been selected for the post because he no longer satisfied requirement (b), though there was no technical reason why he could not attend the interview since his application had been 'timely'. In other words, the interview had become the complainant's pointless right.

To complicate matters, an unknown person privately informed the complainant of the result of the interview, and he came to know that he had been placed first. It was this forbidden knowledge that spurred the complainant to approach the Ombudsman; had the complainant possessed no such knowledge he would not have felt he had any grounds for protest.

The complainant tried to strengthen his case by claiming that the selected candidate did not have to possess Resident Academic status, since the wording, he claimed, implied that the post itself would endow him with such status. This is patently absurd, since if (b) were to read "*The Director, moreover,.....(b) shall be six feet tall*", it would not mean that the University would give him extra inches in case he were shorter.

## Observations

During the course of the investigations it became amply clear that the complainant had merited his first placing in the interview, because his knowledge of the subject and his vision for future progress in his academic field were solid and most



praiseworthy. Given the man's state of health, mental alertness and his experience and knowledge, one understands that in such cases the legal retirement age can be felt as enforced early retirement.

It was also clear that the interview process had been conducted in proper manner and fashion, and that the listing of interviewees was equally just.

### **Conclusion and recommendations**

The Commissioner pointed out, in his Final Opinion, that the call for applications clearly intended the applicant to be in possession of Resident Academic status not just during the interview but for the duration of tenure in case of selection; he also pointed out the fallacy of believing that Resident Academic was a quality pertaining to the post, rather than an essential quality for occupying the post.

He therefore did not uphold complainant's request, and stated that the University's selection of the person placed second on the list was correct and was incontestable.

He also deplored the lack of circumspection displayed by the person who leaked the information to the applicant as well as the applicant's attempt at using such information, which was unseemly, and urged the University to warn all interviewing panels against disclosure. He urged the University to do its best to conserve the complainant's expertise by utilising him in a non-resident position. He finally advised the University to assess its present policy of interviewing applicants who, irrespective of their qualifications and experience, did not possess Resident Academic status, if this was a *sine qua non*, on the date of the interview, even if they had possessed such eligibility at the time of submitting their application.

**Malta College for Arts, Science and Technology**

# Electronics help to detect a cheating student

A student asked the Commissioner to defend her against accusations of plagiarism by MCAST but the evidence against her was overwhelming.

**The complaint**

The complainant approached the Office of the Ombudsman on 23 August 2018, claiming that she had been unfairly accused of plagiarism and equally unfairly treated by the MCAST investigative Board, known as the MCAST Disciplinary Appeals Board (MCDB) and later by the MCAST Corporate Appeals Board, known as MCAB. Since she was challenging the procedures, she was also challenging the punishments which the Boards inflicted.

The Commissioner also possessed copies of postings and emails exchanged between the complainant and the other student, and this material was proof of fundamental importance.

**Investigation and findings**

The complainant's case was presented in formal fashion by a lawyer. The complainant's position was that although her work showed a similarity to that of another student, it was in fact the latter who had copied her work. Complainant also maintained that the evidence presented to prove this had been ignored by the Board.

The Commissioner, after presenting her case to MCAST, received a detailed rebuttal of complainant's case from the Principal. The similarity between the work submitted by complainant and that submitted by a colleague had been flagged by a computer

programme called 'Turn it in', which is in standard use by practically all academic institutions. The programme estimated a 65% similarity between the assignments submitted by complainant and the other student.

The Commissioner decided to ask for copies of the assignments of the two people involved, and MCAST duly obliged, although there were several pages missing. This was duly rectified when MCAST's attention was drawn. In the interim, the Commissioner interviewed the examiner who had spotted the similarities.

During this interview, it transpired that the complainant had a very poor attendance record, whilst the other student involved was rather average. This was taken into consideration by the Commissioner when he came to form his Final Opinion. The Principal, too, had officially drawn the Commissioner's attention to the fact that her attitude during her meeting with the NCDB had been quite negative and rather deplorable, and that she had refused to accept suggestions by the Board in order to placate matters.

### **Observations**

The Commissioner went through the assignments submitted by both students very carefully, and ascertained the existence of several common areas. One particular instance was outstanding: both students had a paragraph which displayed the same orthographic and lexical errors, an illustration being the word 'this' being spelled 'tjis' by both students. Naturally, this was conclusive in concurring with MCAST's certainty that someone had copied, or that information had been shared.

The problem was, however that of establishing who had copied from who. There was also the matter of establishing whether whoever had copied had done so with or without the other's consent or knowledge.

The Commissioner felt it would be futile to confront the two students in order for them to testify under oath, because experience taught him that he would be faced with two conflicting depositions.

The correspondence that had been exchanged by the two students showed that they conversed frequently, and that the salient topic was the plugging of gaps in their knowledge about particular aspects of their course. This went beyond the

mere banter and banalities most students indulge in when conversing with their colleagues, and indicated a symbiotic relationship which was not academically healthy. It was clear that one student had more urgency in obtaining information than the other, but since the correspondence did not indicate who had said what but merely what was being said, the weaker one could not be identified by name. Both students called each other 'man', although one was female.

It is logical to assume that the complainant, who had a dismal record of attendance, would be in greater need of help, since such a student would have a nebulous impression of the subject-matter. It was, however, a particular phrase in the correspondence that proved the unhealthiness of their dialogue: "*It is not on Turnitin*". Clearly, the two were fishing for material they could use in 'cut-and-paste' fashion without being detected.

The Commissioner felt sure that rather than being a case of plagiarism, this was one of collusion. In fact, the complainant's defence rested on admitting that help had been offered to the other student, but that this was regretted.

### **Conclusion and recommendations**

The Commissioner did not uphold the complainant's pleas. He felt sure, given the weight of the evidence he had seen, that the complainant had developed an academically-unhealthy reliance on the other student, and that it was the complainant who had received material, not the other way round. The Commissioner, too, deplored the fact that complainant had offered, as defence, the preposterous idea that the sharing of information with a colleague in order to dupe the institution was innocuous and was to be considered an act of charity; this displayed an inability on the part of complainant to understand the gravity implied by both plagiarism and collusion.

The Commissioner, therefore, did not uphold the complainant's request for clearance from guilt; neither did he see any improper proceeding on the part of MCAST, except for one particular detail: he failed to see what prompted MCAST to arraign only the complainant when (1) evidence clearly showed that two students were involved and (2) MCAST regulations clearly cater for disciplinary procedures specifically in cases of collusion, apart from plagiarism, and that both carry the same penalties. The Commissioner urged the student to follow the instructions of MCAST in order to rehabilitate and reform.

# **Case Notes from the Commissioner for Environment and Planning**



## **Planning Authority**

# **Unfair treatment by Planning Authority not sustained**

### **The complaint**

This Office received a complaint from an applicant who alleged unfair treatment by the Planning Authority when his application for a change of use to a Class 4B shop at Santa Venera had been refused.

### **Case history**

Complainant had been alleging unfair treatment by the Planning Authority (PA) in the refusal of his application for a change of use at Santa Venera while another application for a change of use in the same area had been accepted.

This Office examined both files pertaining to the applications in question and it resulted that there was a substantial difference between the two applications which were being compared by complainant.

### **Outcome**

It resulted to this Office that the approved application concerned a Class 4B shop that is allowable according to the Local Plan for the area whilst complainant's application included the change of use to a Class 5A (stone-setter workshop) which is not allowable according to the same Local Plan.

Complainant's allegation of unfair treatment was therefore not sustained and this case was closed by this Office.

**Building Regulation Office**

# **Request by an EPB assessor to practice without warrant denied**

**The complaint**

An investigation regarding a complaint against the Building Regulation Office (BRO) by a prospective EPB assessor against the requirement of a warrant established in Legal Notice 47/18. Complainant is arguing that EU citizens should be able to practice as assessors without the need of a warrant.

**Case history**

Since complainant was arguing that citizens should be able to become EPB assessors without the requirement of a warrant as established in L.N. 47/18 this Office informed the BRO of the complaint and requested information on how this issue was transposed through Directive 2010/31/EU and whether there were prior discussions with the Commission regarding this requirement of a warrant.

The BRO informed this Office that prior to the mentioned Legal Notice which had been circulated as part of the inter-ministerial consultation process and the wider public consultation exercise which had eventually been undertaken, the final draft of the Legal Notice drawn up by Malta was sent to the EU Commission for its approval and the requirement of a warrant mentioned by complainant had been agreed to by the EU Commission itself.

**Outcome**

Complainant was informed of the BRO's reply and requested to comment on its reply. Since no reply had been received from complainant this complaint could not be sustained and the case was closed.

## **Planning Authority**

# **Planning Authority accused of improper authorisation**

### **The complaint**

Complaint against the Planning Authority on an alleged improper authorisation for the use of a motor servicing garage which had been issued following a simple letter of the applicant's architect as opposed to a Full Development Permission. This authorisation was issued based on the grounds that the old license for a blacksmith falls within the same Class 5B of the Development Planning (Use Classes) Order.

