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FINAL REPORT

(Article 21 sub 1 National Ordinance Ombudsman)

Complainant: Complainant

Date complaint filed: 26 November 2014

Complaint no.: 2014/00189

Ministry of General Affairs

Department: Personnel & Organization

Department Head: Christ'l Larmonie

Synopsis of Complaint:

Complainant claims that she has not received a salary since September 2014, although she has been going to work. According to Complainant, her salary is being withheld, because of a misunderstanding about her return to work after a period of illness.

Despite writing a number of letters to the Head of Labor & Social Affairs, and attending a hearing to discuss the issue, the matter regarding the payment of Complainant's wages and salary remains unresolved.

In a letter submitted to Labor & Social Affairs and Personnel & Organization, dated 27 October 2014, Complainant requested early retirement, due to her ongoing health issues. To date of filing the complaint with the Ombudsman, Complainant claimed that she had not received a response to the letter of objection, dated 29 September 2014, about the decision to withhold her salary or to her request for early retirement.

Findings:

Complainant claims to have been called by Personnel & Organization (P&O) on **17 July 2014** instructing her to show up to Social Health Insurances (SZV) for a medical evaluation on 7 August 2014. According to Complainant, on the morning of 7 August 2014 the security guard present, informed her that the doctor was off-island. She was then asked to sign a card and was told that the doctor would call her.

In a letter dated 22 September 2014, Complainant was informed that her monthly salary was blocked by "*Loon & Salaris*", the department responsible for wages and salary, because



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she failed to report to work after being declared fit for work, and she failed to cooperate with a medical re-evaluation as instructed by P&O.

In a letter dated 29 September 2014 Complainant expressed her disagreement and objected to the decision to block her monthly salary.

In a letter dated 15 October 2014 Complainant informed Mrs. Peggy-Ann Dros-Richardson, Head of Labor Affairs (further: Head of Labor Affairs) that she was still awaiting a response to her letter dated 29 September 2014. Complainant also requested that the Head of Labor Affairs elaborate on the matter.

By email of 16 October 2014 Complainant was invited to a meeting on 28 October 2014 to discuss the letter of 15 October 2014, with the Head of Labor Affairs, Mr. Erick van Arneman of Labor Affairs and Ms. Shamika de Weever, P&O advisor.

In a separate email sent on 16 October 2014, the Head of Labor Affairs provided Complainant with copies of some of documents for her review. The documents listed were:

- LMA;
- Sick Leave Policy;
- Vacation Policy; and
- Employee Handbook 2011.

By email of 21 October 2014 the Head of Labor Affairs informed Complainant of the considerations with regard to the payment of her wages and salary for October 2014. The email provided a breakdown of the calculations made. These were:

- *“Unauthorized absence was from July 18 – September 12, 2014 which is equal to 328 working hours.*
- *Based on this total salary of September was withheld, an amount of 173.33 hours.*
- *October salary will absorb the difference therefore being $328 - 173.33 = 154.67$ hours. So October salary payment is equal to 18.66 hours à $173.33 - 154.67 = 18.66$ hours.”*

By email of 22 October 2014 the Head of Labor Affairs informed Complainant of a medical evaluation at the SZV scheduled on 30 October 2014 at 1:45pm. In a follow-up email from the Head of Labor Affairs later that day, Complainant was informed that she needed permission to leave work during working hours.



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On 28 October 2014 the meeting to which Complainant was invited by email of 16 October 2014 was held in the form of a hearing. During the hearing, Complainant submitted a letter dated 27 October 2014, requesting early retirement due to her ongoing health problems. The letter was accepted by P&O for handling.

Following the hearing on 28 October 2014, the Head of Labor Affairs informed Complainant via email that the attached documents mentioned in her letter dated 27 October 2014, were not received. Complainant was then advised to submit copies of said documents to Ms. de Weever from P&O.

On 24 November 2014 the Complaint Officer of the Ombudsman contacted the Head of Labor Affairs, informing her of Complainant's intent to file a complaint with the Ombudsman, as she had not received a response to her letter dated 27 October 2014. Following the conversation, the Head of Labor Affairs emailed the Ombudsman a synopsis of a hearing held on 28 October 2014, with email correspondence about the case attached. A copy of the email was also sent to Ms. Shamika de Weever the P&O advisor present at the hearing and to Complainant's union. The email contained the following synopsis of the hearing:

