CASE NOTES 2020

PARLIAMENTARY OMBUDSMAN MALTA

OMBUDSMAN

FOR THE PERIOD
JANUARY - DECEMBER 2020

Edition 40

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October – May	08:30am – 12:00pm
	01:30pm – 03:00pm
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Note: Case notes provide a quick snapshot of the complaints considered by the Parliamentary Ombudsman and the Commissioners. They help to illustrate general principles, or the Ombudsman's approach to particular cases.

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

Foreword

This edition of the Case Notes from the Office of the Parliamentary Ombudsman will probably be the last to be published under my watch. Having given over nearly sixty (60) years of service to the public administration, I have reluctantly decided not to seek another term, leaving an institution that is now widely recognised in parliamentary democracies to be a valid tool in the defence of citizens. I do so sadly and with a heavy heart.

These last five years have been a most satisfying experience even though the Office had to face difficult challenging situations ranging from serious political upheavals, major institutional deficiencies and reforms, as well as a worldwide pandemic. We did not fail to make our voice heard when necessary to promote good governance and to secure a good public administration. We continued to perform assiduously our functions above all by executing our primary duty to receive, process and investigate complaints from aggrieved citizens and to recommend adequate redress when appropriate.

In achieving this goal I was indeed fortunate to be ably supported by competent, hardworking and highly qualified staff, some of whom have served the Office loyally since it was set up. They all gave their utmost often under difficult circumstances, to ensure that justice and good public administration are well served. I recognise that without their valid contribution the Office would not have been in a position to continue to provide the excellent service to aggrieved citizens as it has done for the last twenty five years.

This latest edition of the Case Notes is further evidence if need be, to the quality and diversity of the complaints that were handled by me and the Commissioners ably supported by our small team of experienced investigating officers. Care has been taken to ensure that at the end of each case note a comment is made on the outcome and sequel of the complaint. This gives an indication of the level

of cooperation that the Office has found from various government departments and public authorities in implementing recommendations to redress identified injustice suffered as a result of maladministration. Further effort has been made in this publication to render the Case Notes more user-friendly and accessible to the general reader. The Case Notes are more succinct than those in previous editions. They concentrate mainly on reporting the merits of complaints that relate to situations that are of general interest and the considerations of the Ombudsman and Commissioners and the recommendations made to address the proven injustice. Recommendations made in the light of applicable rules based on justice and equity.

As in previous years, this bi-lingual volume includes three separate sections reporting complaints investigated by our specialised commissioners in the areas of Health, Education and Environment and Planning. During these five years I have worked closely with these Commissioners and have come to appreciate their undoubted expertise and competence in their specialisation. The obvious advantage of their having direct and easy access to the departments and public authorities falling within their remit, as well as the opportunity of working within an integrated office covering the various sections of the institution have proved to be an added value to the quality of the service provided by the Office of the Ombudsman. I take this opportunity to thank these Commissioners for their sterling work and wish them well.

Finally, this volume of Case Notes is being dedicated to Mr Charles Caruana Carabez, our Commissioner for Education whose untimely death has shocked and saddened us all. His loss has left a void that was not easily filled. His Case Notes reported in this volume are a living testament to his humanity, his literary prowess and his refined sense of justice and equity. He strove incessantly to provide redress whenever he perceived an administrative injustice. He held the Ombudsman institution in high regard and undoubtedly his many virtues outshone the human frailties we all have. We extend our condolences to his widow and family. May he rest in peace.

Anthony C. Mifsud
Parliamentary Ombudsman

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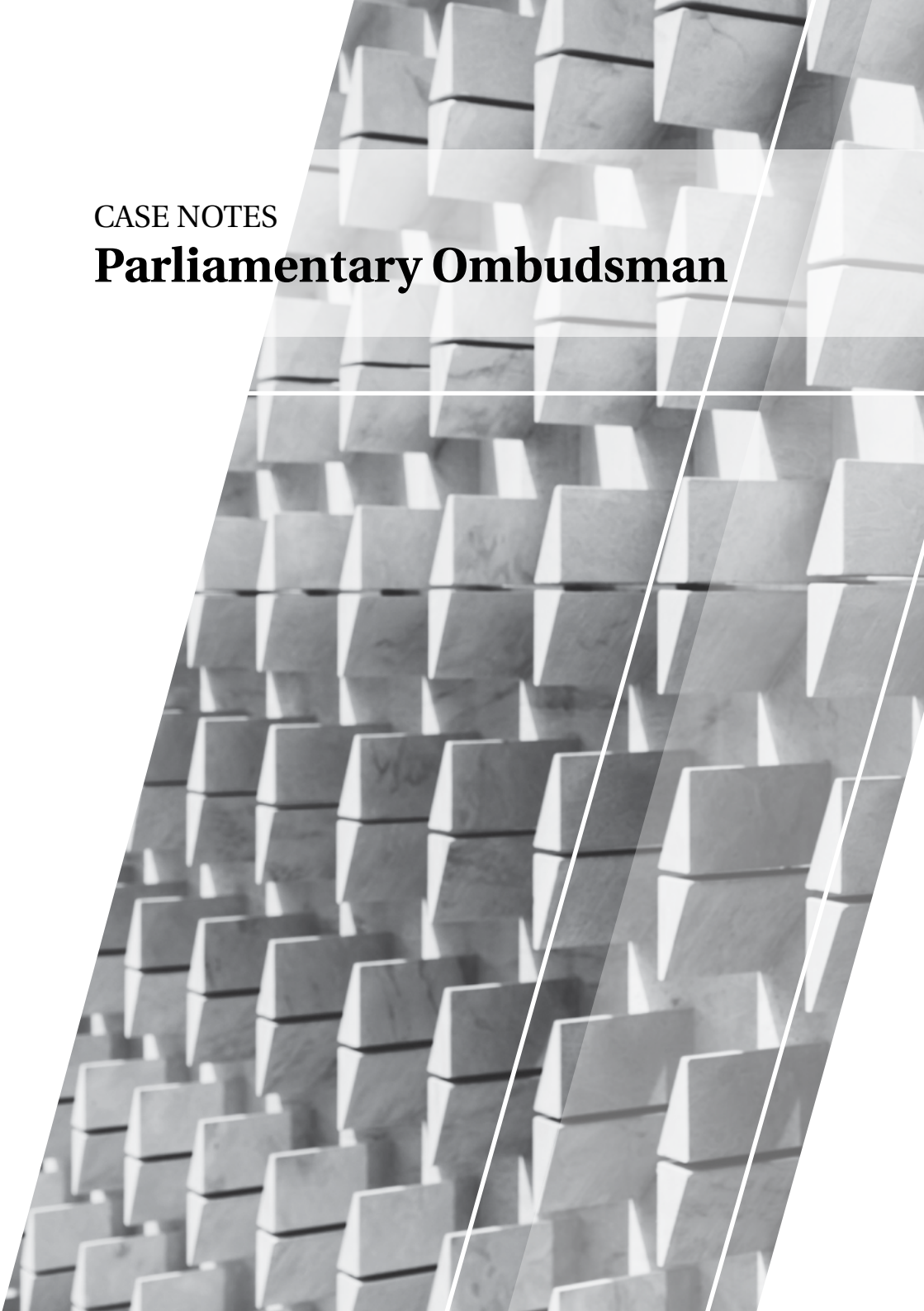


Identity Malta/Jobsplus

Ombudsman censors excessive bureaucracy

The complaint
A Serbian national complained that because of excessive bureaucratic procedures involving Jobsplus and Identity Malta Agency, his application for a temporary work permit had not been processed. Not only had the permit not been issued but he had suffered financial loss including a €150 registration fee as well as unnecessary hassle and stress.

The facts
Complainant came to Malta on holiday in 2016 to look for employment as a diving instructor with a local diving school. He received an offer of employment the following summer. When he arrived in Malta, he obtained certification as a scuba diver and applied for a six-month work permit at Jobsplus in July 2017 while he was still within the 90 day visa-free time frame applicable to Third Country Nationals (TCNs).

Complainant paid €150 on submission of the application and both he and his prospective employer had been requested to provide documentation to Jobsplus which was duly submitted. Complainant contends that notwithstanding several emails exchanged with Identity Malta Agency and Jobsplus where one entity kept sending him to the other to obtain the "*Blue Paper*", his application had been left pending. Eventually, he had to leave Malta with the assistance of the Immigration Police as he had exceeded the three month visa-free time frame within which he was allowed to remain here.

Complainant's submissions
Complainant submitted that he was authorised to stay in Malta in terms of an EU Regulation applicable at the time for a non-visa national. He was therefore exempt from the requirement of a visa while in EU territory for ninety days within any six month period. His application was made within that time frame. He had therefore satisfied the requirements stipulated in the Jobsplus checklist when his application was submitted in July 2017.

Complainant claimed that in his opinion the application was not processed as a result of lack of coordination between Jobsplus and Identity Malta officials. He insisted that he had found little assistance from officials at both entities and only received support from the Immigration Police who had realised that his was a genuine case and that he had not overstayed maliciously.

Notwithstanding the lapse of considerable time, his application had remained pending and was never rejected, yet he did not receive the permit which, complainant maintained, would have hastened the process of the issuing of another work permit in any other European Member State.

Jobsplus' reaction
Jobsplus maintained that upon submission of an Employment Licence Application the unit receiving the application was obliged to ensure that the required documentation was presented. The entity was not however responsible to update or issue any visa or to regularise an applicant's position in Malta. It was up to the applicant to ensure that all the required documentation was valid and that his stay in Malta was legal.

Jobsplus emphasised that it was not the entity's responsibility to assist an applicant's immigration position in Malta. It claimed that when complainant's application had been accepted, he had been advised that his eligibility to stay in Malta was about to expire and that he had to present updated documentation.

Identity Malta's reaction
Identity Malta explained that once complainant had applied for a permit with Jobsplus, complainant needed to present an employment licence so as to be able to apply for a residence permit on the basis of employment. It further observed

that the Agency had been made aware of the issues when complainant's original authorisation to stay had been exhausted and it did not appear that complainant was authorised to stay in Malta after that period.

The investigation

During the investigation, Jobsplus gave further information on the procedures to be followed. Jobsplus reiterated that its officials had informed complainant on acceptance of the application that updated documentation needed to be provided. It further elaborated that in so far as it was aware when a TCN applied for an employment licence with Jobsplus and his visa was about to expire he/she could go to Identity Malta with the receipt provided by Jobsplus and would be issued with a temporary visa/residence permit. It however acknowledged that Residence Permits fell within the responsibility of Identity Malta.

During the investigation a meeting was held with officials from Jobsplus and Identity Malta in which the process in place at the time when complainant submitted his application was discussed. It was observed that the procedure was a lengthy and complex one. Third Country National applicants can make use of the Single Permit procedure to reside and work in Malta which is regulated by specific legislation. It was clarified that the "*Blue Paper*" was not an Interim Residence Permit but a receipt of payment for the application submitted to Identity Malta for a Resident Permit.

Lengthy and complex procedures

However, as the stakeholders involved in the assessment of the application for a permit and the carrying out of the due diligence process were conscious that this was a lengthy procedure and that there had been various occasions of insufficient coordination between the various stakeholders, it had been agreed that the "*Blue Paper"*, although being a receipt of payment, could be used by the applicant as an authorisation to stay in Malta legally while the application was still being processed. This document was therefore an administrative, informal authorisation allowing the applicant to stay in Malta, accepted by the Police and Identity Malta, to avoid the issuing of an extension. This interim receipt once issued, is extended pending the assessment of the application by the relevant stakeholders.

Jobsplus explained that complainant's application had remained pending as the Immigration Police did not send a no-objection to the issuing of the Temporary Employment Permit but requested evidence that the applicant was in possession of an Interim authorisation or that he/she had left Malta.

Feedback from the Police

Complainant had recourse to the Police Immigration Section after the expiration of his 90 days visa-free time frame so as not to incur legal consequences and be barred from re-entering the EU because of the bureaucratic situation complainant found himself in. The police had assessed complainant's situation and decided to allow complainant to leave the country without consequence as a review of the documentation and correspondence presented indicated that this was a genuine case and that complainant had not sought to fool the system to obtain a residence card.