### **The investigation**

In this case the Planning Authority accepted that its official had made a mistake in the letter issued to the applicant's architect by which he had been informed that there was no need for a permit, since both a blacksmith and a motor servicing garage fall under different classes, namely that of Class 5B and 5C and not both in Class 5B as indicated by the same officer of the Authority. However, the Authority considered the letter of the applicant's architect as a notification under Article 3 of the Order.

After complainant insisted that Article 7 of the Order should apply to this case, since the use as a Class 5B was being taken into consideration, (a Full Development Permission was needed, since the original license had been issued before 1994), the Commissioner concluded that Article 7 does not apply to this case because this applies only if there is a change of use in the same class as specified in the same Order. In this case, where the change of use is from a Class 5C to a Class 5B, Article 3 of the Order should be applied. This Article states clearly that a development notification should be made using the appropriate form.



**Conclusions and recommendations**

Since the motor servicing garage was found to be operating with a wrongly issued document, it was recommended that the Authority should inform the applicant's architect of the error and also inform him to submit a Development Notification Application with all costs settled by the same Authority. It was also recommended that the Licensing Office should be informed of the final decision of the Authority in order to update the information on the relative license.

**Outcome**

At the time of publication, the Authority had not informed this Office whether it will be accepting the recommendations made.

## **Planning Authority**

# **Planning Authority did not abide by law in authorising the demolition of a building**

### **The complaint**

Complaint lodged against the Planning Authority (PA) on alleged failure to abide by law in authorising the demolition of a building at Marsa.

### **Case history**

Complainant alleged that the PA had approved a request to demolish a Grade 2 scheduled building on the basis of Subsidiary Legislation 552.05, which does not authorise the PA to approve demolition of buildings but only the removal of dangerous ones. The building in question was never found to be a dangerous one. It was also stated that this approval was abusive and should be declared null.

Following a preliminary investigation of the relative file this Office informed the PA that there were a number of anomalies in the way this permit was issued and therefore merited immediate suspension of this permit which should be rendered null and void since:

- a detailed site inspection by a Perit appointed by the Authority had not been carried out as per Article 4(3) of S.L. 552.05;
- S.L. 552.05 allows demolition when strengthening is not possible, but the structural appraisal report submitted by applicant's architect only indicated that the building is not structurally sound and that remedial measures to strengthen the existing building are not financially feasible;
- the applicant submitted false information when declaring that the site is not a scheduled one;

- the structural appraisal report indicates that only half of the back part of the building is affected with significant damage whereas the permit in question allows the demolition of the whole back part of the building; and
- when issuing this permit the PA did not request the applicant to submit method statements in shoring the abutting building and in ensuring that the demolition of the back part of the building would not lead to further erosion by the sea, which might, in the future, lead to danger in the front part of the building.

The PA submitted that the dangerous structure request was submitted by the applicant's Perit. The initial request was a proposal to demolish the building. An independent Perit submitted drawings accompanied by a Structural Appraisal Report. The declaration of the need for demolition was not just the appraisal report but it consisted of the entire submission made by the applicant's Perit. The report is a justification for the demolition and the Perit takes full responsibility for his declaration.

The PA added that the independent Perit drew up the structural report independently and may not have been aware of the proposed demolition, however the applicant's Perit requested the demolition of the entire building on the basis of the report and made the application description statement accordingly. The PA also stated that:

- an inspection of the site was not carried out because of the level of detail of the structural analysis which had been carried out by the independent Perit and the quantity of illustrative material which it contained. These clearly presented the state of the building, and incidentally, indicated the division in the relative state of the two halves of the building;
- the structural report and the assessment carried out by the PA were not based on financial feasibility. The most critical structural vulnerability which was identified during the appraisal relates to problems in the foundation of the building. The geotechnical investigation carried out seems to suggest that such footings consist of pad foundations, clearly not the most appropriate type given the location and ground conditions. A new-build would address the problem related to the foundations as well as that which relates to the lack of adequate load bearing capacity of the building frame systems;
- given that the main causes of damages/defects are related to fundamental structural aspects such as inadequate building foundations and under-sized structural elements which are not deemed to satisfy current design Eurocodes,

the building in its current condition is not fit for purpose and therefore demolition and redevelopment of the building may be considered to be the most viable option;

- perusal of the Geoserver indicates that the building itself is not scheduled;
- examination of the documentation submitted indicated that the building may be divided into two parts. The front half is distinct from the rear part of the building in both the type of construction as well as the levels of the individual floors and there is no internal link between the two. The applicant's Perit report indicates the area where the most significant damage is manifested, however, this does not mean that there is no damage in the rest of the building. The PA considered the report and felt that based on its findings, it was prudent to request the reduction of the proposed demolition to the rear half of the building. The architect was requested to reduce the scope of the application in order to retain the front part of the building; and
- the PA informed applicant that when dismantling the part of the building as indicated in the drawings it is his responsibility to ensure that a dangerous situation is not created on any existing building(s) abutting the site on either side, meaning that care must be taken not to damage any building(s) not earmarked for dismantling which includes the front portion of the building. With regards to the wharf, which is already collapsing, this belongs to third parties and it is their responsibility to ensure that the wharf does not collapse.

### **Observations**

An authorisation had been issued by the PA based on S.L. 552.05 following a "*Removal of danger*" application. This consent states that it is evident that danger exists on the site, therefore in terms of Legal Notice 258 of 2002, urgent remedial works are necessary to remove the source of danger. Since the proposal appears to be the only means of removing the source of danger, consent is hereby being granted to remove the source of danger, that is, to dismantle the part of the building as indicated in the drawings.

One of the conditions in this consent stipulates that this consent shall not be used as justification to acquire any future permission on the site. All the provisions of Legal Notice 258 of 2002, Legal Notice 211 of 2016, and PA Circular 3/12 apply.

The issues raised in connection with this complaint can be summarised as follows:

- the absence of a detailed site inspection by a Perit appointed by the Authority;
- whether a danger in terms of the law really existed on site;
- the applicant's failure to declare that the site was scheduled;
- discrepancy between what was declared as dangerous on site and what was actually approved; and
- failure to request the applicant to submit method statements for shoring.

### **1. The absence of a detailed site inspection by a Perit appointed by the Authority.**

The PA based its authorisation on a Structural Appraisal Report drawn up by a Perit who is not the Perit responsible for the application according to law. Against this part of the complaint the PA stated that *"an inspection of the site was not carried out because of the level of detail of the structural analysis which had been carried out by the independent Perit and the quantity of illustrative material which it contained. These clearly presented the state of the building, and incidentally, indicated the division in the relative state of the two halves of the building."* The Perit who prepared the structural analysis report was commissioned by the applicant<sup>1</sup> and hence in its justification the PA is wrong in stating that this analysis had been carried out by an independent Perit. Furthermore, Subsidiary Legislation 552.05 (Legal Notice 258/2002) clearly binds that any authorisation can *"... only be issued on the basis of detailed site inspection by an architecture and civil engineering professional (Perit) appointed by the Authority"*; and establishes that *"Any authorisation issued by the Authority in accordance with article 2 at this Order shall be null and void if it is subsequently discovered that:*

- *one or more of the qualifying conditions for authorisation did not exist at the time that the original request to the Authority was made."*

Hence, the lack of an inspection by a Perit appointed by the Planning Authority is quite evident both at the time that the original request to the Authority was made and even during the processing of this application, and also when this fact was flagged by this Office. Therefore, the authorisation issued by the PA in this regard should be rendered null and void.

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<sup>1</sup> As mentioned in the same structural analysis report.

The terms of the law also show that the appointment of a Perit by the PA (obviously at the request of the applicant) should have already been made when the original request to the Authority was made, thus signalling that the procedure for such authorisations should commence with the mentioned on-site inspection rather than through an application which is processed solely from behind the desk at the PA offices.

## **2. Whether a danger in terms of the law really existed on site.**

The PA submitted that *“The structural report as well as the assessment carried out by the Planning Authority were not based on financial feasibility”* and referred to *“P. 32, Option 3, para 2”* of the structural report which states that *“the most critical structural vulnerability which was identified during the appraisal relates to problems in the foundation to the building...”* and that *“... such footings consist of pad foundations.”* As stated in the structural report a new-build would address the problem related to the foundations and that the building in its current condition is not fit for purpose. Therefore demolition and redevelopment of the building may be considered to be the most viable option. First and foremost, the PA's assertion of an assessment carried out by itself is uneventful as it failed to appoint a Perit as obliged by law. Secondly, the mentioning of *“option 3”* in itself shows that there were at least two other options (other than demolition) as outlined in the same structural appraisal report submitted by the applicant. Subsidiary Legislation 552.05 clearly states that the Authority may authorise emergency remedial works provided that the Authority is satisfied that the danger cannot be removed by temporary shoring of the building or dangerous structure as provided in the Development Notification Order (Article 2(b)(v)). Options 1 and 2 from the structural appraisal report clearly define how shoring could have been done if the third option of demolition were not to be implemented. Demolition option 3, being the viability option, should have been left as the last option to be considered by the PA before issuing this authorisation. Therefore, even in this regard, this authorisation was found to be irregular.

