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CASE NOTES

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Foreword

As is well known, the main contribution by the Ombudsman towards improved service delivery and higher standards of public administration consists in the investigation of cases that are brought to his attention by members of the public who feel aggrieved by actions and decisions taken by government departments and public bodies. On various occasions, where grievances are considered justifiable and upheld by the Ombudsman as well as in other complaints where no evidence of maladministration is found, the outcome of cases is of considerable interest since there may be lessons to be learned by officials in the public service.

The case summaries that are included in this seventeenth edition of **Case Notes** illustrate the wide range of issues that are handled by the Ombudsman not only in terms of subject matter but also by type of outcome reached. For those who have an interest in the work of this Office, the material that appears in this booklet provides guidelines and standards of good administration against which public officers can measure their actions. Narrated in anonymised form, these summaries serve to raise awareness against possible pitfalls caused by deficient administration which must be avoided if people are to be dealt with properly, fairly, openly and impartially.

The common thread linking these various cases is the need to show in practice how the right of Maltese citizens to good administration is to be safeguarded in the context of proper governance so that an individual's affairs are handled fairly and in a fitting manner by Maltese public institutions and their officials.

Finally, I would like to express my appreciation at the wide coverage which a section of the local press gave to the previous edition of this publication. I believe that this initiative served to bring the activities of this Office even closer to the public and contributed towards a wider recognition among citizens of the principles which inspire this institution.

Joseph Sammut
Parliamentary Ombudsman **April 2004**

B l a n k

Case No B 452

ARMED FORCES OF MALTA

Reluctance by AFM captain to sit for promotion examinations

The complaint

An officer serving as a captain in the Armed Forces of Malta sought the intervention of the Ombudsman in connection with his complaint that he had not been promoted to the rank of major with the rest of his colleagues who had enlisted in the AFM in the same cadet intake.

In his statement of case to the Ombudsman, complainant explained that a few weeks before the issue of the promotion order for officers in the Armed Forces, he had been informed by the Commander that he did not feature in a list of officers who were being recommended for promotion to the rank of major and whose names were being submitted for the consideration of the Office of the Prime Minister. His exclusion from this list was attributed to his reluctance and his failure to sit for examinations that had been held some time earlier for the promotion of captains to the next higher rank. He was informed that it was this insistence on his part not to sit for these examinations that had blocked his prospects for career advancement and had rendered him ineligible for promotion.

Complainant pointed out that during his meeting with the Commander he was told that, together with another officer who held the same views, he was to be given another opportunity to sit for the next session of the promotion examinations. He was also warned that if he missed this chance, he would either be discharged from the Armed Forces or else obliged to resign. At this stage, complainant decided to submit his application for the upcoming promotion examinations.

In his letter to the Ombudsman, complainant explained the reasons for his conduct. He stated that he felt that different weights and measures were being

applied in the award of promotions to AFM officers and was of the view that the new policies and procedures that were being adopted by the Armed Forces regarding promotions were unfair.

Complainant drew the attention of the Ombudsman to regulation 6(1) of the Malta Armed Forces Act (Appointments and Conditions of Service of the Regular Force Regulations) which states that promotion to the rank of major "*shall be made subject to recommendation based on efficiency, seniority and selection to fill a vacancy*". He maintained that his refusal to sit for promotion examinations arose partly from his conviction that he already met these criteria especially since in addition to his normal duties as a captain in the Armed Forces, he had been given various other assignments which, according to the AFM establishment, should have been carried out by an officer holding the rank of major. He insisted that he had always carried out these additional duties thoroughly and to the best of his ability.

Complainant stated, however, that he was particularly irked by the introduction of a new requirement whereby as from 1998 officers holding the rank of captain had to pass a practical and a written examination in order to be eligible for promotion to the rank of major. He pointed out that officers serving as captain who had joined the Armed Forces under a cadet intake merely one year prior to his own intake, had not been asked to take these examinations and had been promoted on the basis of AFM regulations regarding promotions for officers commissioned from the ranks that did not envisage any such tests.

Facts of the case

From official file records made available by the AFM, the Ombudsman ascertained that in May 1997 the Government had approved the introduction as from 1998 of practical and written promotion examinations for officers serving in the Armed Forces. This new requirement covered lieutenants seeking promotion to captain and captains seeking advancement to major.

All officers affected by these new rules were informed that the fundamental aim of this new system was to consolidate professional standards and to bring the AFM in line with other modern armed forces. The attention of these officers

was also drawn to the fact that it was the responsibility of each individual officer to prepare himself for these examinations although the AFM was prepared to organize *ad hoc* instruction courses and lectures to assist officers to develop their professional knowledge and enhance their technical ability to assume wider responsibilities in their career with a view to improving their prospects for promotion.

When the first session of examinations for the promotion of captains to the rank of major was being organized in 1998, complainant and another fellow officer, however, decided not to attend courses organized by the AFM and not to sit for the examinations. This happened again when the second round of examinations for promotion to the rank of major was held in 2000 despite repeated warnings by the superiors of these two officers that failure to pass the mandatory promotion examinations would render them both ineligible for promotion.

File records also showed that when complainant notified his superiors that he would not attend lectures and would not take the examinations, he was duly informed in writing that this was his last opportunity to sit for these examinations before the due date of promotion to major. He was even warned that in line with the approved promotion criteria, if he did not pass these examinations by the day in question, he would again not be recommended for promotion. Despite these repeated warnings, however, complainant stuck to his decision.

Faced with this situation, complainant's superiors excluded his name from the list of AFM captains who were recommended for promotion to the rank of major early in 2001. This list included seven other officers who belonged to the same intake as complainant but who had raised no objection to sit for promotion examinations and had been successful.

Since it had been decided to allow each officer three attempts to pass the promotion examinations, complainant was again advised in March 2001 that the AFM planned to hold another practical and written examination session in 2002/2003. The Commander of the Armed Forces also informed him that he would be considered eligible to be recommended for promotion if he were successful in these examinations although in his case the effective date of his

promotion would be the date when he would pass these tests since the due date for his promotion to the rank of major had already gone by.

On this occasion complainant and his colleague were also warned by the Commander of the Armed Forces that in the event that they failed to pass these examinations within a period of three years from their promotion date that was originally due in January 2001, he would be obliged to recommend their compulsory premature retirement in terms of regulation 14 (1) and (2) of the Malta Armed Forces Act (Appointments and Conditions of Service of the Regular Force Regulations) whereby

"14(1) An officer may be called upon to retire or resign or may be removed at any time by the Commander with the approval of the Minister on grounds of inefficiency, unsuitability or misconduct.

14(2) An officer may be called upon to retire or may be removed in manner aforesaid on grounds of non-recommendation or failure to pass promotion examination in such circumstances and under such conditions as the Minister may determine."

Records again showed that although complainant and his colleague were given a deadline within which to present their submissions, they both failed to give their reply in time to the Commander of the Armed Forces. Some three months after this meeting with the Commander, however, complainant finally indicated that he was willing to attend courses organized by the AFM and to sit for the next round of promotion examinations.

Outcome

Following careful consideration of the various issues connected with this case, the Ombudsman accepted the competence of the AFM authorities to introduce new procedures as from 1997 for promotion to the rank of major including practical and written examinations. The Ombudsman was of the view that AFM regulations regarding promotions allow the AFM authorities full discretion on how to determine the merits of an officer in order to fill vacancies

and these regulations do not in any way exclude resort to written and practical tests.

The Ombudsman also ruled that although on previous occasions no written tests were held for promotion to the rank of captain of officers who had joined the AFM in the first place as officer cadets as well as of those who were promoted through the ranks, this should not preclude the introduction of new methods or of different procedures for the assessment of officers for the purpose of promotion to the next higher rank. This development was acceptable especially at a time when the AFM was seeking to raise professional standards by initiatives aimed at widening the technical, military and intellectual abilities of its officers.

On these considerations, the Ombudsman did not uphold complainant's claim that he had been treated unfairly and found no evidence to indicate that an act of injustice had been committed in his regard by the AFM authorities.

Case No C 341

HEALTH DIVISION

The case of the hospital employees who were unwilling to work in oppressive heat

The complaint

Two employees in the Midwifery Management Unit at Karen Grech Hospital sent a written complaint to the Ombudsman to express their annoyance at the environment in their workplace since in their view this constituted a health hazard in summer.

Despite their long-standing request to the hospital management for an improvement in their working conditions, the two employees felt aggrieved because although other areas in the hospital had undergone improvements, they had been left to work in very uncomfortable surroundings.

Complainants requested the Ombudsman to intervene on their behalf with the health authorities since they felt that they could not continue to work in such appalling conditions in the summer months. They also felt that their request for the installation of air conditioning units in their offices deserved priority status.

Facts of the case

In their letter to the Ombudsman, the employees complained that it was virtually impossible for them to carry out their duties properly and to concentrate on their tasks during the summer months due to the extreme heat and lack of air circulation in the offices of the Midwifery Management Unit in Karen Grech Hospital. Although two years earlier the hospital authorities had been requested to install air conditioning units in this section, the request

was turned down on the grounds that the electricity supply in the hospital was overloaded.

Complainants informed the Ombudsman that subsequent to this refusal, air conditioning had in fact been installed in other offices in the hospital. According to the employees, this meant that once the electricity supply in the hospital had been strengthened, the hospital authorities could no longer claim that the supply was inadequate.

When a second request was submitted shortly afterwards, one of the hospital engineers had advised that it was possible to bring an electricity supply cable to the roof of the Midwifery Management Unit and that this would in turn permit the installation of air conditioning facilities in the rooms occupied by the Unit. However, the Director of Institutional Health at the Health Division again turned down this request but failed to provide an explanation for his downright refusal.

A few months later the trade union representing the two complainants approached the Health Division in connection with improvements to the Midwifery Management Unit. This request was again refused although this time various reasons were given to explain why the proposal could not be accepted. In the first place the Health Division insisted that caution had to be exercised to keep the overall electricity supply situation in the hospital under control especially since air conditioners are known to be heavy energy consumers. At the same time the Division considered the request as having a low priority.

The Health Division also felt that the offices occupied by the Unit were already adequately well ventilated and that given the nature of the work performed in these offices, proper ventilation could be assured by the use of fans. On their part complainants explained that a verandah on one side of the area in question is exposed to around eight hours of direct sunlight every day in summer and that two offices in the Unit have no outside windows. As a result, the temperature inside these rooms becomes unbearable and the buildings are stiflingly hot during the summer months.

The employees also rejected the explanation given by the Health Division

that there was already adequate circulation of air inside their offices by means of the use of fans installed in these rooms. They explained that when in use these fans circulate hot air and this only serves to make the situation even more untenable.

Another reason put forward by the Health Division to justify its stand was that the Midwifery Management Unit was expected to be one of the first sections to move to the new hospital at Tal-Qroqq. The employees, however, remained unconvinced by this argument because even at that time it was already known that the migration plan to the Mater Dei Hospital was being held in abeyance.

When approached directly by the Ombudsman, the Director of Institutional Health in the Health Division stuck to his view that it was not essential to provide air conditioning facilities in the area mentioned by the two employees. He pointed out that this area, previously allocated for use by patients, had been converted into office space without the approval of the central health management authorities and as a result of this unauthorised move, badly needed ward space had been encroached upon. According to the Director, the situation that irked the two complainants was largely brought about by the closure of a verandah facing Marsamxett Harbour and its transformation into a kitchenette by employees of the Unit. If this area had not been enclosed, the Unit would have been assured of adequate ventilation.

The Health Division also referred to existing constraints on the electricity supply at Karen Grech Hospital and at St Luke's Hospital. It was explained that the system being proposed to extend the electricity supply to this area was technically unacceptable since it was considered to constitute a potential serious hazard in the event of electricity supply failure.

The Health Division furthermore argued that staff who complained about the situation are not expected to spend much time in their offices but to undertake ward duties and other tasks and, therefore, it was felt that a fan should suffice for these employees in the same way that fans suffice for the large majority of staff and patients.

The Ombudsman was not, however, fully satisfied by this reply. He sought an

explanation from the Health Division as to why no instructions had ever been issued to the Midwifery Management Unit to reopen the verandah in order to improve ventilation in the area in question. At the same time the Ombudsman, while appreciating the constraints in respect of the electricity supply situation, insisted that the advice of occupational health experts should be sought in order to establish whether the unbearably hot ambient temperature in these rooms in summer could in fact be considered as constituting a health hazard to employees.

Taking up the Ombudsman's suggestion, the Health Division referred the matter to the Occupational Health and Safety Authority and requested expert advice on the best way in which this situation could be tackled. The Authority was also requested to provide advice regarding any alternatives for a solution of this situation without having to resort to air conditioning equipment.

In its reply regarding methods that can contribute towards an ambient temperature which is both comfortable and not harmful to the health of workers in the area, the OHSA pointed out that what constitutes a comfortable temperature is very much a subjective opinion and the Authority was not in a position to provide advice on this particular issue.