1. *“Present at the meeting – Erick van Arneman , Shamika de Weever, ... and my person.*
2. *Mrs. ... was duly informed that she would be within her rights to have legal counsel and / or Union Representation during said hearing . She opted to forego this right.*
3. *Objective of the meeting was to respond to letters received from Mrs. ... , as a direct response to her salary being blocked for the period of unauthorized absence.*
4. *Mrs. ... was asked to present evidence supporting her claims in said letters – she was unable to do so.*
5. *Mrs. ... made an attempt to abruptly leave the meeting – prior to P&O Advisor being able to ask her question. I beckoned her to remain in the meeting – and she returned to her seat.*
6. *Mrs. ... brought forward two (2) main issues : a) request for early retirement , b) vacation days pending from 2001- 2008. P&O proceeded to advise her in this meeting by stating that early retirement should have been applied for before June 2013, and her rights to vacation days for the period 2001- 2008 is now also invalid- this based on policy.*
7. *Meeting ended by informing Mrs. ... that P&O will look into matters further – and will have the Governor respond to her letters , and this based on the outcome of P&O enquires.”*



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According to the synopsis, Complainant was informed that P&O would look into the matter further and would have the Governor respond to her letters.

In addition, the Head of Labor Affairs stated in the email that Complainant had not reported to work since the hearing on 28 October 2014, and that Complainant failed to attend a scheduled medical re-evaluation on 30 October 2014.

The Complaint Officer of the Ombudsman also contacted P&O on **24 November 2014**, to inquire about the status of the response to Complainant. The Complaint Officer was informed that P&O was busy with an 'advice' and that Complainant's letter would be handled along with the advice.

The above stated findings warranted further investigation of the complaint by the Ombudsman.

On 12 December 2014 a Notification of Complaint (NOC) was sent to the Minister of General Affairs (AZ). The Minister was requested to respond to the NOC within 4 weeks, however no later than 9 January 2015.

The following questions were included in the NOC:

- Has Complainant's claims regarding her visit to SZV and her return to work been investigated?
If so, how was it done? And please provide a copy of the documentation of the investigation. If not, please explain why it has not been done.
- When can Complainant expect to receive a motivated response to her letters concerning the salary blockage and her request for early pension?

On 9 January 2015 a reminder to respond to the NOC was sent to the Minister of AZ. An additional extension of one-week (5 working days) was given for a response until 16 January 2015.

On 4 February 2015 the Secretary General of the Ombudsman sent a reminder to the Secretary General of AZ, since no response was received to the NOC. In the reminder, an additional extension of one-week was granted, until 11 February 2015.

On 9 March 2015 the Preliminary Findings Report (PFR) was sent to the Minister of AZ. To date of the PFR, no response was received to the NOC dated 12 December 2014, neither had



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Complainant received a motivated response to her letters as agreed upon in the meeting of 28 October 2014.

In the PFR, the Ombudsman issued the following recommendations:

- Provide Complainant with a synopsis and the conclusions of the hearing of 28 October 2014;
- Provide Complainant with a motivated answer to her letters, or a thorough status report to her case, including the advice regarding her requests, within four weeks to date of this Preliminary Findings Report.

The Minister was requested to respond to the findings outlined in the PFR by 23 March 2015.

On 24 March 2015 the Secretary General of the Ombudsman sent a reminder (via email) to the Secretary General of AZ, since no response was received to the PFR. In the reminder, an additional extension was granted until 7 April 2015.

By email of 27 March 2014 the Secretary General of AZ confirmed receipt of the email and attached letter.

Considering that no response to the NOC nor the PFR was received, **on 5 May 2015 a Hearing was convened** to discuss the manner in which the situation was being handled. Present at the Hearing were the Ombudsman, the Legal Advisor at the Ombudsman, the Complaint Officer handling the case at the Ombudsman, Complainant, Section Head at Personnel and Organization and two personnel advisors. (The synopsis of Minutes of the Hearing forms an integral part of this Final Report.)

During the Hearing the Ombudsman concluded that the basis for the complaint filed is a lack of communication between parties. Complainant had filed a complaint with the Ombudsman because she had not received a response to her letter dated 27 October 2014, nor was she updated on the status of the requests made in the letter. In addition a synopsis of a hearing held on 28 October 2014 with VSA, P&O and Complainant did not reach Complainant, nor was follow up given to actions agreed to by the parties involved.

It was also established that Complainant did not follow procedures provided for by law regarding sick-leave, and does not review emails.

The matter regarding the withholding of Complainant's salary did not form part of the Hearing, as this is the subject of appeal proceedings initiated by Complainant in reaction to a



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letter dated 2 April 2015 from the Governor of Sint Maarten. The Ombudsman refrained from further investigating this part of the complaint.