## **3. The applicant's failure to declare that the site was scheduled.**

The PA indicated that perusal of the PA Geoserver shows that the building in itself is not scheduled. However, the same Geoserver shows that the site is within a scheduled area of High Landscape Value, that is, the Harbour Fortifications. Although the applicant still submitted false information in the application form

when he declared that the site (and not the building) is not scheduled when in fact it is, the PA's assertions that the omission of this declaration from the original request does not have any bearing on the issue of this authorisation since Article 2(b)(vi) of the legislation mentions a "*scheduled building*" rather than a "*scheduled site*" are being accepted, although with certain reservations since in a letter to the applicant the PA itself states that the building in question is "*listed*". Following this investigation, a minor amendment to the relative application form for the removal of dangerous structures was suggested requiring applicants to state whether the building, rather than the site, is scheduled.

#### **4. Discrepancy between what was declared as dangerous on site and what was actually approved.**

This issue was raised by this Office since the structural appraisal report<sup>2</sup> only showed half of the back part of the building "*where the most significant damage is manifested*" whereas the PA authorised the demolition of all the back part of the building as shown on the plans submitted with the application. The PA states that "*... it was prudent to request the reduction of the proposed demolition to the rear half of the building*" being distinct from the front half where the clock tower and adjoining offices are located. Although it is not the Commissioner's intent to enter into any technical issues, the main bone of contention regarding this complaint is the actual authorisation issued by the PA for the demolition of the rear part of the building in question as mentioned in parts (1) and (2) above, rather than the details of the same works. Hence, further investigations in this regard are superfluous.

#### **5. Failure to request the applicant to submit method statements for shoring.**

After this Office brought to the attention of the PA its failure to request the applicant to submit method statements for shoring the abutting building and also to ensure that the demolition of the back part of the building would not lead to further erosion, by the approach of the sea, which erosion might, in future, lead to danger in the front part of the building as well, the PA referred to its consent wherein it informed the applicant "*that it is your responsibility to ensure that a dangerous situation is not created on any existing building(s) abutting the site on either side*" and referred to the collapsing wharf as belonging to third parties. It is

<sup>2</sup> Page 15 of the structural appraisal report.

neither safe, nor good practise, nor beneficial for the local cultural heritage to leave any structure yearning for maintenance for years and then allowing its demolition with the PA's endorsement through an accelerated and no-consultation procedure. Although one can understand the difficulties arising in implementing any type of building assessments, of this type, the PA or any other relevant authority should at least be equipped to immediately tackle issues related to imminent danger or illegal demolition of buildings, empowered to suspend any demolition works for a few days until a preliminary *prima facie* investigation is carried out by a Perit appointed by the authority, similar to the procedure followed by the Law Courts when hearing cases involving requests for prohibitory injunctions.

### **Conclusions and recommendations**

The complaint lodged against the Planning Authority (PA) on alleged failure to abide by law in authorising the demolition of a building at Marsa was sustained and the following recommendations were made:

1. The authorisation issued by the Planning Authority for the demolition of part of the building should be rendered null and void since the Planning Authority did not appoint a Perit to inspect the site.
2. The appointment of a Perit by the Planning Authority to inspect the site should be done at the very early stages of the processing of similar applications for the removal of dangerous structures.
3. A minor amendment to the relative application form for the removal of dangerous structures is being suggested, requiring applicants to state whether the building, rather than the site, is scheduled.
4. The PA, or any other relevant authority, should be equipped to immediately tackle issues related to imminent danger or illegal demolition of buildings empowered with the authority to suspend any demolition works for a few days until a preliminary *prima facie* site inspection is carried out by a Perit appointed by the authority.

### **Outcome**

The Planning Authority implemented recommendations number 2 and 3 in that it started appointing an independent Perit when processing similar applications and by amending the relative application form to include a declaration whether the building, rather than the site, is scheduled or not.



However, in its reply the PA stated that although it was in agreement that in this case no site inspection was carried out by a Perit appointed by the Authority, at the same time, the Authority was not agreeing with the recommendation that the authorisation issued by the Authority for the demolition of part of the building should be rendered null and void.

To this effect the report with recommendations was brought to the attention of the Prime Minister. However, as the complainant filed a case in court on the subject matter of this investigation, the Prime Minister was informed that this case had been suspended from further investigation as established by the Ombudsman Act.

## **Planning Authority**

# **Refusal of development permit reversed by PA**

### **The complaint**

Complaint regarding the reversal of a consultation reply submitted from Enemalta to the Planning Authority regarding a development application for the construction of a cow farm at il-Maghtab, Naxxar.

### **Case history**

Complainant stated that the case officer recommended a refusal based on Enemalta's objection to this application since it lies directly beneath the high voltage overhead lines and no development is to be permitted within a 20m corridor on either side of the centre line of the high voltage overhead lines.

Enemalta later changed its position and stated that there is no objection from the side of Enemalta to the issue of the relevant development permission.

Complainant also stated that the construction of a cow farm right next to their homes would present a health and safety hazard and that Enemalta's decision to overturn its submission on this application from an objection to a no-objection is detrimental to their health since it was fundamental for the overturning of the Planning Authority's decision to approve this application.

Enemalta was therefore asked to inform this Office of the reason for its decision to over-turn its submission on this application and it informed this Office that following the original objection letter, further investigation and discussions were carried out, and following a discussion with the applicant a solution was found by deviating power cables, if needed, which the applicant would have needed to undertake at his own expense and therefore withdrew its objection.

Enemalta also informed this Office that health issues mentioned by complainant are not within the competence of Enemalta but are the responsibility of other authorities. It also stated that it does not enter into civil disputes between neighbours and such decisions are only taken on technical grounds as determined by competent Enemalta employees and in line with the law and any other directions given by the relevant authorities and therefore believes that no injustice has taken place.

Complainant was informed of Enemalta's reply and stated that he was never aware of such agreement and if such an agreement was ever in force, Enemalta would have officially justified its change in opinion in writing but evidence shows that such agreement never existed.

The applicant's Architect's only justification for Enemalta's change in position, was that there was a precedent where the very same high tension power lines would have passed over a private property, whose owner was also one of the objectors. Enemalta's position was changed following the persistence of the applicant's Architect and the clearance letter was only issued a few hours prior to the Planning Commission's public meeting.

Complainant also stated that Enemalta is aware that the original objection was correct and that the change in their position was flawed which makes them liable and subject to further precedents with other planning applications.

This Office was also informed that the document presented by Enemalta to withdraw its decision had never been published. Complainant was only shown this document during the Planning Commission's meeting but could confirm that this document made no reference to the agreement mentioned by Enemalta.

Further clarifications were requested from Enemalta regarding their statement that following a discussion with the applicant a solution was found through deviation of lines, if needed, and its objection where it stated that "*no development is to be permitted within a 20m corridor on either side of the centre line of the high voltage overhead lines*". This Office queried why in this case, this is classified as "*if needed*" when a 20m corridor should always be required and, if not, what the lack of 'needs' that may justify departure from such a requirement are.

A copy of the agreement between Enemalta and the applicant mentioned by Enemalta was also requested and this Office informed Enemalta that it is not investigating a civil dispute but rather alleged maladministration by Enemalta.

Enemalta clarified that it is the sole authority competent to determine what is required for its infrastructure and in this case, following further investigation, it was determined that the 20m corridor was not required. Regarding the mentioned agreement Enemalta informed this Office that a verbal agreement was made and a subsequent works agreement would have been entered into once works were required. This Office was also informed that Enemalta **only** has the authority to determine what is required for its infrastructure and any ultimate decisions relating to permits fall within the remit of the Planning Authority and is therefore strongly objecting to the allegation of maladministration.

### **Observations**

This Final Opinion is specifically reporting on the way Enemalta acted as a consultee during the processing, by the Planning Authority, of the development application in question for the renewal of a permit for a cow farm at Naxxar.

This Office did not delve into whether the relative permit that was issued constituted any maladministration by the Planning Authority since this issue was the subject-matter of proceedings pending in front of the Environment and Planning Review Tribunal and it did not delve into whether the overturned objection constituted any disregard to the health and safety requirements, both since the complainant's concern is not the health and safety of the cow farm but the health and safety of the neighbours due to the same cow farm permitted (which permit is subject to the mentioned appeal) and also since the high-tension cables in question were already in place and hence an objection or a no-objection from Enemalta when consulted by the Planning Authority whether these cables had any effect on the proposed cow farm would not have direct effect on health and safety issues concerning the complainant or other neighbours.

