OMBUDSMAN

Case Notes 2012

The Office of the Ombudsman, Malta

Edition 32

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Foreword

This 32nd Edition of Case Notes is a first in many respects. It is the first that is being issued contextually with the Annual Report of 2012. It is customary in our Annual Reports and that of most ombudsmen, to include a number of Case Notes to illustrate in practical terms how complaints are investigated and in what way the rights of citizens are defended.

These Case Notes shed some light on how the institution of the Ombudsman help to ensure a transparent and accountable public administration. They illustrate in practice how the Ombudsman, as a constitutional authority, contributes to guarantee the observance of the fundamental right of good public administration to which every citizen is entitled.

This edition is the first that includes sample cases investigated by the newly appointed Commissioner for Environment and Planning and the Commissioner for Health. These Commissioners were appointed in August of this year and therefore their published cases only span a short period of four months. They are however enough to show clearly the advantages of having Commissioners focussing exclusively on specific areas of the public administration. The selected reports of investigations undertaken by these Commissioners during this short period as well as investigations made on their own initiative, illustrate the advantage of having specialised Commissioners.

The great variety of topics touched upon in these Case Notes is evidence of the wide remit the Parliamentary Ombudsman and the Commissioners embrace in the exercise of their functions as auditors of the administrative acts of the public administration in a wide sense.

An effort has been made to make the summaries as reader friendly as possible, limiting the text to an outline of the more relevant considerations motivating

the final opinion. These and other Case Notes can be accessed online on www.ombudsman.org.mt.

For the first time the Case Notes, like the Annual Report 2012, is being issued in Maltese. It is also for this reason that it has been considered advisable to split the Annual Report into two volumes that are more manageable and easier to handle.

I trust that the new format satisfies your tastes and meets your approval. We shall be guided by your reaction in planning our future Case Notes.

Chief Justice Emeritus
Joseph Said Pullicino
Parliamentary Ombudsman

Note

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

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

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Case Note on Case No K0119
Various Entities

Inconvenience and loss of business caused by an Open Centre for Immigrants.

(immigrants – open centres)

The complaint

The management of a wedding and other receptions complex in close proximity to an Open Centre (which used to accommodate hundreds of irregular immigrants) complained of the chaotic and disastrous situation in the area resulting from the activities which had been allowed to develop because of alleged bad administration by various Government Departments/Agencies. As a result, the Company lost most of its financial business.

Complainant did not dispute the need to maintain the openness of the Centre or the need/related process of integration of these immigrants within the country and society. Nor did he dispute the free movement of these immigrants outside the Open Centre as a pre-requisite to such integration. However he maintained that the application of these principles should not prejudice the rights of others. He iterated that the related activities should respect the laws and regulations applicable to the rest of the Maltese society. He argued that this balance was not being maintained.

Complainant further argued that the Open Centre was not covered by a MEPA permit and therefore no Environment Impact Assessment especially the related traffic impact of the related activities had been carried out. He submitted proposals on how such negative impacts should be reduced.

Complainant stressed that the negative impacts have ruined his business.

The investigation

This Office interviewed the various parties involved, including the Police authorities, Local Council officials, the Management of the Open Centre and

complainant. Information was also sought from the Audit Officer MEPA in respect of the role/responsibilities of MEPA in the situation under consideration. The following facts emerged:

a) The road in question is the only artery that leads to complainant's establishment which is duly licensed to hold weddings and other receptions for several hundreds guests. The road is poorly lit at night.

b) The Open Centre is a tent village which can accommodate several hundreds of immigrants and has its main entrance in this road. The environment is far from welcoming – it is a depressing site and raises doubts from the humanitarian aspects.

c) The negative impact of the siting of the Centre on complainant's business was very evident not only because of the visual degradation inherent in the set-up, but more importantly because of the chaotic traffic situation that had been allowed to develop in the immediate vicinity of the main entrance to the Centre.

d) As a result of the rightly and justly accorded freedom of movement for residents of the Open Centre, and the encouragement to provide for their daily needs as a community, a certain level of commercial activity has developed to cater for the needs of this community – resulting in a number of hawkers (at the time of the investigation, some were licensed, others not) gathering daily at different times of the day, but especially in late afternoon and evening. The residents of the Centre converge onto this road for their daily purchases and to socialise between themselves.

e) The road in question has no pavement and the commercial activity at times assumes the proportion of an open market, often congested, making access by car very difficult and dangerous both to residents and drivers, and all the more so in winter when there is less daylight. The situation becomes even worse when cars are heading for a reception at complainant's establishment.

f) Despite repeated reports by complainant, also to the effect that he was losing business, and the surprise visits by the Police, these sporadic inspections did not resolve the problems caused by the daily activities.

g) Complainant produced evidence of the loss suffered by his business, including the loss of an exclusive contract from a leading catering firm for the operation of complainant's complex, on the grounds that the complex "*is no longer in a fit condition for the use for which it has been let".* This firm confirmed that it had cancellation of bookings because of the problem and of guests being intimidated and turned back on their way to a social event. As a result complainant's business activity practically came to a standstill.

Considerations

The Ombudsman understood the mammoth crisis facing Government because of the problem of irregular immigrants who need temporary accommodation and therefore appreciated the need for an Open Centre. At the same time, the Ombudsman also noted complainant's positive attitude in respect of the latter's appreciation of the needs of an Open Centre for immigrants. Complainant was in fact only insisting that the related activities should be done with the least possible inconvenience to other social and commercial activities in the area.

Having established the facts which confirmed complainant's predicament, and the related circumstances, particularly the chaotic situation in the area which also constituted a danger to drivers and pedestrians, besides ruining complainant's business, the Ombudsman went on to consider the proposals put forward by complainant himself which he considered would help to ease the situation. It was confirmed with the MEPA Audit Officer that the Open Centre needed, but was not covered by, a MEPA permit, with the result that no Environmental Impact Assessment including an evaluation of the traffic impact in the area was ever carried out. An Environmental Impact Assessment raises awareness to the inconvenience caused by an activity and serves to promote the implementation of measures to address such negative impact. However the Ombudsman considered that these are matters that fall within the competence of, and should be addressed, by MEPA.

Complainant made four proposals on how the situation could be improved. These included:

1) the narrowing of the main gate of the Open Centre and its use solely for administrative functions;

2) the opening of a small gate on the south side of the Centre, next to the container storage depot, for easy access to the residents of the Centre and their needs;

3) an alternative place to accommodate hawkers; and

4) the erection of hoarding along existing fence to protect the privacy of residents.

While the Ombudsman agreed that a certain amount of commercial activity was needed in the area, he considered that this should be regulated by the identification of a properly designed location, with hawkers duly licensed, and in full respect of regulations as applicable to other open markets. This was a matter that should be considered by the competent authorities, including, amongst others, MEPA, the Department of Trade, and the Management of the Open Centre.

The Ombudsman however expressed concern regarding any proposal that would in effect restrict the access of the immigrants to and from the Centre. He agreed that hawkers should not be allowed to converge on the main gate, but disagreed with the proposal of a hoarding in the area. The Ombudsman was of the opinion that in considering complainant's proposals/options, MEPA should seek professional advice from OIWAS and from the Management of the Open Centre. Since all these fell within the competence of MEPA which had to ensure that the Centre was duly covered by a permit, it was not for the Ombudsman (at that stage) to reach any definite conclusions on these proposals.

In the light of the above findings, the Ombudsman upheld the complaint in respect of the chaotic commercial activity in front of the main entrance to the Open Centre which needed to be properly regulated and well lit. The Open Centre itself needed to be covered by a MEPA permit. As a result of the failure of the authorities to effectively control the situation, the complainant was the victim of such failure with serious financial repercussions.

The Ombudsman recommended that the competent authorities including MEPA should investigate the situation to determine what steps were needed to be taken in line with his report so as to address complainant's grievances.

Follow up

The Ombudsman sent his Final Opinion to the complainant and to the competent authorities including MEPA, Police, the Ministry for Justice and Home Affairs and the Management of the Open Centre.

The continued sporadic police presence in the area did not result in any significant improvement. Nor had the competent authorities implemented the Ombudsman recommendation. He had only succeeded to convince MEPA to ensure that an application for a permit to sanction is filed. This however is a long way off from finalisation. The Ombudsman therefore brought the matter to the attention of the Prime Minister stressing that the lack of proper control of the situation in the area and lack of effective action by the responsible authorities had caused grievous financial losses to complainant. The Ombudsman pointed out that if the administration is not in a position to solve the problem in the short term such as to enable complainant to carry out his commercial activity in a fair and effective manner, he had no option but to request Government to consider that the Open Centre run by Government was in effect expropriating complainant's property by rendering it unjustly valueless. Government should further consider that it was not fair for one single person to suffer in a disproportionate manner because of the interests of the country and should consequently compensate complainant in an adequate manner. In making this statement, the Ombudsman referred to an analogous case, a villa in Delimara where the Courts ordered compensation because of the negative effects of the Enemalta Power Station chimney to the detriment of the owner of that villa.

While informing the Prime Minister that the next step open to Ombudsman, in terms of the law, was to refer the matter to the House of Representatives, he concluded by recommending to the Prime Minister that the latter appoints an Official within his Office to coordinate the necessary measures on the part of the various departments/agencies to remedy the situation.

Case note on Case No L0237
Directorate for Life Long Learning

Scholarship awardee in disagreement on the travel allowance provided

(allowances – STEPS scholarships)

The complaint

A postgraduate student who had been awarded a scholarship to pursue Doctoral studies on a full-time basis under the Strategic Educational Pathways Scholarship (STEPS 1st Call) in 2009, felt aggrieved by the decision of the STEPS Board that the additional travel allowance provided for in the applicable regulations were not to be accorded to him in full, but were to be paid on a *pro-rata* basis during the second and third years of his studies, since he had only spent a few days abroad as part of his studies in the foreign university. He complained that although, both the regulations applicable to his scholarship and his contract specified clearly the allowances payable for travelling abroad, the STEPS Board was interpreting the relevant provision in such a way as to deny him part of the funds originally agreed upon.

Complainant insisted that prior to his being awarded the scholarship, he had informed the STEPS Board that the foreign university where he was reading for his Doctorate, required him to perform professional practice in Malta (placement) during the second and third year of his studies and maintained that once the Board had been aware of this, he should be accorded the full amount of the travel allowance and not a part of the same.

He further pleaded that during the two years he travelled frequently to follow the taught part of the programme, to make presentations and interact with his supervisor at the University and could prove that the expenses he incurred annually exceeded by far the amount specified in his contract and in the regulations.

Facts and findings

In terms of the Regulations, scholars were entitled to the reimbursement of tuition fees, a maintenance grant and the following supplementary allowances

1. Additional costs related to studying abroad up to a maximum of €2,500;

2. A Child Allowance (for applicants with children);

3. Married applicants awarded Doctorate programmes abroad exceeding one academic year, were entitled to a Marriage Allowance of €2,330 annually, provided that the spouses were residing together at the same address in Malta prior to leaving and the scholar was accompanied by the spouse abroad; and

4. An additional maintenance supplement of €1,050 annually, for Gozo residents following a Masters or a Doctoral Course in Malta.

Complainant argued that the Regulations provided for the payment of an additional annual allowance of €2,500 for students studying abroad without limiting payment to scholars actually residing abroad and that the possibility of making pro-rata payments of the said allowance, was introduced in subsequent calls, the terms of which were not identical to the contract he signed in 2009.

He stated that the pertinent provision merely provides that –

"*13.6.1: Scholars studying abroad:*

For Scholars selected by the STEPS Board and who are following full-time studies outside Malta in a foreign University or Higher Education Institution, an additional allowance of Euro 2,500 per annum shall be given to cover additional costs related to studying abroad."

Thus, once he was studying in a foreign university he was entitled to the full amount of the allowance, since he still incurred costs in connection with his studies abroad.

Complainant further contended that the interpretation given by the STEPS Board of this clause was discriminatory and unfair, particularly when one considers that Gozitan students following a Masters or Doctoral Course in Malta, were granted an additional maintenance supplement of €1,050 per annum in terms of the regulations because of extra travelling costs without being required to prove that they were residing in Malta, while the Board had accorded him an insignificant part of the total entitlement, when his costs were far superior.

The Ombudsman sought the reactions of the STEPS Board and the Director for Lifelong Learning in regard to this complaint and that of another scholarship beneficiary, who also felt aggrieved by this decision.

The Director explained that the STEPS Board wanted to ensure consistency in the payment of such allowances and that in its opinion, the keywords in the relevant provision are those indicated in bold -

*"For scholars selected by the STEPS Board and who are **following full-time studies outside Malta** in a foreign University or Higher Education Institution, an additional allowance of Euro 2,500 **per annum** shall be given to **cover additional costs to studying abroad.**"*

He elaborated that this additional amount was always meant to cover additional costs incurred while studying abroad during a period of one year and that its payment is not automatic. The Board noted that both the complainants were not "*following full-time studies outside Malta"* and had in fact requested permission as per Clause 14.5 of the Regulations, to work up to 19 hours per week at the Department of Student Services and when an awardee is in Malta and working up to 19 hours per week, that scholar does not incur such '*additional costs for studying abroad*' as those incurred by one regularly resident outside Malta. It had therefore recommended that the allowances were to be disbursed to those who merit them on a *pro-rata* basis, depending on the number of days spent abroad and reflecting the needs and exigencies of the scholar. This decision was confirmed by the STEPS Appeals Board.

The Board's decision remained unchanged even after the Ombudsman's Office passed on documentation indicating the costs incurred by complainant in

connection with his second and third year of studies. The Board insisted that its interpretation of the provision had always been coherent – payment of the allowance was conditional on the fact that the scholar was away from Malta on a full-time basis and the allowance covered expenses which the scholar incurred while he was abroad. In fact, those following a course by distance learning were not entitled to this allowance.

Considerations of the Ombudsman

The Ombudsman premised that the complaint arose as a result of complainant's disagreement with the interpretation given by the authorities of Clause 13.6 of the Regulations of the Strategic Educational Pathways Scholarships (1st Call), which in terms of the contract signed by complainant, form an integral part of the scholarship he was awarded.

The Ombudsman pointed out that his role is that of ensuring that actions of government departments, entities and authorities are in accordance with the established rules of good administration, not unreasonable and unfair. He pointed out that it is not his function to definitely interpret contracts entered into between a third party and a government agency or entity, or any terms contained therein. The final decision regarding the interpretation of such agreements lies with the Courts, as clearly stipulated in the STEPS contract which complainant had signed when he was awarded the scholarship. On the other hand, the Ombudsman's role is to determine whether the administrative process in the interpretation and application of the clause/contract was unjust or clearly mistaken.

The Ombudsman referred to complainant's contention that the regulations applicable to his scholarship, unlike those published in subsequent calls which specifically provide that the additional allowance is payable to those "*resident abroad throughout the programme of studies*", did not limit the payment of the allowance to scholars studying on campus but referred merely to the pursuance of studies in a foreign institution and to the decrease in the earning capacity of the scholarship awardee.

While acknowledging that the clause under examination was somewhat vague on whether the scholar must reside on campus throughout the academic year

to be entitled to the payment of the total amount, and could have been better worded - as was in fact done in subsequent calls – the Ombudsman expressed the opinion that the interpretation given to the clause by the STEPS Board was plausible and not unjust.

He noted that the Board's interpretation reflected the intention of the awarding body – that of providing further financial assistance so as to support scholars studying on campus abroad and thus incurring **additional** costs throughout the academic year while residing there. This was also reflected in the heading of the allowance, which specifically refers to '*Scholars studying abroad*'. Moreover, it had been ascertained that scholars following studies in a foreign university through distance learning were not entitled to this allowance.

