OMBUDSMAN




OFFICE OF THE OMBUDSMAN

CASE NOTES 2013

EDITION 33

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October - May 08:30am - 12:00pm
01:30pm - 03:00pm

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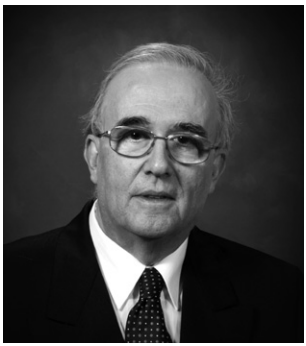
FOREWORD



The thirty third edition of the Case Notes carries summaries of some of the finalised opinions during 2013. An election year that ushered in a new administration that took over from a previous government that had been in office for practically twenty-five years. It was during those eventful years that the Ombudsman Act was unanimously approved by Parliament. The Office was set up in 1995 and has been providing the individual ever since with an effective tool to defend his rights against perceived injustice and maladministration.

The recognition of the Ombudsman institution as a constitutional authority and the 2010 Amendments empowering the Ombudsman to appoint Commissioners to investigate specialised areas of the administration are milestones in the development of an authoritative, one stop body to which aggrieved persons could address their complaints in an effort to seek redress.

Throughout these years, through hard work, the correct application of the Ombudsman Act and its continuous emphasis on its independence and autonomy, the Ombudsman Institution has gained the respect and trust of citizens and the public administration alike.

The appointment of Commissioners to investigate complaints regarding the vital areas of health, education and the environment and planning, enriched the Office with technical expertise that brought about a marked improvement in the investigation of complaints in these areas. Moreover, these Commissioners with the authorisation of the Ombudsman, can conduct own initiative investigations on areas of the administration which they identified as suffering from systemic failures affecting the general public.

The Case Notes published in this edition reflect the work done during the Commissioners' first full year in Office and the added value that complainants gained from their expert focus on the issues raised and how these were tackled by the appropriate authorities. This sample of their final opinions is proof of the effectiveness of introducing a measure of specialisation in investigations, and clearly justifies the validity of the institutional reform brought about by the 2010 amendments. In this respect this Office was ahead, if not a leader, of its European

counterparts, a number of which have introduced or are in the process of introducing similar initiatives.

The published Case Notes also reflect the uniformity in the method of investigation and in the drafting of Final Opinions that has, during this year, been achieved through all round cooperation between the Commissioners and the Ombudsman and the investigative and the administrative staff of the Office.

The Case Notes evidence an integrated office working under the same rules, applying the same methods of investigation and drafting of Final Opinions. Frequent consultations between the Commissioners and the Ombudsman help to produce common approaches on how complaints should be addressed, in full respect of the autonomy that each Commissioner enjoys in the field under his scrutiny.

It is suggested that readers keep this background information on the institutional development of the Office in mind, when going through these cases. It will help them understand how the Office operates, what principles of good administration are applied during the investigation and the finality and effectiveness of the Final Opinions. It is important to understand that Final Opinions do not constitute precedent. The principles of good administration on which the Ombudsman and Commissioners base them remain valid and applicable across the board. However, each complaint has its own characteristics and is investigated on its own merits.

This publication also reflects the complete autonomy of the Office from government. It continues to exercise its functions in the defence of the individual, irrespective of any changes in the public administration brought about by popular vote in a general election. It is the duty of this Office to create and maintain good relations with the new Executive and the restructured public authorities and entities charged with the implementation of the Government's Electoral Programme. It is still work in progress in this respect but considerable progress has been made.

I trust that readers will find these Case Notes interesting, and more importantly, useful if they need to seek the services of our Office.

Chief Justice Emeritus
Joseph Said Pullicino
Parliamentary Ombudsman

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

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

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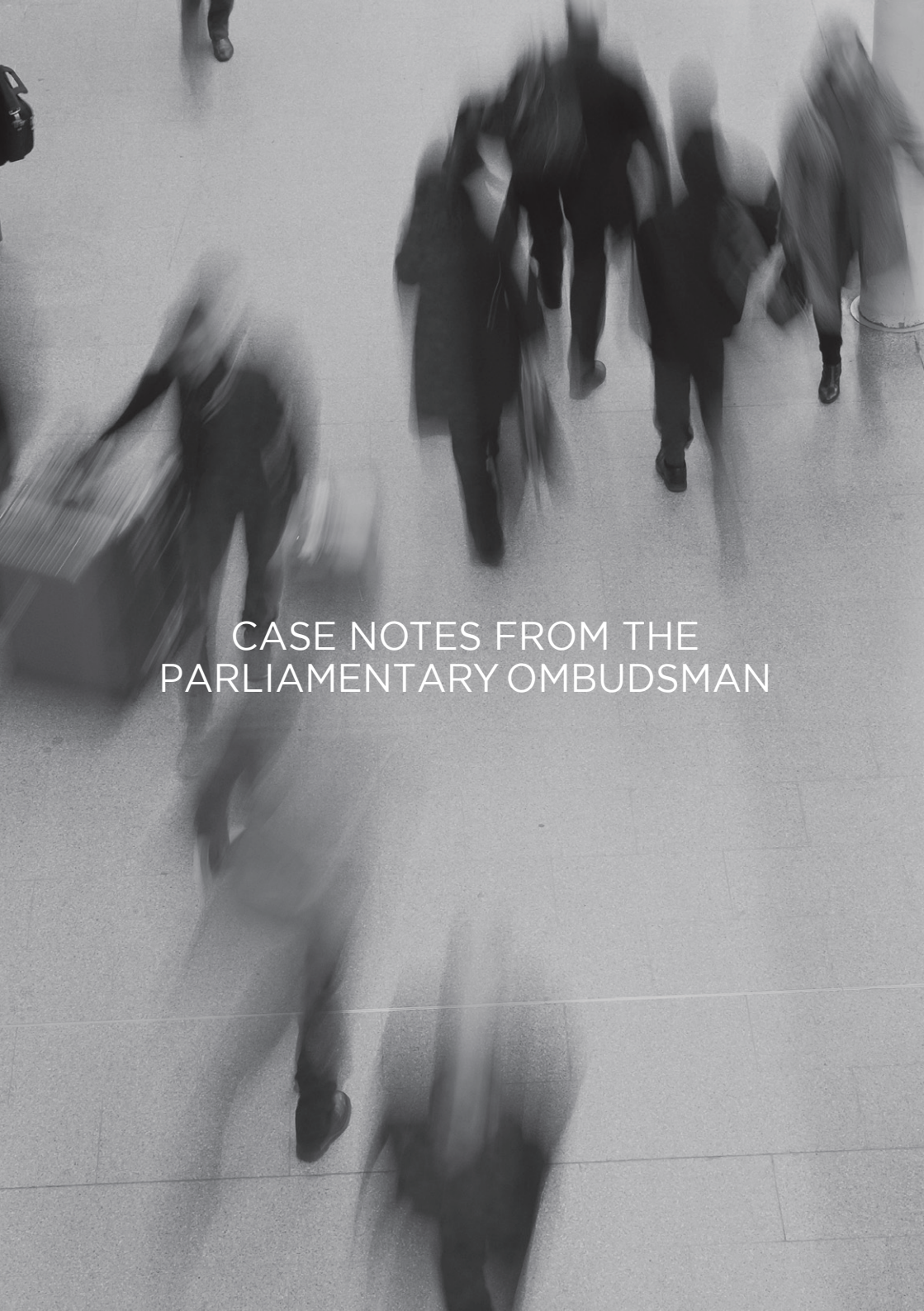


CASE NOTES FROM THE PARLIAMENTARY OMBUDSMAN

CASE NOTE ON CASE NO M 0067
LOTTERIES AND GAMING AUTHORITY

EMPLOYEE ALLEGED THAT INTERNAL SELECTION PROCESS LACKED GOOD PRACTICES

(internal selection process, good practice, interviews)

The complaint

Complainant, an employee of the Lotteries and Gaming Authority who had not been selected in the internal selection process held by the Authority for the position of Supervisory Inspector sought the intervention of the Ombudsman arguing that the selection process had not been carried out in accordance with good practices generally used in public entities.

Complainant explained that after he was interviewed by two different selection boards he had enquired about his ranking in this selection process but was informed by the Director, Corporate Services (DCS) that the results had not been officially published. Once the results were published some weeks later he had requested information on his performance during the interview and his ranking in the process, also in view of the fact that one of the appointees had resigned. He had been asked to attend a meeting with the Chief Regulatory Officer and the Director, Corporate Services both of whom had been members on the selection boards and they had informed him that it had been difficult for the panels to come to final decision since all the applicants had been close, but he was still not provided with his marks. He stated that during this meeting he had explained to these members that even though he was getting older he was willing to further his studies and that he had been perturbed with the question put by one of the selection boards in connection with the employee's membership in a Union. He however insisted that shortlisting was never mentioned during this meeting.

Following further enquiries complainant was provided with a breakdown of the marks and the comments of the selection panel during a meeting held with the DCS where the latter had stated that the Board had found it difficult to come to a final choice. Complainant stated that once he reviewed the comments of the selection panels he sent an email to the DCS informing him that he was not in

agreement with the marks awarded and the comments made. He alleged that some days later the DCS had called him for a meeting where he advised him to withdraw this email since it could cause him detriment. Some time later he had requested his ranking in the selection process once again and this time he had been informed by the DCS that since he had not been shortlisted he did not form part of the final ranking of candidates. Complainant insisted that no-one had ever mentioned that a shortlisting process had been carried out and that he had not been shortlisted. On the other hand, he had always been told that it was very difficult for the Board to come to a decision.

The reaction of the Authority

The Authority stated that six applications had been received in connection with this call for applications and that all applicants had been requested to attend two interviews held by two separate panels. It explained that the two-interview system had been implemented so as to ensure that no form of internal collusion would be perceived and in fact the second panel was composed of a Board member and the Chief Officer, who barely knew the interviewees and acted as a check and balance over the first panel. The two panels prepared two separate reports which were not discussed outside the panel before finalisation and both panels concluded that only two candidates were suitable for this supervisory role. The Authority insisted that the selection process had been conducted in full compliance with the rules of proper governance, without favouritism and in a transparent and fair manner.

In its reply to the complaint, the Authority noted that complainant had quoted the name of the Authority incorrectly notwithstanding that he had been employed there for many years. In the opinion of the LGA this reflected complainant's level of education and his inability to use appropriate language skills which are significant factors guiding the choice of candidates for management positions. It stated that the members of the Selection Board had noted that he did not possess the adequate level of education and had commented that he had not shown the willingness to pursue a graduate diploma within the time-limit agreed upon.

According to the Authority when the Board had asked complainant how he would resolve union issues which may arise between employees and management if he were to be appointed Supervisory Inspector, he had appeared extremely uncomfortable at this line of questioning and had not answered the question satisfactorily. The Authority submitted that this question was very pertinent since the ability to handle union issues is a key requirement in the management

of employees and is indispensable in maintaining a healthy relationship with the Union representing employees.

The Authority affirmed that complainant is unable to state with any degree of certainty whether there was a difference between the marks awarded to the various candidates, since his request in regard had been denied in view of the fact that data concerning with the performance of other candidates is to be kept confidential. LGA denied that complainant had been told to delete his email, that he had been informed that he had not been shortlisted or that his results were not part of the final order of merit when he enquired about the final order of merit in this selection process. On the contrary, the Authority commented that in a previous meeting complainant had informed Management that he had requested this information so as to understand how he had performed during the interview and not because he intended to take any form of legal action.

The Authority remarked that complainant appeared to have deliberately modified the order of the emails submitted in support of his claim. The LGA insisted that complainant had been informed that he had not been shortlisted because he had not convinced the Board members that he was willing to take up the requisite studies and because the panel had been shocked at his statement that he was in the habit of bending rules to find a reasonable solution – a behavioural trend which is unacceptable within a regulated and licenced regime.

By way of conclusion the LGA clarified that the Board's decision that only two candidates were suitable for the position was final and the fact that one of the appointees resigned does not automatically imply that the post will be filled by the Authority – in fact management had decided not to fill the vacant post.

Complainant's rejoinder

Complainant rebutted the statements made by the Authority arguing that a candidate's knowledge is not restricted to certificates but encompasses the experiences gained over the years, the training one has undergone and the courses the candidate would have attended to widen his knowledge. He pointed out that he had gained a wealth of experience from his previous career. He reiterated that he had always been willing to follow a Diploma course in management and clarified that any information sought referred to the marks awarded to him by the Board and was in line with the provisions of Article 21 of the Data Protection Act. He denied having made any of the statements mentioned by the Authority and pointed out that the panel's comments contrasted with the marks which he had been awarded.

He restated that he is and has always been a law abiding citizen. Complainant later presented a Judicial Protest against the Authority in this regard.

The investigation

This Office interviewed the various parties involved and examined the documentation relevant to this selection process. Clarifications were provided to this Office in connection with the selection process, the criteria utilised by the two selection panels, the comments made by the panel members about complainant's performance during the interviews and the exchange of information and correspondence which occurred between the Authority and complainant after the conclusion of the selection process.

The Authority also clarified that the appointees had been occupying the position as Designate Supervisory Inspectors, as specified in the call for applications, since they did not possess the required Diploma and also clarified that the person occupying the position was following a Diploma in Management as stipulated in the contract of employment.

It was established that an internal call for applications had been issued in May 2011 for the position of two Supervisory Inspectors to work within a team on a shift basis. In terms of the call, the candidates were expected to possess the following abilities:

- *"Have good oral and written communication skills;*
- *Have good knowledge of IT skills relating to the profession;*
- *Hold a graduate diploma in Accounts, I.T. or Management;*
- *Have a minimum of 4 years work experience within the gaming industry;*
- *Be highly methodical; have excellent team playing skills with a flexible and hand on approach to work.*

Candidates with relevant experience but without the requested qualifications may also apply for this post for a designate position, provided that the candidate commits him/herself to follow a course leading to the required qualifications. Candidates selected in a designate position shall be required to obtain the necessary qualifications within a stipulated timeframe as agreed with the DCS and following the attainment of the qualification the candidate shall have his/her position confirmed."

All eligible candidates were interviewed by two separate selection panels, each composed of two members. The first Board assessed candidates in accordance with a number of criteria established before the commencement of the selection process and a minimum of 1 mark up to a maximum of 5 marks were awarded individually by each member of the selection panel in each criterion. The final mark was established after the average of these marks was worked out. The Panel also passed comments about the performance of each applicant.

From a review of the documentation it transpired that the Board had expressed the view that although complainant was a good employee he did not fit the role and did not have the necessary characteristics. The Board noted that complainant was one of the least qualified employees and commented that from his body language during the interview complainant had given the impression that he was not eager to take up the required studies. Complainant was awarded 70.5% by the first panel.

The criteria utilised by the second panel were leadership skills, aptitude for the role and dedication to the Authority. Complainant was awarded 60 out of the available 100 marks. This panel expressed the view that complainant was a very experienced individual commenting that during the interview he had demonstrated *"...strong attitudes which demonstrated that he may not be fit to be a leader, firmly believing in a divide between management and employees. ...sways towards bending rules in trade of finding a reasonable way out may be a matter of concern for the role he currently holds".*

Complainant's average mark in the selection process was 62.25% and he ranked in fourth place.

The Board members clarified a number of statements allegedly made by complainant. The selection board stated that what was meant in the Authority's email of December 2011 was that complainant was not selected for the final stage since he did not meet the expected level in the first two interviews. The members of the second panel insisted that the Authority had an open door policy to discuss issues of an industrial nature with its employees and elaborated that their comments about complainant sought to describe the characteristics of the applicant concerned such as the manner in which his past experiences *"...contribute to the perception that he is prepared to seek solutions to issues that may lie outside an appropriate interpretation of the applicable rules."*

Considerations of the Ombudsman

The Ombudsman observed that the selection process was carried out by two separate Boards which utilised distinct criteria, a practice which cannot be criticised as not being administratively correct. The criteria were all subjective in nature and therefore depended on the subjective evaluation of the members of the Board of a candidate's performance during the interview - consequently the Ombudsman cannot change or challenge these opinions when he was not even remotely involved in the process.

On the contrary, the Ombudsman criticised the feedback provided to complainant by the Authority in connection with his performance during the interviews. The Ombudsman pointed out that complainant should not have found difficulties in being provided with the marks he had been awarded in the selection process and that the Authority should have provided him with his marks once the results were official. Complainant was entitled to this information so that he could understand what needed to be improved for future selection processes.

The Ombudsman stated that an applicant is entitled to information as to his ranking in a selection process, but remarked that the Authority had failed to provide complainant directly with this information. He elaborated that complainant contended that he had been told that he was not included in the final ranking, but it had resulted that complainant had ranked in fourth place with a global mark of 65.5%.

In this context, the Ombudsman considered complainant's allegation that he had been told that he had not been shortlisted by the Selection Board. The Authority had insisted that complainant had not been precise and that in the meeting held in September 2011 he had been informed that he had not been shortlisted because he had failed to convince the Board that he was willing to pursue the course required in the call for applications. The Ombudsman pointed out that the wording used in the Authority's email of December 2011, informing complainant that during the meeting held in September 2011 he had been informed that his marks did not form part of any order of merit since he had *"... not been shortlisted for the final stage for selection of the post of Supervisory Inspector..."* was mistaken and not appropriate in the circumstances, since a shortlisting process is carried out before the final interview takes place. The Ombudsman affirmed that similar equivocal comments gave rise to doubts as to whether one had been treated fairly and impartially, even if there was no concrete evidence of injustice.

The Ombudsman remarked that the right to good administration by authorities

and bodies of the European Union is a fundamental right of every individual in terms of Article 41 of the European Charter of Fundamental Rights and forms part of the Treaty of the European Union. He elaborated that the European Ombudsman had also published 'The European Code of Good Administrative Behaviour' explaining what this right entails in practice. The European Ombudsman had noted that the impact of the Code went beyond the institutions of the European Union and that a number of States had accepted the responsibilities emanating therefrom. The Ombudsman commented that in terms of Article 41 of the Charter entities operating in the public sphere must operate in an open and transparent manner and that citizens have the right to be provided with reasons for decisions taken and are entitled to access their file, provided this is done respecting the legitimate rights of third parties. In the light of the aforesaid the Ombudsman criticised the failure on the part of the Authority to provide precise and clear information and stated that this could be interpreted as an attitude lacking transparency and one which is not in accordance with good administrative practices. He however pointed out that throughout the investigation the Authority had taken note of the points raised by this Office and had assured the Ombudsman that his recommendations would serve as guidelines in future recruitment processes.

The Ombudsman stated that he could not take a decision in regard to the statements which the members of the selection panels claim where made by complainant during the interview and regarding their impression that complainant was not willing to further his studies because of the conflicting versions which were given by both parties. He observed that the assertions of the selection board members were the result of the subjective interpretation of these members about what was stated by complainant during the interview. The Ombudsman commented that in similar instances, and where there is no documentation, it is generally very difficult to come to a conclusion about what was said and how these statements had to be interpreted. On the other hand, the Ombudsman pointed out that the Authority had provided a plausible explanation in connection with the question put by the Selection Board about union issues.

The Ombudsman observed that the Selection Board was justified in including qualifications and level of education as one of the criteria for selection in a position at this level. He pointed out that the call for applications specified that applicants required good oral and written communication skills and a good knowledge of IT skills relating to the profession. Moreover, in view of the fact that the call for applications specified that the appointee was required to follow a graduate diploma

in Accounts, IT or Management, it was necessary for the Board to evaluate the qualifications and level of education possessed by the applicants so as to ensure that the selected candidates possessed the necessary qualifications to apply for the course and were capable of following these studies successfully.

Finally, the Ombudsman noted that since complainant had ranked 4th in the selection process he was not next in line to fill any vacancy that may have occurred following the resignation of one of the appointees.

Conclusions

The Ombudsman therefore concluded that:

i. the selection process was administratively acceptable, at least until the appointments were made, even if the criteria utilised throughout were completely subjective in nature. Naturally, it is more desirable that objective criteria are included amongst the criteria utilised in a selection process so that a review can be carried out by the authorities. This however does not diminish the validity of the Selection Board's report;
ii. since the criteria were all subjective in nature, the marks awarded are not verifiable and the Ombudsman cannot substitute a subjective assessment of the Selection Board with his own, since he was not involved at any time during the selection process;
iii. the question put during the interview in connection with union issues was relevant and the Authority provided a plausible explanation; and
iv. this grievance arose mainly as a result of how complainant's requests for information were handled by the Authority and this attracts criticism. This notwithstanding, the Authority informed the Ombudsman that it had learnt from this complaint and had included the recommendations and suggestions made by this Office into its recruitment processes so as to ensure that HR processes are transparent and fair. In view of the Authority's statement no recommendations were necessary.

CASE NOTE ON CASE NO N 0194
MINISTRY FOR FOREIGN AFFAIRS

RETIRED DIPLOMAT CLAIMS THAT HE WAS DEPRIVED FROM HIS TERMINATION BENEFIT

(diplomat, termination benefit, resigning from post)

A retired diplomat claimed that he was unfairly deprived of the termination benefit due to him in terms of his contract when he terminated his employment. He further claimed payment for vacation leave he did not avail himself of.

Complainant had in addition to previous postings, served as Ambassador in a Maltese mission abroad between 2010 and 15 May 2013 and was the only Maltese Diplomat in that country. For this purpose he had signed an agreement with the Ministry for Foreign Affairs which had been extended until 31 July 2013. Clause 15 of this agreement stated as follows:

> *"In the event of a change of Government, or of the Prime Minister, or of the Minister responsible for Foreign Affairs, the Ambassador shall be expected to offer his resignation; the agreement may be terminated by either party forthwith. In the event that the Ambassador would be residing abroad, the last date of engagement till when he would be compensated for would however allow for a reasonable period of not more than six (6) weeks, to be decided upon in consultation between the Ambassador and the Permanent Secretary of the Ministry, which would run from the day when the Ambassador's resignation is accepted, in order to permit the outgoing Ambassador to wind down his personal affairs and to make his travel and transportation arrangements. Upon effective termination of his appointment, the Ambassador would be then entitled to receive a terminal benefit equal to six months' salary."*

Following the announcement of a change in Government, complainant submitted his "*resignation in accordance with clause 15*". The Ministry approved his request for the termination date to be 15 May 2013.

On 7 May 2013 complainant requested the Ministry to compensate him for

eleven (11) days vacation leave which, he claimed, he could not avail himself of. The Ministry immediately informed him that this was not approved and confirmed this decision despite complainant quoting Maltese employment legislation. At this stage the Ministry also informed complainant that his claim for a terminal benefit had also been rejected.

This Office requested the Ministry to justify its rejection of complainant's claims. In its reply, the Ministry summarised its justifications for the refusal of both claims on the following grounds:

- in terms of clause 15 of complainant's contract all ambassadors are expected to offer their resignation following a change in administration. Complainant had duly offered his resignation. However the administration had the discretion to accept such resignation (and recall the officials concerned) or else to allow him to retain his position. In fact the Ministry stated that it had decided to accept the resignation of those Ambassadors whose term (unlike complainant's) had still more than a year to run their course. It therefore allowed complainant's contract to continue while at the same time granting the terminal benefit to those whose contract had been terminated prematurely by Government. Complainant did not fall within the latter group since, according to the Ministry his resignation had not been accepted and he was therefore still a serving Officer and would have remained so had he not opted to terminate his contract; and
- in respect of refused compensation for unutilised vacation leave, the Ministry pleaded that it acted in terms of the Public Service Management Code (PSMC) which does not provide for such payment. Complainant had the possibility to avail himself of vacation leave before terminating his office, by postponing the date of termination. Furthermore, complainant had never, in the past, been refused any request for vacation leave.

Observations and comments

A. The Terminal Benefits

The Ombudsman agreed with complainant's counter-comments that the Ministry was not correct in stating that he had offered to resign. In fact he had tendered his resignation strictly in terms of clause 15 of his contract which, amongst others, specifically stated that *"the agreement may be terminated by either party forthwith"* – this within the context of a change in Government and the provisions for the

payment of a terminal benefit in such situation. In fact this clause further states that "*Upon effective termination of his appointment, the Ambassador would be entitled to receive a terminal benefit ...*". The Ombudsman considered that there was only one clear and unequivocal interpretation of this provision. He further argued that there was in fact the change in Government (as referred to in clause 15) and therefore what follows in the same clause of the agreement was binding to both parties, both in respect of obligations and of rights. Moreover the clause can validly be interpreted as granting complainant the right to terminate his contract forthwith following a change in Government. Complainant did so by giving notice of his termination of the contract on the first working day following the announcement of the general election result, even if his contract had only a few more weeks to run prior to its expiry. He gave a notice period to allow Government to make the necessary arrangements for his replacement since he was the only diplomat in that mission. The Ombudsman added that this was not a case (as argued by the Ministry) that Government exercised its discretion to retain complainant until his contract expires. He had not offered to resign, he had terminated his contract as was his right in terms of clause 15 of the contract. Nor had Government informed complainant that his resignation has not been accepted. On the contrary it informed him that it was accepted.

