Ombudsman

CASE NOTES

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MALTA

Contents

Foreword

Mainly as a result of the work done by this Office since it was set up in 1995, most people appreciate that the main aim of the ombudsman service is to safeguard the right of citizens to good public administration.

A corollary to this objective is to ensure that the experience which aggrieved complainants have undergone will not be repeated and that defective administration which causes inconvenience, hardship and frustration to citizens will not be allowed to recur.

The sixteen cases that are included in this issue of **Case Notes** cover a number of instances of maladministration that were upheld by the Ombudsman as well as other cases of perceived defective administration that were judged not to be so by the Ombudsman.

These cases have been chosen with a purpose: firstly, to disseminate among readers a wider awareness of how public officials should treat people in the quest for improved service delivery and greater respect for citizens; and, secondly, to enable officials to learn from mistakes and incomprehension which appear in this digest of cases so as to avoid them in future. More often than not the improvements that are needed to serve the public better do not require any additional financial or manpower resources but merely a staunch commitment by all the parties concerned so that service provision on the ground is at all times fair, efficient, responsive and citizen-centred.

It is my wish that this edition of **Case Notes** will provide another learning experience to readers, officials as well as those who have the Maltese public service at heart.

Joseph Sammut
Parliamentary Ombudsman **April 2005**

Case No C 27

NATIONAL ORCHESTRA

The lament of the French horn musician

The complaint

A musician whose application to join the National Orchestra was unsuccessful lodged a complaint with the Ombudsman where he claimed that although he sent his application on time, he had not been asked to attend an interview and an audition with the other applicants. He alleged that he had been called at a later stage when the selection had already taken place and he was consequently placed at a disadvantage when compared to other applicants.

Facts of the case

The Ombudsman's review of this case revealed that the call for applications from musicians who were interested in joining the National Orchestra had to reach the Chairman of the Orchestra by not later than Friday 26 October 2001. Complainant's application dated 22 October 2001 arrived on Monday 29 October 2001 as can be seen from the date of the acknowledgement to complainant. However, whereas complainant continued to insist that he had mailed his application sufficiently ahead of the closing date, the management of the National Orchestra on the other hand was adamant that his application was found in the letterbox of the Orchestra on 29 October 2001.

The Ombudsman found that when complainant discovered that auditions were due to take place on 26/27 November 2001, he had inquired why his name was not included. It was only after complainant had made a sworn declaration that he sent his application on time that the management of the National Orchestra decided to call him for an audition. In the meantime the other applicants had already been interviewed when on 28 November 2001 the Chairman of the National Orchestra invited complainant to attend an audition on 5 December 2001.

Complainant alleged that even before his audition took place, other applicants including two musicians who played the same instrument as he already knew that they had been successful. This was a direct implication that the audition was merely a whitewash because the choice had already been made.

Complainant also raised the point that during his audition he was asked to play a different score from the one that had been played by other applicants in their audition and this placed him at a disadvantage.

Considerations and comments

The Ombudsman pointed out that the grievance did not concern complainant's merit in relation to the other candidates but was based on the fact that he was not auditioned at the same time as the other applicants and was consequently placed at a disadvantage.

The Ombudsman stated that conflicting evidence emerged as to whether the application submitted by complainant had reached the office of the National Orchestra before the closing date for the receipt of applications. However, from the time that complainant sought to discover the reason why he had been omitted from the list of applicants who were summoned for an interview and an audition until the management of the National Orchestra decided to call him, there was necessarily a lapse of time and the auditions of the other applicants had in the meantime taken place.

The Ombudsman took note of complainant's statement that as early as 15 November 2001 he had inquired as to why he had been excluded from the list of applicants. Clearly the decision by the Orchestra management to call complainant to attend an audition was considered as a concession so as not to deny him the benefit of the doubt as to whether his application had in fact been sent before the closing date for the receipt of applications. The Ombudsman was of the opinion that in the circumstances management could have tackled the situation with greater alacrity and it would have been fairer if the auditions were postponed to a later date until a decision would be taken as to whether complainant should be called for an interview or not.

No evidence emerged in support of complainant's claim that there were irregularities during his audition. It was true that he had been asked to play a different musical score than the other applicants but this was considered a fair approach in the sense that the other candidates were not aware in advance of the musical score which they were expected to play.

The Ombudsman held that as long as the score which candidates had to play in the first audition was of the same standard as the score which complainant had to play in his audition, then no injustice occurred.

The Ombudsman also felt that complainant's allegation that the successful candidates had already been selected by the time that his audition was held, had not been borne by facts. It was true that when complainant's audition took place the evaluation of the other candidates had already been held but this cannot in any way be taken to imply that he had not been examined properly on the basis of the same criteria as the other candidates. Neither can it be taken to mean that if complainant had scored a better result than the other candidates he would not have been included among the successful ones. In the final analysis, the final result had not yet been announced when complainant's audition took place.

Conclusion

The doubts which arose regarding the date of arrival of complainant's application were unfortunate and a source of embarrassment to all those who were involved. This situation could have been avoided, however, if complainant had made the necessary checks to ensure that his application had been received before the closing date.

The National Orchestra management too slipped when complainant started to inquire as from mid-November about the outcome of his application and why he had not been called for an audition and it failed to inform him that his application had not been accepted because it had arrived late. The National Orchestra management, however, had sought to remedy this shortcoming by allowing the complainant to sit for an audition before the results were issued.

On the strength of the Ombudsman's investigations, there was no evidence to suggest that complainant had not been assessed on the same criteria as the other applicants. The Ombudsman concluded that the fact that complainant's audition had taken place after the auditions of the other candidates did not contribute towards complainant's failure to be selected for the position. This failure resulted from an evaluation of complainant's merit in relation to the merit of the other candidates and the final placing of applicants was determined on the basis of the respective merit of each candidate.

In view of these reasons the grievance raised by complainant that he had not been treated fairly was not considered justified by the Ombudsman and the complaint was not upheld.

Case No C 41

EDUCATION DIVISION

The student who was left out of the Leonardo programme

The complaint

The parents of a youth who did not receive any funds to support his studies at a college for higher education in Scotland alleged that this amounted to unfair discrimination by the headmaster of the school where their son was enrolled. They raised the matter with the Ombudsman and alleged that the funds were shared instead between three other fellow students from their son's school who attended the same course with him.

Facts of the case

Following contacts between the school which complainants' son used to attend and a Scottish college for further education, it was agreed that representatives of the college would visit Malta to conduct interviews with students who were interested in following a course of studies at the college leading to a degree in Graphic Design. All the students who were interested, including complainants' son, were informed of the dates of this visit but the youth failed to turn up for the interview.

Following this, complainants made private arrangements so that their son would be interviewed in Scotland. This interview had a positive outcome and the youth was accepted for the course. A few weeks later he left for Scotland on the same flight as the three students who were successful in their interview in Malta.

Up to that time it was made clear that students were expected to meet their own tuition costs and living expenses in Scotland. However, an application by the school for funds under the EU Leonardo Community Vocational

Training Action Programme was successful and the school was allocated funds for the three students listed in its application who were following the course in Scotland and for an exchange programme for two of its teachers. As a result of this initiative, each of the three students received a sum of €4,900 to support his studies. Upon being made aware of this allocation, complainants contacted the headmaster of the school and inquired why their son had been excluded from these funds.

Although the headmaster tried to divert unutilised funds under the staff exchange component of the Leonardo programme to support the studies of complainants' son in Scotland, this was not possible under the rules of the Leonardo programme.

Considerations and comments

In their letter to the Ombudsman complainants held that the school authorities could easily have contacted their son and informed him that the Scottish representatives were on the island to conduct interviews with Maltese applicants. In this way his interview would have taken place in Malta instead of Scotland.

Complainants explained that although school attendance records showed that their son was a regular absentee from school, the school authorities were fully aware that this was due to the fact that he was studying on his own for his A level examinations at that time. In any event, they argued that the headmaster knew that their son had been accepted to follow the course since when he left for Scotland with his fellow students the headmaster himself was at the airport to bid them farewell.

Complainants pointed out that representatives of the Scottish college had told them that they would themselves be getting in touch with their son's school in Malta to inform them of the outcome of his interview. The headmaster should therefore not have excluded their son when he applied on behalf of the other students for EU funds under the Leonardo project.

On his part the headmaster insisted that complainants' son regularly missed lessons and that all interested students had been informed of the dates when representatives of the Scottish college were due to visit Malta. The headmaster admitted that he knew that complainants intended to take their son for an interview in Scotland although they never informed him of the outcome of this interview. Neither did the college in Scotland ever inform him of the result and he only came to know about it indirectly when he attended the graduation of teachers from his school at the college in Scotland and was informed that complainants' son was there.

The headmaster explained that when he submitted the application for EU funds he could only apply in respect of students about whom he had received official information regarding their acceptance at the college in Scotland. He had even subsequently tried to allocate unspent EU funds to their son but this had not proved possible.

The headmaster maintained that complainants had no valid grounds on which to blame the school authorities for the fact that their son had not been interviewed in Malta because although he was informed of their impending visit he persisted in absenting himself from school. In the circumstances the headmaster felt that he had fulfilled his responsibilities toward his students and there was nothing else that he could have done.

The Ombudsman found no evidence that the school authorities had ever received any official information from the Scottish college that complainants' son had been admitted to the same course as his three fellow students. However, there were more than enough grounds to believe that the headmaster knew – or had reason to understand – that the youth was following the same course as the three other students.

According to the headmaster since the school had no official information regarding the acceptance of complainants' son by the Scottish college, there was no reason why the youth should have been included with the other students in the school's request for EU funds. He maintained that the school found itself in this position because complainants had not bothered to inform the school management of the outcome of their son's interview. The Ombudsman,

however, regarded this line of reasoning by the school authorities as an example of the application of administrative procedures in a rigid manner.

In this connection the Ombudsman thought that it was relevant to point out that at the time of the departure of the four students, EU funds were not yet available and all the students were expected to meet the full cost of their studies without any outside support. In fact it was only when complainants came to know that the three students had received EU funds that they contacted the school authorities.

Regardless of whether in terms of administrative procedures the school authorities should or should not be faulted for excluding complainants' son from the application for EU funds, the Ombudsman felt that another issue deserved consideration. Since a head of school is required to act as a *bonus paterfamilias*, the headmaster would have acted in a more proper manner if he included complainants' son with the three other students in the school's application for EU funds.

If any doubts arose whether complainants' son had been accepted by the Scottish college and whether he was following the course of studies abroad, the issue could easily have been solved by contacting complainants before the application was submitted. This was a failure on the part of the school authorities despite efforts at a later stage to divert unspent EU funds in favour of complainants' son.

Conclusion

Following his review of this case, the Ombudsman concluded that:

- complainants' grievance that their son was not informed of the visit to Malta by representatives of the Scottish college was not justified; and
- the headmaster of the school may be administratively excused for not including complainants' son in the application for EU funding

although if he had acted as a *bonus paterfamilias* in respect of the youth he would have adopted a fairer and more equitable approach.

The Ombudsman felt that a recommendation was not warranted in this case.

Case No C 42

MALTA ENVIRONMENT AND PLANNING AUTHORITY/POLICE

When asking for neighbours' consent would have been more prudent

The complaint

Writing to the Ombudsman on behalf of his family, a complainant alleged that contrary to established procedures, the Police had issued a permit so that commercial activities could be held in a garage next to their residence three months before the relative permit was issued by the Planning Authority – as the Malta Environment and Planning Authority (Mepa) was then known. Complainants also alleged that the Police failed to secure the neighbours' consent before this permit had been issued.

