

[REDACTED]

vs

[REDACTED]  
[REDACTED]  
[REDACTED]

**COMPLAINT**

1. On the 25<sup>th</sup> September 2023, [REDACTED] (the “**complainant**”) lodged a complaint with the Information and Data Protection Commissioner (the “**Commissioner**”) in terms of article 77(1) of the General Data Protection Regulation<sup>1</sup> (the “**Regulation**”), alleging that the [REDACTED] within the [REDACTED] [REDACTED] (the “**controller**”) “*processed his personal data and sensitive data without having a lawful basis, unpredictably and without the required transparency. Additionally the data was processed for a different purpose than the purpose the data was collected for causing grave prejudice to my client [the complainant]*”.
2. The complainant further submitted the following information:
  - a. that the complainant was an employee of the [REDACTED] [REDACTED] until the 3<sup>rd</sup> July 2023 and also a part-time employee of the controller until the 2<sup>nd</sup> July 2023;
  - b. that the complainant was dismissed from employment by [REDACTED] as a result of the unlawful processing being alleged, and this was supported, by the provision of an email dated the 4<sup>th</sup> July 2023, wherein the [REDACTED] informed the complainant that: “*You worked as Exams invigilator with the [REDACTED] during office*”

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<sup>1</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

hours when you are fully employed with [REDACTED]. The [REDACTED] have supplied a report to confirm all the days and worked hours when you attended to the above mentioned "part time" job without any authorisation and during sick leave"<sup>2</sup>;

- c. that the controller went as far as covertly supplying [REDACTED] with a report containing information about the attendance details of the complainant without having a lawful basis and in blatant breach of the data protection legislation;
- d. that the complainant was terminated from his part time duties by the controller as a result of the unlawful processing being alleged, namely, that the controller was covertly made aware by [REDACTED] of the fact that the complainant was on sick leave from [REDACTED], whilst he was carrying out his duties of invigilator with the [REDACTED] and
- e. that once again, the information which was processed by the controller was collected by the latter for a purpose completely distinct from the purpose it was collected.

## INVESTIGATION

3. On the 10<sup>th</sup> October 2023, pursuant to this Office's internal investigation procedure, the Commissioner requested the controller to provide its submissions on this complaint, and to provide any other information it considered relevant and necessary to submit in relation to the allegations made by the complainant.
4. On the 19<sup>th</sup> October 2023, the controller provided its submissions, together with the following principal arguments, for the Commissioner to consider in the legal analysis of the present case<sup>4</sup>:
  - a. that the complainant was employed by [REDACTED] on a full-time basis as an [REDACTED] [REDACTED] and during the [REDACTED], he worked as an 'Examination Invigilator' on a part-time basis with the [REDACTED]
  - b. that during the complainant's initial interview with [REDACTED] the complainant informed [REDACTED] that he would occasionally need to request permission to work as an invigilator during office

<sup>2</sup> A copy of the email dated the 4<sup>th</sup> July 2023 was submitted together with the complaint.

<sup>3</sup> A copy of the email dated the 5<sup>th</sup> June 2023 sent by the [REDACTED] was submitted together with the complaint.

<sup>4</sup> The controller declared that the submissions were being also made in conjunction with [REDACTED]. The Commissioner emphasised that, for the purpose of this decision, only the manner in which the controller processed the complainant's personal data will be considered. The analysis and determination regarding how [REDACTED] processed the complainant's personal data will be addressed separately in a distinct legally-binding decision.

hours with the [REDACTED] and given that this would have required the complainant to book vacation leave, [REDACTED] had confirmed to the complainant that such requests would be considered on a case-by-case basis;