With regard to the circulation of air to avoid the accumulation of stale air in the various compartments in the midwifery section, the Authority pointed out that closure of the verandah could surely not be considered to have helped matters. At the same time, there was no doubt that the cubicles used by the Midwifery Management Unit lacked an adequate supply of fresh air. The Authority advised that if this area were to be used for any extended period, then it would be advisable to make alternative arrangements either by the relocation of staff operating from this area or by ensuring a more suitable supply of fresh air.

In the light of this advice, the Health Division informed the Ombudsman that it was issuing the necessary instructions to the hospital management to reopen the verandah and, alternatively, to relocate the offices occupied by the Midwifery Management Unit.

Outcome

With these findings in mind, the Ombudsman ruled that the grievance raised by the two employees was partly justified since it had been ascertained that staff were working in sub-optimal conditions because of problems associated with inadequate air circulation. Regardless of who was responsible for the closure of the verandah, it was the department's responsibility to take action to remedy the situation that had arisen. In this regard the Ombudsman expressed satisfaction at the Division's willingness to issue instructions to implement the advice given by the OHSA.

At the same time the Ombudsman found no evidence to conclude that complainants were discriminated against or that they were unreasonably deprived of air conditioning facilities at their place of work. This element of their complaint was not therefore sustained.

Case No C 443

DEPARTMENT OF CONTRACTS

The contractor who blew his chance to win a tender by an invalid bid bond

The complaint

After responding to a call for tenders issued by the Foundation for Tomorrow's Schools of the Ministry of Education and submitting its proposals to the Department of Contracts in July 2002, a company engaged in the provision and installation of engineering services felt aggrieved when its submissions were rejected outright on the grounds that its bid bond was invalid.

Although the company claimed that the bank which issued this bid bond had given the necessary assurances to the Director General of the Department of Contracts regarding the validity of this guarantee and had also provided an amended bank guarantee to replace the old document, the department was resolute and stuck to its original decision not to consider the offer by the company. As a result, the tender was awarded to the company's competitor whose offer was priced Lm20,000 higher.

Alleging that its tender had been unjustly disqualified and that the tender evaluation process had been vitiated by a departure from approved procedures, the company approached the Office of the Ombudsman for an investigation.

Facts of the case

On 9 July 2002 a local company submitted an offer to the Department of Contracts for the supply, installation and commissioning of variable air volume ventilation plant at a boys' secondary school.

The company claimed that it met all the requirements laid down in the tender

dossier issued by the Foundation although at the same time it admitted that as a result of a genuine error by the bank which provided the required bid bond to the Department of Contracts, this guarantee was inadvertently dated 9 August 2002 instead of 9 July 2002. The company pointed out, however, that this was clearly a typing error because banks do not issue a post-dated bank guarantee.

The company drew the attention of the Ombudsman to the procedures adopted on the closing date for the submission of tenders when proposals found in the tender box were opened and summarily reviewed by officials of the Department of Contracts. According to tender instructions, contractors were required to submit all the necessary documents in two sealed envelopes: the first envelope would contain the bid bond while the second envelope would contain the completed form of tender, priced bills of quantities, technical literature and other technical information. The company made particular reference to section 1.22.6 in the tender dossier prepared by the Foundation for Tomorrow's Schools which stated:

"*Tenders unaccompanied by a valid original bid bond (Envelope No. 1) on the closing date and time of tender shall not be considered for award of this contract and Envelope No. 2 in the tender offer shall be discarded unopened*."

The company narrated that when officials of the Department of Contracts opened the bids that were received and the company's documentation was being examined, it was noted that these officials were at one point engaged in discussing matters related to the bid bond. However, when company representatives inquired about the matter, the officials replied that everything was in order and in turn proceeded to open the company's second envelope.

The company held that since the officials of the department had decided not to discard this envelope and had even opened it, this was taken to mean that the bid bond enclosed in the company's first envelope had been accepted and considered valid. It was at this stage that the company became aware that its proposal was Lm20,000 cheaper than the offer by the other contractor.

Soon after the official opening of these two tenders, the schedule of tenders was placed in the notice board at the Department of Contracts and the company realized that its offer had been disqualified because of the wrong date that

appeared on the bid bond. The company immediately wrote to the Director General of the Department of Contracts to object to this exclusion. It considered its disqualification from the tender adjudication process to be unjust because despite the wrong date on the bid bond, the covering letter in its tender submissions indicated quite clearly that the offer was valid for a four-month period starting from 9 July 2002. Moreover, despite its wrong date, even the original bid bond stated that the guarantee would expire on 9 November 2002 in line with tender stipulations. The company therefore requested that its offer would still be considered valid.

At the same time, in order to rectify this situation regarding the bank guarantee that had been declared invalid and to further strengthen its case for the reinstatement of its tender, the company sent an amended bank guarantee with a corrected date that was issued by the bank in replacement of the old bid bond. A few days later the bank management itself wrote to the Department of Contracts to confirm that the original bid bond was still valid and that any claims made under this guarantee would be honoured as from the date when it was issued (9 July 2002) even though the bond was erroneously dated 9 August 2002.

When the tender award committee undertook its review of the documents and submissions received in response to the call for tenders, members of this committee considered an explanatory letter sent to the Director General of the Department of Contracts by the bank management which contained an admission that the complainant company was not to blame for the error and should not be penalised for this genuine mistake. The committee decided, however, that the offer by this company should be disqualified because of the wrong date on the bid bond by the bank and awarded the tender to the contractor who had submitted the only other offer which was considered eligible in all respects.

When on 22 August 2002 the Department of Contracts informed the company that its offer was rejected because it had not presented a valid bid bond, the company reacted sharply to this exclusion. It claimed that it had been disqualified unjustly for an error that had been committed by its bankers and that all along it had acted in good faith. Furthermore, it claimed to have satisfied

all the tender conditions and to have forwarded the relative mandatory bid bond as required by the tender dossier.

Outcome

The Ombudsman raised the matter with the Department of Contracts and gained access to the file papers related to this call for tenders and the ensuing developments.

The Ombudsman ascertained that when the tender award committee was faced with the issue of the validity of the original bid bond presented by complainant, members had decided to seek legal advice on the matter before reaching a decision on the award of the contract. Legal advice was that this tender could not be legally considered as having been supported by a valid bid bond as requested in the tender dossier. In view of this ruling, the committee agreed that the tender should be disqualified.

At this stage the Ombudsman noted the ample references in section 1.14 of the tender dossier issued by the Foundation for Tomorrow's Schools regarding the provision of a bid bond to the Department of Contracts by interested contractors.

Paragraph 1.14.1 stated that each tender had to be accompanied by a valid and original bid bond issued by a Maltese bank to the amount of Lm3,000 in the form of a specimen bid bond that was attached to the dossier. This guarantee had to be valid for a period of four months from the date set for the submission of tenders and was intended as a pledge that would be forfeited in the event that a submission was withdrawn before the stipulated four months or if the successful contractor failed to provide the performance bond within seven days of receipt of the letter of acceptance.

Paragraph 1.14.3 stated ominously that offers which were not accompanied by the mandatory bid bond on the closing time and date fixed for the submission of tenders, would be disqualified.

Furthermore, paragraph 1.17.1 gave the Director General of Contracts the

right to reject a tender that was not accompanied by a valid and original bid bond.

Aware of this strong emphasis in the tender dossier on the provision of a valid bid bond, the Ombudsman was of the opinion that although complainant pleaded that the covering letter stated that the offer was valid for four months from 9 July 2002, this letter could not however take the place of a valid bid bond since any bank guarantee has of course to be issued by a bank.

The Ombudsman also noted that the dossier issued by the Foundation had made it amply clear that all tenders had to be accompanied by a valid and original bid bond in the form of a specimen bond that was annexed to the tender document. Two important paragraphs in this specimen bid bond stated that:

"*We… hereby guarantee to pay you on your first demand in writing (the) maximum sum of three thousand (3,000 Malta liri) in case the tenderer withdraws his tender before the expiry date or in the case the tenderer fails to provide the performance bond if called upon to do so in accordance with the Conditions of Contract.*
…. This guarantee expires within four (4) calendar months starting on the closing date of tender, that is, it is valid for four (4) months from the closing date of this tender at the close of business…"

The Ombudsman held the view that regardless of the date of the issue of the bid bond by complainant's bank, the bid bond presented by complainant failed to reproduce the exact words of the prescribed form. It did not refer to the closing date of the tender and made no mention of a guarantee in respect of the performance bond as stipulated in the Foundation's specimen form. Besides the wrong date, therefore, the bid bond submitted by complainant did not provide the required guarantee in respect of the performance bond. It was therefore not valid and, in accordance with the conditions of tender, the Department of Contracts was right to reject this offer.

On these grounds, the Ombudsman ruled that there was no administrative failure on the part of the Department of Contracts and the complaint was not upheld.

Case No C 454

MEDITERRANEAN CONFERENCE CENTRE

Failure to give adequate notice of termination of contract

The complaint

A consultant, initially recruited on a one-year contract that was renewable for a further period of one year with the Mediterranean Conference Centre, declared that he was extremely perturbed when a few days after the end of the first year of his contract, he was summarily informed in writing that the consultancy post was being made redundant and that his agreement had been terminated.

Feeling aggrieved at the manner in which his assignment had been brought to an end, the consultant wrote to the Centre through his lawyer to point out that this action was in flagrant breach of the agreement between the two sides. In this letter the consultant requested that the agreement be renewed for another year and held management responsible for all the damages that he had suffered or might suffer as a result of this decision.

Since no reply was forthcoming after a lapse of more than six months, the case was referred to the Ombudsman for his consideration.

Facts of the case

By means of a one-year consultancy agreement that took effect on 1 January 2001, complainant was entrusted with the responsibility to undertake a range of tasks aimed at a fuller utilisation of the facilities at the Centre and at the promotion of the Centre as a venue for cultural activities. The agreement also stipulated the annual consultancy fees payable for services rendered by the consultant as well as the retainer fees to which he was entitled from activities which he was expected to introduce during his assignment.

With regard to the duration of the agreement, the relevant clause of the contract stated as follows:

"*This agreement shall be automatically renewed for a further period of one year unless either party gives notice in writing of the intention to terminate this agreement two months prior to the expiry of the initial one-year period*."

When the Ombudsman approached the Centre in connection with this complaint, it was explained that throughout the agreement clear indications started to emerge that the objectives of the contract were not being attained and that no effective measures were being taken by the consultant to address this situation. Management felt that the consultant had failed to remedy this unwelcome state of affairs and that he was not being sufficiently proactive in his initiatives to generate and capture more work.

It was explained by management that given this failure to achieve any tangible results, complainant had been verbally informed even more than two months prior to the expiry of the initial one-year term of the contract of the intention to terminate the consultancy agreement due to the fact that there was no work for him to perform. Management argued that this verbal notice in itself was adequate to satisfy contract conditions regarding the procedures that had to be followed whenever either party wanted to terminate the agreement.

On his part, complainant argued that he could not accept that any words to this effect should have been interpreted as the formal notice that was specifically required under the terms of the contract if his services were no longer needed after 31 December 2001. In any event, he firmly denied that he had ever been informed verbally of management's intention not to renew the contract some two months prior to its expiry. The consultant therefore had continued to report for work even after the end of 2001.

When the consultant ignored the verbal notice that had been given to him and continued to appear at his workplace even after the first year of the agreement had expired, management informed him in a letter dated 7 January 2002 that

"*As you are well aware during the year the ideas for which you were contracted failed to materialize for a number of reasons and the post is therefore not*

sustainable any further. In view of the above the consultancy post is being made redundant and your consultancy terminated."

Management pleaded that although complainant claimed that notice to terminate the contract was given verbally and not in writing, however, this was of no consequence. It was held that substantively notice was given to complainant and although admittedly not in writing, this did not alter the fact that adequate notice had indeed been given. According to management, the written letter conclusively establishes that the notice to the employee was in fact given and its absence by the stipulated date did not render the verbal notice issued earlier null and void.

The consultant countered management's comments that he had not achieved any significant results by stating that his efforts to introduce a range of activities in the Centre had reached an advanced stage by the time his contract was terminated. Complainant explained that he had also worked hard on other activities and whereas one of these events had been cancelled due to the various changes that were being continuously introduced by management, the other activity was still under active consideration at the time that his consultancy post was made redundant.

Although complainant alleged that after his former post had been declared redundant, another employee had been recruited to carry out his tasks, this claim was not, however, substantiated.

In order to strengthen the claim that complainant had been given adequate warning about the quality of his work output and about the management's intention to terminate the contract, the Ombudsman received a statement from a member of the Centre's management team recalling an instance in December 2001 when complainant was told that his contract would not be renewed on grounds of non-performance.

Outcome

In his review of this case, the Ombudsman pointed out that the contract between complainant and the Centre was a definite one-year contract which could be

automatically renewed for a further period of one year unless either party to the agreement gave formal notice in writing of its intention to terminate the agreement two months prior to the expiry of the initial one-year period. On this basis, 31 October 2001 was the latest date when either side could inform the other in writing regarding its intentions for the year ahead.