The Ombudsman further considered that the provision under the same clause for the grant of the terminal benefit in such situation was not linked to any condition and, as worded, applied irrespective of whether the termination was voluntary or forced following a change in Government and was irrespective of when the contract would have normally expired. The Ministry did not bring up one single valid argument as to why complainant was not entitled to the terminal benefit following his (early) retirement as he was entitled to do in terms of his contract. The contract binds both parties and no one party is free to depart from the obligations assigned on signing of the contract and no one party is authorised to interrupt such contract in a way that does not reflect the intention of both contracting parties.

Briefly summarised, the elements of this agreement that are a *sine qua non* to trigger its applicability and to entitle each of the contracting parties to revoke it were the following:

i. there was a change in Government, Prime Minister and Ministry of Foreign affairs;
ii. in such event, the Ambassador is bound to offer to resign;

iii. the termination of the contract is a unilateral right reserved to both parties. This right is absolute, unconditional and is not dependent on any condition other then the change in the administration. The resignation is effective the instance it is rendered, irrespective of whether it is voluntary or forced by Government; and
iv. as a direct consequence of the effective resignation of the Ambassador, he would be entitled to a terminal benefit equal to six months salary, irrespective of the reason for the resignation, and this benefit is in no way subject to any other condition.

The Ambassador cannot be denied such right unless it is proved that any one or more of the above constituted elements is lacking. The right of the Ambassador to terminate his contract is not subject to any right of the administration to retain existing serving officers. Nor is that right prejudiced because the administration chose or wished to retain his services after his voluntary resignation. Such right includes the payment of the terminal benefit.

The Ombudsman further considered article 1002 of the Civil Code which deals with the interpretation of contracts. This article lays down that:

> *"where, by giving to the words of an agreement the meaning attached to them by usage at the time of the agreement, the terms of such agreement are clear there shall be no room for interpretation".*

The agreement is not ambiguous and its wording presents no doubt as to what the parties intended. The rights and obligations it sets out, are clear and need no interpretation.

B. Payment for outstanding vacation leave

Complainant had countered the Ministry's reasons for refusing him compensation for outstanding vacation leave by stating that although it was true that his requests for such leave were never refused he only requested leave when he had no commitments or obligations relating to his duties. He was the only diplomat in that mission and was not at liberty to so avail himself at any time, and his absence from office had therefore to be of limited duration. He had to act responsibly and respect protocol. While the PSMC does not provide for compensation in such situation, it does not on the other hand prohibit it. On the other hand Maltese employment legislation specifically provided that *"...an employee has the right to*

claim financial compensation for any balance of outstanding leave that is due". He moreover argued that the Ministry never advised him to avail himself of the leave prior to his retirement.

The Ombudsman noted that subsequent to his request for his termination to be effective on 15 May 2013, he had eight (8) days prior to this date drawn the attention of the Ministry to the outstanding 11 days vacation leave. The Ombudsman considered that complainant's reference to local employment legislation must be considered in the light of the fact that the relevant provision of the Employment and Industrial Relations Act does not apply to the Public Service which, in respect of conditions of employment, is regulated by its own rules – the PSMC. While considering that this fact does not necessarily mean that payment in such conditions is outrightly ruled out – and here he referred to situations where requests for utilisation of outstanding vacation leave had been repeatedly requested and refused, complainant did not provide any convincing evidence that exigencies of the service prevented him for making such requests. He could have made such request before terminating his employment.

Complainant had further countered that the Ministry should have informed him that he could do so. The Ombudsman considered that this could have been a valid argument in the case of employees to whom the Employment and Industrial Relations Act applies but not in the case of Public Officer. Such obligation does not arise in their respect either through law or through PSMC. Although it would be better in such situations for management in the Public Service to act in the same way as its counterpart in the Private and Public Sector, one cannot ignore that it is in the interest of Public Officers, particularly those occupying higher level positions, to take such step themselves and ensure that they seek their right in the first instance and submit in time, an application for outstanding vacation leave.

In view of the above considerations, the Ombudsman:

i. sustained complainant's grievance regarding the failure of the Ministry to pay him the terminal benefit in terms of clause 15 of his contract and recommended that the Ministry pays him the terminal benefit amounting to six months' salary within six weeks from the date of the Ombudsman's Final Opinion plus interest on the sum due from date of termination of the contract. This recommendation was accepted and implemented; but
ii. did not sustain complainant's claim to compensation for outstanding vacation leave.

In the course of the investigation, complainant raised another issue. The Ministry had failed to submit complainant's Termination Notice to the Employment and Training Corporation (ETC) as it was obliged by law. The Ombudsman found that there was an additional failure on the part of the Ministry since such notice was only submitted following queries from this Office, and was in effect, submitted with a delay of over five months.

CASE NOTE ON CASE NOTE NO N0040
TRANSPORT MALTA

FORMER PUBLIC OFFICER UNJUSTLY DEPRIVED OF HIS PENSION

(public officers, parastatal entities, pensions)

The complaint

A former public officer who subsequently became a Transport Malta employee felt aggrieved that he was unjustly deprived of his Treasury Pension when he retired in 2012, while colleagues in his position were granted such pension.

The investigation

From documentary evidence requested by this Office, complainant was already providing a service to the Police Department as far back as July 1977 – on loan from Enemalta "*...with the Police Department as Bus Despatcher ...*" Complainant continued to provide a service to Government uninterruptedly and on the advice of the Public Service Commission, he was appointed as Bus Despatcher in the Police Department with effect from 1 April 1979. He was subsequently posted with the then Public Transport Authority (now Transport Malta) and on 18 June 1997 signed a declaration whereby he opted to be a permanent employee of that Authority. This decision was taken in the context of agreements/decisions taken earlier in respect of former public officers who joined parastatal entities. In fact a Government document (MPO/44/95, GS/MF, dated 16 February 1996) stated that:

> *"Public officers providing a service to the Entities and who are entitled to a Treasury pension (because of their having been in government employment before 15 January 1979) retain their right to such pension irrespective of whether they remain with the Entity or return to the public service in case of redundancy or privatisation. The period of service with the Entity shall count for pension purposes, however the relative details of the workings of such pension have to be discussed further".*

Moreover, a side letter dated 4 October 1996 signed between the Public Transport Authority and *Union Ħaddiema Magħqudin (UĦM)* entitled:

> *"Offer of Permanent employment with the Public Transport Authority of public officers detailed with the Authority for duty as Bus Despatcher (Transport Malta Assistant)" stated as follows:*
> *"The arrangements regarding Employees with Government Entities (vide copy of attached letter dated 16 February 1996) shall apply in respect of those public officers who accept the offer of permanent employment with the Authority in terms of this agreement".*

Yet it resulted that Transport Malta had no record of this side letter. In fact this Office had to provide a copy of this document which it had received from the Office of the Prime Minister. Further documents perused by this Office included one from Employment and Training Corporation (ETC) which showed that complainant was in full-time continuous employment with Government and/or Public Transport Authority/Transport Malta from 25 July 1977 till his retirement in 2012.

However, despite the fact that there was no evidence of any letter of resignation or dismissal or any other form of a break in service in complainant's records as OPM HRIMS records search reported as follows:

> *"The employee you are looking for has resigned".*

This unsupported statement was disproved by all the other documented evidence listed above.

Transport Malta in its initial comments on this complaint, submitted a list of "*Public Officers detailed with the former Malta Transport Authority (APT) to be detailed with the Authority for Transport in Malta (TM)*" which list had been received from the Office of the Prime Minister in April 2010. Complainant was not included in this list. Transport Malta's records also showed complainant's declaration of his option to take up a permanent appointment with the Public Transport Authority. In respect of its not having initiated any action for complainant's treasury pension when complainant retired in 2012, it stated that it did not have any claim from complainant to this effect and argued that the personal record sheets of public service employees are kept by the Public Service. Transport Malta only had a copy of the document referred to above regarding complainant having been attached (on

loan) with the Police Department with effect from 25 July 1977.

Section 8C of the Pensions Ordinance safeguards the pension rights of former Government employees who before 1 April 2002 took up permanent employment with the Public Transport Authority/Authority for Transport in Malta. Transport Malta did not prepare complainant's pension papers when he was due to retire in 2012.

In June 2013 the facts listed above were brought to the attention of Transport Malta and of the Public Administration HR Office (PAHRO) and the Ombudsman requested them to inform him why on the basis of the above facts, complainant should not have been granted a service pension.

PAHRO's reply, copied to Transport Malta stated that in terms of the Pensions Regulations and of the Public Service Management Code (PSMC) –

> *"when an individual is employed within the Public Service on casual/part-time basis (i.e. not through the PSC) and subsequently this individual is appointed to a grade/position on a full-time basis without a break of service, the individual concerned would, on retirement, be entitled to a treasury pension, provided that during his casual/part-time employment he worked more than half the normal working hours of his full-time counterpart."*

After perusing complainant's records it concluded that complainant satisfied all the requirements under the Pensions Ordinance and PSMC and was to be entitled to a Treasury Pension.

The Ombudsman waited for the reactions of Transport Malta but despite a reminder which including drawing the attention of the Chairman/CEO of the entity as to the urgency of the matter, the entity failed to react.

Considerations and comments

The Ombudsman considered that normally it is the duty of management to initiate the process of preparing treasury pension papers of entitled officers before an employee retires, so that the pension is issued in time on retirement. The reason given by Transport Malta as to why this was not done suggested that the entity did not assume such role unless it had a claim. But what was more important, was a clear indication of the lack of proper personnel records at Transport Malta – at least in respect of complainant's record of service besides not having a copy of an important document regarding conditions of service of former Government employees who

worked with the entity. Transport Malta considered complainant as one of its employees without any treasury pension rights.

Transport Malta's failure was further aggravated by its inertness when faced with the facts which this Office presented to it on 12 June 2013 and which clearly suggested that complainant was entitled to a Treasury Pension. The entity did not deign to reply to this Office, despite a reminder and also despite the fact that the attention of the highest authority at the entity was personally drawn to the urgency of this case on 1 August 2013. Nor did Transport Malta react when PAHRO informed it that it had sought legal advice and confirmed complainant's entitlement to a Treasury Pension.

This attitude attracted strong criticism from this Office.

The victim of this gross failure on the part of Transport Malta was the complainant who had been deprived of his Treasury Pension for over sixteen months, including loss of interest that would have accrued on the amount of pension due to him including interest he could have earned on the sum he was entitled to as a result of commutation of his pension.

When Transport Malta failed to react despite reminders as to the urgency of the matter, the Ombudsman concluded his Final Opinion on the complaint.

The Ombudsman's conclusions and recommendations

In the Ombudsman's opinion here was a failure on the part of Transport Malta which unjustly deprived complainant of his Treasury Pension for over sixteen months. Complainant's right to such pension had been confirmed by PAHRO on the basis of his uninterrupted service to Government since 1977 which was followed by his appointment as a public officer after 15 January 1979. When complainant opted to be permanently employed with the Public Transport Authority (eventually Transport Malta), this was on the basis of a prior agreement between Government and the Union representing that category of employees, that he retains his (Treasury) pension rights - an agreement which was sanctioned by an amendment to the Pensions Ordinance. The Ombudsman therefore upheld the complaint and strongly criticized the entity for failing to take immediate action especially when faced with facts. The Ombudsman considered the Authority's attitude as insensitive when it deprived him of his pension and showed no urgency to remedy its failure even when this was brought to the attention of senior officials. The investigation also revealed a serious *lacuna* in the personal records of Transport Malta's employees and it was not excluded that this was still the position in respect of employees in complainant's position.

By way of remedy, the Ombudsman recommended that Transport Malta:

- submits, with immediate effect, complainant's treasury papers to the Treasury Department;
- apologizes in writing to complainant for its failure;
- compensates complainant for loss of interest on the amount due to him as from the date of his retirement until the pension was finally issued to him;
- furthermore pays complainant the sum of €500 in consideration of the pain, suffering and stress unnecessarily caused to him by the Authority's failure; and
- takes immediate steps to update its personnel records including also data on retained rights of former public officers now permanently employed with it.

Follow up

Transport Malta immediately initiated the process for submitting complainant's pension papers to the Treasury Department. It also accepted to pay interest on the amount of pension and gratuity due to complainant starting from date of his retirement as recommended by the Ombudsman and to update its records. However it initially disagreed to compensate complainant for pain suffering and stress, arguing that these were potential and subjective in interpretation.

The Ombudsman informed Transport Malta that this was further evidence of insensitivity on the part of Transport Malta. Following this, Transport Malta accepted to also pay such compensation, thus implementing the Ombudsman's recommendations in full.

CASE NOTE ON CASE NO L0177
PAHRO

GOVERNMENT FAILED TO HONOUR COMMITMENT ON SALARY SCALE

(public officer, definite contract, salary scale retention)

Failure on the part of Government to honour a commitment made to a public officer while on contract with a Government agency.

The complaint

A public officer in a substantive grade in Salary Scale 8 but who was on a definite contract with a Government agency in a position in Salary Scale 5, pleaded that Government had unjustly failed to honour a commitment made to him in writing to the effect that when his definite contract ceased to be in force, he would retain his Salary Scale 5 on a personal basis. When he reverted to the public service he was instead placed in Salary Scale 8.

The investigation

The investigation revealed that complainant, whose substantive post was in Salary Scale 8 (progressing to Scale 7) had, in May 2007, been detailed on grounds of public policy, and for an indefinite period, to provide a service with a Government agency and to enjoy a salary equivalent to Salary Scale 5. By letter dated 12 December 2007 the Permanent Secretary responsible for the agency informed him that following a Government decision, he was considered as Officer in scale with a salary compensable to his basic salary at the time, while retaining his substantive grade in the public service. Moreover, he was informed that in the eventuality that his contract would not remain in force, he would still retain this salary scale on a personal basis, apart from his substantive grade.

Complainant was forced to resign from his definite contract following an inquiry. Although he disagreed with the findings, he did not challenge it because in any case he was consoled by the assurance he had been given in writing that he would retain his Salary Scale 5 on a personal basis when reverting to his substantial grade.

This Office sought the comments of the Public Administration HR Office

(PAHRO). PAHRO confirmed that in August 2007 complainant had been detailed for an indefinite period with the agency with a salary pegged to the maximum of Scale 5 in terms of the relative call for applications. Since the agency had a distinct legal personality, complainant was not a Ministry employee. It however argued that his indefinite status as Officer in Scale 5 was based on his engagement with the agency and as such "*...could only subsist alongside and in conjunction with his engagement with* [the agency] *and it was not transferable to the Public Service.*" PAHRO further contended that when complainant resigned, his detailing with the agency was revoked and he reverted to his substantive grade without forfeiture of his rights in that grade in terms of PSMC. This Code provided for only two instances where a public officer who has reverted to the public service from a public entity retains the basic salary he had at the entity, and none of these applied to complainant's case. PAHRO concluded by stating that complainant was treated fairly and in strict consistency with standing policy.

Complainant rebutted that he had been forced to resign following a direction given by the Prime Minister. He considered the findings of the inquiry as unjust and unfair but stated that he did not contest them and accepted the Prime Minister's decision for him to resign. He declared that he did this because he was comforted by the fact that the December 2007 letter assured him that he would retain Salary Scale 5 on a personal basis and therefore, salary wise he would not suffer financially.

Complainant challenged PAHRO's statement that his Officer in Scale status was based on his engagement with the Agency and was subsistent alongside, and in conjunction with, his engagement with the Agency. He argued that this PAHRO statement was in conflict with the December 2007 letter.

PAHRO's statement was supported by the then Principal Permanent Secretary who added that the December 2007 letter issued to complainant by the then Permanent Secretary in the Ministry responsible for that Agency "*...was in line with the instructions and template issued by MPO to all ministries, and subject to the policies in place with respect to the granting of Officer in scale status*".

Article 1.5.2 of the Public Service Management Code (PSMC) refers to the "*Reversion to the Public Service of public officers deployed with public entities*". Furthermore, Article 1.5.2.3 states as follows:

"*Upon reverting back to the Public Service such Public Officers:*

- *will revert to their last Public Service substantive grade and will start receiving the corresponding salary;*

- *benefit from the prevailing conditions applicable in the Public Service;*
- *be posted in a Department where their professional skills and competencies are required;*
- *continue to be entitled to a Treasury pension, if they are of a pensionable status, as other public officers."*

Considerations

There was no contestation in respect of the following:

i. the complainant was detailed for an indefinite period with the Agency with a salary pegged to the maximum of Scale 5, while retaining his substantive grade in the public service which grade was in Salary Scale 8;
ii. he resigned his position in the Agency under pressure to do so from the Office of the Prime Minister, even if at that time he reserved his right to challenge the findings of the relative Inquiry which led to his forced resignation; and
iii. on 12 December 2007 he was officially and formally informed that following a Government decision he was considered as Officer in Scale with a salary comparable to his basic salary at that time while retaining his substantive grade in the Public Service. In the eventuality that his contract ceased to be in force he would retain the above-mentioned salary scale on a personal basis, apart from his substantive grade.

The Ombudsman noted that chronologically, the December 2007 letter followed the publication of L.N 51 of 2007 granting indefinite status to employees on a definite contract.

The Ombudsman considered the interpretation given by PAHRO to the 12 December 2007 letter. PAHRO's interpretation emphasised that at that time employees/officers in the public service/public sector who were on a definite contract were given indefinite status as Officer in Scale on the basis of the definite contract they held. In the case of detailed officers (like complainant) his contract was turned into an indefinite contract to subsist insofar as the Officer remained with the entity. However, according to PAHRO, on reversion to the Public Service these officers were to revert to salary tied to their substantive grade to which they were appointed through the Public Service Commission – in line with PSMC. The Ombudsman however noted that there was no such condition attached to the official 12 December 2007 letter when he was forced to resign his position with the Agency he reverted to

his substantive grade with a salary in Scale 8 even if subsequently he progressed to Scale 7 in line with the agreement applicable to his grade. The Ombudsman agreed with complainant's argument that PAHRO stance in respect of his Salary Scale 5 as subsistent alongside, and in conjunction with his engagement with the Agency, as being in conflict with the 12 December 2007 letter. The Ombudsman considered it was difficult to follow this reasoning, he was of the opinion that there was only one indisputable interpretation of the 2007 letter – namely that Government informed complainant that he was considered as an *'Officer in Scale'*. This designation existed only in the Public Service and not at the Agency. Moreover, this letter went on to "*assure*" complainant that, *on a personal basis*, he would on cessation of his contract retain his Salary Scale 5 despite that he would still retain his substantive grade in the Public Service. There was no condition whatsoever attached to this commitment.

The Ombudsman also considered the undisputed fact that complainant resigned his contract under pressure from OPM and had moreover, no reason not to believe that in accepting to resign, complainant was comforted by the assurance, given to him in the December 2007 letter, that salary wise he would retain Scale 5.

If the December 2007 letter was intended to have a different meaning from this, it should have been worded differently. Moreover, if one was to accept PAHRO's interpretation, then this was an example of poor letter writing. The Ombudsman was inclined to believe that this was not the case and that the letter was issued to complainant by mistake. This notion is supported by the view of the Public Service Commission on the matter that the letter was *ultra vires*. It is to be pointed out that in the course of the investigation, the Ombudsman had sought the views of the Public Service Commission in respect of the 12 December 2007 letter. The Commission had informed this Office that it had not made any such recommendation as required under Article 110 of the Constitution of Malta for complainant to be granted Officer in Scale Status. The relative letter was never referred to, or endorsed by the Commission and therefore considered that it was "*ultra vires and had no validity at law*".

The PSC's opinion can also be justifiably interpreted as implying that the Government had committed itself to granting Salary Scale 5, which in effect meant a promotion that was irregularly given since the advice of the Commission to this effect, had not been sought or received.

Irrespective of whether the December 2007 letter was erroneously issued to complainant or was drafted badly as to not reflect the Government's intention, the fact remained that the letter became an element of the contract that determined

complainant's conditions of service. It unilaterally bound Government to guarantee complainant a definite remuneration in Salary Scale 5 both during and beyond his contract with the Agency – an obligation which Government was bound to honour. This was an unconditional commitment and Government could not avoid its obligation by pleading that the wording could have been better or that the letter was ultra vires. Government was bound to find ways and means of meeting its written contract with the parameters of existing rules and regulations.

While one needs to respect the stance taken by the PSC, the Ombudsman considered that it did not seem unreasonable to maintain that the fact that an officer is permanently in receipt of a salary above his substantive grade does not necessarily mean that he has been promoted. Salary Scales and substantive posts are two separate concepts that need to be clearly distinguished. Indeed a Salary Scale is an essential component of a substantive post and the grade that goes with it. However being in receipt of a salary according to a given Scale in no way gives the grantee the same rights and obligations that are inherent to a substantive grade.

Indeed complainant could only claim to receive the higher salary as determined in the 12 December 2007 letter of the Permanent Secretary to the Ministry responsible for the Agency. He had no right to claim a posting in a substantive grade reflecting his Salary Scale, still less could he benefit from the advantages which such a grade confers. In fact complainant had never put forward such a claim.

After giving further consideration to the provisions of Article 1.5.2.3 of PSMC, and the Public Service Commission's declaration of nullity of the December 2007 letter, the Ombudsman concluded as follows:

- there was no doubt that in the 12 December 2007 letter addressed to complainant, Government informed complainant that in the event that his contract with EUPA would cease to be in force (for whatever reason once that no other condition was specified), he would retain his substantive grade but, on a personal basis, he would retain his then Salary Scale 5. There could be no other valid interpretation to that letter, and the interpretation given by the authorities was mistaken in fact.
- there was no reason to doubt that when complainant was forced to resign, he was comforted by the belief that he would, on a personal basis, retain his Salary Scale 5 while retaining his substantive grade.

When following his resignation, Government did not grant him Salary Scale 5 on a personal basis, he rightly felt aggrieved.

The Ombudsman therefore upheld the complaint and the issue of redress arose. Government was bound to find ways and means of meeting its written commitment within the parameters of existing rules and regulations.

The Ombudsman therefore recommended that PAHRO recommends to PSC, that complainant be granted Salary Scale 5 on a personal basis; if this were not accepted, complainant should be adequately compensated financially.

Follow up

After some delay, PAHRO wrote to the Public Service Commission enjoining it "*... to consider the Ombudsman's recommendation in the light of this Office's [*PAHRO*] above-stated representation*". These representations included PAHRO's concern at creating a dangerous precedent. The Public Service Commission after due consideration, decided that it was "*...unable to endorse or act on the recommendation that* [complainant] *be placed in salary scale 5 on a personal basis*". It added as follows:

> *"The Commission cannot accept that a public officer who is granted a benefit in a manner that is unconstitutional and ultra vires has any entitlement to retain such a benefit."*

The Ombudsman informed the Commission that he did not, as could be implied in the Commission's reply, specifically recommended that the Commission should appoint complainant in Salary Scale 5, but that PAHRO makes this recommendation.

This was a procedural step that was required if complainant was to be redressed in the way Government (even if wrongly and without respecting the provisions of the Constitution) had assured him in writing of his Scale 5 status.

This Office, acknowledged the right of the Commission in terms of its Constitutional mandate to take the final decision on a recommendation of this nature. It was precisely for this reason that he had envisaged the possibility of a negative opinion of the Commission on such recommendation when he stated that if the recommendation is not accepted, complainant should be compensated financially.

The Ombudsman subsequently requested PAHRO to indicate what action it intended to take to redress complainant financially on the basis of the alternative indicated in his Final Opinion. PAHRO resisted such redress. Therefore in terms of

the Ombudsman Act, the Ombudsman referred the matter for the attention of the Prime Minister. At this stage the Principal Permanent Secretary informed PAHRO that the Ombudsman's Final Opinion should be implemented and directed PAHRO to take necessary action accordingly.

CASE NOTE ON CASE NO L 0347
SAINT VINCENT DE PAUL

CASUAL ASSISTANT RESIGNED FROM EMPLOYMENT AFTER REFUSAL OF PARENTAL LEAVE

(parental leave, part-time employment, resignation)

The complaint

A former Casual Social Assistant (CSA) complained that she lost the opportunity of full time employment (as a public officer) because she had earlier been forced to resign her employment when her request for parental leave was unjustly refused.

Despite that the act complained of occurred more than several months before complainant lodged her complaint, the Ombudsman considered that there were enough grounds which warranted the waiving of prescription in terms of the Ombudsman Act.

Complainant was a part-time CSA at St Vincent de Paule Residence (SVPR). Her personal file showed that she was an employee at this Residence as per notice sent to Employment and Training Corporation (ETC) on her start and cessation of such employment. Her salary was paid by Government and the relative payslips indicated her as an employee. The documents sent by the Department of Social Security also recorded her as an employee of the Department for the Care of the Elderly.

In 2008 complainant gave birth to twins and was granted maternity leave. On termination of this leave, she contacted the Management at SVPR but was told that since she was not a public officer, she was not entitled to parental leave. Having to care for two infants she had no option but to resign.