By letter dated 20 May 2015 Ms. Christ'l Larmonie, Department Head of Personnel and Organization responded to Preliminary Findings Report of 9 March 2015 and the Minutes of the Hearing of 5 May 2015. The response included the following:

- *“The decision to withhold the salary of ... is not based on a misunderstanding, ... was declared medically fit for work by the SZV as per July 17th, 2014. As a result thereof she was obliged to return to work as per said date. ... did not report to work and based on article 24 of the Landsverordenening Materieel Abtenarenrecht (LMA), the ‘no work-no pay’ principle was applied.*

Article 87 was not applied to Mrs. Consequently, article 89 of the LMA is not applicable in this case.

- *Mrs. ... , as well as Mrs. Derie Leonard, her union representative, were provided with a synopsis of the hearing of October 28th, 2014 via e-mail on October 28th, 2014 at 1.33 pm.*
- *The Ombudsman has come to the conclusion that ... was not informed of a deadline for the handling of her letters. On several occasions personnel of the Department of Personnel & Organization as well as Mrs. ... 's manager tried to contact her by telephone, but were unsuccessful. Mrs. ... did not make an effort to return any of said telephone calls. It therefore can be concluded that Mrs. ... could not be informed of a deadline due to her own unavailability.*
- *It is furthermore indicated that Mrs. ... should have been informed of the possibility for early retirement due to her ongoing health issues. In 2013 all employee were informed of the possibility for early retirement by means of a letter from the Minister of General Affairs.*
- *A decision was taken on March 23rd, 2015 to deny Mrs. ... request for early retirement. During the handling of the advice the necessary decree was accidentally omitted. The Department of Personnel & Organization has prepared said decree and taking into consideration the decision-making process in government, it is our expectation that Mrs. ... will receive her national decree within a period of three weeks.*



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- *The Ombudsman is of the opinion that Mrs. ... should have been provided with information regarding the application for a disability pension. Mrs. ... is not eligible for disability pension as she has been deemed medically fit to perform her duties by the SZV.*

Legal Basis:

National Ordinance Ombudsman (AB 2010, no. 20)

Pursuant to article 19 sub 1 of the National Ordinance Ombudsman, the Ombudsman is authorized to request from government bodies, civil servants, the complainant, civil servants as experts or witnesses, all information and or documents pertaining to the investigation. The persons mentioned in the aforementioned article are obliged to respond to the request within the time indicated by the Ombudsman, except in cases where the persons can appeal to legal grounds (“*verschoningsrecht*” - see article 19 sub 4).

Article 8, section ‘Financial Consequences’ of the Explanatory Note – Civil Servants Working Hours Regulation, Point 5, Paragraphs 3-4 states the following about the ‘No Work, No Pay Policy’:

The ‘No Work, No Pay Policy’ entails that a department head is to inform the head of the Finance Department about the unauthorized absence of civil servant. Furthermore, it should also be requested that the payment of salary for the civil servant concerned be suspended until further notice.

Before a Department head proceeds to this drastic measure, the civil servant concerned will be notified of the fact that unauthorized absence has been registered, with a request to explain said absence. If the absence cannot be satisfactorily explained, the deduction for the duration of the unauthorized absence will proceed.

Article 24 National Ordinance Material Civil Servants Law (AB 2010, GT no. 25)

A Civil Servant will not receive remuneration or any related allowances or reimbursements for the time in which he/she is in violation of their obligations and intentionally fail to perform their duty, unless he/she is able to provide a justifiable reason for their absence after being granted the opportunity to do so by the head of service.

Sick-leave Policy Island Territory Sint Maarten (May 2005)

According to **Section 2.3** of the Sick-leave Policy, employees are responsible for reporting their illness and recovery and SZV decides if the recovering employee is fit to work.



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Section 3.1 states that the ‘unfit for work’ declaration of the house doctor is rescinded. The house doctor is consulted only if the employee finds that treatment is necessary.

According to point 6 of subsection 3.3.1, one of the responsibilities of the department head is the generation of financial transactions of unauthorized absence which can occur due to the Sick Leave Policy.

Point 6e states that unauthorized absence must be reported in accordance with the proper procedures such as included in the Framework (memo) and the Civil Servants Working Hours Regulation to the payroll administration, leading to a deduction of salary or suspension payment.

Standard(s) of proper conduct:

The Ombudsman investigates whether the behavior of public bodies towards citizens is correct. The applicable standards of proper conduct in this case are *Active and adequate information provision* and *Fair Play*.

