Report on Case No CEDUC-24-4468

The complaint

1. The complaint was filed by the Union of Professional Educators (UPE). The UPE represents a number of educators in the public and private education sectors but is not recognised as the majority trade union for purposes of collective bargaining (that recognition is held by another union). The complaint was filed with the Ombudsman's Office on 23rd February 2024.

2. The complainant union, in its own name and on behalf of its members employed as Learning Support Educators in state schools, alleges that members opting to follow UPE directives had been asked by some heads of school (notably those of San Ġwann, Ħad-Dingli, Ħal Għaxaq, and Żejtun A primary schools) to produce written documentation from the complainant union that they were really members of the complainant union in order to be "allowed" to follow one or other particular directive. The complainant union further alleges that in one of the abovementioned schools the situation "degenerated" into a form of harassment of some of its members during a staff meeting, and further, that members of other unions employed with the public sector as educators are never asked, when obeying a union directive, to disclose their trade union affiliation or to produce any documentary evidence of such affiliation. In sum, the complainant union claims that the instructions given by the Directorate of Educational Services to Heads of School to insist on proof of union (UPE) membership was discriminatory and in violation of the freedom of trade union association.

3. Notice of the complaint was served upon the Permanent Secretary at the Ministry responsible for Education only on 10th April 2024. As was explained in that communication, the delay was due to the need to ascertain that the substance of the complaint as submitted to this Office was not the subject of any case pending before any court or tribunal (Art. 13(5) of the Ombudsman Act).

The investigation and the findings

4. As indicated above, the UPE has issued a number of directives to its members who are LSEs. The undersigned Commissioner wants to make it pellucidly clear from the start that this Office takes a dim view of union directives – by any union – which, while ostensibly intended to promote, secure and improve the working conditions of its members, end up by causing disproportion harm particularly to the most vulnerable in society. If such a directive or directives is or are unlawful, then the authorities have the means at law to hold the union in question accountable. But unless such directive or directives is or are held to be illegal by the competent courts, then they must be regarded as legal by all concerned, including the "employer". In the instant case, the Education Authorities did attempt to obtain a warrant of prohibitory injunction against the complainant union, but the request was rejected by the First Hall of the Civil Court (Mizzi, J) on the 11th March 2024, and the matter was not pursued further in the courts.

5. From all the evidence – witness statements and documents – received, it does, indeed, result that in one particular school (which will remain unnamed to protect the identity of all concerned) there was, during a staff meeting, a heated exchange between the Head of School and one particular UPE member, and words were uttered which can be interpreted as snide remarks. However, this

incident was blown out of all proportion by the complainant union. Nothing that happened or that was said by the Head of School in this short exchange can be considered as reaching the threshold required to trigger Article 22(1)(b) of the Ombudsman Act. Of course, it is unwise for a Head of School to lose his cool, but that fact by and of itself, and even in the specific context of the incident in question, did not amount to any harassment or to an act of maladministration. This leg of the complaint will not be pursued further.

6. There remains, however, the issue of the production of what the Education Authorities are calling "a personalised union directive". From the evidence received it transpires that when a member of UPE decides to follow a directive issued by this Union, he or she is requested by the Head of School to produce from the said Union a note or letter stating that he or she is a member of UPE and is following its directive. From the evidence received, no such "personalised union directive" was ever requested when any teacher – whether a member of the MUT or of some other union, or indeed not affiliated to any union – follows a directive issued by the MUT.

7. The Education Authorities seem to be basing their stand on what they perceive to be "collective directives", a term which is nowhere to be found in the Employment and Industrial Relations Act (Cap. 452). That law speaks of "collective agreement", "collective bargaining" and even "collective redundancy", but nowhere is there any reference to "collective directives". Indeed, it is slightly embarrassing for this Office to read, in the Permanent Secretary's letter of 2nd May 2024 addressed to the undersigned, that:

> "*It is established practice in industrial relations that collective directives are issued only by the union which enjoys bargaining recognition. Other unions can issue directives but on individual issues and not on collective issues.*"

One, of course, struggles to find the rationale of this in the law. Indeed the practice has been heretofore the contrary: even a minority union can issue directives to its members and these can be followed also by employees who are not members of that minority union – this is implicit in the use of the expressions "a person" and "one or more persons" (and therefore without reference to membership) in Articles 64 and 65 of Cap. 452. The Education Authorities are further relying on Regulation 5 of the Recognition of Trade Unions Regulation 2016 (S.L. 452.112). Even here, the expression "collective directives" is conspicuous by its absence. Regulation 5 is simply intended to protect the recognised union (or, as explained in the second proviso to Regulation 2(1), the joint recognised unions) from attempts by another union or unions to bargain collectively. No more and no less.

8. The stance taken by the Education Authorities in requiring the so called "personalised union directive" from the UPE is – apart from issues of privacy and GDPR – *prima facie* in breach of the law (Art. 22(1)(a) of Cap. 385); moreover it is, both as regards the complainant union and as regards its members, unreasonable and unjust in that it has a chilling effect on free and unhindered union membership as recognised by Article 11 of the European Convention on Human Rights.

Conclusion and recommendation

9. In view of all the above, the complaint is upheld only to the extent that the requirement of producing a "personalised union directive" when a member of the complainant union follows any of the union's directives is in breach of Article 22 (1) (2) of Cap. 385.

10. The undersigned, therefore, recommends that the Education Authorities stop and desist forthwith from insisting on the so-called "personalised union directive" (directive/circular DG DES 14/2024).

Vincent A De Gaetano
Commissioner for Education

4 October 2024