Although no record was found in her personal file of a written application for parental leave, a document dated a few days before her resignation signed by the Manager Nursing Service (MNS) at SVPR and addressed to the Principal Permanent Secretary strongly suggested that there had been a query on the matter. This letter referred to previous correspondence with the Management and Personnel Office (MPO), and included mention of a circular which the Office of the Prime Minister (OPM) had declared as not applying to Casual Social Assistants. Once these employees were paid by the Department for the Care of the Elderly, the MNS asked

how could it be that they were not Government employees. He concluded his letter as follows:

> *"I really want to clear my conscience that I have encountered some form of injustice and did nothing about it."*

MPO's reply dated 9 June 2008 referred to the Budget speech for 2003 which stated that CSA's were no longer to be considered as self-employed but as part-timers with all the pertinent rights under the Employment and Industrial Relations Act. However, since they had been engaged following a public call *to provide a service* and therefore were not considered to be part-time Government employees as they were not engaged through the Public Service Commission (PSC), the Public Administration HR Office (PAHRO), which succeeded MPO, argued that they were not entitled to the benefits listed in the Public Service Management Code (PSMC). PAHRO added that for further clarifications on the conditions of their service, this Office should seek information from the Ministry for Social Policy which had engaged them.

Since this case concerned a refused family friendly measure, this Office requested PAHRO to clarify the date when these were extended to employees in the public sector who were not engaged through PSC. This clarification had been sought since perusal of section 4.8.4 of the 9th Edition of PSMC dated 1 June 2008 (i.e. 9 days before MPO's letter cited above), which dealt with Parental Leave, had a footnote which stated "*Applicable to public sector employees*". Public sector employees are not appointed through the PSC. PAHRO replied that the Budget speech for 2007 extended the applicability of family friendly measures to all public service and public sector employees and that this became applicable as of 1 January 2007. At this stage, the Ombudsman requested explanations from the Principal Permanent Secretary as to why, considering that:

- by letter dated 9 June 2008 PAHRO had referred to a change in status of these Casual Social Assistants for that of providing a service to that of employees, and entitled to benefits under legislation;
- all documents referred to these persons as employees in the Ministry responsible for Health and the Elderly;
- the MPO letter dated 9 June 2008 excluded these employees from the benefits under PSMC on the grounds that they were not engaged through the PSC;

- no consideration had been given to paragraph 4.8.4 of PSMC of 1 June 2008 (i.e. before the 9 June letter) - this paragraph clearly stated that the provisions in respect of parental leave apply (also) to public sector employees; and the Budget speech for 2007 extended family friendly measures applicable to public officers were to apply also to the entire public sector whose employees are not engaged through the PSC - should the MPO letter of 9 June 2008, excluding employees not engaged through PSC from related benefits, not be considered as being contrary to Governments' 2007 declared policy as also clearly stated in the Family Friendly Measures Manual issued as a Government document?

The Ombudsman pointed out that complainant's resignation was submitted one month after MPO's 9 June 2008 letter which letter was in response to a query from the Nursing Manager at SVPR where complainant worked. The query was raised at the time when complainant's maternity leave was due to expire and she had to decide whether, following refusal of her query for parental leave, to give priority to her family needs of caring for her new born twins, or return to work. The Ombudsman believed it likely that complainant had made enquiries about parental leave but was brushed off because she was not a public officer engaged through the PSC.

In his reply the Principal Permanent Secretary referred to the Budget speech when CSA's ceased to be considered as self-employed and became part-timers. He confirmed that the status of CSAs was regulated in November 2010 when they were absorbed as public officers (Social Assistants) – a status which they did not enjoy before.

The Principal Permanent Secretary added that CSAs had not, before November 2010, been considered as public sector employees and he did not consider that it could be argued that the extension of family friendly measures also to public sector employees meant that it applied also to the CSAs. He further added that the Budget speech determined that the CSAs would not have been eligible to benefit from parental leave entitlement as provided in PSMC but only to rights under labour legislation (EIRA). It was only in 2007 that the PSMC included public sector employees as entitled to parental leave.

In conclusion the Principal Permanent Secretary stressed that conditions of employment are always evolving but the changes could not be applied retrospectively.

The Ombudsman found it difficult to understand the official side's contention which effectively meant that in 2007 Government extended parental leave entitlement to the public sector employees who were not engaged through PSC but

barred its own employees who were casual or part-time from such benefit on the basis that they were not engaged through PSC. The Ombudsman further opined that this was not a case of applying new conditions retrospectively. However the official side maintained its stance.

Considerations and comments

The Ombudsman found that there were strong and valid indications that the MPO ruling dated 9 June 2008 was linked to complainant's right or otherwise to parental leave. This ruling excluded Government employees who had not been engaged through PSC from parental leave. Complainant was not a public officer engaged through the PSC, indeed, like other CSAs, she was originally a self-employed person providing a service to Government. She became a part-time Government employee following the budget speech of 2003. The Budget speech of 2007 marked a significant development - it extended family friendly measures under PSMC to the entire public sector.

In 2008 complainant gave birth to twins and utilised her right to maternity leave under the employment legislation. There was no reason to doubt, and indeed official documents support the notion that she sought to obtain parental leave to give priority to her newborns in line with Government's official family friendly measures.

In the opinion of the Ombudsman, the MPO ruling dated 9 June 2008 clearly suggested that it was a confirmation of an earlier verbal (negative) opinion by another MPO Official to the SVPR Management that since the CSAs were not engaged through the PSC, they were not public officers and therefore not eligible to the family friendly measures applicable to the Public Service. This ruling failed to consider the fact that the Budget Speech for 2007 (one year earlier) had abolished the concept that family friendly measures were limited to public officers engaged through the PSC.

Moreover the 9th edition of PSMC was dated 1 June 2008 – (a few days before the MPO ruling of 9 June 2008) had incorporated the 2007 Budget declaration. Once the public sector employees had become eligible to parental leave despite their not being engaged through PSC, it was beyond comprehension why the MPO had at that time based its ruling on the fact that the CSAs had not been engaged through PSC.

The Ombudsman found it difficult to understand that Government's 2007 budget decision to extend parental leave to public sector employees was intended

to be interpreted as barring its own employees (who were casuals but had been engaged for a number of years) from such benefits. In its reply Government did not address this point, but referred to these employees as having been regularised through the PSC only in November 2010 and one could not apply entitlement to new conditions retrospectively. In essence, the authorities stuck to the concept that prior to November 2010, family friendly measures for Government employees were limited to public officers engaged through PSC.

In this context reference must be made to a ruling from this Office in 1997 in respect of Case No 1777 where a female employee was refused the benefit of availing herself of maternity leave on the grounds that she was a part-time employee despite that she had for a number of years, been working a full forty-hour week. MPO had at that time resisted her request and only approved it following the decision of the Ombudsman which sustained her complaint. That decision led the MPO to issue a new circular to cover employees who were not public officers. At that time, maternity leave was the only family friendly measure in force.

In the Ombudsman's opinion, the official stance ceased to be relevant when in November 2007 Government removed the requirement of engagement through PSC in order to benefit from Family Friendly Measures - a declaration which was endorsed in PSMC edition dated 1 June 2008. Complainant had sought parental leave subsequently. The Ombudsman further considered that it was inconceivable for the authorities to argue that its Government part-time employees were, as a consequence of the Budget speech and of the PSMC, specifically excluded from such benefit.

The implication of the 2008 decision by MPO had a more serious impact because complainant had no option but to resign. Her family needs were very pressing and the new born twins needed her care. As a result, she lost her chance of a permanent appointment when in November 2010 her colleagues (CSAs) were absorbed as public officers in the grade of Social Assistants in Scale 20.

Conclusions and recommendations

In the light of the above findings the Ombudsman concluded that:

- there was enough circumstantial documentary evidence in favour of complainant having sought to apply for parental leave which was refused by MPO because she was not engaged through PSC – this despite that the 2007 Budget speech and PSMC 9th edition which preceded such decision, extended family friendly

measures (including parental leave) to public sector employees who were not engaged through the PSC. Government's stance in respect of its employees who were not engaged through PSC was unacceptable.

- Government's argument that improved conditions in the public services cannot be applied retrospectively misses the determining issue in this case. What was at stake here was complainant's loss of her entitlement to go on parental leave in 2008 when Government had, one year earlier, extended such entitlement to employees in the public sector who were not public officers since they were not engaged through the PSC. What happened in 2010 was a development which *aggravated* the consequences of the 2008 decision. The Ombudsman did not believe that Government wanted to exclude its own employees who had not been engaged through the Public Service Commission when it extended such right to public sector employees. This would have been an act of improper discrimination.

The Ombudsman therefore upheld the complaint. He recommended that the Office of the Prime Minister liaises with the Public Service Commission as to the best way to redress complainant's grievance in the light of the fact that CSAs engaged before 2010 had been appointed public officers and that she was unjustly deprived of this opportunity following the decision to exclude her from the family friendly measures benefit of parental leave that was applicable to her, resulting in her being forced to resign from Government service.

This recommendation was accepted and implemented.

CASE NOTE ON CASE NO M0288
MINISTRY FOR EDUCATION AND EMPLOYMENT

AN APPLICANT WHO FAILED TO OBTAIN A TRAINING SUBSIDY

(EU funded training, subsidy, appeals board)

The complaint

An applicant for a training subsidy, felt aggrieved that the Training Subsidy Scheme ETC (TSSA) Appeals Board did not uphold his appeal against the decision of the Selection Board in respect of his application requesting a training subsidy for a programme of study in Digital Media on the grounds that he did not have 'A' Levels. He argued that his IT relevant qualifications, work experience and motivation were more relevant than 'A' Levels. He also stated that the TSSA Appeals Board was giving more points for 'A' Levels when the course was in Digital Media, an area in which he had more qualifications.

Findings

There were 262 applicants for the Scheme of which 257 applicants were interviewed. The criteria that were adopted were essentially in line with those announced in the Scheme itself, namely:- academic merit; suitability (including performance during the interview; relevant experience and motivation); relevance of applicant's choice of study/impact in the development of Malta; and the availability of much expertise in the economy.

Complainant appealed his interview result, and specifically as to how the Interviewing Board had evaluated his skills, education and work experience. In respect of his academic merit he referred to his nine (9) 'O' Level certificates besides a number of IT qualifications.

The terms of reference of the Appeals Board are listed in the European Social Fund document entitled:

"Project ESF 1.33 & ESF 2.4
Training Subsidy Scheme MCAST & Training Subsidy Scheme (Academic)
TSS Selection Board – Digital Media (TSS – SB –DM)
Malta 2007-2013"

Article 3 of this document dealt with Appeals, and stated as follows :

"*Under no circumstances shall the Appeals Board change the score of applicants deriving from interviews by the TSS–SB-DM, nor change the ranking of an applicant as a result of such score*".

It resulted that in assessing candidates, the interviewing Board "...gave an individual and not an automatic assessment to each certification (at all levels) based upon the response during the interview as well as the capacity of the applicant to prove his or her achieved competence in relation to the aspired Higher Qualification. Similar qualifications were therefore given different marking based on the individual's response to his or her aspired higher qualification and in relation to the acquired academic experience for that qualification. The Board made full use of the interview to assess not just the paper qualification (at face value) but also the academic merit of individuals who sought to link their previous academic experience with their prospective qualification. The Board gave more weight to the individual's grasp of the academic area in relation to the prospective qualification than to a simple evaluation of a qualification at the level of the Malta Qualifications Framework. Although this was felt to be time consuming, the Board wanted to ensure that academic merit is evidenced by an individual's performance during interview (vis-à-vis his or her qualification) and not just paper qualifications.

Therefore, besides the scores on the qualifications already obtained by the applicant, the Interviewing Board gave weight to other factors including:

- *the grade obtained in the qualifications possessed (example: persons with higher grades were given higher scoring...);*
- *the aptitude of applicants during the interview (the Interviewing Board asked a number of questions on which the applicants were assessed and those with the most innovative and creative ideas were given higher scorings even though they may have possessed similar qualifications); and*
- *applicants that had already completed part of the qualification for which they applied for under the TSSA.*

During the interview, the Interviewing Board asked all applicants to elaborate on the benefits that [they] would be acquiring upon successfully completing

the Higher Qualification. Applicants had the opportunity to explain how the knowledge, skills and competences expected to be achieved through the Higher Qualification would affect their future research focus, employability or career prospects. Through these questions the Interviewing Board wanted to ensure that the applicants that are awarded a scholarship had the necessary aptitude to successfully complete the Programme.

The above methodology [was] in line with the objectives set under the Operational Programme II that encourage measures aimed at increasing the participation rate in lifelong learning and enable human resources to shift to those sectors where there is greater demand."

In effect, complainant was awarded 28 marks out of a maximum of 50 for academic merit. The method used for assessing qualifications in this way was based on the distinction between 'academic qualifications' and 'academic merit', the latter concept being much wider than the paper qualifications themselves. This fact meant introducing a subjective element in the decision taken by the members of the Interviewing Board on the marks to be allotted to candidates for this criterion, depending on the subjective judgment of the members of the Interviewing Board on the replies/performance of the individual candidates during the interview.

In relation to complainant's comment regarding 'A' Levels as against IT certificates, the Ombudsman noted that it did not result that possession of 'A' Levels was in any way determinant to the outcome of the result. There were in fact more successful candidates who were not in possession of 'A' levels than those who had 'A' Levels. Therefore he was not in a position to sustain the allegation that during the interviews the Board "*...incorrectly gave the benefits to holders of A Levels even if irrelevant to the course material.*"

It further resulted that the Interviewing Board also took into consideration complainant's experience since June 2010 as IT Support Specialist as against the previous years as Technical Support, in relation to the course of studies applied for which in terms of the Scheme was intended for IT in gaming and financial services. Complainant was awarded 5.8 marks out of 10. Regarding performance during the interview, he obtained an average mark of 7.2 (out of a maximum of 10) which indicated a reasonably good *overall* performance at the interview in this respect.

In respect of motivation, the average marks awarded to complainant was 5.5 – a mark which was below average when the highest mark awarded for this criterion was 9.3. While the significance of the comment of the Appeals Board in respect

of motivation (without underestimating complainant's motivation to further his studies) was not understood in the context of the Interviewing Board having given him a below average mark, it had to be considered that this mark, as was the case of other criteria, depended on the subjective judgment of the Interviewing Board on how he replied to questions related to this issue during the interview.

Regarding the relevance of the choice of applicant's study/the impact of work in the development of Malta, complainant had referred to his proposed course as aiming, amongst others, to provide an educational foundation for a range of technical software and that students who complete this diploma would find a number of career opportunities in ICT industry or in IT Departments. This was a valid argument and one would normally expect a reasonably high mark for all IT (Digital media) courses, especially when one considers the importance at national level given to training in IT. However, in evaluating complainant's answers on this issue the Interviewing Board considered his replies as rather poor, resulting in a mark of 3.8 out of 10. Excluding one exceptional mark for one candidate, the highest mark that was awarded for this criterion was 8+. The comments in respect of this criterion apply also to the availability in the economy in respect of which complainant was awarded 4 marks. Save for one exceptional mark for the same candidate referred to earlier, the highest mark was 8.

In assessing complainant's performance on these two criteria, the Board had the support of two technical experts. However, candidates had to present reasons/arguments as to whether there was availability of such skills or not. The role of these experts was to assess whether what was being said by the candidates during the interview was correct or not. The Ombudsman was not in a position to know exactly what complainant said during his interview.

Overall complainant placed 219th when only the first 144 candidates in order of merit were awarded a scholarship.

Considerations

The Ombudsman considered that the Interviewing Board gave major importance to the way the candidates "*proved their point*" in explaining their case in respect of the selection criteria. While this was the reason for adopting the criteria of "*academic merit*" and not "*academic qualifications*", the Board's approach introduced a strong subjective element in the assessment of some criteria, in particular those of "*Relevance of Study*" and "*Availability in Economy*" where the course applied for by complainant would normally be expected to score higher marks than those awarded

to him. In fact the vast majority of the candidates obtained a higher mark.

In this context it must however be considered that the Interviewing Board adopted this procedure across the board and there is no evidence of any differential approach in respect of the individual candidates. Once this was the case, it was not the function of this Office to substitute the subjective opinion of the members of the Board by his own, even if, **for the sake of argument**, he were to hold a different opinion. The same applies to any reviewing body, including, in this case the Appeals Board.

Without prejudice to the above, it had to be noted that even if theoretically each of complainant's marks for the criteria "*Relevance of Study*" and "*Availability in Economy*" were topped up to a very good mark, for example 8 marks out of 10, this would have only added another 8.2 marks to his total and bring it to 62.27 marks. Complainant would only advance to 173rd place in order of merit when only 144 scholarships were awarded.

Conclusions

The Ombudsman therefore concluded that in light of the preceding considerations, namely:

i. that possession or otherwise of "A Levels" was not, in any way, determinant to the success or otherwise of applicants and in fact there were more successful applicants who did not have 'A' Levels than with such qualifications;
ii. the evaluation of candidates in respect of the pre-set criteria and related methodology was done subjectively and there was absolutely no evidence that this was not applied across the board and without distinction. It was not the function of the Ombudsman (or for that matter any reviewing body), to substitute the subjective judgment of the individual members of the Interviewing Board by his own, even if, for the sake of argument, he were to hold a different opinion; and even if, **for the sake of argument only**, one were to consider a theoretical upgrade (as indicated earlier in this report) of marks for two of the criteria where complainant was given a low mark, he would still not have qualified for a grant under the scheme.

The Ombudsman was therefore not in a position to sustain the complaint.

CASE NOTE ON CASE NO M0390
PAHRO

CLAIM BY AN EXECUTIVE SECRETARY OF A LOCAL COUNCIL TO A HIGHER GRADE IN THE PUBLIC SERVICE

(salary scale, top executive position, PSMC)

The complaint

An Executive Secretary of a Local Council claimed that she was unfairly, and contrary to the provisions of the Public Service Management Code (PSMC), denied tenure in Salary Scale 4 in terms of Section 1.3.7.1 of this Code.

The second indent of this section states as follows:

> *"Public officers in a substantive grade below Scale 4 who satisfactorily perform duties for six (6) years in the top executive position of an Authority or public entity, shall be offered tenure as Officer in Grade 4".*

In essence complainant based her claim to Officer in Grade 4 in terms of the above provision, because:

- *she had been satisfactorily performing duties as Executive Secretary of a Local Council for over 18 years;*
- *her substantive grade was below Scale 4 (Principal in Salary Scale 7);*
- *the position of Executive Secretary is a "top executive position (...Executive, Administrative and Financial Head) of ... Local Council..."; and*
- *the PSMC section does not leave room for interpretation. In no part of the second indent did it state - as is argued by Public Administration HR Office (PAHRO) - that to have tenure in Grade 4 on the basis of this provision, one has to perform work in a grade comparable to Scale 4.*

Findings and considerations

The issue in this case was whether PAHRO had, in complainant's case, correctly interpreted (its own) PSMC provisions.

PAHRO argued that the second indent of section 1.3.7.1 is specifically targeted at public officers, in a substantive grade below Scale 4 of the Public Service Salary Scales, who however perform higher duties creditably, and at least comparable to Scale 4 of the Public Service Salary scales, for at least six (6) years in a position within the top echelons of an Authority or a public entity. It added that for this reason the relative PSMC provision benchmarks performance of duties at Scale 4 level. In contrast, the position of Executive Secretary of a Local Council is pegged to Salary Scale 7/6/5 (depending on the size of the Council) of the Public Service Salary Scales. PAHRO further argued that complainant had not performed duties at a level comparable to Scale 4 and therefore she was not entitled to benefit from this provision.

On her part complainant insisted that this argument was built on a false premise, since the quoted PSMC provision does not mention that one has to have been performing duties not below Scale 4 of the Salary Scales.

The Ombudsman noted that it was a fact that, as contended by complainant, the second indent to section 1.3.7.1. does not specifically mention that the duties performed must be at Salary Scale 4 or higher. However, in the Ombudsman's opinion, this provision had to be interpreted in its context. The above quoted provision was only one of the many examples listed under section 1.3.7.1 of how the opening statement of the said section should be implemented. The opening statement of this section stated as follows:

> *"1.3.7.1 Officers who are appointed to certain higher management positions in a salary scale which is higher than their substantive grade will be appointed to the higher substantive grade on completion of six (6) years satisfactory performance in the respective position ... as explained hereunder."*

This overriding provision must be considered as the operative principle that had to be applied to what follows under it by way of examples. This section was clearly intended to compensate service by a public officer in a higher management position (and to a related higher salary scale) such that they are appointed to a substantive grade in the higher salary scale in which they have satisfactorily performed duties for (at least) six years.

There were also in the Ombudsman's opinion, further points which had to be considered in this case:

- complainant's substantive grade was that of Principal which reaches a maximum Salary Scale 7. The duties she was performing at the particular Local Council were remunerable at Scale 7 – the lowest of the Salary Scales of Executive Secretary of a Local Council. It could not therefore be argued that complainant satisfied the requirements under the main paragraph of Section 1.3.7.1 – namely that she was appointed to a higher management position in a Salary Scale which was higher than her substantive grade; and
- the second indent of section 1.3.7.1 on which complainant based her claim refers to "*top Executive position of an Authority or public entity*". The terms "*Authority*" or "*public entity*" are not defined and one may hold different views as to whether a Local Council can reasonably be considered as an Authority or public entity for the purpose of this provision of PSMC. However one important guideline, and in the Ombudsman's opinion, a valid one can be found in the Second Schedule of the Public Administration Act which lists the Government Departments.

In terms of this Schedule, the Director Local Government Department is recognised as the Director responsible for Local Councils, whose function is "*To support and monitor the activities of Local Councils*". As such, and since the Local Council and its Executive Secretary are answerable to the Director Local Government who is the Head of the Local Government Department, it could not be validly argued that the second indent of section 1.3.7.1 was applicable to an Executive Secretary of a Local Council.

Conclusion

While the Ombudsman agreed that the wording of the second bullet of the provision of PSMC could have been better worded as to leave no doubt on its interpretation, the interpretation given by PAHRO was, on the other hand, a reasonable one and could not be considered as unjust or otherwise amount to maladministration.

However, even if, the relative provision should be more clearly worded, the Ombudsman regretted that he was not in a position to sustain the complaint.

CASE NOTE ON CASE NO N0001
PAHRO

MARKS AWARDED FOR QUALIFICATIONS IN A SELECTION PROCESS

(selection criteria, qualification process, points)

The complaint

A private citizen contended that while "*... the Government of Malta holds as incontestable the value of university degrees in respect to employability (and this is actually underscored by numerous sectoral agreements made by the Government over the years, where university graduates are given a Qualification Allowance)*" he failed to understand why top posts in the Civil Service continued to be regularly awarded to persons who are not in possession of a university degree. He mentioned three positions for which he had applied, elaborating on the marks he was awarded by the selection board and added that in the three selection processes, the marks awarded to the applicants' qualifications were minimal. He added that notwithstanding his First Class BSc (Hons) Degree in IT not only was he not selected for the positions but he also failed the interview and was surpassed by people who did not possess a university degree.

During a meeting held at the Office of the Ombudsman, he clarified that his complaint was not specifically directed at any of the selection processes which he mentioned, but to the routine practice of selection processes in the Civil Service whereby the maximum mark allotted to a candidate's academic qualifications does not extend beyond 15% of the total mark. In complainant's opinion this practice "*... devalues and depreciates university education by awarding trivial marks to university degrees, whereas in fact, it should be the other way round, and persons with university degrees should be favoured over others who did not bother with pursuing and investing in a university education*[1]".

As explained during the meeting held with complainant, the function of the Ombudsman is that of investigating administrative acts and procedures and

1 Letter of complaint

establishing whether the act or procedure with which a complainant is aggrieved amounts to maladministration. The Ombudsman does not comment on the criteria or sub-criteria utilised in a selection process or the weightings allocated to each of these, once it appears that these criteria were approved before the commencement of the selection process and were applied fairly and consistently by the Board in its assessment of the candidates in a selection process. Complainant did not contest this.