Considerations

The Ombudsman considered that the facts that resulted from the investigation amply proved that complainant had suffered an injustice as a result of administrative failures. Undoubtedly Jobsplus was correct when it contended that it was not the entity responsible for assessing or regularising an applicant's immigration position. Its function in this case was to process the application for employment and it was up to the applicant to ensure that his stay in the country was legal.

At the same time, the rules of good administration demanded that Jobsplus a public entity funded by public funds whose mission is *"… to enhance accessibility to the labour market through modernised and targeted services, whilst facilitating labour mobility and promoting investment in human capital"*[1], should have sought to assist the applicant who was seeking to ensure that his stay in Malta continued to be in line with applicable policies and rules. Jobsplus officials should have communicated with Identity Malta officials as soon as they were informed by complainant that the Agency to whom they had referred complainant was insisting that the interim residence permit could only be issued once the necessary document (probably the employment licence) was provided by Jobsplus.

1 Mission Statement included in Jobsplus website.

Need for co-operation among public entities

The Ombudsman stressed that undoubtedly, when a number of entities were involved in the processing, vetting and issuing of an application or request, it was essential that the entities involved cooperate and coordinate amongst themselves and that officials from these entities were able to communicate so that any difficulties or technical glitches could be solved without undue delay. This would ensure an efficient and effective service to those seeking assistance from the entities involved and will help averting situations similar to that of complainant.

Conclusions

The investigation showed that at the time of the submission of complainant's application, Jobsplus and Identity Malta lacked synergy and did not have clear protocols and procedures in place that could be applied to resolve complainant's situation. Moreover, there did not seem to have been a line of communication between officials within these two entities.

Complainant was unfortunately caught in this situation and had been referred by one entity to the other without any progress being made in the processing of the application. In fact, the application had been left pending even though Jobsplus was aware that it could not be processed further unless complainant's stay in Malta was regularised by the issuing of an interim authorisation that had not been issued by Identity Malta. The Office of the Ombudsman appreciated complainant's frustration that eventually led to complainant's decision to leave Malta with the least possible harm.

The Ombudsman concluded that in his opinion, although Jobsplus was entitled to charge the €150 processing fee, payable upon submission of the application as indicated in the new employment licence application checklist[2] for a Third Country National, in view of the circumstances of the case a refund of this fee should be made to complainant as a sign of goodwill.

2 In terms of the New Employment Licence Application Checklist for a Third Country National the processing fee amounts to €150 to be paid upon application and €80 to be paid on issue of the licence.

Recommendation

In order to avoid similar situations it was recommended that Jobsplus ensures that applicants are informed in writing upon submission of an application that although the entity would start processing their application, this procedure requires an amount of time as it involves vetting and the carrying out of due diligence by other stakeholders. It is the applicants' responsibility to visit the relevant agency and to ensure that their legal residence is extended while their application is still pending.

Outcome

The Ombudsman was subsequently informed that since the date when complainant's application had been submitted, the procedures in force for the handling of employment licences and Single Permits adopted by both Jobsplus and Identity Malta had improved and there is now better liaison between the two organisations. The Ombudsman has been further informed that complainant would be refunded in line with his recommendation.

Ministry responsible for EU Affairs

Salary supplement unjustly withheld

The complaint

Complainant, a public officer was engaged by a definite contract of employment for a period of three years in 2006 to take on a role within the ministry responsible for European Affairs.

In July 2011 complainant signed a second employment contract that covered another period of three years (2009-2012) that stipulated that complainant be paid a remuneration pegged at Salary Scale 7 with an additional 15% supplement. Complainant however was never paid the said supplement. It later came to the attention of complainant that other colleagues, who were also public officers, were paid the supplement. Complainant therefore submitted a request that payment be made in terms of the employment contract. The matter, however, remained unresolved and the supplement remained outstanding.

Complainant lodged a complaint with the Office of the Ombudsman submitting that the refusal to pay the supplement was not only unfair and abusive but was also in breach of the employment contract and therefore illegal. Complainant also requested the Ombudsman to investigate why the matter was not promptly acted upon despite several reminders being sent.

The facts

1. The Ombudsman sought to establish the facts through enquiries made with the Ministry responsible for European Affairs, the Office of the Prime Minister, the perusal of complainant's personal files and other relative documentation. He enquired into the various Model Contracts of employment available to engage public officers to perform the specific duties for which complainant was engaged.

2. The Office established that prior to entering the first definite contract; complainant was employed as a public servant. The first contract expired on 1 August 2009. Following the attainment of all the necessary approvals, a renewal letter under the same remuneration conditions was issued (valid as from May 2009) extending the employment contract for a further 33 months. Subsequently, a renewal contract was entered into between Government and complainant in July 2011 which superseded the said renewal letter (valid as from 1 August 2009). The contract as far as the remuneration package was concerned, stated that the employee would receive the global emoluments attached to salary scale 7 "*supplemented by the addition of an amount equivalent of fifteen percent of the said global emoluments*".

3. The contract therefore granted complainant an effective increase in the form of a 15% supplement, which however remained outstanding.

4. Complainant pointed out that this non-payment of the supplement went counter to Article 15 of the Employment and Industrial Relations Act that expressly prohibits an employer from making any deductions unless ordered to do so by competent court or by virtue of an agreement entered into between an employer on the one hand and a trade union representative of employees on the other. The Act also specifies that remuneration for earnings include any bonus payable under Article 23 other than any bonus or allowance related to performance or production. It is established that in terms of the contract of employment, the 15% supplement payment to which complainant was entitled was not a bonus or allowance related to performance or production.

5. The failure to pay dues under employment contracts was not an isolated incident as evidenced by the conclusions of the Auditor General's and Audit report – Public Accounts dated 2012.

The Ministry's position

The Ministry stated (somewhat erroneously) that complainant had never been given the option of benefitting from the 15% supplement since the extension in 2009 was carried out by means of a letter extending the original employment agreement under the same terms and conditions (without said supplement). This situation led to an anomaly in complainant's regard since a number of colleagues who had their agreement extended at the same time had done so by means of a new

contract and therefore benefitted from this supplement. The Ministry informed the Ombudsman that steps were taken to ensure that similar situations would not arise in the future. The fact was however acknowledged that officers in complainant's position were denied an opportunity that was enjoyed by their colleagues purely due to the different procedures employed across ministries in regard to extending similar agreements.

The Ministry therefore decided that it was only fair to recommend that complainant be granted global emoluments linked to the maximum of salary scale 5[3], on a personal and exceptional basis for his third term of service. The third renewal was granted on the basis of complainant's consistently strong performance in the past.

Complainant signed a third employment contract. In view of these facts the Ministry was of the opinion that complainant's contention was superfluous and without basis.

This Office observes that due to lack of communication between respective departments and issues with regards to record keeping, there appeared to have been a lack of awareness that complainant entered a renewal contract with the 15% supplement which in effect replaced the initial renewal letter.

Considerations

The Ombudsman could not agree with the Ministry's final position. This Office established that complainant's claim centred on the financial loss suffered as a consequence of the Ministry's failure to pay the 15% supplement due under the employment agreement governing the first extension.

The Ombudsman observed that the contract was a legally valid agreement binding complainant to carry out certain specific duties for which Government was bound to pay a set remuneration package. The payment of the supplement was not in any way discretionary.

3 At this point it was no longer possible to grant a 15% supplement. Remuneration pegged to Scale 7 plus the 15% supplement was roughly equivalent to remuneration pegged at a maximum of Scale 5.

Complainant had an excellent track record as far as performance of duties were concerned, so much so, that the employment contract was renewed for a third time. There was therefore no justification for the supplement to be withheld. The Government as an employer, was legally bound to honour its contractual obligations.

It was established that the way HR matters were organised, left much to be desired. Not all employees in this category were treated equally. Some had terms renewed by means of letters and others by contract. Moreover, the delays in dealing with renewals were not an isolated incident. The fact that there was lack of awareness that a renewal contract was entered into between complainant and the Government in July 2011 was also cause of great concern considering the impact this had on complainant.

Systemic administrative failures

The Ombudsman observed that these failures were somewhat systemic and were also to some extent highlighted by the Auditor General's report. The situation, in which an employee was denied dues under an employment contract with Government, could only be described as untenable. In other analogous cases steps had been taken to rectify the situation. The Ombudsman was baffled as to why similar steps were not immediately taken to pay complainant what was owed under the employment contract and this in breach of the Industrial and Employment Relations Act.

The investigation brought to light another important issue of general interest. On analysis of personal files, it appeared that problems with coherent record keeping persisted and discrepancies between hard copies and soft copy files, with conspicuous lacunae, were identified.

Moreover the delays the Ombudsman experienced in being provided with the information and documentation necessary for the investigation were not only unacceptable but also indicative of ongoing problems. Good record keeping and communication between departments and entities are essential for the public administration to function in an efficient and coherent manner. Failure to maintain proper records or to maintain open channels of communication could have severe repercussions not only on employees but also on the public in general. Indeed, no

one should be made to suffer and bear the consequences of deficiencies within the public administration over which one has no control.

In this particular instance complainant had been denied payment of a portion of the salary due under the employment contract for years as the matter was bounced from one person to another without proper resolution.

Conclusion
The Ombudsman therefore concluded that it was in the interest of equity and justice to recommend that complainant be paid the 15% supplement as set out in the contract he entered into with the Government as employer and this with immediate effect. The Ombudsman further recommended that a systemic overview be carried out by the competent authorities of their personnel record keeping procedures as well as contract renewal procedures to comprehensively identify deficiencies and failures in them and to take the appropriate action to address identified failings.

Outcome
The Ministry informed the Ombudsman that it was accepting the recommendations made by him in relation to complainant and would be acting in line with them.

Malta Council for the Voluntary Sector

Failed due diligence in allotting grants

The complaint

An Association set up to promote the cultural heritage of a seaside locality complained that it had been unfairly treated when it was denied a grant under the Small Initiatives Support Scheme (SIS) managed by the Malta Council for the Voluntary Sector for voluntary organisations (VO) registered in Malta (the Council – MCVS). The Council had initially approved the grant but had later reversed its decision when it realised that the procedures of adjudication had not correctly followed the set of rules governing the scheme.

The facts

1. Complainant submitted an online application to the appropriate portal for the Small Initiatives Support Scheme (SIS 2019) adhering to a set of rules governing the scheme.

2. MCVS informed the Association of the results of the scheme and the final rankings of the applicants, including their respective placings and approved grants. The final ranking was published on the Council's website and the VO funding portal. Complainant's Association was given a ranking within the bracket of successful applications and a €3000 grant was approved.

3. Later on that same day, the Association was informed by the Council that its application was successful and that MCVS was in the process of drafting the grant agreement. The Association was requested to give information on the bank account that had to be used wholly and exclusively for the grant. Subsequently, complainant called a meeting of the Association's committee in order to start working on the necessary procedures.

4. However, the day after, MCVS informed the Association that a miscalculation had been identified regarding the final evaluation mark of its application. It had been established that this was not according to the guidelines regulating the scheme. A new calculation brought about a variation in the Association's final mark that affected its placement in the overall ranking list. Consequently, the Association could not benefit from the funds under the scheme.

The Association felt that the Council's decision to vary its final mark at that stage was unfair, unprofessional and also infringed the Council's own rules and guidelines.

The investigation

The Ombudsman thoroughly investigated the evaluation of applications submitted by a number of associations. MCVS asserted that a human error had occurred in the calculations, that it was the same Committee that initially approved complainant's application which decided to change the final ranking upon being informed of the mistake and that the Committee manages its own protocol and was therefore entitled to correct its decisions if a genuine mistake had been made.

The Council informed the Ombudsman that during internal verifications, a technical mistake was noted in the calculation of the final marks awarded to applicants that required a third external evaluator. The computation of the marks awarded was based on an incorrect interpretation of the applicable rules. In fact, MCVS explained that "*… the marks are (were) checked by two Officers who incidentally had both been engaged recently and both interpreted the formula in the same incorrect manner*" and that "*This was a genuine mistake that could always happen*" and that "*… the corrective exercise had to be carried out in order for the results to be in full conformity of the fund's guidelines*". MCVS insisted that one had to abide by the guidelines and that the genuine mistake had to be rectified for the sake of accountability, transparency and good governance.