- c. that while the complainant reported to [REDACTED] that he was on sick leave (which leave was backed by medical sick leave certificates), [REDACTED] received reliable information that the complainant was working as an exam invigilator;
- d. that the complainant had never informed [REDACTED] that he was going to work during his sick leave period, and, or never obtained due permission, and consequently [REDACTED] proceeded to verify this allegation before taking further action;
- e. that, on the 1<sup>st</sup> June 2023, [REDACTED] contacted the [REDACTED] to inform them that the complainant had reported sick and that he was allegedly working as an exam invigilator, and thus being remunerated by the [REDACTED] and accordingly, [REDACTED] requested details from the [REDACTED] to verify this allegation;
- f. that the controller had a valid lawful basis for the processing of the personal data pertaining to the complainant in terms of article 6(1)(b) of the Regulation, which states that the *“processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract”*;
- g. that, in line with data minimisation principle<sup>5</sup>, [REDACTED] provided the controller with the date(s) during which the complainant was covered by the sick leave so that the information provided by the controller to [REDACTED] would be restricted to what is necessary;
- h. that subsequently, [REDACTED] provided the controller with the following information:
  - the sick leave start date, which was the 3<sup>rd</sup> of April 2023;
  - that the sick leave was ongoing; and
  - that the sick leave entitlement ended on the 28<sup>th</sup> of June 2023; and
- i. that the controller provided [REDACTED] with a list of shifts (i.e., date and time from – time to), but no further shift details (e.g., location) were provided in terms of the principle of data minimisation.

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<sup>5</sup> Article 5(1)(c) of the Regulation provides that personal data shall be *“adequate, relevant and limited to what is necessary in relation to the purpose for which they are processed”*.

5. As part of this Office's investigation procedure, the Commissioner provided the complainant with the opportunity to rebut the controller's submissions, and by means of an email dated the 10<sup>th</sup> of November 2023, the complainant submitted the following salient arguments:
- a. that as confirmed by the psychiatrist's report, the complainant was on sick leave due to work-related post-traumatic stress disorder and severe anxiety for reasons beyond his control, and that, as part of his recovery treatment, the psychiatrist had recommended that he takes up part-time work and pursue a hobby;
  - b. that [REDACTED] should have clearly addressed any concerns by asking a self-appointed medical adviser to visit the complainant, who in turn would have assessed the certificate issued before making any recommendations, and without disclosing unnecessary personal data;
  - c. that the complainant did not need to apply for leave during the period in question, as he was already on sick leave, so he did not perform any work during the period in which he had to report for work. On the contrary, the medical psychiatrist advised him not to report to work at [REDACTED] and recommended that he takes up part-time employment elsewhere and, or pursues a hobby. Neither activity required further prior authorisation from [REDACTED] which in turn could only have restricted such part-time work if there was an objective reason relating to issues such as health and safety, protection of commercial confidentiality, or conflicts of interest;
  - d. that [REDACTED] had no legal basis for the covert processing of the complainant's personal data when it informed the controller that the complainant was on sick leave, and it was also unjustified when it requested the controller to obtain personal data concerning the complainant himself;
  - e. that there is no express or implied provision in the complainant's employment contracts that gives the employer, as the controller, *carte blanche* to disclose personal data to a third-party controller and vice-versa;
  - f. that these actions performed by the controller without the employee's knowledge constitute excessive monitoring of the complainant. Furthermore, the [REDACTED] and [REDACTED] are considered different and completely independent controllers, with no contractual obligations between them, hence it cannot be argued, by any stretch of the imagination, that such actions can be justified on the legal basis of processing necessary for the

performance of a contract. In this regard, and considering the specific facts of the case, such actions cannot be justified under article 6 of the Regulation; and

g. that any legal basis relied on by a controller must be clear and precise and its application must be foreseeable for the data subjects, in accordance with the case law of the Court of Justice of the European Union and the European Court of Human Rights.

6. On the 4<sup>th</sup> of December 2023, the controller provided its final submissions concerning this complaint and submitted the following salient arguments:

- a. that as an employer, both the [REDACTED] and [REDACTED] had a legitimate interest in verifying whether the complainant was adhering to its policies, particularly if there were reasonable grounds to suspect abuse or dishonesty;
- b. that the information it received was treated as strictly confidential by the controller and was not used for any purpose other than to verify compliance with the complainant's contractual obligations;
- c. that there is nothing covert about obtaining information for the legitimate financial and general efficiency interests of either employer. In an employment context, the request for data based on legitimate interests and legal obligations is entirely legitimate. This is even more so when such minimised data is crucial for the employers to form an informed and factual opinion on the matter at hand to take the appropriate steps concerning their contractual obligations;
- d. that article 6(1)(b) of the Regulation states that the processing shall be lawful if *“processing is necessary for the performance of a contract to which the data subject is party”*;
- e. that it is indeed the complainant who, although he considered it appropriate to inform [REDACTED] that he would be working with the controller for fear of conflicting shift times, then failed to inform [REDACTED] that he would be carrying out the same activity, which should only be allowed on a case-by-case basis due to conflicts; and

- f. that the complainant should be aware that secretly holding two jobs with conflicting hours, especially when such a conflict is notified to the employer before employment and is to be settled by the employer after proper notification, could only lead to the present result.
7. The Commissioner referred to the submissions provided by the controller, wherein it submitted that the processing activity is based on article 6(1)(b) of the Regulation in accordance with the complainant's employment contract, and on article 6(1)(f) thereof as "*both [REDACTED] and [REDACTED] had a legitimate interest in verifying whether an employee is adhering to their policies, especially if there is substantial suspicion of there being abuse or dishonesty*". For this reason, in terms of article 58(1)(e) of the Regulation, the controller was requested to provide the Commissioner with a true copy of the complainant's employment contract highlighting the relevant parts which authorise the controller to process the data of the complainant.
8. On the 12<sup>th</sup> of February 2024 the controller held that the controller "*did not issue a formal contract agreement document for [REDACTED] who was employed on a part time casual basis*". Additionally, the controller provided the Commissioner with the letter concerning his investigation duties.

## LEGAL ANALYSIS AND DECISION

9. As a preliminary step of the investigation, the Commissioner proceeded to examine the subject-matter of the complaint. The complainant alleged that the controller disclosed his personal data to [REDACTED] after the controller received a request for information from [REDACTED]. [REDACTED] requested this information to verify whether the complainant was performing part-time employment duties as an invigilator while simultaneously reporting sick for his full-time employment.
10. During the course of the investigation, the Commissioner examined the submissions of the controller, particularly, the annex to the first set of submissions, which included the emails exchanged between the controller and [REDACTED] on the 1<sup>st</sup> June 2023 and the 2<sup>nd</sup> June 2023. From this exchange of correspondence, the Commissioner could note that the controller disclosed to a separate controller information in relation to the dates and times as to when the complainant was performing his part-time employment duties with the [REDACTED], which data were subsequently processed by [REDACTED].

The Commissioner noted that the data which the controller disclosed to a separate controller relates to the days and times when the complainant reported to work<sup>6</sup>, and, therefore this is considered to be ‘personal data’ within the meaning of article 4(1) of the Regulation.

11. Pursuant to article 8 of the Charter of Fundamental Rights of the European Union, personal data must be processed fairly for specified purposes and on the basis of a legitimate basis laid down by law. In this regard, article 6(1) of the Regulation specifies that processing shall be lawful only on the basis of at least one of the six specified conditions set out in article 6(1)(a) to (f).
12. Without entering into merits of any employment termination issues, for the purpose of the investigation of this complaint, the Commissioner proceeded to examine whether the controller had a valid lawful basis to process the personal data of the complainant in terms of article 6(1) of the Regulation.
13. In its submissions, the controller submitted that the personal data of the complainant are processed on the basis of the employment contract entered into between the controller and the complainant, and also for the purpose of pursuing the legitimate interest of a third party. Pursuant to ‘Opinion 2/2017 on Data Processing at Work’, the Article 29 Working Party states that within the context of an employer-employee relationship, “*performance of a contract and legitimate interests can sometimes be invoked, provided the processing is strictly necessary for a legitimate purpose and complies with the principles of proportionality and subsidiarity*”. Therefore, the Commissioner sought to examine the provisions cited by the controller, namely, article 6(1)(b) and article 6(1)(f) of the Regulation, as the bases of its processing activity.