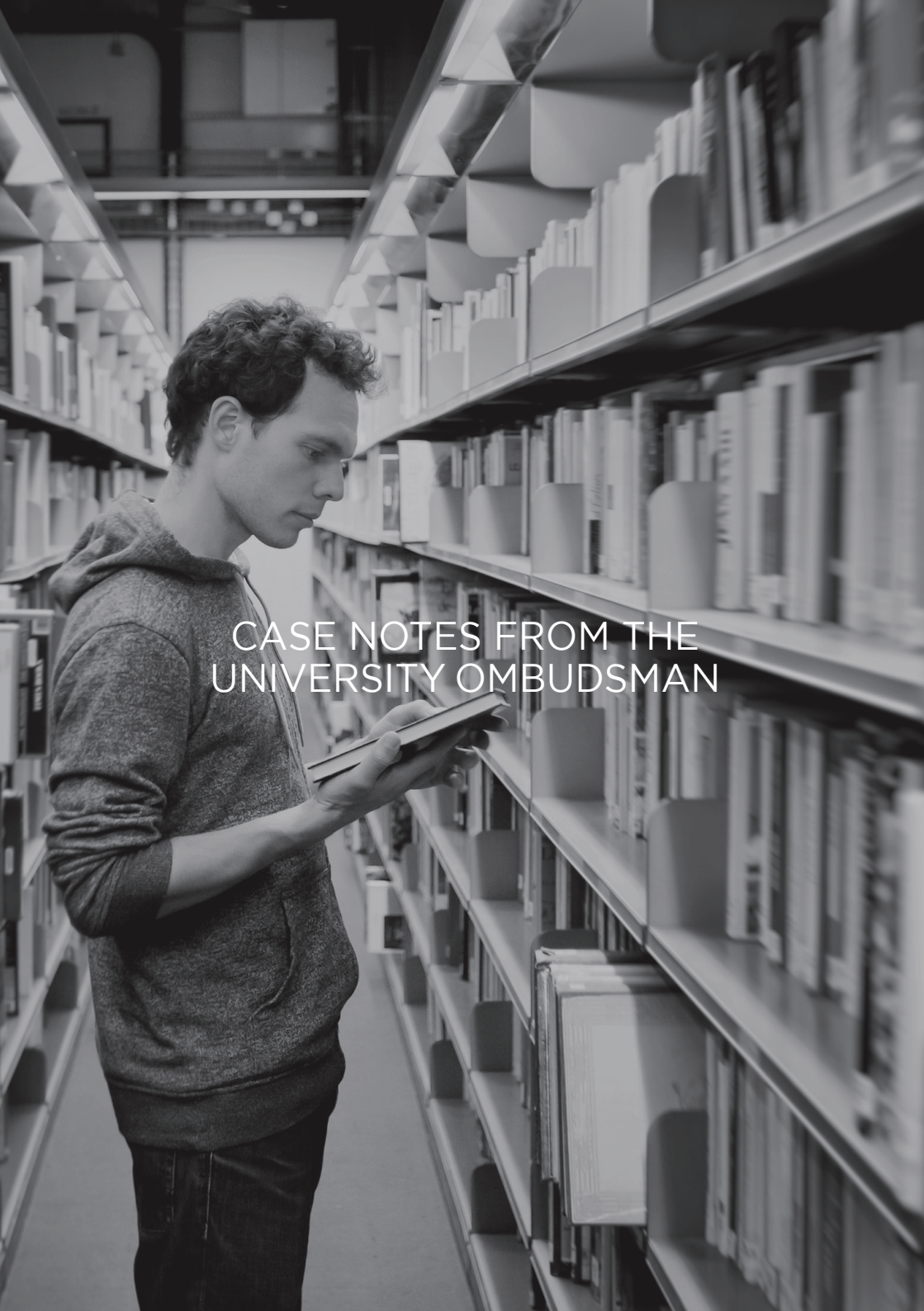
The Ombudsman considered that, as pointed out by complainant, it was undisputed that Government valued the worth of university degrees and in fact several years ago Government started paying a qualification allowance to public officers who further their studies. However, the primary aim of this payment was that of encouraging officers in the Public Service to improve their academic qualifications so that they could in turn render a better service to the general public. This, also in view of the fact, that academic qualifications although valuable, cannot and do not substitute the practical knowledge and experience possessed by a candidate, assets which are indispensable for a proficient performance in the position applied for.

The Ombudsman did not support complaint's contention that qualifications were not being given adequate recognition in selection processes and that the 15% generally allocated to qualifications was negligible. It was pointed out that those who do not possess related qualifications are awarded no points for this criterion – consequently, the selection process does give weight to the academic qualifications. Moreover, as rightly pointed out by the Public Service Commission, selection processes for senior positions should not be based exclusively on qualifications and it was up to the applicants to demonstrate to the Selection Board that they merited a positive assessment in terms of the selection criteria for the position applied for. The Office of the Ombudsman held that the interview process, despite any inherent defects, was still universally applied and had not found a better replacement. Moreover, the interview was perhaps the best opportunity where a candidate's vision of the responsibilities of the post/position applied for, could be tested in depth.[2]

Considerations

In view of the above submissions, the Ombudsman did not take further cognisance of the complaint.

2 Final Opinion in Case No J0024.



CASE NOTES FROM THE UNIVERSITY OMBUDSMAN

CASE NOTE ON CASE NO UM0043
UNIVERSITY OF MALTA

YOUNG LADY'S ASPIRATIONS TO BECOME A LIBRARIAN SQUASHED

(unjust treatment; filling of post; qualifications)

An aspiring librarian complained that the University of Malta treated her unjustly when she was not selected for the post of Library Assistant.

The complaint

A young lady lodged a complaint against the University of Malta claiming that the Institution unfairly denied her, without sufficient justification, the post of Library Assistant even though she had the required qualifications and some experience in the area. She also wished to know her weak points in order to improve her performance the next time she applies for a similar post.

Facts and findings

The complainant had been working in the Physiotherapy area with the State health authorities for the last twelve years. However, she earnestly wished to work as a librarian even if it meant loss of income.

In October 2009, she enrolled for the course leading to the Diploma in Library and Information Studies, which she completed successfully and graduated in November 2011 with an overall Grade 'C'. As part of the course programme, she carried out a two-and-a-half weeks (100 working hours) *practicum* at the Health Sciences Library at Mater Dei Hospital. Her tutors awarded her Grade 'B' (70 percent) for her work performance.

The complainant applied for the post of Library Assistant following a call for applications issued by the University on 8 June 2012. This was her fifth application for library related work. In fact, she applied unsuccessfully twice for the post of Assistant Librarian and three times for Library Assistant.

The Members of the Selection Board for her most recent application were:

- the University Secretary;

- the Director of Library Services; and
- two other Members.

The Board interviewed the complainant on 17 July 2012 and applied the following selection criteria:

i. relevant academic qualifications;
ii. relevant work experience;
iii. aptitude and suitability; and
iv. performance in interview.

The Board considered 65 applications, shortlisted and interviewed 53 candidates, and selected three persons for the post. The complainant was not one of the selected candidates, and sought reasons from the University authorities as to why she was not chosen. Unsatisfied with the University's reply, she lodged a complaint with the Office of the University Ombudsman.

The University Ombudsman requested the University to react to the lady's complaint, whereupon the Rector asked the Selection Board to reconvene and examine the complainant's claims. The Board reconsidered the complainant's case on 25 September 2012, and confirmed its earlier decision not to appoint her. At this point, the University Ombudsman felt it pertinent to ask why it took the University three-and-a-half months to deal with his request for feedback when the reconvened Selection Board met and reached its conclusions on 25 September 2012.

Observations

The responsibility of evaluating and deciding on applicants' objective and subjective attributes rests primarily with the Selection Board, which is the appropriate body designated by the University Council to carry out this task. In cases such as this, the University Ombudsman's remit allows him to evaluate and comment mainly on the Board's evaluation of clearly objective criteria such as the academic qualifications and the work experience of the applicants concerned. He does not disturb decisions reached by Selection Boards unless he finds erroneous evaluations of objective criteria, or manifest irregularities and discrepancies, or blatant discrimination. His responsibilities concentrate on trying to ensure that the selection process was fair, equitable, conducted according to set and approved procedures, and in a manner that is not improperly discriminatory.

In dealing with this case, the University Ombudsman was not in a position to comment on the purely subjective decisions such as Selection Board's evaluation of the applicant's *'aptitude and suitability'* for the post of Library Assistant. Similarly, he could not pass judgement on the complainant's *'performance during the interview'*. Indeed, on the latter point, the Boards concluded that:

> *"Ms ... did not give a positive impression during her interview due to the manner in which she answered the questions and through her non-verbal cues."* [3]

In contrast, the Selection Board found that:

> *"The three persons selected were smart and presentable and able to communicate effectively. They responded well to the questions posed by the Selection Board."* [4]

The University Ombudsman accepted the Board's evaluation of the two subjective criteria, and suggested that the above statements should provide the complainant with the guidance she sought to improve her future performance. However, he had reservations about the Board's appraisals of the complainant's objective attributes, namely *'relevant academic qualifications'* and *'relevant work experience'* especially when compared with those of the selected candidates.

The three selected candidates are first-degree holders at Honours level in Arts subjects namely in History, Communications and French respectively, and it was up to the Board Members to decide the extent of the *'relevance'* of their degree to library duties. In contrast, the complainant undertook a two-year part-time Diploma course dedicated to Library and Information Studies with 62 study-units (including two synoptic final examinations) specifically devoted to the acquisition of the knowledge and the development of skills required for library work. Evaluated objectively, the complainant's lower qualification appeared more relevant to the post of Library Assistant than the selected candidates' first degrees. One also notes that over time, the University Library has lost a number of graduate Library Assistants, who initially accepted the post, but feeling overqualified, moved on to other posts as soon as the opportunity arose.

The appraisal of the complainant's *'work experience'* also raised questions. She spent two-and-a-half weeks (100 working hours) under supervision in actual library

3 Reconvened Selection Board Report.
4 Ibid.

work at the Health Sciences Library at Mater Dei Hospital. Again, an objective evaluation showed that the complainant's albeit limited library work experience was more directly relevant to the post in question than the selected candidates' part-time "*while studying*" [5] work experiences, which were in either sales, supply teaching, machine operating or nursing.

Furthermore, an important point about the complainant's quality of work during her *practicum* needs to be clarified. The complainant's official academic transcript issued by the University recorded that her supervisors assessed this part of the Diploma programme at Grade B (70 percent). However, the report by the reconvened Selection Board states:

> *"Her [the complainant's] performance during this placement [practicum] was not satisfactory. This was confirmed by the Director of Library Services, a Member of the Selection Board, who had received feedback about [the complainant's] during her placement at the Library of the Faculty of Health Sciences."* [6]

It was evident that the feedback on complainant's *practicum* performance received by the Director of Library Services contrasted markedly with her supervisors' assessment. The University official grading scheme qualifies Grade 'B' (70 percent) as "*work of good quality*", indeed better than "*average quality*" [7]. Obviously between the contrasting evaluations the tutor's official assessment should have carried more weight than unofficial feedback.

Conclusions and recommendation

In a letter dated 1 October 2012, the Director for Human Resources Management and Development wrote to the complainant:

> *"There were a number of applications for this position and the selected candidates proved to be stronger in the areas of relevant work experience and were better able to demonstrate their aptitude and suitability for the post of library assistant".*[8]

It may well have been the case that when one took into account all the attributes

5 Ibid.
6 Ibid.
7 Complainant's official academic transcript.
8 Letter, dated 1 October 2012, by the Director for Human Resources Management and Developlemt to the complainant.

and factors covered by the four selection criteria, the selected candidates proved to be stronger contenders than the complainant. However, a careful analysis of all the facts does not justify such an unqualified conclusion, certainly in respect of *work experience* criteria. As stated earlier, the University Ombudsman did not question the Selection Board's evaluation of the complainant's '*aptitude and suitability for the post'* or her '*performance during the interview'*. On these counts, the University Ombudsman accepted the HR Director's statement that the selected candidates proved to be stronger in these attributes than the complainant. However, the University Ombudsman could not reach the same conclusion with regards to the evaluation of the objective criteria, namely '*relevant academic qualifications'* and *'relevant work experience'* where the indicators point to the conclusion that the complainant had the stronger attributes.

In view of the above and having taken into account all the factors in this case, the University Ombudsman's Final Opinion was that the young lady's complaint was partially justified since her qualifications in Library and Information Studies, and her limited but highly relevant work experience in a University library do not appear to have been fully appreciated.

Furthermore, in view of the discrepancy between the complainant's *practicum* 'B' grade in contrast to the negative feedback given to the Director of Library Services for the same exercise, and which he cited during the selection process, the University Ombudsman recommended that the Selection Board should have a fresh look at the complainant's attributes. In the process, the Board would reconsider whether she was suitable for the post of Library Assistant when one weighs her suitability with her qualifications and experience.

Outcome

The University accepted the University Ombudsman's recommendations.

CASE NOTE ON CASE NO UM0054
MCAST

A SEEMINGLY INCONGRUOUS DECISION

(discrimination, unfair treatment)

A College lecturer complained that the Malta College of Arts, Science and Technology (MCAST) discriminated against him when he was not shortlisted to sit for a selection interview for the post of Director at one of the College's Institutes.

The complaint

A College lecturer lodged a complaint against MCAST claiming that the College treated him unfairly and discriminated against him when he was not called for a selection interview for the post of Director at one of the College's Institutes. He argued that he possessed all the requirements for the post advertised in the call for applications. He pointed out that at the time he applied he had served as the Acting Director of the same Institute for fourteen months

Findings

In August 2012, the Director of the Institute in question resigned her post thus creating a vacancy. MCAST issued a call for applications for the vacant post and the closing date for the said applications was 17 September 2012. The call for applications contained the following eligibility requirements:

- *"A first degree in a subject directly related to one of the areas in which the Institute*
- *... offers programmes of study;*
- *A qualification equivalent to a Masters degree in an area related to any of the study programmes offered by the Institute OR in Management OR in Educational Leadership OR five (5) years experience in a managerial position; and*
- *A minimum of five (5) years teaching/lecturing or industrial experience directly*
- *related to one of the fields in which the Institute of ... offers tuition."*

The complainant applied for the post citing extensive attributes including the following academic qualifications and work experiences:

i. Academic Qualifications

- *Bachelor of Arts (Honours) specialising in 3D Design Mains – Interior obtained from a British University;*
- *Post-Graduate Certificate in Education (PGCE) specialising in the teaching of Art and Design in Secondary Schools obtained from the University of Malta; and*
- *Several qualifications at Diploma and Certificate levels in Art and Design.*

ii. Relevant Work Experience

- *Seven years administrative and lecturing experience, as Deputy Director at an MCAST's Institute;*
- *Fourteen months administrative experience as Deputy Director at the MCAST's Institute where the vacancy occurred; and*
- *Several assignments in a specialised field conducted on behalf of educational and commercial bodies.*

In his application, the complainant pointed out that since the resignation of the Director of the Institute concerned, the MCAST authorities had assigned him the duties of Acting Director, the very same post he applied for.

The Selection Board was made up of the following members:

- the Principal, as Chairman;
- a member of the Board of Governors; and
- the Deputy Principal.

The Board Members evaluated sixteen applications. They initially shortlisted three candidates for a selection interview but added a fourth whose appeal at not being shortlisted was upheld by the Board of Governors. The latter acts as an Appeals Board mechanism in such cases.

The Selection Board decided that the complainant was not eligible for the post because he failed to satisfy the first requirement in the call for applications quoted

above. Consequently the Board did not call him for an interview. The Board based its decision on the grounds that although the applicant held a Bachelor's degree and a PGCE in Art and Design, this specialisation was not related to the main programmes taught at the Institute.[9] He appealed the decision, however, MCAST's Board of Governors upheld the Selection Board's conclusions,[10] following which the complainant lodged his complaint with the University Ombudsman.

Observations

The Selection Board's decision, endorsed by the Board of Governors, was not to shortlist the complainant for a selection interview for the very post that he was holding as Acting Director. At first glance this decision appears highly incongruous. However, an analysis of the complainant's qualifications clearly shows that his academic qualifications and teaching competences did not match the requirements for the advertised post. He possessed the academic qualifications and lecturing experiences at the required levels, but not in the subject areas taught by the Institute. There is no doubt, therefore, that he did not meet the first requirement listed in the call for applications. Consequently, the incongruence does not arise from the fact that the complainant was not shortlisted for interview for a post he was filling as Acting Director. The mismatch resulted from his appointment first as Deputy Director, and later as Acting Director in an Institute where his knowledge of the subjects taught was basic.

There are, however, several other relevant factors that require further consideration. Further insight into the events leading to the complainant's complaint reveals that his appointment as Acting Director at the Institute was not as irrational as it may initially appear. He held the post of Deputy Director at another MCAST Institute for seven years. He requested and obtained a transfer to

9 Selection Board final report, dated 7 December 2012. It also appears that the complainant did not satisfy the third criterion of the call for applications. However, the MCAST authorities made no reference to this point.

10 Minutes of the Board of Governors meeting held on 13 November 2012. It is to be noted that MCAST has adopted the policy to notify candidates who are deemed to be ineligible for a post, well before the final report of the Selection Board is published. This procedure allows such candidates to appeal should they feel that the Selection Board has not evaluated properly their credentials. In this case, the Selection Board notified the complainant that he was not eligible for the post soon after its first meeting, he appealed to the Board of Governors who met to discuss his case amongst others on the 13 November 2012, while the Selection Board concluded the selection process on 7 December 2012. This explains the apparent discrepancy between the dates of the Board of Governors' decision and the Selection Board's final report.

provide services at the Education Division when, to his great disappointment, he was not appointed Director of that Institute. Eventually, he was transferred back to MCAST, but following consultations with the Permanent Secretary at the Ministry of Education, Employment and the Family,[11] the College authorities decided that it was in the best interest of all concerned not to re-assign him to his previous post of Deputy Director at the other Institute. Rather than render him jobless and to benefit from his acknowledged administrative skills and industry contacts, the complainant was assigned the duties of Deputy Director at another Institute, were his attributes were needed. The fact that his academic qualifications were not related to any of the subject areas taught at the Institute was not an issue since the academic aspects were well served by the Director and the other Deputy Director. Moreover and significantly, at the time of his transfer, a Deputy Director was not required to have academic qualifications related to any of the subject areas taught in the Institute.

A year later, the Institute's Director resigned her post and the new Principal felt it necessary to appoint an Acting Director until the selection of a permanent one. His choice was limited to one of the Institute's two Deputy Directors. In fact, it was a Hobson's-choice since the complainant's fellow Deputy Director declined to be considered for the post and in any case, was working on reduced hours. It is important to note that the Principal made it very clear to all concerned, including the complainant,[12] that his services as Acting Director were of a temporary nature. The Principal also maintains that while the arrangement sufficed as a stopgap measure, the College's policy now aims for the appointment of Institute Directors who are competent in administrative and managerial skills as well as qualified in one of the academic programmes provided by the Institute.

The September 2012 call for applications for the post of Director within the Institute in question reflected these aims and new policy, which in fact rendered the complainant ineligible for the post. The Principal emphasised[13] that the new requirement (which was being applied across the board for all new appointments of Directors) and the decision not to consider the complainant for the post,

11 Letter dated 4 November 2011 from the Permanent Secretary, Ministry of Education, Employment and the Family addressed to the complainant.

12 These points emerged from conversations with the MCAST Principal and Vice-Principal, and separately with the complainant.

13 Letter, dated 18 December 2012 by the Principal MCAST to the University Ombudsman in reaction to complainant's claims. This was also emphasized during a meeting held with the Principal and Deputy Principal on 19 December 2012.

were not intended to exclude, harm or spite him. Indeed, the College valued his administrative contribution to the Institute, however in the new circumstances, even if he was Acting Director, the complainant lacked the first requirement in the call for applications. One notes that the Selection Board reached identical conclusions regarding applications by Deputy Directors from other Institutes who applied for the post in question.

One also has to acknowledge that MCAST is a young institution, whose policies and directions are still at an evolutionary stage and it is to be expected that these would change as the College administration acquires new experiences.

It does not fall within the remit of the University Ombudsman to evaluate all the required attributes of applicants for the filing of vacant posts, although he can appraise and comment on clearly objective criteria such as qualifications and work experience. The responsibility of evaluating and deciding on applicants' attributes rests mainly with the appropriate body designated by the College regulations to carry out this task, namely the Selection Board. Therefore, the University Ombudsman, does not disturb decisions reached by such bodies unless he finds erroneous evaluations of objective criteria or manifest irregularities and discrepancies or blatant discrimination. The University Ombudsman's responsibilities are to ensure that the selection process was fair, equitable and conducted according to set and approved procedure, which are not improperly discriminatory.

Conclusion

The allocation of duties to the complainant as a temporary Acting Director of the Institute in question until the appointment of a permanent Director, created conditions to complicate the issue in this case. As stated earlier, it appeared incongruent for the MCAST authorities to assign the duties of Acting Director to an individual who, at a later stage, was declared ineligible for the post of Director in the same Institute. However, the University Ombudsman was of the opinion that when they took this decision, the MCAST authorities acted in the best interest of the institution. Equally important, they did not break any established rules or regulations then in force. A review of the situation proves the point:

On his return to MCAST the complainant already held the substantive post of Deputy Director, at a time when there were no restrictions on his eligibility to a similar position in the Institute in question. This was done with a clear understanding that his duties would be limited to administrative and managerial issues since the then Director and the other Deputy Director would assume the responsibility for the academic matters.

On the retirement of the incumbent, the Institute was functioning without a Director, and of the two Deputy Directors, only the complainant was willing to fill the temporary void.

The temporary nature of complainant's duties as Acting Director was unequivocally explained to all concerned. There was a clear understanding that the College would eventually appoint an Institute Director, whom it considered most suitable to fulfil his or her administrative and academic roles in line with newly established eligibility criteria applicable to all Institute Directors.

MCAST had every right, indeed it was its duty, to spell out these new eligibility requirements in calls for applications for future Institute Directors, and eventually to appoint one who met both requirements. I do not find any evidence of improper discrimination in the upgrading of the eligibility criteria.

With regards to the complainant's specific complaint, since he did not satisfy all the eligibility criteria, the University Ombudsman found that he was not discriminated against when the Selection Board did not shortlist him for an interview. Furthermore, the University Ombudsman found no evidence that the call for applications set new requirements specifically to exclude him. As stated earlier, the College had every right to set the most suitable eligibility conditions for the post of Director. The Selection Board duly evaluated the complainant's credentials and concluded that his academic qualifications did not meet the set requirements. It was also within the Board's discretion to reach such a conclusion, which it later justified in its report. Furthermore, the College's Board of Governors, considered the complainant's appeal against the Selection Board decision, but concluded that the latter's decisions were correct and valid. In addition, the College Principal provided the University Ombudsman with a detailed reply to the complainant's claims. As a result, the University Ombudsman did not find any flaws in this process. In reaching their decisions, the College authorities did so fairly and correctly. They treated the complainant without any discrimination, in the same manner as they dealt with other applicants.

In view of the above, the University Ombudsman concluded that the complaint cannot be upheld.

Outcome

Although not happy with the University Ombudsman's conclusions, the complainant accepted the outcome of the case.

REPORT ON CASE NO UN0009
UNIVERSITY OF MALTA

EXAMS MARKERS' FEES REDUCED

(reduced renumaration)

Two examiners complained that the University of Malta arbitrarily reduced considerably their fees as MATSEC markers.

The complaint

Two MATSEC examiners/markers lodged a complaint against the University of Malta claiming that, without consultation or prior notice, the MATSEC Support Unit (MSU) did not remunerate their services as markers for the examination scripts in 2012 at the same rates they were paid in the previous four years.

Findings

The complainants have acted jointly as markers for one of the MATSEC Matric examinations subjects since 2008. In the years 2008-2011 the University remunerated their services at an average rate of €5.87 per script, but in 2012 the remuneration was reduced to €3.78 per script without prior consultation or notification. Since in 2012 they marked 704 scripts, they claimed between them a shortfall payment of € 1,471.32.

In 2012, the University Council established the markers' remuneration at the rate of €4.40 per script, information that the MSU claims to have communicated to all markers. However, throughout the investigation, the complainants (as well as the subject Examination Chief Examiner) insisted that the MSU Principal Subject Area Officer gave them this information only in January 2013 when they complained about the 2012 remuneration.

In spite of the set €4.40 per script, the MSU allowed Subject Examination Chairpersons to apportion remuneration among the examination team members according to the task performed by each individual. This procedure was permitted as long as the total sum paid out did not exceed that allocated for each subject, and provided that the examiners and markers concerned agreed to the proposed distribution.

The Matric examination subject concerned consists of four papers, where Papers 1 and 2 are of 180 minutes duration and carry 100 marks each, whereas Papers 3 and 4 are of 90 minutes duration and carry 50 marks each. Dr X, who was the subject Examination Chairman for the years 2008-2011, factored in the reality that it was more arduous and time-consuming to mark Papers 1 than it was to mark Papers 2, 3 and 4. Consequently, he recommended the remuneration for Paper 1 at a rate of €5.87 instead of €4.40, while markers for Papers 2, 3 and 4 were remunerated at a lower rate. The MSU approved and paid the recommended rates once the total sum did not exceed that allocated to the subject examination. On this basis complainants received between them the following payments for marking Paper 1:

2008: 556 scripts @ €5.87 = €3,261.86
2009: 724 scripts @ €5.87 = €4,247.46
2010: 754 scripts @ €5.87 = €4,423.47
2011: 667 scripts @ €5.87 = €3,913.06
except for
2012: 704 scripts @ €3.78 = €2,651.12

Mr Y replaced Dr X as the subject Matric Examination Chairperson in 2012. The new Chairman gave MSU the names of the markers without distinguishing between those who marked Papers 1 and those who marked Papers 2, 3 & 4, and without factoring their respective input and differentiated rates of payment. He assumed that his task was to concentrate on the academic aspects of the examination, while MSU officials would cater for the administrative details including the rate of payments based on previous years. During our meeting he assured me that he only became aware of the €4.40 and €5.87 per script rates when this case arose, and therefore he could not have discussed the rate of payment with the complainants and other examination markers.

The MSU accepted the data provided by Mr Y as it had Dr X's. However, without instructions to do otherwise, the MSU Principal Subject Area Officer divided the sum allocated to marking indiscriminately among the individuals concerned. This worked out at the rate of € 3.78 per script.