The Ombudsman stated that this was the nub of the matter: whether complainant had been informed in writing in time, in accordance with the contractual obligations binding the two parties, of management's intentions regarding the renewal or otherwise of the contract after the end of the year. In the view of the Ombudsman, all other considerations such as those relating to the quality of the output provided by complainant during his stint at the Centre were irrelevant and he felt that any comments on his part on this aspect of the case would be superfluous.

The Ombudsman agreed that management had acted fully within its mandate and had used its discretion when it decided not to retain the services of complainant beyond 31 December 2001. This decision, however, in turn brought about an obligation on the part of management to inform complainant in writing as to its intentions by not later than 31 October 2001. Management's insistence that it had provided adequate verbal warning to complainant more than two months before the end of the contract could not therefore be taken to have satisfied the terms of the contract since the only valid formal notification that it gave to complainant was by means of its letter dated 7 January 2002.

The Ombudsman recalled that the contract made no mention of the way in which it could be rescinded before its expiry. At the same time he accepted that management had full competence to take the decision to bring the contract for consultancy services to an end if members shared the view that the services provided by complainant were no longer required. Although in this regard management had exercised its right to terminate the contract with complainant, it had failed to inform him in writing by the due date of its intention not to renew the agreement. This constituted an act of maladministration and drew a critical remark from the Ombudsman.

In order to make up for this deed, the Ombudsman recommended that complainant should be awarded the sum of Lm500 which was equivalent to

the consultancy fees due to him for two months under the 2001 contract.

On its part management continued to maintain that its actions were legally correct and that it had honoured the stipulations of its contract with complainant when it had informed him verbally that the contract would not be renewed. Despite its reservations on the recommendation put forward by the Ombudsman, management agreed, however, to pay complainant the sum that had been recommended by the Ombudsman as a sign of respect towards the ombudsman institution.

Case No C 525

MALTACOM plc

Is it early retirement scheme H or scheme K for me?

The complaint

An employee whose first application in September 2001 under early retirement scheme H that was launched by Maltacom was not accepted, shortly afterwards submitted a second application under another proposal (scheme K) that was presented by the company to its employees. Although this time his application was accepted, the financial terms of the second retirement scheme were decidedly less advantageous to him.

The employee claimed that he had never withdrawn or cancelled his first application and that the decision not to release him from his employment and to shelve his application had been taken solely by Maltacom management. He therefore requested that the financial package linked to his early retirement should be based on the conditions that featured in the scheme under which he had submitted his original application. This request was, however, turned down.

Upon receiving this refusal, the employee submitted a complaint to the Ombudsman where he claimed unfair treatment by Maltacom. He claimed that his grievance was further aggravated by the fact that two other employees whose applications for early retirement had been shelved by the company for no less than two years, were then allowed in March 2001 to benefit from the conditions that formed part of the retirement scheme under which they had submitted their applications.

Facts of the case

During his investigations, the Ombudsman learnt that in September 2001 complainant had applied for retirement under Maltacom's early retirement

scheme H whereby selected applicants aged between 55 and 58 years on the closing date of the scheme would be given the equivalent of 15 weeks salary for each year outstanding up to retirement age with the maximum amount payable not exceeding Lm15,000. Among other conditions, the company reserved the right not to accept any application on grounds of company exigencies and not to give reasons for its refusal to accept any application.

In providing an explanation to the Ombudsman of the way in which events unfolded, Maltacom management stated that the access network division where complainant worked had been integrated with a fully-owned subsidiary that was registered in October 2001 with a view to commencing operations in the development, design, construction and management of an access network infrastructure early in 2002. In order to ensure that this project would be launched successfully, the company reached the decision that regardless of the level of responsibility, all employees involved in the provision of this service would be retained among its workforce and that any applications for early retirement under scheme H from employees engaged in these activities would be turned down. At that stage it was also decided by the company that no other early retirement schemes would be announced due to the various development projects that were then being taken in hand by Maltacom.

The Ombudsman noted that following this decision, complainant was not the only employee whose application for early retirement under scheme H was refused. In fact there were eight other workers who found themselves in the same situation as complainant and who were required to submit another application before they were allowed to benefit from other early retirement schemes that were launched in May 2002 when the company's overall work situation permitted the release of more employees.

In this regard Maltacom management also referred to its right to exercise its prerogative to refuse any application on the grounds of work exigencies without being bound to provide any explanation or justification of its actions. Reference was made to the original application for early retirement by complainant where he indicated that he was fully prepared to abide by the fact that his application could be turned down by the company in the light of the operational situation prevailing at that time and market conditions in the national communications sector.

The company furthermore explained that when after a few months it again found itself in a position where it was able to release more workers, a number of other early retirement schemes were issued. This took place in May 2002 and employees whose applications under previous schemes had been refused, were verbally informed that their previous applications were no longer valid and that they had to submit new applications if they wished to participate under these new schemes.

Since at this stage complainant was still interested in taking advantage of the company's offer, he submitted another application for early retirement under scheme K that was the one now applicable to him. Under this scheme, employees were offered the equivalent of 13 weeks salary for each outstanding year up to retirement, again subject to a limit of Lm15,000. Here, too, the previous safeguards regarding the company's right to refuse any application and not to explain its selection criteria were included in the set of conditions that formed part of this scheme.

When in June 2002 complainant was informed that his application under scheme K had been accepted by Maltacom management, he realized that the reduction of two weeks salary for each outstanding year up to retirement age under this scheme meant a drop of some Lm2,600 in his gratuity when compared to the sum to which he would have been entitled if his first application under scheme H had been accepted. Complainant's request to Maltacom that his retirement gratuity be calculated on the basis of the terms of the old scheme H instead of scheme K was, however, turned down on the grounds that in the meantime scheme H had closed and his first application had expired and was no longer considered valid. Maltacom management insisted that in these circumstances it was both fair and equitable for complainant to benefit from the sum that was due to him under scheme K upon completion of the normal retirement procedures.

The Ombudsman's investigation also covered the allegation made by complainant regarding the way in which two other company employees were said to have received more favourable treatment when conditions regarding their early retirement were being considered by Maltacom management.

With regard to the first instance, the Ombudsman was of the view that this bore no relationship to complainant's case and was in no way comparable. In this case the applicant, a key officer in the company's workforce in the access network sector, had requested early retirement under a scheme that was in force in 1999 and his direct superior had only agreed to support this request on the understanding that the applicant would not be released from his duties before the last quarter of 2000 so as to enable an understudy to be trained and to assume his duties. In the light of this position, the applicant had agreed to initiate his retirement procedures on the date established by Maltacom and had subsequently received the full sum that he was entitled to by way of retirement gratuity under the terms of the 1999 scheme under which he had lodged his application.

Insofar as the second case was concerned: the Ombudsman found that this was quite similar to complainant's experience. Here, although applicant had submitted a request for early retirement under a scheme that was issued in January 1999, his application was withheld because he too was considered a key officer in the access network field whose services were required in order to safeguard the company from disruption of its ongoing business commitments. The Board of Directors of the company, however, had subsequently found that there were enough grounds to grant this applicant a concession and his gratuity was established under the financial terms of the first scheme under which he had applied instead of another scheme under which he had subsequently submitted his application so that he would not suffer any financial disadvantages.

Outcome

The Ombudsman concluded that there were no grounds to believe that Maltacom management was guilty of an administrative failure. All throughout complainant had been treated fairly and in the same manner as other company employees whose original application for early retirement under scheme H had been withheld.

The Ombudsman maintained that the company was fully within its rights to adopt this approach and no evidence emerged to suggest that its refusal of

complainant's first application was a capricious one. It also appeared that the same yardstick had been applied in the assessment of all the applications received from company employees under scheme H and there was no evidence of any discrimination in the way in which these applications had been handled.

At the same time the Ombudsman felt that although complainant had no automatic right to have his application accepted under the more advantageous terms of scheme H, there was one aspect which needed to be given due consideration. Scheme H and subsequent early retirement schemes that were offered by Maltacom to its employees could to some extent be considered as variations on the same theme in the sense that the financial terms of each package were quite similar even if not identical. Having been found ineligible to benefit under scheme H, complainant was also unable to qualify under scheme J on account of age criteria and fell just short of the age bracket that would have allowed him to participate under this scheme which in effect offered the same conditions as he would have been entitled to had his original application under scheme H been accepted.

The Ombudsman gave due recognition to the fact that only a few months had elapsed between Maltacom's refusal of complainant's first application and acceptance of his second application. The Ombudsman also considered that in certain aspects the case under review was analogous to the case of the second applicant mentioned by complainant.

The Ombudsman felt that these special circumstances provided an adequate basis for the grievance submitted by complainant to be reassessed by the company's Board of Directors as had in fact happened in an earlier case. This would enable the Board to give an airing to the issue raised by complainant and decide whether special considerations existed that justified the award of a concession on the same lines as before.

Following consideration and a decision by the Board of Directors of Maltacom, complainant informed the Ombudsman that his grievance had been resolved and the case was closed.

Case No C 542

POLICE FORCE

The towing of a vehicle from an approved parking bay

The complaint

When some time before eight o'clock on the morning of 16 July 2002 a bank employee left his car in a parking bay in West Street in Valletta, little did he realize that a brush with the police authorities lay in store for him.

At that time West Street was free of No Parking signs and no signs to indicate any parking restrictions had been placed by two o'clock in the afternoon. He was therefore quite surprised when he went back to his car at seven o'clock in the evening and found that it was being towed. Although he explained to the police officers that in the morning and early afternoon on that day there were no signs to indicate that parking was prohibited in that area, his pleas were unsuccessful.

Equally unsuccessful was his written appeal to the Commissioner of Police that the offence should be cancelled and that the fine of Lm45 should be refunded. At this point, the bank employee referred his case to the Ombudsman because he was adamant that he had committed no parking offence.

Facts of the case

Complainant explained that when he parked his car in West Street on the morning in question, he noticed signs in a number of streets in the area to show that no parking was allowed in that zone after 1300 hours. He also noted that a number of police officers were patrolling the area to ensure that this restriction would be observed. However, since there were no police officers in sight in West Street and the street was free of parking restrictions, complainant parked his car in a bay and went to work.

Feeling somewhat apprehensive and in order to check whether in the meantime the Police had placed any traffic restrictions, the employee went during his lunch break to have a look at the area where he had left his car. He ascertained that no signs that restricted the parking of vehicles in West Street had been placed during the morning and early afternoon and noticed that in contrast with other streets in the neighbourhood, many cars were still parked along West Street.

At the end of the day's work when he went to retrieve his car, the employee was taken aback when he noticed that his car was being lifted onto a towing truck. Although he explained to the police officers involved in this operation that there were no signs earlier that morning to indicate that parking was not allowed in the section of West Street when he left his car, he was told that since a religious procession was shortly due to pass through this street, they had no option but to tow the car away when their efforts to identify its owner were unsuccessful.

When police officers on site sought directives from their superiors as to whether the towing of the car should go ahead or not since its owner had by then appeared, the reply was that since the car had already been lifted, the only solution was for its owner to pay the fine to have the car released and then send an appeal to the Commissioner of Police for a refund of the fine. The reply by the Assistant Commissioner of Police to the letter that was subsequently send by the employee was not, however, particularly encouraging. It merely stated that

"*(The)… case was reviewed and it resulted that No Parking signs were placed in (the) said street. Furthermore a notice was published in the* ***Government Gazette****. Hence your request cannot be acceded to*."

Complainant considered this reaction by the Police as grossly unfair. He was prepared to confirm on oath his version of events and that police officers who were on the scene had told him that since his car had to be towed away from a place where No Parking signs had not been placed, his fine would be refunded upon sending an appeal to the Commissioner. He also informed the Ombudsman that police officials had asked him to cooperate with them and

not to put them in a bad light by having to unload the car in front of a whole group of people who had in the meantime crowded round the tow truck.

Complainant was particularly intrigued by the statement by the Assistant Commissioner that No Parking signs had been placed in the street when he knew without any shadow of doubt that there were no such signs at least until the early afternoon. He stated that it was clear that the Police had failed to ensure that the street was clear of encumbering vehicles on the day in question and that he was paying the penalty for their failure to restrict parking in a street where a religious procession was due to pass.

Complainant also referred to the point by the Assistant Commissioner of Police that a notice for the temporary prohibition of parking in West Street had been published in the **Government Gazette**. He pleaded that even if this notice was enough to justify the action taken by the Police, the fact that surrounding streets had No Parking signs that morning whereas there were no such signs in West Street, had led him to believe that on that day he was free to park his car in the usual place. In fact, while surrounding streets were clear, West Street on that morning at eight was available for parking as usual with no parking prohibition in force.

When the Ombudsman saw the police file on the matter, he confirmed that the Police had issued instructions at about 1830 hours on the evening in question for complainant's car to be towed. This was a few minutes before a religious procession was due to leave the Carmelite Church which is only a few metres away from where complainant's car was parked.