Complainant further claimed that the application to the Planning Authority had been vitiated when the word "*store*" was replaced abusively by "*wholesaler*" and that the permit had been issued even though it ran counter to the provisions of Legal Notice 53/94 which indicated streets where permits for business activity could be issued.

Other concerns in complainant's letter to the Ombudsman were that a lift had been installed in the garage without the necessary permit and that commercial activity in the area was causing inconvenience to residents as a result of double parking and noise.

Facts of the case

The Ombudsman's investigations revealed that the premises in question had been licensed for the wholesale of wines, spirits and drinks since 1975. The licence was first issued in the name of a female owner and was passed to her son in 1993. When this second permit holder passed away in 2001, his wife

submitted an application so that the licence would be transferred to her name and would cover wines and spirits, tobacco, detergents and foodstuffs. This application had been accepted a couple of weeks later.

Since this application made no reference to the installation of equipment and motors in the premises and to the retail of wines and drinks, the consent of neighbours had not been sought. It was explained that this approach was adopted because the premises had been licensed as a wholesale store since 1975 and this permit had been renewed ever since. It was also explained that once there had not been any change of use of the premises, there was no need to seek the permission of the Authority.

Full development applications that were subsequently presented to the Authority by the owners of the garage referred to the construction of two floors as a dwelling unit and the fixing of a signboard. The applications included a copy of the licence showing that the premises were authorised for wholesale operations and the Authority issued the permit shortly afterwards.

A few months later, however, the Authority issued a stop and enforcement notice in connection with these works because the first floor of the new building was being used as a storage facility without the necessary permit. When the Planning Appeals Board turned down the appeal by the owner of the premises against this decision, the next step by the owner was the submission of another application to sanction the works that had been carried out without any prior permission. Complainants objected to this development and the Authority turned down the application. The owner of the premises requested a reconsideration of this application but at the time that the Ombudsman was investigating the case the Authority had not yet reached a decision.

Considerations and comments

In this complaint against decisions taken by the Planning Authority and the Police, it appeared that complainants were not aware of the sequence of events concerning the various applications that had been submitted by the owner to the Planning Authority.

The application for the building of a two-storey residential unit contained no reference to a storage facility and had been approved. It was only when the first floor started being used for storage purposes that the Authority issued a stop and enforcement notice. In this connection the Ombudsman pointed out that although Mepa had not approved the new development for commercial use, it could not enforce its stop and enforcement notice until a final decision had been reached on the matter because an appeal was still outstanding on its enforcement action.

Although complainants alleged that the garage had been demolished, it was ascertained that no illegal action had been committed when approval was given to the building of a new residential unit overlying this garage since these premises were already authorised for wholesale trading activity.

With regard to the issue of a police licence: the Ombudsman found that regardless of the actual use of the garage during previous years, these premises were first licensed by the Police for wholesale activity in beer and soft drinks way back in 1975 and the licence had been renewed ever since. Given that this licence had been issued before the Planning Authority was set up in 1992, the Authority had duly recognized its validity.

The Ombudsman also confirmed that after the demise of the licence holder, his wife had submitted an application to the Police for an increase in the range of items that could be sold wholesale from the premises under this licence. Since this application did not change the class of use as laid down in Legal Notice 53 of 1994 of the Planning Authority and because there was no request for the installation of machinery or for the retail sale of wines and spirits, neighbours were not approached to give their consent. This course of action was in line with policy guidelines then prevailing.

However, some time later it was found that a lift was installed in these premises without the Police permit that is required for the operation of machinery. Since this installation did not have the necessary authorization, the Police took criminal action against the owner. At the time of the Ombudsman's investigations the issue was still pending in court.

Although the Ombudsman found that there was no disregard of procedures in the issue of a police permit, it was felt that it would have been better for good order's sake if the consent of neighbours had been sought. It is obvious that an increase in the scale of operations of a commercial outlet is bound to have a negative impact on a residential area and that any such development is bound to generate additional noise, parking problems and other inconveniences that are associated with this type of activity.

The Ombudsman felt that in the circumstances it would have been better if the police authorities had given greater consideration to this problem before the permit was issued especially when it was known that measures taken by the Police with regard to illegal parking in the locality were generally ineffective because of lack of resources and other tasks that have to be carried out by the Police in the area.

Conclusions and recommendations

After having gone into the merits of the case, the Ombudsman concluded that:

(i) the Planning Authority was not guilty of any breach insofar as the issue of the permit was concerned; and

(ii) the outlet in question was licensed for wholesale activity since 1975 and the scale of its activities grew after a substantial increase in the list of objects that could be sold from the outlet although the nature of the licence had not changed.

Although the Ombudsman did not find any evidence of abuse or improper conduct on the part of the police authorities, it would nonetheless have been more prudent if the Police had asked for the neighbours' consent at the time that the range of products was extended. The Ombudsman also recommended that the Police should carry out better supervision and enforce rules and parking regulations and maintain proper order in the area in cooperation with the local council.

Cases No C 646, C 666 and D 27

FONDAZZJONI ĊENTRU GĦALL-KREATTIVITA`

The employees who wanted a system of time in lieu

The complaint

Three public officers alleged that they suffered an injustice when their attachment with the *Fondazzjoni Ċentru għall-Kreattività* was terminated abruptly after they failed to sign their work contracts with the institution. Since their complaints were in a similar vein, the Ombudsman considered the three complaints as a multiple complaint and issued one joint report.

Complainants felt aggrieved because:

- their work contracts did not allow them time off in lieu whereas they had been verbally assured by the General Manager of the *Fondazzjoni* that they were entitled to these arrangements; and
- the contracts did not specify their hours of work and did not provide an adequate definition of flexibility.

Facts of the case

Some time ago serving public officers were invited to submit applications for a two-year attachment on contract with the *Fondazzjoni Ċentru għall-Kreattività* at St James Cavalier. The circular stated that selected officials would be required to work flexible hours and under flexible conditions on weekdays and during weekends and public holidays and that no overtime rates or shift allowances would be paid.

Some eight months after the complainants commenced this attachment, they were presented on two separate occasions with an employment contract by the General Manager of the *Fondazzjoni* which they were asked to sign within a few days. However, on both occasions the signing was postponed when

they were told by their legal adviser that there were various discrepancies between the contract and the conditions in the original circular.

Soon afterwards the Director of Corporate Services of the Ministry of Education informed the employees of yet another date and time for the signing of the contracts and added that those who failed to turn up would be considered as having lost interest in continuing in their job with the *Fondazzjoni*.

When a request by complainants' legal adviser for a meeting with the Director on the issue was turned down, the adviser wrote to him that the contract was unacceptable because some of the conditions were different from those which appeared in the original call for applications and from the conditions which up to that time regulated complainants' work with the *Fondazzjoni*.

The day after complainants failed to turn up to sign the contracts, they were told to report at the Management and Personnel Office to be assigned duties in their substantive grades.

Considerations and comments

The main issues in this case were whether the contract offered by the Ministry of Education reflected the conditions that appeared in the original call for applications and whether there was any administrative failure which contributed to the unjust termination of complainants' attachment with the *Fondazzjoni*.

Complainants expressed concern that the reference to flexibility in the contract could possibly be applied in an abusive manner by management because the contract made no mention of time in lieu and no indication was given as to the way in which hours over and above the normal working hours would be reckoned.

According to complainants the exclusion of any reference to time in lieu arrangements in their work contracts went against the words of the General Manager of the *Fondazzjoni* during a meeting with prospective applicants when he mentioned that selected employees would be allowed time in lieu

for any extra hours worked. Complainants also pointed out that they availed themselves of the time in lieu option during the months they had been at the *Ċentru*.

The General Manager of the *Fondazzjoni* denied that during this meeting he had promised that employees would be granted time in lieu and this was confirmed to the Ombudsman by a top official from the Ministry who was present during the meeting. He insisted that the three employees had not been allowed to take time in lieu during their stint at the *Ċentru* and maintained that the circular made it clear that management's aim was to recruit persons who were prepared to work flexible hours and who would find no objection to work late in the evening and during weekends.

The General Manager insisted that during their nine months at the *Fondazzjoni* the three workers were allowed to adopt a flexible working system in the sense that whenever their services were required after normal working hours they had been compensated by means of arrangements whereby they were allowed to report for work after the normal opening time of the *Ċentru*.

The Director of the Ministry's Corporate Services confirmed that he had refused to discuss the issue with complainants' lawyer because he felt that there was no room for any further discussion. He held that the contracts were in line with the provisions of the call for applications and he was not authorised to make any amendments.

It is the view of the Ombudsman that a public official should not refuse to meet a representative of a government employee, such as a legal adviser, or even a citizen. In the event of a legal problem that might arise during any such meeting, a public official has the right to reserve judgement and to ask legal advice to guide him on the best way to tackle the matter. The decision not to accept the request to hold a meeting was therefore not correct although this did not in any way invalidate the department's decision to enforce the target date which it had set for the signing of the contract by complainants.

The main areas of contention between management and complainants regarding the contract related to the issues of flexibility and time in lieu. Since the original circular envisaged a flexible work schedule for employees,

complainants had merely to recall the arrangements that were being followed during the time they had been attached to the *Fondazzjoni* in order to be aware how arrangements regarding flexibility would be applied by management.

With regard to the second issue: management maintained that an employee who works overtime is compensated either by means of financial remuneration or by means of a time in lieu system. The stipulation in the circular that the posts at the *Ċentru* were non-overtime positions on the lines applied in the public service meant that these employees were not entitled to any financial remuneration whenever their services were required after normal working hours. As a result, the employment contract was not in conflict with the provisions of the circular.

The Ombudsman took into account the popular perception that under arrangements regarding time in lieu an employee can report for duty after the start of work in order to compensate for work done in the evening after a normal day's work.

Although the Ombudsman understood that an emphasis on flexible work arrangements was made during the meeting for prospective applicants, it was impossible to ascertain the exact words that were used throughout this meeting. It was quite probable, however, that misunderstanding arose in the sense that flexibility during working hours because of duties after normal working hours was associated with a system of time in lieu.

Management was of the view that whenever the need arose for employees to work more than forty hours in a week, the flexibility that formed part of their working arrangements was more than adequately compensated by their overall remuneration package which placed these employees straightaway on the maximum of the salary scale of their posts. This represented a considerable rise over the salary of their substantive posts and, in the case of two complainants, was accompanied by the award of a performance bonus of 15%.

Reference was made by complainants to the fact that their contract did not specify the number of hours which they were expected to put in every week. The number of working hours per week in a work contract is covered by a

wage regulation order for the different categories of employees and complainants did not indicate which wage regulation order had been broken.

The Ombudsman felt that holders of management posts should not be particularly uneasy about any additional hours that they might be required to work because of their responsibilities. As a matter of fact the posts had been declared straightaway as non-overtime grades and the conditions offered to employees included an inbuilt measure of compensation for any extra hours worked.

The Ombudsman also considered the complaint by two of the three employees that they were not sent back to their previous workplace when their attachment with the *Fondazzjoni* was terminated. In this regard it was noted that the circular by the MPO that invited applications for these posts stated that upon completion of their attachment employees would return to their substantive grade and gave no undertaking that they would be sent back to their former place of work.