Enemalta's reply to this Office's queries raised three serious concerns namely:

- How the statement issued by Enemalta in its original objection letter that no development is to be permitted within a twenty metre corridor on either side of the centre line of the high voltage overhead lines can be over-ruled by the same Enemalta?

- Why in its' objection letter Enemalta stated categorically that no development is to be permitted within the twenty metre corridor whilst in Enemalta's second letter to this Office it replied that a solution was available through deviation of lines "*if needed*"?
- What type of agreement was signed between Enemalta and the applicant in order to over-rule this condition by shifting the high-voltage lines?

To the queries raised by this Office on the above issues, Enemalta replied that it is the sole authority competent to determine what is required for its infrastructure and that at that stage a verbal agreement was reached with the customer.

When considering that the overturning of the objection by Enemalta in this case resulted directly in the Planning Authority's overturning of the refusal recommendation of the proposed development in question, it is necessary, in the first place, that Enemalta adopts strict procedures that remove any doubts from the way consultations are carried out.

If Enemalta is to issue objection letters to proposed developments on the basis that "*no development is to be permitted within a twenty metre corridor*", then it should also state that Enemalta will be willing to allow deviation from this condition so that every applicant is put on the same level playing field, or rather on the same lines, whilst removing any shadow of a doubt.

Secondly, a verbal agreement is not a well enough justification for this objection overturn. What happens if the lines would need to be shifted because of the same cow farm and the owner fails to appear for a works agreement? Are these expenses going to be borne by the company? And what happens if the owner with whom a verbal agreement is reached sells his property in the meantime, also keeping in mind that a permit issued by the Planning Authority is valid for five years and is extendable? Would this verbal agreement be lost? Certainly, similar verbal agreements should be avoided and when Enemalta overturns an objection or even a no-objection, the second letter should clearly state the reasons why the same decision is being overturned. This is required for the benefit of the same company and also for the benefit of the developer, objectors and any other developers, citizens and Architects for the sake of consistency when similar cases are being processed.

Furthermore shifting of lines would also involve third-party properties to where the lines will be shifted and hence an agreement with just the applicant is also not enough.

### **Conclusions and recommendations**

Although Enemalta's overturning of an objection to a no-objection for the proposed cow farm did not directly affect the health and safety of the neighbours but was only the catalyst for the issue of the relative permit, the complaint was sustained on the way Enemalta acted as a consultee in this case. This also asked for serious ramifications in the way Enemalta replies during similar consultations:

- The no-objection letter dated 26 February 2018 issued by Enemalta when consulted regarding a development application concerning the renewal of a permit for the construction of a cow farm at Naxxar was found to be irregular and unjustified.
- When issuing an objection or a no-objection to any proposed development, Enemalta should give the correct full message, that is, if the development infringes or does not infringe its policies it should also state that any amendments could result in the overturning of the objection or no-objection as the case may be.
- When Enemalta issues two opposing statements on the same issue, the second statement shall also give the reason/s why the original statement is being overturned.
- Any agreements between Enemalta and third-parties should never be done verbally and are to be made in writing whilst also imposing the same agreed conditions on any eventual transfer of the property in question and should also consider the impact such agreements would have on neighbouring properties belonging to other third parties.

### **Outcome**

Enemalta replied that these recommendations will be implemented by issuing a no-objection with a number of conditions on a normal basis and an objection is issued in extreme cases.

## Planning Authority

# Own Initiative Investigation on the application of garages policy by the Planning Authority

### The complaint

An Own Initiative investigation in connection with the application of Circular 3/14 issued by the Planning Authority (PA) regarding garages.

### Case history

From a simple search on the applications approved during December 2017, doubts arose whether the PA was correctly applying this Circular as shown below:

- part 3 of Circular 3/14 applies to the “*Change of use of Small Garages linked to Single Dwelling Unit*” but the PA had approved the change of use of a garage that is not so small and garages that are not linked to single dwelling units and that form part of a block of apartments;
- paragraph 3.5 of the same Circular states a number of conditions in line with Paragraph 2.6, which paragraph clearly refers to garages in basements. Nonetheless, the PA approved the change of use of a garage that is not at basement level; and
- paragraph 3.5(c) of the same Circular states that the permit should include a condition which will not allow any reserved parking or any other restrictions to parking as a result of the permitted commercial activity. The PA had not been imposing this condition on the relative permits. Furthermore, the PA should have also been communicating similar decisions with the relevant authorities such as Transport Malta and the relative Local Council.

This issue drastically adds local traffic/parking problems and the mentioned cases are only those that resulted following a one month search and hence more can be found if one were to search the 42 months preceding December 2017.

The PA was also asked to make this Circular available to the public in its website.

The PA informed this Office that the permits referred to by this Office were all recommended for refusal by the Planning Directorate. However, the Planning Commission overturned this recommendation on the justification that the applications were, amongst others, compliant with this Circular.

This Office also informed Transport Malta (TM) of the matter who informed this Office that the PA Circular 3/14 states that discussions with TM have revealed that in instances where there is a conversion from a garage for private cars to small scale use or as classes 4a or 4b, the 'No Parking' space in front of the former garage may be released for general parking, but neither TM nor the PA were aware of any consultations/discussions on this policy. It had been understood that this policy decision was that a new, on-street public parking space would be created when the property's garage access is removed and converted into a small shop but this logic is not always technically applicable.

### **Outcome**

It resulted to this Office that the PA is the competent authority responsible for determining the level of parking provisions required for residential and non-residential development and whether a development that does not comply with these parking provision standards can be permitted and has set up schemes which regulate a developer's financial contribution towards any shortfall in parking. In view of the Commission's decision, the Authority were to evaluate the situation and propose any amendments where necessary.

As the PA is the sole competent authority responsible for establishing and applying parking standards for all new development proposals, TM does not assess a planning application for its compliance with PA parking standards set out in DC2015 or PA circulars. In this respect, TM's clearance for planning applications only concerns those aspects falling directly under TM's legislative and policy remit and it does not get involved in the management or administration of such schemes.



**Environment and Resources Authority**

# **Selection Process deemed as unfair and discriminatory**

**The complaint**

Complaint lodged against the Environment and Resources Authority (ERA) by applicant for the position of Senior Officer Administrative Support within ERA's Human Resources Office alleging that there was an unfair selection process.

**Case history**

After being denied the position during a selection process which was denied by a majority decision of a three-member appeals board, complainant alleged that the selection process was unfair and discriminatory in that another applicant was transferred to the same unit thus accumulating experience. Complainant alleged that a member of the selection panel asked a personal question related to complainant's active role in a particular union. She also pointed out that the allocation criteria were distributed unfairly.

ERA submitted that during the time of the Malta Environment and Planning Authority (MEPA) demerger the Authority required an employee responsible for time, attendance and payroll, and another employee under temping services performing human resources secretarial work without disrupting the operations of the already established Environment Directorate. ERA added that since its inception it has always allocated the criteria for Qualifications, Experience, Suitability and Ability in line with the collective agreement and even though these allocation criteria are published before the selection process, no candidate has objected so far.

**Observations**

The complainant alleged that a member of the Selection Panel surprisingly asked whether her active role in a union would potentially be in conflict with the activities within the human resources unit. Although this question was not in the list of previously approved interview questions and therefore should not be asked. During the relative appeal complainant failed to indicate to the Promotion Appeals Board which member of the Selection Panel asked this question and furthermore complainant did not summon the same member in front of the Promotion Appeals Board to sustain this point. At appeals stage complainant had all the information required to prove this alleged fact in front of the Promotion Appeals Board but failed to use the opportunity in sustaining this allegation. This allegation therefore could not be considered at this stage after the complainant failed to prove this allegation at the first instance in the appropriate forum.

One of the candidates for this post that has incidentally attained the highest marks for suitability and ability and consequently achieved the highest score in this Selection Process had been temporarily posted with the Environment Directorate within the then MEPA. A Final Opinion issued by the Commissioner for Environment and Planning within the Office of the Ombudsman regarding a similar complaint submitted by the same complainant against the then MEPA recommended that *“It is to be emphasised that care should be taken to ensure that no candidate is given an undue advantage over other applicants in a selection process because of the experience he/she may have acquired as he/she was moved to a particular section, particularly if the Authority is aware that a call for that position will be issued in the near future. Such situations might give rise to understandable doubts and suspicions that the selection process was not being conducted on a level playing field for all candidates and was therefore unfair.”* What applied to MEPA applies to ERA. This recommendation still holds and no further actions can be recommended.

One cannot recommend any reduction of points to candidates who have had such experience since this is neither fair on the relative candidate nor beneficial to the whole process. Postings in a particular section, especially if the Authority is aware that a call for that position will be issued in the near future, should be carried out with due diligence and motivation so that any doubts are eliminated, even so when the Authority was aware that various candidates showed their interest in the relative post through the previous call for application that was the subject of the mentioned Final Opinion.