Police records also showed that it was true that early in the afternoon of 16 July, West Street was full of parked cars. According to the Police, however, at about 1500 hours duty personnel were deployed to several positions in the area to ensure that the route of the religious procession would be free of parked vehicles. The Police stated that complainant was not correct when he said that no signs were posted in West Street because portable No Parking signs were distributed during the afternoon of the previous day and had been there for a whole day prior to the procession. The Police remarked that it was likely that complainant had not noticed these signs among the parked cars.

The relative entry in the police file went on to state that:

"*Furthermore a Legal Notice was published in the* ***Government Gazette*** *to the effect that vehicles will not be allowed to park in West Street (including other streets) and also that vehicular traffic will be temporarily suspended during the procession*."

Police records also referred to the allegation by complainant that he had been told by a police officer that on appeal to the Commissioner, his fine would be refunded since no signs to restrict parking had been placed in West Street. This allegation was flatly denied by the officer who was supposed to have said these words and who also denied that he had ever requested complainant not to insist that his car should be unloaded from the tow truck so as not to put the Police in a bad light.

According to the Police, once a tow truck has already lifted a car that is causing an obstruction in the road, it is not then possible to issue instructions to unload the car. The Police were also emphatic that despite complainant's remarks, No Parking signs were placed throughout the whole route that was to be followed by the religious procession and West Street was no exception; and in fact two portable No Parking signs had been placed in this street.

While admitting on his part that No Parking signs were positioned in the street in the evening when he went to collect his car, complainant said that in his view it was unfair if the Police had placed these signs in West Street in mid-afternoon and then expected owners of parked cars to remove them in time before the procession was due to start at seven o'clock. In these circumstances a car owner who was not aware of the sudden introduction of parking restrictions and who had not been asked by the Police to remove his car, had to pay the price for police inefficiency.

Outcome

The Ombudsman noted that section 52(1) of the Traffic Regulation Ordinance states as follows:

"*The Commissioner of Police shall have power to make orders by notice in the Gazette, for controlling, restricting or prohibiting temporarily the passage or stopping of vehicles of any description through or in any street on the occasion of processions, religious ceremonies or other public solemnities or celebrations…; signs shall be appropriately placed to indicate the prohibition or other restriction, unless a Police Officer is present to control traffic*."

Searches by the Ombudsman in the **Government Gazette** in connection with notices published under the Traffic Regulation Ordinance concerning religious celebrations in Valletta in mid-July 2002 revealed that the Commissioner of Police had notified that the transit of vehicles would be suspended on Tuesday, 16 July 2002 from 1900 hours to 2300 hours in a number of streets in the vicinity of the Carmelite Church. However, although no less than seven streets were listed in this notice, the Ombudsman found that West Street did not feature at all in this list.

As a result, since West Street was excluded from the list of streets where parking was temporarily prohibited on the day in question, the Ombudsman felt that irrespective of whether signs had been placed to indicate this restriction or not, the towing of complainant's car was not justified.

The Ombudsman found that two conditions are necessary for the temporary restriction of parking in streets during religious festivities; firstly, the issue of adequate notice in the **Government Gazette** and, secondly, the positioning of appropriate signs to indicate this restriction. In this case, failure by the Police to observe the first condition constituted a breach of their own regulations and rendered illegitimate their action to tow away complainant's car.

The Deputy Commissioner of Police agreed with the conclusion in the Ombudsman's report that since West Street had been excluded in the Police Notice in the **Government Gazette** through an oversight, the grievance raised by complainant should be upheld and action was taken to issue a refund of the fine that had been imposed on him.

Case No C 562

CUSTOMS DEPARTMENT

The case of the imported beach mats and cushions that were released at the end of summer

The complaint

In April, way before the onset of the summer season, a local importer received a consignment of beach mats and cushions for garden chairs, benches and sunbeds. When these items were being unloaded, the releasing officer from the Customs Department refused to allow their withdrawal unless the importer agreed to pay a levy on these items and a fine equivalent to the total amount of the levy for a false declaration for customs purposes of imported goods.

The importer refused to pay the levy and the fine even though this would have enabled him to collect the goods straightaway and allowed the dispute to be settled in due course in the appropriate channels. Feeling confident that the items would be classified exempt from levy and be released in time for the incoming summer, the importer decided instead to submit samples to the Tariff Classification Committee of the Customs Department.

Following protracted contacts between the importer and the government departments that were involved, the goods were finally released by the Customs Department and were transported to the warehouse of the importer in the last week of September when the summer season had virtually come to an end.

Feeling annoyed that the Customs Department had taken such an inordinately long time to release these goods, the importer raised the matter with the Office of the Ombudsman. He pointed out that the department should be held responsible for the delay that had occurred until the goods were released since this had resulted in loss of sales and the cancellation of orders and the need to find storage space to hold these products until the next summer. Complainant asserted that the period of five months taken by the Customs Department to

classify these goods was unjustified and constituted an instance of bad administration.

Facts of the case

When in April a container load of garden furniture that was manufactured in Italy reached Malta, it never crossed the mind of the local importer who had already imported similar items from the same supplier in previous years that this time things would take a completely different twist.

In the process of unloading the container at the Luqa stripping shed, the representative of the Customs Department insisted that a levy was chargeable in respect of the cushions and beach mats that formed part of the consignment. In addition the importer was asked to pay an equivalent amount as a fine for the presentation of a false declaration on imported goods for customs purposes. This amounted to a total sum of around Lm4,000.

Not unexpectedly, the importer expressed surprise at this decision. He pointed out that identical items he had imported in the previous year and that were examined by the same section of the department had not been subjected to the payment of a levy while the department had accepted without any difficulty the HS classification given by the importer to this consignment. The importer also argued that the tariff code being used by the department referred to bed mattresses and was not applicable to the items that were the subject of the whole controversy.

Although at this stage the importer could have chosen to pay the levy and the fine under protest and then contest the department's decision since this would have led to the immediate release of the goods, he decided instead to submit samples of these products to the Tariff Classification Committee of the Customs Department. In doing so, complainant had reason to believe that the Committee would back his argument that levy was not chargeable on these items and that the goods would be released in a few days so that they would still be in time for the summer season.

The matter, however, dragged on for months on end although complainant

made regular phone calls to the Customs Department to check on the stage reached by the department in its classification of the beach mats. Finally, after some three months, the Commerce Division of the Ministry for Economic Services issued an exemption order that was dated mid-July although according to the importer, for some unknown reason, this document only reached his office in early August.

This was by no means the end of the story. When the exemption order was presented to the Customs Department it was noticed that the HS Code Number shown in this document was not the one that had been sanctioned by the customs authorities and, consequently, the Commerce Division was asked to issue an exemption order with the correct tariff code. At the end of this saga, the importer was asked by the Customs Department to pay rental charges since in the meantime the consignment had been kept at the department's Bonded Stores. Following the importer's objection, agreement was finally reached between the two parties for a payment that covered only the first month of storage. The goods finally reached the importer's warehouse at the end of September.

In the explanations that were furnished to the Ombudsman by the Customs Department, however, a somewhat different turn emerged regarding various aspects of the version that had been narrated by the importer.

The department explained that from the very outset the official entrusted with the release of the consignment had classified the items in question as "*mattresses of a width not exceeding 110cm*" under HS Code Number 9404.29.90.10 and subject to the payment of a levy. This classification was based on a decision taken some time earlier on similar items by the Tariff Classification Committee (TCC) of the Customs Department.

As is normally done whenever similar disputes arise, complainant was given the opportunity to have the goods released against the payment of a deposit corresponding to the amount of levy and VAT endangered and the payment of an equivalent amount pending a decision as to whether a fine should be imposed for the submission of a false declaration. However, since complainant refused to pay these amounts, the Customs Department had no other option but to store these items in one of its warehouses until the matter was settled.

The Customs Department also explained that shortly afterwards, the classification of the imported items was discussed by the TCC in its first meeting after this case had arisen. This meeting took place in the first week of June and the previous classification was confirmed. Although the importer was informed of this decision and was allowed a period of ten days to submit an appeal and to present new evidence to substantiate his claim, he failed to do so.

In May the Customs Department also requested complainant to provide an explanation for the discrepancy in his declaration but no response was forthcoming. This happened again in August.

In mid-August 2002 the importer presented by hand to the Customs Department a copy of a Levy Exemption Order that had been signed almost a month earlier by the a/Minister for Economic Services under section 9 of the Local Manufactures (Promotion) Act and which he had received by fax. It was also at this stage that the importer informed the Customs Department that he had not replied to the department's requests for an explanation because in the meantime he had submitted an application to the Commerce Division for the issue of an exemption order on the items in dispute.

At this point the customs authorities noticed that the exemption order presented by the importer made reference to the wrong HS Code Number; and it was only by means of a letter that was issued late in August that the Commerce Division issued a revised exemption order in favour of complainant with the correct HS Code Number. The Ombudsman ascertained that the number quoted by the Commerce Division in the amended exemption order was in fact the classification code number on which the Customs Department had insisted all along.

The Customs Department also informed the Ombudsman that taking everything into account, it had been decided not to impose a fine on the importer for an incorrect declaration and that storage rent should be calculated as from the day when the importer was informed that the exemption order should be amended to show the proper classification.

Finally, the department referred to complainant's protest on the length of time

taken to issue the exemption order and explained to the Ombudsman that it was not at all involved in the issue of this document.

Outcome

Faced with the grievance raised by complainant that the delay in the release of imported goods was due to lack of administrative competence by the Customs Department and that this delay had caused loss of sales and expenses related to stock holding and storage charges as well as loss of profits, the main issue that was tackled by the Ombudsman was whether the delay that had taken place was in fact avoidable.

The very fact that the goods in question required an exemption order in order not to pay levy charges vindicated the stand of the customs releasing officer when insisting on the proper classification of these items. At the same time, although the same type of goods had been imported without the payment of levy in previous years, this should not have been taken to mean that the items were not in fact subject to levy.

An examination of the sequence of events reveals that there were delays that could have been avoided by the Customs Department as well as by complainant. On the other hand, it is widely acknowledged that the procedures that are involved in the issue of an exemption order to protect local industry necessarily take time to be concluded; and in order to counter this situation, procedures exist whereby goods can be released while administrative procedures take their course. Indeed, complainant could easily have adopted this course of action from the very start.

The Ombudsman acknowledged that since the items in question are largely associated with summer, failure to release these items on the market in time must have led the importer to miss the peak of the sales period associated with these products and to incur additional expenses in the form of stock financing and storage charges. Despite these considerations, however, the Ombudsman found that there was no instance of maladministration in this case and the charge that the delay was attributable to the incompetence of the Customs Department was not sustained.

Case No C 629

MALTA MARITIME AUTHORITY

Refusal to accept registration of vessel under Maltese flag

The complaint

The Malta-based representative of a foreign ship owner reported to the Ombudsman that he had been the victim of discrimination by the Registrar-General of Shipping and Seamen of the Malta Maritime Authority. He alleged that the Registrar had exceeded his powers when he repeatedly refused to accept his application for the issue of a provisional registration of a ship under the Merchant Shipping Act.

The representative complained that the Registrar's action had been detrimental to his interests and had caused him financial damage and that despite his efforts to have this decision reconsidered, the Registrar had refused to budge.

Facts of the case

In October 2002 complainant submitted an application to the Merchant Shipping Directorate of the Malta Maritime Authority for the registration under the Maltese flag of a small bulk carrier that was built in a shipyard in Germany in 1977. This application provided relevant technical data including tonnage and register dimensions as well as all the necessary certificates to show that the vessel was in very good seaworthy condition. This was confirmed by the history of the inspections of the vessel during the previous eighteen months.

Soon after the submission of this application, the Directorate informed the ship owner's representative that the Registry did not accept vessels that were built in 1977. It was explained that it was the policy of the Malta Maritime Authority not to consider the registration of vessels that were twenty-five years or more and that this policy had been announced by means of Notice

No. 36 of the Merchant Shipping Directorate. Although the Directorate explained that in this case the decision was related solely to the age of the ship in question, complainant refused to accept this ruling and wrote back to the Directorate to point out that a refusal on these grounds ran counter to subarticle 3.8 of the Merchant Shipping Act which states that

"*No ship shall be registered otherwise than by or with the express permission of the Registrar-General if the completion of her first construction occurred more than twenty-five years before the commencement of the year in which application for registration is first made under this Act, and the Registrar-General may allow the registration, or refuse to allow the registration of, any such ship:*

Provided that the Minister may, in any case, direct the Registrar-General, not to register any ship irrespective of its age in respect of which an application for registration has been made, if in the Minister's opinion it would be detrimental to the national interest of Malta or the interest of Maltese shipping for the ship to be registered."

According to complainant, this subarticle referred to vessels of more than twenty-five years before the commencement of the year of application.

Efforts by complainant for a reconsideration of the Registrar's decision proved unsuccessful. He was again informed that in accordance with Notice No. 36***** captioned **Guidelines for the ascertainment of seaworthiness of vessels being registered as Maltese ships** which was issued on 16 February 2000 by the Merchant Shipping Directorate of the Malta Maritime Authority and came into effect on 1 March 2000, it was the policy of the Authority not to register ships of twenty-five years and older and the Authority saw no justification to depart from a policy decision that was introduced almost three years earlier.