#### Article 6(1)(b) of the Regulation

14. Article 6(1)(b) of the Regulation is one of the grounds that enables the controller to process personal data if it “*is necessary for the performance of a contract to which the data subject is party*”. The European Data Protection Board (the “EDPB”) in its ‘Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects’ further defines the scope of article 6(1)(b) of the GDPR:

*“A controller can rely on the first option of article 6(1)(b) to process personal data when it can, in line with its accountability obligations under*

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<sup>6</sup> A copy of the email dated the 2<sup>nd</sup> June 2023 sent by the [REDACTED] was submitted together with the complaint.

*Article 5(2), establish both that the processing takes place in the context of a valid contract with the data subject and that processing is necessary in order that the particular contract with the data subject can be performed. Where controllers cannot demonstrate that (a) a contract exists, (b) the contract is valid pursuant to applicable national contract laws, and (c) that the processing is objectively necessary for the performance of the contract, the controller should consider another legal basis for processing”.*

15. In such case, the controller submitted that the “[REDACTED] did not issue a formal contract agreement document for [REDACTED]”. Therefore, it is unclear as to why the controller chose to rely on this legal basis when there is no formal contract between the parties that enables the disclosure of the complainant’s personal data to a third party. For this reason, the controller failed to effectively demonstrate that the “*processing is necessary for the performance of a contract to which the data subject is party*”.

#### Article 6(1)(f) of the Regulation

16. The Commissioner proceeded to assess article 6(1)(f) of the Regulation, which provides that the processing is lawful if “*is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject*”.
17. Given that the processing activity subject to this complaint was not instigated by the controller but by the third party, namely [REDACTED] when it sent a communication to the controller specifically requesting, for its own purposes, personal data about the complainant, the Commissioner will analyse the disclosure, by means of the response, in the light of the legitimate interest pursued by [REDACTED], *qua* the third party.
18. Consequently, the Commissioner assessed whether the disclosure of the complainant’s personal to [REDACTED] was indeed necessary for the purposes of the legitimate interest pursued by [REDACTED] as a third party. However, in a separate decision<sup>7</sup> concerning the same subject-matter, the Commissioner decided that [REDACTED] infringed article 6(1) and article 9 of the Regulation when it disclosed to the controller information in relation to the sick leave of the complainant, and when it subsequently processed the information obtained from the controller in relation to the dates and times as to when the complainant was performing his part-time employment duties.

<sup>7</sup> CDP/COMP/866/2023 [REDACTED] vs [REDACTED]

19. Given that the Commissioner established that [REDACTED] failed to demonstrate the necessity of processing the complainant's personal data, specifically, the request submitted to the controller and the information contained therein, for its legitimate interest, the Commissioner concludes that the disclosure of the complainant's personal data was not necessary for the legitimate interests pursued by a third party, namely [REDACTED]. In light of the fact that [REDACTED] itself could not demonstrate that processing the complainant's personal data was necessary for its legitimate interest, it logically follows that the controller could not legitimise its processing based on the legitimate interest pursued by [REDACTED] as a third party.

**On the basis of the foregoing considerations, the Commissioner is hereby deciding that the controller did not process the personal data of the complainant in a lawful manner, and therefore, the controller infringed article 6(1) of the Regulation when it disclosed information to a separate controller in relation to the dates and times as to when the complainant was performing his part-time employment duties.**

**In terms of article 58(2)(b) of the Regulation, the controller is hereby served with a reprimand and warned that in the event of another infringement of the same nature, the Commissioner will take the appropriate corrective action.**

Ian  
DEGUARA  
(Signature)

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by Ian DEGUARA  
(Signature)  
Date: 2024.07.22  
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**Ian Deguara  
Information and Data Protection Commissioner**

**Right of Appeal**

In terms of article 26(1) of the Data Protection Act (Cap 586 of the Laws of Malta), *“any person to whom a legally binding decision of the Commissioner is addressed, shall have the right to appeal in writing to the Tribunal within twenty days from the service of the said decision as provided in article 23”*.

An appeal to the Information and Data Protection Appeals Tribunal shall be made in writing and addressed to:

The Secretary  
Information and Data Protection Appeals Tribunal  
158, Merchants Street  
Valletta.