The investigating officer identified a number of inaccuracies in the adjudication process and communications following the identification of the mistake.

The Ombudsman also noted that the selection exercise should have been done rigorously and diligently and that strict adherence to the guidelines should have brought about a successful result. Proper double checking or review of the

calculations of the final marks should have been made in good time to ensure that there was full conformity with the guidelines, especially in the issue of awarding public funds.

MCVS should have carried out due, diligent, internal verifications and checked the results prior to the selection committee's endorsement and before making such results official and distributed to the applicants. This, especially considering that the officer/s who made the erroneous calculations was/were "*recently engaged*". Had MCVS exercised proper due diligence in the function and management of the scheme, the human mistake would have been noticed and rectified at a stage prior to its publication.

Considerations

The Ombudsman was of the opinion that the shortcomings in the adjudication process showed lack of the required standard of management in such delicate matters involving the administration of public funds. MCVS should have been more attentive and professional when dealing with such a sensitive issue. An injustice has been caused to complainant who was led to believe that his Association had been awarded a grant when subsequently it turned out not to have been successful since after the justified revision, its application obtained a much lower final ranking.

The Ombudsman did not contest the Council's right to verify the procedures carried out by its Selection Board and the correct results if they were found not to be in line with its guidelines. He insisted, however, that the exercise of verification and proper review of results should have been made in good time.

Conclusion

The Ombudsman was of the opinion that complainant had suffered an injustice due to bad administration. The Malta Council for the Voluntary Sector had failed to exercise its functions with the required due diligence and complainant had been negatively affected with the change of the final results and the consequent dismissal of his application.

Moreover, the Council's shortcomings, inaccuracies in detail, failure in keeping proper record of its own workings and failing to work in line with the guidelines had been identified. Given the circumstances of the case, no remedy could

be recommended to rectify the injustice that arose as a result of the mistaken calculations in the results.

The Ombudsman strongly recommended that MCVS should seriously and diligently take all the necessary measures and precautions when dealing with such delicate matters to ensure that such mistakes do not happen during selection processes. A system should be adopted by the Council to ensure that official records are kept throughout the whole process of evaluation and selection to clearly show that the correct and proper procedure was followed in line with the applicable guidelines.

Ministry responsible for the Economy, Investment and Small Business

Family business incentive – need to exercise due care and diligence

The complaint

The shareholders of a family business, a limited liability company, complained that they were unable to avail themselves of the favourable duty applicable on the transfer of their shares introduced by the Duty on Donations of Marketable Securities and Immoveable Property used for Business (Exemption) Order (S.L. 364.15). They submitted that they had been unjustly deprived of this benefit because of a wrong interpretation of the law. Complainants argued that they were misled into believing that they needed to register their business under the Family Business Act in order to benefit from the favourable tax rate. As a result they incurred thousands of Euros in the payment of additional duty on the share transfer when this could have been avoided.

The facts

1. In order to facilitate the transfer of his business to his children the complainants' father sought to take advantage of the incentive under the Duty on Donations of Marketable Securities Order that provided for a considerable reduction in the payment of stamp duty from 5% to 1.5% on the gratuitous transfer of marketable securities to family members. The law provides that in order to claim this benefit the transfer had to be made by a public deed.

2. Complainants started the procedure of registering the business as a "*Family Business*" in terms of the Family Business Act in order to benefit from this incentive. Unfortunately their father passed away before registration was

complete and before all the formalities necessary for the transfer *inter vivos* took place.

3. They therefore had to pay 5% on the value of those shares in duty *causa mortis* and this added thousands of euros to the cost of the transfer.

4. Complainants only became aware at a later stage that to benefit from this incentive, registration as "*Family Business*" was not necessary. They therefore contended that they had been misled by the information provided by the Family Business Office. They had consequently wasted precious time complying with unnecessary procedures with the result that they faced a significantly larger tax bill.

Considerations

The Office of the Ombudsman established that in order to benefit from this incentive, the law did not require that the business fall within the definition of a "*Family Business*". Nor did it have to be so registered in terms of the Family Business Act. It only required that the transfer be made by means of a public deed to members of the transferor's family in the degree established by the law. The Family Business Office also confirmed this position when it submitted "*… that the particular benefit referred to is not administered by the Family Business Office, nor does it relate to registered Family Businesses.*"

The Ombudsman verified that the complainants did not communicate directly with the Family Business Office prior to initiating the registration process. Complainants confirmed that the registration procedure was undertaken solely on the strength of the information available at the Family Business Office website which they argued "*packaged*" the incentive and registration as a "*family business*".

Problematic Website Information

The Ombudsman observed that whilst no mention of registration was made in the webpage text describing the incentive, the use of the words "*family business transfer"* could be seen as somewhat problematic. The average site user might at first associate the availability of the incentive with the requirements to register the business under the Family Business Act. This is especially so when one considers that as soon as one accesses the homepage of the Family Business Office website,

the user is immediately prompted by means of a pop-up window to register their business.

Moreover the fact that no guidelines were provided was distinctly unhelpful. On the other hand, the sparse information on the webpage on this particular benefit would however have necessitated further research into the conditions associated with it and the application procedure (possibly by seeking the assistance of the Family Business Office itself). The information available on the particular webpage was simply not enough for anyone to avail oneself of the said benefit.

If complainants had researched further they would have found that the incentive was being made available under Subsidiary Legislation 364.15. A regulation that was easily accessible online for all to read. Had complainants done so, it would have become clear to them that registration as a "*Family Business*" was not necessary to benefit from the incentive. Ignorance of the law cannot be used as an excuse for the failure to avail oneself from a benefit or other. It is up to a person who would be beneficiary to carry out the due diligence necessary to ensure that a benefit can be availed of.

It could also be argued that certain expertise might have been required to carry out this exercise. In this case the Office was aware that complainants were being assisted by an accountant and therefore had the necessary expertise at their disposal.

Conclusion

The Ombudsman concluded that whilst the information available on the Family Business Office website was somewhat sparse, it could not conclude that the failure to complete the *inter vivos* formalities for the transfer of the shares was due to the complainants being misled by the said website. It was up to them to exercise due care and carry out the appropriate verifications to ensure that all the necessary procedures were followed to allow them to benefit from the incentive.

The Ombudsman further observed that it would be in the interest of the public and in particular business owners as well as the Family Business Office itself that the website and other printed promotion material clearly indicate which benefits were available, under which legal provisions, and which were only available upon registration and which were not. The Ombudsman therefore recommended that

the content available on the Family Business Office website and on its printed promotion material be reviewed and amended as necessary.

Outcome
The Family Business Office welcomed the Ombudsman's recommendation. It informed him that it will be taking on board his recommendations and would include further information on its website accordingly.

Commissioner for Police / Ministry for Home Affairs and National Security

Ex-Prime Minister's security detail denied clasp

The complaint

A police officer filed a complaint against the Commissioner of Police and the Minister for Home Affairs, National Security and Law Enforcement alleging that they had unjustly refused to award him the clasp that accompanies the Long Service and Efficiency Medal.

The facts

1. Complainant joined the Police Force as a Constable apprentice in May 1981 and was detailed to serve in a number of responsible positions. One of the most important details was that he served as an official security with the former Prime Minister of Malta, Mr Dom Mintoff. This service started in 1997 when complainant was stationed with the Special Branch in Luqa Airport until the Prime Minister died in August 2012.

2. He was posted to the Special Branch specifically as security detail for Mr Mintoff, a task which he performed for about fourteen (14) years. In July 2010 he was given the Long Service and Efficiency Medal in line with the rules governing Honours, Grants and Decorations to members of disciplined forces.

3. In March 2012 complainant had been involved in a traffic accident in which a person suffered serious injuries. The Court of Magistrates found him guilty but acquitted him on condition that he does not commit another crime within one year. The Public Service Commission took note of that judgement and recommended that complainant be given a warning that could eventually lead to dismissal. Complainant contested that decision since he maintained that

the traffic accident was accidental and had nothing to do with his service as a policeman. The Public Service Commission however confirmed its decision which was approved by the then Prime Minister.

4. In August 2018 complainant requested that he be awarded the clasp that accompanied the Long Service and Efficiency Medal previously granted to him. His request was refused because the Commissioner maintained that this ran counter to the regulations that required that the medal should be given only to those members of the Force who had an impeccable character and conduct.

5. Complainant again protested against that decision and submitted that the regulations only refer expressly to the granting of medals and not to the clasp. He also stressed the dedication he had shown in the exercise of his functions especially during the time he was detailed to look after the needs of the former Prime Minister.

6. The Commissioner of Police informed him that he could not change his decision. A decision that remained unchanged even after complainant submitted his case to the Grievances Unit and to the People and Standards Division in the Office of the Prime Minister. The Grievances Board informed complainant that it could not enter into the merits of the case since these did not fall within its remit.

Considerations

The Ombudsman noted that the issue in this case was not the Long Service and Efficiency Medal itself, which was awarded after eighteen years to those who during that time had given efficient service with impeccable conduct and character. Members of the corps were eligible to have a clasp added to the Medal after having served an additional seven years and another clasp after a further five years. Complainant is claiming that he should have been given the first clasp after seven years. It was clear from the facts that a determining factor for the refusal of the Commissioner to give the clasp was the traffic accident in which complainant was involved.

The Ombudsman established that complainant had given good service, particularly at the time when he was acting as security for the former Prime Minister. Mr

Mintoff's daughter had confirmed that complainant enjoyed the trust of her father and was not merely his security officer. He attended to his needs also outside office hours in a considerate and discreet manner.

The Ombudsman considered the circumstances surrounding the traffic accident mentioned earlier. The Ombudsman noted that the prosecution itself had withdrawn the charge that complainant as a public officer had failed in his duty to prevent the commission of an offence. Complainant had been found guilty on the charge of negligent driving resulting in grievous bodily harm to a third party. He also considered that the suspended sentence had elapsed by the time that complainant was entitled to be considered for the first clasp.

It was important to note that the second schedule of the Certificates Ordinance provided that a judgement that imposed a penalty of not more than one year should be deemed not to have been given after the lapse of that term. In this case therefore no consideration should have been given to the suspended sentence when the Commissioner of Police evaluated the service record of complainant.

The Ombudsman was of the opinion that in assessing the conduct of complainant the authorities should have taken into account the fact that the former Prime Minister with whom complainant was detailed had a demanding character. If complainant had not rendered exemplary service Mr Mintoff would have undoubtedly made his objections known. Mr Mintoff found in complainant a loyal person he could trust who would protect him and attend to his needs.

Conclusion

The Ombudsman concluded that in his opinion the complainant had suffered an injustice. The authorities should not have taken into account the judgement that imposed a penalty that according to law should be ignored after that the probationary period lapsed. A situation that effectively meant that complainant had a clean conduct sheet.

The Ombudsman therefore recommended that complainant should be awarded the clasp. He considered that complainant had paid for his past mistake and therefore, depriving this police officer from what was due to him constituted an unjust act.

Outcome

The Ministry for Home Affairs, National Security and Law Enforcement and the Commissioner of Police informed the Ombudsman that they agreed with his recommendation and that it would be shortly implemented.

Department of Social Security

Ineligibility for a Service Pension

A pensioner well-advanced in years, complained that he was being unjustly discriminated against by the government's refusal to accede to his request to a service pension over and above the contributory pension to which he was entitled under the Social Security Act.

The facts

1. The complainant had for many years since the early 1970's, (up to his retirement) occupied senior managerial posts in major companies in which the government had a controlling interest. As Chief Executive of one of these companies he had been involved in representing Malta at various high-level conferences and seminars and was responsible for the organisation of a number of conferences at international level.

2. Complainant said that during his employment in positions that involved very onerous responsibilities, his salary had always been pegged to and limited with corresponding grades in the civil service. His position was finally assimilated with the rank of Director General and his salary had been pinned to that grade. Since this had been a cabinet decision, he had been told at the time that, for that reason, his requests for a higher remuneration could not be entertained.

3. The pegging of his remuneration to that of a Director General that was due to him while giving service to government in its parastatal companies only lasted until his retirement. Upon retirement his request for a service pension was repeatedly declined, even though he had been in continuous employment with these companies even before 1979.