The Maltese representative was upset by the fact that the Merchant Shipping Directorate had failed to address his concerns regarding the conflict that was

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***** The relevant parts of Notice No. 36 state that *"The Merchant Shipping Directorate has reviewed the guidelines for ascertaining the seaworthiness required in terms of section 12(a) of the Merchant Shipping Act for vessels being registered as Maltese ships… As a rule, trading ships of twenty-five years and over will not be registered…"*

manifest between the provisions of subarticle 3(8) of the Merchant Shipping Act and the contents of its own Notice No. 36. He was also perturbed by the repeated refusal of the Registrar to provisionally register the ship in question under article 12 of the Merchant Shipping Act merely because the vessel was aged twenty-five years when this article included no such provision.

At this stage, the local representative brought the matter to the attention of the Ombudsman. He pointed out that vessel registration under the Maltese flag should be regulated on the basis of due observance of Maltese laws relating to merchant shipping and not by means of notices issued by the Merchant Shipping Directorate that are only meant to serve as policy guidelines.

He also insisted that ascertainment of seaworthiness for the purpose of registration under the Maltese flag ought not to be done under the terms of the Directorate's Notice No. 36 but under conditions deemed proper by the Registrar in line with article 12 of the Merchant Shipping Act. This article establishes, among other things, that upon the receipt of an application for registration of a vessel that is made in accordance with articles 10 and 11 of the Act, the Registrar may then provisionally register the ship as a Maltese ship for six months provided that the applicant for registry has furnished satisfactory evidence that the vessel is seaworthy and the registered owner has satisfied other conditions established under the Act.

Complainant felt aggrieved by the fact that although he had provided all the necessary safeguards including a copy of all the vessel certificates required by law for a provisional registration of the vessel, the Registrar had continued to refuse to issue this provisional certificate on the grounds that the vessel was aged twenty-five years. Thus, at no stage was the seaworthiness of the vessel taken into consideration and the age factor was the only yardstick that was taken into account. Complainant considered that the way in which the Registrar had based his decision was unacceptable and maintained that unless the Registrar had sufficient reasons as provided for in the Merchants Shipping Act, then his refusal to register the ship merely on account of age was contrary to the law.

Complainant furthermore stated that the way in which the Registrar had treated his application was especially unfair because at the same time that his

application was being turned down, another vessel of a similar type and age had been accepted and provisionally registered under the Maltese flag by the Malta Maritime Authority.

When approached by the Ombudsman, the Malta Maritime Authority on its part defended its outright refusal to register the vessel on grounds of non-conformity with the guidelines appearing in Notice No. 36 of the Merchant Shipping Directorate. Although the provision in the Merchant Shipping Act whereby ships that are more than twenty-five years old are not eligible for registration may in turn be taken to imply that vessels that are less than twenty-five years are eligible, yet the proviso in subarticle 3(8) of the Act still allows the Minister responsible for shipping to direct the Registrar not to register any ship regardless of age if in his opinion any such registration would be detrimental to the national interest of Malta or to the interest of Maltese shipping.

According to the Registrar, the guideline in MSD Notice No. 36 that "*as a rule trading ships of twenty-five years and over will not be registered*" in itself constituted and should be considered as a valid directive that was issued directly by the Minister to the Registrar in order to safeguard the international reputation of the Maltese shipping industry. The Registrar also found comfort in the fact that Notice No. 36 had featured in the Authority's **Annual Report 1999-2000**; that the Notice was issued by the Directorate with the Minister's approval; and that the Minister himself had commented favourably on this policy in Parliament.

Outcome

The core of the issue under investigation by the Ombudsman was whether the refusal of vessel application by the Registrar on the strength of the guidelines given in Notice No. 36 satisfied the requirements of the law.

It was the opinion of the Ombudsman that since the vessel met the stipulations laid down in the Act, the vessel should have been given a provisional registration. This would then have enabled its seaworthiness to be verified by the submission of evidence to the satisfaction of the relevant authorities.

The Ombudsman appreciated that refusal of registration on grounds of age even if a ship satisfies subarticle 3(8) of the Act may only be made by a minister's directive to the Registrar-General if, in the Minister's opinion, such registration would be detrimental to the interest of Maltese shipping. He argued, however, that even if the Minister was of the view that ships of an age less than that stipulated in the law would not be in the interest of Maltese shipping, the directive would only apply to the vessel for which such an application for registration would have been filed and should not be taken as a blanket directive.

It was the view of the Ombudsman that the minister's implied agreement with the broad thrust of the general guidelines that had been issued by the Merchant Shipping Directorate does not satisfy the procedure laid down in subarticle 12(a) of the Act. This procedure requires provisional registration to be followed by the production of evidence to the satisfaction or otherwise of the appropriate authorities on the seaworthiness of a vessel. Since the Ombudsman considered this procedure as mandatory on the Minister and not simply a regulatory feature, he argued that the mere publication of guidelines does not appear to satisfy the requirements of the Merchant Shipping Act.

Following his consideration of the various aspects of this case, the Ombudsman concluded that in his opinion the proper course of action in this case should have consisted in following the requirements of subarticle 12(a) of the Merchants Shipping Act whereby the first step would be the provisional registration of the vessel followed by an obligation on the part of the applicant to furnish evidence regarding the seaworthiness of the vessel in question.

The Ombudsman also referred to the admission by the Malta Maritime Authority that in October 2002 it had allowed the registration of a vessel that was also built in 1977 and that this registration had been accepted by mistake. Although the Authority pleaded that this mistake did not justify the abandonment of a policy that had been adopted since March 2000 and that was considered to have enhanced the reputation of the Maltese shipping register, the Ombudsman felt that this was not a sufficiently plausible reason for treating complainant's application differently. As a result he agreed that complainant's grievance in this respect was justified and that the action by the Malta Maritime Authority attracted criticism.

Finally the Ombudsman referred to the discrepancy between the age of a vessel as stated in the Merchant Shipping Act and the guidelines given in MSD Notice No. 36 and suggested that this discrepancy, albeit marginal, be rectified so as to eliminate complaints as had happened in this case. The MMA subsequently informed the Ombudsman that it would recommend that the Merchant Shipping Act be amended at the first opportunity to ensure the complete alignment of the provisions of the law with policy guidelines issued in furtherance of this legal framework.

Case No C 630

MSIDA LOCAL COUNCIL

Allegations of wrongdoing in the selection of Executive Secretary

The complaint

A candidate for the vacant post of Executive Secretary with the Msida Local Council whose application in June 2002 was short-listed, wrote to the Ombudsman and claimed that although during the first round of interviews with applicants held in July the majority of councillors had been in favour of his selection, the position had then been allowed to remain vacant for a long time. He alleged that the reason behind this delay and the impasse which arose was due to the wish of the Mayor of the Msida Local Council to appoint a relative to fill this position.

Complainant informed the Ombudsman that in order to get a second opinion, the Local Council had then turned to an organization which provides employee selection and recruitment services. He alleged, however, that following a second round of interviews, the recommendation of this agency that he was the candidate who was best qualified for the post of Executive Secretary, was ignored by the Council. He also alleged that following political pressure, the person who was eventually chosen for the job was the second-placed candidate.

Complainant claimed that once he had been originally ranked first in the list of short-listed candidates, the whole selection process was in effect merely a smokescreen and the final choice was based not on merit but on nepotism.

Facts of the case

From documents made available by the Msida Local Council and by the Employment and Training Corporation to enable him to investigate this case, the Ombudsman noted that during a meeting on 10 September 2001, the

Council agreed not to renew the contract of its Executive Secretary upon its expiry in the first week of October. It also agreed to take the necessary steps for the selection and recruitment of a new candidate.

In these circumstances the Msida Local Council was bound to observe the provisions of the law and the regulations that expressly concern the procedures that are to be adopted in the appointment of a new Executive Secretary. These include:

- subsection 49 (3) of Part V **Officers and Employees** of the Local Councils Act which states that "*If the Executive Secretary is appointed from outside the public service, the requirements of article 110(6) of the Constitution shall be observed*";
- article 110 (6) of the Constitution which states that "*Recruitment for employment with any body established by the Constitution or by or under any other law… shall, unless such recruitment is made after a public examination duly advertised, be made through an employment service… (provided out of public funds which ensures that no distinction, exclusion or preference is made or given in favour or against any person…)*";
- section 3 of Part II **Qualifications and Remuneration of Secretaries** of the Local Councils (Human Resources) Regulations which states that "*No person shall be qualified for appointment of Council Executive Secretary if that person does not produce a certificate, reference or declaration indicating that he possesses the following minimum qualifications:*

(a) is proficient in accounting procedures and office computer applications (word processing, data-base and spreadsheet);
(b) has managerial and/or executive experience or competence; and
(c) possesses the qualifications which are normally required in order to read for a university degree in Business Administration and/or Management."

On 20 September 2001 the Msida Local Council asked the Employment and Training Corporation to submit a list of candidates on its unemployment register who were qualified to fill the post of Executive Secretary and to serve as the Council's executive, administrative and financial head.

Although this process was repeated over and over again, the Msida Local

Council was not satisfied with the educational background and work experience of the various candidates whose names were put forward by the Corporation and on 5 June 2002 asked for the approval of the Corporation to advertise this vacancy in local newspapers.

The ETC's reaction to this request, however, was to submit the names of other candidates. Since these candidates too were not in possession of the appropriate qualifications and were considered by the Council to lack the necessary experience and unsuitable to fill the post of Executive Secretary, the Council again sought the approval of the ETC on 5 September 2002 and on 17 October 2002 to advertise its vacancy in the local print media with a view to attracting other more eligible candidates.

Finally, on 24 October 2002 the ETC agreed to the Council's request to issue an advertisement in the press for the recruitment of an Executive Secretary on the understanding that the criteria for selection including employee qualifications would correspond to the original request made to the Corporation.

From a close examination of the documents received by the Ombudsman in connection with this case, it emerged, however, that although the ETC's permit to the Msida Local Council to proceed with the issue of an advertisement in local newspapers was only issued on 24 October 2002, a call inviting applications for the post of Executive Secretary with the Council had already appeared on 13 June 2002. This meant in effect that some four months before the ETC had sanctioned the Council's request to issue an open call for applications and before this permit was in the hands of the Local Council, the Council had already taken steps to invite applications for this post by means of a public call. The Ombudsman also discovered that the closing date for the submission of applications was 28 June 2002 and that interviews by a selection panel that was set up for the purpose by the Council were held on 25 July 2002.

The Ombudsman next examined the way in which the selection process took place and the procedures that were followed until the Local Council reached its decision on the appointment. It emerged that after the panel consisting of four members of the Msida Local Council had conducted interviews with

applicants, an agency that provides manpower selection and recruitment services was requested by the Council to carry out a series of psychometric tests for the appraisal of candidates' aptitudes and abilities. The Ombudsman ascertained that following an evaluation of the personality, communication style, powers of decision-making, organisation and planning, motivation and management style of the applicants, the candidate reports that were prepared by this agency in respect of complainant and the successful applicant indicated that both contestants deserved to be short-listed for the position.

The Ombudsman also sighted an extract from the minutes of the meeting of the Msida Local Council that was held on 29 October 2002. From this document it appeared that a copy of the report by the recruitment agency on the two short-listed candidates had been distributed to all the members of the Council and that following discussion, the Council had agreed by four votes to two to select the applicant who was on the short-list with complainant since it was felt that he was better suited for the job.

The Ombudsman also noted that following the recommendation by the Msida Local Council regarding the appointment of the selected candidate to the Local Councils Department of the Ministry for Justice and Local Government in accordance with subsection 49(1) of the Local Councils Act, it was verified that this person in fact possessed the necessary qualifications to satisfy the provisions of the Local Councils (Human Resources) Regulations. As a result, in line with the relevant provisions of the law the Minister approved the appointment of the candidate who had been selected by the Msida Local Council.

The Ombudsman also verified the allegation by complainant that the Mayor of the Msida Local Council was related to the candidate who was eventually selected for the post in the sense that the wives of the two gentlemen are sisters. The Ombudsman took note of the categorical assurance by the Mayor that this was not true and that the chosen candidate was not a relative as laid down in article 20(4) of the Local Councils Act. Further investigations of this allegation by means of records held at the Public Registry revealed that the Mayor's statement was correct and that complainant's claim was completely unfounded.

Outcome

Following his review of these events, the Ombudsman concluded that the complaint could not be upheld on the following grounds:

- in the appointment of the Executive Secretary by the Msida Local Council, the provisions of the Local Councils Act were satisfied. However, although the Council went through the motions of recruitment through the Employment and Training Corporation as required by the Constitution, the procedures that were followed were irregular. Indeed, the fact that the Corporation and the Local Councils Department were not aware of and unable to track irregularities committed by the Msida Local Council when it issued an open call for applications and held interviews for the post prior to the issue of a permit by the ETC attracted criticism;

- the selection of the successful candidate by the Council was supported by a majority vote and was in order and the allegation of nepotism in the selection process was unfounded.