The allocation of duties forms part of the prerogatives of management and as long as duties allocated to an employee are compatible with the employee's grade and the transfer to a new workplace is not a punitive measure, an intervention by the Ombudsman is not warranted. In this case the Ombudsman found no evidence that the new duties assigned to complainants were incompatible with their grades or that the transfers were meant as a punitive measure.

Conclusion

Following his investigation the Ombudsman reached the conclusion that maladministration in this case was limited to the refusal by the Director of Corporate Services of the Ministry of Education to meet the legal adviser of complainants even though it appeared that the two sides had discussed the matter on the phone. This instance of maladministration did not, however, reflect on the validity of the decisions that were taken by the authorities in their handling of this case.

The Ombudsman was of the view that the points that had been raised by complainants remained unsubstantiated and closed the file.

Case No D 16

LAW COURTS

A court marshal's failure to execute a warrant of seizure

The complaint

In a letter to the Ombudsman the owner of a shop that sold household goods complained about the way that the court authorities had acted towards him.

Complainant stated that when a court marshal had carried out a warrant of seizure which he had issued against a debtor in connection with outstanding payments, this warrant had not been executed properly. As a result, a car and other items which were registered under the debtor's name had not been secured despite the fact that the debtor had been found guilty by the Small Claims Tribunal.

Facts of the case

The Ombudsman learnt that complainant had instituted proceedings in the Small Claims Tribunal against one of his customers who failed to settle an outstanding payment of around Lm250 for goods which he had sold to her. Complainant had won the case but since he only received a small part of the payment he asked the court to issue a warrant of seizure against his erstwhile customer in connection with the outstanding amount together with interest charges as well as other expenses which he had already incurred. The Small Claims Tribunal issued a warrant of seizure bearing the address of the debtor which had to be executed in connection with her car.

However, when on the due date the court marshal went to this address to execute the warrant of seizure against the debtor as laid down in the court document, he found a third person who declared that the motor vehicle in question did not belong to the debtor but belonged to himself. This third person also informed the court marshal that all the possessions in the house

did not belong to the debtor. According to complainant this third person was none other than the partner of the debtor.

After complainant paid the necessary court charges the marshal went again twice to the same address to execute the order but his calls remained unanswered. This happened again on two other occasions. On this last occasion, however, the warrant seizure covered four items instead of the vehicle and also replaced the old address by a new address in another locality. The marshal's attempts to execute this warrant in the new address again proved futile since his knocks on the door again remained unanswered.

Investigations carried out with the Licensing and Testing Department in connection with the motor vehicle in question revealed, however, that at the time that the court marshal had first called at the debtor's residence and was informed that the vehicle did not belong to her, the car in fact was officially registered under her name. The Ombudsman confirmed in this way that what had been alleged by complainant was true.

Considerations and comments

The first warrant of seizure was based on an indication given by complainant that the debtor owned the car that was mentioned in this warrant. However, when the court marshal first went to the residence of the debtor and was informed by the debtor's partner who opened the door of the residence that the car belonged to him, the marshal had failed to implement the seizure warrant on the car.

The Ombudsman was critical of the way in which the court marshal had blindly accepted this reply and desisted from carrying out his duty.

In his report the Ombudsman stated that a court marshal should not rely on the words of a person who is the subject of the warrant of seizure or of interested third parties. The function of a court marshal is to execute faithfully the seizure warrant that he had been entrusted with and the onus to prove that any item that is being seized by the marshal does not belong to the debtor falls fairly and squarely upon the latter. Once a warrant of seizure has been

implemented, it is the responsibility of the debtor to prove that the item that has been seized belongs to third parties and to explain to the court the whole situation.

From evidence that was gathered by the Ombudsman it appeared that the court marshal had acted in this way on another occasion but not in the case in question. In fact when the same marshal went to execute a warrant on another case during the same time as the case under review was unfolding, he had explained to the court authorities that he had been able to seize only two objects because he had been told that the contents of the apartment did not belong to the debtor since it was a furnished flat and he had been shown the contract for the rent of the premises as proof of this situation.

This episode shows that unless proof is made available to a court marshal regarding the ownership of the items that feature on the seizure warrant, a marshal has no other option but to implement the warrant and seize the item or items in question. Clearly then, in the case under consideration when the marshal went to seize the car, he ought to have asked for the vehicle's log book in order to verify the ownership of the car and not rely solely on what an interested party had told him.

Conclusions and recommendations

The Ombudsman agreed that complainant's allegation that the court marshal had not carried out his duty properly was correct because he had failed to seize the car which in fact belonged to the debtor. As a result of his failure to do so, the debt toward complainant remained unsettled.

The Ombudsman considered that it was the responsibility of the court administration to make amends for this administrative failure. Indeed the Ombudsman was critical of the court administration which should have taken upon itself proper measures against the court marshal when in the light of the results of the Ombudsman's investigations which were made available to the administration, it was evident that the court employee had failed his duty.

The Ombudsman therefore recommended that the Director General and Registrar of Court should provide adequate redress to complainant to make up for the act of maladministration which had damaged prospects of recovery of the amount that was due to him. The Ombudsman was of the opinion that this remedy should consist in the sum that was due to complainant by the debtor as well as the additional court expenses which he incurred as a result of the shortcomings of the court administration.

Although the Director General and Registrar of Courts refused to redress complainant's grievance on the grounds that the Ombudsman has no jurisdiction on judicial matters, on the other hand the Ombudsman insisted that this was a case of maladministration.

Case No D 40

TREASURY DEPARTMENT

Assessment of service pension

The complaint

An aggrieved pensioner sought the intervention of the Ombudsman because he believed that the assessment of his service pension had been computed wrongly and that he was entitled to a higher rate of pension.

Facts of the case

Complainant had served as a captain in the Airport Company of the Armed Forces of Malta. When the company was disbanded in 1998, members of the AFM were allowed to make a choice between:

- engagement by the Malta International Airport plc (MIA) with an option to revert to the AFM within a period of two months after the conclusion of a collective agreement between the MIA and trade unions representing MIA employees;
- reversal back to the AFM; or
- retirement on pension.

Complainant opted for engagement with the MIA on 24 April 1998. However, because of an industrial dispute, the collective agreement was not signed before December 2001. In the meantime, however, complainant reached retirement age in March 2000.

Problems arose when the former AFM captain realised that his pension was based on salary scale 8 – which is the salary scale of an AFM captain – even though when he retired he was on scale 7 in MIA's salary structure.

Comments by the Ombudsman

Faced with the issue of the pension rate which was applicable to complainant based on his salary at the time of his retirement, the Ombudsman found that in all likelihood the Pensions Office of the Treasury Department had based its decision to award the pension on the salary of an AFM captain because in a letter dated 25 February 2002 the Malta International Airport plc had stated that at the time of his retirement complainant was deployed at the Airport "*on unpaid special leave from the Armed Forces of Malta in accordance with an agreement dated 22 April 1998*."

The Ombudsman ascertained that this statement was misleading. By virtue of an agreement that was signed by all the parties concerned it was stated that the effective date of engagement of ex-Airport Company employees in Malta International Airport plc was the date of disbandment of the Airport Company as a corps of the AFM. This had taken place on 1 May 1998.

In the light of his decision, on the date of his retirement complainant was therefore a full-fledged MIA employee and could not be considered as an employee who was deployed "*on unpaid special leave"* from the AFM as stated by the MIA in its letter to the Pensions Office. Renouncing to his option to revert to the AFM, complainant had in turn registered his chance to join the MIA where he had served up to his retirement date and to all intents and purposes he was therefore an MIA employee on salary scale 7 on the date of his retirement.

Conclusions and recommendations

The Ombudsman upheld complainant's grievance and stated that he was entitled to a service pension based on his salary on the date of his retirement. The Treasury Department accepted the Ombudsman's ruling and issued the correct pension to complainant.

Case No D 51

MALTA ENVIRONMENT AND PLANNING AUTHORITY

Enforcement on the rocks

The complaint

In a letter to the Ombudsman complainants alleged that the Planning Authority (as the Malta Environment and Planning Authority was then called) had authorised development works near their residence which caused great inconvenience and disturbance as well as traffic disorder.

Complainants maintained that the Authority gave the go-ahead to these works without any serious study on the impact of this development on traffic levels and on the environment. They argued this permit flouted the Authority's policy regarding good neighbourliness and insisted that the Authority never carried out any effective enforcement of the conditions that featured in its development permit.

Facts of the case

Over a number of years the Authority gave its approval to various applications for development works in two corner sites in two nearby roads including residential and commercial facilities, the change of use of a store to a wholesale store and an additional floor linking the two buildings to increase storage facilities. As a result this area witnessed a rapid rise in the level of activity in the wholesale and retail trade.

Residents in the neighbourhood were greatly irked because in spite of recommendations that the applications be turned down on the grounds of deleterious impact on the amenity of the area and of existing adjoining uses by virtue of noise, vibration, additional traffic generation and operating times,

the Development Control Commission authorised the development on condition that all loading and unloading activity would take place inside the building.

Various unauthorised internal development works took place while the project was under way including the building of a shaft which overlooked a number of residences, cold room facilities, additional office space and variations to the warehouse. The project promoter in turn sought to counter the stop and enforcement notices issued by the Authority by the submission of applications to sanction the irregular works.

Complainants again raised their objections with the Authority to the proposed sanctioning of these works and made particular emphasis on noise generated by the movement of heavy traffic and delivery trucks as well as haphazard and abusive parking which the previous development had generated in the area. On no less than ten occasions residents drew the attention of the Authority to the problems that had arisen as a result of the uncontrolled expansion of commercial activity in the neighbourhood.

Residents were also deeply annoyed by the fact that despite the condition that had been imposed by the Authority that loading and unloading had to be done indoors, this was not being observed and instead these operations were taking place in the street. They accompanied their complaints to the Authority by various photos to confirm the dangers faced by passers-by as the loading and unloading of merchandise continued to take place outside the warehouse. Although meetings were held with officials of the Authority on the matter, the only reaction by the Authority was to ask complainants to submit additional information.

Complainants protested strongly about lack of enforcement of the relevant building laws and planning regulations by the Authority and about the issue of permits which went against the basic principles of good planning and respect for good neighbourliness and without any assessment of the impact of these development works on traffic levels in the area and on the environment. However, despite their insistence that these shortcomings be rectified, the inconvenience to which they were being subjected continued unabated.

Considerations and comments

The crux of the issue in front of the Ombudsman concerned the issue of permits by Mepa which, according to complainants, disturbed the peace of their residential zone. It was alleged that this occurred because the Authority had failed to observe its own policies regarding good neighbourliness and had not carried an in-depth assessment on the negative impact of the development works that were being proposed. Furthermore, complainants held that Mepa was not enforcing the conditions that were included in the original permit and was blatantly disregarding their repeated protests.

Mepa files seen by the Ombudsman showed that various inspections took place by the enforcement section of the Authority to check whether the conditions that were attached to the permit were being observed. It was noted, however, that most of these inspections were made on Saturday morning or on Sunday when it is known that there are hardly any loading and unloading operations in commercial establishments at that time. The Ombudsman found that according to the enforcement section of the Authority the conditions that had been imposed were being generally observed.

Mepa documents, however, also showed that on some occasions the unloading of delivery vehicles and trucks whose doors were bigger than the warehouse opening would take place next to the opening itself. In these circumstances enforcement officers would draw the attention of the owner that this method for the unloading of goods constituted a breach of the permit. Although the owner insisted that these instructions be issued to him in writing – and the Ombudsman found records to this effect in the files of the Authority – it did not result that any such written instructions were ever issued.