4. Complainant submitted that this was a serious anomaly that was causing him serious financial hardship. In his view, this assimilation to the civil service grade should have been extended to his pension entitlement. If that was not the case he had been wrongly deprived of annual salary increases that had originally been agreed to in his terms of employment with the parastatal companies that employed him.

Government's reaction

The Social Security Department submitted that complainant's requests had been very carefully considered in the light of the provisions of the Pensions Ordinance (Chapter 93 of the Laws of Malta) since he was requesting to be considered as being eligible to a service pension.

Article 21 of that Ordinance provided that "*The provisions of this Ordinance shall apply to all officers appointed to the public service of Malta after the commencement of this Ordinance but prior to 15 January 1979*". It also provided that *"... no pension, gratuity or other allowance shall be payable under this Ordinance, nor shall any other payment be made thereunder, to any person who was not an officer before the date aforesaid, or to the widow, child or other relative of any such person*".

The Pensions Ordinance defined an Officer as the person substantively appointed to an office in respect of which a pension or retiring allowance may be granted under the Ordinance. The Director General, Social Security submitted that the entities with which complainant was employed as Chief Executive and Managing Director were not an entity that entitled its employees to a pension or retiring allowance under the Pensions Ordinance.

Considerations

The Ombudsman reviewed the replies sent by the Department of Social Security and sought further clarification from the Ministry on the basis of the complaint. The Ministry reiterated its previous standpoint that complainant's request for a service pension could not be entertained since he could not be considered eligible due to the fact that the Pensions Ordinance was only applicable to those officers who were appointed in the public service between 1 April 1957 and 15 January 1979. The Ombudsman considered that the natural interpretation of the applicable provisions of the Ordinance must be that only a person who is "*substantively*"

appointed within the public service within these specified dates is entitled to a service pension. Unless an individual was substantively appointed to an office in terms of the Ordinance, he could not be a beneficiary of a service pension. There was only one exemption to this rule in the proviso of Section 21 of the Ordinance that provides that *"(i) in respect of persons who, though not officers, were in the public service before 15 January, 1979 and in respect of the widow, child or other relative of any such person, the provisions of this Ordinance shall apply in such manner and to such extent as may be necessary to give effect to arrangements concerning such persons made prior to that date.*" The qualifying element here is that a person, though not a public officer (that is not substantively appointed) before the appointed day, was "*in the public service*" on that day.

The interpretation which has been given to this proviso is that a service pension would be granted to those who were employed in the Public Service on probation or on a temporary agreement before the 15 January 1979 but were confirmed in their substantive appointment after this date and worked without a break in service until retirement age. This proviso clearly could not be used in complainant's case as he was never substantively appointed as a public service employee. He only occupied senior managerial positions within a parastatal entity or a government controlled company. A substantive appointment within the public service could only be done through the procedure established by the Constitution whereby the Public Service Commission is vested with the powers to oversee the procedures applicable to the engagement of public officers.

The fact that complainant's salary was pegged to that of a Director General in the public service did not amount to a substantive appointment in the Public Service. The Ombudsman also considered that Article 7 of the Pensions Ordinance provides that "N*o pension, gratuity or other allowance shall be granted to any officer except on his retirement from the public service…*". In terms of Regulation 2 of the Pensions Ordinance "*… every officer holding a pensionable office in Malta, who has been in the service of Malta in a civil capacity for 10 years or upwards, may be granted a pension…*". The natural interpretation of this is that only those employees in the Public Service who until the time of their retirement hold a substantive grade qualify for a service pension.

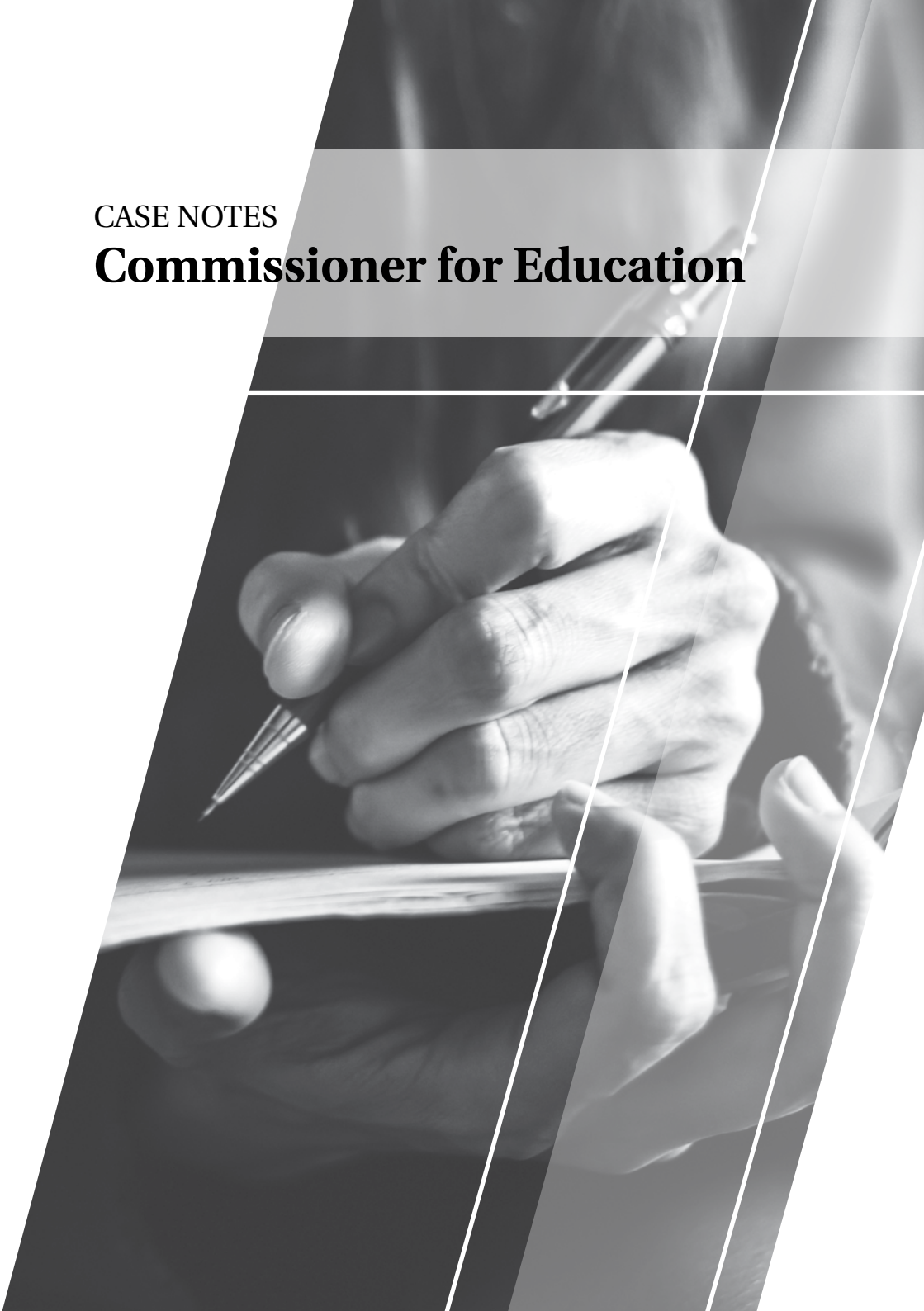
As stated, complainant was never appointed formally to a position within the public service in line with the procedures established by applicable legislation.

Conclusion

The Ombudsman concluded that, while understanding complainant's frustration, he could not entertain his submission that the decision of the Social Security Department constituted an injustice or an act of maladministration. His complaint could not therefore be upheld.

CASE NOTES

Commissioner for Education



On the 15th October 2020, the Commissioner for Education, Mr Charles Caruana Carabez suddenly passed away.

Mr Caruana Carabez was appointed as Commissioner for Education on 1 September 2017. He dedicated his life to promoting education and ensuring high educational standards. During his short term in office as Commissioner for Education he sought to advance good relations between the authorities and public educational institutions while defending the interest of aggrieved citizens seeking redress against maladministration. He did so with a strong sense of purpose tempered with equity and humanity.

Mr Caruana Carabez had an outstanding career as an educator. He has served as teacher, lecturer and Head of Department at the Technical Institute, the Gian Frangisk Abela Upper Secondary and the University Junior College. He has been a member of the Council of the University, and member of the boards of the ITS, the National Book Council and the National Commission for Further and Higher Education. He has been a prolific contributor of articles to the press and has authored two books on English literature.

This edition of the Case Notes is dedicated to his memory.

Ministry for Education and Employment (MEDE)

Refund of scholarship tuition fees unjustified

The complaint
A complainant who had been awarded an Endeavour Scholarship in September 2016 which covered her Ph.D studies complained that government authorities had failed to set her mind at rest that she would not incur the refund of tuition fees because of her failure to inform the board of her inability to complete studies by the set date.

The facts
Complainant had to complete her Ph.D course until September 2019 but had asked for a three month extension till January of the following year on the grounds of her pregnancy. She had initially applied for this extension in June 2018 but was informed that she had to write to the Board. She did so by letter asking for a full year's extension but never received any feedback. In the meantime, the key staff at the Scholarship Section of the Ministry for Education had resigned and the vacancies had not been filled until late 2019.

Complainant was worried about whether she would fall foul of the agreement by which she had been awarded the Scholarship that stipulated that refunding of tuition fees in whole or in part should be made in case of failure by the student to inform the board of any inability to complete studies by the set date. The fact that complainant had not received an answer from the Board of the Malta Government Scholarship Section (MGSS) about her position was a cause of great concern that made her have recourse to the Office of the Ombudsman.

The investigation
The Commissioner for Education took note of all the documents relative to the complaint. He approached the Permanent Secretary at the Ministry for Education and Employment (MEDE) who eventually informed him that the matter had been presented to the newly appointed board and that he could do nothing except await their decision.

After weeks, complainant again expressed her anxiety about the fact that the Permanent Secretary's reply still left her in a limbo. The Commissioner relayed complainant's concern to the Permanent Secretary giving him a deadline for a reply that was not forthcoming.

Considerations
The Commissioner harboured no doubt about the integrity of complainant, nor about her veracity about the narrative of events. She was sure that she had applied in time for an extension to finalize her Ph.D course following the instructions given to her by MEDE officials. He was equally convinced that in normal circumstances her request would have been accepted.

The Commissioner was also aware of the difficulties faced by MEDE and the Permanent Secretary in particular, created by the resignations of key personnel at MGSS together with a turbulent situation resulting in a change of Minister. He considered however that the public service was in duty bound to carry out its duties to the public in spite of adversity and to observe due courtesy in its dealings with the public.

The fact that what could have been a rather routine matter remained unresolved over a span of many months was unacceptable. Neither was it acceptable to fend off requests from either the public or the Commissioner himself by means of "*automatic*" or "*semi-automatic acknowledgements*". In fact the Commissioner drew immediate attention that such letters could not be interpreted by him as a unilateral postponement *sine die* of the investigation of a case.

The Commissioner affirmed that one should keep in mind that if it was decided that complainant had been in breach of her agreement this would imply a potentially heavy financial penalty that could cripple a young family. This had caused

consternation, fear and misgiving in complainant who had to live in uncertainty and dread for many months. This when she had done nothing to deserve it but in fact had followed the rules.

Recommendation
The Commissioner therefore, even on the principles of natural justice, believed that irrespective of whether matters were or were not in MEDE's control, the Ministry was at fault procedurally. To this effect then it should not demand any restitution of fees, in whole or in part, from the complainant as postulated in the Scholarships Agreement. It was up to the Ministry to present this final opinion to the Scholarships Board informing it that it should demonstrate conformity by issuing its backdated acceptance of the complainant's original request for an extension. The Ministry should also establish contact with complainant to see whether its relationship with her was financially up to date with regards to payment due to her.

The Commissioner expected the Ministry to inform him within a specified time whether it intended to adhere with his recommendations or not.

Outcome
MEDE informed complainant that the Commissioner's recommendation for an extension of the time limit to conclude the Ph.D had been accepted on condition that no further funding should be allocated during the extended period.

Complainant was satisfied with this outcome and thanked the Commissioner for his help.