The Local Councils Department did not subscribe to the Ombudsman's criticism. It pointed out that the Local Councils Act states that consultation with the Minister responsible for local government is necessary prior to the appointment of an Executive Secretary by every local council. The department also stated that its role in any such occasion is to ascertain that selected candidates meet the qualifications and requirements listed under Part II of the Local Councils (Human Resources) Regulations and that, if satisfied that these criteria are met, the department then proceeds with its recommendations to the Minister.

The Ombudsman in turn refused to accept this limitation in the department's role. He argued that since any nomination to the post of Executive Secretary is vetted by the Local Councils Department before recommendations are submitted to the Minister, it was his view that the department should also ensure that all the requirements of the Local Councils Act, including the provisions relating to the appointment of an Executive Secretary, are fully observed. In this way any irregularities will be brought to light and the attention of the Minister will be drawn prior to his clearance of any such appointment.

Case No C 670

CIVIL PROTECTION DEPARTMENT

Lack of adequate explanations concerning a staff selection process

The complaint

An employee in the Civil Protection Department who claimed that he always went about his job as best he could, with responsibility and efficiently, resorted to the Ombudsman and alleged that he had suffered discrimination in the way in which his application for the post of Leading Assistance and Rescue Officer had been processed.

Complainant affirmed that although he had performed well during an interview with a selection board that was set up for the purpose and despite the years of long-standing experience to his credit in the Fire Brigade, he considered his ranking in the overall order of merit of successful candidates as derisory. He alleged that other applicants with fewer years of experience in fire fighting and with a less impressive record of attendance at in-service training programmes and job-related courses had secured a higher placing in the final order of merit.

Complainant also stated that although he had asked for an explanation from the Director of the Civil Protection Department why he had ranked eighteenth in the final overall classification, no adequate clarification had been forthcoming. Even his petition to the Public Service Commission for a reconsideration of his case and for a breakdown of his overall mark had been to no avail.

Facts of the case

A circular issued by the Director of the Civil Protection Department in May 2001 informed Assistance and Rescue Officers under his charge that the Public

Service Commission was inviting applications from eligible public officers for the post of Leading Assistance and Rescue Officers in the department. The circular listed a range of duties and responsibilities associated with this position that were mainly related to fire fighting and stated that applicants must be officers with at least five years experience in the post of Assistance and Rescue Officer or in possession of documented evidence of at least three years experience in fire fighting and/or rescue operations or related activities. Applicants were required to support their claims regarding qualifications and experience by certificates and/or testimonials and to submit service and leave record forms. Eligible applicants would be required to attend for an interview by a selection board designed to ascertain their suitability for this position.

Documentary evidence made available to the Ombudsman in connection with this complaint showed that the Public Service Commission had approved a set of criteria that were to be adopted by the selection board in its assessment of candidates for the post of Leading Assistance and Rescue Officer. The Commission agreed that the maximum marks in respect of each of these criteria should be as follows:

- knowledge of and adherence to rules and regulations and technical aspects — 25 marks
- relevant experience/performance — 25 marks
- leadership and other abilities required in the post — 25 marks
- qualifications/certificates — 15 marks
- personal qualities — 10 marks

From these documents the Ombudsman ascertained that thirty applicants were successful and that the first nine candidates had been appointed to the post. The Ombudsman also confirmed that complainant had been awarded 64 points and that he was placed in eighteenth position in the result sheet on the basis of the report prepared by the selection board that was also approved by the Public Service Commission.

Other documentary evidence in the hands of the Ombudsman showed that following publication of the order of merit of successful candidates, there were letters of protest from three candidates in connection with their placing in the final overall list. Reacting to claims by these officers that they deserved

higher marks on the basis of their long years of experience in fire fighting and their creditable performance throughout these years, the chairman of the selection board pointed out, however, that other criteria such as the amount of sick leave availed of throughout a four-year period as well as conduct had been taken into account in the assessment of the relative experience and performance of each candidate. In the light of this explanation, it was felt that the representations that had been raised in the three letters of protest had been adequately assessed during the interviews held by the selection board with these candidates.

The Public Service Commission in turn held that during these interviews the selection board was in a good position to give careful consideration to the answers given by applicants as well as to the track record of each applicant and found no evidence to suggest that the discretion of the selection board and its judgment should be put in question. The PSC saw no reason why the order of merit given by the selection board should be revised.

Despite the stand taken by the Commission, the Ombudsman was of the view, however, that the charges that had been levelled by complainant merited deeper investigation on his part. From documents placed at his disposal, the Ombudsman gathered information on the call for applications including details on the educational qualifications of a number of candidates who had responded to this call, their work experience, their service and leave records and the extent of their attendance at in-service training programmes. This enabled the Ombudsman to draw a number of interesting observations.

It appeared, for instance, that complainant who possessed no less than fourteen years' experience in fire fighting and who had availed himself of a total of only three days of certified sick leave during the four years prior to the issue of the call for applications, had been allocated a score of 20 out of a maximum of 25 points under the criteria based on experience and performance. At the same time, two other applicants with far less years of experience in fire fighting and with a considerably higher amount of working days taken as certified sick leave compared to complainant, had been given equivalent or even higher marks.

The Ombudsman felt that although the chairman of the selection board had

stated that criteria such as the amount of sick leave taken and the conduct of applicants had been given consideration in the assessment of the suitability of candidates for the post of Leading Assistance and Rescue Officer, no satisfactory explanation was given by the board regarding the yardstick on which points were in fact awarded to these candidates.

In a similar vein, the Ombudsman found that the allocation of points to applicants for educational qualifications and for participation in training programmes and courses related to fire fighting defied any attempt at logic. There seemed to be no hard and fast criteria for the award of points to candidates even though applicants were required to submit certificates and testimonials and this should have made it possible to verify the marks allocated to each participant.

The Ombudsman expressed concern at the way in which marks had been awarded by the selection board to candidates for their educational background and for their attendance at training programmes and was critical of the board's failure to provide a sound explanation of the criteria on which these points had been awarded. The Ombudsman concluded that from the limited verification that it was possible for him to conduct into the award of points to candidates, serious doubts arose on the way in which the selection board had exercised its judgment on the merits of candidates. These doubts were reinforced by the fact that although explanations had been sought, the answers that were given had been anything but convincing.

Outcome

The Ombudsman informed the Public Service Commission about his concern at the fact that generally in their assessment of candidates for government positions, selection boards tend to be increasingly in favour of reducing the weight set for objective criteria and instead seem to attach more importance to purely subjective methods of assessment. This approach allows members of the board a freer hand in their deliberations and in their choice of successful candidates and at the same time lessens the possibility that a fair and impartial review of a staff selection process may be conducted in the event that questions arise about its outcome. At the same time it tends to blur the element of

transparency that should be considered as a crucial feature in any process for the selection or promotion of staff.

In the case under review, the Ombudsman in particular showed dissatisfaction at the way in which the selection board failed to provide quality information when asked to explain the criteria that had been adopted for the allocation of marks under staff selection procedures based on experience and performance. The Ombudsman recommended the Public Service Commission to seek further explanations from the selection board regarding the way in which marks had been awarded and the criteria on which the board had reached its judgment in the allocation of these marks.

Despite insistence by the Ombudsman, the Public Service Commission was unsuccessful in its efforts to unearth this information. Faced with this situation and after consideration of the new circumstances that had been brought to light by the Ombudsman, the Public Service Commission decided that it could not disregard the mistakes and inconsistencies which emerged as a result of the Ombudsman's investigations and which surfaced from replies provided by the selection board in explanation of its actions.

The Public Service Commission consequently decided that the selection process in connection with the call for applications for the post in question should be terminated and that no new appointments were to be made in response to this call although it was also agreed that the appointments that had already been made would be allowed to stand.

Following this decision, the Ombudsman informed complainant of the outcome of his investigations and closed the file.

Case No D 139

LAND DEPARTMENT

The case of the farmer who availed himself of his right of first refusal

The complaint

Some years after the transfer to the Government of property that previously belonged to the ecclesiastical authorities in Malta, a considerable tract of land that had been leased for many years by the Church to a full-time farmer became the subject of an open call for tenders that followed standard procedures adopted by the Land Department in similar calls.

Benefiting from his right of first refusal for this land under this call for tenders, the farmer discovered much to his surprise that he had to raise his original bid significantly in order to match the best offer that had reached the Land Department from a property company. However, soon after having agreed to do so, the farmer learnt that in the meantime the company withdrew its offer and at this stage he requested that the land in question be sold to him at his original tender price.

Since the Department refused to accept this request and the farmer was hesitant to enter into heavy loan commitments with the bank in order to finance the purchase of the land at the price that had been agreed upon, the farmer sought the intervention of the Ombudsman.

Facts of the case

Throughout the years when this large area of land in an agricultural zone was leased by the local church authorities to the farmer for the purpose of poultry production, the farmer had undertaken various development projects that were sanctioned by the appropriate environmental management and agricultural authorities. As a result of this substantial investment, the business undertaken

by the farmer thrived significantly and the value of the land rose considerably.

Subsequent to the Agreement reached in November 1991 between the Holy See and Malta relative to the transfer to the Maltese Government of immovable property that is not required by the Catholic Church for pastoral purposes, the land that had been leased by the Church to this farmer was transferred to the Government of Malta and its administration fell under the Joint Office. A few years after this Agreement came into force, the farmer submitted a request to the Joint Office, through his lawyer, to purchase this land on terms and conditions to be agreed upon between the two sides so that he could undertake additional investment.

In its reply the Joint Office drew attention to policies regarding disposal of property that is already leased to a tenant and informed the farmer that tenants of a running lease had two options: either to renounce to their tenancy rights and open the way for a call for tenders for disposal of this property under any other title; or, in the case of tenants who intend to invest in the property leased to them, these tenants may request to have their property granted on emphyteusis by means of a tender procedure. In any of these two options, the tenant would be required to renounce to his tenancy rights prior to the issue of the call for tenders but would be granted the right of first refusal. These policies also stipulated that bidders might be required to accompany their offers by a bid bond.

Three months after the farmer renounced his lease, a call for tenders for the land in question was duly issued by the Land Department. However, when the department examined the two proposals that were received, it emerged that a property development company had presented a vastly superior offer to the one submitted by the farmer. Upon being informed of this more favourable offer, the farmer decided to make use of his right of first refusal and wrote to the Land Department to raise his offer more than threefold to match the amount submitted by the other bidder.

Upon accepting the farmer's offer, the Land Department referred back to the bank the bid bond issued on behalf of the property company since it was now no longer required. At the same time complainant asked the Land Department to allow him to extend the three-week limit which he had been allowed in

order to sign the contract for the purchase of the land to be able to conclude negotiations for a loan facility to finance this purchase. A few days later, the property company that had originally submitted the highest offer informed the Land Department in turn that it was no longer interested in purchasing the land and withdrew its offer.

In the face of these developments, complainant claimed if the sale of the land were to proceed on the basis of his agreement with the Land Department, he would suffer an injustice on two counts. He claimed that, firstly, he had become aware in the meantime that the original estimate of the land in question as drawn up by a government-appointed architect prior to the issue of the call for tenders was much closer to his first offer; and, secondly, that once the company which participated in the call for tenders had withdrawn its offer and the Land Department was left with only his offer, he should be allowed to purchase the land at the price established by the government architect and not at the price which he had undertaken to pay when he had exercised his right of first refusal.

The farmer requested the Ombudsman to investigate the insistence by the Land Department to sell the land to him at the agreed price because he felt that it would be unfair for him to secure a bank loan for this purchase when the value of the land in question was allegedly acknowledged to be much lower than the amount which he had undertaken to pay.

Outcome

The Ombudsman examined all the relevant documentation regarding this case and reached the conclusion that in the way in which it had handled the situation, the Land Department had thoroughly followed all the established procedures on the disposal of property that is already leased and where the tenant of a running lease intends to invest in this property.

The Ombudsman also gave due weight to the fact that complainant had freely made a signed declaration to the Land Department where he accepted to pay an amount that was equivalent to the highest offer and that the other bidder had withdrawn his offer five days after complainant had already entered into

an agreement with the department regarding the purchase price of this property.

Considering all these factors, the Ombudsman concluded that this was surely not a case of maladministration by the Land Department. On the contrary, had the department acted otherwise and not followed strictly these regulations, then it would have laid itself open to criticism and possibly opened the door for abuse.

The Ombudsman rejected the complaint and closed the file.

Case No D 259

FOOD AND VETERINARY REGULATION DIVISION

The mystery of the cat that did a disappearing act

The complaint

A foreign national who travelled to Malta in May 2003 to reside permanently in the country brought over with her on the same flight her cat of a European-Persian breed.

