

[REDACTED]

VS

[REDACTED]
[REDACTED]

COMPLAINT

1. On the 25th 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 Regulation¹ (the “**Regulation**”), alleging that the [REDACTED] the “**controller**” or [REDACTED] “*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 controller until the 3rd July 2023 and also a part-time employee of the [REDACTED] within the [REDACTED] [REDACTED] until the 2nd July 2023 (the “[REDACTED]”);

 - 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 4th July 2023, wherein the [REDACTED] informed the complainant

¹ 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.

that: “You worked as Exams invigilator with [REDACTED] during office 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”²;

- c. that the [REDACTED] 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 [REDACTED] [REDACTED] as a result of the unlawful processing being alleged, namely, that the [REDACTED] [REDACTED] 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];
- e. that, in this regard, [REDACTED] wrongly seemed to have failed to inform the [REDACTED] [REDACTED] that the complainant was authorised by [REDACTED] himself to carry out such part time work with the [REDACTED] and had not even attempted to verify whether or not the complainant was duly certified to carry out such work from a medical perspective⁴; and
- f. that once again, [REDACTED] clearly processed personal data and sensitive data belonging to the complainant for a purpose completely distinct from the purpose it was collected.

INVESTIGATION

3. On the 12th 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.

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

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

⁴ A copy of the medical certificate dated the 14th April 2023 was provided by the complainant as supporting documentation.

4. On the 19th 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 case⁵:
- 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 [REDACTED] [REDACTED] 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 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 the controller 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 1st 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 principle⁶, [REDACTED] provided the [REDACTED] with the date(s) during which the complainant was covered by the sick leave so that the

⁵ The controller declared that the submissions were being also made in conjunction with the [REDACTED] within the [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 the [REDACTED] processed the complainant's personal data will be addressed separately in a distinct legally-binding decision.

⁶ 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*".

information provided by the [REDACTED] to [REDACTED] would be restricted to what is necessary;

- h. that subsequently, the controller provided the [REDACTED] with the following information, without disclosing any information regarding the reason(s) behind the sick leave (e.g., a medical condition) in full respect of the principle of data minimisation:
 - the sick leave start date, which was the 3rd of April 2023;
 - that the sick leave was ongoing; and
 - that the sick leave entitlement ended on the 28th of June 2023; and
 - i. that the [REDACTED] 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.
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 10th 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 4th 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 ██████ that he would be working with the controller for fear of conflicting shift times, then failed to inform ██████ 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 ██████ and ██████ 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 28th of February 2024, the controller submitted a copy of the employment contract entered into between the parties.

LEGAL ANALYSIS AND DECISION

9. As a preliminary step of the investigation, the Commissioner proceeded to examine the subject-matter of the complaint, wherein the complainant alleged that the controller disclosed to, and obtained from, a separate controller information in relation to his sick leave and attendance for the purpose of verifying whether the complainant was performing part-time employment duties as an invigilator whilst 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 the [REDACTED] on the 1st June 2023 and the 2nd June 2023. From this exchange of correspondence, the Commissioner could note the following: (a) the controller disclosed to a separate controller that the complainant reported sick, including the start and end date of his sick leave; and (b) the controller requested a separate controller to provide 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 the controller.
11. The Commissioner noted that the data which the controller disclosed to a separate controller relates to the days when the complainant reported sick. To this end, the Commissioner considered the definition of ‘data concerning health’ as set forth in article 4(15) of the Regulation, which reads as follows: “*personal data related to the physical or mental health of natural person, including the provision of health care services, which reveal information about his or health status*”.
12. The European Data Protection Supervisor in its ‘Guidelines concerning the Processing of Personal Data in the area of leave and flexitime’⁷ defines data in relation to health which is processed within the workplace as follows:

“Health data generally refers to personal data that have link with the health status of a person. This would normally include medical data (e.g. doctor referrals and prescriptions, medical examination reports, laboratory test, radiographs), as well as administrative and financial data relating to health (e.g. medical appointments scheduling, invoices for healthcare service provision, indication of the number of days of sick leave, sick leave management).

Therefore, even if medical information is kept separate from administrative information, in the case of recording of leave, the EDPS’ position has been to consider that processing of personal data relating to health occurs nonetheless.”