The Ombudsman stated that those resident on campus in a foreign university for the entire academic year are entitled to receive the maximum yearly amount stipulated by the regulations independently of the amount of expenses they incur during that year but commented that these expenses are by far higher, than those incurred by someone who travels abroad for a short period of time. It is with these scholars that one should make comparisons and not with the allowance payable to Gozitan scholars who are following studies in Malta.

He declared that the allowance is paid to cover '*additional costs related to studying abroad'* throughout a particular academic year and not merely to cover costs related to studying in a foreign university. Consequently, it was necessary that the scholar actually incurred the expenses while he was studying abroad on campus. In complainant's case it had been established that throughout the academic year 2010/2011 he had only spent 20 days abroad, and thus the Board instructed the Project Leader to make a *pro rata* payment of the amount of expenses he incurred while he was on campus.

The Ombudsman also supported the Board's argument that during the last two years complainant had not been following full-time studies **abroad** since it had been established that during this time he had been employed with the Department of Student Services. While, appreciating complainant's argument that his posting at the Department of Student Services, was an essential and integral part of his doctorate, the Ombudsman observed that this implied that

complainant was in Malta for the great majority of the academic year, and was in receipt of a salary from this posting.

Conclusion

In view of the above considerations, the Ombudsman declared that he could not conclude that the STEPS Board's decision to disburse the allowance to those who merit them on a *pro rata* basis, depending on the number of days spent abroad, was unreasonable.

Case Note on Case No L0245
Board of Film and Stage Classifiers

Censorship issues and the classification of films

(censorship – transparency when taking decisions)

The complaint

A local film distributor complained with the Office of the Ombudsman about the decisions and policies of the Board of Film and Stage Classifiers (the Board), which examines and classifies the films released locally.

Complainant explained that when films were received by the company from foreign suppliers, the Chairperson of the Board was notified for an appointment to be arranged for the films to be viewed and examined in the company's preview theatre, on a date and at a time, when the cinema and the projectionist were available. For many years it had been the practice that once a film was viewed, the company's management would be informed of the rating given and in case of disagreement a discussion would follow between the Board and the Company, but this practice had been stopped in November 2006, following a disagreement between the Board and the Company over the rating of a film, in regard to which a certificate had already been issued by the Police.

Complainant alleged that the Company was being negatively affected by the ratings given by the classifiers under the current Chairperson, commenting that in 2010, over 28% of the films released locally had been given a higher rating than in the United Kingdom. The Company seldom appealed the initial decision of the Board since this decision was rarely changed because the film was reviewed by members of the same Board. In fact, since 2006 out of the 17 decisions appealed only 6 ratings were revised. Furthermore, recourse to the Administrative Review Tribunal was not practical from the Company's point of view since the procedure is too lengthy and time is of the essence in this sector.

Complainant also felt aggrieved by the fact that the Company was no longer being provided with the guidelines utilised by the Board when taking its decisions,

guidelines which indicated details as to what would be objectionable in respect of classifications.

He therefore requested the Ombudsman to investigate the Board's existing policies and to suggest an amendment of the same, particularly so that –

1. local theatrical film classifications be brought in line with those in the UK with the introduction of the 12A classification, in addition to those already in use;

2. the classifiers resume with the practice of discussing the rating awarded with the distributor and the guidelines are provided to the distributor;

3. the company is provided with a report on every film with details regarding the classification awarded;

4. film classifications should carry consumer advice with brief details; and

5. a separate and independent appeals Board be set up, to review films.

Facts and findings

When asked for their reactions, the Board and the Office of the Permanent Secretary within what previously was known as the Ministry for Justice and Home Affairs asserted that the Board had always acted in accordance with its legal obligations and that the existing classification system indicated in Regulation 45 of the Cinema and Stage Regulations is adequate. They explained that –

1. The Board does not discuss the films with the distributor before a rating is granted so that the classifiers are not influenced by external factors, including the opinions of the distributor, before watching and rating any film. Each film is assessed exclusively on the basis of its content and there would be no added value either for the Board or for film distributors, if the Board were to consult film distributors prior to, or pursuant to, the rating process because the Board does not have a policy whereby a specific rating is given subject to the condition that certain scenes are not screened –

films are assessed in their entirety and rated accordingly. Furthermore, no consultation is required in terms of the Cinema and Stage Regulations[1];

2. A report need not be provided when a classification is not being contested, but the Board provided a report explaining the reason for a specific classification, whenever requested by complainant;

3. Guidelines had been drawn up in line with Regulation 42(2), but these had not been given to complainant since the Board does not consider it necessary to publish or distribute guidelines which are meant to provide an indication as to the classification of films to the members of the Board. Moreover, the Regulations do not require the Board to publish or distribute the said guidelines; and

4. As stipulated in the Regulations, when a second examination is requested the film is not reviewed by the classifiers responsible for the first examination. Every effort is made to ensure that appeals are addressed within the shortest time-frames possible and the time-frame set out in the Regulations for the film to be reviewed is always respected. The fact that there were a number of instances where the rating given initially was reviewed on appeal, attests that there is fairness and transparency.

The Ministry also forwarded a copy of the guidelines utilised by the Board for consideration by the Ombudsman.

Complainant however, still insisted that the Board should not be allowed to operate with so much secrecy in a democratic country. He stated that discussions between the Board and the distributor should resume and that the guidelines, which assist film distributors to better assess if the classification given is correct and in accordance with the established principles, should thus be made public. He suggested that appeals should be dealt with by persons who are independent of the Board, as is the practice in other countries.

So as to appreciate fully the procedure utilised by the Board and to discuss the grievance under investigation, the Ombudsman held a meeting with the Chairman

1 (S.L. 10.17).

of the Board where a number of issues were discussed and where it became evident that the Board needed to be provided with the proper tools necessary to carry out its functions adequately, particularly premises where it could meet to view the films, which were currently being viewed at complainant's office.

Developments occurring while the investigation was still pending

In the course of the investigation Government announced its intention to carry out an overhaul of the laws regulating stage performances and films. In fact, a three week consultation process was launched in mid-January 2012 and government's proposed amendments were made available on the Government internet portal for the reaction of the public and interested entities.

In view of this positive development, the Ombudsman decided to examine the legislation currently applicable and the amendments being proposed, with the aim of making additional suggestions in regard to issues which might have been overseen in the proposed amendments. He also examined diverse systems of certification and procedures adopted in other countries.

The legislation applicable when the complaint was lodged

The Ombudsman observed that the legislator required every film to be classified, before it could be shown in local cinemas. The classification of films and stage productions was regulated by the Cinema and Stage Regulations, enacted under the Criminal Code (SL 10.17), in terms of which, classification is carried out by the Board of Film and Stage Classification, appointed annually by the Minister responsible for the Police. This Board is composed of a chairperson and between five to fifteen members appointed by the Minister.

In terms of the Regulations every film must be classified by at least two members of the Board on the basis of guidelines to be drawn up by the Board, based on the following main criteria -

"*(a) the standards of morality, decency and propriety generally accepted by reasonable adults; and*

(b) the literary, artistic or educational merit, if any, of the production; and

(c) the general character of the production including whether it is of medical, legal or scientific character; and

(d) the person or class of persons to whom it is intended or by whom the production is likely to be viewed[2]*."*

In terms of the Regulations, if the person who had applied for the film to be examined disagrees with the classification awarded by the Board or is aggrieved by its decision, he may within ten days, apply in writing to the Chairperson for a second examination of the film. This is carried out by three classifiers, all of whom must not have participated in the initial examination of the film. Their decision may then be reviewed by the Administrative Review Tribunal.

The proposed amendments to the law

In terms of the proposals, the regulations would be enacted under the law regulating the Malta Council for Culture and the Arts. Two separate boards – A Board of Film Age-Classification and a Theatre Guidance Board - were to replace the current structure. However, while in the case of the Board of Film-Age Classification (referred to as Film Board), no indication was made of the expertise to be possessed by the members appointed on this Board, a detailed description was provided in the case of the Theatre Guidance Board.

In this regard, the Ombudsman commented that a similar approach to that envisaged in the case of the composition of the Theatre Guidance Board should be also adopted in the case of the Film Board, ensuring that the persons appointed broadly represent the Maltese community. The Ombudsman expressed the view that the Board should include a mixture of men and women with as close to a gender balance as possible, incorporating persons of different ages so that there is a reasonable spread of age amongst the members. It should include persons who can assess equality issues and the concerns of vulnerable persons and persons with special needs. Moreover, at least one

2 Regulation 42(2) of SL.17 subsequently amended by LN. 415 of 2012.

of the members should be well versed in issues affecting children and young people, either as parent or through his previous employment or other activities he is involved in. One could appoint this member following consultation with the Commissioner for Children, as is being proposed in the Theatre Guidance Board. He also suggested that Board members should be able to articulate their views, appreciate the opinions of others and be flexible enough to change their views following discussion with the other classifiers.

In terms of the proposals, film classification was to be carried out in accordance with guidelines to be drawn up by the Board, but just as in the case of the current regulations, no mention was made on whether these guidelines would be made available to applicants or the general public. However, the Film Board would be endowed with the discretion to discuss the age-rating to be given to the film to be classified with the applicant prior to the certification of the film by the Board and as an additional age classification – 12A – was also to be introduced locally.

The Ombudsman pointed out that in terms of the proposals the Film Board was to issue, concurrently with the classification, notices to the public containing additional information as to the content of the films classified – a practice already in place in many countries and which is indispensable since it enables consumers to know which classifiable elements (e.g. coarse language, violence, drug use, nudity, etc.) have led to the classification decision.

Additionally, the amendments provided that a review of the classification was to be carried out by a separate board created specifically for this purpose - the Classification Appeals Board - whose decision can be appealed in front of the Administrative Review Tribunal.

Considerations of the Ombudsman

The Ombudsman immediately clarified that he would not be deliberating on the issues already addressed in the amendments government had proposed to the existing legislation, namely the introduction of the 12A category, the procedure to be adopted for a second examination of a film and complainant's

proposal that a classification should carry consumer advice with brief details. He would therefore be tacking complainant's remaining grievances, namely -

1. complainant's request that the Board provides distributors with a report on every film, giving details on the classification awarded;
2. that the Board resumes the practice utilised before 2006 and discusses the film and its contents with applicants after it views the film;
3. that applicants should be provided with the guidelines utilised by the Board.

The Ombudsman stated that discussion with the distributor before the viewing or following the review of the film should not be mandatory. He pointed out that the Chairperson of the Board had insisted that the Board did not consider it proper to discuss its opinions regarding the film viewed with the distributors, and that this discussion could give rise to the members feeling unduly pressured into changing their initial decision. The Ombudsman asserted that it was indispensable for the Board members, who had been appointed because of their expertise and knowledge, to be allowed to decide on a rating without being influenced by external factors, such as the opinions of the local distributor of the film. Discussion on the part of the classifiers with any third parties – whether it is an applicant or any other person they deem can be of assistance to them in carrying out their task diligently and conscientiously – should be left within the discretion of the Board, as envisaged by Regulation 42(5) of the present Cinema and Stage Regulations and reflected in the draft law proposed by government. In the Ombudsman's opinion applicants would not be prejudiced by this absence of dialogue, provided they are given the possibility of making submissions, verbal or in writing, following the first decision of the Board. Should an applicant still not be in agreement with the report of the classifiers, he could then appeal and ask for a second examination of the film.

At this stage however, the Ombudsman referred to Article 41 of the Charter of Fundamental Rights of the European Union and declared that the rules of good administration require that entities in the public sphere operate in an open and transparent manner as possible, giving reasons when taking decisions. He maintained that public entities are in duty bound to justify their conduct and should be open, truthful and credible when accounting for their decisions

and actions. They should clearly state the criteria on which their decision making was based and communicate their reasons to the parties concerned in due time, even in the case of an adverse decision. He remarked that one should look at complainant's request to be provided with a report following every classification and at his suggestion that the rules guiding the Board in its decision making should be made available to the distributors, in the light of the above principles.

The Ombudsman pointed out that although the law in force did not require the Board to provide a report as to why a film was given a particular classification, the basic values of transparency, accountability and fair decision making suggest that the Board - and the legislator - should adopt a policy whereby **a brief report** indicating the key grounds which led the Board to decide in favour of a classification, is made available without delay to the person requesting certification. He added that when the certification is not being contested, this brief report is sufficient, provided it gives a clear motivation for the decision reached. However, **an additional report** ought to be provided by the Board when an applicant is not in agreement with the decision and requests more detailed explanations on how the Board came to its conclusion. This latter report should contain enough information to enable applicant to appeal from the initial classification, particularly when the proposals to the law in force at the time, suggest that a second examination of the film would be carried out by an Appeals Board which is completely distinct from the first Board.

The Ombudsman further commented that the principles of transparency and accountability dictate that the guidelines used by the Board should not only be made available to applicants, but also to the general public, who should be informed about the parameters used in the decisions taken.

This approach not only demonstrates fairness but will in turn increase public confidence and should be followed despite any risk that this might expose weakness. He elaborated that the publication of guidelines, not necessarily those used presently by the current Board, would help the public understand clearly how films are reviewed and why a film has been classified within a category and not another. It would further enable

parents to decide whether a movie, even if rated within a specific category is suitable for their children, since guidelines generally, not only describe each of the classification categories, but the limits of material suitable for each category in more detail.

This having been said, the Ombudsman insisted that guidelines are tools and not binding legal documents and should be interpreted in the spirit of what is intended, as well as what is written. Consequently, any published list could not be considered as being exhaustive – they are parameters which help the Board decide and it is the Board, who has been delegated with its functions by the administration, who interprets and applies them and finally comes to a decision. This decision is generally binding, subject to the normal considerations of fairness and reasonableness.

Further reflections

The Ombudsman commented that the proposed Legal Notice to be issued under the Malta Council for Culture and the Arts Act, setting up a new regime for the regulation of cinema and stage showings, underscored a marked shift in policy from one exclusively based on censorship to one where the emphasis is on self-regulation, which necessarily presumes an adult audience, mature enough to assess the content of a theatre production or a film and to decide accordingly, whether or not to attend the performance. He noted that the proposed regulations effectively did away with censorship altogether for theatre productions but retained a measure of control over the showing of films through their pre-viewing by a board whose function is to classify their content according to the age of the audience. Through this classification, a measure of censorship can be enforced, primarily as a protection for children and vulnerable persons, as well as for the common good. Thus, even in the case of the showing of films, there has been a recognition that society has "*matured*" as a result of its exposure to the inevitable globalisation of mass-media and the technological advance in the means of communication, coupled with the realisation that the fundamental rights of freedom of expression and the right to impart and receive information can only be subjected to the most basic and essential limitations.

In his opinion, the emphasis of the new regulations should be that of providing an objective assessment that will serve as a guidance to help create an informed audience to make a choice, rather than an unwanted, imposed protection, forcibly limiting the adult's freedom to choose.

The Ombudsman noted that this shift of emphasis was in line with the approach adopted in most European countries – an approach that may be welcomed by most, but contested by others. It was however a policy decision that reflected a change in mentality and way of life, and the political will of the legislator.

Function of the Ombudsman

The Ombudsman clarified that it is not his role to inquire whether this policy is valid or opportune. He can only express an opinion on whether the Regulations are unlawful, unjust, unreasonable, oppressive or improperly discriminatory - an issue, that does not arise at this stage. His role is that of inquiring and determining whether the administrative procedures adopted were just and respected the basic rules of a fair hearing.