In the call for applications, ERA indicated that the allocation criteria will be 10:10:40:40 for Qualifications: Experience: Ability: Suitability. This gave the following results:

Candidate	Experience	Qualifications	Ability				Suitability				Total	Order of Merit
A	5	10	8	8	8	8	8	8	8	8	79	<b>1</b>
B	9	10	6	7	5	7	5	4	4	4	61	<b>11</b>
C	7	10	8	9	7	7	7	8	8	4	75	<b>3</b>
D	9	10	7	7	7	7	7	6	7	7	74	<b>4</b>
E	10	10	7	8	8	7	6	4	5	4	69	<b>8</b>
F	10	10	7	7	7	6	7	6	6	5	71	<b>5</b>
G	10	10	8	8	8	7	7	7	7	6	78	<b>2</b>
H	9	10	7	6	7	7	6	6	6	6	70	<b>6</b>
I	7	10	7	7	7	6	6	6	6	6	68	<b>9</b>
J	8.5	10	7	7	7	7	6	6	7	4	69.5	<b>7</b>
K	8	10	7	7	6	6	6	5	6	5	66	<b>10</b>

In the previous call which was the subject of the mentioned Ombudsman report, MEPA had established a ratio of 20:25:30:25 for the relative criteria. In this regard, ERA submitted that the established ratio of 10:10:40:40 is in line with the Collective Agreement and that ERA has adopted the stance of allocating 10% for the 'Experience' criteria in all the call for applications in order to streamline its recruitment process, thus avoiding arbitrary decisions.

In actual fact, the allocation of 10% for 'Experience' is encouraging arbitrary decisions rather than avoiding them since a lesser percentage for the objective criteria of 'Experience' leads to a higher percentage for the subjective criteria of 'Ability' and 'Suitability'. Furthermore, objective criteria, as opposed to subjective criteria, can be easily scrutinized for example at appeal stage and the table below shows that the allocation of 10% for 'Experience' will result in an Order of Merit for all candidates that is fairly similar to the Order of Merit the candidates would have attained if the candidates' experience was not considered at all. Thus undermining the whole Selection Process since this would mean that experience did not play any part in the adjudication process.

Candidate	Qualifications	Ability				Suitability				Total	Order of Merit	Order of Merit 1
A	10	8	8	8	8	8	8	8	8	74	<b>1</b>	1
B	10	6	7	5	7	5	4	4	4	52	<b>11</b>	11
C	10	8	9	7	7	7	8	8	4	68	<b>3</b>	3
D	10	7	7	7	7	7	6	7	7	65	<b>4</b>	4
E	10	7	8	8	7	6	4	5	4	59	<b>9</b>	8
F	10	7	7	7	6	7	6	6	5	61	<b>5</b>	5
G	10	8	8	8	7	7	7	7	6	68	<b>2</b>	2
H	10	7	6	7	7	6	6	6	6	61	<b>6</b>	6
I	10	7	7	7	6	6	6	6	6	61	<b>8</b>	9
J	10	7	7	7	7	6	6	7	4	61	<b>7</b>	7
K	10	7	7	6	6	6	5	6	5	58	<b>10</b>	10

Furthermore, it is not fair that a candidate with five years' experience achieves the same marks in the 'Experience' criteria as a candidate with twenty years' experience. Thus, other than increasing the percentage allocation for 'Experience' to 20%, it is also being recommended that candidates are awarded a point for every year of experience up to a maximum of twenty years in order to improve the Selection Process and this for the benefit of both the employee and the employer.

The allocation of 10% for 'Qualifications' (over and above the entry requirements) is similarly indicative that with or without qualifications (over and above the entry requirements) almost all candidates would have achieved the same standing as shown in the table below, thus prejudicing the whole Selection Process as this would mean that candidates for similar non-managerial posts who embark with further studies to enhance their qualifications are not rewarded in the adjudication process.

Candidate	Experience	Ability				Suitability				Total	Order of Merit	Order of Merit 1
A	5	8	8	8	8	8	8	8	8	69	<b>1</b>	1
B	9	6	7	5	7	5	4	4	4	51	<b>11</b>	11
C	7	8	9	7	7	7	8	8	4	65	<b>3</b>	3
D	9	7	7	7	7	7	6	7	7	64	<b>4</b>	4
E	10	7	8	8	7	6	4	5	4	59	<b>8</b>	8

F	10	7	7	7	6	7	6	6	5	61	<b>5</b>	5
G	10	8	8	8	7	7	7	7	6	68	<b>2</b>	2
H	9	7	6	7	7	6	6	6	6	60	<b>6</b>	6
I	7	7	7	7	6	6	6	6	6	58	<b>9</b>	9
J	8.5	7	7	7	7	6	6	7	4	59.5	<b>7</b>	7
K	8	7	7	6	6	6	5	6	5	56	<b>10</b>	10

Thus, an allocation of 20% for the qualifications (over and above the entry requirements) criterion is also being suggested in order to further improve the Selection Process whilst encouraging employees to improve their qualifications and this for the benefit of both the employee and the employer.

The recommended criteria of 20:20:30:30 for Qualifications: Experience: Ability: Suitability with one point for every year of experience as suggested would have given the following results (Order of Merit 2) as compared to the actual results (Order of Merit 1)<sup>3</sup>.

Candidate	Experience	Qualifications	Ability				Suitability				Total	Order of Merit 1	Order of Merit 2
A	10	16.5	6	6	6	6	6	6	6	6	74.5	<b>1</b>	6
B	18	8.5	4.5	5.3	3.8	5.3	3.8	3	3	3	58	<b>11</b>	11
C	14	19	6	6.8	5.3	5.3	5.3	6	6	3	76.5	<b>3</b>	4
D	18	20	5.3	5.3	5.3	5.3	5.3	4.5	5.3	5.3	79.25	<b>4</b>	2
E	20	11.583	5.3	6	6	5.3	4.5	3	3.8	3	68.33	<b>8</b>	10
F	20	20	5.3	5.3	5.3	4.5	5.3	4.5	4.5	3.8	78.25	<b>5</b>	3
G	20	20	6	6	6	5.3	5.3	5.3	5.3	4.5	83.5	<b>2</b>	1
H	18	14.167	5.3	4.5	5.3	5.3	4.5	4.5	4.5	4.5	70.42	<b>6</b>	8
I	14	20	5.3	5.3	5.3	4.5	4.5	4.5	4.5	4.5	72.25	<b>9</b>	7
J	17	20	5.3	5.3	5.3	5.3	4.5	4.5	5.3	3	75.25	<b>7</b>	5
K	16	18	5.3	5.3	4.5	4.5	4.5	3.8	4.5	3.8	70	<b>10</b>	9

In its submissions regarding the above, ERA justly added that no candidate has so far objected to the 10% allocation. However, it is very unlikely to expect a candidate participating in a selection process to object to the selection criteria that were established to adjudicate the Order of Merit of the same candidate and that of the fellow applicants.

<sup>3</sup> The marks for 'Ability' and 'Suitability' have been adjusted accordingly, that is 40:30.

Although the above reasoning as illustrated in the relative tables appears to be too mathematical, this Selection Process was purely based on a mathematical table outlining the marks achieved by each candidate in various criteria, thus calling for a similar mathematical analysis that signifies the reasoning behind the following conclusions and recommendations.

### **Conclusions and recommendations**

Although the allocation of 10:10:40:40 for the criteria of Experience: Qualifications: Ability: Suitability in the selection process was unfair and resulted in a worse standing for the complainant, the complaint is not being sustained both since the complainant would still have not attained the first two positions required for the post and also since this allocation was established and advertised from the start of the selection process.

Nonetheless, this investigation has highlighted the need for a revision of the Selection Process by revising the ratio for the selection criteria to 20:20:30:30 for Experience: Qualifications: Ability: Suitability attributing a point for every year of experience particularly for non-managerial posts and posting of employees in a particular section, especially if the Authority is aware that a call for that position will be issued in the near future, should be carried out with due diligence and motivation so that any doubts are eliminated, even so when the Authority was aware of various candidates that showed their interest in the relative post through the previous call for application that was the subject of another investigation.

### **Outcome**

As a follow-up to this recommendation, ERA agreed that any future calls will include the following to further enhance and improve the selection process:

1. Over and above entry requirements will be assessed for both the qualifications and the experience criteria.
2. The experience criteria will be on a one point to one year experience rather than one point for two years experience as was assessed for the case in caption.
3. Other than the selection panel and the selection criteria, the call issue will also include a statement indicating the right of the candidates and the procedure to be adopted when there is an objection against the composition of the selection panel.

## Planning Authority

# Incorrect application of policies and procedures by Planning Authority

### The complaint

Complaint lodged against the Planning Authority (PA) on alleged incorrect application of policies and procedures for a site at Pembroke.

### Case history

Although complainant lists a number of objections against this application, the main issue considered in this opinion related to the procedure adopted by the PA when it excludes stores from the retail area calculation when considering shops within residential areas.