Observations

The running of the national MATSEC Examinations, involving almost a hundred subjects and tens of thousands of scripts, is a most complex exercise. It was therefore

appropriate for the University Council to set a standard remuneration-marking rate. It was also a sensible policy of the MSU to allocate a global sum based on Council's established rate to cover the cost of each subject examination, but leave it at the discretion of Subject Examination Chairman, following consultations with the examiners involved, to pay the questions-setters and the script-markers concerned according to their respective inputs. It may not have been a perfect system but it was fair, practical and agreed to by all concerned. Problems arose when a failure in communications occurred as happened in this case with the change of the Subject Examination Board Chairman. In 2012, the officials involved followed what they considered the right procedures, which resulted in considerably reduced payments to the complainants. The latter did not have the opportunity to accept or reject the reduced rates because they were never consulted about them.

Conclusion and recommendations

In the four consecutive years 2008-2011, the complainants were remunerated for marking Paper 1 of a MATSEC paper at the rate of €5.87 per script even if the rate set by the University Council was €4.40. The MSU allowed the difference in payment when the Subject Examination Chairman Dr X, who took into account the input by the different markers, recommended it. The MSU accepted the Chairman's logic, complied with his recommendations and paid the complainants at the higher rate.

In 2012, Chairman Mr Y did not distinguish between the inputs of the various script-markers as his predecessor had done. As a result, the complainants were remunerated at the newly computed rate of €3.78 per script for performing exactly the same duties they had carried out in the previous four years at the rate of €5.87 per script. With 704 scripts involved, they estimated an under-payment of €1,471.32 between them. They were neither consulted nor notified by the new Chairman or any other MSU official that they were to be remunerated at a lower rate than in the previous four years.

Therefore, considering all the factors involved, it was logical for the two complainants to expect that the rate of remuneration for 2012 would continue to be at the previous rate of €5.87 per script. In view of these facts, I sustain the complainants' claim that their remuneration for the marking of examination scripts in 2012 was not consistent with that of the previous four years. In the light of the above I recommend to the University to pay the outstanding sum of €1,471.32 due to them jointly.

Outcome

The University authorities accepted the University Ombudsman's recommendations and remunerated the complainants the full sum due to them.

CASE NOTES FROM THE COMMISSIONER FOR HEALTH

CASE NOTE ON CASE NO HN0031
MATER DEI HOSPITAL

UNJUST TRANSFER

(unjust transfer)

The complaint

A Mater Dei Hospital (MDH) employee felt aggrieved because she alleged that she was vindictively and unjustly transferred, without any reason, from MDH to Sir Paul Boffa Hospital. Following her transfer, she suffered from a psychological trauma which rendered her unproductive and non-functional, as certified by a Consultant Psychiatrist, and consequently was on sick leave for three months.

Complainant had requested for the transfer to be revoked and to be remunerated for the loss of income and other expenses incurred. She also asked that her sick leave entitlement will be reinstated to the level it was immediately preceding her transfer.

Preliminary considerations

Before initiating the investigation, the Commissioner for Health recognised the fact that allocation of duties is the prerogative of management. However he insisted that this should not be interpreted that management can treat its employees in a manner which negatively affected them unless there was valid justification for its decisions. Nor can this prerogative mean that it can transfer employees in a punitive or vindictive manner or allocate duties to an employee such that these degrade him/her. Furthermore, the Commissioner pointed out that the management should not allocate duties which are significantly below the employee's grade.

To sustain this argument, the Commissioner quoted the European Ombudsman's European Code of Good Administrative Behaviour which states:

> *"**Article 16***
>
> 1. *In cases where the rights or interests of individuals are involved, the official shall ensure that, at every stage in the decision-making procedure, the rights of defence are respected.*

2. *Every member of the public shall have the right, in cases where a decision affecting his or her rights or interests has to be taken, to submit written comments and, when needed, to present oral observations before the decision is taken."*

*"**Article 18***
Every decision of the institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision.

The official shall avoid making decisions which are based on brief or vague grounds, or which do not contain an individual reasoning."

*"**Article 20***
The official shall ensure that decisions which affect the rights or interests of individual persons are notified in writing as soon as the decision has been taken to person or persons concerned.

The official shall abstain from communicating the decision to other sources until the person or persons concerned have been informed."

The Commissioner for Health concluded that in the light of the considerations mentioned above, and in view of complainant's allegations that her transfer was vindictive and due to the fact that complainant was not given reasons for the administrative decisions which negatively affected her, the case was to be investigated.

Facts and findings

The Commissioner sent a copy of the complaint to the Permanent Secretary, Ministry for Health, for his comments. In his reply the Permanent Secretary stated that complainant had initially requested to be transferred to a specific Health Centre but since there was no vacancy for a Nursing Officer at the Health Centre, she was sent to Sir Paul Boffa Hospital. He added that the transfer was effected in the exigencies of the service and in terms of the letter of appointment.

The Commissioner also sought the comments of the Public Administration, Human Resources Office (PAHRO) on complainant's request for sick leave and financial compensation.

In their reply PAHRO stated that:

i. the transfer was effected in the exigencies of the service;
ii. the sick leave cannot be considered as Injury Leave; and
iii. in view of (i) and (ii) above "*...financial compensation is not warranted in this case*".

During the investigation, the complainant and her lawyer had a meeting with the Director of Nursing and the Manager Nursing Services of Primary Health Care. Subsequently complainant's lawyer sent an email to the Commissioner informing him with the outcome of the meeting.

In this meeting it transpired that the complainant was informed verbally that she was being transferred to Primary Health Care. Although not committing himself, the Director of Nursing was of the opinion that there should not be any objections for the request that the period of sick leave would be considered as special leave with reimbursement. During the meeting the complainant and her lawyer understood that the allegation of vindictiveness was accepted by the Health Authorities and the transfer to Sir Paul Boffa Hospital was to be revoked.

The Commissioner forwarded a copy of the letter sent by the complainant's lawyer to the Permanent Secretary for his comments. The Permanent Secretary rejected the complainant's request for special sick leave with pay and argued that the transfer to the Primary Health Care Department was made "*...without prejudice to whether the alleged transfer was deemed vindictive or not. The issuance of such a transfer to Primary Care has nothing to do with accepting that a vindictive transfer was issued in the first place*".

Following these circumstances, the complainant indicated a witness who could help in the investigation. The Commissioner met the indicated person who gave a statement which the witness was prepared to confirm under oath. The witness concluded that "*I have no doubt that this was all a matter of vindictiveness*".

During the investigation, the Commissioner interviewed another witness, who was mentioned by complainant. This witness, informed the Commissioner that he intervened for the sake of justice, and wrote the Prime Minister asking him that in view of the many bad things that were being said about complainant, she should at least be given the opportunity to defend herself. The witness continued that after a few days he was contacted by a senior staff at the Prime Minister's secretariat, but nothing else developed and complainant's version of events was not heard. The

witness had also spoken to a Cabinet Minister but again nothing happened. He concluded that, in his opinion, there was a strong smell of vindictiveness behind this transfer.

The Commissioner asked for a list of transfers that had been made from the Department of Health, from which it resulted that complainant was among the first to be included.

At this stage of the investigation, the Commissioner asked the complainant to give more details concerning her transfer and asked her also to provide copies of all relevant documents and correspondence exchanged with the authorities.

The correspondence submitted by the complainant, included e-mails sent to the Prime Minister, the Minister for Health, the Director of Nursing and the Legal Advisor at the Department of Health as well as copies of a Press Release issued by the Communications Coordinator, Ministry for Health and a copy of the Judicial letter.

The complainant also provided detailed information about action that was taken with the hope of solving the impasse. She declared that:

i. she was informed by her then Departmental Nursing Manager that she had been transferred to Sir Paul Boffa Hospital. She later spoke to the Manager Nursing Services at MDH who confirmed the transfer and told her "*għalina tista' tmur hemm minn issa*" (as far as we are concerned, you can leave immediately);
ii. she sent an e-mail to the Prime Minister and copied the Minister for Health. In her email, she explained that she was greatly surprised with the transfer and also gave details of the medical problems from which her daughter and her husband suffer. She added that in her over 30 years' service she had always worked diligently and that she was not given the opportunity to defend herself;
iii. she had requested a Minister to delve into the matter with the hope of finding the real reason behind her transfer; and
iv. she, together with one of the witnesses, met the Minister for Health who informed them that he had approved the transfer to the requested Health Centre. This was also confirmed in press release issued by the Ministry for Health.

The complainant confirmed that after she had told the Minister that due to family medical problems she preferred to stay at MDH, the Minister asked her to indicate where she preferred to work other than MDH. A few days later, the Minister informed her at fifteen past midnight that no one wanted her at MDH.

For these reasons, the complainant presented a Judicial Letter against the Minister for Health. Through, the Judicial Letter, the complainant appealed to the Minister to reverse the transfer forthwith so that she could resume her former duties at MDH.

The Ministry rejected all the claims made in the said Judicial Letter. The Legal Advisor of the Department of Health, informed her of her new conditions of work and that the request for special leave was still being considered. In a subsequent letter complainant's lawyer was informed that the request for special sick leave was not approved.

At this point, the Manager Nursing Services at the Primary Health Care phoned complainant and informed her that she was to be transferred to Primary Health Care.

In a particular Sunday newspaper, it was reported that the Secretary General of the Malta Union of Midwives and Nurses (MUMN) confirmed that he was informed that initially the complainant was going to be transferred to Mount Carmel Hospital, but following an intervention from someone who commented about health conditions in her family, they decided to transfer her to Sir Paul Boffa Hospital. The comment of the Secretary General of MUMN in the press was never denied by the authorities. The Commissioner spoke to MUMN's Secretary General, who confirmed his statement.

Considerations and comments

After analysing all documentation, and having spoken to all sides during the investigation, the Commissioner commented that complainant was one of the first employees in the health sector to be transferred after the change in Government and that no valid information on the exigencies of the service were provided as to why complainant was to be transferred.

He continued that apart from the complainant, at least four persons were strongly of the view that was an element of vindictiveness in this case.

The Commissioner pointed out that in complainant's 30 years' service there were never any instances of any disciplinary proceedings against her. This was confirmed by the Permanent Secretary and also after the Commissioner perused complainant's personal file.

During the course of the saga, the complainant was never given a valid explanation on the reason behind such transfer except for the statement by the Ministry for Health, that she was a *persona non grata* at MDH. However, this latter statement was never substantiated. The Commissioner noted that the complainant was never given a chance to give her version of events.

Conclusions and recommendations

From the investigation it emerged that complainant's transfer from MDH was originally intended so that complainant provides a service at a particular Health Centre, also in line with her earlier request for such transfer on humanitarian grounds. Instead, for reasons for which no explanation was provided by the health authorities, somebody within the health administration changed complainant's new posting to Mount Carmel Hospital. This was never denied by the Health Authorities despite reports in the press to this effect and as also confirmed by the Secretary General MUMN. The Minister had acceded to complainant's request to be transferred to a particular Health Centre. The Commissioner stated that he had reasons to believe, that this transfer had been changed behind the Minister's back by someone else, this time to Mount Carmel Hospital. The sequence of events did not support the grounds that the transfer was done in accordance with the exigencies of the service. In fact no explanations were given why the transfer was initially issued for complainant to provide a service at Mount Carmel Hospital – a posting which was later changed to Sir Paul Boffa Hospital.

Moreover, complainant was denied her right to be heard by the authorities to explain her case despite her pleas to this effect. Decisions which negatively affected employees are tantamount to denial of a citizen's right to good administration unless the individual is given the opportunity to defend himself/herself prior to the decision being taken.

The sequence of events casted doubts on the real motivation for such transfer. Complainant claimed that it was vindictive and was triggered by persons within Government.

The evidence based to some extent on information given to her but which cannot, by itself, be considered as grounds that were valid enough to support the allegation of vindictiveness. However the belief among independent reliable persons, was that there was a strong smell of vindictiveness in the motivation for complainant's transfer.

This was also confirmed by an eminent highly respected independent person who had tried unsuccessfully to mediate in the matter with the highest authorities and ended by expressing his belief that this transfer smelt of vindictiveness. The fact that the Minister informed the complainant that she was *a persona non grata* at MDH, without any justification and without complainant ever being heard, thus automatically indicating that there were persons at MDH who absolutely did not want her there. To a significant extent this situation contributed to support

the theory of vindictiveness, more so since in over 30 years' service she was never accused of having failed in her duties.

It is clear that whoever triggered this transfer did not have the complainant's rights or the department's reputation at heart.

For these reasons, the Commissioner stated that he cannot but agree with complainant's statement that the transfer was vindictive.

The Commissioner concluded that besides that there was absolutely no evidence that the complainant's transfer was in the interest or exigencies of the service, the whole process lacked transparency and militated in favour of the complainant's belief that it was the result of a vindictive plot against her.

The Ombudsman always maintained that the public administration is not necessarily bound to give reasons to its employees justifying action it takes "*in the exigencies of the service*". However, it is bound to give a satisfactory and plausible explanation to the Ombudsman during his investigation of the complaint. An explanation could be given in confidence but that would enable the Ombudsman to conclude that the administration had acted justifiably, reasonably and without improper discrimination and to enable him to so inform complainant. No such explanation was forthcoming by the Health Authorities in this case. If anything, indicators and evidence point exactly to the contrary.

On the basis of these considerations it was clear that the transfer was a case of maladministration which attracted criticism from this Institution.

The Commissioner noted that this saga has been, to a certain extent, resolved by a new posting given to complainant to work at a Health Centre on a new project. However complainant had produced medical evidence that the saga she has been through, which as stated above amounted to maladministration on the part of the Health Authorities, had affected her negatively, including a long period of sick leave with loss of earnings and loss of vacation leave.

Therefore, the Commissioner, recommended that complainant had to be compensated through the following measures:

i. all the period of sick leave following the announced original transfer be considered as special sick leave on full pay;
ii. as a result, complainant should be refunded the deductions in salary and allowances she would have been entitled to if she were not on sick leave;
iii. any vacation leave which complainant had to avail herself of in order to mitigate loss of earnings should be restored; and

iv. the Health Authorities should give a compensation to complainant for the unfair treatment which she suffered, especially in view of the fact that she was medically certified to have become for some time, unproductive and non-functional as a result of the transfer.

Outcome

The Department of Health agreed to the first three recommendations but to date the Office of the Ombudsman has not received any comment or had any feedback on the fourth one.

CASE NOTE ON CASE HM0002
DEPARTMENT OF HEALTH

UNJUST TRANSFER FOR ALLEGED SEXUAL HARASSMENT

(sexual harassment – fabricated allegations – transfer)

The complaint

The complainant asked the Office of the Ombudsman to investigate an unjust transfer by the Department of Health. The Parliamentary Ombudsman referred the case to the Commissioner for Health for investigation.

The complainant was suspended from work for alleged sexual abuse on four female colleagues. He was arraigned in Court by the Police but was found not guilty and was cleared of the accusations. In Court, one of these colleagues admitted that the allegations were fabricated.

Following the clearance from Court, the complainant was removed from the position he occupied and was transferred to another department. The complainant alleged that he was treated unfairly by the Department of Health, when after being cleared from all accusations, and the Court declared that he was not guilty, he was subsequently removed from the place he had been working before the incident. Consequently, the complainant suffered loss of income related to his previous role.

The complainant said that the Department of Health had not taken any disciplinary action against the four employees who had maliciously accused him. He also pointed out that at the time of the allegations he was not given the opportunity to defend himself before the matter was referred to the Police.

Facts and findings

From investigations made, it transpired that one of the four employees admitted in Court that "*din l-istorja kienet ivvintata*" and the Court found the accused not guilty.

The Commissioner for Health asked the Department of Health to comment about the case. In her reply the Chief Medical Officer (CMO), said that the reason behind the transfer of the complainant was not related to the case. She continued that there was a significant number of employees in the complainant's grade who were transferred, and the transfer had no bearing on the complainant's reputation as alleged.

On the allegation, that the complainant was not given the opportunity to defend himself before reporting the case to the Police the CMO stated *"...the Department had no option but to refer the matter to the Police for necessary investigation"*. The CMO said it was the Police who proceeded with the case and arraigned the complainant.

Since the Department of Health, did not comment on the fact that it did not take any action against the four employees after the judgement was delivered by the Court, the Commissioner for Health sought further comments.

The Department was also asked why it did not follow the provisions of the Public Service Management Code (PSMC) which said:

i. "the alleged harasser should be given the opportunity to state his/her case prior the commencement of any disciplinary action" - (Section 7.2.5.2);
ii. "the harasser shall be given the opportunity to defend her/himself..." - (Section 7.2.10.2); and
iii. "As sexual harassment can also constitute a criminal offence, Directors are to consult the Attorney General...before deciding whether to institute criminal or disciplinary proceedings." - (Section 7.2.11.2)

Moreover, Section 11 of the *The Public Service: Guidelines on what consititues sexual harrasement and on the procedures to be adopted in cases of sexual harrassment* states "*Employees who unjustly accuse colleagues or raise malicious or frivolous complaints will themselves be liable to disciplinary/criminal proceedings*."

In their response, the Department of Health said that "*Given that the alleged accusations were of such a serious nature the reports were immediately referred to the Police.*" It also confirmed that the "*4 persons were not prosecuted any further by the Police and still retain a clean Police conduct*."

The Commissioner for Health, also asked the Public Administration Human Resources Office (PAHRO) to comment on the mentioned sections of the PSMC. Before replying to the Commissioner, PAHRO sought the views of the Public Service Commission (PSC). In their reply the PSC, stated "*Regulation 13 of the Disciplinary Regulations and the policy on sexual harassment stipulated in para 7.2.11.2 of the Public Service Management Code (PSMC) refers to situations where there is a doubt whether an alleged disciplinary offence might also constitute a crime. Both Regulation 13 of the Disciplinary Regulations and the policy are premised on the understanding that where an offence is clearly and unambiguously a crime, the offence should be*

reported to the Police for it to be investigated under the criminal law. It was never the intention that Regulation 13 of the Disciplinary Regulations and the policy should obstruct the Police authorities in their investigation and prosecution of alleged crimes since this could create a conflict with criminal law."

Of the four employees who made the allegations against the complainant, the PSC stated that only one of them is a public officer and that the other three were employees of a contractor engaged by the Department of Health.

The CMO confirmed that the contractor had been directed by the department not to send these three employees to work in the same department where the complainant works to avoid further contact with him.

Considerations and comments

On the unfair treatment and the unjust transfer alleged by the complainant, the Commissioner for Health stated that, it is the prerogative of the management to effect transfers according to the exigencies of the service. In fact quite a good number of employees in the same position of complainant, had also been so transferred at that time. The Commissioner explained that his Office does not intervene in such instances unless evidence is brought up that the transfer was vindictive or the new duties do not fall within the job description of the Officer's grade or are degrading. No such evidence was produced in this case.

On the allegation by the complainant that he should have been given the opportunity to defend himself before the matter was referred to the Police, in view of the serious accusations which implied a crime, and in line with PAHRO's interpretation of the applicable provisions, the Department of Health was right to refer the matter directly to the Police. PAHRO had also consulted the Public Service Commission on the subject.

The complainant also raised the fact that the Department of Health at the time of the allegation, had not taken any disciplinary action against the four employees who had maliciously accused him. The Commissioner confirmed with the Police that no action of perjury against the four employees was taken.

The Commissioner pointed out that it was not within his function to express himself on whether the action of the Police was right or whether there had been any administrative failing in that respect. Any complaint arising out of Police action or inaction has to be addressed to the competent authorities, in this case the Police Board established under the Police Act.

In his Final Opinion the Commissioner for Health stated that the fact that the

Police did not take any action against the four persons who falsely lodged a complaint against complainant, does not mean that the Department of Health could not itself initiate disciplinary action in terms of Section 11 of the *The Public Service: Guidelines on what consititues sexual harrasement and on the procedures to be adopted in cases of sexual harrassment*, against the public officer who made allegations against the complainant. One of those who made the allegation against the complainant was a public officer and through her actions, rendered herself liable to be charged with this provision. It did not result that any disciplinary action had been taken. The Department should have given more in depth consideration to the impact that such behaviour could have on healthcare delivery in a clinical setting where a serene atmosphere is essential.

The fact that no criminal charges were taken against the four employees, in no way precluded the Department from initiating disciplinary action on the same facts against the employees, once there was *prima facie* evidence of an offence.

The Department should have considered whether there was a case for disciplinary action to be taken against them when the criminal case against the complainant was finally closed. The Department could have taken action when it was officially informed of the outcome and of the evidence that resulted potentially incriminating the four employees.

In his Final Opinion, the Commissioner noted that the nature of the offence allegedly committed by the four employees is extremely grave. He said that it was up to the Department to protect its employees and ensure that offenders violating the PSC regulation were not allowed to do so with impunity. Despite that three (3) of the four (4) employees were not public officers, but were providing a service to the Department, the Commissioner said that he considered that the concepts within the public service rules should have been applied in an analogous manner.

Conclusions and recommendations

After evaluating the facts and considerations, the Commissioner concluded that apart from the issue of disciplinary action against the four employees who had maliciously accused him, it did not result that complainant was unfairly treated by the Department of Health. Therefore, the complaint was only sustained on the element of discipline of his four accusers. However, the Commissioner, pointed out that, in connection with the fact that no action of perjury against the four employees was taken, the complainant could have taken up the matter with the Police. The complainant could have also sought advice on the reason behind the decision that no disciplinary action

was taken against one of the four employees who was a public officer.

The Commissioner recommended that, with regard to the public officer, the Department should have discussed with the PSC to see whether any action could have been taken.

In respect to the contractor's employees who made the allegations that subsequently proved to be false during the Court proceedings, the Department should have reviewed the situation in light of their false allegations against the complainant with the impact on such behaviour on healthcare delivery. The Commissioner commented that this was a duty that befell on the administration when the facts came to light.

Finally, the Commissioner recommended that certain paragraphs of the Public Service Management Code should be amended to reflect the ruling given by PAHRO that *"where the alleged offence is clearly and unambiguously a crime, the offence should be reported directly to the Police for it to be investigated under the criminal law."*

Outcome

Recommendations were made to the PAHRO to amend certain paragraphs of the PSMC. PAHRO agreed with recommendations made by the Commissioner and amended the PSMC.

The Department of Health consulted the PSC who agreed that once no action for perjury was taken by the Police, the department was correct in its decision in not initiating disciplinary proceedings.

CASE NOTE ON CASE NO HN0020
MATER DEI HOSPITAL

TEMPORARY DEPLOYMENT LASTED OVER FIVE YEARS

(temporary deployment – non-remuneration – performing higher grade duties)

The complaint

A public officer, working in IT at Mater Dei Hospital (MDH), in a substantive grade, in Salary Scale 11 complained that in 2008 he was informed that he was going to be asked to carry out other duties. The complainant said that, when he was assigned in this position, the period set for this task was two months, but he performed and was still performing these duties without being compensated, for over five years. The complainant continued, that when he was deployed, he was informed that this was only a temporary measure that was taken due to a delay in a call for applications that had to be issued at the time.

Facts and findings

In June 2008, the complainant received an email from his Director, in which he was informed that following a high-level meeting held with the Parliamentary Secretary, it was decided that one member of the section in which he worked, had to be urgently redeployed for two months, to train hospital staff in IT. The Director also specified that this was in view of the fact that an issued call for applications for Hospital IT Trainers by Government was taking longer than expected and the need to increase training capacity was becoming very urgent.

The Director communicated that *"After careful consideration, I have identified you as the most suitable candidate for this."* And also *"I am 100% confident that you will succeed to make a very good job out of this training."*

The complainant said that, although he was promised several times that the call for applications was going to be issued, his deployment lasted for over five years and the call for applications had not yet been issued.

The Commissioner for Health sent all the details submitted by the complainant to the management at MDH for their comments.

The Director, Information Management and Technology (IM&T) at MDH, replied that the complainant was not forced against his will to take up the assigned duties but he was asked, and he accepted.

He also stated that the complainant did not suffer any financial disadvantage as a result of the redeployment; on the contrary, he was assigned to a shift which met the need to deliver training outside normal office hours and which resulted in an income greater than that associated with the complainant's substantive grade of Officer in Scale 11. Complainant was also paid the shift, public holidays and Sunday allowance.

The Director insisted that, *"When the situation was reviewed, (the complainant) did not express a desire to return to his previous duties. He preferred to continue working as a trainer (which would increase his chances of securing the Scale 10 position when the call was issued)."*

He also confirmed that, despite continuous pressure from MDH management, Government did not open the call for Hospital IT Trainers. The Director explained that this was beyond the control of MDH management.

The Director added that the complainant is aware of the fact that *"...the Hospital does depend on him as no recruitment has been forthcoming, and the fact that his colleague is due for retirement with the eventuality that he will take over the entire unit."*

To avoid that the situation gets worse, the Director communicated with the Malta Information Technology Agency (MITA) in order to initiate the process to subcontract this service by issuing a tender for this service. However the Director concluded that "*due to lack of funds*" the initiative was shelved.

The Commissioner analysed the correspondence attached to the Director's reply in which it transpired that, before the complainant started working full time in the section he was deployed to, he had written to his Manager where he stated *"...please understand that I cannot continue in delivering other duties that are past my grade"*. However, in an exchange of correspondence with the management they referred to the complainant as one who *"...likes the work and is not looking for any extra perks."*

On the point stated by the Director IM&T that, despite continuous pressure from MDH management, Government did not open the promised call for applications, the Commissioner asked the Director, Human Resources Practices of the Department of Health to specify what action was taken on the issue.