The Ombudsman considered that the refusal of the Board to publish the guidelines drawn up by it on the basis of the criteria established by the Regulations, and which determine the classification given, could not be justified. This refusal not only undermined the transparency of the procedures of the Board, but went against the basic principle of a fair hearing since the parties are entitled to a decision that is well motivated, on predetermined and well publicised grounds and that allow the possibility of an appeal before the competent tribunal.

He emphasised that when exercising its functions to determine a classification, the Board not only defined the right of the distributor to exhibit the film, but also determined what section of the public, if any, would be precluded from viewing it. Consequently, it is not only the distributor who has the right to know what the guidelines drawn up by the Board are, but also the general public who has the right to be informed on how the board evaluated the criteria set out by law, what guidelines determined a classification, and in what circumstances would the board be justified in its decision to limit, in an absolute or relative

manner, the fundamental right to freedom of choice and expression. In the Ombudsman's view it should also be incumbent on the Board when classifying a film to draw up its decision in the light of these guidelines, identifying the reasons for the classification given, within their parameters.

Loosening state control on censorship is not to be equated to decriminalisation

The Ombudsman pointed out that though there is a marked and welcome change in the direction of concretely loosening the control of the State on what film and theatre productions an adult audience should or should not see, the proposed regulations did not completely decriminalise their breach, and actions violating the regulations could still be considered, in certain circumstances, an offence punishable at law.

According to the Ombudsman the fact that the State chooses to loosen its laws on censorship, does not mean that there will no longer be restrictions on the fundamental right of freedom of expression. These restrictions are considered necessary in varying degrees in all countries, to protect vulnerable people, children, the security of the State and the common good. It is for this reason that the European Convention on Human Rights permits the limitations of this right for a number of reasons including, among others, "*for the prevention of disorder or crime, for the protection of health and morals"*. Similar limitations are also imposed through other international instruments including the Convention on Civil and Political Rights[3].

He expounded that classifying a film or theatre production by age through a Board decision or self-assessment, did not exempt the exhibitor or producer from liability, if the film or theatre production is unacceptable from a criminal law point of view and violated statutory laws on the vilification of religion, offences against decency or morals, or contraventions affecting public order, obscene libel and others. Age classification however provides not only a yardstick as to the suitability of a film or production for viewing by persons within a given age bracket - but also a certificate, and in a way a first line of defence to exhibitors, that they conform to existing

3 Article 19, Paragraph 3.

legislation. It is also for this reason that it is vital that the guidelines on which the Board based its judgement be publicised and subjected to public scrutiny.

Additionally, it was imperative that the guidelines should be made public since the proposed regulations, like the current ones, provide that classification was to be made on the basis of guidelines to be drawn up based, *inter alia*, on "*the standard of morality, decency and propriety generally accepted by reasonable adults*". He commented that notions of morality, decency and propriety do not lend themselves to univocal definition and are generic, undefined concepts that require a subjective assessment to translate into a concrete reality. Similarly it is difficult, if not impossible, to determine or objectively establish what is generally accepted by reasonable adults and any judgement in this respect has necessarily to be conditioned by the personal convictions and background of those entrusted with taking a decision.

Recommendations by the Ombudsman

In the light of the above considerations the Ombudsman recommended that –

1. the guidelines should be published and made available not only to the person requesting the classification, but to the public in general. He suggested that the Administration and the Board co-operate in the formulation of new guidelines which will reflect not only the accumulated experience of the members of the Board, but also the opinion of the public in general, research available and the legal expertise required in the drafting of the guidelines;

2. in the interests of transparency, accountability and fair decision-making, and so as to ensure that the rights of distributors are not prejudiced, the obligation of the Board to provide a report motivating its decision should be mandatory.

3. the motivation in the latter report should be adequately comprehensive so as to enable the applicant to properly appeal before the Appeals Board where he feels aggrieved by the classification given[4]. Once the Regulations provide for the right of a further appeal before the Administrative Review

4 Regulation 8 (1).

Tribunal, established under the Administrative Justice Act, to "*any interested person from a decision of the Appeals Board*"[5], it is even more imperative that the motivation of the Board is not only comprehensive but also made known to the general public. It is therefore advisable that the regulations should provide that the decisions of the Appeals Board be posted electronically. Any term for the filing of an appeal before the Administrative Review Tribunal should start running from the date on which they are available online;

4. the approach adopted in the proposed amendments to the legislation in regards to the appointees on the Theatre Guidance Board should be adopted in the case of the Film Board. The authorities should ensure that those appointed, broadly represent the Maltese community and that individuals of different ages are appointed. There should also be a mixture of men and women with as close to a gender balance as possible. One of the members must be well versed in issues affecting children and young people and in this regard this member should be appointed following consultation with the Commissioner for Children;

5. the newly set up Board should be provided with the tools necessary to carry out its functions appropriately, such as premises where to meet and review the films which it is requested to classify, an administrative support system and legal advice, where necessary.

Sequel to the complaint

Following the Ombudsman's Final Opinion the Working Group appointed by the Ministry to work on the amendments on the Cinema and Stage Regulations met up with the Ombudsman and discussed with him the action which they intended to take in line with the Ombudsman's recommendations.

In July 2012 Parliament started debating the relevant Bill, which was approved in October 2012. The Cinema and Stage-Age-Classification Regulations, 2012 were promulgated by Legal Notice 416 of 2012 on 30 November 2012.

5 Regulation 8 (4).

Case Note on Case No M0329
Ministry of Finance

A public officer's claim to an extension of service beyond retirement age.

(discrimination – re-engagement of personnel after retirement age)

The complaint

A.B. (complainant) felt aggrieved that his request for extension of service beyond retirement age was refused by the Ministry responsible for Finance, without being given a reason for such rejection. He also alleged discrimination since another officer within the same Ministry, whom he named, was given such extension.

The investigation

In its comments on the complaint, the Ministry stated that complainant had submitted a request "*to be engaged again as part-timer after the date of (his) pension*" and not for an extension of service. The Ministry stated that it was not Government policy to re-engage personnel after retirement age unless there was expressive need for the service of the employee. In complainant's case, the management did not express such need. Moreover, complainant had not submitted either verbally or in writing, such request through his Department, in line with existing policy, but preferred instead to deal directly with the Ministry and the political authorities. Moreover, the Department where he worked did not recommend a favourable consideration of his request.

This Office also sought clarification in respect of the public officer whom complainant had named as having been treated favourably. The Ministry explained and gave details to prove that, the situation of the other officer's case was different. The details given, could not be communicated to complainant, because of data protection considerations. The decision in respect of this other public officer had been taken in line with Government policy in a special situation, which included a project in which the contribution of the retiring employee was

in the interest of the Department where he worked. The timing, as well as the relative nature of the request was different from that of complainant.

Complainant disagreed with this explanation and expressed his readiness to confirm his statement under oath. He contended that he applied for an extension because there was an extreme need for messenger duties and he had offered to perform such duties despite that he had held a higher post. He reiterated his allegation of discrimination stating that the other employee could only perform duties pertaining to a lower salary scale than his.

Considerations

The Ombudsman considered that this complaint was lodged long after the deadline of six months (imposed by the Ombudsman Act for a complaint to be lodged) from the time the complainant first had knowledge of the acts complained of. In fact the complaint was lodged around two years following his retirement and several months after the extension had been given to the other employee. As such the complaint was prescribed at law, and therefore inadmissible for formal investigation. This notwithstanding, the Office considered whether there were valid grounds for waiving such prescription.

The Ombudsman considered that:

- the Ministry had clarified its decisions in both cases under consideration and such clarifications had been communicated to complainant;

- complainant's application was for re-engagement as a part-timer (after the date of his retirement) within the Ministry or in any department, and not for an extension;

- there was no request from his department for the need of his services after retirement age;

- the respective decisions in both cases were taken within Government policy regarding retention beyond retirement age, that is, retention is accepted

if there was an expressed need for the services of a particular employee in special situations such as participation in a particular ongoing project. There was no such need in complainant's case as was the case in respect of the other employee; and

- there were no valid grounds to challenge the explanations/reasons given by the Ministry for its decisions.

- The Ombudsman therefore concluded that he could not be of further assistance to complainant and he informed complainant accordingly.

- Complainant was still not happy and requested a meeting in person with the Ombudsman. During the meeting, the Ombudsman explained at length the reasoning behind the decision. He informed complainant that this Office had done all it could to help him and that no further action could be taken in his case.

The Ombudsman then closed the case.

Case Note on Case No M0240
Ministry of Finance

The Government's policy on the transfer of Gozo domiciled public officers working in Malta who wish to work in Gozo.

(transfer of Gozo domicile public officers)

The complaint

A Gozitan employee in a departmental grade within the Directorate for Educational Services and posted in Malta complained that colleagues in the same grade of his, who like him, were posted in Malta, were transferred to Gozo on humanitarian grounds irrespective of their seniority and simply on the basis of production of a medical certificate. As a result his transfer to work in Gozo where he resides was being unduly delayed.

The investigation

The Ombudsman received confirmation that over the years, eight (8) Gozitan officers in the same grade as complainant were "*temporarily*" transferred from Malta to work in Gozo on the basis of a medical certificate irrespective of their seniority in the grade. However, only one such transfer took place in 2012. Except for one case, the temporary transfer of the other seven employees was renewed every year. Of these, only one was endorsed by a Medical Board. The temporary transfer was extended year after year on the basis of updated medical certificates signed by medical specialists, in line with a long standing policy adopted by the education authorities.

Sub-Article 1.1.2.5 (iii) of the Public Service Management Code (PSMC 11th edition) provides for the maintenance of waiting lists of Gozitan domiciled departmental grade officers who are working in Malta who wish to work in Gozo. While, for general services grades, the list is kept by the Office of the Prime Minister for the purpose of seniority and priority. In respect of officers

in departmental grades, who so wish to be transferred, such list is kept by the respective Ministry or Department. In the case of the latter group, there is generally no need for the respective Ministry or Department to seek approval from the Public Administration HR Office (PAHRO) within the Office of the Prime Minister, unless the transfer to Gozo is to the Ministry for Gozo, and not to the same Ministry or Department.

In the case under consideration the onus of maintaining the relative list and deciding on the transfer of officers in these departmental grades lay with the education authorities and PAHRO clearance was not necessary.

Another provision (sub-article 1.1.2.5 (vii)) of PSMC provides that pregnant Gozitan officers working in Malta may be temporarily transferred to Gozo until the end of confinement on presentation of a medical certificate and following confirmation by a Medical Board convened by the Health Division.

The Ombudsman also took cognisance of a letter Circular MPO/164/1995 dated 10 September 1996 which refers to general service grades, whereby such employees are, except in the case of pregnancy, to be considered on light duty and, with the concurrence of the Public Service Commission, the increments in their salary (beyond the first increment) is to be withheld, and their years of service while so temporarily transferred were not to be reckoned for the purposes of progression to a higher grade. The officer so transferred has to be re-examined by a Medical Board within 6 months. PAHRO also informed this Office that it was its intention to establish this praxis as a service-wide provision across the board and include it as a future provision in PSMC.

Considerations

In his deliberations the Ombudsman considered that complainant's grievance stemmed from the longstanding policy of the education authorities to transfer Gozo resident employees from their posting in Malta, to work in Gozo, "*temporarily*", on the basis of a medical certificate. As stated by complainant, a number of colleagues in the same grade had intimated that they could produce a medical certificate in order to jump the (priority) seniority list.

The Ombudsman further considered that despite there were no *ad hoc* provisions in the PSMC, PAHRO was accepting the humanitarian situation as a reason for bypassing the seniority rule in respect of general service grades. However, in such cases, PAHRO sought confirmation of the situation from a medical board appointed for the purpose by the health authorities and furthermore besides periodic review by a Medical Board, the officers so approved were considered as on light duties, their increments withheld with the approval of the PSC, and their service during this temporary transfer was not reckonable for progression purposes. These "*deterrents*" did not feature in the long standing policy adopted by the education authorities in an analogous situation.

While stressing that these considerations should not in any way be interpreted that the officers with the education sector were abusing the system (and there was no evidence of this) the Ombudsman dwelt on the best practice which should be applied in such situations.

In the Ombudsman's considered opinion, the policy of the education authorities in accepting medical certificates for such "*temporary transfer*", without independent medical vetting, was a risky one and certainly could not be deemed to be best practice. In such situations, the Head of Department should consult independent medical experts. This would ensure more transparency and reduce risk of potential abuse. Unfortunately to date there was no such provision in PSMC nor was there any circular to this effect.

The Ombudsman did not enter into the merits of whether Gozo domiciled officers transferred to Gozo on humanitarian/medical grounds should be considered as being on light duties with consequential loss of increments and progression while so transferred. It was up to PAHRO to decide on this issue in the first place and whether its present policy should apply service wide, including departmental grades. However, he considered that in such cases, primary consideration has to be given to whether or not the transferred employee can, despite his medical condition, perform the full range of duties of his grade. This was a decision that can be taken by a Medical Board.

Conclusions and recommendations

On the basis of the above considerations, the Ombudsman concluded that the complaint was justified as the system whereby a medical certificate is accepted without verification was risky and could give rise to abuse, even if in this case there was absolutely no such evidence.

The Ombudsman therefore recommended that:

a) The Education Authorities change their policy and review past approvals for Gozo domiciled employees transferred to Gozo on medical grounds, and subject these employees to a medical board. The individual cases should then be medically reviewed on their own merits in line with the recommendations of the medical board in each case; and

b) the Resourcing Department within the Office of the Prime Minister ensures that its policy applicable to general services grades is applied by all the Departments in respect of departmental grades and this in so far as verification of such medical certificates by a Medical Board.

Follow up

The education authorities immediately informed this Office that it was accepting the recommendations and had taken immediate action for all the cases to be reviewed by a medical board. Moreover they will be applying this policy in future.

On its part PAHRO while agreeing with the Ombudsman's recommendations, informed this Office that in consultation with the pertinent stakeholders, it has updated its policy which addresses the considerations and recommendations made by the Parliamentary Ombudsman in the investigation report.

Case Note on Case No M0190
Contracts Department

Alleged incorrect information provided by a Departmental Contract Committee to a tenderer

(government tenders – right of appeal)

The complaint

The Director of a local Company (complainant) felt aggrieved at the disqualification of his tender for a particular medicinal product by the Departmental Contracts Committee. He argued that the Committee had wrongly interpreted a statement in his tender offer in respect of the expiry date of the product offered, and as a result disqualified his tender. Subsequently, the Chairperson of the Committee had given him wrong information about the deadline for submission of an appeal. He subsequently submitted his grievance to the Director of Contracts but was still not satisfied with the outcome. He had also argued that the processing of this tender was inconsistent with previous practices.

Facts and findings

On 9 April 2012 complainant was informed by means of a faxed letter that his tender for the product under consideration had been disqualified on the grounds that it did not conform with the tender specifications as regards the shelf-life of the product offered. Complainant was at the same time informed that he could lodge an official objection by noon, 13 April 2012 against a deposit of €400.

Complainant replied on the same day, acknowledging the information regarding his right of appeal and on the basis of his experience, three years earlier (when he appealed the decision in respect of another disqualified tender) he declared that the Company was "*not in a position to appeal in this case*". In its reply the Departmental Contracts Committee reminded complainant of the right to an official objection against a deposit.