Although the PA was given twenty days' time to submit its view on this matter, no reply was forthcoming.

### Observations

The case officer report on this application states that:

*"The proposed Class 4B shops together with the store and sanitary facilities covers a total floor space of 141 square metres. As, the actual proposed retail space is limited to 73sqm, the proposed development can still be considered for local use, in line with the Local Plan designation. Furthermore, the site in question is located in proximity of the Pembroke Local Centre and thus, the flexibility policy FL-GNRL-1 (particularly proviso G) of Partial Review of Subsidiary Plans: General Policy relating to Regeneration/Consolidation Initiatives can be applied for this proposal."*

With regards to the flexibility policy FL-GNRL-1, the case officer report did not qualify the applicability of this policy to the application in question, especially since proviso G specifies that this policy is applicable to areas that “... *are already occupied by a considerable level of legitimate commitment whose nature may not necessarily be in line with local plan policies or on a site which is a legitimately established business outlet*”. The case officer report only justified the applicability of this policy on the argument that “... *the site in question is located in proximity of the Pembroke Local Centre*”. If this were to be the case, then almost half of the residential area of Pembroke will qualify within the parameters of this flexibility policy.

The case officer reports that “*According to the North Harbours Local Plan, the area is designated as Residential. Policy NHHO01 of the Local Plan permits Class 4B shops within Residential Areas, provided that these do not exceed a floor area of 50m<sup>2</sup> for comparison or convenience goods and 75m<sup>2</sup> for convenience goods only and that they do not unacceptably exacerbate parking problems in a residential street that already has an acute under provision of parking spaces for residents, and they comply with any relevant section of DC 2015 (design, access, amenity, etc.)*.” Policy NHHO01 of the Local Plan permits small shops in residential areas provided that:

- “*the small shops (of any nature) are not to exceed a total floor area of 50 sqm each, and convenience shops are not to exceed a total floor area of 75 sqm each;*
- *they comply with all the provisions of paras. 1.4.16 to 1.4.18 of the Interim Retail Planning Guidelines (2003); and*
- *they comply with any relevant section of the DC2005 (design, access, amenity, etc.).”<sup>4</sup>*

Paragraphs 1.4.16 to 1.4.18 of the Interim Retail Planning Guidelines (IRPG) state the following:

**“1.4.16** *The Malta Environment and Planning Authority will encourage the modernization and limited expansion of local convenience shopping facilities. This will be achieved by allowing the continued development of very small convenience shops within residential areas other than those areas zoned in the Temporary Provision Schemes or Local Plans for detached or semi-detached residential development (as per DC 2000 section 15.3).*

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<sup>4</sup> The total floor area is being underlined since the word ‘total’ was omitted in the case officer report.



*1.4.17 Small shops (Class 4A as per Use Classes Order 1994 as amended) in residential areas offer a vital service to the neighbourhood. In many locations, there is continued demand for new and expanded convenience shopping. As a general principle, local provision of such facilities will reduce the need to travel by encouraging shorter shopping trips, often on foot. Many small shops can be accommodated within residential areas without causing nuisance to neighbours. However, careful control of these uses is required in order to protect the residential character of the local neighbourhoods, prevent nuisance to neighbouring properties, and avoid localized traffic congestion within residential areas.*

*1.4.18 Small shops (Class 4A as per Use Classes Order 1994 as amended) with a combined sales and storage area of up to 75 sq m will be allowed, without an automatic requirement for additional off-street parking provision provided that:*

- *The proposal will not threaten the residential character or function of the area either by:*
  - *attracting a large number of customers from outside the immediate locality; or*
  - *introducing a development which is not sympathetic with neighbouring residential buildings in terms of building line, scale or the design of the façade; or*
  - *visual intrusion of signboards and advertisements (illuminated or otherwise)*
- *The shop will not create nuisance for neighbouring residents through noise, smell, lighting, hours of servicing, hours of congestion and operation or other factors.*
- *The shop will not cause local traffic congestion, or jeopardize the safety of road users or pedestrians, through customer parking or access by parking vehicles.*
- *The shop will not encourage on-street parking on arterial or distributor roads.”*

Assuming that the shop in question is of a convenience nature, section 1.4.18 of the IRPG clearly states that the maximum allowable area of 75 square metres is the “... combined sales and storage area ...” and hence the case officer was wrong in

recommending an approval of this application on the proviso that the shop qualifies as a local shop within the Local Plan designation when in fact it was not according to the established policies since the proposed shop had a total area of 141 square metres. Otherwise, a shop with a retail area of 75 square metres and a storage space of say 100 square metres will be approved notwithstanding that a shop with a total floor area of 175 square metres can never, by any means, be considered as a small shop. Furthermore, this separation of the storage area from the actual retail area in calculating the total area is also endorsing the introduction of unacceptable storage areas within residential areas.

Hence, the Planning Commission was misled by the case officer report when the proposed shop was flagged as a small local shop less than 75 square metres in area when in fact it was not. This error on the face of the record in the processing of this application calls for the revocation of the permit in question.

### **Conclusions and recommendations**

The complaint alleging incorrect application of policies and procedures by the Planning Authority when excluding storage areas from the total floor area of small shops within residential areas is sustained.

Small shops shall be allowed within residential areas strictly as established in the Local Plan, that is, not exceeding a total floor area of 50 square metres for shops of any nature and not exceeding a total floor area of 75 square metres for convenience shops. The total floor area is always to be taken to mean the combined sales and storage area.

The Planning Authority should initiate revocation procedures since this permit was issued following an error on the face of the record as the Planning Commission was misled in this regard by the case officer report.

### **Outcome**

The Planning Authority Board voted against the revocation of this permit.

As another application on the same site that further increased the shop area and that was subsequently also approved by the Planning Authority was appealed by the complainant in front of the Environment and Planning Review Tribunal, this recommendation was not followed up pending the outcome of the Tribunal decision.

# **Case Notes from the Commissioner for Health**



**Department for Health**

# **Department of Health states that a baby in utero is not recognised as a person at law**

**The complaint**

A pregnant woman whose yet unborn baby was diagnosed with a condition that needed an urgent operation abroad immediately after birth was sent to the United Kingdom (UK) by the Department of Health so that, after delivery, the baby would be operated.

Before departure to the UK, the parents were told that the Department of Health was not going to pay them for their airfares in line with the policy of the Department of Health regulating cases of babies or children under the age of eighteen. The reasoning behind the Department's decision was that when they left Malta the baby was still unborn.

The parents sought help from the Office of the Ombudsman and lodged a complaint.

**Facts and findings**

The Commissioner for Health took up the case and asked the Department of Health for their position on the matter. In their reply, the Department of Health agreed to pay for the inward fare, i.e. from UK to Malta, of the baby but not the parents. The Commissioner drew the attention of the Department that in this case, the patient was the unborn baby. Therefore the parent's airfares should have been provided for as is the norm with patients under 18 years of age.

Following the representations made by the Commissioner, the Department accepted to reimburse the inward flight tickets for the parents too (UK to Malta) but not the outward flights (Malta to the UK). The Commissioner

asked the department to explain how an unborn baby could receive treatment immediately after birth unless the mother who is carrying the baby in her womb travels to the UK.

### **Conclusions and recommendations**

The Commissioner for Health did not agree with the reasoning of the Department, and in his reply, he argued that in his opinion the Treatment Abroad Committee, within the Department of Health, did not send the pregnant women to deliver her baby in the UK, but the pregnant woman was sent abroad because of the medical problems which the baby had been diagnosed with before birth.

The Commissioner recommended that the parents should also be reimbursed for the outward (Malta to the UK) tickets.

### **Outcome**

Following the recommendation of the Commissioner, the Department of Health informed the Commissioner that his recommendation was not accepted because *“A baby in utero is not recognised as a person at law”*.

The Commissioner for Health replied that if *“a baby in utero is not recognised as a person at law”*, why does the Ministry for Health send mothers whose babies in ‘utero’ would need to be operated whilst still in the womb and the mother then returns to deliver her baby in Malta? Therefore, if the *“baby in utero is not recognised as a person at law”* on what does the surgeon operate?

The Commissioner than also quoted extensively from a Civil Court judgement given by Mr Justice the Hon. Lawrence Minto<sup>1</sup> in 2015 which shows that an unborn baby has its rights and that once conceived he/she is not an object but a person.

Following this, the Department of Health informed the Commissioner that they were accepting his recommendations.

Subsequently, the Commissioner for Health, in a letter to the Department for Health, stated that the said categoric statement of the Department of Health is completely

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1 Judgement delivered by Hon. Judge Lawrence Minto<sup>1</sup> Civil Court, First Hall, 16th December 2015, Ref:242/15LM.

unacceptable, not only because it opens up the entire contested issue of whether the human foetus has a right to the protection of law, but also because it prejudices and compromises the on-going debate on whether abortion should or should not be entertained at any stage.