The Director replied *"calls for applications are subject to inclusion in the Capacity Building Exercise and subsequent approval by the Ministry of Finance and the Office*

of the Prime Minister – it does not transpire that any further vacancies in this grade were ever approved, and, therefore, the call could not be issued."

The Commissioner sent the reply received to the Director IM&T, for his remarks and he replied that since he was appointed in 2011 he had, *"on various occasions, highlighted the fact that the IM&T Directorate was in dire need of additional resources"* but *"recruitment within the IT Sector at MDH has been none over the past four or five years".*

The Commissioner referred the matter to the Permanent Secretary of the Ministry for Health for his comments. The Permanent Secretary replied that the Ministry was not in a position to give the complainant extra remuneration for the work done during his deployment since he performed duties that were required by him in that post. The Ministry also said that in the following Capacity Building Exercise (CBE) they had to ask for the filling up of a new post in the IT Department for which the complainant could apply if he deemed himself suitably qualified.

Amongst other clarifications, the Commissioner asked the Director IM&T, to clarify:

i. the Scale of the other employee who had an identical job description;
ii. hether the other officer held the same position of the complainant; and
iii. whether the other officer was also doing the same duties of complainant.

The Director replied that the other employee was in Scale 10 and occupied the position of IT Training Officer. The Director confirmed that the complainant was performing duties of *"training of individual on hospital applications"*. The Director reiterated that he had requested for more staff because the only other officer was due to retire and had also asked for an additional six officers.

Complainant argued that his duties were, in fact, more intensive than those of the IT Training Officer. He explained that his colleague gave training to the clerical staff whilst he trained the professionals i.e. nurses, doctors and consultants.

Considerations and comments

From the investigation carried out by the Commissioner, it transpired that, in September 2008, complainant was asked to carry out the duties of IT Training Officer. This had to be a temporary measure (two months), however, this protracted for over five years.

It was also clear that the Department of Health was asked several times by the

MDH's administration to issue a Call for Applications for the position in question. This was never given priority by the Department of Health, even though the Department knew that during the two Calls for Applications in 2007 there were four vacancies, and none was filled.

Since then no further action was taken and due to the impending urgency MDH asked for seven positions – one to fill any imminent vacancy, and six other vacancies.

The Commissioner pointed out that the hospital authorities had tried without success to recruit staff through MITA. The only solution that the Department of Health could offer was, that in the subsequent CBE, it would be asking for the filling up of a new post in the IT Department.

The Commissioner replied that this was not a *"filling up a new post but to replace the officer who was about to retire."*

Evidently complainant was performing duties that were higher than his grade. During the investigation, it turned out that the other officer who worked with the complainant was on Scale 10.

The Commissioner pointed out that he was in disagreement with the statement of the Permanent Secretary where he stated "*the duties performed by complainant were those expected of him in his grade*."

In his comments about the findings, the Commissioner said that the complainant's appointment was of a Support Officer, a post in a lower grade at a Salary Scale 11 and not that of a Training Officer which carried a Scale 10 salary.

The Public Service Management Code (PSMC) (paragraph 2.4.6.2) accepts the concept of "*a deputising allowance*" for "*the carrying out of higher duties*" and in paragraph 2.4.6.4 the rate of payable allowance is spelled out. However, the fact that the Health Authorities failed to, "*seek the endorsement of the Employee Relations Directorate*" as indicated in paragraph 2.4.6.3 of the PSMC should not have disqualified the payment of the allowance. The employee was in no way to blame for the inaction of his superiors.

The Commissioner continued that, irrespective of any other requirements under the PSMC for such allowance, it was morally unacceptable for an employee to be assigned duties pertaining to a higher grade and Salary Scale for a long period and being paid a lesser remuneration. This is worse when there are employees performing the same duties with a higher pay.

Conclusions and recommendations

The Commissioner concluded that the complainant had been asked to perform the duties of the Training Officer which he had been doing and was still doing, since September 2008. These duties were of a grade higher than his substantive grade for over five years; yet he was paid at the Salary Scale of his substantive post. The assertion that he had worked in a roster/overtime was not a valid argument for paying complainant less than he was entitled to. It was the hospital that decided that working on roster basis/overtime was needed in view of the nature and duties of that post that was a higher grade. In fact, the complainant's colleague was also working on shift basis.

It is clear that the Health Authorities has allowed the situation to go on for over five years without taking effective action to remedy the situation. The Commissioner declared as unacceptable for an employer to request an employee to perform duties of a higher grade for such a long period of time because this could actually be considered as cheap labour.

The Commissioner understands and accepted the fact that, in the spirit of the PSMC, an employee can be assigned duties pertaining to a higher grade because of exigencies of the service for a period of not more than three months. However in this case, the situation had been allowed to protract to over five years.

Therefore, the Commissioner recommended that the complainant had to be given the difference in pay i.e. Scale 11 to Scale 10 backdated to September 2008 with applicable increments.

He also recommended the Department of Health to consider immediate steps to expedite the Capacity Building Exercise, so that a call for application could be issued.

The Department of Health accepted the Commissioner's recommendation and agredd to give the back dated recommended renumeration.

CASE NOTE ON CASE NO HN0026
MATER DEI HOSPITAL

MDH REFUSE TO OPERATE PATIENT DUE TO OUTSTANDING BILLS

(humanitarian grounds – outstanding bill – operation)

The complaint

An elderly foreign patient at St Vincent de Paul Residence, who needed medical treatment and to undergo surgery, complained that the authorities at Mater Dei Hospital (MDH) are refusing to give the go ahead to the surgeon to operate upon her because she owed money to MDH from a previous hospitalisation. The complainant explained that due to financial problems, she could not pay the outstanding bill.

The medical condition of the complainant was in such a bad state that even sitting down and walking was becoming difficult. The complainant requested the intervention of the Commissioner for Health to investigate and asked that on humanitarian grounds, she will be allowed to undergo the operation that was due for a number of years.

Facts and findings

From the investigation made, it transpired that the patient had come to Malta with her son from a non-EU country. After some time in Malta, the complainant had to be hospitalised and the hospital authorities rightly asked the patient to pay quite a substantial amount for the services rendered. The bill issued by MDH amounted to thousands of euro.

Subsequently her son died in Malta, and she was left alone and destitute.

The Commissioner for Health was informed that since the patient had outstanding bills with MDH, only 'life or death operations/procedures can be performed' and the medical intervention needed was not considered as 'life or death operation'.

The Commissioner asked the Chief Medical Officer (CMO) to comment about the case. In her reply, the CMO informed the Commissioner that she made a request to the authorities for the bills to be waived on humanitarian grounds, considering that there was no way for the patient to be in a position to pay. Subsequently the patient

would be treated for her condition. In fact, she confirmed that an appointment at the outpatient department was scheduled.

When the complainant went to the outpatient's department for the appointment set by the CMO, she was not seen by the Consultant because the approval to waive the outstanding bills was not yet forthcoming. The patient informed the Commissioner for Health of the outcome.

Recommendations

The Commissioner for Health informed the CMO of what happened and recommended that humanitarian grounds should be considered not only to waive the outstanding bill but also for the patient to be treated urgently.

Outcome

Following the intervention of the Commissioner for Health, the CMO notified this Office that the Minister authorised the waiver of the outstanding balance in terms of Legal Notice 201 of 2004.

The patient was given an appointment for the same day and operated without any further delay. Following the operation and necessary treatment, the patient was sent back to St Vincent de Paul Residence.

In a letter to the Commissioner, the complainant thanked him for his intervention and informed the Commissioner that the operation was successful, and that her condition was very much improved.

CASE NOTE ON CASE NO HN0036
MINISTRY FOR HEALTH

REFUSAL OF APPOINTMENT

(appointment – PSC decision – refusal)

The complaint

A Mater Dei Hospital employee complained with this Office that he was not given the Appointment although all procedures had been approved by the Public Service Commission.

The complainant, who worked as an Acting Manager, had applied for the post of Manager, following a call for applications. The complainant placed first among those applied for the post. The ranking was officially published both by the Public Service Commission (PSC) and Mater Dei Hospital (MDH). The complainant stated, he had heard nothing about the Appointment and the signing of the contract. After some time the complainant was informed that he was going to be redeployed back to the post he had before he was in the grade of Acting Manager. The complainant also contested the way he was informed to leave the office and alleged that he was treated unprofessionally by his superior.

Facts and findings

In August 2013, the Commissioner for Health informed the Chief Executive Officer (CEO) at MDH, about the case and asked for his comments. In his response the CEO said *'that due to the lack of nurses in Malta, we are attempting to pull back as many qualified and experienced nurses as possible to nursing work rather than administrative work'*.

The Commissioner, requested the CEO's comments on the allegation that the complainant was treated unprofessionally by his superiors when asked to leave his office. The Commissioner asked for additional information about how many employees who were doing 'administrative work' were 'pulled back' to do 'nursing work'.

The CEO replied that the drive to put nurses to do nursing work instead of being assigned on administrative duties was ongoing. As regards to the allegation of unprofessional treatment the CEO said *'if the way he was treated was such, it could have been managed differently with a more respectful tactic'*. He also added that the

complainant was politely informed to move out but he did not comply.

The CEO also commented that the new administration, had big plans for the department in which the complainant used to work, and wanted a more 'scrupulous and studied selection of people'.

Following the comments from the CEO of MDH, the Commissioner asked for the views of the Public Service Commission (PSC). In a letter dated September 2013, the Executive Secretary of the PSC informed the Commissioner that, in his response to the complainant, the CEO at MDH gave no indication that the post the complainant was chosen for, was under reconsideration. Instead he indicated that the complainant's appointment was under reconsideration because of the shortage of experienced nurses.

The PSC had taken the view that once the post was still needed, the complainant was entitled to the appointment since the call for applications was opened also to nurses and because the complainant was selected through a regular selection process. Therefore, the Commission decided that the complainant should be engaged as Manager as stipulated in the call for applications.

The Commission took its decision in terms of the instrument of delegation issued under Article 110(1) of the Constitution. Such decision taken under this instrument is binding on the Ministry unless such decision was not appealed within a month. The PSC informed also the Permanent Secretary at the Ministry for Health with its decision.

Following the PSC's decision, the Commissioner wrote to the Permanent Secretary at the Ministry for Health asking what action he intended to take following the ruling of the PSC.

In his reply, the Permanent Secretary at the Ministry for Health said that an intense review of the department in question was being undertaken with a view to allow a more streamlined execution of the function of the department. Therefore he was of the opinion that the filling of this post *'which emanates out of an organigram that is being reviewed might not be proper to undertake at this juncture'*. He continued that he was requesting that the mentioned position remained unfilled until further notice.

In view of this the Commissioner informed the PSC of the correspondence. The PSC confirmed that the Permanent Secretary had appealed the decision on the basis explained in the letter to the Commissioner, however the PSC concluded that these representations did not justify a reconsideration of its decision. Therefore the PSC confirmed that the complainant was to be appointed as Manager.

Outcome

The Department of Health finally accepted the PSC's ruling and offered the complainant the post of Manager at another department not at MDH since the call for applications made no specific reference to MDH. In view of this, complainant refused the appointment because he preferred to work at MDH.

CASE NOTE ON CASE NO HN0056
MINISTRY FOR HEALTH

HEALTHCARE PROFESSIONAL UNJUST TRANSFER

(unjust transfer – breach of contract)

The complaint

A healthcare professional submitted a complaint to the Office of the Ombudsman and alleged that she suffered an injustice that affected her professional career. The complainant stated that the Chief of Staff in the Ministry for Health had verbally informed her *"... to move out of ..."* the role occupied within Mater Dei Hospital (MDH) and *"...choose where ... (she) wanted to go as a third party was to occupy ... (her) post"*. Notwithstanding her objections, after a couple of days, the complainant received a letter from the Chief Executive Officer (CEO), Foundation for Medical Services (FMS) informing her that her services were required at Rehabilitation Hospital Karen Grech (RHKG). In his communication, the CEO said that the redeployment was *"...being made in full cognisance of Clause 1.2 of (the complainant's) existing definite Contract of Service"*.

The complainant stated that she had twice successfully qualified for the post she was into after a public call and selection process. During her tenure, she was given full performance bonus, and was never told that she was failing in any way in her role at MDH. The complainant argued that she considered her transfer as a demotion that greatly affected her professionally and psychologically.

Facts and findings

After evaluating the information submitted by the complainant, the Ombudsman assigned the case to the Commissioner for Health for investigation.

The Commissioner sent all the documents to the Permanent Secretary at the Ministry for Health for his comments. In his reply, the Permanent Secretary said that he had *"...explained to [the complainant] on several occasions and it was made very clear that her re-deployment from Mater Dei Hospital was prompted by a pressing need to improve the quality of nursing service-provision..."* at RHKG in the direct interest of patients.

The Permanent Secretary added that *"... the FMS continues to maintain that [the complainant] was not subject to any discrimination whatsoever and her move was prompted entirely by service exigencies – and in full cognisance of the added value that [the complainant] would bring to the nursing stream..."* at her new workplace.

During the investigation, the Commissioner perused the Calls for Applications issued by FMS for the position held by the complainant published in 2009 and 2012 which both specifically stated that the position was needed at MDH.

The call for applications also states "*Applicants for this position shall be expected to demonstrate a propensity for change. In line with Government's performance objectives for Mater Dei Hospital"* and also *"applicants are advised that this position shall be tied to a series of key performance indicators that will be used to define targets; measure performance and report on deliverables. These indicators shall reflect critical success factors associated with this position."*

The Commissioner analysed the Contracts of Service which were signed by both the CEO, FMS and the complainant. The contract signed in 2012, specifically stated *"The Employee declares that she is aware of the fact that her employment will be required at Mater Dei Hospital and any other premises that the Employer so directs".*

Another contract, signed in 2009, stated *"The Employee declares that she is aware of the fact that her employment will be required at Mater Dei Hospital and/or any other premises that the Employer so directs".*

Considerations and comments

In his considerations, the Commissioner pointed out that both calls for applications unequivocally stated that the successful applicant will perform duties at MDH. They moreover added that the key performance indicators "*shall reflect critical success factors associated with this position*". The Commissioner also remarked that, the fact that the complainant was again successful in the 2012 call, supports the notion that she had met the "*critical success factors*" mentioned in the 2009 call.

It was also noted from the two contracts, that the one signed in 2012 stated that the complainant's services will be required at MDH and any other premises. The contract signed in 2009, stated that she will be required at MDH and/or at any other premises. Therefore, the CEO was not correct when he said that the transfer was "*being made in full cognisance of Clause 1.2 of the [complainant] contract*". The contract specifically stated Mater Dei Hospital AND any other premises as opposed to the previous contract AND/OR. This distinction proves that the authorities wanted the complainant to be at MDH. Besides the contract established that

complainant's position was of Director Nursing and Midwifery, however there was no midwifery services at RHKG.

The Commissioner also commented that, he fully understood that the complainant felt that, the transfer, meant a demotion which affected her professionally, because, from 850 bedded hospital, she was transferred to 269 bedded hospital. If the complainant's services were needed elsewhere, as stated by the Permanent Secretary who said *"...that her redeployment from Mater Dei Hospital was prompted by a pressing need to improve the quality of nursing services-provision..."*, the Commissioner remarked that this could have been easily done by adding the institution, in which the complainant was sent, to her other duties as was done before when another hospital was included to her duties. Another option could have been that the person who replaced the complainant at MDH, could have been assigned to this hospital, which is smaller and easier to handle by a person who has less managerial experience than the complainant. This would have respected the contractual obligations which the authorities had towards complainant.

In his Final Opinion, the Commissioner said that he was not convinced with the statement by the health authorities that the complainant was not subject to any discrimination. It was the duty of the FMS to explain to the complainant why she was being transferred. Considering the circumstances of how the transfer occurred, the Commissioner said the reason given was not convincing. The complainant's statement in which she alleged that she was told by the Ministry's Chief of Staff to move out of her role was never rebutted or denied by the Health authorities.

The Commissioner insisted that every employee has the right to be informed by the Management about the reasons behind the decisions taken by the Management that affect their wellbeing. The Commissioner quoted Articles 18 and 20 from the European Code of Good Administrative Behaviour issued by the European Ombudsman, which state:

> *"**Article 18***
> *Every decision of the Institution which may adversely affect the rights or interests of a private person shall state the grounds on which it is based by indicating clearly the relevant facts and the legal basis of the decision.*

The official shall avoid making decisions which are based on brief or vague grounds, or which do not contain an individual reasoning."

*"**Article 20***
The official shall ensure that decisions that affect the rights or interests of individual persons are notified in writing, as soon as the decision has been taken, to person or persons concerned."

Conclusions and recommendations

On the unfair treatment, alleged by the complainant, the Commissioner concluded that the complainant had been unfairly treated when the conditions of her definite contract signed by her and FMS ceased to be honoured by FMS when she was effectively removed from her position at MDH. This essential part of her contractual obligations was done without her consent. There was no provision in the contract that allows FMS to act unilaterally. Nor was there a termination clause which allows FMS to terminate her contract except for health or disciplinary grounds. The Commissioner also stated, that, in this case, FMS did not terminate the contract. It simply stopped honouring it.

The Commissioner upheld the complaint, and after investigating the case, he concluded that the complainant was unfairly treated because FMS had breached her contract. He continued, that in his opinion, the FMS and the Health Authorities, had failed in respect to the complainant, and he had no doubt that they have caused humiliation, pain, suffering and trampled upon the complainant's dignity.

In view of this he recommended that, the Health Authorities, who were responsible for administrative failure in which resulted in an injustice to the complainant, must act to remedy in a reasonable, correct and fair manner. The Commissioner recommended that the injustice could be alleviated, if the complainant is re-instated to her former position. Otherwise, the Commissioner recommended, that if the Health Authorities were not in a position to implement such decision, the complainant should be paid a compensation of €2,000 to mitigate the effect of the injustice. The Department of Health agreed to give the recommended compensation to the complainant.

CASE NOTES FROM THE COMMISSIONER FOR ENVIRONMENT AND PLANNING

CASE NOTE ON CASE NO EM0066
MEPA

PROCESSING AND DETERMINATION OF PERMITS RELATING TO DEVELOPMENT

(processing of permits)

In November 2012, the Office of the Ombudsman received a complaint requesting an investigation into the processing and determination of permits relating to development in the grounds of a villa in a southern village.

The Ombudsman referred the complaint to the Commissioner responsible for Environment and Planning.

Facts and findings

The Commissioner started the investigation by focusing on the allegations of damage to trees within the grounds of the property, the MEPA was requested to survey the site and plot any existing trees or remnants such as stumps and hacked trunks.

Following a meeting with the complainant, it emerged that an objector was filing an appeal against the MEPA approval on the same merits as the complaint submitted. Complainant was therefore informed that the investigation was to be suspended pending conclusion of these appeal procedures. He was also informed that the Commissioner was requesting MEPA to carry out the survey without delay.

On 17 December 2012 the MEPA informed the Commissioner that the requested tree survey was carried out. The Commissioner informed the complainant about the survey and informed him that according to MEPA the permit contained a condition that development could not be taken in hand until an appeal was lodged.

In January 2013, the complainant requested an investigation, alleging that the submission contained misleading information, and requested an investigation into how the application was approved notwithstanding a recommendation to refuse and in view of violations of Structure Plan and Local Plan policies.

Few days later, the MEPA Chief Executive Officer (CEO) informed the Commissioner that another site inspection had been carried out to verify the claims

regarding the uprooting of trees. A copy of this report which was forwarded to the Commissioner stated that:

> *"1. Only one tree was found to have been cut. This intervention, supported by aerial photography and photo within NP 0019/09 was carried out prior to 2008. The existence of the said olive tree in 2009 has been denied through the aerial photos;*
>
> *2. In addition, whilst noting that condition 7 in PA 1350/06 is in itself contradictory (Mature trees will be protected* **vs** *Any uprooting will be according to the provisions of LN12/01.) the transplanting of the three olive trees has been carried out in accordance with the nature permit NP 0019/09 issued within the terms of LN 12/01.*
>
> *3. The cutting of the olive tree has been carried out prior to the end of 2008 (as evidenced through the absence of the tree in 2008 aerial photography). Although the cutting of the said olive tree in the period between 2004 and 2008 may have been in breach of the then in force Subsidiary Legislation 504.16, Trees and Woodlands Protection Regulations, Legal Notice 12 of 2001, there is no evidence of any violation of the permit condition 7. This is since the permit was issued in the end of 2008, that is once the said tree had already been cut.*
>
> *Any further processing of the cutting of the tree should therefore be followed through the potential breach in LN12/01."*

As per standard procedure, the MEPA was invited to submit its response to the complaint. MEPA responded, saying that the request for a revocation of the permit "*... was assessed and concluded by the MEPA Board on the 12 February 2013. The objector was informed on the 6th March 2013 that there is no basis for revoking planning permission*".

After being informed of such decision, complainant alleged that apart from the failure of the applicant's architect to declare the UCA and protected enclave status of the site in question on the Outline Application, as well as the existence of the central protected 150-year old olive tree that was later destroyed, the existence of an underground well (ġ*ibjun*) was also not indicated.

The Commissioner advised the complainant to bring this matter to the attention of MEPA.

Conclusions and recommendations

The Commissioner commented that the complaint which was against the granting of an outline permit for the construction of residential units with underlying garages was received by MEPA on 6 March 2006, and was approved by the Board on 1 October 2008.

The Commissioner continued that, although the complaint was being made more than six months after the application was approved, rendered the request time-barred under section 14(2) of the Ombudsman Act (Chapter 385). However, the issues raised, and the fact that there was a request for a revocation of the permit due to misleading or false information had been turned down by the MEPA Board very recently, rendered it proper to carry out an investigation as permitted under the same section, as in the Commissioner's opinion there were sufficient reasons for the case to be treated as one where '*special circumstances*' occured.

The Development Permit Application Report (DPAR) was prepared on 12 May 2006, recommending a refusal on a number of points, including that the maximum height limitation was being exceeded, that the proposal was running counter to Structure Plan policy UCO 13 and South Malta Local Plan SMIA 10, and that it was non-compliant with policies 1.8 and 3.8 of the Development Control Policy and Design Guidance 2005.

The Board minutes show that the case was discussed a number of times. A site inspection was also held on 2 April 2007. However there are no minutes recorded in the website fact sheet, and the details are only viewable in the updated Notes to Committee section in the DPAR. The minutes of the following meeting showed that the (then) DCC had transferred the file to the DCC 'C' Board as "*site is within UCA*". This notwithstanding, the DPAR retains the site as being "*...within the limit of development boundary ...*" and that it "*... abuts on the UCA boundary*".

The Commissioner noted that an important feature of the report is the feedback from the CHAC and IHM. This because the planning policy, as advised by the Local Planning Unit stated that:

> *"... clearly states that the planning parameters to guide development are to be formulated following an assessment of the garden which is to the satisfaction of MEPA. CHAC and IHM agree that any development will compromise the garden whilst the assessment report seems to indicate that some form of development may be permitted. IHM and CHAC were requested to review the case. Both the NHAC and the CHAC confirmed their previous minutes..."*

These minutes clearly indicated that no development was to be allowed in the site in question and that any uprooting of trees is to be carried out according to the provisions of LN 12/01.

Moreover the NHAC and CHAC, following a request to re-evaluate their advice, remained consistent and adviced that the garden was to remain untouched. The conclusions of the assessment report allowing limited development were therefore in direct conflict with the advice, confirmed on re-assessment, given by the NHAC and IHC.

Once the policy clearly laid down that any planning parameters to guide development were to be formulated following an assessment of the garden to MEPA's satisfaction, which assessment underlined the importance of retaining the garden untouched "*in toto*", meant that allowing any form of development was against the policy, and therefore to the South Malta Local Plan policy SMIA 10.

The Commissioner said that yet the DCC, which had itself noted that the site was within the UCA and not in the development zone, and notwithstanding the advice to the contrary which it received after it had arrived at its own conclusion that limited development was allowable, went ahead with its own assessment and approved the application for development. The DCC had justified the overturning by stating that "*...proposal ... is considered to conform to policy SMIA10 of the SMLP*".

The Commssioner examined the policy which ephasised that the development proposals were to be considered ONLY (policy emphasis) after an assessment of the garden was to be carried out to the satisfaction of MEPA, to determine the importance and value of the garden and its features and in the Commissioner's opinion **whether development could be permitted**.

In this case the MEPA's assessment, supported by the findings of its consultative committees, emphatically indicated that development was not to be permitted. The DCC's decision therefore ran counter to Local Plan policy. The complainant had also alleged that false information was submitted and the application did not indicate that the site formed part of the UCA, and designated for scheduling by the Local Plan, as well as having protected trees.

From the investigation it transpired, that the application was validated on 14 March 2006, before the South Malta Local Plan was approved. The plotting of the application by the MEPA also placed the site within the Development Zone, and it was only when the application was seen by the DCC that the anomaly was noted. In fact the file was transferred to DCC 'C', the Committee which at the time was responsible for determining such applications.

Therefore, the Commissioner commented, that as such there was no conclusive proof that at the time of submission of the application, the information was incorrect or misleading.