⁷ EDPS 2012-0158

13. Therefore, this led the Commissioner to establish that the controller disclosed to another controller information in relation to the health status of the complainant. This information is considered to be a special category of personal data pursuant to article 9(1) of the Regulation and it thus requires heightened protection. The Court of Justice of the European Union⁸ (the “CJEU”) reiterated that *“the purpose of Article 9(1) of the GDPR is to ensure increased protection against processing operations which, due to the particular sensitivity of the data concerned, may constitute a particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, guaranteed by Articles 7 and 8 of the Charter of Fundamental Rights”*.
14. For this purpose, the Commissioner examined the wording of article 9(2) of the Regulation, which, as a general rule, prohibits the “[p]rocessing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation”. The specific prohibition set out in article 9(1) of the Regulation is not triggered insofar as one of the derogations laid down in article 9(2) of the Regulation applies.
15. Accordingly, a controller processing a special category of personal data cannot invoke solely a legal ground in terms of article 6(1) of the Regulation, but it shall also ensure that one of the exceptions listed in article 9(2) of the Regulation applies. Recital 51 of the Regulation clarifies that, in addition to the specific requirements for the processing of special categories of personal data, the general principles and other provisions of the Regulation shall apply *“in particular as regards the conditions for lawful processing”*. The CJEU held that *“[a]ccording to the first subparagraph of Article 6(1) GDPR, processing of ‘particularly sensitive’ data, such as data concerning health, is lawful only if at least one of the conditions set out in points (a) to (f) of the first subparagraph of Article 6(1) is met”*⁹. It therefore follows that article 6(1) and article 9(2) shall apply in a cumulative manner, and in the absence of this, the processing shall be deemed to be unlawful.
16. 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

⁸ C-667/21, ZQ vs Medical Service of the Health Insurance North Rhine, decided on the 21st December 2023, paragraph 41.

⁹ *ibid.* 8, paragraph 74.

had a valid lawful basis to process the personal data of the complainant, as outlined in paragraph 10 of this decision, in terms of article 6(1) and article 9(2) of the Regulation.

17. 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 the controller. 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

18. 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 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”.

19. Thus, pursuant to the principle of accountability, it remains the responsibility of the controller to fully demonstrate that the processing of the complainant’s personal data is taking place in the context of the employment contract entered into between the controller and the complainant on the 17th January 2022 and the processing is necessary in order that the particular contract with the complainant could be performed. In such case, the Commissioner was not presented with

any explanation by the controller as to how the processing of the complainant's personal data is indeed necessary for the purpose of the performance of the employment contract. Without prejudice to this, the Commissioner proceeded to assess the clauses of the employment contract in order to determine whether any of the clauses would objectively require the controller to process the personal data of the complainant for a purpose that is integral to the performance of the contract. However, there is nothing in the contract that would justify how the controller processed the personal data of the complainant in the manner which it did.

Article 6(1)(f) of the Regulation

20. Article 6(1)(f) of the Regulation provides that the processing is lawful if it “*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*”.

21. The case-law of the CJEU reiterated on a number of occasions that a controller may rely on article 6(1)(f) of the Regulation if it satisfies the three-part test¹⁰. In particular, the CJEU in the landmark ruling of Rigas stated that:

“In that regard, Article 7(f) of Directive 95/46 lays down three cumulative conditions so that the processing of personal data is lawful, namely, first, the pursuit of a legitimate interest by the data controller or by the third party or parties to whom the data are disclosed; second, the need to process personal data for the purposes of the legitimate interests pursued; and third, that the fundamental rights and freedoms of the person concerned by the data protection do not take precedence.”¹¹

22. In this respect, the Commissioner assessed the present case in the light of the three (3) cumulative conditions as laid down by the CJEU. All the three (3) conditions identified by the CJEU need to be present: (i) the existence of a legitimate interest justifying processing; (ii) the necessity of processing for the realisation of the legitimate interest; and (iii) the prevalence of that interest over the rights and interests of the data subject, which calls for balancing of interests.