MCAST

Academic qualifications not adequately recognised

The complaint
The Commissioner for Education investigated a complaint by a lecturer at the Malta College of Arts, Science and Technology (MCAST) that his City and Guilds Certificate rated at Level 6 by the Malta Qualifications Recognition Information Centre (MQRIC) was not recognised by MCAST as a degree in his application for promotion.

The investigation
In the course of the investigation the Commissioner consulted the latest sectoral agreement signed between MCAST and the MUT and investigated the policy of MQRIC regarding the recognition of qualifications. The Commissioner established that the highest qualification complainant possessed was considered a "*legacy award*". Although it acknowledged the possessor's level of mastery of a particular aspect of technology it was nothing but a licence to operate as a practitioner within the specified area and did not correspond to a degree which could only be issued by a recognised University.

MCAST explained that since the complainant's qualification was not a degree the institution would be breaching sectoral agreement if it were to favourably consider his application for promotion.

Considerations
The Commissioner considered that this complaint highlighted the problems faced by many valid educational professionals in Malta. Whilst they were approaching retirement age, rapid developments in the educational landscape had faced chances of promotion and progression together with formidable hurdles towards

achieving those goals. These professionals obviously merited promotion but could not obtain it because whatever academic qualifications they possessed were either considered as being obsolete or else were obtained at a time when they were the highest available locally but were not degrees.

The Royal University of Malta (as it was then known) offered no qualification in their field of specialisation. It was only recently that technical qualifications at graduate and post-graduate levels were available from local institutions and few could afford to study abroad at the time when these men/women were young enough to do so, with only rare opportunities for scholarships being made available.

Moreover with the education enjoining itself to conform to European requirements and specifications (especially through the creation of the Malta Qualifications Framework and the setting up of MQRIC) the obsolescence of such qualifications was exasperated through the application of standardised moral criteria in the processes of recognition and especially validation.

Another complicated factor was the signing of sectoral agreements which defined the strict requirements for promotion. Such agreements generally concern themselves with accommodating majorities and rarely giving even a passing nod to deserving minorities.

The Commissioner considered that the complainant fitted the plight of such professionals perfectly. According to what he established in the course of his investigation the complainant gave sterling and loyal service to MCAST particularly at a time when it was next to impossible to recruit academically qualified lecturers that even taught diploma students which showed that the institution felt that the complainant knew more than such students required to know. The next step after the diploma level is the degree one. Thus the institution was considering him a virtual graduate.

On the other hand, when it came to considering complainant's promotion application, MCAST had no choice but to follow the sectoral agreement which required the possession of a First degree conferred by a recognised University as a *sine qua non.* The Agreement made no provision for considering a certification issued by a foreign board many years ago no matter at what MQF level.

The Commissioner felt that the complainant was justified in feeling used and was certainly entitled to some form of redress which would conserve the dignity by acknowledging long years of service delivered beyond the normal call. He considered that redress in such a case was a form of payment of debt and therefore in the absence of any possibility of breaching existing agreements by means of promotion, he believed that such redress should take a financial form.

Conclusion
The Commissioner was of the opinion that the institution is in terms of the principles of natural justice morally bound to award complainant a one-time payment of a sum of money. The amount of which is to be established by the two parties even as a sign of gratitude for complainant's concrete and important contribution to the development of the institution and society in general which would otherwise go unrewarded.

The Commissioner indicated that he would be following his recommendation to establish whether MCAST had adhered to his advice and implemented his recommendation.

Negative Outcome
Following the publication of his opinion the Commissioner and MCAST had further exchanges on his recommendation to award complainant a one-time payment of a sum of money as a sign of gratitude for complainant's contribution towards MCAST.

Eventually the Principal and CEO of MCAST informed the Commissioner that the management of his institution had considered his recommendation at length. However, when all things were considered it was felt that it could not adhere to the Commissioner's advice. The Principal pointed out that MCAST was bound by the MCAST-MUT Collective Agreement signed on 22 July 2018. Granting one exception to the contents of that Agreement would in the management's opinion, automatically imply that MCAST was willing to compromise and negotiate new terms over and above those stipulated in the agreement.

MCAST had carried out a study to determine how many of its employees were in the same category as complainant. While not phenomenal, it was difficult to

establish the number of employees (past and present) who would be entitled to some form of benefit should exceptions be made to that which was agreed upon in the Collective Agreement. Hence the financial repercussions could not be forecast or accounted for.

The Principal emphasised that as evidenced from the replies submitted by MCAST throughout the investigation of this complaint, the complainant and other lecturers have had plenty of opportunities throughout the years to further their studies even through sponsorships in order to be able to further advance their career. These opportunities had never been taken up by complainant. MCAST as an institution has undoubtedly, over the years invested in its employees to enable them to succeed further. MCAST was of the opinion that had complainant taken up these opportunities, he would have been able to progress through the same channels as other employees had done. He concluded that because of these reasons MCAST would not be complying with the recommendation of the Commissioner but it would continue to seek ways and means how to regularize the current situation.

Commissioner voices grave concerns

The Commissioner regretted the decision of the management team not to follow his recommendation and recorded his grave concerns in the following terms that merit to be reproduced:

"*He* (the Commissioner) *understands that tangibly acknowledging the loyal and sterling service given by* (complainant), *a service which went beyond his call of duty and which imposed responsibilities on him which were not commensurate with his qualifications, places MCAST in a difficult financial position because there may be many others like him.*

He strongly condemns this line of reasoning, which is creeping into many institutions. It is condemnable because it implies that Justice depends on magnitude, and that is a most dangerous concept. If such ideas are encouraged, institutions would prefer to be unjust with entire groups, because there could be no way, according to them, of setting things right. The very claim that there may be many others like him also upsets the Commissioner, because the issue concerns the exploitation of an individual's goodwill and loyalty. The institution, rather than being a model employer, resorted

to what amounts utilising cheap labour of an excellent quality, and apparently, this practice was so widespread that it would put a financial burden on the institution if it were to acknowledge this in material terms.

The Commissioner is familiar with such work-practices; he has seen many excellent men, both technical and academic, being seduced with vain promises to extend their services beyond the worth of their hire, only to regret their generosity and dedication in their latter days.

We speak of men who quietly, but dedicatedly, built the affluence of contemporary society, of men who laboured for unremarkable salaries at a time when owning a fixed-line telephone was a privilege, and so helped to create a generation which affords a mere child today to have in his pocket extraordinary pieces of technology. They served well and never complained but rather co-operated, yet winced when it dawned on them that they had been short-changed by society. Society's response is that it is unable to give them not reward, not even their due, but a token fraction of their due because there are too many of them.

The Commissioner also feels that the Institution, in times gone by, has offered its valid but less qualified personnel various courses in order to improve their academic standing. This is most laudable. What is less laudable is that the institution left it up to them to choose whether or not to take the opportunity. Improving qualifications should be considered in the same way as in-service-courses, and be mandatory, especially in the milieu of fast-changing technology. One has to bear in mind that many of the staff involved were of a certain age when these 'options' became available, and did not have the elasticity and freedom from commitment which younger men possess, and so required more than mere enticement. This should have been worked into the negotiated final document of the sectoral agreement. What the person involved failed to do does not in any way erase what he in fact did do.

There is another aspect which merits consideration. Failing to acknowledge such an admirable work-ethos and the qualities that sustained it is a tacit encouragement of what is its very opposite. It sustains the attitude of self-servers, of men and women who consider institutions as milch-cows, or as forage-troughs for their inordinate ambition. Such an attitude attracts a work-force which is akin to a machine which consumes too much fuel for the energy it supplies, or whose weight is greater

than its power-output. Such an attitude is bound to generate inefficiency, and the Commissioner hopes that this not the fate that awaits it. Yet this fate is inescapable if the positive role-models are not praised.

Given, then, that the Team has decided, unlike Portia, that the quality of Justice must be strained, and given that the College does not have the wherewithal, the Commissioner will not, like the celebrated Dr Johnson, kick the rock of reality whilst saying to Boswell 'I refute it thus', thereby foolishly injuring his foot, but will rather bow to sordid factuality by saying to the Team "I free you from being just and fair, for it is an impossible demand.""

MCAST

Student stipend unjustly withheld and refunded

The complaint

A student at MCAST following the last year in a course leading to a BSc (Hons) in Construction Engineering complained with the Commissioner for Education that the annual stipend to which he was entitled during that academic year was being unjustly withheld.

The facts

1. Complainant had filed the necessary application together with supporting documents to the Students' Maintenance Grants Board asking to be awarded the stipend due to him for the academic year 2019/2020. After the lapse of an inordinate delay attributed to the uncertain political situation at the time, the Students' Maintenance Grants Board informed complainant that his request could not be acceded to since he was not deemed eligible for the payment of that stipend.

2. The Board pointed out that the documents submitted by him showed that his income exceeded the threshold amount set for the assessment of applications submitted by students who were registered as self-employed. It considered that complainant did not satisfy the conditions of Legal Notice 308 of 2016 that regulated eligibility for maintenance grants in so far as his annual income as a part-time self-employed exceeded € 3000.

3. Complainant maintained that this threshold that had led to his disqualification was arbitrary and did not result from any law or regulation.

Complainant's submissions
Complainant submitted that he satisfied all the requisites set out in this Legal Notice for entitlement to the stipend. He was a citizen of Malta; he had lived in Malta for a period of not less than five (5) consecutive years immediately before the start of the course of studies and had completed the term of compulsory education. He was regularly attending the course of higher education and was making satisfactory progress. He was not in full employment or in a part-time occupation of more than 20 hours a week. He was also making progress in his program of studies.

Complainant pointed out that nowhere in these regulations was there any mention of a maximum of income derived from his employment, above which a student would not remain eligible for the maintenance grant.

The investigation
Having established that complainant had submitted a well-documented application, the Commissioner sought to establish on what legal grounds the Students' Maintenance Grants Board had disqualified complainant. The Board informed him that its decision was based on a Memo issued by it regulating the grant of benefits to self-employed students, on 6 February 2019. The Memo stated that "*Some of these students' income is very low in the region of €3000 annually. The Students' Maintenance Grants Board agreed unanimously that if a profit and loss duly signed by an accountant is submitted by students showing an income of up to €3000/annum application is approved. If the income from self employed students' exceeds this threshold there will be no automatic approval but applications are to be dealt with one by one and forwarded to the Board for consideration if they are not straight forward*".

The Commissioner queried the validity of this decision. He established that there was no regulation in Legal Notice 308 of 2016 which stipulated an income threshold which if exceeded, rendered an applicant ineligible or subject to added hurdles in his or her quest for a maintenance grant. The parameters and regulation of the Legal Notice were scrutinised and approved by Parliament and could only be changed by amendments which are in like manner presented to and approved by Parliament. Moreover all political decisions that further define a Legal Notice were to be made public. It did not result that this had happened in the case of the Memo in question. Neither the complainant nor the Commissioner were aware of their existence.

Considerations

The Commissioner considered that the disqualification of complainant's application on the grounds of not having furnished an audited Profit and Loss Account, did not result from any provision of law and was therefore invalid. The Legal Notice did not make any provision for a declaration of earnings by the applicant. Neither did it stipulate the threshold of earnings beyond which a citizen would lose his entitlement to assistance to a student's maintenance grant. The Memo issued by the Chairman of the Students' Maintenance Grants Board (SMGB) was not empowered by any provision of the Legal Notice and was therefore invalid at law. Moreover, it was never published in calls for applications subsequent to the date of the memo.

The Commissioner observed that the SMGB's remit did not endow it with the power to arbitrarily issue regulations which discriminate against a sizeable sector of society on financial grounds. More so, when such citizens were unaware of such a discriminatory impediment in their regard because their ineligible status was only discovered by them after they had in all trust submitted their application. Such threshold was not stipulated within the Legal Notice and could only come into existence through the publication of subsidiary legislation which rendered the impediment public because it resulted from the observance of parliamentary procedure. In other words, the imposition of such an impediment was *ultra vires* to the authority of a board or any other public official.

Conclusion and recommendation

In view of these reasons, the Commissioner upheld the complainant's request to be rendered eligible for the maintenance grant from the date of his original application and was to be reimbursed with the monies that were due to him up to the date of the Commissioner's Final Opinion.