With regards to the allegation about the destruction of protected trees, the report by the Environmental Assessment Unit dated 20 December 2012 stated that the site was inspected on 19 December 2012. An earlier inspection had been carried out on 21 November 2012. The conclusions of the second report modify those of the earlier one in that an olive tree referred to as a transplanted tree in the first report was found to be in fact a stump of an older tree which was re-sprouting.

The same report concluded that one tree was found to have been cut but that this had been carried out between 2004 and 2008, and that three other trees had been transplanted in accordance with Nature Permit. The report acknowledged that the cutting of the tree may have been in breach of Subsidiary Legislation 504.16, Trees and Woodlands Protection Regulations, Legal Notice 12 of 2001, but that there was no evidence of any violation of condition 7 of the permit as the tree cutting had taken place before the permit had been issued.

This would effectively mean that any sanctions against the illegal cutting down of the tree would have to be applied in terms of LN 12/2001 and not under the provisions of the Planning Act with regards to non-observance of *a planning permit condition.*

On the request for revocation filed by complainant the Commissioner said that the request alleged that the MEPA decision to approve the Outline Application in PA 1350/06 contained an error in terms of Section 77(1) of the Planning Act, as the decision should have been taken in conformity with the current policies, including the Local Plan, and not with the policies applicable when the application was filed in March 2006.

The findings of this investigation show that the DCC did consider the policies, including the Local Plan, applicable in 2008 when it approved the application, but that it made a wrong interpretation of policy SMIA 10 in that it considered that the policy allowed for limited development when the MEPA, as set out in the same policy, had clearly stated that the garden was to remain intact and that no development should be allowed.

Whether this misinterpretation and the consequential approval constitute an "*error on the face of the record*" as provided in Section 77 (1) of the Planning Act is another matter however, as it was the decision by the Board, not the facts supplied leading up to the decision, which was faulted.

After evaluation all the facts, findings and infomation, the Commissioner came to a conclusion that:

- the complaint that the application was determined in violation of Local Plan policy SMIA 10 was sustained as the required consent from the MEPA for development to take place within the garden had not been granted. However section 77 of the Planning Act was not applicable as the wrong interpretation of the Local Plan policy which led to the Commission's approval did not constitute an error as contemplated in this section.
- the complaint that there had been destruction of protected trees was also sustained. However this destruction had been found to have taken place prior to the submission of application. Any sanctions applicable should therefore have been in terms of LN 12/2001 and not in terms of the Planning Act because of a breach of permit conditions.
- it was indeed a matter of concern to note that a misguided decision has compromised the integrity of an important element of our national architectural heritage. The MEPA should seriously consider withdrawal of permit in such cases, even if such withdrawal would incur payment of damages. Funds from the Urban Improvement Fund could be utilised for this scope. Wouldn't the retention of such patrimony contribute to the quality of the urban environment?
- improvement in urban quality should not merely consist of embellishment with potted plants and benches in public spaces but should incorporate a recognition of the value of retaining the character of existing urban spaces and the implementation of a robust policy, (including withdrawal of permits where the loss to the national heritage justifies it) aimed at such retention.
- this case is an example of a shortcoming within the Planning Act which does not provide redress for administrative or other errors except those falling within the parameters of Section 77.
- to date it is the applicant who normally has to foot the bill for such losses even when these are totally due to the MEPA.
- the opportunity provided by the MEPA reform should be grasped and the necessary amendments introduced into Planning legislation so that MEPA clients as well as the public in general will have a right to receive compensation for damages suffered as a result of MEPA maladministration.

CASE NOTE ON CASE NO EM002
GOVERNMENT PROPERTY DIVISION, MALTA TOURISM AUTHORITY, MEPA, POLICE FORCE

LACK OF ACTION ON ILLEGALITIES IN THE PLACING OF TABLES AND CHAIRS OUTSIDE CATERING ESTABLISHMENTS

(abuse, lack of control, tables and chairs outside catering establishments)

The complaint

In August 2012 a complaint was received by this Office on the lack of action by the Government Property Division, Malta Tourism Authority (MTA), the Malta Environment and Planning Authority (MEPA) and the Police in regulating the placing of tables and chairs outside catering establishments.

Complainant alleged that there was widespread abuse and lack of control in the manner by which tables and chairs were placed outside catering establishments, particularly in tourist areas.

Extensive correspondence submitted by the complainant, showed that he had contacted the relevant authorities, both on specific cases, as well as on the issue in general.

The Ombudsman referred the case to the Commissioner for Environment and Planning and the complaint was investigated in terms of Section 13 of Act No. XVII of 2010.

Facts and findings

The investigation focused on the long-term use of public space for the placing of tables and chairs by catering outlets. Short-term use of this nature (that is of a temporary nature such as during '*festas*'), is not included in the investigation, though the whole issue of the way short-term permits are granted does indeed merit looking into.

External 'extensions' to catering outlets are considered as part of the urban scene in Malta as flat roofs. They create movement and colour and enliven our squares

and pavements, serving as focal points for people to meet. They generate economic activity and provide employment opportunities. They are therefore welcome additions to our *piazzas* and public spaces.

However, it is noticed that in many cases, the space allocation for such activities is grossly exceeded and ends up occupying much of the public space around a catering outlet, to the detriment of pedestrians. This is acutely felt in cases where such illegal occupation forces pedestrians, especially elderly people and parents with young children, to step off the pavement into the road, putting themselves at risk of life and limb.

Clearly there is a need for proper regulation for such a facility. A balance has to be struck between the opportunity for catering entrepreneurs to expand their facilities and the right of unhindered passage for pedestrians.

Presently the clearance for obtaining a permit to place tables and chairs in public spaces, falls within the remit of a number of public entities, namely, the Government Property Division, the MEPA, Transport Malta, and the Malta Tourism Authority. The Local Councils claim that they have a right to be consulted in terms of Article 33 (1) (i) when a proposal for the occupation of public space by tables and chairs is being considered by the Government Property Division. However, there seems to be a divergence of views on whether this is the correct interpretation.

At present, applicants wishing to be allocated space to place tables and chairs outside their catering outlets have to obtain clearance from the Malta Tourism Authority and Transport Malta, which they then submit to the MEPA as part of their application for a planning permit in terms of Class 14 of the Development Planning (Use Classes Order) of 1994.

Once the permit is approved, the Government Property Division then proceeds to issue its own licence and mark out the area given on encroachment terms. Each of these processes entails the payment of fees and administrative charges.

So far the process is a clear and relatively straightforward one. However, the problems arise when the monitoring of the use of these spaces is taken in hand. In fact, the first question that arises is 'Who is responsible for ensuring that the encroachment limits are respected and not exceeded?' The answer seems to be the Police who are called in to order the removal of chairs and tables outside the encroachment area since they would then be forming an obstruction to a public passage. Local Councils seem to be the least involved authority when in reality this issue is a matter they should be very closely involved in.

The investigation process

The consultation carried out with the authorities involved in the process elicited some interesting replies. The Malta Tourism Authority, in a very comprehensive reply, explained that after obtaining a 'No Objection' letter from MTA, the applicant applies to MEPA for planning permission. On obtaining such permission the applicant must revert back to MTA for the MTA License to be issued. This is done after the MTA consults with the Government Property Division for its approval of the encroachment. Following such clearance, the license is issued on payment of the relative fees.

With regards to enforcement, the MTA explained that any breach of the Malta Tourism Act and subsidiary regulations is forwarded to the Police, together with a complaint for steps to be taken against the contravener.

Interestingly the MTA letter stated that in the case of tables and chairs, this procedure is used when the tables and chairs are not licensed. What happens when the tables and chairs are licensed but placed outside the encroachment area?

It could be argued that in such case there was a breach since the authorisation applies within the encroachment area, on this the Commissioner sensed that this was fertile ground for much legal wrangling in Court.

The MEPA replied that such cases are tackled by the Government Property Division and the MTA, with the participation of the MEPA, according to an 'administratively agreed' procedure. It was not clear what the MEPA's participation consists of, though presumably it would involve its Enforcement Section.

The MEPA stressed the importance of involving the Government Property Division since "*... any deviation from permit (expansion) would be* de facto *encroachment*".

The Commissioner also sought feedback from the Local Council Department. The Director of Local Government's reply merely referred to Article 9 of Legal Notice 119 of 2002 which regulated the 'deposits' (sic) of tables and chairs to provide food and beverages. This Article however deals with temporary licenses issued for specific events, which issue does not form part of this investigation, as previously stated.

The Local Councils Association replied that this was an issue they had long been complaining about. Their contention is that the whole issue of licensing and regulating the placing of tables and chairs should be devolved to the Local Councils.

No reply was received from the Government Property Division.

From the investigation it transpired that it was evident that the system of

regulating and enforcing the various licenses and permits issued for placing tables and chairs outside catering establishments is fragmented, unwieldy and incapable of providing an immediate and effective response to complaints of this nature.

The two forces entrusted with enforcement are the Police, acting upon a complaint by the MTA, and the MEPA's Enforcement Directorate. In the first case, the process involves hauling the contravener to Court, occupying the time and resources of the Police and the Courts. In the second case, though response would be quicker, the end result would also involve the lengthy process of an Enforcement Notice for non-compliance with the MEPA permit.

The Commissioner argued that a rapid-response system on the ground, with spot checks and on-the-spot fines, and suspension/withdrawal of the licenses for repeated offenders, was needed. The Commissioner stated that this system would also include the possibility to contest such fines in front of a tribunal.

For the system to succeed, it would first be necessary for the Government Property Division to mark out the encroachment granted in a clear and permanent manner. During the course of investigaion, the Commissioner was informed that the use of paint proved unreliable, since the paint faded and was not tamper-proof, and that metal markers were then used at one point in time but this practice was discontinued since these markers were not suitable "*...on health and safety grounds*".

Considerations and recommendations

The Commissioner is of the opinion that when the encroachment area has been defined by the GPD, it should then be up to the Local Council to monitor and enforce compliance. Local Councils employ wardens who are perfectly capable of carrying out such work as part of their normal duties. The Local Councils should be empowered to impose fines for non-compliance with the conditions of all the permits and licenses issued by the relative authorities, and even withdraw the license for repeated offences of this nature.

The Commissioner proposed that contestations would be then dealt by the Local Tribunals. Contraveners whose license is withdrawn would have to re-apply for a fresh license. Such measures would help instil a sense of discipline and compliance by operators.

On its part the Local Council should retain a copy of the MEPA and MTA permits available for public scrutiny. It would also have to ensure that monitoring can take place even at late hours of the day, and not just during normal office hours.

With regards to the issuing and renewal of the license, the Commissioner

recommended that the applicant would have to go through the present procedure to obtain the license for the first time. Local Councils should then be consulted during the MEPA application processing period. It is also recommended that the permit should be a 'holistic' one in that no development can take place, even if authorised by one entity, unless the other entities give their clearance as well.

Once the license is issued and the encroachment area defined as explained previously, renewals of the license would be carried out through the Local Council. This could be accompanied by a check of the markers to verify that these have not been tampered with. Spot checks should also be carried out during the period of licensing. The Local Council would then collect the license fees payable on behalf of the MTA, to whom it would pass on the payment while retaining an administrative charge.

This system would increase the surveillance capability and ensure that operators stick to their license conditions with regards to the area allocated to them as well as to the number of tables and chairs allowed, where and when such a condition is imposed.

In conclusion therefore:

- the complaint that there was a lack of proper regulation with regards to the placing of tables and chairs outside catering outlets, was partly sustained, in that the system did not provide an effective and timely means of control of abuse in such cases;
- the present system should be changed in order to provide for a greater involvement of Local Councils in the post-permit process of monitoring for abuse;
- during the MEPA application processing period, Local Councils should be consulted. No development should be allowed to take place until all entities have issued their approval. A copy of the permits shall be retained at the Local Council for public scrutiny;
- when an application is accepted, the area granted for the placing of the tables and chairs has to be clearly and permanently marked out by the Government Property Division, which shall retain responsibility for maintaining the markers, and the power to effect spot checks as and when it deems necessary. Any infringements should be reported to the Local Council for immediate action to be taken within the system as being proposed;
- once the permit becomes operative: the monitoring, enforcement and license renewal systems should be devolved to the Local Councils. These powers shall

include the power to effect checks for abuses, prosecute for contraventions in front of the Local Tribunals, and obtain suspension/withdrawal of licenses. Local Councils shall ensure that surveillance capabilities are available even into the late hours of the day;

- once a license has been revoked a fresh application will have to be made to obtain a permit once again; and
- local Councils shall be responsible for renewing licenses, collecting the relative payments and forwarding them to the entity involved. An administrative charge shall be collected for this service.

CASE NOTE ON CASE NO EN0022
MEPA

LACK OF FAIRNESS OR BALANCE WITH REGARDS TO THE PROCESSING AND DETERMINATION OF A PLANNING APPLICATION

(unprofessional treatment, lack of fairness or balance, planning application)

The Complaint

On 5 April 2013 the Ombudsman's Office received a letter from complainant alleging *"...very shoddy, unprofessional treatment ...by MEPA".* The complainant stated that following very protracted discussions with the DCC, the Board gave direction as to what was further required for the granting of a permit requesting slight modifications. The Board requested fresh plans which were handed in on 23rd August, 2010.

The complainant continued that his architect kept following the application, waiting to appear again before the DCC Board and was always told that the meeting was imminent. The complainant said, that after eight months waiting for a date, he went to MEPA to check and was told that his file was lost. MEPA Officials, the complainant said, assured him that the file could be rebuilt and there was nothing to worry about. After insistance from the complainant, the file was found in an empty room in the bottom shelf of an otherwise empty cupboard, the complainant alleged. When the file was found it resulted that the SEO had approved and stamped the plans.

The compalinant argued that the meeting was set for two months later, but the DCC had been replaced by the EPC board which started to process the application from the beginning and with the narrow parameters of ODZ regulations. In his letter, the complainant said that "[The EPC board] *dismissed the application in two minutes flat, doing away with all the hard work which had been undertaken over almost two years by my architect and the DCC! I appealed maintaining that the stamped, approved plans should stand. The EPC ruling went against all principles of good, administrative governance.* ***The DCC had given clear, unequivocal***

guidance and the SEO confirmed that these guidelines were abided by and, therefore, approved and stamped the fresh plans."

The complainant requested the Office of the Ombudsman to look into the matter before going any further.

The Ombudsman referred the case to the Commissioner for Environment and Planning and a meeting was held with complainant where he requested a suspension of the investigation pending the decision of the Environment and Planning Review Tribunal (EPRT) on the case.

Following a reminder which was sent to the complainant, another meeting was held where complainant informed that the investigation should continue and that he would be submitting further documentation. The complainant submitted various documents relating to the applications made on the site and MEPA decisions thereof. A copy of the EPRT decision, dated 11 December 2012 was also attached.

Facts and findings

This complaint deals with development on a site which was originally developed as an entertainment venue but was subsequently redeveloped as two villas, each with a pool, after an application filed in 2001 was approved on 11 July 2002.

Complainant subsequently applied to renew the permit and the application was approved.

In 2009 applicant put in an application to sanction works which had not been carried out in accordance with the approved drawings, and to be allowed to carry out further amendments to them. Following a refusal the application was finally approved by the Environment and Planning Review Tribunal (EPRT) on 11 December 2012.

In the course of the hearing by the EPRT, applicant submitted further amendments consisting of a reduction of 50 square metres in footprint to one of the villas, as well as the reduction in size of the swimming pool which had been proposed with an area in excess of that approved.

According to the covering letter to these submitted drawings, complainant's architect stated that these amendments would bring one of the villas and the pool back to the approved footprints while increasing the landscaped area.

The Tribunal accepted these arguments, finding that there were sufficient grounds to address the reasons for refusal, and sent the file back to the Environment and Planning Committee (EPC) to process the application in terms of the latest submissions.

The complaint centres on the processing of the 2009 application. Complainant stated that after the application was considered twice by the (then) DCC, the Board, at its meeting held on 4 August 2010, requested fresh plans "*... to show the swimming pool as per policy. ...*[Also] *the soft landscaping should be increased*."

Complainant submitted the revised drawings in accordance with the Board's decision on 24 August 2010. However the file was not brought up for a decision until 18 May 2011. By then the DCC had been succeeded by the EPC as part of the MEPA Reform process. The outcome was a refusal of the application, through a unanimous vote.

Complainant is stating that through the procrastination by the MEPA in processing the application in accordance with the DCC directions given during the meeting of 4 August 2010, when it appeared that the application was to be approved, the application was finally determined by a completely new Committee which refused it, and disregarded the process which had taken place with the DCC over two sittings and which, complainant alleges, had already resulted in a commitment by that Committee to approve the application.

In turn the MEPA defended its position stating that complainant had ample time to complete the project as approved yet chose to submit a request for a renewal and when this application was approved, he chose to carry out further changes necessitating another application which was refused by the EPC and subsequently approved by the EPRT. This cannot be construed as constituting procrastination or unnecessary delays, concluded the MEPA statement.

The Commissioner commented that MEPA's statement did not address the complaint raised. What a developer chooses to do with his project is largely up to him. If he chooses to carry out changes he knows full well that these have to be approved by the MEPA, following an assessment process.

The Commissioner noted that MEPA's statement failed to mention that it took a *full nine and a half months* for the file to be processed and brought back for a decision following the decision taken by the DCC on 4 August 2010. The amended drawings requested from applicant were in the MEPA file on 24 August 2010. Yet the DPA report was only updated on 11 October 2010 which means that it took almost two whole months for the amended drawings to be endorsed by the SEO and the report updated.

Seven months later the application was finally brought for a decision when by then the Committee had changed. The new Committee decided to ignore the clear direction that the previous Committee had taken on the application and refused it.

It was not the scope of the investigation to go into the merits of whether the application should have been approved or refused (it was eventually approved by the EPRT anyway albeit with some modifications). It was the issue of the time taken to conclude the processing and determination of the application which was being investigated, since complainant was alleging that this delay resulted in a refusal and subsequent appeal in which he was constrained to propose reductions in the building footprint in order to obtain a favourable outcome, which reductions would not have been necessary if the processing had been concluded in a reasonable time and brought in front of the DCC since that Committee had already indicated that it was favourably disposed to approving the application as submitted.

The Commissioner evaluated whether the undue delay in concluding the processing of the application prejudiced the outcome of its determination. The outcome obviously depended on whether there was a commitment by the DCC to approve the application. If a commitment existed then there could be no doubt that the delay, resulting in a final determination by a completely new Committee which threw the application out, unequivocally prejudiced the outcome to the applicant's detriment.

The application was seen by the DCC twice, on 28 April and 4 August 2010. In the first case applicant's architect was requested to submit further information in tabular form on the approved footprint, floor space and pool, as well as a section through the boundary wall. This was duly provided.

In the second case, after the DCC reviewed the information submitted and therefore had all the data required to determine the case, it decided to request amended designs showing the swimming pool as per policy and the soft landscaping increased. It also ordered the SEO to vet the fresh plans.

This last decision by the DCC is important. Applications destined for refusal are not sent to the SEO since it is considered superfluous and time-wasting for this process to be carried out for an application which is destined for a refusal. The fact that in this case the DCC ordered this vetting gave a clear and unequivocal indication that the Committee at that point, had taken the decision to approve the application subject to the amendments requested being approved by the SEO.

The fact that a final decision was not taken at that sitting should not have had a negative effect on the final outcome. It is inconceivable to suppose that the DCC, on receiving the amended drawings endorsed by the SEO, would have then refused it at the final sitting. The commitment therefore was clear. The message sent was that the application was to be approved at the following sitting once the designs,

duly amended as requested and endorsed by the SEO, were presented. The fact that it did not manage to determine the application itself was due to the excessive delay in bringing the file up onto its agenda. This delay is solely attributable to the MEPA.

The principle that instructions to amend drawings and have them vetted by the SEO thereby gave a clear indication that the amended designs would be found acceptable constituted a commitment had also been confirmed by decisions of the former MEPA Appeals Board. The incoming EPC should have therefore respected the commitment made and approved the application, even if in its evaluation it was not in agreement with the commitment.

Conclusions and recommendations

After analysing the sequence of events and the documents provided by the complainant, the Commissioner concluded that:

- the complaint raised is therefore justified. The undue delay by the MEPA in concluding the processing of the application just when it was about to be determined in a positive manner for complainant directly resulted in a negative outcome as the application was finally determined by a totally different Committee, requiring an appeal and amendments including a reduction in the floor space of the building before the appeal was favourably decided;
- complainant has suffered prejudice in that the development has a reduced footprint which reduction came about because of the negative disposition of the new decision-making Committee towards the proposal, as against the positive disposition clearly demonstrated by the previous Committee which was about to determine the application. This comment is not to be taken as criticising the manner by which the Committee arrived at its decision, but it serves to highlight the outcome of the delay complained about;
- unfortunately it is not possible for redress to be given by recommending a reversal to the status post 4 August 2010. The application has been approved by the EPRT and this Office is precluded from investigating such decisions, apart from the fact that the complaint is not addressed at the decision itself but at previous delays during the processing stage;
- it has already been remarked in previous cases that the MEPA should not adopt a cavalier attitude towards such shortcomings. Merely stating that the file "*was lost*" leaving the application pending for months on end is unacceptable. A fore-file could have been opened. The MEPA should assume its responsibilities in

such cases. No information was given as to where the file was "*found*", whether an investigation was carried out and if any steps were taken against MEPA personnel for negligence; and

- in addition it is being recommended once more that changes to the Planning Act be introduced, enabling aggrieved parties to obtain redress from the MEPA in similar cases. It is unacceptable that the MEPA's clients are placed completely at the mercy of carelessness without any satisfaction or redress given. Such incidents cannot but help to create perceptions of intentional mislaying of files in order to obtain a different outcome to the process. Ultimately therefore, it is the MEPA's image which stands to gain by improving on the situation as it stands today.

CASE NOTE ON CASE NO EM0004
MEPA

DENIED RIGHT OF APPEAL FROM A PLANNING APPROVAL

(right of appeal)

This case was decided by the MEPA Audit Officer whose post was abolished in August 2012. The Commissioner for Environment and Planning took over the follow-up action for the implementation of the recommendations by the Malta Environment and Planning Authority (MEPA).

The MEPA Audit Officer had sustained the complaint that a registered interested third party was not informed that a development application for which he had submitted representations, had been approved.

As a result, MEPA was advised to inform the objector so that he would have the opportunity to appeal from the decision if he deemed fit.

The MEPA Chairman replied that complainant had not advised the MEPA of his change of e-mail address, consequently he did not receive the decision notice. MEPA had also published the issuance of decision notification in the press where the rights for the submission of an appeal against the decision were advised.

In his rejoinder the Audit Officer stated that although complainant had submitted his representations by e-mail, the MEPA had consistently comunicated with him by means of letters, and it was only at the end of the whole process that communication by e-mail was resorted to. The MEPA was alerted about the non-delivery of the e-mail on the same day. The Audit Officer however insisted that the complaint was justified and that a remedy was to be provided.

On taking up the caseload, from the MEPA Audit Office, the Commissioner for Environment and Planning, took up this case with the MEPA CEO, in order to seek a means of redress for complainant. The Commissioner was also in contact with the complainant where he confirmed that he was still insisting on a right to appeal.

Though the case was discussed on many occasions with the CEO, the feedback remained negative. As a result, the complainant remained without a redress to his justified complaint.

According to the Planning Act an appeal cannot be re-heard unless it is ordered to do so through a sentence handed down by the Courts of Law.

The Commissioner has asked MEPA to inform him whether it would be assuming its responsibility at law in providing a suitable means of redress, if necessary even through financial compensation.

The MEPA replied that it did not intend to add anything further to the reply sent by the Chairman to the then MEPA Audit Officer.

In view of this reply, the case was forwarded to the Parliamentary Secretary for Planning and Simplification of Procedures, for action.

CASE NOTE ON CASE NO EPM 0012
MEPA

INCORRECT APPLICATION OF POLICIES ON DEVELOPMENT AT SANTA MARIA ESTATE, MELLIEĦA

(planning applications, enforcement, incorrect application of policies)

The complaint

On 2 February 2009, a complaint was received by the MEPA Audit Officer from complainants' Perit, regarding the erection of a boundary wall separating his clients' plot from the adjacent one.

In his letter, the Perit gave an explanation on the background to the case. He also stated that:

> *"My major complaint as enunciated in the letters referred to above was that the heights stipulated for building above the existing site levels were not respected. As a result my clients now face a blank party wall some 35 to 40 crs high instead of enjoying a valley view....*
>
> *Our contention now rests that the permit was issued after a wrong evaluation of facts and without asking for further information at various stages of the buildings....*
>
> *Our thesis is that once the MEPA cannot go back on any decision taken by the DCC Board, our trust lies solely in your evaluation whether in fact the work carried out as a result... [of the permits issued] should have had approval of the DCC of the application or not".*

The Audit Officer opened an investigation and requested the Enforcement Section to inspect and report on whether everything was built according to approved plans.

A report by the Enforcement Officer dated 11 June 2009 stated that an inspection was carried out on 4 June 2009, when it was noted that other works were being

carried out which required clearance. These works were located in another area of the site than the party wall. As to the party wall itself, it was noted that an opening approximately 1.8m wide which was four courses high was closed and another three courses were added on top of the existing wall.