Instead of lodging an official objection, complainant sought redress from the Director of Contracts informing him that the deadline given to him by the Departmental Contracts Committee was mistaken in terms of Regulations 5 & 6 of Legal Notice 296 of 2010 which allow for five working days for such objection when in effect the deadline that was imposed on him fell short of what the regulations allow. The Director Contracts requested complainant to clarify his claims. Complainant argued that based on past experience he needed legal advice prior to submitting his objection and this was not possible with the reduced deadline imposed by the Departmental Contracts Committee. He argued that he was given four days within which he could 'appeal' - and not five as stipulated by law. He therefore requested to be compensated, that measures be taken to ensure that such decisions are not repeated and that ambiguities/imprecise information in tender documents are appropriately addressed. The Director of Contracts informed complainant of action that was being taken on his part to address these issues.

Considerations and comments

In his deliberations the Ombudsman considered that complainant had made two allegations. The first one relating to the disqualification of his tender, while the second one related to the wrong information given to him by the Departmental Contracts Committee regarding the time frame within which complainant could submit a formal objection or appeal. In respect of the latter complainant argued that he was not given enough time to seek legal advice in order to prepare his appeal.

As regard the disqualification of complainant's tender, the Ombudsman considered that this fell within the competence of the Revisions Board in terms of paragraph 21 "*Right of Recourse*" of the tendered document which states that any tenderer who is aggrieved by an award of a contract may file a letter of objection, together with a deposit, within five working days from the publication of the notice, setting forth any reason for his complaint. This statement is in conformity with paragraph 3 of Regulation 21 of Legal Notice 296 of 2010 as subsequently amended. The Ombudsman opined that, in the first instance, it was this Board that had jurisdiction to decide whether

the decision to disqualify complainant's tender was correct or not, and if not, decide on redress. The Ombudsman is not a substitute for this Board if a complainant does not, for a valid reason, avail himself of this means of redress. The reason given by complainant for deciding on the first day of receipt of the notification of the disqualification of his tender, namely that of already having lost an appeal three years earlier, was not in any way, a valid reason. Neither were his other subsequent arguments of not having time to consult his lawyer. Therefore the Ombudsman abstained from taking further cognisance of the allegation in respect of the merits of the disqualification of complainant's tender.

In so far as concern the alleged misinformation on the deadline for appeal, the Ombudsman noted that complainant was informed by fax on the morning of 9 April 2012 of the disqualification of his tender and was given the reasons for this decision. He was further given up to noon of 13 April 2012 to appeal against a deposit of €400. In such situations where a short deadline is given, the first day of the notification is not to be considered for the purpose of the deadline period. This means that complainant was given less than the prescribed period of five working days prescribed by Legal Notice 296 of 2010.

In considering complainant's argument that it was only subsequently that he became aware of the mistake in the deadline and did not have enough time to prepare an appeal on the advice of a lawyer, the Ombudsman acknowledged that the deadline communicated to complainant fell short of that stipulated in the tender document and by law. However the Ombudsman could not ignore the following facts:

1. the tender document submitted by complainant included a statement that the tenderer is declaring that he is aware of the relevant laws and regulations pertinent to the tender;

2. paragraph 21 "*Right of Recourse*" in the same document informed, the would be tenderers of their right to object to an award within five working days from notification, against a deposit. The above means that complainant knew, or should have known of his rights in this respect;

3. despite the shorter deadline, complainant had on the same day of receipt of notification replied to the Chairperson of the Departmental Contracts Committee. This means that on the first day of the period communicated to him, complainant had already formulated his reply. In this reply he declared that on the basis of past experience, the Company was not in a position to benefit from an appeal[6]. In effect he had at that time decided not to exercise his right of appeal; and

4. notwithstanding the above, if complainant had meanwhile changed his mind and wanted to consult his lawyer, he could still have written back objecting to the mistaken deadline, argue that this misled him on his decision and request more time to submit his objection.

For the above reasons the Ombudsman did not consider that the mistaken notification on the part of the Departmental Contract Committee negatively affected complainant's right of appeal.

Since in the course of the investigation the Ombudsman drew the attention of the Chairperson in respect of the statutory period of five working days for submission of an appeal, and noting that the Chairperson had assured him of action taken by the same Committee to change its policy, the Ombudsman decided that there was no scope for any recommendation in this respect.

6 In actual fact the merits of the disqualification of complainant's 2009 tender were totally different from those of the present case.

Case Note on Case No M0008
Department for Health

A specialised nurse complaints about the non-renewal of a definite contract

(non-renewal of definite contracts)

A nurse who held a definite contract in a particular speciality complained that the health authorities did not renew his fixed term contract when this expired, despite that he had been a pioneer in the setting up of his clinic and had worked in it for a number of years before being given the contract. As a result, he lost the opportunity to progress to a higher salary scale on completion of another year in that position.

The investigation

Complainant was awarded a 36 month contract as a specialist nurse in the Health Division after his successful application following a call for applications for such positions. In terms of this call, the selected candidates were to retain their substantive grade during the period of the contract and were to return to their substantive grade on its termination. The salary was pegged at a higher scale than that of complainant.

Complainant's contract was not renewed on expiry. Complainant therefore wrote to the health authorities requesting written reasons for this decision but did not receive a reply.

Following his meeting with the nursing management, during which it was explained that the reason for non-renewal was his attitude and behaviour towards a nurse colleague in the same speciality clinic, complainant again requested the authorities to give him written reasons. He argued that the other nurse worked with a different medical specialist, running separate clinics, and their duties do not overlap. Complainant dwelt on his dedication to patients and expressed his willingness to further develop his expertise in the speciality. He referred to his repeated requests to management for more human resources

to be made available. He stressed that he did not make any grave mistakes and had never been accused of unsatisfactory performance.

The health authorities informed this Office that the decision not to renew this contract was taken after consideration of complainant's performance at this clinic – a decision supported by the nursing management after consultation with the Consultant in charge of this particular clinic. Complainant had been made aware of his behaviour which was considered as unprofessional, unethical and highly disrespectful but there was no improvement and disciplinary action had also been taken against this officer. The authorities also enclosed a copy of a report on complainant dated July 2011 where the Consultant in charge of this specialist clinic had spoken to the nursing management on complainant's unacceptable behaviour which had been going on for some time. Complainant was rude to patients and to him as well as to a visiting Consultant, using inappropriate language in the presence of third persons. He disobeyed clinical advice in respect of time frames to be allocated per patient and even became abusive to the Consultant if the latter dedicated more time to any particular patient. The "anger therapy" recommended by a disciplinary board had no effect. At times, complainant even threatened that he would go on sick leave and did not always give adequate advance notice to the Consultant of his going on vacation leave. The Consultant finally advised that complainant be removed from the clinic before a serious incident involving staff or patients could happen.

During a meeting at this Office, this Consultant confirmed the above statement made to the nursing management, but added that at that time he had clearly stated that this nurse was very good and dedicated, but was tired because of stress due to the enormous workload for which he was responsible. Repeated requests for additional staff were never acceded to by the authorities, with the result that complainant was easily upset. In fact the same Consultant had some time earlier, made a very laudable report on complainant's skills and nursing qualities including his knowledge of all the patients and doing everything to ensure their comfort. Complainant had at that time, been described as a very responsible and conscientious person and an asset to the speciality clinic.

The Consultant also referred to the huge disparity in respect of the workload of the two firms at the clinic - each firm being made up of 1 Consultant and 1 nurse. The Consultant added that the relations between these two nurses at the clinic were bad but considered that the blame could not necessarily be placed at complainant's door.

On its part, the nursing management confirmed the disparity in the workload of the two firms but argued that to ease the problem complainant had been allocated a full time clerk. Moreover, the other nurse was directed to cover for and work closely with complainant but complainant strongly refused this offer. The authorities confirmed that there was very good cooperation between complainant's replacement and the other nurse at the clinic. Because of this cooperation, the problems have eased despite the increased workload.

In respect of the allegation of financial loss resulting from the non-renewal of the contract, complainant confirmed that had the contract been renewed he would have been four years in this position which attracted a higher salary scale and he would then have qualified for a permanent higher scale in terms of the Contracts for Fixed Term Regulations 2007.

Consideration and conclusions

In reaching his conclusions on this case, the Ombudsman had to decide whether the non-renewal of the contract in question amounted to maladministration. He considered that –

- complainant's fixed term contract did not provide for an automatic renewal. On the other hand it stated that at the end of the contract complainant was to revert to his substantive grade. As such there was no breach of contract;

- on the other hand, such renewal was not excluded and was at the discretion of the health authorities;

- complainant was not immediately given written reasons for the non-renewal but these were revealed in the course of the investigation – namely

complainant's attitude and behaviour towards patients and superiors and lack of teamwork particularly with the nurse of the other firm in the same clinic;

- the authorities had drawn complainant's attention to this, and had also provided other support, but things did not improve. There were also instances where disciplinary procedures had been instituted against the complainant;

- complainant disputed the allegations on his attitude and behaviour and argued that what prompted the non-renewal of the contract were the repeated requests made for additional staff. Complainant categorically denied the allegation of abusive language towards Consultants or patients "*except for the usual outburst*" due to the stressful situation;
- the authorities had instructed the other nurse who had a lesser workload to support complainant, but the latter adamantly refused such cooperation. The relations between the two were not good; and

- following complainant's replacement at this speciality clinic, there was better cooperation between the two nurses and the problems have eased despite the increased workload.

- On the basis of the above considerations the Ombudsman concluded as follows –

- since complainant's contract was a definite one with no provision for renewal, there was no breach of contract even if the authorities could have renewed it; and

- in such cases the renewal is essentially at the discretion of the management. There was no evidence that this discretion was executed unreasonably or unfairly.

Complainant's contract was not renewed because of his attitude and behaviour. Even if this was due to stress because of the high workload, it could not be concluded that the authorities were at fault. In this respect one cannot brush

aside the instructions given by the nursing authorities to the other nurse to assist complainant which the latter strongly refused. It further resulted that with the cooperation between the other nurse and complainant's replacement, the problems eased to the benefit of the clinic and patients.

On these bases the Ombudsman did not uphold the complaint but stressed that this conclusion was without prejudice to complainant's dedication as a nurse which had not been disputed.

Case note on Case No M0104
Courts of Justice Department

What attire is adequate when one is summoned to give evidence in Court?

(court proceedings – Ombudsman's remit)

The complaint

A young professional, who had been summoned to give evidence in front of a Judicial Assistant in pending court proceedings, lodged a complaint with the Ombudsman arguing that because of unclear information provided by the administration of the Law Courts about what attire is required in these instances, there was a possibility that a male who attended a court sitting without a tie and/suit could be charged with contempt of court. Complainant elaborated that he had enquired with officials of the Law Courts about whether a specific dress code applied in these cases and had been informed that this existed only in the case of lawyers. This not withstanding, complainant was advised to wear a dark suit with a tie, since this is what members of the judiciary generally insist on. These officials also informed him that in terms of Regulation 27 of Legal Notice 333 of 2008[7], any Court Executive Officer could refuse entry into the precincts of the Courts, if he was of the opinion that the person was not adequately dressed.

Complainant, was not satisfied with this reply and pointed out that there is no legal obligation that one should wear a tie and that the opinion of an executive officer is somewhat subjective. He therefore requested a copy of the latest publication issued by the Director General in connection with this issue, quoting Subregulation 2 of Regulation 27 which requires the Director General of the Law Courts to periodically inform the general public what type of dress is regarded unacceptable within the precincts of the Courts of Justice. The Director General informed complainant that no such publication had been issued and that in his opinion everyone is aware what decent attire is.

7 SL 12.09 also referred to as the Rules of Court – Legal Notice 279 of 2008 as amended by LN 333 of 2008.

Complainant, felt he had not been provided with a conclusive answer to his enquiries from the person entrusted by law to establish what attire is unacceptable in Court and referred his grievance to the Ombudsman, contending that the Law Courts were abusing their authoritative jurisdiction, by imposing their conservative views on society and requesting the Ombudsman to establish if –

1. The court authorities were failing to provide adequate information to the public of what attire is unacceptable within the court building, notwithstanding the provisions of Regulation 27(2) of the Court Practice and Procedure and Good Order Rules; and

2. If it is legal for fines for contempt of court to be issued in connection with inappropriate attire, if the public has not been informed of what is unacceptable attire.

Complainant additionally suggested that the aforementioned Legal Notice should be amended, either by indicating which attire is suitable, or by completely omitting this provision, which he contends infringes on the individuals' rights because of latency to adapting to change.

The reaction of the Courts of Justice Department

When asked for his views on the complaint, the Director General, Courts of Justice Department, explained that he had advised complainant to wear a tie and suit, but had not obliged him to buy a suit, since it is accepted practice that males wear a jacket in court, not necessarily a suit. He further remarked that the general public is well aware of the attire which is appropriate in Court.

The Director General emphasised that he was not responsible for the drawing up of the Regulations, which are drawn up by a specifically appointed Board and are subsequently approved by the President of the Republic of Malta – consequently, complainant's argument that he is the person officially responsible for such rules, is inaccurate. He however, admitted that although the Legal Notice put the onus on him to periodically update the public about what dress

code is acceptable or otherwise within the precincts of the Law Courts, he had not issued any notice so as to avoid listing a detailed description of what is acceptable and what is not, an exercise, which in his opinion, could end up being a parody of attire with the Court's Director General explaining in detail the lengths of skirts and blouses. By way of conclusion, he pointed out that rather than amounting to an abuse of the Court's authority, as complainant contends, the regulations create a sense of dignity and respect for the institution.

Considerations and comments by the Ombudsman

In the first instance, the Ombudsman observed that his remit does not include the amendment of existing legislation, a role reserved to Parliament, the legislative branch of government. His function is that of ascertaining whether an administrative act or failure to act, on the part of a government department or entity is in conformity with existing laws and regulations or constitutes an act of bad administration. The Ombudsman however commented that where he believed that a law is unjust or oppressive, he can make a recommendation for a change in that law. He also stated that in terms of the Ombudsman Act he was not empowered to scrutinise actions of the Judiciary.

The Ombudsman noted that complainant was correct when he stated that *'The Court Practice and Procedure and Good Order Rules*[8]*'* stipulate that:

1. the Director General (Courts) shall, from time to time, inform the general public as to the type of dress which is unacceptable within the precincts of the Courts of Justice; and

2. subject to what is stipulated in the Proviso of Regulation 27(1), every court executive officer *may* refuse entry into the precincts of the Courts of Justice or into any courtroom to a person who, in his opinion, is not properly dressed.

He however drew complainant's attention to the fact that these rules are created by the Rule Making Board, which in terms of the law is composed of

8 Regulation 27.

members of the Judiciary, the Attorney General, the President of the Chamber of Advocates and the President of the Chamber of Legal Procurators. The Board is entrusted with the formulation of subsidiary legislation intended to regulate matters intimately affecting the conduct of court proceedings which the legislator considers should be regulated directly by members of the judiciary and the legal profession. This intention of the legislator is evident in Article 988 of the Code of Organization and Civil Procedure which stipulates that judges and magistrates are empowered to enforce order during the sitting over which they preside and to maintain good order and decorum within the precincts of the courts in which they sit.

The Ombudsman highlighted that in terms of Regulation 27(1), where a court executive officer is of the opinion that a person who has been summoned to appear before a court is not suitably dressed, the officer is bound to inform the judge, magistrate or member of the tribunal before whom the person was due to appear, and take instructions from him as to how to proceed. This is so, because fines for contempt of court are issued as a consequence of the decision taken by the presiding Judge, Magistrate or member of the Tribunal, that a person is not properly dressed and is therefore guilty of contempt of court. A decision which is taken in accordance with the powers vested in the Judiciary by the law and consequently cannot be reviewed by the Ombudsman.