The Ombudsman commented in a critical vein on the way in which these inspections had taken place and the extent to which this enforcement action could be regarded as effective. Although enforcement should not be done in a way that makes it easy to anticipate when inspections are likely to take place or at a time when persons whose activity is under surveillance are likely to be on their guard, the Ombudsman expressed his criticism of the habit of enforcement officers to carry out inspections at a time when it was quite likely that there would be no loading or unloading of merchandise instead of during normal working hours on weekdays.

As a result of this dubious method of enforcement, no effective enforcement action was taken and the problem continued unabated despite photos which showed the extent of the problems that were being caused in the area by delivery vehicles and trucks.

Other documents in the relative Mepa file seen by the Ombudsman confirmed that despite the enforcement notice that was issued regarding the installation of cold storage facilities inside the building, Mepa had failed to take effective steps to ensure that the unauthorised use of these facilities would cease as the Authority was obliged to do under subsection 52(6a) of the Development Planning Act despite the sanctioning application that had been filed by the owner of the premises in respect of these facilities. This situation drew a critical remark from the Ombudsman.

The Ombudsman also commented that it was obvious that a change in the use of the premises coupled with a wider range of facilities in the building meant that the proposed development would in due course generate additional traffic, noise and other inconvenience to neighbours. The Development Control Commission was therefore duty bound to review the issue in the context of Structure Plan Policy BEN 1 regarding good neighbourliness.

The Ombudsman was of the opinion that the DCC had failed seriously in its duty when it had disregarded the aspects regarding good neighbourliness.

The Ombudsman pointed out that the decisions of the DCC went against Structure Plan Policy BEN 1 and that this warranted a critical comment. The Structure Plan Policy was approved by the House of Representatives and carries the full force of a legal document and the DCC has no mandate to put aside the policies set in this Plan.

When Mepa was asked to indicate whether an environmental impact assessment and a traffic impact assessment had been carried out, the Authority replied that the proposed development did not warrant these studies. The Ombudsman was highly critical of this attitude by the Authority and commented that if, given its scale, the development project in question did not require an environmental impact assessment, then it is no wonder that citizens harbour serious doubts about the regulations that determine the

instances when any such assessment is required. Results in this case showed that the interest of residents and the need to safeguard the environment had been ignored when the proposed development had been authorised.

The Ombudsman stated that this was not the first case that had been investigated by his Office where it was found that the DCC had acted against its own Structure Plan policies. This situation would give rise to even stronger concern if Mepa itself failed to take the necessary action so that similar problems would not arise again. Decisions by the DCC are legally binding and a request for reconsideration can only be challenged by resort to the Planning Appeals Board which is independent of the Authority.

The DCC undertakes its duties under the terms of Government Notice 529/97 and in accordance with conditions that are laid down by the Authority itself. To all intents and purposes its decisions are considered by law as decisions taken by Mepa under the terms of subsection 13(3) of the Development Planning Act. To date Mepa has adopted a policy not to intervene in decisions that are taken by the DCC even when these are manifestly wrong and not in accordance with the provisions of the law. The Ombudsman recommended that this policy should change as a matter of urgency and in the best interest of good public administration in order to ensure that the aims of the legislator are achieved.

Conclusions and recommendations

On the strength of the evidence collected by the Ombudsman, the grievance raised by complainants was upheld because:

- the issue of the permit in question by Mepa went against Structure Plan Policy BEN 1; and
- there had been an all-round lack of effective enforcement by the Authority subsequent to the issue of its own enforcement notices.

The Ombudsman recommended that his views should be given due weight in the consideration by the DCC of any outstanding application by the promoter in connection with this project when the Ombudsman's report was issued.

The Ombudsman also recommended that Mepa should ensure that henceforth it would take effective enforcement action to ensure that in future it will not issue any development permits that flout Structure Plan Policy.

Case No D 66

ENEMALTA CORPORATION

The employee who performed duties of a lower grade for eight years

The complaint

An employee with Enemalta Corporation felt aggrieved because he had not been promoted to Principal after eight years in the grade of Assistant Principal notwithstanding the provisions of the collective agreement for Enemalta employees.

Facts of the case

Complainant was appointed Assistant Principal with the Corporation in 1994 but for eight years was allocated clerical duties by the management of the Corporation which felt that he lacked the necessary attributes to assume the responsibilities of his substantive grade. These duties consisted in the maintenance of employee records including staff attendance which are considered appropriate for a person at clerical level but not at Assistant Principal level.

Despite performing duties that were not at par with his grade, complainant was confirmed as Assistant Principal when his probationary period ended. It was understood that this occurred because procedures were not taken in hand in time so that this confirmation would not take place.

According to the agreement on general service grades in the Corporation, an Assistant Principal can be promoted to Principal after eight years in the grade "*subject to satisfactory performance*." At the same time in order to be eligible for promotion, Enemalta employees should demonstrate efficiency, competence and commitment in their work and show that they can assume

wider responsibilities while heads of departments must be prepared to withhold the promotion of an employee who fails to make the grade.

When complainant's performance review and evaluation programme for 2002 was carried out by his immediate superior officer, he was rated with a "*very good overall performance*". However, when this report reached the higher echelons of the Corporation's management it was pointed out that since the tasks undertaken by complainant were basic tasks that were not in line with the duties of an Assistant Principal, a more realistic assessment of his capabilities ought to be made. As a result complainant was not considered deserving of a promotion to the rank of Principal on the grounds that he did not possess the capability to assume the responsibility and to undertake the tasks that are associated with this grade.

Considerations and comments

The sequence of facts established by the Ombudsman revealed that although complainant lacked the necessary qualities for the post of Assistant Principal and although soon after his appointment to this post his duties were limited to tasks that are done by persons in a lower grade, complainant was never made aware of the difficulties that were associated with the confirmation of his appointment before his probation came to an end. Nonetheless his appointment was confirmed and for a number of years he continued to be assigned duties with a much lower level of responsibility than those associated with his substantive grade.

When according to the staff agreement for Enemalta employees it was time for complainant to be considered for promotion to the post of Principal, the management of the Corporation was of the opinion that his output was not satisfactory despite the fact that in his performance assessment complainant was credited with a "*very good overall performance*" insofar as his workload was concerned. Complainant's promotion was therefore turned down.

According to the Public Service Management Code, in order to be attributed a "*satisfactory performance*" an employee must not only be able to perform his duties well but must also show that he is able, as he gradually acquires

more experience in his tasks, to assume a wider range of responsibilities. The very fact that for eight years complainant undertook tasks that were lower than the level of duties associated with his grade because he was not considered to possess the necessary qualities to perform the tasks that pertain to his substantive grade cannot be interpreted as "*satisfactory performance*".

Information made available to the Ombudsman by Enemalta Corporation showed that throughout all these years the Corporation's management had never drawn the attention of complainant to this anomalous situation which was serving to prejudice his qualification to the post of Principal. The Ombudsman discovered that although complainant had been aware of the contents of his performance report for 2002 and had even put his signature to the document, he did not know that a second report on his work performance contained negative comments on his work.

At the same time the Ombudsman found that complainant had not been sufficiently motivated to improve his output at work so that he would be able to perform the tasks associated with his rank and undertake a trial period in this grade. Together with the fact that complainant had been confirmed in his appointment because of an administrative mistake, all these episodes attracted a critical comment on the method of operation of the Corporation's management.

The Ombudsman was strongly of the opinion that the Corporation was obliged to inform complainant of his position and to let him know that the fact that he was performing duties that were lower than tasks that pertain to his rank was bound to harm his prospects to be promoted to the grade of Principal. The Ombudsman also expressed his conviction that during all these years complainant must have known – or, at least, should have known – that he was performing tasks that were not at par with his grade.

The situation that was allowed to develop by the connivance of Enemalta management meant that because of its extremely tolerant approach, complainant did not qualify for a promotion. On the other hand, it could be claimed that complainant had benefited from this situation in the sense that for eight long years he had been remunerated at a rate that was higher than the rate that was applicable for the type of work that he was in fact performing.

In this regard the Ombudsman noted that complainant had given a good account of himself in the tasks that were assigned to him by his superiors and had been led to nourish expectations that in due course he would be appointed Principal.

Conclusions and recommendations

After having considered the various aspects of this case, the Ombudsman concluded that the Corporation was guilty of maladministration when for many years it had allowed complainant to work in a way that rendered him ineligible for promotion without informing him in advance of the likely repercussions of this situation. The Ombudsman pointed out that this failure on the part of the Corporation led complainant to miss his opportunity to be promoted because if he had been alerted in time he might have improved his output in a way that would have allowed him to assume higher responsibilities.

The Ombudsman therefore agreed that there was an element of justification in complainant's grievance.

Since the way in which circumstances had developed during these years had allowed complainant to nourish hopes that he might be promoted to the grade of Principal, the Ombudsman recommended that Enemalta management should assign to complainant the tasks that belong to his substantive grade. Throughout this assignment complainant would be on trial for one year while his performance would be subjected to a regular monthly evaluation by his immediate superiors.

In the event that at the end of this period he would be considered to have performed his duties in a satisfactory manner, the Corporation would then proceed to promote him to the grade of Principal on a probationary basis as stipulated in the agreement governing promotions to this post.

Case No D 246

HEALTH DIVISION

Boiler problems

The complaint

A contractor who was awarded a contract by the management of a government hospital for works on one of its boilers and who performed castable refractory works on the door of this boiler for a second time felt aggrieved when the hospital authorities refused to issue payments in connection with works which were re-done. Claiming that this constituted an act of injustice by the hospital management, the contractor submitted his grievance to the Ombudsman.

Facts of the case

Upon receiving a verbal request from the management of the hospital, complainant presented a quotation for the sum of Lm1,100 (exclusive of VAT) in order to remove the door of the boiler, refit the stainless steel plate and cast new refractors. His offer also stated that the cost of any other work would be additional to the price of his quotation and that the curing of the refractory works would be the responsibility of the hospital authorities and at their cost.

The letter of acceptance issued by the hospital authorities merely referred to the contractor's quotation without including any other conditions. This was not the first time that complainant had been entrusted with similar works.

The contract works consisted in the filling of the door of the boiler with a cement mixture of various thicknesses across the full face of the door together with the refitting of a stainless steel plate. Upon completion of these works, curing would then be carried out when the boiler would need to be fired at

low temperatures for short periods on various occasions. If fired at high temperatures, the refractory work would not give adequate results and would have to be re-done.

After the refractory works were completed, in accordance with arrangements with the hospital authorities and in line with the experience of previous contracts, the curing works were to be carried out by hospital employees. Complainant issued instructions to hospital staff to fire the boiler very slowly and to use timber for the curing process.

Technical staff of the hospital who had undertaken similar works on previous occasions performed the curing operation for three consecutive days. However, on the next day when the boiler started to be fired regularly the refractory broke and an explosion occurred. The technical staff of the hospital explained that they had fired the boiler for five minutes, allowed it to cool for one hour and then repeated these procedures five times daily for three days.

Soon after the accident occurred, complainant requested that a survey be held on site in the presence of all the parties involved by the engineer who usually inspected the hospital boilers. This inspection did not take place. Nevertheless, complainant brought the engineer on site in order to inspect what had happened as an independent third party. This engineer subsequently confirmed to the Ombudsman that he had not prepared an official report on the matter but had visited the site merely to see whether any technical assistance was required.