The Commissioner moreover entreated MEDE to refrain forthwith from the unfair process of exceeding its authority with regard to the assessment for the financial position of applicants and their disqualification if they exceed arbitrary limits.

Outcome

The Ministry for Education and Employment accepted the Commissioner's Final Opinion and decided to implement his recommendation. After completing the necessary procedures the Board acceded to complainant's request and paid him the outstanding amounts.

Ministry for Education and Employment

Improper discrimination in conditions of work

The complaint

A number of complainants entrusted with the running of specialised schools known as Schools of Art, Drama, Music and Dancing claimed that they were being improperly discriminated against because they did not enjoy the conditions of work of a Head of School but were only listed as "*Centre Coordinators*" when they performed the same duties and were burdened with the same responsibilities. They were consequently being deprived of the pay, allowances and infrastructural support which were the entitlement of Grade 5 Heads of Schools whilst the population of their schools varied between 500 and 1300 students. Complainants also stressed that they carried out their duties outside normal working hours since these centres catered for part-time students.

The investigation

Complainants submitted four distinct claims which they felt would rectify their position. They asked to be placed in Scale 5 which includes the allowances applicable to Heads of Schools and that they be granted a "*disturbance allowance*" since they operated outside normal working hours which included evenings and Saturdays. They submitted that their conditions of work should be streamlined with those enjoyed by Heads of Schools especially with regards to leave of absences and that their establishments be granted a staff structure similar to those of other schools which included Assistant Heads and Heads of Departments.

In investigating this complaint the Commissioner for Education met the complainants and the President of the Malta Union of Teachers' and established that the complaint was based on correct facts. It was also clear that the union had

not used the sectoral agreement governing the years 2018-2022 to settle the anomaly that was resulting in an improper discrimination to the prejudice of complainants.

The Ministry for Education and Employment (MEDE) limited itself to simply acknowledging the *status quo* of complainants as Centre Coordinators (not Heads) and informed the Commissioner that their allowance had been raised from 10% to 15% per annum. The Commissioner on his part registered that he was not at all happy with the attitude displayed by MEDE in regard to complainants who felt that they were not being given their due as a result of an unorthodox label given to them as Centre Coordinators. Considering their responsibilities, working conditions and human resources, it was the opinion of the Commissioner that that label constituted discrimination resulting in an injustice.

Considerations

The Commissioner pointed out that Colleges consisted of Schools managed by Heads and directed by a Principal, and that these Special Schools formed part of Colleges without being called schools. He pointed out moreover that the "*Centre Coordinators*" received as Head of Schools their annual bonus after endorsement by their Principal. This further sustained complainants' argument and exasperated their anomalous conditions of employment.

Failure to cooperate

In his Final Opinion the Commissioner regretted the failure of MEDE to adequately cooperate with him in this and other complaints. Despite repeated reminders the Commissioner failed to elicit any reply of substance. Seeing that no headway or goodwill on the part of MEDE to even discuss the matter to any meaningful depth had been registered, the Commissioner decided to finalise his opinion and recommendations.

The Commissioner premised that no establishment which operated to educate people in whatever subjects was to be considered as one not being a school on account of the age of its students or the hours of the day in which instructions are imparted. By extension and as a result of this premise State Education Establishments should be identical in all aspects, be they with regard to equipment, human resources, facilities or conditions of work of their employees.

Centres, State Schools and Colleges

The Commissioner recorded that the educational establishments which were "*coordinated*" by the complainants were schools in all these essential elements that define schools. They only differed in the nomenclature ascribed to the persons in charge, their conditions of work and last but not least the servicing infrastructure of the establishments. They were also unorthodox in their operational hours but this cannot be taken to indicate that they were not schools but "*Centres*". State schools in Malta were satellites of Colleges. Each school had a Head, Assistant Heads and clerical staff and each College had a Principal with supporting staff. Any entity which gave service within a College was to be deemed a school and nothing else. There did not exist entities which had a physical presence within a school which belonged to a College (like the NCFHE) but since they did not impart learning they could not be termed schools.

The word "*Centre*" was more appropriate to entities which gave a service to the community in the form of assistance or advice. The replacing of the word "*school*" by the word "*Centre*" in the case of the entities administered by complainants gave MEDE the chance to reap advantages to which it should have renounced in the name of equity and fairness. Such a change of appellation whilst accommodating MEDE, inflicted hardship on complainants by making them carry out duties which pertain to Heads of Schools without giving them their due whilst receiving a lower remuneration for their work.

The Commissioner noted that the last place where one would have expected to meet with cheap labour was a Ministry or a Government Department and the situation prevailing in the case of these complainants amounted to the exploitation which marks out cheap labour.

Finally the Commissioner could not point out the failure on the part of the Teacher's Union to defend complainants. Once the Union had accepted them as members it had recognised their true status as members of the teaching profession in spite of their misleading title. It was therefore in duty bound to safeguard their interests. It had missed the opportunity to rectify a glaring injustice on the negotiating table during the last sectoral agreement and this was certainly not something that it could boast about.

Conclusion
The Commissioner therefore concluded by upholding all complainants' requests except for that concerning the payment of allowances for disturbance etc since disturbances and associated effects issued from the very nature of the school which the complainants had opted to direct, given the awareness on their part that they were not being asked to head a school but a special school.

Recommendation
The Commissioner recommended that:

1. the word "*Centre*" should be replaced by the word "*School*" in every instance where it was used;

2. the complainants be placed in Grade 5 with other Heads of Schools enjoying all the benefits and carrying out all the duties of such heads whilst benefitting from all material and human resources of any other school; and

3. this be carried out fortwith whilst making allowance for any delays accruing from the legal and tactical constraints of this operation with the reservation that the financial benefits resulting from regrading, be enjoyed by the complainants from the date of his final opinion.

Outcome
This file has not been closed yet. At the time of publication it was still pending at the office of the Commissioner for Education.

University of Malta

Student correctly assessed

The complaint
A student explained that he had been unfairly treated when he had been judged to have failed a study unit for only five (5) marks and was being asked to redo and be reassessed in all the units for the whole year in question. He felt that this was extremely punitive and asked to be given the chance to study and be reassessed only in the unit he had failed.

The investigation
The Commissioner for Education examined all the relative documentation not only by the Pro-Rector for Students and Staff Affairs and Outreach for the University of Malta but also all the documents submitted by complainant in support of his claim. The Commissioner for Education considered that prospective post-graduate students (and indeed all prospective students) should first of all understand that their academic sojourn at the University of Malta for the duration of a course was regulated by what are called Bye-laws that are published and with which students were expected to be familiar with.

The University assumed that students were familiar with these bye-laws and thus the strictures contained in them strictly formed a legal obligation binding both sides namely the student and the Institution. Failure to read and understand these strictures did not exonerate a student from the penalties envisaged in any part of the article or paragraphs of the bye-laws, though unfortunately, the process of reading these bye-laws seems to be, in the Commissioner's experience, observed in the breach in the majority of cases. It was only when serious hitches arise that students became aware of them.

Considerations

In determining this complaint the Commissioner's main focus was always to investigate whether the University had committed a unilateral breach of the contractual obligations by not following the bye-laws because that was what constituted unfairness and discrimination and a lack of proper application of the rules. The Commissioner could not either contest or question the appropriateness of the marks ascribed to a student's work by the experts who formed the academic *corpus* as stated by the law governing his activities. Any claim of unfairness then had to be assessed only on the basis of whether the institution had adhered to the rules when applying them. A student could not complain that a rule was unfair on the basis of it being very rigorous because he had in fact tacitly consented to its possible application when he registered for a course.

The facts of the complaint were governed by a bye-law issued under the Education Act (Chapter 327 of the Laws of Malta) in terms of the General Regulations for University post graduate awards for the degree of Master of Arts in Public Policy Leadership. A regulation that came into force well before the complainant fell afoul of it and was active when he had registered for the course. The Commissioner could not see any instance of the University misapplying it in any way in complainant's case.

Complainant was completely incorrect to seriously suspect that he had been the object of some conspiracy against him. It should be noted that both the Registrar and the Pro-Rector had correctly applied the rules. It did not lie within their jurisdiction to dispute the stringency or leniency of any bye-law. He had simply to ensure that the University abided strictly with its procedural laws. It was also pertinent to point out that the Commissioner for Education could not exhort the University to ignore a bye-law because "*it is only a matter of five (5) points*". The demarcation lines stated in the bye-laws are not capricious but were chosen for technical reasons. The same applied for the serious effect when falling within the demarcation line of competence imposed on a student, whether it was for one or for five points.

It was clear that both the Registrar and the Pro-Rector pointed out that if a student failed twice in one unit he/she would be deemed to have failed the entire course, with all the consequences that failure brings with it. Units compulsory status (implying that it is of fundamental importance to a complete mastery of the subject)

certainly sustained whatever sense the drafters of the bye-law originally had in their intention. It was this that the complainant was contesting. Any serious University had such bye-laws in order to guarantee the quality of the degrees it bestows. The bye-laws in question were far from capricious.

Conclusion

The Commissioner concluded that laws which had been *in vigore* for quite some time without being contested could not be considered unfair and the University of Malta committed no breach of procedure or any form of maladministration when it applied the bye-law in question. In view of this the Commissioner did not uphold complainant's petition.

University of Malta

Quality of tutorship at Ph.D level

The complaint

A postgraduate student submitted his proposal for the award of a Ph.D degree to the Faculty Doctoral Committee of the Faculty of Laws of the University. He did so by registering for an MPhil and then requesting a transfer of his work to Ph.D level. A request that was accepted.

The Board of Examiners had eventually asked complainant to revise and crop the title of the thesis. However, when the thesis was presented to the Board with the revised title, complainant was told that the work would only qualify an MPhil. Complainant felt that he had been poorly guided throughout by some supervisors assigned to the thesis submitted for the MPhil. No one had drawn his attention throughout the gestation period of the first thesis to the possible unsuitability of the title. The general lack of guidance had led to the rejection of the second thesis with a revised title submitted for the Ph.D. Complainant had asked the Office of the Ombudsman to provide some sort of remedy for the injustice allegedly suffered.

The investigation and findings

The Commissioner felt that the facts that resulted from his investigation showed that two essential issues formed the backbone of the complaint. The first issue concerned the propriety or impropriety of pointing out a radical defect (an unsuitable title for the thesis) in a thesis at a rather late stage. The second one concerned evaluating whether the supervision team provided by University performed at the expected standard and if it had not, whether this had been an important factor which contributed directly to the rejection of the thesis by the Board of Examiners.

The facts showed that it was rather clear even to the non-adept, that the title originally chosen by complainant for the thesis was unsuitable for a Ph.D. That much the Commissioner had established upon receiving the complaint and before he had ingested the material presented. At that stage the Commissioner was not yet aware that the ponderous and prolics title would in fact be one of the bones of contention in the investigation. Had he been supervising the complainant's work he would have demanded a more succinct and focused title at the outset. He would have expressed his surprise at the student's rather uncritical choice. The Commissioner was also surprised that this had not been pointed out to complainant, whether officially or unofficially, at an early stage.

The Commissioner considered that titles are like fences and delineate the issues to be raised in the proposed discussion. As such too many issues could produce large boundaries making the "*territory*" to be explored too vast. There were clear indications offered by the inelegant structure of the phrasing of the title as well as by the somewhat colloquial tone that rendered it inappropriate in a formal academic work.

Although admittedly it occurred at a somewhat late stage, the pruning of the title suggested by the Examiners' Board was absolutely correct. The thesis would have stood no chance had it retained its original title. In effect therefore the responsibility for a bad start lay squarely with the author and the first supervisors. The later supervisors tutoring the Ph.D certainly did not materially help to adjust matters in a timely fashion.

Ph.D thesis a mature exercise

The Commissioner considered that, once the author shoulders an amount of responsibility in not realising the pitfalls presented by the original title, there was no case for any claim for compensation for wasted work. At Ph.D level there should be little or no reliance on others because the thesis presented was an expression of its author's intellectual capacity. That was why one should never speak of tutors but of supervisors who mainly see that the writer was meeting his deadlines on time and was preparing himself sufficiently and properly through personal research. In any case, in either failure or success, it was the student who was finally responsible. In case of lack of success or failure he could not shift the blame on those detailed to

give assistance. A Ph.D thesis was above all a mature exercise which was based on one's personal judgement and intellectual resources and no one else's.