¹⁰ C-13/16, Rigas satiksme, paragraph 28 and C-708/18 TK v Asociația de Proprietari bloc M5A-ScaraA, paragraph 40.

¹¹ C-13/16, paragraph 28.

23. First, the processing is conditional upon the existence of legitimate interests of the controller or of a third party. The Regulation does not define legitimate interest and thus, it is for the controller to determine whether there is a legitimate aim that could justify an interference with the right to the protection of personal data.
24. The Commissioner interprets “*interest*” to be the broader stake that a controller may have in the processing, or the benefit that the controller or third parties may derive from such processing. This interpretation is substantiated by the recitals of the Regulation, which provide some non-exhaustive examples of situations in which legitimate interest could exist and this could be processing for the purpose of preventing fraud, processing for direct marketing purposes, the transmission of certain data within groups of companies and processing for the purpose of ensuring network and information security. Furthermore, the case-law of the CJEU held that transparency or the protection of the property, health, and family life, are legitimate interests¹².
25. Accordingly, the Commissioner examined the submissions of the controller, wherein it argued that it 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 on the part of the complainant.
26. Within this context, the Commissioner carefully assessed the wording of recital 47 of the Regulation, which provides that “[t]he processing of personal data strictly necessary for the purposes of **preventing fraud** also constitutes a legitimate interest of the data controller concerned” [emphasis has been added]. Thus, the Commissioner is of the view that preventing abuse could serve as a legitimate interest of the controller.
27. In relation to the second condition of the legitimate interest test, the Commissioner proceeded to determine whether the processing of personal data pertaining to the complainant was indeed necessary for the purpose of the attainment of the legitimate interest at issue. In this regard, the Commissioner noted that the principle of data minimisation as laid down in article 5(1)(c) of the Regulation requires that the processing shall be adequate, relevant and limited to what is necessary in relation to the purpose of the processing. It therefore follows that the processing of personal data should be limited to what is plausibly necessary to pursue the legitimate interest, and, therefore, there should be a connection between the processing and the interest pursued.

¹²C-92/09 and C-93/09, Volker and Markus Schecke and Eifert, paragraph 77 & C-212/13., Rynes, paragraph 34.

28. The CJEU in the ‘TK vs Asociația de Proprietari bloc M5A-ScaraA’ held that the necessity test must consist, in essence, in ensuring that the legitimate interest “*cannot reasonably be as effectively achieved by other means less restrictive of the fundamental rights and freedoms of the data subjects, in particular the rights to respect for private life and to the protection of personal data guaranteed by Article 7 and 8 of the Charter*”¹³ [emphasis has been added].
29. The Commissioner emphasises that the onus rests upon the controller to concretely demonstrate how it conducted the legitimate interest test in terms of the principle of accountability as set forth in article 5(2) of the Regulation. In such case, the controller failed to provide the Commissioner with an explanation that its intended objective could not reasonably be achieved by other means less restrictive of the fundamental rights and freedoms of the complainant. The employment contract itself recognises that other methods could have been used by the controller to verify any sick leave reported by the complainant. In fact, clause 18 of the employment contract reads as follows:

“18. Sickness absences may also be verified by Specialists commissioned by the Entity. The findings of the Specialist commissioned by the ██████████ shall prevail in every instance” [emphasis has been added].

30. During the course of the investigation, the Commissioner was not provided with any evidence to demonstrate that the controller had attempted to carry out its necessary verifications in terms of clause 18 of the employment contract or by any other less intrusive means or methods. In this regard, the Commissioner does not deem the processing activity conducted by the controller to be necessary and proportionate in relation to the interest pursued. It therefore follows that the second condition of the test was not fulfilled, and consequently, the rest of the legitimate interest test could not be completed.
31. This led the Commissioner to conclude that the processing activity conducted by the controller is not based on any of the legal grounds set forth in article 6(1) of the Regulation, and consequently, the Commissioner could not conduct a legal analysis of the derogations set out under article 9(2) of the Regulation.

¹³ C-708/18, paragraph 47.

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) and article 9 of the Regulation when it disclosed to a separate controller information in relation to the sick leave of the complainant and when it subsequently processed the information obtained from another 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 Appeal Tribunal
158, Merchants Street
Valletta.