The Ombudsman however considered that in terms of Regulation 27(2) the Director General was periodically required to inform the public on what type of attire was unacceptable within the precincts of the Courts of Justice and verbally drew the attention of the Director General about this matter. Following discussions with the Director General, the Ombudsman was informed that guidelines were in the process of being published by the Department.

Conclusions

The Ombudsman found that complainant's grievance that the Director General (Law Courts) was required to issue notices in connection with what attire is regarded as improper within the precincts of the Law Courts was justified. He however indicated that from the documentation forwarded to the Office,

the court administration had promptly answered complainant's enquiries and provided him with the guidance required. On the other hand, he stated that had complainant been more specific and clear in his enquiries, stating that he had been summoned to appear before a Judicial Assistant, he would have been informed that the dress code is less rigid and that no tie or jacket was required.

The Ombudsman concluded that the current policy that male members of the public wear a jacket and tie appears to be a reasonable one and cannot be considered as an abuse of authority by the courts. It is a simple requirement bearing a reasonable relationship to the proper administration of justice in that court. Determining dress code is perceived as a way of ensuring proper decorum and discipline in Court and cannot be qualified as an abuse of the court's "*authoritative jurisdiction*" unless manifestly unreasonable or arbitrary. The matter falls squarely within the discretion of the competent authorities and one is expected to conform to existing or prevailing regulations.

Outcome of the case

Some months later the Director General (Courts of Justice) implemented the recommendation of the Ombudsman and published notices advising the public that members of the public may be refused entry into the precincts of the Courts of Justice or in any Courtroom should they not be properly dressed. These notices indicated a non-exhaustive list of attire deemed to be unacceptable.

Case Note on Case No L0184
Water Services Corporation

Water Services Corporation employees entering private property without permission or advance notice.

(access of WSC employees in private property)

The complaint

AA (complainant) requested the Ombudsman to investigate an alleged invasion of his property on the part of Water Services Corporation (WSC) employees. He alleged that when he visited his flat in Gozo, he discoverred that the water meters in the commom parts of the block of flats had been changed. Such change entailed that the employers had to enter through the front common entrance door and, in his case, open a locked aluminium box which housed the meter. Nobody had asked him for the key of his box, which key was always in his possession. There was no sign of the box being forced open and in fact he found that it was still locked but the meter inside it changed.

Complainant had objected to such intrusion but the WSC authorities never gave him satisfactory information on how the employee/s concerned accessed the meter. He was only informed that the employees concerned said that one of the owners of the flats in the same block had opened the aluminium box which contained all the meters. The same WSC official apologised for any inconvenience. On his part, complainant denied that all the meters were in the same box and in any case all the owners had to be informed in advance.

The investigtion

In its reply to complainant, the WSC argued that the employees had worked in the common parts of the block where there were other residents and had accessed the meters because the common door was open as were the doors where the respective meters were enclosed. The Corporation assured complainant that it did not have any keys which open the clients' property.

Complainant declared that when he bought the flat in question the vendor (developer) retained the ownership of the common parts, while guaranteeing the buyer's right of access and use of the common parts. Complainant added that he also contributes to the maintenance of these areas in line with the Condominium Act. Moreover and importantly, the WSC Account (for meter rental and consumption) was in his name and not in the name of the developer, and the aluminium box enclosing the water meter was also his and had found it closed despite that the meter inside it had been changed.

The Ombudsman perused the Water Supply Regulations and particularly Regulations 43 and 44 thereof which refer to rights of entry of the Corporation's employees into consumers' premises including for the purpose of inspections, meter readings and to carry out any necessary works. However, Regulation 44 provides that the Corporation must give notice (at least 4 days in advance) in writing to the consumer in respect of any related works, and indicate the estimated time when the works are intended to be carried out. The notice period may be longer in certain situations.

Considerations

In his deliberations, the Ombudsman declared that he was not in a position to determine whether it was true that the WSC employees found both the main door of the block of flats, as well as the aluminium box enclosing the water meter, open when they arrived. On his part complainant insisted that this was not true, arguing that even if someone had left the outside door (leading to the common parts) open, he had always left the aluminium box closed, and when he subsequently went to his flat, this box was still closed. He had also stated that this box was his and he had the keys to it.

What was however beyond doubt, was that the Corporation had failed to inform complainant as it was in duty bound to do, in terms of its regulations. These regulations guaranteed right of entry to its employees into the consumers' premises but if works are to be carried out, the Corporation is obliged to give them advance notice in writing.

Despite the fact that complainant did not own the common parts, he had the right of passage and access thereof, and was even obliged to contribute to their proper maintenance. Above all, in respect of his relations with WSC, complainant was the Account Holder in respect of the meter rent and water consumption at his flat, and in terms of the WSC regulations he had the right to be informed in advance and in writing. No such notice was given. WSC did not inform him that it was carrying out works on his water meter.

Conclusions

In the light of the above considerations, the Ombudsman concluded that even if one were to accept the WSC version that its employees found the respective doors open, the Corporation failed to observe its legal obligation to inform complainant as stipulated in Regulation 44 of the Water Supply Regulations. This attracts criticism from the Office of the Ombudsman.

The Ombudsman expressed his hope that this failure was a one-off occurence and that it was not WSC established practice. The Ombudsman re-iterated that the WSC is in duty bound to honour its obligations at law when it intends to carry out any works on any of its meters.

Case Notes from The University Ombudsman

Case Note on Case No UL0058
Department of Pharmacy, University of Malta

Pharmacy students proceed to Masters Degree

(unfair treatment – discrimination)

The complaint

Thirty-seven students enrolled in the 2006-2011 Bachelor of Pharmacy Honours (B.Pharm. Hons) Course lodged a complaint against the University of Malta claiming unfair treatment. They claimed that the Institution denied their request to be included in the restructured Pharmacy course. The new structure would have allowed them to graduate with a Bachelor of Science (Honours) Pharmaceutical Science (BSc (Hons) Pharm. Sc.); with an additional 30 ECTS they could obtain a Master of Pharmacy (M.Pharm.) degree.

The Fifth Year students also alleged that the University discriminated against them when it allowed the other four student groups registered in the B.Pharm. (Hons) course to benefit from the restructured programme, but denied complainants the same opportunity. They wished to join the new scheme, take the extra semester containing 30 ECTS and, like their fellow students, graduate with a M.Pharm.

Findings

The complainants were registered in the five-year programme leading to B.Pharm. (Hons) in 2006. In the course of their studies, the Department of Pharmacy conducted a course restructuring exercise whereby, following four years of study, students could graduate with a B.Sc. (Honours) in Pharmaceutical Science. Under the new structure, holders of this degree could proceed to a fifth year (composed of three semesters with 90 ECTS) and graduate with a M.Pharm. The Department of Pharmacy agreed to the scheme in February 2011; Senate approved it on 22 June 2011.

The new scheme was initially planned to commence with the October 2011 student intake. However, the University considered the scheme as beneficial to the incumbent B.Pharm. (Hons) students, and offered the First, Second and Third year students (namely the 2010, 2009 and 2008 intakes respectively) the option to join the restructured programmes, which they all did. Fourth and Fifth Year students (namely the 2007 and 2006 intakes) were excluded.

Both student year-groups appealed the University's decision and eventually, partly through the intervention of the University Ombudsman, the Fourth Year students were awarded the BSc (Hons) Pharmaceutical Science degree at an unscheduled graduation ceremony in December 2011. They were also allowed to proceed to the M.Pharm. programme. Fifth Year (2006 intake) students were denied to join the scheme and graduated with a B.Pharm. (Hons) on 24 November 2011. The Fifth Year students lodged a complaint with the University Ombudsman against the University claiming unfair and discriminatory treatment.

Observations

The University insisted that it did not act unfairly or discriminate against the Fifth Year Pharmacy students (hereinafter referred to as the complainants). It argued that they had registered for a course leading to a Bachelor's in Pharmacy and on the successful completion of their studies were awarded this degree. The University also pointed out that the complainants could if they wished, register for the M.Pharm. On the successful completion of another three semesters containing 90 ECTS, they would graduate with the higher degree. The University also insisted that the complainants did not really need to follow this course of action since it was negotiating with the Malta Qualifications Council (MQC) to recognise the five-year B.Pharm. (Hons) as a Level 7 qualification similar to the M.Pharm.

The students disputed this line of argument and contended that:

a) in the international Pharmacy realm, a BSc (Hons) in Pharmaceutical Studies degree has greater kudos than a B.Pharm. (Hons); and
b) in the hierarchy of degree holders, a M.Pharm. graduate is acknowledged as having a higher qualification than one with a B.Pharm. (Hons).

The complainants argued that both factors become highly significant on one's *Curriculum Vitae* when seeking employment or further studies in Pharmacy.

The University Ombudsman did not consider it his task to judge the values of the various degrees in Pharmacy since this responsibility pertained to the Malta Qualifications Council. Consequently, he was not in a position to pass judgement on the academic claims and counter-claims by the University and its students. However, he argued that it was reasonable to observe that to the layman, the potential employer and the academic evaluator, a Master's degree was a higher qualification than a Bachelor's. In this context, he asked what spurred the Department of Pharmacy to restructure the course and introduce the higher qualification, if it expected the MQC to recognise the B.Pharm. (Hons) and the M.Pharm. degrees as being equivalent. Here the University Ombudsman felt it pertinent to point out that the Chief Executive of the MQC stated:

"Kindly note that the position of MQRIC [Malta Qualifications Regulation Information Centre] has been to level rate the B.Pharm. (Hons) at Level 6 of the MQF [Malta Qualification Framework]. This was the position under the previous Chief Executive, … and the position hasn't changed." [9]

The University's second reason for declining the complainants' request stressed the administrative necessity to '*draw a line somewhere*'.[10] As explained earlier, Senate initially set the cut-off point at the new student intake of October 2011, but eventually all student-groups except the complainants were admitted into the scheme. The University excluded the 2006 – 2011 student group on the grounds that they had already covered most of the B.Pharm. (Hons) programme and would graduate at the November 2011 convocation.

The complainants acknowledged that a cut-off point was an administrative necessity, but held that a fairer distinguishing criterion would have been between those who already held a B.Pharm. (Hons) and those students who were still reading for the degree. They contended that when the Pharmacy Board of Studies (in February 2011) and Senate (on 22 June 2011) approved the course restructuring, they were still students, and they should have been

9 E-mail dated 20 March 2012 from the Chief Executive of MQC to the University Ombudsman.

10 The University convincingly argued that it would be inadmissible to allow all past B.Pharm. (Hons) graduates, who had followed the five-year course since its inception in 1995, to become automatically eligible for a M.Pharm.

treated like all the other student-groups. The complainants stressed that all the student-groups who joined the new scheme had, like themselves, originally registered for a B.Pharm. (Hons) degree.

The University Ombudsman too recognised the need for a cut-off point that was valid and unambiguous as well as fair and administratively feasible. He agreed that on Senate's approval of the course restructuring, the University could not provide all B.Pharm. (Hons) holders since 1995 with the same opportunities as it offered the incumbent students. The evolving course content over eleven years would have rendered the decision academically questionable. At the same time, he considered a criterion that distinguished between past graduates and incumbent students as more coherent than the University's differentiation between student groups.

He also considered it fairer. During the course of the investigation, it transpired that a number of students who joined the course in 2006, over the five year period, had failed a year, had to repeat it, and consequently had fallen back a year. As things stood, the repeated students were to benefit from the restructuring scheme, while their higher achieving colleagues would not.
The complainants claim yet another reason for their grievance. They allege that on comparing lecture-notes with M.Pharm. students, the contents of the study-units were identical to their own Fifth Year studies. They also assert that the added-on 30 ECTS were being absorbed in the same study-units they themselves had covered. They cited the dissertation requirement, which allegedly had been artificially upgraded from a 'project' to a 'thesis' and allocated an extra 10 ECTS. The students asserted that the remaining 20 ECTS were being covered by two 3-hour seminars and the practical experience they had also undertaken. The complainants concluded that if they were to enrol in the M.Pharm. programme as the University demanded, they would be repeating 60 ECTS needlessly.

The University Ombudsman was not in a position, nor was it his task to evaluate the academic content of the two Pharmacy programmes. Consequently, he could not confirm or deny the veracity of the students' claims. However, it is significant that when he discussed the students' assertions with the Head of the Pharmacy Department, she did not refute them categorically. Indeed, the University Ombudsman could state with the Head's consent that she supported a recommendation to the Senate to reconsider favourably the complainants' request.

Conclusions and recommendations

The main issues in this case centre around two questions:

a) whether the University unjustly discriminated against the complainants when it denied them the same opportunities it provided other student-groups who, like them, were registered in the B.Pharm. (Hons) course; and,

b) whether the University acted fairly and reasonably to demand that in order to obtain a M.Pharm., the complainants had to undertake an extra year of study containing 90 ECTS, sixty of which they had already covered in the out-going 2010 – 2011 academic year.

The University Ombudsman did not discuss the academic aspects of the case because, as already stated it is not in his remit to do so. He concentrated on the administrative decisions that relate to issues of equity and discrimination. The evidence shows that there was a lack of equity in the University decision *vis-à-vis* the complainants. At the time (February 2011) the Department of Pharmacy decided on the restructured B.Pharm. (Hons) course, and on the date (22 June 2011) when the Senate approved the new courses, the complainants were still students and would continue to be so until they graduated in November 2011. In the University Ombudsman's view, the distinction between B.Pharm. (Hons) holders and the students in the course was a more logical and coherent demarcation criterion (or so-called cut-off point) about who should have been allowed to join the new scheme, then the University's differentiation between student groups.

Moreover, the University's claim that a five-year B.Pharm. (Hons) degree equates a M.Pharm. was contentious, and was not supported by MQC statement quoted above. In the academic realm and in people's perception of university degrees, a Master's is a higher qualification than a Bachelor's.

Furthermore, the University had no justification to demand the complainants to repeat 60 ECTS in subjects they covered only a few months earlier. It would have been unnecessarily onerous on the complainants and a waste of University resources to make them repeat work they had completed successfully. It would also have cost the complainants a year's wages.

For the reasons stated above the University Ombudsman upheld the students' complaints that the University did not treat them with equity when it denied them the opportunity to join the restructured Pharmacy programme as it had to their fellow students.

Consequently, he recommended that the University should reconsider the complainants' request to proceed to a M.Pharm. by undertaking an additional semester containing 30 ECTS. Thus, the University would be treating them on the same basis as it treated their fellow students who, between 2007 and 2010, were also registered in the B.Pharm. (Hons) programme. Such a decision could mean withdrawing the complainants' B.Pharm. (Hons) degree to replace it with the M.Sc. (Hons) in Pharmaceutical Science degree. If the University agreed to this proposal, it would apply solely to the 2006 – 2011 student group.

The University Ombudsman also suggested that when Senate discussed such or similar issues, it would assist the debate if the Head of the Department concerned was to be invited to attend the meeting. His or her presence would aid the Dean of the Faculty concerned in clarifying ambiguous points and providing a full perspective on the matters under discussion.

Outcome

The University Senate approved the University Ombudsman's recommendations. The complainants were allowed to proceed to a Master of Pharmacy degree following a semester's work of revised and upgraded study-units.

Case Note on Case Nos UM0010/11
Institute of Tourism Studies

Termination of secondment

(secondment - termination)

The complaint

A member of the academic staff lodged a complaint against the Institute of Tourism Studies (ITS) claiming that:

1. ITS terminated his secondment to the Institute on the false pretext of redundancy; he demanded to be reinstated at ITS;

2. ITS arbitrarily terminated his participation in three European Union (EU) Projects without a justifiable reason. He wanted to resume his participation in these projects arguing that the actions taken against him were invalid because the ITS Board of Governors lacked the authority to decide on such matters;

3. ITS refused to remunerate him for the extra hours of work he devoted to the above-mentioned projects; he requested to be paid the outstanding payments due to him; and

4. the ITS Management tarnished his professional reputation by falsely accusing him of spreading damaging information about the Institute; he requested ITS to retract its accusations.