After the incident, complainant was requested by the hospital authorities to remedy the defects that had developed and he again undertook these works. Without any prior agreement with the hospital authorities and acting solely on his own initiative, complainant also brought an expert engineer from overseas to inspect the work that had been done in the first place.

Upon completion of the repair works, complainant requested the hospital management to be paid for all the expenses which he had incurred after the incident and which amounted to Lm4,171.

The hospital authorities, however, denied that they were responsible for the incident and only paid the amount which appeared in the original agreement with the contractor. On his part the contractor continued to insist that he should be paid the full amount including the costs of the visit to Malta by the foreign engineer.

Considerations and comments

In this case the Ombudsman was expected to decide, many months after the incident had happened, which party was responsible for the problems which arose, the workmanship involved and whether the curing works by hospital employees had been done properly.

Not surprisingly, the two sides came up with sharply contrasting versions and each side claimed that it had done its share of the works properly. The issue was further complicated by the fact that an on site survey had not taken place in the presence of all interested parties immediately after the incident in order to establish the cause of the explosion.

The Office of the Ombudsman has no technical competence to assess the problem and to determine who was in fact responsible for the accident. In the circumstances the Ombudsman had to rely on the evidence and on the information that was provided by the parties who were involved in order to reach his own conclusions. The Ombudsman also found himself in a difficult situation because the contract document between the two sides merely consisted of complainant's original submission for the works and made no mention of any clauses or conditions that would apply in the event of a dispute.

The Ombudsman also noted that in repair and maintenance contracts it is normally the contractor who assumes the responsibility to prove that works are in order upon project completion. In this case curing works, which are an essential component of the project, were carried out in accordance with a long-established tradition by technical staff of the hospital. The onus to ascertain whether the contractor had successfully implemented the works therefore rested fairly and squarely upon these employees.

The Ombudsman's investigations revealed that the hospital authorities favoured these arrangements in order to save the contractor's fees for curing works. It was also established that whenever complainant had been awarded similar contracts he was never requested to send his representatives to attend curing works to cut down further on costs.

The hospital authorities maintained that there was bad workmanship in the original works done by complainant and listed a number of shortcomings. They also pointed out that when the contractor undertook to carry out the repairs, he had not indicated that he expected any additional payment for these works. Neither had any agreement been reached between the two parties for additional payment for these extra works. The hospital management therefore insisted that it had acted correctly when it only effected payment due to the contractor under the terms of the original agreement and refused to make any additional payment.

Complainant did not take these claims by the hospital authorities lying down. In turn he submitted a certificate by the foreign engineer whom he had brought over to Malta stating that the explosion had been caused by bad and improper curing of the works. He also presented various photos taken at the site of the incident to show that curing works had not been done properly. At the same time he insisted that he had never given any indication to the hospital authorities that he would be renouncing to any payments for the additional works which he carried out after the incident. All along the contractor had acted on the assumption that the hospital authorities would solve the issue in a fair manner.

A high-ranking official from the hospital management who had witnessed developments because his office is located close to the boiler installation admitted with the Ombudsman that in his view the problems that arose were attributable to defective curing methods used by hospital employees. On his part the engineer who normally conducts routine inspections on the boilers at this hospital indicated that he fully shared this view and stated that he did not agree that the shortcomings mentioned by the hospital management contributed to the damage which had occurred.

This technical evidence provided strong indications to support complainant's viewpoint that the problems arose due to defective curing and not to bad workmanship. Furthermore from the evidence given by the two employees who carried out the curing works it was established that it was only on one day that they had done the work together and that on the other two days curing had been done by one person alone.

Conclusion

In his report the Ombudsman alerted the hospital authorities to the fact that the contract between the two sides for these works was defective in the sense that it made no reference to the procedures that were to be followed in the event that difficulties arose in the execution of the works. This case confirmed that it is advisable that in any future contract the authorities should include hard and fast conditions that should be followed if problems occur.

The Ombudsman pointed out that the hospital authorities could not claim that curing was the responsibility of the contractor when in previous years responsibility for these works had always fallen upon them and the contractor had clearly indicated in his proposal that curing works would be their responsibility.

As a result the Ombudsman concluded that the complaint raised by the contractor was justified and recommended that complainant should be paid for the work that had to be re-done. This meant that the hospital authorities should release an additional payment to the contractor that would be equivalent to the payment that was effected under the terms of the contract for the original scope of works.

The Ombudsman felt, however, that since there was no prior agreement between complainant and the hospital authorities regarding the costs incurred on the inspection by the foreign engineer, expenses incurred on this visit by the contractor should not be refunded.

Case No D 262

MANAGEMENT AND PERSONNEL OFFICE

The unsubstantiated concerns of fifty-two Principals

The complaint

The trade union representing a group of fifty-two Principals who were unsuccessful in their bid for promotion to the grade of Senior Principal Officer presented a petition to the Public Service Commission (PSC). After the Commission decided that there were no grounds to revisit the results of the selection process, they submitted a joint complaint to the Ombudsman to investigate the matter and to provide a remedy for the injustice which they allegedly suffered.

Preliminary consideration

The PSC is an independent commission established under the Constitution whose decisions cannot be examined by any court of law with the exception of points of law. In this case any investigation by the Ombudsman of complaints regarding the work of the Commission had to focus on the way in which the PSC considered the petition and to ascertain whether the selection process was vitiated by any irregular proceedings. In the absence of any irregularity the Ombudsman is not competent to pass any judgement on the selection process and to substitute the results reached by a team of qualified assessors whose work and findings were approved by the PSC with his own views.

Facts of the case

The Ombudsman's investigations revealed that a board consisting of a chairman and four members had conducted the selection process and that the

Public Service Commission had approved the criteria that were established by this board to guide its evaluation process. Before the selection process got under way, candidates were informed of the allocation of marks and of the evaluation criteria while members of the board had access to the schedule of service, the latest Performance Management Programme and the *curriculum vitae* of each candidate throughout the interview sessions.

The selection process consisted of an extended interview that included a group discussion, written reports on these discussions and individual interviews. Three members of the selection board corrected these written reports and the final mark was the average of the marks given by these examiners. The published results showed the overall marks awarded to each candidate and their ranking in the list of successful candidates.

When the outcome of the selection process was known, various unsuccessful candidates asked for a revision of papers and for a breakdown of their overall mark. Most of these candidates also submitted an individual petition to the Public Service Commission where they contested the marks which they had been awarded.

The Public Service Commission referred these requests to the board of examiners. The board in turn carried out a detailed evaluation of the whole process and provided a full explanation of how interviews had been held and how marks had been assigned. The examiners also provided detailed comments to the PSC on every individual case and a copy of the examination script of the individuals who were involved.

A review of this report by the Ombudsman revealed no trace of irregularities. On the contrary, in the opinion of the Ombudsman the whole exercise had been conducted in a most serious way especially when it was recalled that, as laid down in the call for applications, seniority had not been used as one of the criteria in the selection process.

A point that was raised by the unsuccessful candidates was that officials with a long record of service scored lower marks for their track record and experience than officials with a shorter service record. The selection board explained that marks had not been awarded exclusively on the length of service

of each candidate but were given instead according to the experience which candidates had gained and the initiative which they had shown throughout their careers. This method for the evaluation of candidates reflected the main objectives of the civil service reform programme which placed a higher onus on performance instead of length of service and was in line with the spirit of the agreement on general service grades signed in November 1993.

Another issue raised by these candidates was that they had revealed their names and identity card numbers on their examination scripts instead of an index number which masked their identity. This could have served to put them at a disadvantage. The selection board explained that written reports on their own do not constitute a qualifying examination but are merely one component of an extended interview. The Ombudsman expressed his view that although the system of index numbers might eliminate suspicions, the fact that candidates had revealed their identity did not amount to a lack of ethics by the selection board.

Furthermore, the board of examiners had carried out a revision of the examination papers of all those candidates who asked for such a revision and provided a detailed report to the PSC which justified the marks that had been awarded in each case.

Complainants also referred to the fact that the published results did not provide a breakdown of the marks obtained in each section of the examination process. In their view this constituted lack of transparency. Although candidates who asked for a breakdown had received this information, the Ombudsman expressed his opinion that it would have been better if the result showed the points awarded to candidates in each component of the examination since in this way candidates would be aware of their performance and their results in relation to other candidates.

Conclusions and recommendations

The Ombudsman concluded that before the Public Service Commission reached its final verdict as to whether there was any justification to amend the results of the whole exercise, the Commission had given a thorough airing

to all the petitions sent by candidates and considered them meticulously. This task had been conducted in a very objective manner and the Ombudsman considered that there was no basis for the complaints that had been raised.

Nevertheless the Ombudsman put forward recommendations for consideration by the PSC that henceforth index numbers should be used by candidates in their written examinations and that marks obtained by candidates in each phase of the selection process should be published.

Case No D 494

FOUNDATION FOR MEDICAL SERVICES

A second call for applications with revised requirements for eligibility

The complaint

A candidate for the post of Medical Equipment Executive with the Foundation for Medical Services (FMS) sent a letter to the Ombudsman where he alleged that he had been treated unfairly by the Foundation.

He wrote that after he had been called for an interview for this post, the interview was not held and a fresh call for applications had been issued with revised requirements for the post. Complainant alleged that these new criteria suited the only other applicant who had been called with him for an interview after the first call.

Facts and findings

Following approval by the Employment and Training Corporation, the Foundation for Medical Services issued a public call for applications for the post of Medical Equipment Executive with the following eligibility requirements:

- a Higher Technician Diploma (HTD) certificate or a full Fellenberg diploma in electronics;
- a minimum of five years working experience in the field of medical equipment;
- proficiency in both Maltese and English; and
- an excellent command of computer packages.

After an initial screening of the four applications that were received in response to this call, two candidates were short-listed for an interview. Complainant was one of these candidates.

However, before the interviews were held, one of the members of the selection board suggested that her place should be taken by a person who was more knowledgeable in the field of medical equipment and who would be better able to evaluate candidates' merits and capabilities.

When the newly appointed selection board reviewed the applications of the two short-listed candidates, it was discovered that none of them was in fact eligible under the terms of the call for applications. Complainant did not possess the minimum five years of working experience in the medical equipment sector on the closing date of the call for applications while despite working for twenty two years in this field the other applicant possessed qualifications that were not equivalent to a full Fellenberg diploma in electronics.

The new selection board therefore recommended that the selection process should be suspended. At the same time the board made it clear to the FMS management that the importance of experience for the post of Medical Equipment Executive should not be underestimated since in its view experience was more important than qualifications for this post.

Both applicants were subsequently informed by the Foundation that the selection process had been discontinued. In addition, complainant was informed that he did not possess the minimum five years work experience laid down in the call for applications.

Subscribing to the view that for this post a person's fund of hands-on experience was possibly more relevant than academic qualifications, the FMS management acted on the board's advice and considered ways how it could attract applications from persons in possession of the right amount of work experience. As a result, it was agreed to introduce different eligibility criteria in the second call for applications.

Under this new call the qualification requirements were lowered to a City and Guilds certificate (Parts 1, 2 and 3) in electronics, or equivalent, while the other requirement for hands-on technical experience in the field of medical equipment in a hospital environment was raised to ten years. This new condition excluded complainant from submitting an application.

The second call attracted eight applications including an application from the candidate who had been originally short-listed with complainant. This candidate was again short-listed together with two other candidates but when complainant filed his grievance with the Office of the Ombudsman the whole selection process was again postponed.