Upon her arrival in Malta, however, the customs authorities refused to release the cat because it was found from the sanitary certificates presented by the new resident that not all the necessary medical tests had been administered on her pet and that the requisites of the Pet Travel Scheme had not been observed. As a result, it was decided that the cat had to be kept in quarantine for six months at the Small Animal Quarantine Section in Luqa. Some time later the owner of the cat was informed by means of a telephone call that her cat had disappeared from this station.

The owner did not accept the explanation that was given to her by the officials responsible for the Quarantine Section that her cat had escaped and just vanished into thin air to gain freedom. She found it difficult to understand why her cat had to be kept in quarantine for six months as a security measure and then it was reported to have escaped from these premises apparently with relative ease. In these circumstances, she was rather inclined to believe that the mysterious disappearance of her cat was the result of a malicious action.

By means of a letter through her lawyer, the owner of the pet immediately requested the Director General of the Food and Veterinary Regulation Division of the Ministry for Rural Affairs and the Environment to launch an investigation into the matter and to give her a satisfactory explanation as to what had happened. She also requested that the incident be referred to the police authorities and without prejudice retained her right to any further action which

she considered necessary including a claim for damages.

When no explanation was forthcoming, the owner of the pet resorted to the Office of the Ombudsman. She asked that the matter be investigated with a view to establishing the true circumstances under which her pet had disappeared so that the appropriate steps would be taken against any official at the Quarantine Section found responsible for this incident. Also feeling aggrieved at the way in which the matter had been handled by the authorities, she requested the Ombudsman to investigate the reasons why the management of the Small Animal Quarantine Section had failed to give her an answer or to provide an explanation.

Facts of the case

Soon after the intervention of the Ombudsman, the Director General of the Food and Veterinary Regulation Division at last wrote to the owner of the pet. He expressed his regret at the incident and pointed out that this was the first time in twenty years that a pet had managed to escape from quarantine. He also explained that although an intensive search of the premises and the neighbouring areas had been carried out shortly after the escape of the pet, this search had yielded negative results.

The Director General informed complainant that the matter had been reported to the Police and that a reply on their investigation was still awaited. Also according to the Director General, the Division had set up a board to conduct an internal investigation into this incident and he was prepared to take the necessary disciplinary action if the outcome revealed that this was a case of negligence by members of staff at this Division.

In his review of the case, the Ombudsman gained access to this internal report. The document stated that cats kept in the Cats' Section of the Small Animal Quarantine Section are regularly fed and cleaned by quarantine attendants in accordance with a set of standard operating procedures. Under these procedures, the attendant closes the main door of the area before opening the cages of the cats.

During its inspection, the board examined arrangements for the fastening of the main door from the inside whenever cleaning and feeding operations are under way. These arrangements were found wanting. It was discovered that during cleaning and feeding time this door would not be adequately well secured since the loop that fastened the door was rather loosely inserted in the wall.

The board concluded its findings by pointing out that in its view there were no signs of negligence by the quarantine attendant and the veterinary officer who were involved in this incident. It was recommended, however, that

"*more attention should be given whilst handling the animals and immediate action must be taken when any faults that can lead to such incidents are noticed. We recommend that a double door should be placed at the entrance of the cat section and that a general refit should be given to the fence enclosing the quarantine area*."

The Ombudsman also saw the signed declaration that was made by the attendant who was responsible for the feeding and cleaning of cats held at the Cats' Section of the Small Animal Quarantine Section when the incident happened. In his declaration, the attendant stated that while he was placing the litter inside the cage, the cat suddenly darted swiftly out of the cage and made a dash for the door which was thrust open under its impact. This allowed the cat to escape through the perimeter fence surrounding the premises. This person confirmed that efforts by personnel working in the Quarantine Section to find the cat were unsuccessful.

The Ombudsman also took note of the doubts expressed by the Division about complainant's suspicion that her pet had been stolen because it was a pedigree cat. The Division claimed that over the years it had handled a large number of pure breed animals and none of these animals were ever stolen. There was therefore no reason to believe that complainant's pet was stolen.

Outcome

In his report the Ombudsman clarified that his function was to investigate

administrative shortcomings and acts of maladministration and that in this case he had no competence to determine the circumstances that led to the cat's disappearance. In other words it was not the Ombudsman's responsibility to determine whether the cat either escaped or was stolen while under the responsibility of the Quarantine Section. The Ombudsman's responsibility in this case was to determine whether the Section acted with due diligence while the cat was in its custody.

Throughout his investigation the attention of the Ombudsman was drawn to a report on the situation at the Small Animals Quarantine Section that was prepared by a veterinary officer following the incident. In this report reference was made to structural defects in most buildings in this station as well as the poor state of various fixtures and fittings including cages, kennels and units where animals were kept. It was stated that the door of the Cats' Section was defective and irreversibly detached at the lower part and this made it possible for a cat to push the door forward and creep out. The report remarked that existing facilities to fasten the door of this section were inadequate and besides the replacement of the existing door, the installation of a double door at the entrance passage was recommended. A site inspection by the Ombudsman confirmed the primitive state of the door in question.

Following his review of these facts, the Ombudsman concluded that the disappearance of the cat was attributable to failure by the Food and Veterinary Regulation Division to ensure that while the pet was held in quarantine under its responsibility, it was kept in a properly maintained place. Apart from the serious public health implications of this incident, this is a case of maladministration which attracts criticism.

The Ombudsman therefore felt that the issue of a mere apology to complainant by the Director General of the Food and Veterinary Regulation Division was not enough and that the Division should assume responsibility to cover the cost of the pet. For this purpose complainant was advised by the Ombudsman to present a claim supported by receipts and other relevant documents with a view to the payment of compensation by the Food and Veterinary Regulation Division.

Although the management of this Division did not agree with the

recommendations that were expressed in the Ombudsman's final report, the Ombudsman maintained his view that the major factor which contributed towards this incident must have been the improper maintenance of the quarantine section and the overall bad state of repair of facilities in the section where complainant's cat had been kept.

Case No D 275

MALTA ENVIRONMENT AND PLANNING AUTHORITY

The late registration of two stuffed protected birds

The complaint

A person who submitted an application to the Malta Environment and Planning Authority to register two stuffed protected birds which were in his possession, was upset when the Authority refused to accept his application on the grounds that he had not followed the rules that were laid down for the submission of these applications. When the Authority turned down his request for a reconsideration of this decision, this person requested the Ombudsman to look into the case since he claimed that he had been treated unjustly.

Facts of the case

In mid-May 2003 the Malta Environment and Planning Authority issued a notice in the local media to inform owners of stuffed protected birds that they had to send an application to register their birds in order to comply with legal notice 41 of 2003. Among other things, this notice stated that "*any person who has in his possession any stuffed bird or birds that were not registered before such date as the Minister may prescribe, shall register an application with the Director (of the Environment Protection Directorate) so that the Director may issue an official certificate listing the stuffed birds in such person's possession, and no action shall be taken under these regulations or under any other law, against persons who apply before such date*."

The notice by the Authority in the newspapers also referred to legal notice number 56 of 2003 whereby the Minister for Home Affairs and the Environment established the 31st May 2003 as the prescribed date for the registration of stuffed birds.

The notice by the Malta Environment and Planning Authority in the newspapers for the registration of stuffed birds had made it clear that completed forms had to be submitted by hand together with applicant's identity card and that applications submitted by post would not be accepted. In addition the notice clearly stated that no applications would be accepted after 12 noon of 31st May 2003.

Complainant explained to the Ombudsman that on 21 May 2003 he had mailed his application to the Authority for the registration of two stuffed owls and that a few days later he had received a letter dated 28 May 2003 from the Authority whereby he was informed that his application could not be accepted because of the Authority's policy to accept only applications that were delivered by hand. The original application was sent back to complainant in this letter in which he was also informed that his application had to be delivered by hand before noon on 31 May 2003.

Complainant stated that he had only received this letter during the morning of 31 May 2003, which was a Saturday, and that since he did not know that the Authority is open on Saturdays, he thought that it was impossible for him to meet the deadline. Consequently, when he handed his application to the Environment Protection Directorate on the morning of Monday, 2 June 2003, his application was refused since the closing date for the submission of applications had already expired.

In his letter of protest to the Authority, complainant claimed that although there was enough time for him to rectify the situation from the date when he had mailed his application on 21 May 2003 up to the end of the month, yet the delay by the Environment and Planning Authority to inform him of his failure to observe the rules had contributed to the expiry of the registration time. Complainant was also annoyed because he felt that the delay by the Authority to draw his attention to his mistake was further compounded by the fact that although the numbers of his telephone and of his mobile phone appeared in his application, officials of the Environment Protection Directorate did not contact him by phone and chose instead to send him a letter even though the closing date of the registration scheme was by then fast approaching.

Complainant's letter of protest was not, however, upheld by the Authority. The Environment Protection Directorate maintained that the closing date for the registration of stuffed protected birds was established by law and that

adequate publicity had been given well before this date to the requirements that were attached to the scheme for the registration of birds. On his part, complainant claimed that he had never come across the requirement that all applications had to be handed to the Authority at its Floriana offices and that applications sent by post would not be accepted.

Throughout his contacts with the Authority on this complaint, the Ombudsman ascertained that although dated 21 May 2003, the application by complainant had reached the offices of the Authority on 28 May 2003 and that on the same day a senior official of the Environment Protection Directorate had sent a reply to complainant to inform him of the two main conditions of this scheme. The Ombudsman also ascertained that the advert by the Authority appeared in at least four local newspapers and that adequate coverage was given in this advert to the two basic conditions of this scheme regarding its closing date and the need to deliver applications by hand.

The Malta Environment and Planning Authority informed the Ombudsman that its offices were open as usual up to 1230 hours on Saturday, 31 May 2003 and that, despite its warning, it had received in all 76 applications by post, some of which reached its offices after the closing date for the scheme. The Authority also explained to the Ombudsman that the decision by its Environment Protection Directorate not to accept applications by post and to insist on the delivery by hand of applications was taken following the experience of a similar scheme some years earlier when it was found that a large number of applications which had been received by post contained inaccurate information or failed to provide the required details and it had taken the Directorate quite a long time to contact these applicants to get them to amend their applications. This experience had led to the decision that all applicants had to go in person to the offices of the Authority so that all applications would be vetted and acknowledged on the spot.

The Ombudsman's review of the way in which applications were handled revealed that all 76 applications that were received by post had been rejected and that complainant was the only one who had protested about the way in which invalid applications had been handled. It was also found that no attempt had been made by officials of the Environment Protection Directorate to contact any of these applicants by phone and that a letter had been sent to all of them

to draw their attention to their failure to observe the rules attached to the scheme for the registration of stuffed protected birds.

The Ombudsman furthermore found that even the website of the Authority stated quite clearly that applications in connection with this scheme had to be delivered in person before the established deadline.

Outcome

The Ombudsman accepted the Authority's stand that its requirement for the submission of applications by hand was based on the experience of a similar exercise when difficulties arose in the handling and processing of applications that were received by post. The Ombudsman felt therefore that the Authority's decision to introduce this condition could in no way be faulted or criticized.

The Ombudsman also agreed that the Authority had given adequate notice in its adverts in the media and on its website to the two main requirements that had to be observed by all applicants under this scheme.

In these circumstances the Ombudsman ruled that the point raised by complainant that he had never come across the requirement regarding the delivery by hand of registration forms, did not constitute a valid justification to explain why he had mailed his registration form instead of delivering it in person at the offices of the Authority. Complainant's failure to observe the rules could not be put at the door of the Authority since all along it had adopted procedures that were made known to all interested applicants well ahead of the stipulated deadline.

On the other hand, the Ombudsman felt that the attitude adopted by the Authority in respect of applications received through the post showed unmistakeable signs of officiousness and of a strong penchant for bureaucracy. It was indeed anything but a client-friendly approach. Sending a letter on a Wednesday with instructions that had to be met by the following Saturday, was unreasonable and betrayed a certain amount of indifference towards the Authority's clients. The Ombudsman was of the view that the relatively large number of applications that were received by post did not by itself constitute

sufficient justification for sending a letter of refusal with an almost impossible deadline instead of a making a simple telephone call to alert applicants to shortcomings in their applications.

The Ombudsman therefore concluded that this was not an instance of maladministration on the part of the Malta Environment and Planning Authority since the Authority has every right to include all those conditions which it deems fit and proper in connection with the conduct of its business, especially after the experience in connection with a similar scheme some time earlier. The Ombudsman also felt that the Authority had given adequate coverage to the main conditions behind this scheme and that it was in the interest of applicants to observe these conditions.

The Ombudsman stated that he is in favour of an attitude by public bodies and agencies that is more clearly focussed on providing the best possible standards of service to clients. In this case, however, sending a stock letter so that an applicant would regularize his position when time was running short and the cut-off date of the scheme was virtually round the corner, may be considered as the epitome of a rigid attitude towards clients which does not constitute good and proper administrative practice.