Findings

The complainant started his teaching career with the Education Division of the Ministry of Education as a teacher in Secondary Schools, but was seconded to ITS in September 2007 to assist in the work of the IT Co-ordinator at the Institute. His letter of secondment did not specify the conditions under which

he was being transferred. At the end of the 2010-2011 scholastic year, ITS informed the Ministry of Education that it no longer required the complainant's services since his IT related work did not justify his employment at the Institute. As a result, the complainant was transferred back to the Education Division to provide teaching duties in State Secondary Schools as from September 2011.

In 2010, ITS, together with several similar institutions in Italy, Portugal and Cyprus, was awarded three EU projects related to training in the hospitality industry. The complainant and five other ITS personnel agreed to participate in these projects, which involved frequent visits to the participating countries by the complainant and two other colleagues. In November 2011, the ITS Board of Governors terminated the complainant's participation in the projects on the grounds that, once he no longer worked at the Institute, he could not contribute to them constructively.

ITS also rejected the complainant's claims for overtime payments related to the EU projects. ITS Management pointed out that while he worked at the Institute, activities associated with the EU projects were considered as forming part of the participant's workload. In addition, ITS argued that it could not pay him for work he may have carried out on the projects after his transfer back to the Education Division since the Board of Governors had instructed him not to work on them any further.

In December 2011, the legal advisor to ITS wrote a 'warning letter' to the complainant accusing him of contributing to anonymous emails and a website by spreading false and malicious information on the ITS and its management team. The complainant's lawyer replied that his client denied outright the accusations, and demanded that ITS should either substantiate or retract them.

Considerations and Observations

Claim I: Termination of Complainant's Secondment

The complainant asserted that the ITS Board of Governors lacked the authority to decide on the cessation of his secondment to ITS, as well as on the termination of his participation in the EU projects. He argued that the Board's role was merely advisory, not executive.

Apart from the question of whether the Board's decisions concerning the complainant were justified or not, his claim on the Board's jurisdiction was not borne out by its terms of reference. These, among other functions, stipulate:

"The Board will approve the appointment of the Institute's professional cadre at a level that will ensure the achievement of the qualitative and quantitative objectives aimed for by the Institute.

The Board will oversee and appraise the effectiveness of the Institute's academic programmes through consideration of periodic reports submitted by the Director of Studies."[11]

In view of the above, the complainant's claim that the Board acted beyond its powers when it terminated his secondment to ITS and his participation in the EU projects could not be sustained.

Claim II: Termination of his participation in EU prjects

The complainant confirmed to the University Ombudsman that he was transferred to ITS with the full awareness that, as in the case of other seconded employees, the Education Division could recall him to provide teaching duties in its schools according to '*the exigencies of the service*', as in fact it did in September 2011. He claimed, however, that the recall was unjustified because his services were still required at the Institute. The ITS Executive Director, however, provided data to show that in order to increase his workload, the complainant took on lecturing duties, which during most semesters averaged 10 hours per week when the average should have been 19 hours per week. The Executive Director added that originally the complainant had not been transferred to ITS to lecture in any subject but to support the work of the IT Co-ordinator at the Institute. He added that in his view, the secondment, which took place before he took office, was neither required then, nor later.

In mid-2011, the Board of Governors decided to consolidate the staff compliment by replacing 'seconded' and part-time personnel by regularly appointed staff

11 Role of the Board of Governors of the Institute of Tourism Studies Malta; Section Functions of the Board, copy laid on the Table of the House of Representatives S263 18 October 2010.

and full-time lecturers.[12] To fulfil this aim, in February 2012, the Institute advertised a number of lecturing posts on a 'definite service contract' basis. The complainant applied for a number of these posts but was not appointed in any of them since the various Selection Boards found him to be either ineligible for the posts, or concluded that other candidates had stronger qualifications or more suitable attributes.

On the basis of the available evidence, the University Ombudsman was unable to sustain the complainant's claim that his secondment to ITS was terminated without justification. The University Ombudsman added that in the course of the investigation, the complainant informed him[13] that he no longer wished to return to ITS under the existing management team.

Claim III: Payment of overtime work associated with EU Projects

The complainant claimed that ITS owed him remuneration for a total of 404 hours in overtime work associated with the three EU Projects referred to earlier.[14] In reply, the ITS Management submitted detailed accounts with receipts signed by the complainant confirming that he had received payment covering all travel, accommodation and subsistence allowances for the trips related to the EU projects. The Executive Director explained that all participants in the EU projects had tacitly agreed that, once they received their full salary when abroad together with a generous subsistence allowance and full travel costs, they would not seek other payments. The ITS Finance Officer confirmed that none of those involved in the EU projects had ever sought or received extra payments in this regard. He pointed out that the complainant and another lecturer with a similar claim, had only sought overtime payments following the termination of their secondment at ITS. In addition, the EU Project Manager confirmed that all the officials concerned had joined the EU projects with the understanding that they would not be paid for overtime. He further stated that he could only confirm that the complainant had worked the claimed number of hours (and probably more) on the projects, but he was not in a position to affirm that the work was carried out outside regular working hours.

12 ITS Executive Director's written reactions dated 8 June 2012, to the complainant's claims.

13 Meeting at the University Ombudsman's Office on 10 October 2012.

14 Letter dated 14 August 2012 by the complainant to the University Ombudsman

The Executive Director and the Finance Officer added that as a matter of policy, extra payments by ITS were honoured only in instances when overtime work -

a) was requested, justified and approved beforehand; and
b) was carried out, itemised in detail, and endorsed by the supervising officer.

None of the established procedures was followed when the complainant had submitted his claims. [15]

Claim IV: Allegations of Unprofessional Conduct

On 7 December 2011, the ITS legal advisor, on behalf of the Institute, wrote to the complainant as follows:

"According to information currently in possession of the above mentioned Institute, you are deeply involved and responsible for the sending of emails which have been anonymously sent to various persons using the email address '[specified e-mail address]*'."*

The letter went on to state that the emails contained untrue, malicious and injurious information about ITS senior officials, and instructed the complainant to "*IMMEDIATELY desist from sending further similar emails"*. It also warned him that legal and libel action would be taken against him if he continued with the alleged activities. In a reply dated 20 December 2011, the complainant's lawyer rebutted all the allegations and demanded ITS to either prove these accusations or to withdraw them.

In the course of the investigation, ITS failed to provide tangible proof of the allegations that the complainant had spread information or rumours that harmed the Institution.

During a meeting held with the ITS legal representative in the presence of a Senior Investigation Officer, the University Ombudsman expressed his concern

15 Letter dated 4 January 2013 by the ITS Executive Director to the University Ombudsman and meeting held at ITS on 19 January 2013.

that the availability of the 'warning letter' in the complainant's personal file could prove detrimental to the complainant's future career prospects. It was therefore agreed that ITS and the Ministry of Education would verify and ensure that copies of the letter sent to the complainant and any references to it, were not contained in the latter's file at ITS and the Education Division and if so contained the letter or copies of it would be removed.

Conclusions

Ensuing from a careful examination of all the facts and considerations in this case, the University Ombudsman concluded as follows.

There was no doubt that on the basis of its terms of reference, the ITS Board of Governors had the power to engage or terminate the services of the Institute's employees. The Board of Governors concluded that the institution's academic and IT needs would be better served by personnel on 'definite service contracts' rather than by those on secondment. The Board decided that this applied to the complainant's case whose workload was so low that he had to boost it by activities other than those he had been originally seconded to carry out. When he formally applied for the advertised lecturing posts, the Selection Boards found other candidates to be more qualified and more suited for the posts. The University Ombudsman found no fault in the Board of Governors' actions especially as these -

a) were taken in the best interests of the Institute and its students;

b) did not infringe on the complainant's rights as a 'seconded' teacher to ITS; and

c) did not deny the complainant the opportunity to apply for the advertised 'definite service contracts' posts.

Similarly, the Board of Governors acted within its powers when it terminated the complainant's participation in the EU projects once he stopped working at ITS. It also acted with due diligence - the EU projects were intimately related

to services associated with teaching in the hospitality institutions, and the complainant no longer formed part of such an institution after September 2011. The conditions under which the complainant joined the EU projects team did not contemplate the payment for overtime. In fact, he never claimed extra remuneration until the termination of his secondment to ITS in September 2011, and any work on the projects he may have carried out after this date was not sanctioned by the ITS authorities. For the above reasons, the University Ombudsman could not sustain the complainant's claim for overtime remuneration.

The University Ombudsman stated that no institution had the right to accuse its current or former employees of unprofessional conduct without substantiating its accusations. ITS was administratively incorrect to accuse the complainant without producing any concrete proof of its allegations. In this regard, ITS acted incorrectly and the University Ombudsman upheld the complainant's lament.

Recommendation

The University Ombudsman urged that to remove possible future ill-effects of the 'warning letter' on the complainant's career, ITS and the Education Division should abide by their lawyer's commitment to remove all copies and any other material related to this letter from his file/s at the Institute, Ministry of Education and the Education Division.

Outcome

By a letter dated 26 February 2013, the ITS Executive Director informed the University Ombudsman that the letter in question was not and had never been inserted in complainant's personal files at the Institute, the Education Division and the Ministry of Education.

Case Note on Case No UM0033
Malta College of Arts, Science and Technology (MCAST)

Not shortlisted for a selection interview even if eligible for the post

(eligibility in a selection process – functions of the selection board)

The complaint

An aspiring lecturer lodged a complaint against Malta College of Arts, Science and Technology (MCAST) claiming that the College discriminated against her when the Selection Board unfairly failed to shortlist her for a selection interview related to a lecturing post in Information Technology (IT). She claimed that she possessed all the requirements for the post as advertised in the call for applications.

Findings

In May 2012, MCAST issued a call for applications for lecturing posts in IT with 11 June 2012 as the closing date. Applicants were required to:

- "*Be in possession of a first degree in IT; or*

- *Hold relevant qualifications at Level 5 according to the Malta Qualifications Council and have at least five years relevant and appropriate industrial or teaching experience.*

Preference will be given to candidates in possession of the PGCE or any other comparable teacher training qualification. Higher academic qualifications and / or relevant teaching experience and / or related industrial experience will also be considered an asset." [16]

16 Call for applications.

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

- Master of Arts (MA) in Information and Communications Technology (ICT) and Education obtained from a foreign University in 2008;
- Bachelor of Arts (BA) in Art History and Education obtained from another foreign University through open-learning in 2002;
- Several Microsoft and ECDL short-courses certificates in ICT;
- Work at a local public entity in ICT system support from 2003 to 2005;
- IT co-ordinator and teacher at a Church Junior School from 2005 to 2007;
- IT co-ordinator and teacher at a Church Senior School from 2007 to date; and
- Teacher's Warrant obtained in 2009.

The Selection Board for the post was composed of:

- the Director ICT Institute - MCAST, (Chairman)
- the Deputy Principal, and
- the Deputy Director ICT Institute.

The Board considered 63 applications and shortlisted 33 candidates for a selection interview. It did not include the complainant in the latter group on the grounds that she lacked the appropriate academic qualifications. The Board declared her "*ineligible in terms of the call for applications*".[17]

On request, the College Principal elaborated further on the complainant's qualifications and the type of IT qualifications MCAST required of the selected candidate. He wrote:

"*The Board was unanimous in stating very clearly that* [the complainant's] *degree is in how to use IT in Education, and not in IT proper. In this connection the Board also scrutinized in detail all the Masters modules. It resulted that her Masters is in Education and not in IT; in fact it is an MA and not an MSc. The basis of the Masters is using IT in education.*

17 Selection Board Report dated 3 August 2012, and data provided by MCAST's Human Resources Manager.

The lecturers MCAST requires in ICT need to be highly qualified in the technical areas, such as Web Design and Programming, Software Design, and Design and Engineering, Networking and Cloud Computing to mention a few. This criteria was used scrupulously for all applicants.

In the circumstances, [the complainant] *was not considered eligible for a lecturing post in Information Technology in accordance with the provisions of the call for applications*." [18]

The complainant contested the Selection Board's conclusion and lodged a complaint with the University Ombudsman.

Observations

The responsibility of evaluating and deciding on applicants' objective and subjective attributes rested primarily with the Selection Board, which was the appropriate body designated by the College regulations to carry out this task. Consequently, the University Ombudsman's remit was limited to an evaluation of the Board's decisions on the clearly objective aspects involved. In the case of lecturing posts, his remit allowed him only to evaluate and comment on clearly objective requirement criteria such as the qualifications and work experience of the applicants concerned. As University Ombudsman, he would not disturb decisions reached by Selection Boards unless he found erroneous evaluations of objective criteria, or manifest irregularities and discrepancies, or blatant discrimination. His responsibilities concentrated on ensuring that the selection process was fair, equitable, conducted according to set and approved procedures, and in a manner that was not improperly discriminatory.

The complainant based her claim that she was qualified for the advertised post on two counts. First, that her Master's Degree in ICT and Education was highly related to IT as requested in the call for applications, secondly, that her other studies and qualifications in ICT reached Level Five of the Malta National Qualifications Framework (MNQF) and therefore satisfied the alternative option for eligibility stated in the call for applications.

18 Letter dated 1 November 2012 from the Principal, MCAST to the University Ombudsman.

An objective evaluation of the complainant's qualifications showed that her Bachelor's degree in Art History and Education was unrelated to IT. In contrast, her Master's in ICT and Education showed that the first year programme covered the topics '*Learning with the Virtual Worlds'*, and '*Design and Evaluation of Web-based Learning Environments'*. Second-year subjects dealt with '*Critical Studies and Issues in ICT and Education'*, and '*E-Learning Principles and Priorities'*. Furthermore, the foreign University's School of Education literature on the **MA ICT and Education** programme*, inter alia* stated:

"*MA ICT and Education analyses the relationship between ICT and education, and examines how ICT can support learning across a range of educational settings.*

The programme analyses the theoretical, professional and practical applications of ICT, and critically evaluates research and development in ICT and education, enabling you to relate the design and evaluation of materials to a range of learning approaches and practices."

Regarding the technical aspects of IT, the course description adds:

"***Important note***

This programme is not an ICT skills training or programming course; we expect our students to have basic ICT competence before starting the programme." [19]

The above data elicited from the foreign University's website demonstrated that the complainant's Master's programme was related to IT and satisfied the first requirement in the call for applications demanding candidates to *"Be in possession of a first degree in IT".* In fact, her qualification was higher than a first degree.

The College Principal counter argued that the modules covered in the complainant's Master's programme did not deal with the 'highly technical' aspects of IT, and it was these aspects that MCAST expected its prospective lecturer to teach. The Principal supported the Selection Board's conclusion that

19 University of Leeds, School of Education website, 2012.

the complainant's studies concentrated on computer-led pedagogy and the potential of computer-based learning rather than on such aspects as computer programming, software development, engineering and mathematics, etc. He stressed that the complainant's Master's programme did not demand a first degree in the technical aspects of IT as a pre-requisite, which is considered as the norm for students proceeding to higher academic qualifications in the computer programing and design area. The course description quoted above, especially the *"Important Note"* extract, confirmed the Principle's points. It also confirmed that the complainant's degree was in IT even if it lacked the technical components required by MCAST.