Considerations and comments

The main thrust of the complaint was that in the second call for applications the FMS management had purposely manipulated the criteria on which candidates' eligibility had to be evaluated by the selection board. It was alleged that this was meant to exclude complainant and to enable another candidate to benefit from the new criteria.

In the Ombudsman's review of the circumstances that led to the dissolution of the process to evaluate applications under the first call, it was ascertained that, as had been agreed during the preliminary meeting of the selection board, none of the candidates was eligible. In this connection, however, the Ombudsman found that complainant's work experience just fell short of the five years that had been requested.

The Ombudsman confirmed that when on the advice of the selection board in favour of experience instead of qualifications the FMS management had raised the requirement of work experience of candidates from five to ten years, this effectively meant the elimination of complainant. On the other hand, the decision to lower the standards of candidates' qualifications rendered eligible the other applicant then known to the FMS.

The Ombudsman appreciated that the decision taken by the FMS, on its own, seemed fully justified. However, the fact that this decision was taken with the full knowledge of the merits and shortcomings of the two short-listed candidates under the first call for applications justifiably gave rise to suspicions in the mind of complainant.

Conclusions by the Ombudsman

Although the Ombudsman found no evidence of any wrongdoing by the Foundation for Medical Services as had been alleged by complainant, it was felt that in the circumstances the Foundation would have acted more equitably and in a more transparent manner if it had not excluded complainant. This could have been done if the second call for applications made it clear that those who had applied under the first call need not re-apply because their applications would still be given consideration.

In this connection the Ombudsman was guided by the fact that by the time that the second call was issued, complainant had managed to muster the five years experience that was originally requested for the post. The Ombudsman was aware that complainant's work experience, besides three years at St Luke's Hospital which had been acknowledged by the selection board, included an earlier spell with a private firm which is engaged in the servicing and maintenance of medical equipment.

Given the way in which the situation had evolved and since the eligibility of some candidates under the second call still needed to be confirmed at the time that his report was being prepared, the Ombudsman suggested that the first and the second call for applications should be considered as one process. In this way complainant would be called for an interview together with the other short-listed candidates by way of a concession to allay his fears and suspicions about the whole process and in the best interest of transparency.

Case No E 73

ENEMALTA CORPORATION

A very controversial substation

The complaint

A company director alleged that his company had been treated unfairly when Enemalta Corporation insisted on new conditions in the contract of sale of premises for use as a substation which it had built according to designs and specifications issued by the Corporation. It was stated that these conditions were unjust and irrelevant to the sale.

In its complaint to the Ombudsman, the company requested the Ombudsman to declare that the clauses were abusive and to recommend their removal from the deed of sale so that the sale of the substation building could be concluded.

Facts of the case

Complainant's company which owned a block of commercial outlets and offices reached an agreement for a lease of a section of this building to another company. In the course of discussions on this agreement, it was anticipated that additional electricity supply would be required. When an application was submitted, Enemalta Corporation indicated that it required a new substation in the premises in order to meet this additional demand.

After the owner of the premises and the Corporation identified a site within the block which could accommodate the substation, Enemalta commissioned the complainant to build the substation to its design and specifications. This was done on the understanding that upon completion, the Corporation would purchase the substation building for Lm10,000. When the building was completed, the Corporation submitted a copy of a draft agreement to the complainant for the transfer of the premises.

One of the clauses in this draft agreement, however, represented a stumbling block in the sense that its contents were unacceptable to the complainant. This clause stated that:

"*The parties agree that whereas Enemalta ensures that noise levels emanating from the said substation will not exceed those stipulated by international standards, it will not be held responsible for any inconvenience emanating from the said substation*."

According to complainant this clause could be taken to mean that the Corporation would not be held responsible for any claims arising by third parties. In turn complainant proposed the addition of words to the effect that the Corporation would not be held responsible by the sellers of the substation to exclude the possibility of the vendors making any claim against Enemalta.

In response to this proposal, the Corporation proposed the introduction of a new version of this clause. This version stated that while the Corporation declared that the equipment installed will operate according to international standards and that the sound pressure level from the equipment will not exceed agreed standards, the two parties declared that "*should any contention arise, notwithstanding the Corporation's adherence to (these) standards and the Corporation be issued with a court order to decommission the substation, then the Corporation will not be bound to supply electricity to the said development*."

On his part complainant felt that this new version made the situation more untenable since in effect it meant that the Corporation expected him to agree that the Corporation could switch off the electricity supply to the tenants and any other third party in the area.

Complainant insisted that he should not be expected to suffer the consequences of any difficulties that the Corporation might experience to provide electricity supply to its subscribers. It was held that the new tenants of the offices and commercial outlets would be entering into a direct relationship with Enemalta and the electricity supply would then be in their respective names. These tenants were in fact the Corporation's clients and, as landlord, the complainant was not involved in their relationship with the Corporation. Complainant

could not therefore accept this clause in the contract of sale with the Corporation.

Enemalta in turn proposed a second version of this clause where it again undertook to operate in line with international standards but stated that despite its adherence to these standards, the two parties agreed that "*should any contention arise and the Corporation be issued with a court order to decommission the substation, then the Corporation will not be bound to supply electricity to the said development until alternative suitable premises are found or another adequate source of supply is identified. In both cases all expenses incurred for the shifting of this substation are to be borne by the vendor*."

Complainant considered this latest proposal totally unacceptable and requested that it be removed from the proposed deed of sale. On its part Enemalta's counter proposal was that it would agree to remove this proposal from the agreement if the tenant of the premises would agree to assume these obligations instead of complainant. Not surprisingly the tenant refused to accept this suggestion.

Considerations and comments

Complainant insisted that since all the instructions and specifications issued by the Corporation regarding the substation had been observed, Enemalta should pay the sum of Lm10,000 without any insistence upon the inclusion of conditions that are not appropriate to a deed of sale. In particular complainant felt strongly that since there was no guarantee that problems would not arise in the future as a result of the equipment installed by the Corporation, complainant could not be held responsible for any such difficulties.

Enemalta officials confirmed to the Ombudsman that complainant had complied fully with their specifications for the substation and did not contest that the deed concerned a transfer of property. The Corporation's point of view was that the conditions which it had proposed to include in this deed

were standard clauses which feature in all similar contracts. The Corporation insisted that it was bound by the Electricity Supply Regulations and that it could not be held responsible for any complaints associated with noise emissions and radiation levels resulting from substation operations that might arise in the future so long as it complied with internationally acceptable standards.

The Ombudsman ascertained that the Electricity Supply Regulations refer only to technical considerations where new substation facilities are needed in the context of applications for the provision of a new electricity supply. They do not prescribe conditions relating to the acquisition of property for the purpose of constructing a substation except for a limit on the amount of compensation to be paid.

The Corporation argued that it could not guarantee that it will continue to supply electricity if is ordered to remove the substation. However, in the opinion of the Ombudsman, the safeguard which it insisted upon should feature in its contract for the supply of electricity to the new tenant and not in its contract with complainant for the transfer of the property.

At significant expense complainant had carried out the works requested by the Corporation and these works had rendered a section of the premises useless for any purpose other than a substation. Enemalta had never informed complainant in advance of the conditions which it wanted to introduce and which are extraneous to an ordinary deed of sale. Notwithstanding this, complainant was ready to accept a compromise solution whereby the clause under dispute would stipulate that the Corporation would ensure that substation operations would be in line with international standards and that it would not be held responsible by the sellers of the building for any inconvenience arising from this substation.

Conclusion and recommendations

In the view of the Ombudsman complainant should not be held responsible for any disputes that might arise in future between the Corporation and third parties on matters in which complainant is not at all involved.

The Ombudsman concluded that the complaint was justified and recommended that the compromise proposal by complainant be accepted and that the Corporation should proceed with the acquisition of property in line with its original understanding with complainant.

Case No E 96

MINISTRY FOR RURAL AFFAIRS AND THE ENVIRONMENT

Suspension of subsidy payments without prior notice

The complaint

Up to September 2003 owners of layer farms used to receive direct subsidies by the Government which were intended to offset a reduction in the price of eggs to consumers and to assist the restructuring programme in the egg production sector. However, a press release issued in January 2004 by the Department of Information indicated that no more subsidy payments were due to egg producers for the last quarter of 2003 because the production ceiling negotiated with the European Union had been reached.

In a letter to the Ombudsman one of these owners complained that he had not been informed sufficiently in advance of the government's intention to withhold subsidy payments and this had contributed to a considerable loss of profits.

Facts of the case

When preparations were under way in connection with Malta's membership of the European Union, the Government launched the Special Market Policy Programme for Maltese Agriculture (SMPPMA) to counter the removal of levies and their replacement with direct income support and restructuring assistance. The main aim of this programme in the egg production industry was to allocate aid to enable this sector to compete effectively and to undergo restructuring. This Policy Programme was subsequently incorporated in Malta's Treaty of Accession with the European Union.

Under the SMPPMA financial aid for the egg production sector was tied to a production ceiling of 4,995 tonnes and to a maximum subsidy of Lm880,000 for 2003. By the end of September 2003, however, the total amount of subsidy paid to producers had already reached this amount despite the fact that the programme sought to ensure that production levels would not exceed the established ceiling.

In a press release early in 2004 the Government stated that with the exception of tomato processors, there were no outstanding payments to producers in the agricultural sector. This statement was meant to refute criticism that the Government had failed to settle other outstanding subsidy payments and explained that since the production ceiling agreed with the European Union for 2003 had already been reached, no more payments were due by the Government to egg producers.

Comments by the Ombudsman

The point raised by complainant was that he suffered financial losses when subsidy payments ceased abruptly after September 2003 without as much as an advance warning and he had not adjusted his prices.

Unaware of this development regarding subsidies, complainant continued to sell eggs at the previous price in the expectation that arrangements regarding subsidies would continue. It was confirmed that the sudden withdrawal of subsidies had a negative effect on complainant's profit levels; and invoices and VAT receipts in connection with his production costs and sales performance in the last quarter of 2003 that were presented to the Ombudsman showed loss of profits amounting to more than Lm2,200.

Complaint maintained that in the case of the poultry meat sector the government authorities had issued a circular in good time to warn producers that the subsidy would be ending. On the contrary, when owners of layer farms approached officials of the Ministry for Rural Affairs and the Environment in September 2003 they had been assured that no problems

were anticipated for the last quarter of 2003 with regard to subsidy payments in their sector.

The Ministry for Rural Affairs and the Environment explained that the payment of subsidies ceased after September when funds allocated for this purpose for 2003 were exhausted and stressed that the Government had never given any indication that it was prepared to allocate additional financial aid to the egg production industry if the agreed quota would be exceeded. At the same time Ministry officials who were indicated by the complainant denied that they had ever spoken words to the effect that no problems were expected with regard to subsidy payments for the period October to December 2003 in this sector.

The point at issue was whether complainant knew that subsidy payments would cease as soon as the overall production quota for the year was reached and whether the Ministry ought to have informed him of the situation as the quota limit was being approached much earlier than anticipated. The Ministry confirmed that egg producers had not been informed officially that subsidy payments would cease after September 2003. In its view there was no need to do so because cooperatives knew how the situation was unfolding and that the subsidy would cease as soon as the ceiling would be reached. Furthermore, the Ministry had never established any direct contact with individual producers because it assumed that members of the cooperative were being kept informed of the latest developments by the cooperative itself. The Ombudsman also confirmed that the sum that was allocated for the payment of subsidy for 2003 proved insufficient because a number of producers had abused and exceeded their agreed production levels.