Active and adequate information provision

In the interest of managing the affairs of the citizens, administrative bodies are required to provide adequate information to the public actively and upon request. This implies among others the obligation to answer letters from citizens, sending an acknowledgement of receipt, and an interim notice in case the handling of a request takes longer than anticipated.

That administrative bodies are required to provide adequate information to the public actively and upon request entails on the one hand the duty to provide citizens with information upon request. As well as the duty to inform the citizen on its own initiative about proceedings that have a direct effect on them. Proper information provision creates legal certainty for all.

Fair Play

Fair play requires that administrative bodies and civil servants provide the citizen the opportunity to properly utilize procedural opportunities provided for by law and otherwise.

The principle of Fair Play entails that a public body is expected to allow citizens the opportunity to express and defend their views and opinions, while also being able to object the position and or point of view of a public body. Thus the behavior of the public body has



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to attest to openness, honesty and loyalty. A public body should be transparent and cannot prepare covert actions against a citizen. On the contrary a public body is required to actively assist the citizen in utilizing its procedural options. There are various ways to provide the citizen the opportunity to utilize the different procedural options.

Conclusion:

Complainant claims that her salary has been withheld since September 2014. According to Complainant, the decision to withhold her salary is based on a misunderstanding about her return to work after a period of illness.

In a letter dated 22 September 2014, Complainant was informed that her monthly salary was blocked, because she had failed to report to work after being declared fit for work, and did not cooperate with a medical re-evaluation as instructed by P&O.

By letter dated 29 September 2014 Complainant objected to the measures mentioned, as such the Ombudsman refrained from further investigation of this part of the complaint, and proceeded to investigate the non-response of P&O to Complainant's letter dated 27 October 2014, which included Complainant's request for early retirement due to her ongoing health issues.

The standard of *Active and adequate information provision* provides that administrative bodies are required to provide adequate information to the public actively and upon request. This means on the one hand the duty to provide citizens with information upon request, as well as inform the citizen on their own initiative about proceedings that have a direct effect on them.

During the Hearing with the Ombudsman, the department of P&O claimed that Complainant had been informed of the procedure regarding the handling of said letter during the hearing of 28 October 2014 held with P&O. P&O also claimed that they were unable to reach Complainant by telephone and were therefore unable to inform her of the status of her request. Considering that the department could not reach Complainant by telephone, or email, (partly due to circumstances on the part of Complainant,) Complainant should have however been informed by letter through regular mail.



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During the Hearing with the Ombudsman, the department of P&O further stated that all employees were informed of the possibility of early retirement by means of a letter from the Minister of General affairs in 2013.

In the letter dated 20 May 2015 to the Ombudsman the Department Head of P&O stated that Complainant has been declared medically fit for work by SZV, and is therefore not eligible for disability pension. The decision to deny the request for early retirement was taken in March 2015. Complainant should have been provided a response regarding her request, albeit a statement informing her that she is not eligible for early retirement nor disability pension.

The Ombudsman notes that while it was established that civil servants are not (actively) informed about advices and follow-up procedures regarding matters concerning their status (see the Synopsis of Minutes Meeting/Hearing Ombudsman), an advice regarding Complainant's request for early retirement had been drafted on 26 February 2015. From 28 October 2014 when Complainant submitted the letter requesting early retirement to 5 May 2015, the date of the Hearing with the Ombudsman, Complainant was unaware of the status of her request. As a result Complainant was under the impression that nothing was being done.

By providing Complainant the decision taken on 23 March 2015 with regard to her request months after said decision was taken, propriety was not observed, and the standard of *Fair Play* is therefore violated.

Not providing Complainant information regarding the status of her request is in contravention of the standard of proper conduct *Active and adequate information provision* as well as the standard of *Fair Play*. Complainant has been deprived of taking prompt action against the decision to deny her request for early retirement.

Judgment:

The complaint filed by Complainant regarding the nonresponse by the Ministry of AZ to her inquiries is deemed founded. As such the Ministry of AZ violated the standards of proper conduct *Active and adequate information provision* and *Fair Play*.

Recommendation(s):

Considering the above stated findings, the Ombudsman recommends as follows:



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- To duly and timely follow-up on inquiries and letters from persons regarding the status of their affairs.
- o I agree with the recommendation(s)
- o I do not agree with the recommendations (please explain by submitting a written reaction no later than DDMMMMYYYY).

Philipsburg, 6 August 2015

Dr. R. (Nilda) J.A. Arduin
Ombudsman