It was a shortcoming in the call for applications for the post in question that it did not distinguish between the various aspects of computer studies. Once the College required a lecturer qualified in the technical aspects of IT, the call should have been more specific in identifying the 'contents' elements of the degree requirements. If the selected candidate was required to be a specialist in the technical aspects of IT, the call for applications should have said so. Precise and detailed information would have avoided ambiguities. Specific requirements would also have made it clear to those applicants who lacked technical qualifications in IT, that their qualifications were not suitable for the advertised post. The University Ombudsman emphasised that the call for applications implied contractual obligations on the agency issuing the call and on the applicants who responded to it. In this case, as stated earlier, it could not be said that the complainant was *'ineligible'* since she possessed a degree in ICT as the call specified.

Yet, there was another facet to this case to consider. Eligibility for the post did not automatically mean that the Selection Board could not distinguish between '*eligible*' and '*eligible but more suitable'* candidates, and shortlist for interview only the latter category. In this case, the Selection Board identified thirty-three candidates who possessed the required as well as the desired technical qualifications in IT. It was reasonable to conclude, that with such an abundant pool of candidates in possession of the desired technical qualifications, even if the Board considered the complainant eligible, it could have decided not to shortlist her for an interview. In these circumstances, the Board was not in breach of the regulations and the decision was based on acceptable grounds.

The complainant also claimed that she possessed the technical elements of IT required in the call for applications. She referred to her various Microsoft and ECDL qualifications, which she claimed reached Level Five of the Malta National Qualifications Framework as required in the call for applications. An evaluation of these qualifications by the Malta Commission for Further and Higher Education (NCFHE) did not confirm her claim. In reply to the University Ombudsman's queries, the Chief Executive wrote that with regards of the complainant's qualifications:

"*I confirm that, other than ECDL Core Certification and ECDL Expert Certification which are level rated at 3 and 4 respectively, all other qualifications are recognised but not level rated.*

The fact that they are not level rated, however, does not reduce the quality and the validity of the qualifications. In fact, none of the existing Microsoft qualifications are level rated at present. There is an on-going process to level rate the qualifications, but this is an international process and the NCFHE would have to abide by the level rating once this process is concluded." [20]

In the absence of clear evidence to this effect, the University Ombudsman was not in a position to support the complainant's claim that her qualifications in the technical aspects of IT reached Level Five of the Malta National Qualifications Framework. Furthermore, in view of the presence of the Director and Deputy Director of the ICT Institute (both IT specialists) on the Selection Board, the University Ombudsman had no basis to challenge the Board's decision that the complainant's technical competencies in IT did not reach the technical levels required for this post.

Conclusion

The complainant's academic qualifications and work experiences were related to IT as demanded by the call for applications. Therefore, contrary to what the Selection Board concluded, she was eligible for the post and in this respect the University Ombudsman upheld her claim.

20 Letter dated 24 December 2012 from the NCFHE's Chief Executive to the University Ombudsman.

However, her qualifications were exclusively devoted to the pedagogical aspects of computer-use and fell short of the competences expected of prospective lecturing recruits needed by MCAST. Even if it was not clearly stated in the call for applications, the selected lecturer was required to lecture in the technical aspects of IT, namely those associated with the design and the development of hardware and software for computer-use. Once the number of candidates was very high, the Selection Board decided on shortlisting, and in so doing identified thirty-three candidates with the right qualification and experiences to choose from. The Board had no obligation to shortlist candidates who were eligible but did not meet the College's lecturing needs. Consequently, the University Ombudsman did not uphold the complainant's claim that she was discriminated against when she was not shortlisted and not called for a selection interview. Moreover, the complainant was treated like all other applicants whose qualifications were related to computer studies but were found lacking in the technical aspect of the subject.

Recommendation

As stated earlier, calls for applications carry contractual obligations on the issuing agency as well as on the applicants for the posts. Consequently, it is important that the terms and the wording of calls should state clearly and unambiguously the requirements expected of the applicants, and the conditions under which they would be applying.

The University Ombudsman recommended that the MCAST authorities should review the wording of their calls for applications to ensure that future documents will contain precise details of the academic qualifications and/or work experiences required of candidates for advertised posts.

Outcome

The complainant and MCAST accepted the University Ombudsman's conclusions. The latter agreed to follow his recommendations and ensure that the requirements in calls for applications issued by the College will in future be specific, detailed and precise.

Case Notes from The Commissioner of Environment and Planning

Case Note on Case No EM0062
Malta Environment and Planning Authority (MEPA)

Complaint against permit for setting up and operating a circus

(setting up of a circus – temporary use of land – the holding of temporary activities)

The complaint

A letter dated 17 October 2012, accompanied by various documentation, was received at this Office from complainants, stating the following:

"We, the residents of Street A, Naxxar and the vicinity, feel that we have no option left but to refer to you, perhaps you can help us in our plight.

Just days ago, by chance, we have come to know that the Local Council have found no objection to allowing an [events organising company] to install a circus right in the middle of our residential area, in a field surrounded by dwellings of residents. This shocked us as we were not even informed, let alone asked for an opinion. We came to know of this just 5 days ago. This circus which will field about 90 animals, including crocodiles, tigers, pumas etc, will be there from the 8th November to the 9th December, not including installation required and also a pending extension because it will be close to the festive season. This is just weeks away, and that is why the matter is of utmost importance.

I will try to list the reasons for our complaints, as it seems that no authority is willing enough to help us. We have written to the Local Council, The Police Authorities, MEPA and the Health Authorities in the past days but we have had no formal reply yet thus making our situation more precarious.

1. *We feel that having all these animals there for such a long time will definitely endanger the health and sanitary conditions of the area, with us residents bearing the consequences. This apart from noise pollution, traffic etc. 90 animals there all relieving themselves in a field adjacent to our homes, is*

hardly the ideal situation, apart from smells, contamination of waters when rains come etc. Still it seems that no one is willing to help in this matter.

2. *According to a MEPA representative interviewed by THE TIMES (as seen on today's paper) MEPA feels that the site is not suitable for such an event, but cannot do anything because the Local Council have found no objection.*

3. *Believe it or not, from a discussion I held on the phone with a Health Department representative, they could not know how they come into the picture. He referred me to a higher 'Authority', who never contacted me.*

4. *The Local Council never even replied, not even an email of acknowledgement.*

5. *We also feel that the original location has been changed by the [organisers], after they received the go ahead from the Local Council. This was not in the original agreement, and surely one does not change location just by informing the Local Council, but by a new formal request, so that the new site could be inspected and examined. A resident talked to councilors, who were unsure where the site was, and they had to check with the Secretary of the council. This does not augur for good discussion in the council.*

6. *The new area was described as an adjacent piece of land, but it is definitely not adjacent as it [is] right behind dwellings on the opposite side of the road...*

Of course we can go on, but we feel frustration cause the Local Council does not seem interested to help relocate the circus, while other authorities seem to be waiting for the Council to take the first step.

We consider our health and safety threatened, and would like to take just one point from MEPA representative, the area is not suitable for such an event. Thus we are asking you to help us by first of all, in view of all the above, getting the Local Council especially and other authorities to review the situation and relocate the circus.

Included please find,

1. *Copy of minutes of meetings of the Council put online last Friday after we informed them that we knew nothing of the whole event. I believe that the first meeting was in August, so minutes were about 2 months late.*
2. *Copy of the article on today's Times, referring to the MEPA representative.*
3. *Copy of the promotion by [the organising company].*
4. *Petition by residents. This is only the initial copy. Till now there are almost three times as much signatures in other petitions going around.*
5. *Additional info related to the matter.*

I believe that you are the last resort with whom we can search for help. We thank you very much, and hope to hear your reaction soon."

The case was immediately taken up by this Office, in view of the fact that on 8 November 2012 the Circus was due to be placed on site for opening to the public.

The MEPA was contacted by e-mail on 22 October 2012 for further information. The MEPA responded by e-mail dated 23 October 2012 giving the background information of the case. Another e-mail was sent to the MEPA on 25 October 2012 requesting submission of its statement on the case. This e-mail was immediately acknowledged.

Another e-mail dated 25 October 2012, also accompanied by various documentation, was received from complainants highlighting the urgency of the case, and stating that although the site had been changed from the one to which they had originally objected to a different one a short distance away, their objections still stood.

The MEPA submitted its position by e-mail dated 26 October 2012.

Facts and findings

From the correspondence submitted by the complainants, it results that the Naxxar Local Council, during its meeting of 21 August 2012, approved a request

from an operator for the setting up of a Circus for the period between mid-November and the Christmas festive season, in the ex-Trade Fair car park. It appears that the location was later changed to a nearby field, which abuts onto the area in question.

The residents got to know about this event after the Council minutes were placed online around the middle of October.

On its part, the MEPA received an enquiry on 19 September 2012 from a Perit's office, requesting clarification on whether there was a need to apply for the temporary use of land for a Circus, on two sites, one at Għajnsielem, and the other at the Naxxar Trade Fair grounds.

Following the submission of site plans of the areas in question, the MEPA replied that with regards to the Naxxar site there were concerns "... *since the identified location was not part of the Naxxar Trade Fair Grounds (or its parking grounds), and the location was in fact just abutting residential buildings and an established villa area.*"

The Perit replied with a letter from the Naxxar Local Council dated 13 September 2012 which showed approval for the use of a private field next to the car park, as a site for the Circus. The MEPA replied once more on 16 October 2012 stating that the use was "... *not considered compatible and may cause nuisance to the surrounding residential area and thus runs counter to Structure Plan policy BEN 1, and in this regard the proposed temporary use of land cannot be considered as permitted development under the terms of LN 115/07 article 3(5).*"

Following a meeting the following day between the Perit and the MEPA DNO Manager, it was suggested to use Ta' Qali area, but it was explained that there were commitments already in place within the Naxxar area.

On 18 October 2012 a site plan of the Trade Fair parking area, showing the uses within the site, was submitted together with the endorsement of the Naxxar Local Council. The MEPA then issued a definite reply of no objection.

Analysis of the case

Before going into the merits of the complaint, I feel that a couple of preliminary observations are in order.

1. It appears that the Local Council's decision of 21 August 2012 to permit the setting up of the Circus was only put up for public attention in the beginning of October. This gave very little time to the residents concerned, as well as the general public, to voice their concerns.

Local Councils need to exercise greater sensivity in dealing with such requests for uses of land, where the use could potentially raise conflicts with the amenity or character of the location, or which could give rise to objections by the community.

This could be achieved by issuing a notice when such requests are to be discussed at the Local Council meeting. Alternatively, a grace period of one week could be given following notification, for representations to be made. It is important for communities to be given the opportunity to submit their views to the Local Council when changes, even of a temporary nature, are to be made to the use of land situated within their area.

2. The applicant, through his Perit, requested a clarification on the application from the MEPA on 17 September 2012, one month after the application to the Local Council was approved. Such a request for clarification should have been made before the permission was sought from the Local Council. The MEPA was then faced with a situation where approval by the Local Council had been obtained and commitments had been made.

It is therefore perhaps understandable that the MEPA tried to find a compromise solution, albeit reluctantly since it was not completely happy with the choice of site.

3. This chain of events has led to this investigation having to be conducted in an extremely short time-span. The MEPA's collaboration in replying to requests for information and submitting its statement of the case on time is therefore commendable.

The temporary use of land is covered by the Development Notification Order 2007 of the Planning Act (Chapter 356) (L.N. 115 of 2007). Class 10 (Temporary Uses) of the Legal Notice states that:

a. "Subject to the provisions of article 2 in this Class, the following development is permitted under this Class in all areas without any notification as established in subarticle 5(1), except where site lies ODZ, where the notification procedure as established in sub-articles 5(1) and 5(3) shall apply:

(i) The reversible use of land, as well as any temporary structures required for such use, for not more than thirty (30) days, provided that the land used is fully restored to its pristine condition and any structure removed before the expiry of such thirty-day period.

b. Notwithstanding the provisions of article 1 of this Class, the use of land is not permitted if such use is:

(i) for a caravan site; or
(ii) for camping; or
(iii) for off-road vehicle, motor car and motorcycle racing or rallying, or for practising for these events and activities.

c. Notwithstanding anything contained in the provisions of article 1 and 2 of this Class, the development described therein shall only be permitted if:

(i) any temporary structure required for such use would not impair visibility at a road junction or otherwise pose a threat to the safety of pedestrians or vehicular traffic;
(ii) such use does not entail direct or indirect damage to existing historical buildings or monuments, archaeological features including underground shelters, cisterns or water galleries, rubble walls and natural stone paving."

Article 3 (5) states that:

"*A development permission under this Order shall not apply if it runs counter to policies or plans or legislation or policy guidance approved according to the Act*

or the Environment Protection Act, applicable at the time of the notification; nor does it exempt from compliance to reinstate and restore anything done in contravention of such policies."

One must ask therefore, does the proposed use run counter to existing policy, plans, legislation or policy guidance? In a sense this reply was already given by the communication from the MEPA to the Perit by e-mail dated 16 October 2012 where it was stated that "…*the proposed site at Naxxar is not considered compatible and may cause nuisance to the surrounding residential area and thus runs counter to Structure Plan Policy BEN 1, and in this regard the proposed temporary use of land cannot be considered as permitted development under the terms of LN 115/07 article 3(5)*".

The MEPA's response reproduced here was with reference to the proposal to site the Circus in the private field. The site was subsequently changed to the ex-Trade Fair parking lot and nearby football pitch. It follows therefore that the question to be asked here is whether this site raises the same issues under policy BEN 1 as were identified for the previous site. In my opinion it does.

The site is accessed via a residential zone, and is surrounded on two sides by residential zoning. Furthermore, the site is not "… *committed with the commercial use as private parking facilities*" as stated in the communication between applicant's Perit and the MEPA since Policy NA01 of the Central Malta Local Plan currently designates the site for residential development.

The proposed use therefore runs counter to the current Local Plan zoning which in itself would have been a major reason for refusal had the application been made through the normal procedures. The temporary nature of the development should not give a *carte blanche* to bypass other provisions of the Structure Plan and subsidiary policies.

Although the Legal Notice contains adequate provision, it is being recommended that the text should include clearer provisos which would preclude the proposal from being permissible.

It is being suggested that article 3(6) could be amended to include another sub-article stating the issues which would make such activities objectionable under Policy BEN 1. This would serve as a clear indication which would at least oblige applicants to seek guidance from the MEPA at an early stage.

Conclusions

The complaint is sustained since the proposed activity is incompatible with the residential nature and amenity of the surrounding areas, and the designated zoning in the Local Plan. The MEPA should withdraw its 'no objection' to the use of the site for the setting up of the Circus.

It is being recommended that article 3(6) of the Development Notification Order 2007 of the Planning Act (Chapter 356) (L.N. 115 of 2007) should be amended by the addition of another sub-article citing the issues which would make such proposals objectionable under Policy BEN 1 of the Structure Plan.

This case illustrates the complex and often unwieldy situation with regards to the holding of 'temporary' activities. Whether by chance, by negligence or by the turning of a blind eye by one authority to the requirements at law set out by another one, a circus operator found himself caught in a ping-pong battle regarding his permit to operate. The issue was finally resolved by the MEPA in a rather embarrassing fashion. The circus was dismantled and re-erected a few metres away as there was nothing to prevent it from setting up once more in a 'temporary' manner once it had been dismantled and the activity stopped in terms of the temporary permit originally issued.

Own Initiative Investigation

Partly as a result of what has emerged from this investigation, an 'Own Initiative' investigation was taken up on the system of temporary permits for holding outdoor activities.