This statement goes well beyond what various strata of the political spectrum to date publicly have stated to be their stand on this matter. The Commissioner for Health highlighted his concern on this statement, because he is of the opinion, that citizens have the right to a clarification on its content and extent and to be informed whether this, is in effect, the official position.

The erudite judgement delivered by Mr Justice Minto discusses in depth and on the strength of authoritative opinions, to what extent the law recognises the human foetus as the subject of rights and obligations. The judgement rightly considers these issues from a purely legal stand point, avoiding references to relevant, even if conflicting, moral and ethical standards. It is a judgement that needs to be studied and discussed in so far as it correctly enunciates what the legal position is today. In the Commissioner's opinion this judgement:

1. runs counter to the statement made by the Department of Health to the effect that the human foetus does not enjoy any rights;
2. it has to be kept in mind that this judgement was delivered in 2015, i.e. before the public debate on the introduction of abortion had taken ground, and before the legislation allowing for the freezing of human embryos came into force;
3. this latter development underlines the fact that the law today recognises that the human embryo has an existence that is separate and distinct from that of the mother and the natural father, and can be the subject of rights and obligations, even if one could argue that these concern a stage prior to conception;
4. it is in the Commissioner's opinion that a clear distinction is to be made between when rights and obligations are created, and the moment in time when rights can be exercised and obligations become binding. It is therefore perfectly possible for a human foetus to be endowed with rights when still in utero, even though these rights can only be exercised after it is born and viable, or even before being born, by someone on its behalf.

These are vital issues that need to be determined and should not be lightly disposed of by generic statements that can lead to serious misunderstandings. Therefore, the Commissioner for Health felt that he should highlight this issue.

**Principle Permanent Secretary**

# Written warning to a civil servant unjustly issued

**The complaint**

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

Notwithstanding his explanation, the Principal Permanent Secretary informed the civil servant that the charge stood. Following the confirmation that charge was still in force, the civil servant wrote to the Public Service Commission (PSC) asking them to investigate the matter. In their reply, the PSC said that that the decision was administrative and not a disciplinary procedure, and therefore the PSC could not consider the case.

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

**The investigation**

The case was investigated and it transpired that the charge was filed after a Board of Investigation, which was appointed by the Office of the Prime Minister, issued a report. The Board of Investigation had concluded that the actions of the civil servant were neither done intentionally nor as a consequence of negligence. The Board continued that the inactions of the complainant were in their opinion as a result

of lack of knowledge. The Board, however, stated that the employee's actions or inactions could be closely linked to offences indicated in the Schedule of Offences and Penalties in the PSC Discipline Regulations 2017. Following the Board's report, the Principal Permanent Secretary issued the written warning to the complainant.

This Office asked for a copy of the report issued by the Board of Investigation. Following perusal of the report, the Commissioner issued a detailed report, based on documentation compiled by his Office and interviews as part of the investigation. He explained why the employee should not have been charged. The Commissioner concluded that the complainant was in no way responsible as charged and was therefore unjustly found guilty through a written admonishment by the PPS.

### **Recommendations**

The Office of the Ombudsman recommended that the PPS should inform the complainant in writing that the original decision to issue a written admonishment was being rescinded. He also recommended that the complainant should be compensated financially to cover the legal fees he incurred and for the harassment which caused him unnecessary distress during the period of uncertainty while being investigated.

From an operational point of view, the Commissioner recommended that a Standard Operations Procedure (SOP) should be in place for every civil servant to follow.

### **Outcome**

The PPS continued to rely on the findings of the Board of Inquiry commissioned by the Office of the Prime Minister, ignoring completely the findings and conclusions reached by the Office of the Ombudsman. In terms of the Ombudsman Act the case was then referred to the Prime Minister. The reply was received from the PPS stating the same as the previous reply.

The case was therefore referred to the House of Representatives as provided for by the Ombudsman Act.



**Malta College of Arts, Science and Technology**

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

## **The complaint**

A number of employees in the Decontamination and Sterilization Section of Mater Dei Hospital complained with the Office of the Ombudsman because they were told that they were ineligible to apply for the post of Technician in their Section.

In their submission, the complainants stated that, even though they had the necessary qualifications required in the Call for Applications, they were rejected on the basis that the certificate they possessed was considered as an 'Award' and not a Qualification.

Since the employees were employed in the public health sector, the Ombudsman referred the case to the Commissioner for Health for investigation.

## **Facts and findings**

The Commissioner for Health vetted the Call for Applications and one of the requirements, which the employees referred to in their complaint was "... *an MQF Level 3 Qualification...*". The Call did not specify the number of credits required.

The Commissioner asked the complainants to show him a copy of the qualification they possessed following a course at the Malta College for Arts, Science and Technology (MCAST). The certificate awarded to the complainants by MCAST stated that "*Mr X has successfully completed the following course – Decontamination Science*". Also, the certificate issued by MCAST classified the course as "*MQF Level 3 – Credits 4ECVET*".

The Commissioner for Health asked the Public Service Commission (PSC) for a clarification on the matter, and in their reply the PSC stated that the certificate that the complainants possessed, according to the National Commission for Further and Higher Education (NCHFE) Referencing Report 2016, was considered to be an Award, not a Qualification because a qualification would require at least 60 Credits.

The complainant's reaction to the PSC's view on the matter was that they had followed a Course as advertised by MCAST. The Commissioner also vetted the MCAST advertisement which stated that the Course *"is aimed at providing training for an area of employment in Mater Dei Hospital within the Central Sterile Supply Department (CSSD). The course has been designed to provide the necessary theoretical knowledge and to develop personal qualities and attitudes essential for successful performance in the said role.*

*This is a 40hr guided learning course. Students need to invest further hours in the course, which will include private study and home assignments."* The course was the only one offered in this field.

Moreover, the Commissioner noted that the very first words in the advertisement were *"The course offers a focused qualification ..."* and it is at *"MQF Level 3"*. There was no mention indicating the number of credits. Therefore, the Commissioner considered that MCAST misled the students because MCAST very well knew that a Level 3 qualification needed at least 60 Credits.

As part of the investigation, the Commissioner also perused the Agreement for this category of employees, entered into between the Government and the General Workers Union (GWU) which stated: *"Open calls will be issued to candidates in possession of an MQF Level 3 qualification, relevant to the area of work ..."*

The Commissioner for Health recommended to the PSC that a new call for applications be issued to include a clause which stipulates that successful candidates would be given the chance to undergo the new course to be organised by the Head of the Infection Control and Sterile Services at MDH in collaboration with MCAST and will be given the appointment on successful completion of the course which is expected to be of one year duration and which will reach the standards of qualification at Level 3. MCAST will then issue the appropriate certificate.

**A parallel investigation by the Commissioner for Education**

Since there was an educational institution involved in this case, the Commissioner for Health sought the assistance of the Commissioner for Education in the Office of the Ombudsman.

The Commissioner for Education investigated the educational part of the case and during the investigation commented *“that this course leads to an Award, not a Certificate, and is not recognised by either the NCFHE or the Department of Health as a Qualification. It is only meant to introduce interested parties to the subject of Decontamination, but it does not render them eligible to apply for posts or promotions with the Department of Health.”*

In his Final Opinion, the Commissioner for Education concluded that the *“This case presented ... a blatant instance of fraudulent advertising by a major stake-holder in the national educational scene.”* He continued that the fact the Institution belongs to Government makes it worse and the certificate issued by MCAST was a worthless piece of paper.

In their reply, MCAST agreed with the Commissioner for Education and stated that they had passed his strong recommendation about the Course in Decontamination Science to ensure that the recommendation is put into effect.

The Commissioner for Education agreed with the recommendation of the Commissioner for Health and recommended that MCAST, in collaboration with the Head of Infection Control and Sterile Services at Mater Dei Hospital, should draft a syllabus for a course which would endow its successful students with a genuine qualification MQF level 3 or above. He also asked MCAST to eliminate the advertisement pertinent to the course in question and refund the participants the subscription fee.

**Conclusions and recommendations by the Commissioner for Health**

In addition to the recommendation made to the PSC, the Commissioner for Health recommended that it would be only fair that the employees should be given another opportunity to apply for the post, especially since many of complainants had been working in the said section for several years. Therefore a fresh Call for Applications should be issued.

**Outcome**

The Chairman of the Department of Infection Control under whose responsibility this section falls has agreed with recommendations made by the Commissioner for Health.

Discussions are now being held with MCAST to organise the programme.

**Mater Dei Hospital**

# Procurement process causes inconvenience to patients

**The complaint**

A patient who was prescribed elastic stockings which are used to aid circulation complained with the Office of the Ombudsman because Mater Dei Hospital (MDH) do not have the smallest or largest sizes of the needed stockings. The complainant had asked the nurse at MDH for a larger pair and was told that they do not have. She was asked to go to the hospital pharmacy which also did not have the needed size.