Complainant insisted that it was unfair that he had been the one to make up for other producers who had breached the agreement and abused of the subsidy system.

Conclusions and recommendations

At the end of his investigations the Ombudsman concluded as follows:

- the Ministry for Rural Affairs and the Environment had failed to implement properly government policy regarding the payment of subsidies to egg producers and while it had ensured that the ceiling for the industry as a whole would not be surpassed, no checks were made to ensure that the production quota in terms of heads per individual producer would not be exceeded;

- since subsidy payments were issued directly to individual producers and not to cooperatives, the Ministry had been wrong to assume that it had no obligation to inform individual producers that the quota would be exceeded and that it would be the cooperative of egg producers that would inform its members of the situation;

- in the same way that the Ministry had informed owners of broiler poultry farms that subsidy payments would be coming to an end, the Ministry had the responsibility to inform egg producers as well of the situation that was developing in their sector;

- the press release by the Department of Information was not meant to inform producers that subsidy payments would be halted after September 2003 but was merely meant to justify the measures that were being adopted by Government in the situation;

- the stand by the Ministry that no action could be taken because the national quota had been exceeded and the financial allocation had been taken up was unacceptable. The Ministry had failed its duty to check that there would be no abuses by producers and as a result it had the obligation to make up for the loss that had been incurred by complainant who had observed the rules of the subsidy programme.

In the light of these facts the Ombudsman felt that the grievance was fully justified. He recommended that the Ministry should check the actual production records of complainant and if his claims were found to be correct, he should be awarded compensation on an *ex gratia* basis subject to the limit of his own production quota so as to make up for the subsidy which he had foregone.

Case No E 294

MALTA DEVELOPMENT CORPORATION/MALTA ENTERPRISE

The employee who was penalised for showing initiative

The complaint

The Ombudsman received a complaint from an employee of the Malta Development Corporation (MDC) whose functions were taken over by Malta Enterprise (ME). This person alleged that Malta Enterprise failed to honour its commitment that MDC employees who were not engaged by the new organization would retain their former remuneration if they took up alternative employment.

The employee claimed that although on his own initiative he had found employment with the Malta College of Arts, Science and Technology (MCAST), Malta Enterprise ignored his repeated requests for secondment to MCAST and unilaterally terminated his employment from the day that he had found alternative work. As a result, the promised top-up of his MCAST salary by Malta Enterprise did not materialise. Complainant was also unfairly excluded from early retirement schemes that were offered to employees who were on the books of the MDC.

Facts of the case

This case arose soon after the Government decided to wind up the Malta Development Corporation and other public organizations in the fields of investment and export promotion and set up Malta Enterprise instead.

Since the new organisation needed a smaller workforce, a number of employees were declared surplus to the requirements of Malta Enterprise. Complainant was one of the employees who were encouraged to find alternative employment and to apply for vacancies in public sector bodies on the understanding that their salary would not drop.

Complainant explained to the Ombudsman that he had applied for a teaching post at MCAST. However, although applications were normally made through the office of the MDC Chairman, he sent his application directly himself because he had learnt about the MCAST vacancies through the press on his own initiative. Complainant pointed out that even the MDC Chairman had provided a reference for his application.

When complainant's application with MCAST was successful, he informed MDC of its outcome and asked to be re-deployed at the College on the terms that were promised to MDC employees who did not join Malta Enterprise. On its part MCAST management agreed to employ complainant on secondment from the Malta Development Corporation so long as the MDC would cover the salary differential between his former post and his new post as MCAST lecturer and raised the matter with the Corporation.

Despite contacts between the institutions, the issue remained unresolved by the end of August 2003 when complainant had to report for work at MCAST at the start of the academic year. On the first day of September 2003 he took paid leave from the MDC but when his entitlement of paid leave was exhausted and the matter remained pending, he requested unpaid leave until the question of his secondment to MCAST without any loss of income would be settled. Despite verbal approval from the MDC management regarding these arrangements, in November 2003 he was told that the issue needed to be discussed at a higher level.

On 28 November 2003 complainant signed a definite three-year contract with MCAST that was renewable for a further period of three years. The contract was backdated to 17 September 2003.

In his statement of facts to the Ombudsman complainant stated that in February 2004 he was told by the ME management that according to the Employment and Training Corporation (ETC) his position on unpaid leave from the MDC while receiving payment from MCAST was irregular and he was asked to sign termination papers. Complainant replied that this practice was not illegal at all and pointed out that in the past the MDC had allowed its employees to

go on unpaid leave while working for other employers. A fortnight later complainant was informed that the MDC had completed the ETC formalities and his employment with the MDC was terminated as from 16 September 2003.

In his grievance to the Ombudsman complainant held that:

- after he found alternative employment on his own initiative and requested to be seconded to MCAST, MDC/ME management failed to honour its commitment to make up for the difference between his old and his new salary as a surplus MDC employee who found alternative work; and
- MDC was aware that he would be taking up employment with MCAST as far back as August 2003 when he had personally asked the Chairman of the Corporation to be seconded to MCAST.

Complainant argued that he had taken unpaid leave so that he would not incur any loss of pay or benefits or a break of service with the MDC and that despite signing a contract with MCAST he had not resigned from the Corporation. He also claimed that the MDC/ME management had not objected to his secondment with the College and in fact there were ongoing contacts between the institutions on the issue of his secondment to the College.

Malta Enterprise management pleaded that complainant's only interest was to benefit from the early retirement scheme that was offered to MDC employees and that complainant had walked out on the MDC/ME because he held a grudge at not being selected to join Malta Enterprise.

According to the ME authorities after complainant had found a permanent job, they had been requested by the ETC to send his employment termination form. It was maintained that this happened as a consequence of his decision to sign an employment contract with the College and of the submission by MCAST authorities to the ETC of his engagement form. These two actions brought in their wake the automatic termination of complainant's employment with the MDC.

Papers seen by the Ombudsman confirmed that complainant's request for secondment to MCAST was made sufficiently in time before 1 September 2003 and that despite contacts regarding his employment with MCAST and the payment of the difference between the two salaries, no action was taken by Malta Enterprise to settle these issues. The Ombudsman was of the view that failure by the MDC/ME management to settle the matter in time could not be used as an argument against complainant.

MDC/ME management seemed to imply that the issue would not have arisen if complainant had not taken the initiative to seek an alternative job. Faced with the lack of a decision to respond to his request on time, complainant had signed his employment contract with MCAST. Even though this meant that ME would be relieved of the amount of complainant's salary that would be paid by MCAST, the MDC/ME management failed to sanction his secondment with MCAST in time. The Ombudsman felt that this attitude discouraged the kind of initiative that ME was obliged to encourage among employees who did not fit into its plans and did not make sense in terms of good administration.

MDC/ME management was adamant that complainant's employment was automatically terminated with effect from the day when he signed his contract with MCAST since this contract was in turn followed by a request by the ETC to Malta Enterprise for the submission of complainant's employment termination form "*if the employee is no longer in your employ*."

The Ombudsman did not agree with this interpretation. Although aware of the offer for employment which complainant had in his hands, ME management failed to give him a definite reply as was its duty. At the same time the ETC letter directed Malta Enterprise to send the termination of employment form only if complainant's employment had already been terminated.

On its part the ETC confirmed to the Ombudsman that this note was merely a routine form which the Corporation sends whenever it receives a form of engagement for full time work in respect of an employee whose termination form from a previous full time employment would not yet have been received.

The Ombudsman was informed by the ETC that an agency receiving this notice is not obliged to send the employment termination form if the employee is still in its employment. In similar circumstances all that the employer needs to do is to inform the ETC that the employee concerned has been seconded to another organization.

The Ombudsman's reading of the situation was that the ME management sent the employment termination form to the ETC in order to force the issue and used the letter as an expedient to terminate his employment. According to the Ombudsman this was an instance of maladministration which attracted criticism.

Conclusions and recommendations

The Ombudsman concluded that the Malta Development Corporation and Malta Enterprise had treated complainant unfairly when they had deprived him of the benefits to which other employees who had not been selected to join ME were entitled.

The Ombudsman was also critical of the decision by ME management to send the termination of employment form to the ETC and pointed out that this was an act of bad administration that attracted criticism.

Although during meetings with the Ombudsman ME representatives were prepared to reach a settlement with complainant by the award of financial compensation, the Ombudsman was of the view that complainant should be treated in the same way as other employees who remained on the books of the MDC including those who, unlike him, had shown no initiative to find alternative employment.

The Ombudsman recommended that complainant be given all the benefits that had been promised to surplus MDC employees including the topping up of complainant's salary for his new post at MCAST for the duration of this appointment as well as the right to benefit from early termination schemes open to MDC employees.

Case No E 432

DEPARTMENT OF SOCIAL SECURITY

The misinformed returned migrant

The complaint

Upon coming back to Malta in 1995, a returned migrant made enquiries with the Department of Social Security whether he was entitled to any assistance or any social benefits but received a negative reply.

In December 2002, however, this person came to know that another returned migrant was receiving a service pension bonus. He submitted an application and shortly afterwards started receiving this bonus as from the date of his application.

The matter finished in front of the Ombudsman when the returned migrant maintained that since he had been given the wrong information by the department, he was entitled to the service pension bonus as from the date of his first enquiry and not from the date of his application seven years later.

Facts of the case

Complainant explained to the Ombudsman that way back in 1995 he had visited one of the district offices of the Department of Social Security and spoke to an official whose name he could still recall, to ask whether as a returned migrant he was entitled to any benefits. Although he was informed that there were no social security entitlements for returned migrants, complainant had later called on a couple of occasions at the Head Office of the Department of Social Security in Valletta where he was given the same reply.

Complainant narrated that in December 2002 another returned migrant told him that he was receiving a service pension bonus. In the light of this information, he called again at the district office of the Department of Social Security to speak again to the official whom he had met during his first visit in 1995 but was informed that this official was no longer working there. Upon making inquiries about the payment of a service pension bonus he was advised to submit an application and some time later he started to receive this bonus.

In June 2003 complainant requested the payment of arrears of the service pension bonus that was due to him as from 1995 from the Department of Social Security. He was informed, however, that payment of this service pension bonus is not made by virtue of any provisions under the Social Security Act but as a special concession that is awarded by means of an administrative decision by the department and was referred to a press notice that was issued in April 1981. He was also told that payments are only issued by the Department of Social Security upon the submission of an application by persons who are entitled to them. As a result, his request for the payment of arrears was turned down.

When complainant appealed against this decision in June 2004, the Umpire ruled that the service pension bonus is not considered as a benefit under the Social Security Act and that there were no grounds for an appeal.

In his submission to the Ombudsman complainant claimed that if he had received correct information during his first visit to the district office of the Department of Social Security, he would have started to receive this bonus seven years earlier. In this way he had forfeited a total sum of Lm1,260 (Lm180 per annum for a period of seven years).

Considerations and comments

The Ombudsman was of the opinion that once complainant had been awarded the service pension bonus straightaway when he submitted his application, this was a strong indication that he was in fact entitled to this bonus as from the date of his return to Malta.

The Ombudsman's investigations confirmed that the service pension bonus is not a benefit that is provided by law but is awarded as a special concession by an administrative act. It was also confirmed that it is not the practice of the department to pay arrears of assistance that is not provided by law. The department also maintained that this type of assistance is only extended to beneficiaries as from the date that an application is made and that in the case of a concession arrears are not paid at all.