Case Notes from The Commissioner for Health

Case Note on Case No HM0021
Department for Health

Anomalies in medicine's entitlement protocols cause hardship to patients

(entitlement to free medicines – availability of medicines)

The complaint

A pensioner suffering from a permanent and progressive respiratory deficiency, complained with the Office of the Ombudsman that even though he was a pink form holder, issued to persons in a precarious financial situation, the Health Department, was not providing him the more expensive medicines.

The complainant argued that being on state pension, the extra expense to acquire the needed medicines caused him 'a serious financial problem'. The complainant asked the Office of the Ombudsman to intervene in this matter.

Facts and findings

When asked for the reaction, the Chief Medical Officer, of the Department for Health, told the Commissioner that although a patient may be in possession of a Schedule V and/or Schedule II (pink card) entitlement as per Social Security Act, free medicines entitlement was also affected by their availability in the Government Formulary List (GFL) and also by government protocols. The Health Department pointed out that certain medicines were not available in the GFL and therefore no free entitlement was available for these medicines. The Chief Medical Officer suggested that the patient may consult his medical doctor on possible alternative treatment available on the GFL.

After an exchange of correspondence between the Commissioner and the Department for Health, it resulted that the protocol does not permit that the required medicines be given to pink form holders. The Department explained that the medicines in question were not approved for the treatment of Chronic Respiratory Failure but are approved for Chronic Kidney Disease.

Considerations

The Commissioner argued that protocols should not be made to preclude entitled persons to be given what they were entitled to by right in terms of the Social Security Act. He explained that the complainant developed the condition as a result of the treatment that was prescribed to him for the Chronic Respiratory Failure. The medicines which he was requesting were listed on the GFL and were indicated for treating the result of side effects/complications for the treatment of the complainant's condition. Therefore, the Commissioner, insisted that refusing to allow the patient to avail himself of this treatment available on the GFL could be tantamount to denying a patient to the full treatment as was medically indicated for his condition.

The Commissioner continued by asking if it was legally correct to have rigid protocols which, in effect deny a patient from his right to have free medication for his specific condition because of possible side effects which could be overcome by additional medication which was not indicated for the original illness. This meant, the Commissioner continued, that side effects produced by medicines were being ignored for the simple reason that they do not fit into the protocol.

The Department for Health explained that protocols, which governed entitlement to free medicines were based upon medicines indications, established international guidelines, and affordability by the National Health Service. The Department noted that whenever possible alternative treatment available on the GFL was prescribed if the patient develops a side effect related to the treatment he was given.

Conclusions and recommendations

The Commissioner for Health, concluded that, Section 23(1) of the Social Security Act lays down three conditions namely:

1. Entitlement
2. Indication
3. Availability

He stated that once these conditions are satisfied, a patient cannot be denied free supply of medicines irrespective of whether it is Schedule V or Pink Form. The Commissioner observed that if this principle was not accepted, it would consequently discriminate against Pink Form patients.

In his conclusions the Commissioner, quoted a letter sent by the Department for Health, (on a different but similar case), which undertook the commitment to rectify anomalies in the way protocols are written. In the mentioned letter, the Chief Medical Officer stated that the department will "*instruct the Director of Pharmaceutical Affairs to ensure that in future, wording of protocols carefully reflects the scope of entitlement restrictions*".

In view of this and in terms of Section 22 of the Ombudsman Act, 1995, the Commissioner requested to be informed of what action was being taken in line with his recommendations.

The matter will continue to be followed.

Case Note on Case No CH5/P3
Department for Health

A revision of the medicine's procurement procedures recommended

(free medicines – inclusion of a disease in Schedule V – procurement of medicines included in Schedule V)

The complaint

The Times of 7 November 2012, quoted a study conducted by the Swedish based think-tank, Health Consumer Powerhouse, in which it was reported that "*Malta scores badly in EU hepatitis study*" and that Malta scored "*dismally when it came to outcomes and national strategy*". The report continued that "*it is evidently clear that hepatitis is not considered to be a priority to Malta*".

In February 2012, Hepatitis B and C, were included in the revised list of the Fifth Schedule of the Social Security Act and therefore patients were, by right, entitled to receive the medication free of charge. As per Legal Notice No 58 of 2009 Section 2(1) "*the primary objective of those regulations is the promotion of public health by ensuring the availability of adequate supplies of medical products at a reasonable cost in Government Health Services*".

Taking into consideration the mentioned study, the Commissioner for Health felt the need to investigate this situation further.

Facts and findings

The Commissioner wrote to the Chief Medical Officer (CMO) within the Health Department asking to be updated on the action taken to procure the medicines to treat Hepatitis B and C.

In reply to the Commissioner's letter, the CMO said that the Health Technological Assessments for the medicines in question had been performed. These

tests, the CMO continued, would be presented and appraised through the Government Formulary List Advisory Committee (GFLAC). The CMO explained, that the procurement of these medicines could only be initiated if and when the committee recommended the introduction of such treatment onto the Government Formulary list.

The Commissioner queried the procurement process being used which can, according to the CMO, only be initiated after the GFLAC's recommendations. He argued that once the Government decided to include a disease or condition in the Fifth Schedule of the Social Security Act, the GFLAC's clearance, should have been obtained before the issuance of the Legal Notice.

In reply to this query, the CMO explained that such action cannot be taken because Regulation 7(a) of the Second Schedule of Legal Notice No 5 of 2009 precluded such procedure.

Recommendations

Following the correspondence with the CMO, the Commissioner wrote to the Superintendent of Public Health recommending an amendment to the procedure in a way that the approval of the GFLAC was obtained before the Legal Notice was issued.

This would eliminate the risk that the GFLAC may decide not to recommend the inclusion of a drug in the Government Formulary List after that the Government would have committed itself through the issue of a Legal Notice.

In his reply the Superintendent of Public Health, explained that while the Legal Notice 58 of 2009, still refers to the Superintendent of Public Health, the responsibilities have been split between the CMO and himself. The Superintendent explained that the responsibility for entitlement issues and the inclusion of medicines into the government formulary fall within the portfolio of the CMO.

Although he was not directly responsible for the procedure, the Superintendent explained that the procedures for the inclusion of a disease condition in the

Fifth Schedule of the Social Security Act are distinct and separate from the introduction of a new medicine into the Government Formulary. The latter, he explained, involved the approval of a particular medicine used for the treatment of one or more conditions and therefore made it available for patients to use at no cost. A particular disease was usually amenable to treatment by more than one medicine but the inclusion of such disease in the fifth schedule did in no way imply that all medicines available for the treatment for that particular disease would or should be available free of charge for the patient. Therefore in his opinion, the process should continue to proceed in a distinct way from each other.

To substantiate his argument, the Superintendent quoted Regulation 7(a) of the Second Schedule of LN 58/2008 which states *"Entitlement to free medicines shall be as specific in the Social Security Act, Cap. 318, Article 23 and the Fifth Schedule Part II to the same Act regarding Disease and Conditions in respect of which Free Medical Aid may be accorded, as well as medicinal products required for the provision of care within Government Institutions. A medicinal product or a category of medicinal products to treat conditions which fall outside the scope of the Government Health Services may be entirely excluded from the Government Formulary List."*

The interpretation of the quoted regulation given by the Superintendent, was that the inclusion of a medicine in the Government Formulary was not dependent of Schedule V of the Social Security Act. It was the entitlement of an individual to have it free of charge. He continued that the regulation itself stated the need for use of a medical product in the provision of care within Government Institutions was also one of the criteria to be considered by the GFLAC. The Superintendent explained that there were many medicines in the formulary which were used in hospital for the treatment of conditions which were not on Schedule V and if the patient was discharged on such treatment then the patient had to buy such medication.

The Superintendent concluded that the recommendation made by the Commissioner, could only be considered in situations when there was a particular condition which was only treatable by the one and only medicinal product on the market.

From the issuance of the Legal Notice amending the Social Security Act to include treatment for Hepatitis B and C in the revised list of the Fifth Schedule of the Social Security Act, a year had passed, and no action for procurement had been initiated. In this regard, the Commissioner for Health wrote to the CEO of the Central Procurement and Supplies Unit, requesting whether the procurement process has been initiated.

In his reply, the CEO, Central Procurement and Supplies Unit, confirmed that the medicines were not in stock and the procurement process would be only initiated when funds became available.

Conclusions

Following continuous correspondence with the Health Superintendent, the CMO and the CEO of the Central Procurement and Supplies Unit, the Commissioner communicated his conclusions to the CMO. In his conclusions, the Commissioner explained that following consultations with the Parliamentary Ombudsman and the Administrative Consultant to the Ombudsman, all agreed that Legal Notice 58/2008, Schedule II, Regulation 7(a), does not, in any way, impede the Department from taking action to obtain the necessary approvals before a Legal Notice was published to announce the inclusion of a certain disease/condition in Part II of Schedule V of the Social Security Act.

The Public would be more than justified to expect to start receiving the required medicines once the legal notice was published. The Commissioner stated that from a legal point of view, a Legal Notice is binding with effect from the date when it was published and the Department for Health was legally bound to strictly adhere to the contents of the Legal Notice.

Taking this case as an example, the Commissioner proved deficiencies in the system, considering that the Legal Notice to include Hepatitis B and C in Part II of Schedule V was issued in March 2012, and more than a year later the Notice for Tender for the procurement of the medicines required had not been issued. Therefore, the Commissioner recommended that once the decision to include a disease or condition in Schedule V is taken by the Department for Health, and

if the medicines for that particular condition were not already included in the formulary, the necessary approvals were to be sought before the Legal Notice announcing the inclusion of the condition or disease was issued.

The Commissioner explained that if his recommendation is adopted, the Department would be able to take immediate steps for procurement of the medicinal required for the newly added disease.

Outcome

The Commissioner, communicated his recommendations to the CMO, and followed up the issue with the Central Procurement and Supplies Unit, but the medicines needed to treat Hepatitis B and C were not yet available.

In view of this, the Commissioner communicated his recommendation to the Permanent Secretary in the Ministry for Health. The Commissioner stated that after over ten months had passed since the issuance of the Legal Notice, no action had been taken by the Department for Health to procure the required medicines presumably because of financial constraints. This, the Commissioner, concluded was against the law, and the problem had to be addressed without further delay.

The matter will continue to be followed.

Case Note on Case No HM0037
Department for Health and the University of Malta

Employment ambiguity rectified
(employment)

The complaint

A labourer who, for the last 20 years, was receiving his salary partly from the Department for Health and partly from the University of Malta, complained with the Office of the Ombudsman, that he does not really know who his employer was.

He reports for work at the University of Malta and performed cleaning duties at the Faculty of Health Sciences. Although he worked 40 hours a week, his work was not considered as full time and his employment contract was extended on a month by month basis.

The complainant, applied unsuccessfully for several posts to regularise his position, with the last attempt was for the post of messenger at the University of Malta. The complainant asked this Office to investigate his case and help him to regularise his employment situation.

Facts and findings

Since the complainant received his salary from two different entities, the Commissioner asked for the employment information from both entities. The Director for Human Resources at the University of Malta stated that, the complainant was never employed by the University of Malta.

Following some enquiries, with the Department for Health, it transpired that the complainant had been listed on the Department for Health's records as a Health Attendant Trainee for more than 20 years. Although he reported to work at a faculty which falls under University of Malta, his salary was

always paid by the Department for Health on confirmation of his attendance by the relevant authorities. From these enquiries it resulted that during the same period, he was carrying out cleaning duties with the Faculty of Health Sciences. In his correspondence, the Director of Human Resources Management and Development at the University of Malta confirmed that the complainant was receiving from the University, a 'top up' allowance on humanitarian grounds.

The Director for Human Resources & Administration at the Ministry for Health, the Elderly and Community Care, confirmed that the complainant was employed with the ministry.

From further investigations, it transpired that the complainant was the only Health Assistant Trainee left and for the past years he had been given duties in connection with laboratory and class room practice, both at the Pharmacy Department at the University of Malta and at the Institute of Health Care.

A memo dated 15 November 2005, signed by the Assistant Executive Director at the Institute of Health Care, described the complainant as a person "*that can be trusted to give a full day's work performed to the best of his abilities*." His commitment to work was described as "*cares deeply for his work and is constantly on the job without the need of much supervision*". The Assistant Executive Director said that at the Institute of Health Care, he was regarded as one of their best-loved workers because of his performance and good relations with the staff. He also remarked that the complainant, suffered from a slight tremor condition which does not interfere with his work, but which made it difficult for him to find an alternative employment should his services be terminated. Taking all this into consideration, he recommended that in order to regularise the complainant's position, he should be engaged as Laboratory Operator**.**

Conclusions and recommendations

In a letter sent to the Rector of the University of Malta, the Commissioner for Health explained the situation of the complainant quoting the memo extracted from his personal file.

The Commissioner argued that since the employee concerned, worked full time at University, he was of the opinion that the University should appoint him as a full time employee.

It was also suggested that since the complainant suffers from a slight tremor as stated in his personal file, the Disabled Persons Employment Act would facilitate his request.

In his reply, the University Rector, informed the Commissioner that the University Staff Affairs Committee will review the case.

Outcome

Following the requests and the lengthy representations by this Office, the University Council on the recommendations of the University Staff Affairs Committee agreed that the complainant becomes a full time University employee.

The University Council, appointed the complainant, as a full time Labourer until the retirement age, benefitting from an increased salary and conditions, and above all, employment stability.

Case Note on Case No HM0034
Mater Dei Hospital

Compensation for a disability caused after being admitted to hospital for surgery

(compensation – disability)

The complaint

A patient who underwent surgery because of an incarcerated parastomal hernia, stated that he sustained a disability following the surgery. The surgery had no relation to the disability sustained. After a series of medical examinations, a Consultant Neurologist at Mater Dei Hospital concluded that the patient sustained from a 50% disability, which definitely he was not suffering from on admission.

The complainant, through his legal advisor, stated that since he became a disabled and dependent person, and went through various expenses was requesting a compensation. His request was declined. The complainant asked the Office of the Ombudsman to investigate the case.

Facts and findings

In April 2010, the complainant was admitted to Mater Dei Hospital suffering from an incarcerated parastomal hernia. The following day he was operated and his condition was stable. Following the surgical intervention he was transferred to the Intensive Care Unit (ITU). Following a 'stormy post-operative' recovery he was transferred to his ward.

Whilst recovering, his wife noticed that he was suffering from a weakness in his left upper limb. This was reported to the duty neurologist who diagnosed the patient with a possible cerebral infarction which caused a profound weakness of the whole left upper limb. The patient was discharged from hospital in May 2010.

In July 2010, the patient was examined by a Consultant Neurologist, and was diagnosed with a left post ganglionic brachial plexus lesion.

The complainant underwent various neurological tests in the following months and little improvement was noticed. In November 2011, whilst under examination, it was noticed that the patient had Grade 4 weakness of the left triceps, a complete wrist and finger drop and all the intrinsic muscles of the left hand.

The Neurologist Consultant declared that the lesion he was suffering from, was not related to the initial surgical problem, but it may have occurred, either sometime during the surgical intervention, or whilst the patient was under intensive care or whilst he was being transferred to the Intensive Care Unit. He also declared that by analogy, although there wasn't a specific figure for a complete lesion of the lower trunds of the brachial plexus, the patient had a 50% permanent disability.

Conclusions and recommendations

The Commissioner for Health, accepted to investigate the case and after communicating the complaint with the Department for Health, the Commissioner was informed that the Chief Medical Officer was collecting the information about the case, in order to enter into settlement with the patient.

Outcome

The Department for Health, without admitting to any liability whatsoever for the damages alleged by the patient, accepted to compensate the patient. After negotiating the initial offer, the patient accepted the compensation offered.

INFORMATION

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