University's failings

The Commissioner then considered the second issue as to whether complainant was correct in feeling that the University did not provide assistance during the period of preparation of the thesis since that would amount to maladministration.

The Commissioner examined the regulations governing the process of the production of a Ph.D thesis and the duties of various boards involved. He established that it resulted from the documents submitted by complainant that the Faculty Doctoral Committee (that had since changed its name to Doctoral School) did not point out the intrinsic defect in the original title. It had been the Board of Examiners which a Ph.D student dealt with at the final stage of the process, that had recommended the change of title but it did not stop there. It also pointed out several shortcomings which in effect meant that the thesis was below the accepted or expected standard and that these shortcomings did not just emanate from an over ambitious title but even more from the complainant's faulty academic approach and certain omissions.

The original choice of title demonstrated poor critical skills and could be considered as a manifestation of them. Complainant had been given more time to rewrite and resubmit his thesis observing the structures that pertained to the title and addressing the technical defects indicated by the examiners. These circumstances showed that the over ambitious title was not the sole or even the primary cause of the failure of complainant.

The Commissioner stressed that it must be pointed out that he could not dispute the academic merits of the Examiners Report drawn up by officially appointed boards or committees. He therefore accepted the observations listed in the Examiners Report that delineate the various shortcomings identified by him.

Conclusion

The Commissioner was of the opinion that, whilst the University failed in drawing the complainant's attention to the inadequacy of the suggested title in timely fashion and that the lateness of the demand for a more appropriate title caused

disappointment and a certain amount of consternation to complainant, such lateness did not in any material sense, impinge on the quality of the final draft of the thesis. It was not within the Commissioner's remit to dispute the quality of supervision offered by the University.

The Commissioner therefore partly upheld the complaint in the sense that there was a failure on the part of the University to ask the complainant to alter the title at a more appropriate stage. However this was counter balanced by the fact that when it had done so, it had given more time in which to update the thesis. It would have been a different matter had the University never pointed out its reserve during the entire period of the compilation of the thesis and then proceeded to fail complainant in the interview.

Recommendation
The Commissioner recommended that the suitability of thesis-titles be given more importance at the earliest stage even because at that stage it was a matter of suggested titles.

Outcome
The Pro-Rector for Student and Staff Affairs and Outreach reacted to the Commissioner's recommendation. She stated that it was standard practice that at any stage for a doctoral research process, a change in title was recommended either by the supervisory team and even if necessary, by the appointed Board of Examiners. This was in line with academic practices adopted also by foreign universities. A change in title did not constitute a change in the research agenda but was often necessary to capture better the focus of the actual research. It was also not a sanction and was relayed for the benefit of the student.

The Pro-Rector concluded that while the university undertook to recommend changes in titles at an earlier phase, it was likely to remain the case that a change in title was required at a later stage, including when examining a thesis or a dissertation.

CASE NOTES

Commissioner for Environment and Planning

Planning Authority

Pointless Enforcement Action

The complaint
The Ombudsman was asked to investigate the circumstances that led to the issue of an enforcement notice during a pending regularisation application on the same site.

The investigation
A regularisation application was approved subject to the carrying out of safety measures within two years from August 2017. The enforcement notice in question was issued on the same site of the regularisation application in May 2019, that is, during the regularisation application active period. The applicant appealed this enforcement notice in front of the Environment and Planning Review Tribunal. Following the issue of the regularisation permit in question, the Tribunal noted that the merits of the case have been exhausted and that the issue of this enforcement notice was useless.

The merits of this enforcement notice were found to fall within the development of the regularisation application in question. This Office found it strange that the Planning Authority issued the enforcement action in question when the same Authority states and put into practice the procedure of not issuing an enforcement notice if the applicant has submitted a sanctioning application within two weeks of the illegal works being identified by its Enforcement Officer. In this case the applicant not only submitted an application within two weeks, but had submitted a regularisation application almost two whole years preceding this enforcement notice.

Recommendations and conclusion

The complaint that the Planning Authority issued a pointless enforcement notice was sustained. The Commissioner recommended that:

1. on a general note the Planning Authority shall not take enforcement action on any development included in any regularisation application, whether this application is in the initial processing or after the non-executable permit has been issued; and

2. the Planning Authority pays the person against whom the enforcement notice in question has been issued the sum of two hundred Euros (€200) as a recognition of the consequences suffered by the same person in this regard.

Outcome

The Planning Authority paid the recommended refund to the applicant.

Planning Authority

Changing the Proposal Description

The complaint
On 7 November 2019 the Commissioner opened an investigation related to the change in the proposal description during the processing of certain development applications.

The investigation
It came to the knowledge of this Office that the Planning Authority was adopting a system whereby the proposal description was changed from that submitted in the original application following a simple letter by the applicant without however republishing the new proposal and without carrying out the required consultations on the basis that there was no material change. The Commissioner gave three similar examples where:

1. the proposal to sanction a post 1967 extension to existing farmhouse and alterations were changed to include part demolition;

2. the demolition of existing dilapidated dwelling and construction of one dwelling house was changed to restoration of existing structures and extensions and construction of a swimming pool; and

3. the construction of a 4 star hotel was changed to the construction of class 4A offices.

Recommendation

On 2 April 2020 the Commissioner recommended that any material change in the proposal description should be followed with a new application or else republication of the same application.

Outcome

On 27 May 2020 the Planning Authority replied that the applicant can only request to change the proposal description prior to the finalisation of the report provided that the changes constitute a minor amendment, thus not requiring republication. Whenever republication is required, this has to be done at the request of the Executive Chairperson.

Planning Authority

Keeping Third Parties informed

The complaint
The Commissioner was asked to investigate the processing of a regularisation application wherein the Planning Authority did not consider a representation submitted within the statutory time period. The complainant added that the regularisation assessment report was not made available to the public and that the registered interested third party was not notified of the sitting when the Planning Commission decided this application.

The investigation
The representation in question was found to have been considered by the Planning Authority in the Regularisation Assessment Report. Regarding the other matters, this Office asked the Planning Authority to submit comments on the following two facts:

1. The Report was not made available to the public in accordance with Article 33(2) of the Development Planning Act.

2. The registered interested third party was not notified of the Planning Commission sitting in accordance with Article 71(8) of the Development Planning Act.

In line with the basic principles of natural justice (listen to the other side) this Office also invited the applicant and architect of the application for their comments.

After receiving no reply, the Commissioner reported that a Regularisation Application is an application for 'Development Permission' in terms of the Development Planning Act and that the Planning Authority failed to abide with Article 33(2) of the Act in that it did not make available to the public all the Planning Reports. The Planning Authority also failed to follow Article 71(8) of the Act in

that it did not notify the interested third party (who submitted a representation by the established deadline) that fresh drawings have been filed and of the Planning Board's sitting when such application was going to be discussed. Failure to define such a procedure under the relative Legal Notice number 162/16 does not imply that the procedures defined in the Development Planning Act can be ignored.

This error on the face of the record had a material bearing on the decision as the interested third party was not given full access to the information and the Commission did not abide by the basic principle of natural justice.

Recommendations and conclusion
The Commissioner recommended that:

1. the Planning Authority should initiate revocation procedures against this permit in line with Article 80 of the Act; and

2. the administrative procedures of publishing all Planning Reports and informing interested third parties of the Planning Board's sitting must be adopted for all Regularisation Applications.

Outcome
After several months no action was taken by the Planning Authority and similar failures in procedures continued unabated. The case was referred to the Prime Minister wherein it was stressed that these maladministration practices by the Planning Authority were an injustice to both the objectors and the applicants since the first were not held at an equal standing whilst the latter had revocation procedures hanging in the balance.

Planning Authority

Public Meetings Online

The complaint
On 23 March 2020 the Commissioner received a complaint that a meeting of the Planning Board was scheduled to take place on 26 March 2020 even though public meetings were prohibited under a pandemic-related Legal Notice.

The investigation
The Commissioner immediately brought to the attention of the Planning Authority its notice published in the media advertising the same meeting, conflicted with the same Authority's notice published on 16 March 2020 wherein it stated that the Planning Authority has decided to suspend all Planning Board and Planning Commission meetings as from the 16 March 2020.

Recommendations and conclusion
On 23 March 2020 the Commissioner published a press release that no Planning Authority Board meetings were to be held while pandemic restrictions were still in place and to this effect brought to the attention of the Planning Authority that these meetings have to be carried out in public according to the Development Planning Act. Forging ahead with these meetings will seriously put into question the validity of the decisions taken during the same meetings.

Outcome
On the evening of the 23 March 2020 the Ministry responsible for the Planning Authority issued a press release whereby all Planning Authority meetings were cancelled with immediate effect until a regulatory framework is established under the extraordinary circumstances. In the following days the Ministry published a Legal Notice that amended the Schedules of the Development Planning Act regulating the way public meetings could be held with electronic means of communication.

Planning Authority

Restrictions on requests under Article 80

The complaint
On 11 September 2020 the Commissioner received a complaint that the Planning Authority has rejected a request for revocation/modification of a development permission on the basis that the request was not submitted through a Perit or a Lawyer.

The investigation
Requests for revocation or modification of permissions are regulated under Article 80 of the Development Planning Act which states that similar requests may be made by any person. Likewise, the Development Planning Act also allows "*any person*" to submit representations on development applications under Article 71(6) without the requirement of a Perit or a Lawyer, and this is the practice adopted by the Planning Authority in this regard. It is relevant to note that Article 80 also allows the Executive Chairperson to commence proceedings to revoke or modify any development permission and therefore, in line with the basic principles of equality, similarly interested persons should not be obstructed from personally submitting requests under Article 80.

Recommendations
On 20 October 2020 the Commissioner recommended that the Planning Authority shall accept requests under Article 80 without the requirement to submit this request through a Perit, Lawyer or any other representative, and to this effect the Planning Authority is to make the necessary modifications to reflect this in the drop-down menu on its e-Applications platform.

Outcome

On 23 November 2020 the Planning Authority agreed with the Commissioner's recommendation and requests under Article 80 were being accepted through e-mails and letters which will be uploaded by the Authority in the respective file through a system similar to the representation submission for development applications.

Transport Malta

Obstructing access to garage

The complaint
The Commissioner received a complaint that Transport Malta approved parking bays on the opposite side of the road, thus obstructing access to a garage.

The investigation and outcome
On the opposite side of the garage there used to be yellow lines which has since been removed after Transport Malta deemed that there is enough space for a car to manoeuvre and as they were causing considerable prejudice to third party rights. The Commissioner held an on-site inspection where it was noted that with cars parked on the opposite side of the road, there was ample unobstructed road width for the complainant's car to manoeuvre in and out of the garage. The Commissioner also considered the Permanent Traffic Management Policies and Guidelines issued by Transport Malta and found that there was no maladministration act by Transport Malta in that these Guidelines offer a just level playing field on disputes related to this issue.

Ministry for Gozo

Publication of Project Details

The complaint
The Commissioner was asked to investigate the lack of publication of information on the project for the widening of the road from Victoria ta' Marsalforn, Gozo. The complainant alleged that the project will take-up agricultural land and that it would require the uprooting of a significant number of trees. Although a screening application to the Planning Authority was submitted by the Ministry for Gozo, the information therewith attached was not made available to the public as this application was not yet validated by the Planning Authority.

The investigation
In the light of the European Directives opening access to information on environmental matters, the Ministry for Gozo was asked whether the Ministry was in a position to make the documents related to this project available to the public, particularly considering that this development concerns a public project to be executed with public funds.