The Ombudsman also sought to ascertain why complainant failed to submit his application when it appeared that he was entitled to receive this bonus as from June 1995.

Complainant explained that he had not applied earlier because when he made enquiries to find out whether he was eligible for any assistance or any social benefits by the department, he had been given the wrong information. On the other hand when the official who had provided this information during complainant's first visit at the district office of the Department of Social Security was identified and questioned on the matter, he denied that he had ever passed incorrect information although admitting that he did not recall his meeting with complainant.

The Ombudsman was of the opinion that the press release which provides guidelines for the award of a service pension bonus to beneficiaries as well as the application form that is filled by persons who apply for this pension bonus are not sufficiently clear to enable an ordinary citizen to determine whether a person is entitled to this bonus or not. Indeed, the Ombudsman admitted that it was somewhat difficult to establish the basis of complainant's eligibility offhand because even the department itself was not in a position to provide an explanation without making detailed investigations on this case.

The Ombudsman felt that since even high-ranking and experienced officials in the department found it difficult to explain the rationale behind the award of this bonus, it is highly probable that officials in the department's outstations too were not very well versed about the intricacies of this scheme. In fact it was quite likely that the official in the district office had provided the wrong information when complainant inquired whether he was eligible or not.

Conclusions and recommendations

Having regard to these circumstances, the Ombudsman felt that it was quite probable that complainant had not been given correct information when he made his first enquiry. At the same time there were strong indications that had complainant submitted his application in 1995 when he had first asked for information about his entitlement, his application would have been approved and he would have started to receive the bonus payment as from that date.

The Ombudsman considered untenable the argument by the department that whenever assistance is awarded by way of a concession, the payment of arrears is not justified. The principle of equity demands that if a person is entitled to the payment of a benefit, this right belongs to this person regardless of whether the right emerges on the grounds of an administrative decision or by means of a legislative provision.

Since complainant was in fact entitled to a service pension bonus as from the date of his return to Malta in 1995, the issue at stake was whether he had been given correct information by the Department of Social Security. In this connection the Ombudsman pointed out that complainant had recalled clearly what he had been told by the official of the department during his first visit to the district office. At the same time the department's official, while admitting that he did not recall this instance, denied that he could have given wrong information to the caller.

Taking everything into account, the Ombudsman reached the conclusion that in this case the balance of probability was in favour of complainant and that there was an element of justification in his grievance that warranted redress.

The Ombudsman therefore felt that *ex gratia* compensation equivalent to the payment of a service pension bonus that would have been due to complainant for two years seemed justified. This solution was within the competence of the Director of the Department of Social Security who can accept backdated applications under the terms of the Social Security Act even if the award of a service pension bonus is not regulated by this law.

Case No E 438

AĠENZIJA SAPPORT

The support care worker who found no support

The complaint

A former Support Care Worker with an agency which provides assistance including residential help to persons who suffer from physical and mental disability, alleged that she was the victim of an injustice when the agency refused to pay for damages that she suffered following an injury sustained while on duty.

Facts of the case

In her letter to the Ombudsman complainant explained that one afternoon during her probationary period when she was stationed at one of the agency's homes she was instructed to accompany an inmate to a district health centre. All of a sudden the inmate turned into a violent mood and hit her with a blow on her face. She was immediately given attention at the health centre but later on during the evening she went back because she felt pains in her neck. The next day she reported sick on injury leave.

Complainant explained to the Ombudsman that on the afternoon of the accident she phoned to tell the Duty Supervisor about the incident and to inform him that the next day she planned to visit a specialist. According to her, the Duty Supervisor replied that her report had been noted.

A few days after this incident she filled form N.I. 30 of the Department of Social Security entitled *Application for an injury benefit* which she handed to the Duty Supervisor at the agency's Head Office. The form included the signature of the Operations Manager of the home where she was deployed as well as the name of a colleague who was with her at the health centre when the accident happened.

Complainant admitted that she was aware of instructions issued to agency employees that whenever a member of staff is injured while on duty, it is the responsibility of the injured employee to send an Incident Report to the Duty Supervisor within twenty-four hours accompanied by form N.I.30 of the Department of Social Security. The Incident Report is an internal document where employees injured while on duty explain how the incident happened so that management may investigate the matter.

Complainant also stated that instead of sending the Incident Report to the Head Office of the agency, she handed the report to the House Leader at her private residence. The report contained the signature of an agency employee who was at the health centre when the incident happened. The House Leader admitted that complainant had handed to her the Incident Report at her house although she only passed it on to management after about three months because the report had inadvertently remained in her possession.

Shortly after the incident and merely a day before her probationary period ended, complainant's employment was terminated.

When complainant asked the agency for a refund of the expenses for the medical treatment which she was still receiving, her request was turned down because her Incident Report reached the agency three months after the incident and she was fully aware that this was a breach of internal agency procedures.

Management officials also maintained that complainant had not informed them about her injury and that she had visited a private specialist without first seeking their views. This meant that the medical treatment which complainant had undergone too had been brought to their attention almost three months after the incident.

The agency pointed out that if the Incident Report had been submitted in time it would have made its own investigations and if it resulted that complainant's injury was due to the incident at the health centre, the agency would have appointed a medical specialist of its own choice and paid any refund. However, since these procedures had not been followed, complainant's request could not be accepted.

The agency held that since there was insufficient evidence that the injury sustained by complainant was a direct consequence of the incident, she could not be given compensation. At the same time management was aware that the medical board of the Department of Social Security had approved the payment of injury benefits to her because of her injury while on duty.

According to subsection 36(15) of the Employment and Industrial Relations Act "*during any period of incapacity for work of the employee caused by personal injury by accident arising out of and in the course of employment ……occurring in the service of that employer*", an employer is not allowed to terminate a contract of service with an employee without the consent of the employee. The same sub-section states that during any period of incapacity the employee's wages less injury benefit payable under the Social Security Act "*shall accrue in favour of the employee*." This provision applies during the first twelve months of any such incapacity.

On the other hand, subsection 36(2) of the Employment and Industrial Relations Act states that "*during the probationary period the employment may be terminated at will by either party without assigning any reason*."

Considerations and comments

The grievance centred around complainant's request for the payment of her salary until such time as she continued to suffer the consequences of her injury together with a refund of medical expenses.

Complainant's requests on these two counts are addressed by the Employment and Industrial Relations Act. The first six months of any employment under a contract of service are considered by law as probationary employment; and in this case complainant's employment was terminated seven weeks after she sustained her injury at work but one day before the end of her probationary period.

Subsection 36(15) of the Employment and Industrial Relations Act refers to the wage of an employee who does not report for duty because of an incapacity caused by an accident arising in the course of employment but makes no

reference to compensation or to benefits that are equivalent to the wage of any such employee. It is therefore likely that this subsection is in conflict with subsection 36(2) of the same Act.

With regard to complainant's request for a refund of her medical expenses, legislation does not provide for any such compensation unless the incident arose due to negligence or error on the part of the employer. Complainant did not put forward any such claim.

Although in its reply to complainant the agency stated that it would have considered the award of compensation if the Incident Report had arrived on time, the Ombudsman is aware that the agency's internal procedures do not refer to the refund of medical expenses incurred by employees who are injured while on duty.

The main explanation by the management of the agency why complainant's request was not accepted was her failure to send the Incident Report within twenty-four hours in line with established procedures so that the incident could be investigated. Although it is true that complainant failed to ensure, as was her duty, that the report reached the agency as soon as possible and she did not send it directly to the agency, the Ombudsman felt that the agency was adopting a very rigid position.

The Ombudsman felt that this was nothing more than an excuse because management was fully aware from the very start that an employee had been injured while on duty. In fact the agency received form N.I.30 with a full description of the way in which the incident happened in addition to a verbal report which complainant herself made on the phone on the day of the incident.

The Ombudsman was of the opinion that it was the responsibility as well as the duty of the agency to investigate how one of its employees had been injured at work. He felt that management should not have waited until it received the Incident Report especially since this report would probably contain the same details as those in form N.I.30. This attitude by the agency warranted criticism although at the same time it did not give any automatic right to complainant for a refund of the medical expenses which she had incurred.

Without any prejudice to the right of management to terminate her employment during her probationary period and not give her any explanation in accordance with the relevant provisions of the law and although complainant had not contested this termination, the Ombudsman felt that it was appropriate to comment on this situation.

Complainant's termination of employment took place at a time when she was benefiting from a provision of the law whereby a person who is injured at work can receive the salary for up to a maximum period of one year from the start of the injury leave. The agency management denied that complainant's employment was terminated because of her injury at work and referred instead to reports reaching the agency while complainant was on injury leave concerning her treatment of patients.

The Ombudsman understood that complainant was not allowed the opportunity to defend herself from these charges. In this way the agency management had breached the principle of natural justice – *audi alteram partem* – and although the provisions of the Employment and Industrial Relations Act had not been broken, the agency had acted in an unfair way towards her.

Conclusions

Taking everything into account the Ombudsman reached the following conclusions:

(i) although the law makes provision for the payment of the salary to complainant while on injury leave, an employer is allowed to terminate the employment of a worker during the probationary period. It is therefore not clear whether complainant is entitled by law to receive her salary for a period of one year after sustaining her injury because the law refers to the payment of a salary and not to compensation or to a benefit that is equivalent to this salary. Following consultations with the Director of the Department of Industrial and Employment Relations, the Ombudsman concluded that a final decision on this issue can only be reached in a court of law.

(ii) although complainant failed to ensure that her Incident Report reached management on time, this failure did not constitute sufficiently valid grounds for a refusal of her claim for a refund of medical expenses. At the same time, there are no provisions at law or in the policies of the agency which allow complainant an automatic right to a refund of medical expenses.

(iii) although complainant did not observe the agency's policy on accident reporting, management was still aware of the incident not only by means of form N.I.30 but also because of the verbal report on the incident. From an administrative point of view the agency failed to investigate the incident straightaway and reference to complainant's failure to send the Incident Report is not acceptable;

(iv) regardless of the right provided by law for the agency to terminate complainant's employment during her probationary period, the agency acted unfairly towards her when her employment was terminated following reports about her which she was not allowed to rebut.

Recommendations by the Ombudsman

Legislation does not provide for the right of complainant to receive the compensation that she claimed. Nevertheless, when all the circumstances of the case are taken into account, there seems to be an element of justification with regard to her grievance.

The Ombudsman was of the view that the whole episode was treated in a rigid manner and had been considered merely in the context of a narrow interpretation of policy guidelines. He therefore recommended that the agency should consider the award on an *ex gratia* basis of a token compensation to complainant that would be equivalent to her pay for two months and that would be in final settlement of her claim.

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PUBLICATIONS

Annual Report 1995/1996	*Rapport Annwali 1995/1996*
Annual Report 1997	*Rapport Annwali 1997 (fil-qosor)*
Annual Report 1998	*Rapport Annwali 1998 (fil-qosor)*
Annual Report 1999	*Rapport Annwali 1999 (fil-qosor)*
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Annual Report 2002	*Rapport Annwali 2002 (fil-qosor)*
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Case Notes No.	1 (April 1996)	10 (October 2000)
	2 (October 1996)	11 (April 2001)
	3 (April 1997)	12 (October 2001)
	4 (October 1997)	13 (April 2002)
	5 (April 1998)	14 (October 2002)
	6 (October 1998)	15 (April 2003)
	7 (April 1999)	16 (October 2003)
	8 (October 1999)	17 (April 2004)
	9 (April 2000)	18 (October 2004)

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