**Facts and findings**

The complainant was admitted at MDH on a Sunday and needed the stockings to improve blood circulation before she underwent an operation. Being that it was on a Sunday afternoon, it was not possible for her relatives to find a private pharmacy from where larger stocking could be procured. She later decided to lodge a complaint for the benefit of other patients.

The Commissioner for Health accepted to go into the case and asked the Department of Health for their feedback. In their reply, the Department of Health informed the Commissioner that the tender which regularised the procurement of such stockings provided only for small, medium and large sizes.

In his reaction, the Commissioner insisted that the Department of Health should also provide extra-small and extra-large sizes, to cater for all the patients. In their reply, the Department of Health said that this was not possible because it would go against tender regulations.

**Conclusion**

The Commissioner for Health concluded that the present supplier should be asked whether he could supply the extra-small and extra-large sizes. If not, the Department of Health would be in order to procure them from other sources.

The Commissioner for Health commented that he could not understand that on such small expense, the Department of Health is finding it so difficult to purchase a few pairs of elastic stockings.

**Outcome**

After two years this matter is still pending and extra-small and extra-large stockings are not yet available for patients.

**Department of Health**

# **Patients sent for treatment to the UK treated differently from those sent elsewhere in the EU**

**The complaint**

The Department of Health sent a patient for treatment to Italy. The patient was asked to pay for certain expenses which patients, who are sent by the Department of Health to the UK, were not asked to pay. The patient alleged that patients sent by the Department of Health for treatment to the UK are treated differently from patients sent to Italy. This, in his opinion, amounted to discrimination and he felt that he was unfairly treated.

The patient complained with the Office of the Ombudsman asking the reimbursement of the expenses incurred.

**Facts and findings**

During the investigation, it transpired that before April 2017, there was no distinction between paying the expenses of patients sent to the UK or other parts of Europe for treatment. However, in April 2017 the Department of Health reviewed the policy, and decided to pay for the accommodation, flights, and other expenses to patients who went to the UK but only the medical expenses were to be paid for those patients sent elsewhere in Europe.

The Commissioner argued with the Department of Health that the patient did not choose to go to Italy himself, but it was the Department which decided the country and hospital where the patient had to undergo treatment.

**Conclusions and recommendations**

The Commissioner concluded that no distinction should be made between patients sent by the Department of Health for treatment to the UK and patients sent elsewhere in Europe.

The Commissioner recommended that the Department of Health should reimburse the expenses incurred by the patient. He also suggested that the policy should be changed to avoid such discrimination.

**Outcome**

The Department of Health accepted the recommendations of the Commissioner and reversed to the policy as it was before April 2017 and reimbursed the complainant the expenses incurred.



**Social Security Department**

# Cancer patient denied of sickness benefit

**The complaint**

An employee was diagnosed with cancer and had to be treated by chemotherapy at the Oncology Unit of Mater Dei Hospital. The treatment consisted of a three-day session throughout several weeks. The patient applied for sickness benefit with the Department of Social Security. However, his request was turned down because sick leave benefit is granted from three days onwards.

The patient asked the Office of the Ombudsman to intervene in his case to be reconsidered given the circumstances.

**Facts and findings**

The Social Security Act stipulates that an employee that has not already exhausted the annual paid sick leave entitlement, for the first three consecutive days of sick leave availed of by the employee are paid in full by the employer. From the fourth consecutive day of paid sick leave (on full pay) availed of, the employer is to pay the employee his/her full wage less the amount equivalent to the sum set for sickness benefit entitlement at the rate established under the Social Security Act.

However, since the complainant was having regular treatment he had already exhausted all his paid sick leave entitlement. Also, in this particular case, since the duration of the treatment was of repeated three consecutive days, the patient was not entitled for the sickness benefit from the Department of Social Security.

The Commissioner for Health made representations with the Department of Social Security on the after effect of chemotherapy treatment and that the period of recovery should be included as part of the treatment. The Commissioner insisted that the spirit of the law was not meant to include such life-threatening cases. In his view, it should be amended to reflect similar instances.

**Conclusion and recommendations**

The Commissioner for Health concluded that in cases where the patients were hospitalised merits special consideration. The Commissioner recommended an amendment in the Social Security Act so that patients who are hospitalised, even up to three days, would be given the benefit.

In their reply the Department for Social Security submitted that a discussion was initiated to provide for such unfortunate and unfavorable circumstances. Amendments to the Social Security Act will have to be effected in a way that avoids abuses.

The case is still under consideration by the Department of Social Security.

**Mater Dei Hospital**

# **Delay to issue a Certificate of Death caused distress to parents**

**The complaint**

The father of a young person who died suddenly at home complained with the authorities that after six months from the demise of his son the authorities had not yet issued a Certificate of Death. After a series of letters to various high ranking people, the parent resorted to the Office of the Ombudsman for help.

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

**Facts and findings**

From the documents presented with the complaint, it resulted that following the death of his son the authorities only issued a provisional Certificate of Death. The reason given to the parents was that since a magisterial enquiry was underway, blood samples were sent by the Court expert abroad and the results were still not available, therefore a formal Certificate of Death could not be issued.

Even though employees of Mater Dei Hospital assured the parents that the process should not take long, six months after the death of his son, he discovered that the blood samples had not even been sent for analysis.

From enquiries made by the Commissioner for Health it resulted that whenever the Court expert needed to send samples abroad, it was the practice that such samples are taken by hand twice a year. Since the person concerned had died very soon after a batch of samples had been taken to the UK, other cases were left in abeyance. Without a death certificate, the parents could not register the death of their son with the Public Registry and consequently could not perform any other

administrative procedures related to the death of a person. This delay added further anxiety to their grief.

The Commissioner for Health queried with the Court authorities and asked why such samples were not sent by courier whose services are available every day, a practice which is regularly already used by Mater Dei Hospital. In their reply, the Court authorities said that the matter would be taken up between the inquiring Magistrate, and with the Court Administration.

### **Conclusion**

Following the queries made by the Commissioner for Health, the Court expert informed the Commissioner that a local qualified person who can perform the necessary tests was found. It transpired that in previous years, a Toxicologist used to perform these tests locally, however, upon his retirement; no one was available to fill in his post.

The Commissioner also noted that it was wrong that the parents of the deceased were told that the samples were sent for examination when in fact they had not been sent.

### **Outcome**

Following the intervention of the Commissioner for Health, and the fact that the results of the blood tests became available, the Certificate of Death was subsequently issued.

**Mater Dei Hospital**

# **Feeding kits provided by MDH not compatible with pumps supplied by UK hospital**

**The complaint**

A child was sent to the United Kingdom by the Department of Health for treatment. Following investigations carried out by the UK health professionals, it was decided that the child needed feeds through a specific pump available for patients with such conditions. The pump was provided for by the UK hospital, and the child's parents were trained to use the said pump without the need for any assistance. The pump supplied by the UK hospital needed specific kits for the daily use.

After some time the parents asked Mater Dei Hospital (MDH) to give the Kits which have to be compatible with the pump which their child is using. MDH replied that it uses different type of pumps. Instead of providing the Kits, they wanted the parents to start using the pumps which MDH supplied.

The parents of the patient informed the hospital in the UK about the difficulty they encountered, and in their reply, the hospital advised that they should use the pump supplied by them and added that it is useless training parents on a particular type of pump and then these pumps are not available when they go back to Malta.

The parents lodged a complaint with the Office of the Ombudsman, and the case was referred to the Commissioner for Health for investigation.

**Facts and findings**

From documents presented by the parents of the child to the Commissioner for Health, it transpired that in an email sent to the MDH, an official from the UK hospital stated that the parents were trained to use those specific pumps which are easy to use at home. The UK hospital authorities went as far as to state that if MDH were not to provide the Kits, they were ready to reconsider their position whether to accept any more patients from Malta with the same condition of the child.

The Commissioner for Health asked MDH for comments about the case. In their reply, the Department of Health stated that they consulted the relevant department about the pumps provided by the national health system and they have been informed that there were no complaints locally or on a European level against these pumps. On the basis of this, the Department for Health said that they feel that there was no reason to remove these pumps from circulation at MDH.

The Commissioner for Health in his reply stated that the parents only needed the Kits because the pump was already provided free from the UK hospital. The Commissioner also commented that he could not understand why MDH sends patients to this particular hospital in the UK for treatment and then their recommendation is not accepted. The MDH stand on this issue was hindering the possibility for future patients with the same condition to be able to attend treatment in this particular UK hospital.

**Conclusions and recommendations**

The Commissioner for Health stated, that on his part, there was never an issue about the use of the pumps supplied by MDH. The problem was, that unless the Kits were supplied, the pump given to the parents by the UK hospital and on which they were trained would not be used.

After further lengthy correspondence, the Commissioner recommended that MDH should provide the Kits compatible with pumps supplied by the UK hospital.

**Outcome**

The Health Authorities accepted the recommendation of the Commissioner for Health to provide the necessary Kits.