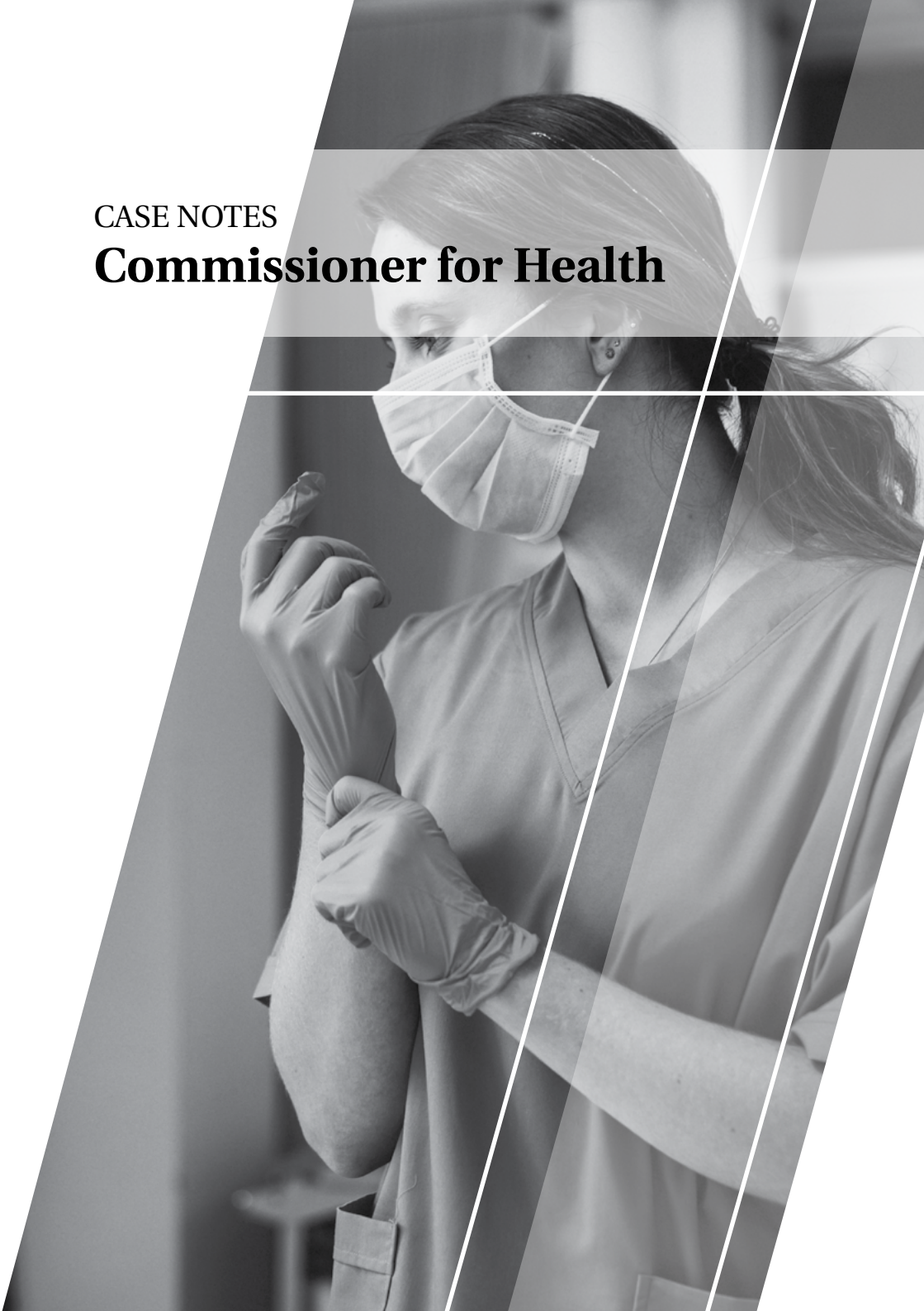
Recommendations and conclusion
Following no reply to this query from the Ministry, the Commissioner finalised an opinion recommending publication of the relative information. This final opinion was then forwarded to the Prime Minister and to the Speaker of the House of Representatives after no action was taken by the Ministry in line with the Commissioner's recommendations.

Outcome
The Commissioner continued to stress the importance of transparency in similar projects of a certain extent and of general public concern with all the Government entities. This concern was also emphasised by the Commissioner in the

Ombudsplan 2020 and in other similar cases where public projects to be executed with public funds for the benefit of the general public should not be kept under wraps. Although the Ministry did not publish the details of the project as requested, the Planning Authority published the requested documents before the validation of the same application.

CASE NOTES

Commissioner for Health



Case Notes update from previous years

The following is an update from previous cases published in last year's edition of the Case Notes. The aim of this section is to highlight the status of the Commissioner's recommendations. In the 2019 Case Notes the following cases were reported:

1. Discriminatory and unlawful protocols;
2. Reimbursement of expenses incurred to purchase medicines not available on the Government Formulary List;
3. Hepatitis C patients not refunded money spent to buy medicines;
4. Salary Scale discrimination;
5. Written warning to civil servant unjustly issued;
6. Indiscriminately not given allowance;
7. Remuneration loss following unfair transfer; and
8. Request for refund of expenses incurred for treatment abroad.

Unfortunately, even though another year has passed, there were no updates on the implementation of the Commissioner's recommendations by the public administration and therefore none of these cases have been concluded.

Sickness allowance for cancer patients receiving chemotherapy in-patient treatment

The Commissioner for Health is pleased to report that following the recommendations of this Office, the Ministry for Social Justice and Solidarity, the Family and Children's Rights amended the Social Security Act so that cancer patients receiving hospital chemotherapy in-patient treatment, would be paid Sickness Allowance even for the first three days.

Department for Health

Right to treatment abroad

The complaint
A UK citizen who lived and worked in Malta for ten years lodged a complaint with the Office stating that even though he possessed a Provisional Entitlement Certificate and paid tax and national insurance contribution in Malta, he was being denied treatment abroad through the Government scheme.

Facts and findings
The patient was suffering from a type of cancer for which he was given treatment free of charge at Sir Anthony Mamo Oncology Clinic but further treatment in the UK was necessary.

The Commissioner started the investigation by asking the Department of Health why treatment abroad was denied. The Department of Health, in their reply, stated that holders of the Provisional Entitlement Certificate are not entitled to treatment abroad.

The Commissioner contested this argument by stating that treatment abroad is considered as an extension of the local national health system. Therefore, since complainant was entitled to free health care in Malta, he should also be eligible to be sent for treatment abroad. He urged the Health Authorities to treat the case with urgency.

In their reply, the Department of Health insisted that British national holders of the Provisional Entitlement Certificate are not entitled to treatment abroad. Furthermore, only permanent residents were allowed to free health care, and therefore complainant had to apply for permanent residence with Identity Malta. The Commissioner contested this argument because all patients who worked

in Malta and paid national insurance contributions were also entitled. The Department of Social Security confirmed that he was paying N.I. contributions and stopped doing so due to his illness.

To make things worse, because of Covid-19 outbreak, only urgent cases were being sent abroad. The patient's case stalled for some months until the restrictions were lifted in July. The Commissioner again requested that the issue be solved and appealed to the Health Authorities to send the patient for the necessary treatment. There was no doubt that the patient needed treatment abroad, and the issue was only of an administrative nature. Seven months to take a decision would have been detrimental to the patient's wellbeing.

Conclusion and recommendations

The Commissioner for Health recommended that in cases where treatment was to be refused, the decision should not rest with one person only. There should be a Committee to determine such issues with urgency in the interest of patients.

Department for Health

The effect of industrial actions on patients

The complaint
A patient who was treated at Mater Dei Hospital for three weeks, for a Neurological problem from which she recovered well, needed intensive rehabilitation by the multidisciplinary team at Karin Grech Hospital.

She was taken to the Admission Ward which, at the time was under quarantine because of Covid-19. The quarantine period lasted six weeks because the ward had to remain closed every time a Covid-19 patient was admitted. During this time no relatives could visit nor could employees from outside that ward attend to patients. All this affected the patient's wellbeing.

At the time there was an industrial action by the Allied Health Professionals Union which represents physiotherapists and occupational therapists. The industrial action had been going on for the previous six weeks, during which period patients could not be transferred from one ward to another. During this industrial action there were about 200 unoccupied beds at Karin Grech Hospital, meaning that all the staff was practically idle.

The patient's husband filed a complaint with the Office of the Ombudsman claiming that his wife did not receive any treatment during this whole period and this had seriously affected her rehabilitation.

Facts and findings

The Commissioner for Health started his investigation by inquiring with the Union the status of the industrial action and if there had been any developments to resolve the issue.

The Union's representatives gave a comprehensive account of what led to the industrial actions. Also they outlined the number of meetings that they had with Steward Health Care, the Office of the Prime Minister and the Ministry for Health. The Union also added that even though two months had passed from the start of the industrial action there had been no feedback from the Ministry.

Representations were also made by the Commissioner for Health with the Ministry for Health and following discussions between the Ministry for Health, Steward Health Care and the Union, a solution was found after a few days and the industrial action was lifted.

Conclusion and recommendations

The Commissioner for Health expressed his concern that in a time of crisis in the Health sector caused by a pandemic, Karen Grech Hospital had 200 beds vacant whilst Mater Dei Hospital was bursting at the seams. Quoting a judgement of the Maltese Courts on another industrial action, the Commissioner stated that it was not fair for Unions to use patients as a pawn in order to press for their demands. The Commissioner recommended that, notwithstanding the negative approach taken by the Union, the public administration should do its utmost to resolve disputes with the least possible delay especially when patients were involved.

Department of Social Security

State's Duty to Care

The complaint
The Commissioner for Health is considering a complaint by a senior health professional, now retired, who has recently found out that after years of dedicated service in Malta's hospitals he was not entitled to a national insurance pension for the period that he had worked in Malta.

The Social Security Department was maintaining that they could not entertain his request since he was receiving a service pension from abroad due to him from his previous engagements in foreign hospitals and because he did not have enough national insurance contributions paid up to enable him to qualify for such a pension.

The basic facts
Enquiries by the Commissioner established that complainant had been advised to pay double the rate of the contributions normally due to make up for the shortfall in his NI Contributions. Complainant had been assured that such an arrangement would secure his entitlement to a social security pension. The assurances given by the health authorities in this respect were important for complainant, since the receipt of a local pension for services rendered when in Malta was for him an important factor when deciding whether to relocate here.

From further enquiries it resulted that complainant had been given a definite contract which stipulated that he was to receive a net salary, with the Department of Health paying income tax on his behalf. Complainant eventually got to know that his income tax was being paid by the Department of Health, following a request by the Department of Inland Revenue.

When he claimed his social security pension on retirement, complainant was informed that he was not entitled to a pension for all the years he worked in Malta, because he lacked the necessary paid up contributions. The Department of Social Security maintained, and is still maintaining, that the advice to make up for the shortfall by a double payment was not in accordance with the Social Security Act and his request could not therefore be entertained. This was despite the fact that the money was deducted from his salary and this payment, even though double the amount, was accepted by the Department of Social Security.

Considerations

The Commissioner for Health is still investigating this complaint and negotiations are ongoing with the Department of Social Security that would ensure that complainant's right to a social security pension is secured. At this stage the Commissioner has made submissions to these authorities that are of general interest and merit publication requesting them to examine the facts of the case in the light of the basic principle that the State should assume responsibility for the actions and inactions of its dependants.

This principle should apply if, as seems likely, the facts show that complainant was suffering prejudice as a result of an administrative mistake or failure to act according to the assurances given to complainant. Such a situation would be governed by the European Code of Good Administrative Behaviour that was agreed to pursuant to Article 41 of the Charter of Fundamental Rights of the European Union, to which Malta is a signatory.

Sub-article 3 of Article 41 of the Charter declares that "*Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States*". A clause that expressly recognises the principle of the State's liability for the actions of its officers and the right of the individual to seek redress against the State for damage suffered.

This principle is expressly provided for in many progressive European Constitutions like the German and Italian ones and is now being increasingly applied by Maltese courts when deciding claims of individuals for damage suffered as a result of actions or inactions by officers or employees of government departments or public

authorities. This Principle has now also been recognised, even if not explicitly, in the Public Administration Act.

The Office of the Ombudsman has in recent years repeatedly given final opinions in which it insisted that this principle was at the core of the citizen's right to a good public administration. The Government should assume full responsibility for the actions of its employees when it results that they have caused damage to citizens.

The Commissioner for Health is insisting that this principle should apply to this case if the facts as alleged by complainant are proved to be correct. The Commissioner for Health continues to seek the resolution of this complaint through the application of this general principle of administrative law, today widely accepted, and the norms of general justice interpreted through equity.

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