The Ombudsman appreciated that in cases where a large number of applicants are involved, deadlines have to be strictly observed. However, when taking due account of the fact that the complainant had completed and filed in his application form some three days before the closing date under a scheme whose main purpose was to regularize the position of persons who were not in line with the provisions of the law, the Ombudsman recommended that the Authority should favourably consider complainant's application as a concession.

Following consideration of the Ombudsman's recommendation, the Environment Protection Directorate felt, however, that it was not advisable to accept this application because such a move could be expected to bring in its wake repercussions from other applicants who were in the same situation as complainant.

In the light of this reply, the Ombudsman closed the file.

Case No D 453

MINISTRY OF EDUCATION

Persistent refusal to pay qualification allowance to employee

The complaint

A female employee who was appointed as Library Assistant in January 2001 in the Department of Libraries and Archives found from her fellow colleagues that she was entitled to receive a qualification allowance by virtue of her honours degree in Sociology from the University of Malta.

When the Department of Corporate Services and Programme Implementation of the Ministry of Education persistently turned down her application for this allowance, she sought the assistance of her trade union and even referred her predicament to the Management and Personnel Office of the Office of the Prime Minister. All her efforts were, however, to no avail since the department continued to insist that she was not entitled to this allowance.

Feeling that she was the odd one out and that this was a case of unjust discrimination because other graduates holding the post of Library Assistant in her department were benefiting from the allowance that was being denied to her, the employee sought a remedy to this situation and referred the matter to the Ombudsman.

Facts of the case

In his review of this case the Ombudsman found that when complainant was recruited for the post of Library Assistant at the Central Public Library in Belt-is-Sebħ, her degree in Sociology had not been considered as an entry requirement for this post since a university qualification was not a pre-requisite for selection to this position. In fact following a public call for applications, she had entered into this grade by means of her other educational qualifications.

The award of qualification allowances to first-time entrants in the public sector in similar circumstances is regulated by sub paragraph 2.4.8.3 of the **Public Service Management Code** which states that:

"*A public officer becomes entitled to the payment of an allowance for a first degree either if the degree is not a pre-requisite for appointment or where the degree is additional to the pre-requisite qualification for appointment…*"

The Ombudsman ascertained that on this basis, complainant was fully entitled to the payment of a qualification allowance. However, officials from the Department of Corporate Services and Programme Implementation thought otherwise and claiming that her degree was not directly related to her job, they had staunchly refused to pay this allowance to her.

To this, the employee had retorted by stating that a colleague who joined the Department of Libraries and Archives with her in the same grade as Library Assistant was receiving a qualification allowance on the strength of his honours degree in History. At the same time she had indicated that other graduate Library Assistants in the department in possession of university qualifications in English and Maltese and whose tasks ranged from work in the library's IT section to the purchase of books and inventory control, were in fact receiving a qualification allowance. Complainant was indignant at the fact that whereas her counterparts whose university qualifications were not related to their job were considered eligible for, and had been granted, this allowance, her application had been turned down on the grounds that her degree was not relevant to her duties.

The Ombudsman also found that efforts by the trade union representing the employee to unravel this situation had similarly not made any headway due to the sustained resistance to this request by the Director of the Ministry's corporate services.

Faced with this brick wall, complainant had brought this situation to the attention of the Management and Personnel Office of the Office of the Prime Minister. The MPO in turn referred to an agreement signed in July 1995 by Government and trade unions on the classification, regrading and assimilation of library grades which listed the rates and conditions for the payment of

allowances for recognized qualifications to the holder of a recognized first degree in instances where this qualification is not a requirement for appointment to the grade held by the officer. Since no mention was made in this document of the question of direct relevance of academic qualifications to the duties performed by an employee, the MPO was of the view that complainant was fully entitled to a qualification allowance by virtue of her first degree in Sociology.

Notwithstanding this clarification, however, the Ministry of Education was adamant in its decision not to issue this allowance to complainant on grounds of ineligibility. The Ministry continued to insist that relevance to the duties being performed ought to represent an important element in the award of a qualification allowance to an employee in the public service. It was felt that if one's qualifications are not relevant to one's work, the person concerned should not receive this allowance.

In order to back his stand, the Director of Corporate Services and Programme Implementation at the Ministry of Education made reference to the agreement on the **Classification, regrading and assimilation of the library grades** signed in July 1995 and to subsequent circulars issued by the MPO in 1997 which standardized the payment of, and eligibility to, qualification allowances.

According to the Ministry of Education, whereas most agreements signed up to 1996 made provision for the payment of a qualification allowance which in most cases was to be paid unconditionally, it was only as from May 1997 that the concept of relevance was introduced in the system for the payment of qualification allowances. The Ministry felt that this concept was further strengthened in particular by an MPO circular issued in November 1997 which stated that "*it must be ensured that the qualification obtained is relevant to the duties performed by the officer*."

Despite this outlook by the Ministry of Education on the issue of eligibility by employees for qualification allowances, the Management and Personnel Office continued to hold firm and to stand by its position that complainant was entitled to receive a qualification allowance by virtue of her first degree. In this regard the MPO found comfort in clause 2.4.8.6 of the **Public Service Management Code** which states that:

"*It is recognized that, in the case of some of the Classification and Grading Agreements, the existing provisions for the payment of a qualification allowance may be marginally more advantageous than the standard provisions outlined in this Code and, in these cases, the more advantageous provisions will continue to apply*."

In this case it was accepted that the more advantageous provisions from an employee's point of view are found in the 1995 agreement on library grades where the payment of a qualification allowance is not conditional on the relevance of an employee's qualifications to the duties of his substantive post. Furthermore, the MPO felt that its hand was further strengthened by the fact that other Library Assistants were already benefiting from an allowance for holding qualifications in subjects that were not directly related to their line of duty following a recommendation by their Head of Department. Finally the MPO held that one should not lose sight of the primary objective underlying the award of a qualification allowance to employees, namely to reward officers who strive to improve their service delivery by obtaining extra qualifications.

Despite this unequivocal answer from the MPO, the position of the Ministry of Education remained firmly entrenched. It again put on record its view that it did not share this position and continued to refuse to pay the allowance.

Outcome

In his review of this controversy, the Ombudsman noted that the Ministry of Education had repeatedly refused to accept pronouncements by the MPO regarding this case.

The Ombudsman stressed that the various circulars that had been referred to time and again by the Ministry of Education were in fact issued by the MPO. It was also the MPO which had coordinated all the preparatory work and led discussions with trade unions regarding the agreement for the **Classification, regrading and assimilation of the library grades**. It was this Office too which had prepared and published the **Public Service Management Code**.

The Ombudsman therefore considered the Management and Personnel Office

to be a competent source for the interpretation of the various aspects of this case. He also ruled that the relevant sections of the agreement between Government and trade unions on library grades and the Public Service Management Code were sufficiently clear and left no leeway for an interpretation of their contents in a way that was different from that given by the MPO.

Given this background, the Ombudsman felt that the insistence by the Ministry of Education on its position at a time when the MPO had issued repeated rulings on this issue amounted to rigidity. The **Public Service Management Code** is there to be observed in its entirety even if members of management in public sector bodies might not be in favour of some of its provisions.

The Ombudsman also considered the plea by the Director of the corporate services of the Ministry of Education that his predecessor had adopted a somewhat liberal approach in granting an allowance to other Library Assistants when their qualifications were not necessarily relevant to their duties. The Ombudsman felt that the interpretation given by the MPO had, in the final analysis, proved that the former Director was after all right.

The Ombudsman concluded that the grievance raised by complainant was justified and recommended that the qualification allowance should be paid to her as from the date of her application. Soon afterwards the Ombudsman closed the file when the Ministry of Education confirmed that the Director, Libraries and Archives had been instructed to pay the allowance to complainant and to make arrangements so that the payment would be backdated to the date when she had first applied for this allowance.

Case No D 476

MINISTRY FOR GOZO

The case of the beach cleaner who felt unwell and left his place of work

The complaint

A general hand who was deployed on beach cleaning duties in Gozo was cleared by a disciplinary board of a charge of having left his place of work some three hours before the end of the day's work without the authorization of his superior. Notwithstanding this decision by the board, the employee received a written warning from the Director of the Department for Projects and Development of the Ministry for Gozo and some time later he also found that his wage for the day in question had been deducted from his pay packet.

Claiming that this deduction in his pay was unjust and contrary to the code of penalties for minor offences under public service disciplinary regulations, the employee submitted his grievance to the Ombudsman and sought redress for this instance of maladministration.

Facts of the case

Although the official working hours in summer of a gang of beach cleaners assigned to Xlendi Bay in Gozo were from 0600 to 1130 hours, on a day in September 2001 one of these workers left his place of work at 0830 hours. When his supervisor learnt of this unauthorized absence from work, he reported the matter to the Department for Projects and Development of the Ministry for Gozo and requested that disciplinary action be taken against this employee. Shortly afterwards, a formal charge of absence from work without permission was issued against the employee and a disciplinary board was set up to investigate the incident, establish the facts and submit its findings to the Director of the Department for Projects and Development.

Due to various procedural issues that arose when the disciplinary board was first convened in October 2001 and other delays, it was only in January 2003 that the board finally met to consider the charge that had been pressed against complainant. In his evidence, complainant admitted that on the morning in question he had reported for work as usual at Xlendi Bay and that feeling unwell, he had looked for his supervisor at about half past eight in order to inform him about his condition. However, since he did not meet him, he had decided of his own accord to leave his workplace without the necessary authorization and went to seek medical advice on his ailment.

Complainant presented to the members of the disciplinary board a medical certificate from his doctor confirming that he was suffering at that time from chronic sinusitis and that after treatment at the doctor's clinic he was advised not to report back for work but to go home. Other beach cleaners confirmed that their colleague had turned up for work on the day in question but had left at around half past eight.

Following deliberation, the disciplinary board agreed that the employee could not be considered guilty of an act of indiscipline on the grounds that on that day he had in fact reported for work and that in view of his condition, it was his own doctor who had advised him to go home. The board agreed that in the circumstances, the charge should be dropped.

The Director of the Department for Projects and Development did not, however, take too kindly to this decision by the disciplinary board. He considered the statement that the employee had first reported for work and then left his workplace to seek medical advice as confirmation that the employee had in fact left his place of work without any authorization.

Faced with this situation, the Head of Department recalled the contents of a circular captioned **Interpretation of the 1999 disciplinary regulations** which was issued by the Management and Personnel Office of the Office of the Prime Minister on 12 September 2002 and which was meant to assist directors in the public service in the management and handling of disciplinary cases falling under their control. In particular, he referred to the second part of this circular concerning section 26 (1)(b) of the **Disciplinary Procedure in the Public Service Commission Regulations** and which states as follows in

connection with decisions and representations on the findings of disciplinary boards:

"*In the case of minor offences, the Head of Department may, after considering the officer's representations, decide against the statement in the report of the disciplinary board as regards the guilt or otherwise of the officer. However, a note shall be entered in the records of the case specifying the reasons why the Head of Department decided against the disciplinary board's statement*."

Guided by this interpretation and putting aside the board's decision, the Director of the Department for Projects and Development decided to use his discretion regarding the conclusions of the board. On 17 February 2003 he issued a warning to the employee and wrote to him on 20 August 2003 to inform him that in addition to this warning, a day's pay was being deducted from his wage.

The Ombudsman ascertained that in the **Schedule of Offences and Penalties** applicable under paragraph 29 of the PSC regulations regarding disciplinary proceedings, "*absence from office or work area without leave or permission*" where no serious consequences result is classified as a minor offence. The Ombudsman also noted that the penalty that may be imposed for such an offence following disciplinary action in an offender's first case is a written warning.

Outcome

In his consideration of this case, the Ombudsman expressed his reservations to the Public Service Commission regarding the interpretation being given to regulation 26 of the Commission's disciplinary regulations since this implies that a Head of Department can find an employee guilty even in the case of acquittal by a disciplinary board. The Ombudsman felt that this interpretation infringes on the right of an employee to a fair hearing.

Following consultations between the Ombudsman and the Public Service Commission, it was agreed that in cases where the disciplinary board clears a public officer who is charged with indiscipline and the employee's Head of

Department subsequently disagrees with this decision, the current interpretation of regulation 26 should:

- be limited to offences of a minor nature; and
- the employee should be allowed the opportunity to submit written or oral representations before the Head of Department will reach a final decision on the matter.

Finally, in the event of continuing disagreement with the board's recommendations, the Head of Department is then bound to provide an explanation and to make the employee aware of the grounds for sustaining his decision.

With regard to the case under review: the Ombudsman was of the opinion that since the penalty applicable in this case consisted only in the issue of a written warning to the employee, the deduction of a day's wage from the employee's wage was *ultra vires* and constituted a breach of the penalty that is applicable in cases involving a minor offence. The Ombudsman insisted that in order to determine penalties on public sector employees arising from disciplinary proceedings, management should strictly comply with the relevant provisions of regulations regarding disciplinary proceedings and only resort to the deduction of a day's pay whenever specific mention is made of this penalty in the relevant regulation.

The Ombudsman ruled that complainant's grievance was justified and recommended a refund of the day's pay that had been withheld.