The report further states that complainant phoned the office on 5 June 2009 with further complaints regarding works allegedly carried out within her property. The site was inspected on 8 June 2009 from complainant's side of the wall, when it was established that the works had been carried out about four years ago and that the allegation of ownership was not a planning issue.

As this case had not been closed by 1 August 2012, when the MEPA Audit Office case load was passed on the Commissioner for Environment and Planning, this case was taken up by this Office.

Considerations and comments

The report commissioned by the Audit Officer concluded that a full development application was submitted but an enforcement notice was being issued just the same. However this application was withdrawn by the Planning Directorate. So why was Enforcement not carried out once the application which was supposed to have sanctioned the works under enforcement not even processed completely and determined by the Board?

This development was characterised by a series of refused/withdrawn applications. Suffice to state that the outline application for the initial development was dismissed, and the next application found was for the sanctioning alterations to an existing villa when the 'original' villa did not seem to have ever been covered by a permit. The Commissioner noted that since this application was withdrawn, the whole development remained without a permit until 2004.

Since the application which was supposed to have sanctioned was withdrawn, the Enforcement Notice issued on the site should have been moved for direct action. This particular case had a bearing on the issue as it included the raising of the boundary wall.

It was noted that at least three other Enforcement Notices were issued. In the first case a subsequent permit had sanctioned the works; in the second case, the illegal works were removed by the owner, while in the third case the works were carried out by third parties on a different part of the site. At the time of investigation the Enforcement Notice was still pending.

It was clear that the situation on site was far from what would normally be

perceived for a development which conforms sound planning principles and design guidelines.

The submitted photographic evidence clearly showed the 'before and after' effect of the raising of the dividing wall. The photographs clearly reveal that the area immediately outside the land where the villa is situated remained undeveloped until 2004. In a 1978 aerial photograph the original steeply-stepped fields shown have disappeared, however the sloping terrain remained untouched.

Therefore the approved development with a large level area shorn of any detail, where the swimming pool and landscaping were subsequently positioned in a later application, could not have been reflecting the real situation on site. The Commissioner noted that there was no permit for landscaping.

This was also confirmed by the 'block plan' submitted which showed that the developer's site covered by the 2004 application did not include much of the part of the site in question. This same block plan showed the stepped contours as well.

The Commissioner commented that it was surprising that a survey which indicated the site levels was never requested until 2006. Even then the survey only covered the lower part of the site. There was no record either of the central part, already referred to previously (the site of the pool), or of the original part where the villa is sited. This lacuna has allowed the development of these additions to the original site to modify the profile of the existing terrain whereas the timely submission of comprehensive data would in all probability have led to a refusal. The Commissioner asked why this information was never requested and why the incomplete survey was accepted instead of a more extensive survey covering the whole site.

There was a further development on this case which merits consideration. In 2012 the MEPA approved a renewal of the permit for the application filed in 2006. Applicant stated that no changes to the originally approved drawings were being proposed. The Commissioner commented that he finds it hard to understand how this application was recommended for approval and subsequently approved when substantial changes had taken place in the pool/landscaped areas and the boundary wall height was raised. This development was all approved through the application filed in 2008. The renewal of the 2006 application permit restores the *status ante* and nullifies any changes subsequently approved.

Once the 2006 permit was the latest approved permit, it follows that any development not shown on the approved drawings was not covered by a planning permit. The MEPA cannot renew permits in a piecemeal fashion. Any development

not showing on the drawings validated and endorsed by the latest permit, which was the 2006 one as renewed, was automatically divested of the legal status it enjoyed on the strength of permits issued after this permit was originally issued.

The MEPA should once more issue an Enforcement Notice over the site for works not covered by the 2006 permit, including the increased boundary wall height. Any ensuing application which includes the revalidation of the increase in height of the boundary wall should not be approved.

Conclusions and recommendations

The complaint raised against the manner by which the MEPA has handled the issuing of permits on this site was sustained. The lax approach to the collation of data regarding the site, when this was situated in such a sensitive and delicate part of the Santa Maria Estate topography has allowed extensive remodelling of the site without proper control.

The Commissioner in his recommendations rose serious doubts as to the factual correctness of the data relating to the site levels in the application filed in 2006.

All development not indicated on the approved drawings in this application was subject to Enforcement action as was not covered by a permit. The additional height of the boundary wall above that approved in the 2006 application had to be removed.

In any subsequent application to sanction by the developer, the additional height of the boundary wall approved in the 2008 application over that approved in the 2006 should have never been approved, even if it was in conformity with the current design guidelines, since other guidelines (2.8A and 9.8 of DC 2007) concerning visual impact should have prevailed. The Commissioner recommended that the boundary wall had to be retained at the approved height in the 2006 application as a maximum.

Outcome

The MEPA, in its response to the recommendations made in the report, stated that according to the site's planning history, the bungalow in question at Santa Marija Estate was originally approved in 1987. The Permit was for the construction of a bungalow, garage and swimming pool. No details of the site levels and the boundary walls were observed in this file.

Another development permission on an application filed in 2004 sanctioned deviations from the drawings approved in 1987. According to the DPAR in this file,

the main changes relate to the site configuration, the location of swimming pool, the layout and extent of the basement level and the layout of the ground floor.

A site survey was submitted and approved, however no detail of the site's boundary wall was noted. The permit conditions set out a maximum height for the front garden boundary wall. No spot levels were indicated in the area along which the majority of the wall under dispute was located. Spot levels of the lower part of the site indicated the difference between the pool area and part of the site located between the pool area and the third party site.

An application in 2006 proposed additions and alterations to existing dwelling, proposed boundary wall along passageway and proposed gate. Full development permission was issued in March 2007. Minor amendment to approved development was granted in August 2010.

The MEPA further submitted that during the processing of the 2006 application a survey was first submitted stating that no changes to the site between the pool area and the third party site were being proposed.

However, when further information relating to another part of the site was requested, and "Existing Block Plan" with spot levels was submitted.

This other information showed that between the submission of the 2004 and the 2006 applications, the site level along the third party property boundary had been raised by at least three metres.

This crucial detail was not investigated and the applicant was not requested to apply for its sanctioning. The MEPA submitted that due to the fact that the application was focused on proposed development in another part of the site, and that there was no colour-coding to differentiate and show the changes in height, this matter was overlooked.

This fact alone should be sufficient to merit a recommendation of the whole case under section 77A.

The MEPA further contended that once the permit on the application filed in 2008 for additions to the developments approved in the 2006 application was granted, it could not be argued that the renewal sought in 2012 was for the permit issued on the 2006 application.

The Commissioner for Environment and Planning noted that MEPA did not explain how a permit for a renewal also retained the validity for a permit issued in the intermediate permit approving additions and alterations to the originally approved works when this was subject to a declaration that AO changes were to be made to the development as originally approved.

CASE NOTE ON CASE NO EM 0071
MEPA

ALLEGED MISLEADING INFORMATION SUBMITTED WITH AN APPLICATION FOR DEVELOPMENT AT SAN PAWL IL-BAĦAR

(misleading information, development application)

The complaint

On 23 November 2012, a complaint was received regarding the issuing of a permit for internal and external alterations to an existing third floor apartment at San Pawl il-Baħar.

In his letter complainant stated that "*The applicant has indicated false information in the application drawings with the intention of misleading MEPA. The application site plan indicates the extent of the site beyond the boundary of the block and includes part of the site ...which is owned by third parties. This has been done to mislead MEPA into believing that the back yard of the applicant's proposal complies with sanitary regulations, while in actual fact it has been built up...*

*The area indicated as a back yard in the floor plans and sections is part of [*a third party property*] and is fully built up, as can be seen from the aerial photo. The overlap between the [two] sites ...can very easily be noticed when checking the site on the MEPA Map Server*."

The complainant further added "*The application was validated in spite of the fact that the plans and sections do not show the* entire *site as required by MEPA "Submission Requirements for Development Permission Applications".*

*The back-yard of the block ...has been illegally built-up and contravenes sanitary regulations. [*The application*] ...did not seek to regularise this unauthorised development and should have been refused in accordance with Circular 2/96.*

*Similar misleading drawings were submitted for [*an earlier*] application [...filed in 2009] and this was brought to the attention of the case officer at the time. Although the application was withdrawn by the applicant, the case officer for [...the latest*

application] should have been aware of these issues."

The Ombudsman referred the complaint to the Commissioner for Environment and Planning for investigation in terms of Section 13 of Act No XVII of 2010. The Commissioner carried out a site inspection and confirmed that the rear of the plot is developed forming a high blank wall facing the site in question, and the only open space forming part of the building was the internal yard on the side.

The Commissioner referred also to the case history which revealed the following applications:

- 1994 – To erect a room at second floor – Approved in 1994.
- 1997 – To sanction signs – Approved in 1997.
- 2000 – Internal alterations and construction of additional floor – Approved in 2001.
- 2009 – To convert third floor unit in a duplex unit and proposed installation of passenger lift – Withdrawn at request of applicant.
- 2012 – Internal and external alterations to an existing third floor apartment – Approved in 2012.
- 2013 (CTB) – Request for consent in relation to internal yards of existing approved apartment – Accepted.

Facts and findings

The permit against which the complaint was raised is the one approving the 2012 application. However the alleged false information supplied was also included in the 2009 application which was withdrawn. Further examination of previous permits revealed, however, that this same information was also shown on the submitted drawings with the 2000 application. It was therefore considered that this application had also to be examined thoroughly in order to arrive at a complete assessment of the history of development applications on the site.

The works permitted under the permit for the 2012 application were for alterations to the front room and balcony to the existing third floor.

The complaint, however, was about the ancillary information contained in the submitted drawings with respect to the rear of the building. The approved drawing showed an arrangement of two bedrooms around an internal yard, with the area directly behind the yard indicated as "*third party property*". One of the bedrooms was positioned behind the yard and the other was on one side of the yard and extends until the rear of the building.

The building at that level terminated at a continuous diagonal boundary wall which also served as the rear boundary of the "*third party property*". The bedroom extending till the end of the building did not have any apertures in the rear wall, as would be customary for rooms giving onto the rear of a plot where the backyard would be situated. In this case both bedrooms draw light and air from the internal yard.

The submitted (and approved) plans indicated an extension of the plot towards the rear, terminating in a cut-line, and bounded along the party walls by means of dimension lines on both sides. It is this space which was the bone of contention of the present complaint. The submitted plans of the underlying floors, as well as the section, also included these dimension lines. The submitted site plan showed the site clearly extended into the built-up third party site at the rear, incorporating the space at the rear shown on the plans.

The complainant alleged that this space should never have been indicated as it forms part of a third-party plot. This plot was 'wrapped' round the site on which the complaint was raised, and it shared a common party wall. Photographic evidence supplied showed a high blank party wall rising up from the rear diagonal wall. Complainant indicated that this property was developed in terms of a permit issued on an application filed in 2003.

A site inspection confirmed the correctness of these facts. It was evident that when the 2012 application was submitted, the building at the rear covered by the 2003 application permit had already been constructed. The submitted information was therefore, at best, incorrect on this point.

As part of the investigation the Commissioner spoke to the Perit responsible for the drawings and was asked for an explanation to which he replied that he did not take any measurements in relation to the backyard and/or the internal yard in view that the proposal was limited to some alterations on the façade. He added that the drawings submitted to MEPA were based on the latest approved permit on site, namely the one on the 2000 application.

An examination of the approved drawings with this permit however, indicated that although this space at the back was also included, it had no dimension lines. The space was indicated as a 'void'. Queried about these discrepancies the Perit replied that "*Dimensions were inserted ... in order to have drawings which are in line with MEPA circular to architects 02/10, Section 1.3 (i) otherwise these would not have been accepted by the same authority. With regards to the rear part of the drawings approved in [...the 2000 application] these are marked with a cut line, which*

... denotes a continuous space with no definite dimensions."

With respect to the block plan the reply stated that "*The submittal of block layout plans for each level was done in order to be compliant to MEPA circular to architects 02/10, Section 1.3 (b) and 1.3.1 (b) otherwise these would not have been accepted by the same authority.*"

Even if one were to accept this justification, the fact remains that all the information relating to the true depth and layout of the plot was incorrect.

The Commissioner noted that it had to be kept in mind that a previous application by the same applicant and Perit in 2009 had been submitted and subsequently withdrawn. Complainant stated that its withdrawal was a result of his submission where he pointed out that the information was misleading. If that was so, then even if the Perit had never even visited the site before to verify measurements, the objection should have alerted him to check on the facts before assuming responsibility for the fresh application.

During the investigation it also transpired that the drawings submitted with the 2012 application with respect to the rear of the plot, are identical to those submitted in the 2009 application with the exception that the word 'void' has been deleted and replaced by dimension lines in the 2012 application, even though this was a clear proof that the rear of the plot was not as had been shown in the 2009 application.

As it was also alleged the drawings in the 2012 application were based on the approved drawings in the 2000 application, this permit was also investigated to establish whether the allegation was correct. In fact it could be confirmed that this was so. The plans in both cases were identical, including the 'void' at the rear. The Commissioner noted an interesting fact about the processing of the 2000 application, he was impressed with the speed with which it was processed. The application was validated, processed and cleared within six weeks, and the file was immediately taken up for determination by the Board on the same date that it was cleared.

An examination of the application form in the 2000 application revealed that the application stated that "*previous permits could not be traced*" when the plotting section immediately identified at least two previous permits on the site.

The Perit responsible for the drawings was interviewed and (a different one than the one responsible for the 2009 and 2012 applications) was asked for an explanation to which he replied that the 'void' at the rear was indicated for completeness' sake (*għal fini ta' kompletezza*), but that however, it was clear that applicant's property is completely separate from the 'void' since there are no apertures giving onto the

'void'. In addition, the approved site plan did not include the 'void'.

Though this was correct, there was an important consideration to be borne in mind. The 2000 application was for development in an upper floor, so it followed that the site boundaries would follow the limits of this floor and would not include the ground floor backyard. Had the development been over the ground floor, the site limits would have extended backwards to encompass the 'void'.

Moreover, the manner in which the information related to the rear of the site was presented in the three applications submitted in 2000, 2009, and 2012 respectively, begs the question – if the 'void' at the rear of the site did not form part of the property under development, why was it indicated at all? And if it was indeed necessary for it to be indicated, why was it not referred to as 'third party property' in the same way that the area behind the internal yard was labelled?

The Commissioner requested MEPA to inform him whether the omission of this 'void' would have had a material bearing on the assessment of the development request in these applications. The reply was in the affirmative. The information submitted served to give the impression that while the proposed development was to take place in an upper floor, at ground floor level, there was an undefined open space at the rear of the building which made it compliant with Sanitary regulations in terms of Section 97.1(n) of the Code of Police Laws (Chapter 10). On the basis of this information the Sanitary Engineering Officer had endorsed the application.

Conclusions and recommendations

In conclusion, an analysis of the manner by which the 'void' at the rear of the site was presented in all the applications, leaves no doubt that, notwithstanding the technical detail of the solid rear wall, the inclusion of this 'void' served to give the impression that the plot included this 'void' at ground floor level.

By this manoeuvre, the applicant in the 2000 application was able to obtain a development permit for the full length of the property eliminating the backyard in the process. This manoeuvre was assisted in no uncertain manner by the lax and rushed manner in which the application was processed. It was never queried why there were no apertures overlooking the 'void', no information such as photographs were requested of this 'void', and applicant or his Perit were never requested to clarify this glaringly obvious suspicious detail.

In the 2012, the Directorate's attitude was not much better. An objection letter, even if submitted late (because the site notice was taken down immediately), had flagged the illegality. An earlier application, submitted in 2009, had been

withdrawn, in all probability because the same objection had brought to light the true situation when it became obvious that the proposal was going to open a can of worms. Plotting would have uncovered the extensive overlap between the site and this party site in the 2003 application, since this time the site boundaries in the application included the rear 'void' but applicant or his Perit were never requested to clarify the matter, especially when the 'void' had now been developed.

The only redeeming factor was that the application was about alterations on the façade and processing focused on this area alone. However a little more attention to the case history would have enabled the MEPA to establish the true facts of the case in time to take corrective action.

After going through all the facts and findings the Commissioner recommended that:

- The complaint that the 2012 application contained false information is sustained. The rear of the plot was not a 'void' but was built up in terms of a permit issued to third parties on an application filed in 2003.
- The layout at the rear follows that approved in the 2000 application. This application also contained false information specifically on this detail, which misled the MEPA into approving development which effectively eliminated the backyard of the property.
- The processing of the 2000 application was lax and rushed and effectively assisted the applicant's manoeuvre to bypass Sanitary regulations and develop the property in contravention of Sanitary regulations.
- It is recommended that when obvious and extensive overlaps are flagged during the plotting process, the MEPA should raise a query and request a clarification from applicants. This would assist the vigilance process aimed at eliminating such abuse.
- Unfortunately no remedy can be recommended as the abusive development approved in the 2000 application due to false information is not affected by the provisions of the Planning Act which empower the MEPA to withdraw permits on such grounds, since these provisions came into force after this application was approved.
- In the 2012 application, although false information was also submitted, it did not have a material bearing on the alterations requested, since these were on the façade of the building not the rear. However, this site should be flagged to alert the Directorate in case any further applications are submitted for further development.

- Although the MEPA Directorate was responsible for lax and rushed processing, the main responsibility for this abusive development lies with the Periti who submitted the false information while signing a declaration that the information supplied was correct and factual. It is therefore recommended that the MEPA inform the Kamra tal-Periti of the case for it to investigate the conduct of the Periti involved.

Outcome

Despite repeated requests to the MEPA for a reply on whether the recommendations were going to be implemented, no such reply was ever received. The case was therefore brought to the attention of the *Kamra tal-Periti* by the Commissioner.

CASE NOTE ON CASE NO EN0043
MINISTRY FOR GOZO

OWN-INITIATIVE INVESTIGATION ON ALLEGED ENVIRONMENTAL DAMAGE DURING CLEANING OF SAN BLAS BAY, GOZO

(irregular use of machinery, protected bay)

Case history

On 16 August 2013, reports appeared in the press stating that machinery had been employed along the sandy beach at San Blas Bay in Gozo, in order to clear the algae washed up and accumulated there.

This action aroused a storm of protest by residents and other persons concerned as the Bay enjoys scheduled status as a Grade 2 Scheduled Heritage site. According to the press reports the Nadur Local Council denied responsibility and stated that works were carried out by the Beach Cleansing Section within the Gozo Ministry.

The Ministry for Gozo issued a statement saying that the works were intended to clear the bay from algae which was washed ashore in a recent storm.

Considering that this issue had raised public interest and concern, the Commissioner for Environment and Planning decided to initiate an Own Initiative Investigation in terms of Section 13(2) of the Ombudsman Act (Chapter 385 of the Laws of Malta).

Requested to state its position on the matter, the MEPA replied that it had not been informed of the works. The Heritage Protection Unit (HPU) further added that the site was scheduled and that *"...any works, including cleaning or beach replenishment must be carried out with a valid permit, which would have conditions on monitoring, an approved method statement and a bank guarantee."*[14]

The Gozo Ministry was requested to indicate the personnel responsible for the works. In reply the Ministry indicated an official from the Cleansing Department as the one responsible for the cleansing section.

14 E-mail copied to this Office by an official of the HPU (Heritage Protection Unit) MEPA dated 29 August 2013.

Interviewed, the person in charge of Cleansing Department in Gozo stated that on 14 August 2013, the eve of the feast of Santa Maria that he was supervising beach cleaning works at Qbajjar Bay, following which he reported to the Police Station in Victoria on a noise complaint relating to these works.

While he was there, a report came in about mechanical equipment being used to remove algae from San Blas Bay. The Gozo Cleansing Department official explained that such works were always carried out by hand in San Blas Bay, but that this year, owing to the large amount of algae washed up, the Ministry was under heavy pressure for mechanical equipment to be used.

He then phoned the liaison officer within the Ministry for an explanation. The Liaison Officer replied that he was acting under orders from the Ministry.

The Gozo Cleansing Department official stated that he then went to San Blas Bay and ordered the mechanical equipment off the beach, half of the beach had been cleared, with the algae shifted to one side. Works were going on to shift the remaining algae to the opposite side.

The following day he checked with the contractor to verify that the machinery had been taken off the site completely according to his instructions, when he was informed by the contractor that they had resumed work at 2.30 a.m. On being asked who had given the order to carry out such works, the contractor replied that it was the Ministry's liaison officer. He then reported the matter to the Minister's representative.

The next day he was instructed by the Ministry to verify reports that some rocks had been shifted during the cleaning process. Following an inspection he had replied that some boulders had been moved from their original position and were piled on one side of the access ramp leading down to the beach.

On 20 August 2013 he had attended a meeting at the MEPA together with the Ministry's representative to draw up a method statement for the re-positioning of the boulders.

The following morning he received a report that the boulders had gone missing. He confirmed this after an inspection together with Ministry's representative. A report was lodged at the Victoria Police Station.[15]

Interviewed, the Ministry's liaison officer stated that he worked as a coordinator within the Secretariat at the Ministry for Gozo. His role was in providing technical input towards achieving more efficiency within the Ministry.

He stated that he was informed of complaints regarding the large amount of

15 This incident is subject to a Police inquiry and does not form part of this investigation.

algae at San Blas Bay, and when he contacted the Cleansing Department official as the official responsible for beach cleaning, the latter informed him that he had been trying to get the contractor to go down and clean up but the contractor was not co-operating. The Gozo Cleansing Department official at that point had asked him to intervene. He phoned the contractor who agreed to go on site to clean up.

The liaison officer further added that later in the day he had gone down to check and found that the middle part of the beach had been cleaned with the algae piled on one side. He also found that the machinery had developed a fault and since it was the eve of the Santa Maria feast, he had ordered the contractor to remove the machinery off the site and take it up the hill.

He did not remain involved in the matter any longer but when he had heard of the incident involving the removal of boulders he had asked the contractor who had replied that he had not moved any boulders but that some could have been knocked while the algae was being pushed. He did not speak to the contractor on reports about work being carried out at night.

The contactor was also interviewed. He stated that he was contracted on providing beach cleaning services to the Ministry for Gozo. The service involved the use of machinery.

He had received instructions from the liaison officer to take his machinery down to San Blas Bay in order to clean the beach. Later on the Gozo Cleansing Department official became involved.

After carrying out some works, there was a discussion on whether the works should continue but finally he was instructed to remove the machinery and he complied.

He also stated that he knew nothing about works being carried out at night. He had not taken down any machinery neither had he instructed anybody to do so, although he could not state whether anybody had taken the machinery down again and used it.

Observations

On comparing the statements made by those directly connected with the incident, it was clear that the instructions to use machinery in order to clean the beach were issued by the Ministry's liaison officer. The contractor himself confirmed that it was he who had instructed him to take his machinery down and clean the beach. The Gozo Cleansing Department official was notified after works had commenced. This account tallies with the version given by the official himself.

As the person directly in charge of beach cleaning works, it should have been the Gozo Cleansing Department's responsibility to issue such instructions, but the Ministry's liaison officer decided to issue them directly. As a liaison officer with no official role in the Ministry he had no right to issue directions to the contractor but should have transmitted them via the Gozo Cleansing Department official.

Had the proper procedures been respected, the Gozo Cleansing Department official would have then drawn attention to the protected status of the beach where the use of machinery was prohibited.

The Commissioner acknowledged that the amount of algae washed up was greater than normal, and as reported "*there was pressure*" on the Ministry to remove it. The question to be asked here was, who was pressuring the Ministry to clear the beach? Judging by the fact that residents were up in arms when the machinery was taken down, they could not have been the ones exerting the pressure.

It was more likely that persons with vested interests in having the bay cleaned exerted the pressure. In any case the Ministry should not have succumbed to such pressure with the risk of creating environmental damage. It was the Ministry's responsibility to act as a guardian of the environmental heritage that Gozo is blessed with.

The Ministry was aware of the protected status of San Blas Bay. The Cleansing Department's statement indicates that the matter was discussed prior to the incident, and that he had informed Ministry's liaison officer that the cleaning of San Blas Bay had to be carried out during the week after the Santa Maria feast due to heavy commitments on his section for the cleaning of other bays. The requirement that only cleaning by hand could take place would have certainly been highlighted during such discussions.

It was clear therefore that the liaison officer, as a Ministry representative, took the initiative in ordering machinery to be used on the beach when he was aware that this was not allowed, and that for cleaning in any other way than by hand, a MEPA permit, including a method statement, was necessary.

Maybe one can attribute the liaison officer's actions to an excess of zeal, but nevertheless they are still condemnable.

Conclusions and recommendations

After reviewing the facts and finding about this case, the Commissioner concluded that:

- the incident where machinery was used in the cleaning of San Blas Bay, in contravention of the protected status that the bay enjoys, were a direct result of the initiative taken by the liaison officer, a Ministry representative.
- this action endangered the protected status of the bay, and was not carried out in the general public interest, but in the interests of a person or persons with vested interests in having the beach cleaned.
- in order to protect the Ministry from further undue pressure, the MEPA should immediately carry out Direct Action on the pending Enforcement cases which are not under appeal, namely EC 867/09, EC 340/10 and EC 341/10. This will help in retaining the pristine nature of the beach.
- the Ministry for Gozo should immediately take up a public awareness campaign highlighting the importance of preserving the protected status of Gozo's coastline and marine designated zones of environmental importance.

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